## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Justin R. Hogg,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

April 25, 2022

Court of Appeals Case No. 21A-CR-2251

Appeal from the Cass Superior Court

The Honorable James Muehlhausen, Judge

Trial Court Cause No. 09D01-2005-F6-130

**Mathias, Judge.**

[1] Justin R. Hogg appeals his conviction for Level 6 felony theft following a jury trial. Hogg raises a single issue for our review, namely, whether the State's

evidence against him at his trial was a material variance from the State's charges. We agree with Hogg that it was. Thus, we reverse his conviction.

## Facts and Procedural History

[2] Sometime prior to March 5, 2020, Hogg, Chad Myer (Hogg's romantic partner), and Gail Slavens (their mutual acquaintance) created false payroll checks that purported to be from a business identified as Last Call, LLC, which business did not in fact exist. The trio made at least six checks: one payable to "Robert Shane Madewell," one payable to Hogg, two payable to Myer, and two payable to Slavens. Ex. Vol. 4 pp. 3-8. Each check appeared to be payable in an amount of about $1000.

[3] On March 5, the three entered the Dutch Mill bar in Logansport. Slavens and Myer each cashed one of the false checks that had been made payable to them. Hogg cashed the false check made payable to Madewell, which was in the amount of $989.19. In endorsing that check, Hogg appears to have initially written a large letter J, but he then wrote "Robert Madewell" over it. *See id.* at 11; Tr. Vol. 2 p. 232.

[4] In the early morning hours of March 7, the three entered the Dutch Mill bar to cash the other false checks. Slavens and Myer again each cashed one of the false checks that had been made payable to them. Hogg cashed the check appearing to bear his name. That check was in the amount of $984.79. In his later testimony, Alex Maloy, an owner of the Dutch Mill bar, stated that, while the second-round of false checks were cashed on March 7, the Dutch Mill bar's

practice was to record those transactions as having occurred on March 6 because the bar had not yet closed down for that evening.

[5] In May 2020, the State filed its charging information against Hogg and alleged as follows:

Count 1 [Level 6 Felony Check Deception]:

> The undersigned [prosecutor] . . . says that on or about March 6, 2020, in Cass County . . . Hogg did knowingly issue or deliver *a check* to acquire money or other property, having a value of at least $750[] but less than $50,000[,] knowing that *said check* would not be paid or honored by the credit institution[] upon presentment in the usual course of business, contrary to . . . I.C. [§] 35-43-5-5(a)(1) . . . .

Count 2 [Level 6 Felony Theft]:

> The undersigned . . . says that on or about March 6, 2020, in Cass county . . . Hogg did knowingly or intentionally exert unauthorized control over the property of Dutch Mill[] with the intent to deprive Dutch Mill of any part of the use or value of the property, said property having a value of at least [$750] and less than the value of [$50,000], *to wit: $984.7[9]*, contrary to . . . I.C. [§] 35-43-4-2(a) and I.C. [§] 35-43-4-2(a)(1)(A) . . . .

Appellant's App. Vol. 2 p. 20 (emphases added).

[6] In September, the State amended its information to include the following new count:

Count 3 [Level 6 Felony Counterfeiting]:

> The undersigned . . . says that on or about March 6, 2020, in Cass County . . . Hogg[] did knowingly or intentionally make or utter *a written instrument*[] in such a manner that *it* purports to have been made by another person, contrary to . . . I.C. [§] 35-43-5-2(a)(1)(A) . . . .

*Id.* at 74 (emphases added). The State also alleged Hogg to be a habitual offender.

[7] Meanwhile, the State moved to join Hogg, Myer, and Slavens as co-defendants in a single action. The trial court granted the State's motion over Hogg's objection. However, after Slavens absconded and Myer pleaded guilty, the State proceeded against Hogg individually.

[8] At Hogg's ensuing jury trial, the State called Maloy as its first witness. During his testimony, the State sought to introduce all six of the false checks. Hogg immediately objected on the ground that five of the checks—the checks made payable to Madewell, Myer, and Slavens—were not relevant to the State's charges against Hogg. The following exchange ensued:

> [Defense Counsel]: Your Honor, I would object to the questioning of that as to the relevance. My client's being . . . charged with one check that was cashed [in the early morning hours of March 7] and he's talking about several checks the day before.
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> [Prosecutor]: No, Judge. There may be some confusion about the State's theory of the case, but he's being charged with several checks on or about a certain date . . . to either side of [March 6th].

* * *

> [Defense Counsel]: Your Honor, . . . [h]e's talking about three checks. The charging information says a check on or about March the 6th, 2020. It does not say multiple checks or several checks.
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> * * *
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> [Prosecutor]: It doesn't have to, Judge. I can . . . charge any number of crimes which occurred as . . . part of a spree of crimes. I can charge it as one single offense and then prove that it happened multiple, multiple, multiple times.
>
> THE COURT: Okay. So, here's my thinking. I understand your argument on the single check. However, theft is charged and to me that brings into play more than just a single check . . . .

Tr. Vol. 2 pp. 94-95. The trial court overruled Hogg's objection.

[9] Thereafter, the State moved to admit into evidence security footage from the Dutch Mill bar from March 5 and March 7. Hogg objected to the footage from March 5 as not relevant to the State's charges. The trial court again overruled Hogg's objection. Maloy then testified that the March 5 security footage showed Hogg cashing one of the false checks at the Dutch Mill bar.

[10] At that point, the trial court took a break for lunch. Upon returning from lunch, the court asked Hogg's counsel to make a more complete record of her objections outside the presence of the jury. The following exchange then occurred:

[Defense Counsel]: I wanted to renew my objection that I had made earlier and go off of that and object to the admission of any evidence regarding the checks of March 5th, 2020, and any acts on March 5th of 2020 including any testimony and video evidence from that date. And the reasoning, Count 1 indicates that it was, that the check deception that's being charged says a check. It's, there's no specific checks, you know, it doesn't say to-wit and then list the checks. And then more specifically in Count 2, the theft indicates $984.76. So that is specific as to the check that was cashed by my client in my client's name, the $984.76, which would show specifically that we're talking about one check for $984.76. And I think that now the State's trying to argue that there's more than one check and I think that should have been specified and any information prior to March the 6th is [in]admissible under 404(b) as prior bad acts and I just want to read for the record violation of 404(b) "prior bad act improperly used to show action and conformity therewith even if it falls within the exception must be excluded under 403 if the prejudicial impact outweighs the probative value." So, I would cite 404(b) and 403. There has to be an intent filed by the State as to their 404(b) evidence. They filed intent of 404(b) evidence but as we had the hearing yesterday on the Motions in Limine, [the State's motion] only specified . . . anything with the defendant and the Court granted that any prior bad acts would not be discussed as to the defendant and then specifically as to Chad Myer [with respect to pending charges in] White County . . . . But there was no intent to offer evidence of prior bad acts and give a reason . . . for why they're wanting to submit it for the March 5th dates. And, so[,] because of that objection . . . I would ask for a mistrial.

* * *

[Prosecutor]: Judge, you should deny . . . the mistrial . . . The . . . State is not required to allege or to prove a specific date . . . . It's noteworthy that on or about the date that's

> used in all three of the [charges] is March the 6th. None of this happened on March the 6th. . . . [A]nd that's the point of . . . a Charging Information is that . . . it is a notice pleading. It is to put . . . the defense on notice and they were also amply put on notice by the fact that all of this was discovered, all of those checks were discovered, all of the supplemental reports written by the police indicating . . . the subsequent discovery . . . of the date range that this was a number of checks . . . [. S]o . . . the ball has not been hidden here and it's appropriate that . . . all of these be talked about. The State is . . . not required to break out each individual act or charge . . . . I can charge one and then I can talk about all three of those things and any one of those could [support the charge] . . . . And, so, the incidents that happened on the 5th that are . . . shown in the check and here in the video are not 404(b). They are, in fact, the charged acts. They are not prior bad acts. They're the charged acts.
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> [Defense Counsel]: []I don't think that the full issue is the "on or about March 6th." The full issue is that Count 1 says, "a check" and then Count 2 specifies, "to wit: $984.76." So, he is not specifically being charged with anything other than the check that was written to him . . . for $984.76. If the State did not intend to be so specific, yes, they did discover the evidence but it doesn't mean that the evidence is relevant or that they're going to charge my client with it, they had the evidence with them and they specifically stated $984.76 . . . .

*Id.* at 109-11. The court then again overruled Hogg's objection and also denied the motion for a mistrial.

[11] The State then continued its examination of Maloy. Maloy testified that he received three false checks on March 5, one made payable to Robert Madewell,

one made payable to Chad Myer, and one made payable to Gail Slavens. He further testified that he did not know of an individual named Robert Madewell but he did recognize Hogg and Myer in the March 5 video as cashing two of those false checks. The State also had admitted into evidence security footage from the early morning hours of March 7. Maloy testified that that video showed Hogg and Myer cashing two false checks at the Dutch Mill bar.

[12] The State also called Myer as a witness. Myer testified that he was solely responsible for making the false checks, and he hoped Hogg would not ask him about the validity of the checks. He added that he was trying to impress Hogg as his romantic partner. On cross-examination, Myer stated that he did not recognize the individual in the March 5 video who presented the false Robert Madewell check as Hogg. The State then presented additional evidence that the March 5 and March 7 checks were false and that there was no Indiana business by the name of Last Call, LLC, and the State rested.

[13] During the State's closing argument, the prosecutor described the evidence to the jury as follows:

> The State's brought three charges. Counterfeiting, check deception, and theft. And each one of those stands on its own. . . . The defendant can in fact be guilty of all three. . . . And the Court is certainly free for a variety of legal reasons to say that these merge or overlap in some way, but that's not your job. Your job with respect to each of these charges is to look at the elements, look at the ingredients, and ask has the State proven them. . . . So, let's look at each one of those recipes and talk about the ingredients. All right. The elements of check deception are pretty straight forward. The State has to prove that the

defendant knowingly or intentionally issued or delivered a check to get money knowing that the check wouldn't be paid. Let's start by talking about the first element. Oh, and we also have to prove it was over $750.00. That . . . [is] in the bag. The first element, let's go through all these. There is this element, the second charge is theft, also has to be over [$]750. And there's the elements of . . . counterfeiting. Now what you just saw in all three was the first element. The recipe in Counts 1, 2, and 3 all has that first ingredient. The State always has to prove who did it. Right? This case is not a who done it. . . . What it turns on is the second ingredient which is also common to all three charges. Knowingly or intentionally. Did the defendant know what he was doing? . . . [R]egardng the chance that you're stealing money from somebody, if you're aware there's a high probability that this check is fishy or forged or inaccurate, that's a high probability that you're engaging in criminal conduct. So, that's the point of that second ingredient that's common to all three charges. Right? The State has to prove that the defendant knew what he was doing or was aware of a high probability that these checks were bogus. So, let's look at the . . . third element for check deception. Issued or delivered a check. Well, that's as clear as day and I don't think we need to talk about it very long. It's right on video. On the 5th of March of 2020, the defendant comes in and puts a check right down there on the table and he endorses it and issues the check. This is what the check looked like, and this is very significant that the check he endorsed that day was made out to someone else entirely. Robert Shane Madewell. He managed to get a driver's license number, we don't know whose, and he managed to pass off a signature and never had to show an ID. We don't know what exactly . . . he said to the bartender, but it was good enough that the new bartender bought it and she paid cash on that. It is curious, however, to look at the back of the check that the defendant passed on the 5th and we compared it to the back of the check that he passed and endorsed in his own name a little more than a day later . . . . Remember on the 5th he's trying to pass himself off as Robert Madewell, but he messes up the endorsement. His

> first name, Justin, starts with a J. Robert sure doesn't loop below the line. He forgot who he was supposed to be[] on the 5th, he forgot he was supposed to be Robert Shane Madewell, and he started to sign his own name and here's the loop to his J. Just like he did a day later. But he scribbles it out . . . . And so that element . . . of check deception is satisfied. And this is him passing or issuing that check on the early morning hours of the 7th. So, that element is satisfied. The last element is that what was passed was a check. We know it obviously is in both cases. On the 5th day and on the 7th. And this was done to acquire money. . . . Further evidence is the fact that he's clearly doing this with other people. And that's part of the scam. Right? . . . And then when three people come in together and they all have payroll checks from the same company, they kind of add credibility to each other. And you can see in the video he does that as he's passing off that first, Robert Shane Madewell check, he gestures over, "yeah, they're . . . with me. They're with me." So, . . . they build on each other and they assist each other in the commission of this crime. . . . They're acting in concert. So, in that respect, the defendant is on the hook not only for the checks that he cashed, but for those that his compatriots passed, his, his partners in crime. The law in the State of Indiana is that if you assist someone in the commission of a crime, you're just as guilty of the commission of that crime. It's accomplice liability. . . . So, the defendant isn't just guilty of the forgery and counterfeiting and theft that he's done on his own, he's helped two other people do the same thing. . . . So, these are two more things that . . . make the defendant guilty of another forgery, another theft, and another counterfeiting. That he assisted Chad Myer in doing this and he assisted Gail Slavens. . . . So, the analysis that we just went through . . . can be the same analysis for Count 2, theft. Right? . . . And the analysis for the last charge is the same thing.

*Id.* at 229-36.

[14] The jury found Hogg guilty on each of the State's three charges, and the trial court entered its judgment of conviction accordingly. At the ensuing sentencing hearing, the State conceded that its evidence for each charge was the same, and the trial court merged Hogg's convictions for Count 1 and Count 3 into his conviction for Count 2.[1] The court then sentenced Hogg to two years in the Department of Correction on the Level 6 felony theft conviction, which sentence the court enhanced by an additional five years for Hogg being a habitual offender. This appeal ensued.

## Standard of Review

[15] On appeal, Hogg asserts that the trial court erred when it overruled his objections to the State's evidence of the false checks other than the one check Hogg cashed on March 7 that was made payable to him. Although we generally "assess claims relating to admitting or excluding evidence for [an] abuse of discretion, to the extent those claims implicate constitutional issues, we review them *de novo*." *Ramirez v. State*, 174 N.E.3d 181, 189 (Ind. 2021).

## Discussion and Decision

[16] Hogg asserts that the State's evidence at his trial was a material variance from the State's charges against him. "Defendants have a Due Process right to fair

[1] To be sure, it is not a sufficient remedy to a double jeopardy violation for a trial court to enter judgment of conviction on multiple counts and then simply "merge" the counts; the judgment of conviction on one of the counts instead must be vacated. *Kovats v. State*, 982 N.E.2d 409, 414-15 (Ind. Ct. App. 2013). However, in light of our resolution of this appeal, we need not remand with instructions for the trial court to vacate the judgment of conviction entered on Counts 1 and 3.

notice of the charge or charges against them, and they are entitled to limit their defense to those matters." *Young v. State*, 30 N.E.3d 719, 720 (Ind. 2015). As our Supreme Court has explained:

> Because the charging information advises a defendant of the accusations against him, the allegations in the pleading and the evidence used at trial must be consistent with one another. A variance is an essential difference between the two. Not all variances, however, are fatal. Relief is required only if the variance (1) misled the defendant in preparing a defense, resulting in prejudice, or (2) leaves the defendant vulnerable to future prosecution under the same evidence.

*Blount v. State*, 22 N.E.3d 559, 569 (Ind. 2014) (citations omitted). Here, Hogg asserts that the variance between the State's charges and its evidence at trial misled him in preparing his defense and prejudiced him by resulting in a conviction for uncertain conduct.[2]

[17] We agree with Hogg that our opinion in *Whaley v. State*, 843 N.E.2d 1 (Ind. Ct. App. 2006), *trans. denied*, is instructive. In *Whaley*, as relevant here, multiple law enforcement officers were involved in a chase of the fleeing defendant. In its charge against the defendant for resisting law enforcement, the State specifically identified which of those officers had ordered the defendant to stop. However,

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[2] We reject the State's argument that Hogg failed to preserve this issue for our review when he objected in the trial court on the grounds of relevance and unfair prejudice. Hogg's variance argument on appeal is not a substantively different question independent in character from the argument Hogg made in the trial court. *See Johnson v. Parkview Health Sys.*, 801 N.E.2d 1281, 1287-88 (Ind. Ct. App. 2004), *trans. denied*. That is, the trial court fairly heard and considered Hogg's argument, and it is thus available for our review. *GKC Ind. Theatres, Inc. v. Elk Retail Invs., LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002).

at trial, the State's evidence was that different officers had ordered the defendant to stop. On appeal, we held that the identification of the officer who had ordered the defendant to stop was essential to the State's charge of and the defendant's convicting for resisting law enforcement. *Id.* at 10. We therefore concluded that the State's evidence was a material and impermissible variance from its charge, and we reversed the defendant's conviction for resisting law enforcement. *Id.*

[18] We also find our Supreme Court's opinion in *Young v. State*, 30 N.E.3d 719 (Ind. 2015), helpful. In *Young*, the State charged the defendants with murder for shooting their victim. However, at trial the State's evidence was that the defendants had committed attempted aggravated battery by beating their victim. Our Supreme Court reversed the defendants' convictions because "the complete factual divergence here—between the 'means used' as alleged in the murder charge (shooting) and the 'means used' on which the [fact-finder] found attempted aggravated battery (beating)—deprived [the d]efendants of 'fair notice' of the charge of which they were eventually convicted." *Id.* at 725.

[19] We agree with Hogg that the allegations in the charging instrument against him and the evidence used at his trial were not consistent. The State alleged, albeit across three counts, a single criminal act: that on or about March 6, 2020, Hogg tendered one false check. Each of the three charges refers to a single check or written instrument. Count 1 identified "a check" and referred to the range of value of "said check." Appellant's App. Vol. 2 at 20. Count 2 specifically identified the amount of the check at issue, $984.79, which was the check that

had been made payable to Hogg. And Count 3 accused Hogg of having made or uttered "a written instrument"—not multiple instruments. *Id.* at 74.

[20] Further, the "on or about March 6, 2020" language used in each of the State's charges was at best confusing. Without question, as the prosecutor emphasized at trial, time was not of the essence to the State's charges here, and, thus, it was not necessary for the State to prove that Hogg's act occurred on the date alleged. *See Barger v. State*, 587 N.E.2d 1304, 1307 (Ind. 1992). Still, coupled with the singular references to "a check" and "a written instrument" and the specific identification in Count 2 to the check payable to Hogg, the most natural reading of the "on or about March 6, 2020" language is that that date referred to the check Hogg cashed at the Dutch Mill bar in the early morning hours of March 7, which the Dutch Mill bar had recorded as a March 6 transaction.

[21] Thus, the charging instrument put Hogg on notice only that he had been accused of committing a single criminal act, which act could have resulted in a conviction for one, but only one, count of check deception, theft, or counterfeiting.

[22] Nonetheless, at trial the State's evidence was far more expansive than the charging instrument suggested. The State presented evidence that Hogg had presented two false checks to the Dutch Mill bar on two different days; that Hogg had forged a third-party's signature on the March 5 check payable to Robert Madewell; and that Hogg, Myer, and Slavens had acted as accomplices in repeatedly deceiving the Dutch Mill bar. On this latter point, the prosecutor

was explicit that the false checks made payable to Myer and Slavens on both March 5 and March 7 were also independent factual bases on which the jury could find Hogg guilty.

[23] Thus, the State's evidence at trial was not that Hogg had committed a single criminal act. Rather, the State's evidence was that Hogg, Myer, and Slavens had engaged in a criminal conspiracy and, individually and collectively, had engaged in at least six criminal acts.

[24] The variance between the State's charges and evidence here is far more expansive than the misidentification of the necessary law-enforcement officer's identity in *Whaley*. Further, the "means used" in the State's charges against Hogg—the singular, March 7 check payable to him—was far different from the "means used" in the State's evidence against Hogg—the apparent criminal conspiracy and each of the six checks made payable to Madewell, Myer, Slavens, and Hogg across two days. Moreover, the authority cited by the State in its brief discusses variances in nonessential details, not variances in what the underlying offenses even are or the factual bases for them. We therefore are not persuaded by the State's cited authorities.

[25] The State's notice to Hogg of its charges against him and the actual evidence presented at his trial was inconsistent. The State's charging instrument did not put Hogg on notice of a criminal conspiracy or that he would be tried for any of the five false checks that did not bear his name.

[26] We also agree with Hogg that this variance misled him in his preparation of his defense. At trial, Hogg argued that he lacked knowledge that the checks were false, and that Myer had deceptively created the checks and presented the checks to Hogg as legitimate. The State's more expansive evidence at trial, of course, undermined that defense.[3] Further, as Hogg's counsel made clear at trial, the State's charging information misled Hogg in the scope of his requested pretrial motions in limine, in which Hogg sought to properly discern and limit the scope of other acts that would and would not be available against him at trial.

[27] We thus turn to whether the variance resulted in prejudice against Hogg. Here, we emphasize both that Hogg's defense was misled as explained above, and, further, that the prosecutor informed the jurors that it could find Hogg guilty on a variety of the acts that were not alleged in the charging information. Because of this, we have no way to discern if the jurors unanimously found Hogg guilty for presenting the false March 7 check payable to him, or if instead the jurors relied unanimously or in part on the Madewell check, either of the Myer checks, either of the Slavens checks, or on a theory of accomplice liability. In short, we cannot say with confidence what the factual basis for the jury's verdict was. Therefore, we agree with Hogg that the variance resulted in prejudice

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[3] The March 5 video and the other five checks may have been admissible under Indiana Evidence Rule 404(b) not as evidence of the crime charged but "for another purpose," such as proving that Hogg did in fact have "knowledge" of the falsity of the March 7 check made payable to him. But having that evidence come in for a limited, other purpose is a far cry from what happened here, where the State made clear that that evidence was itself "the charged acts." Tr. Vol. 2 p. 111.

against him and denied him his due process rights. We reverse his conviction for Level 6 felony theft.

[28] Reversed.

Bailey, J., and Altice, J., concur.