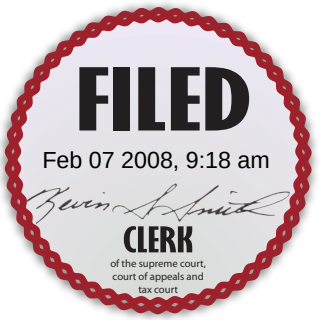

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IN THE
COURT OF APPEALS OF INDIANA

MIRIAM M. RUTHERFORD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0710-CR-880
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Douglas A. Tate, Judge
Cause No. 34D03-0705-CM-597

February 7, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Miriam M. Rutherford appeals her conviction for Conversion,[1] a Class A misdemeanor. Rutherford raises two issues which we restate as (1) whether the evidence was sufficient to support her conviction; and (2) whether the variance in the charging information and the proof at trial barred her conviction. We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 2:52 a.m. on May 6, 2007, Diane Bauder and Donald Jones were working at the Village Pantry located on East Morgan Street in Kokomo. Bauder saw Rutherford put a bottle of Coca-Cola Black and a can of sardines in her coat and walk past the counter without paying for them. As Rutherford walked out the door, Bauder told her she had to come back and pay for the items, but Rutherford did not do so. Rutherford did not have authorization to take this merchandise. Jones called the Kokomo Police Department and reported the theft. After receiving the call, Officer Chad Rodgers arrived and was alerted to Rutherford's whereabouts. After taking Rutherford into custody, Officer Rodgers conducted a search of her person and found a bottle of Coca-Cola Black, Beech Cliff Sardines, and French's Potato sticks. Bauder identified Rutherford at the scene as the person she saw taking the items, and both employees identified her in court as the person they saw in the store.

Rutherford was charged with conversion and resisting law enforcement. After a bench trial conducted on August 30, 2007, the trial court found Rutherford guilty of

[1] Ind. Code § 35-43-4-3(a) (2006).

conversion and not guilty of resisting law enforcement. The trial court sentenced Rutherford to one year of incarceration with all but the twelve days she had already served suspended to probation. Rutherford now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Rutherford first contends that the evidence was insufficient to support her conviction for conversion. When reviewing the sufficiency of the evidence, we will not reweigh the evidence or judge the credibility of witnesses. *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001) (quoting *Harrison v. State*, 707 N.E.2d 767, 788 (Ind. 1999)). We only consider the evidence most favorable to the judgment and the reasonable inferences that can be drawn therefrom. *Corbin v. State*, 840 N.E.2d 424, 428 (Ind. Ct. App. 2006). Moreover, we will affirm the trial court if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Alkhalidi*, 753 N.E.2d at 627.

Here, Rutherford was charged with conversion under Indiana Code section 35-43-4-3, which provides that "[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion." Specifically, Rutherford claims that the evidence offered at trial was insufficient to support her conversion conviction because the State failed to prove that Village Pantry sold the items in question. We are unpersuaded by this claim, however, because Village Pantry employee Diane Bauder testified at trial that she saw Rutherford take a bottle of Coca-Cola Black and a can of sardines from within the store, put them in her coat, and leave

the store without paying for the items. Bauder also testified that Rutherford was not authorized to take the aforementioned items from the store without paying. The trial court found Bauder's testimony to be credible and, as a result, found Rutherford guilty of knowingly or intentionally exerting unauthorized control over Village Pantry's property. Because we will not reassess Bauder's credibility on appeal and we consider only the evidence most favorable to the judgment, we conclude that the Bauder's testimony and the reasonable inferences drawn therefrom could reasonably have allowed the trial court to find Rutherford guilty beyond a reasonable doubt. *See Alkhalidi*, 753 N.E.2d at 627. Therefore, we conclude that the evidence was sufficient to support Rutherford's conversion conviction.

II. Variance

Rutherford next contends that a material or fatal variance existed between her charging information and the proof presented by the State at trial, so as to bar her conversion conviction. We disagree. Charging information must allege the elements of a crime such that the accused is sufficiently apprised of the nature of the charges against her so that she may anticipate the proof and prepare a defense in advance of trial. *Bayes v. State*, 779 N.E.2d 77, 80 (Ind. Ct. App. 2002), *trans. denied*. Here, the charging information stated that "on or about May 6, 2007, … Miriam M. Rutherford did knowingly exert unauthorized control over the property of Village Pantry, to-wit: merchandise in the amount of $3.98." Appellant's App. p. 10. We note that the State is not required to include detailed factual allegations (*i.e.*, the value of the property in question) in the charging instrument, though it may choose to do so. *Id*. (citing

Richardson v. State, 717 N.E.2d 32, 51 (Ind. 1999)). Therefore, in this case, the State could have charged as follows: "Miriam M. Rutherford, on or about May 6, 2007, did knowingly or intentionally exert unauthorized control over the property of Village Pantry." Had the State chosen to do so, the charging information would have been valid, as the essential elements were specified. *See Richardson*, 717 N.E.2d at 51. Here, Rutherford claims that because the State included the value of the items allegedly taken from the Village Pantry in the charging information, the State must also prove the value of said items at trial. We disagree and conclude that at most, the alleged discrepancy between the charging information and the proof presented at trial creates a variance.

A variance is an essential difference between the charging instrument and the proof presented at trial. *Bayes*, 779 N.E.2d at 80. Yet, not all variances are material or fatal. *Id.*

> 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?

Id.; *see also Mitchem v. State*, 658 N.E.2d 671, 677 (Ind. 1997). Here, Rutherford asserts error on the second factor, the double jeopardy factor, arguing that she remains subject to the possibility of another prosecution for conversion of the same items allegedly taken from Village Pantry at issue here.

We note that Rutherford failed to object to any alleged variance between the State's Information and the evidence adduced at trial. Absent fundamental error,

Rutherford's failure to lodge a specific objection at trial waived any material variance issue. *See Bayes*, 779 N.E.2d at 80. Waiver notwithstanding, we will nevertheless address Rutherford's claim of error on the potential for a future double jeopardy violation in this case.

Here, the evidence at trial demonstrated sufficient specificity to guard against the subsequent prosecution of Rutherford for the conversion of the items allegedly taken from Village Pantry. Specifically, Village Pantry employee Diane Bauder testified that she observed Rutherford take a bottle of Coca-Cola Black and a can of sardines. Tr. p. 8. Additionally, upon searching Rutherford after her arrest, Officer Rogers found a bottle of Coca-Cola Black, Beech Cliff Sardines, and French's Potato sticks on Rutherford's person. Tr. p. 11. The aforementioned testimony specifying the exact items Rutherford converted adequately protects her from subsequent prosecution for conversion of these items. Accordingly, we conclude that the variance between the charging information and the proof presented is neither material nor fatal, and as such does not bar Rutherford's conversion conviction.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.