

IN THE  
COURT OF APPEALS OF INDIANA

CAUSE No. 03A04-0712-CR-668

JEFFREY A. GRAHAM,	)	Appeal from the Bartholomew
	)	Superior Court I
APPELLANT (DEFENDANT BELOW),	)	
	)	
VS.	)	Cause No. 03D01-0512-FD-
	)	02059
STATE OF INDIANA,	)	
	)	
APPELLEE (PLAINTIFF BELOW).	)	Hon. Chris D. Monroe, Judge.

**BRIEF OF APPELLEE**

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APPELLEE (PLAINTIFF BELOW).	)	Hon. Chris D. Monroe, Judge.

**BRIEF OF APPELLEE**

**STATEMENT OF THE ISSUES**

I. Whether proof that Graham did not allow himself to be handcuffed, combined with proof that he fled from law-enforcement officers, is sufficient to sustain his conviction for resisting a law-enforcement officer.

II. Whether Graham, who did not object to the trial court's order of restitution and who invited the trial court to make such an order, may appeal on the grounds that the trial court should not have made a restitution order without inquiring into his ability to pay restitution.

III. Whether the Indiana Constitution protects Graham from punishment for criminal recklessness and criminal mischief because he fired a shotgun at a vehicle three times, damaging the vehicle in an amount over \$250.00, and posing a substantial risk of bodily injury to the driver.

## STATEMENT OF THE CASE

On December 20, 2005, the State of Indiana charged Jeffrey A. Graham (“Graham”) with criminal recklessness as a class D felony,<sup>1</sup> resisting law enforcement as a class A misdemeanor,<sup>2</sup> and criminal mischief as a class A misdemeanor.<sup>3</sup> (App. 2-4). On January 13, 2006, Graham posted a \$25,000.00 cash bond. (App. 150). On January 22, 2007, the trial court released all but \$1,000.00 of the cash bond to Graham’s attorney and his brother. (App. 152). Graham was tried before a jury on September 27, 2007 and found guilty on all three charges. (App. 112-14, 153).

On October 24, 2007, the trial court sentenced Graham to thirty-two months, all executed and none suspended, in the Department of Correction for criminal recklessness. (App. 153, 174). The trial court also sentenced Graham to one year for resisting law enforcement and one year for criminal mischief, but suspended these sentences and ordered that Graham serve them on probation. (Tr. 153, 174). The trial court ordered these sentences to be served consecutively. (Tr. 153, 174). As a term of Graham’s probation, the court ordered him to pay \$1,700.00 to the victim of the criminal recklessness and criminal mischief offenses. (App. 2-4, 153, 174). The court ordered that \$500.0 of the \$1,000.00 balance of Graham’s cash bond be applied to his attorney, \$160.00 to court costs, and the remaining \$340.00 to Graham’s restitution. (App. 119, 153).

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<sup>1</sup> Ind. Code § 35-42-2-2(C)(2)

<sup>2</sup> Ind. Code § 35-44-3-3(a)(1)

<sup>3</sup> Ind. Code § 35-43-1-2(a)(1)

Graham filed his notice of appeal on November 15, 2007. (App. 139; Docket). The notice of completion of the clerk's record was issued on November 16, 2007. (App. 148; Docket). On February 27, 2008, this Court granted the court reporter an extension of time to prepare the transcript to March 28, 2008. (App. 159; Docket). On April 3, 2007, this Court granted the court reporter a further and final extension of time to complete the transcript to April 15, 2008. (Docket). The notice of completion of the transcript was issued on April 15, 2008. (App. 161). Graham filed his brief and appendix on May 14, 2007, serving the state by personal delivery on the same day. (Docket; Brief of Appellant, 29).

### **STATEMENT OF FACTS**

In the early evening of December 14, 2005, Adam Sharp was shopping at a Dollar General store in Columbus when he encountered his teenage sister. (Tr. 136). She told him that a window in his mother's house had been broken during a disagreement with a man, and that Sharp should fix the window. (Tr. 137). Sharp did not know then that the window had been broken earlier during an altercation between Graham, his mother, and her boyfriend, during which Graham threw a shoe and broke items in her house. (Tr. 392-94). The argument had progressed to the yard, and involved Graham attempting to hit Sharp's mother with a bicycle and punching her several times. (Tr. 392-94). Graham then went to his own home, which was nearby down an alley from Sharp's mother's house and challenged a neighbor and another individual who were calling him names to a fight while holding a pipe in his hand. (Tr. 392).

Sharp drove his 1989 GMC Jimmy to his mother's house and spent approximately forty-five minutes fixing her window. (Tr. 138, 140). It was approximately 7:00 o'clock in the evening when Sharp left. (Tr. 136, 140, 208). Graham testified that at approximately this time,

Sharp drove past Graham's home numerous times and that, when Graham left the house to confront him, Sharp tried to run him over. (Tr. 422). Graham then entered his house, removed the trigger lock from a loaded twelve-gauge shotgun, and went back outside. (Tr. 294, 396, 402). Graham admitted that he intended to use the shotgun against Sharp: "I wanted to make absolutely certain that I made Mr. Sharp sure that I was not gonna have this. And my thinkin' was that if I don't stop this now, what's to prevent him from tryin' the same thing later on." Graham stood behind a tree in his yard and waited for Sharp to drive past his house. (Tr. 396).

Sharp, who was alone, drove his Jimmy towards Graham's house in an alley that ran beside the house toward Sharp's mother's house. (Tr. 141-42). Sharp saw Graham step out from behind the tree, and opened the vehicle's door. (Tr. 142-43). Graham shouted, "I got you now, you son of a bitch," leveled his shotgun, and opened fire. (Tr. 209-10, 367). The shotgun blast splintered the vehicle's turn signal lens and damaged the front bumper. (Tr. 209-10, 367). Sharp, terrified, hunched down behind the steering wheel and accelerated in an attempt to escape. (Tr. 143). His vehicle's wheels began to spin in the snow-and-ice covered alley until he engaged the vehicle's four-wheel drive and moved toward the street. (Tr. 142-43). Graham continued to fire at Sharp's escaping vehicle, hitting its passenger-side front tire from behind. (Tr. 200, 370). Graham fired a total of three shots at Sharp. (Tr. 142-43).

Sharp managed to escape and drive to a nearby service station and called the Columbus Police Department. (Tr. 149). After speaking with Sharp, officers went to Graham's house. (Tr. 197-98). The house was dark, and there was no response to the officers' repeated and loud knocking on the door. (Tr. 197-98). Because numerous homes were located in the area and Graham used a gun with a maximum range of 200 yards, Deputy Chief Curt Beverage stationed

officers on a perimeter around the house and summoned the police department's SWAT team. (Tr. 262-63, 270-71). A SWAT negotiator managed to contact Graham on the telephone; Graham was by turns argumentative and placating, and eventually a second negotiator was put on the phone in an attempt to obtain Graham's voluntary exit from the house. (Tr. 274-75). Eventually, Graham agreed to come out of the house. (Tr. 277). At the same time, however, he told the negotiator that he was ready to come out and "get it on." (Tr. 319). Graham admitted that he only intended to walk onto the porch and continue the verbal confrontation from there. (Tr. 405).

As Graham walked out the front door onto the porch, he was observed by SWAT officers who had taken up positions around the front of the house. (Tr. 280-81, 320-21). Graham refused to comply with repeated request to put his hands up. (Tr. 280-81, 321). Graham yelled "fuck you" at the officers and turned to go back inside his house. (Tr. 321). Concerned that Graham would return to a house in which a shotgun was present, and in order to apprehend him, the SWAT team fired a "bean bag" round at Graham's upper leg. (Tr. 321, 324). Graham remained standing and continued to yell "fuck you" at the officers. (Tr. 407). Graham continued to ignore commands to put up his hands, and three more "bean bag" rounds were fired, striking his upper legs. (Tr. 321-22).

After the fourth use of a "bean bag" round Graham grabbed his thighs and sank toward the ground. (Tr. 321-22). SWAT officers grabbed Graham and carried him off the porch, placing him on the ground in the front yard. (Tr. 324, 407). Graham refused to be handcuffed despite numerous commands from the SWAT officers for him to display his hands and comply. (Tr. 281). Eventually, Graham was placed in handcuffs. (Tr. 281).

## SUMMARY OF THE ARGUMENT

### I.

There is sufficient evidence to sustain Graham's conviction for resisting a law-enforcement officer. The State submits that the jury may have inferred Graham's forceful resistance by virtue of his aggressive verbal behavior, defiance of the officers' commands, and the fact that Deputy Chief Beverage testified that, when Graham had been placed on the ground by the SWAT officers, Graham was repeatedly commanded to cooperate with handcuffing. Even if Graham is correct in claiming there was insufficient evidence to prove that he forcibly resisted the police, his conviction for resisting law enforcement should be affirmed because there is sufficient evidence that he committed the offense by fleeing from police and the variance did not mislead him in the preparation of his defense.

### II.

Graham has waived review of the trial court's restitution order because he did not object to the order at any time relevant to this appeal. Graham did not object to the entry of the restitution order during his sentencing hearing and did not file a post-sentencing motion, which would also have preserved the issue for review. Graham actually invited the trial court to enter a restitution order, although he attempted to cast doubt on the amount claimed by Sharp. Assuming that Graham has not waived review, the State requests that this case be remanded for the limited purpose of re-examining the issue of restitution as a condition of probation or entering a simple judgment of restitution as part of Graham's sentence, rather than as a term of his probation.

### III.

Graham's convictions for criminal recklessness and criminal mischief do not violate the prohibition against double jeopardy contained in the Indiana Constitution. 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. Graham's firing his shotgun is neither criminal recklessness or criminal mischief. The fact that he fired his shotgun was used to prove only one, but not all, the elements of criminal recklessness and criminal mischief.

### ARGUMENT

#### I.

**Proof that Graham did not allow himself to be handcuffed, combined with proof that he fled from law-enforcement officers, is sufficient to sustain his conviction for resisting a law-enforcement officer.**

When reviewing the sufficiency of evidence to sustain convictions this Court will not re-weigh the evidence or re-evaluate the credibility of witnesses. *Dillard v. State*, 755 N.E.2d 1085, 1089 (Ind. 2001); *Farris v. State*, 753 N.E.2d 641, 647 (Ind. 2001). It will defer to the fact-finder's "exclusive province to weigh conflicting evidence." *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). "Not only must the fact-finder determine whom to believe, but also what portions of conflicting testimony to believe." *In re J.L.T.*, 712 N.E.2d 7, 11 (Ind. Ct. App. 1999); see *Parks v. State*, 734 N.E.2d 694, 700 (Ind. Ct. App. 2000). In pursuit of its factfinding duty the trial court may disregard uncontradicted testimony, *Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004), and the trial court is the sole judge of the effect which any discrepancies, contradictions, or different versions of events may or may not have. *Murray v. State*, 761 N.E.2d 406, 409 (Ind. 2002); *Parks*, 734 N.E.2d at 700. This Court will overturn a verdict only if, after

considering only the evidence and inferences which support the conviction, and after resolving all discrepancies and conflicts in favor of the verdict, it finds that a rational person could not have found the defendant guilty. *Hyppolite v. State*, 774 N.E.2d 584, 598 (Ind. Ct. App. 2002); *Clark v. State*, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

Graham was charged with resisting law enforcement by resisting, obstructing, or interfering with the Columbus Police Department. (App. 3). The statute which defines this offense provides that the resistance, obstruction, or interference must be done “forcibly.” Ind. Code § 35-44-3-3(a)(1). A person forcibly resists a law-enforcement officer when he “directs strength, power or violence towards” the officer. *Wellman v. State*, 703 N.E.2d 1061, 1064 (Ind. Ct. App. 1998) (quoting *Price v. State*, 622 N.E.2d 954, 963 n. 14 (Ind. 1993)). A mere refusal to obey a police officer is insufficient, there must be evidence that “strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.” *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993).

The State submits that the jury may have inferred Graham’s forceful resistance by virtue of his aggressive verbal behavior, defiance of the officers’ commands, and the fact that Deputy Chief Beverage testified that, when Graham had been placed on the ground by the SWAT officers, Graham was repeatedly commanded to cooperate with handcuffing. (Tr. 280-81, 321-22, 407). With respect to this argument, however, the State is constrained to note that Angela Mattox, the only SWAT-team officer who testified at Graham’s trial, told the jury that Graham appeared to be cooperating with the officers’ attempts to handcuff him and that his resistance to their authority was confined to his disobedience and attempt to go back inside the house. (Tr. 325, 328). However, it was for the jury to resolve discrepancies or conflicts in the evidence and

to make reasonable inferences from the facts at hand. *Thompson*, 804 N.E.2d at 1149; *Murray*, 761 N.E.2d at 409; *Parks*, 734 N.E.2d at 700.

Even if Graham is correct in claiming there was insufficient evidence to prove that he forcibly resisted the police, his conviction for resisting law enforcement should be affirmed. “A variance is an essential difference between proof and pleading.” *Reinhardt v. State*, 881 N.E.2d 15, 17 (Ind. Ct. App. 2008). Not all variances are fatal to a conviction:

Indeed, a variance will be considered fatal only if it misled the defendant in the preparation and maintenance of his defense with resulting harm or leaves the defendant vulnerable to double jeopardy in a subsequent criminal proceeding covering the same events, facts, and evidence.

*Wallace v. State* 878 N.E.2d 1269, 1275-77 (Ind. Ct. App. 2008) (citing *Winn v. State*, 748 N.E.2d 352, 356 (Ind.2001)). While Graham was charged with forcibly resisting officers, he acknowledges that subsection (a)(3) of the statute provides that, regardless of whether force is used, a person resists arrest when he “flees from a law enforcement officer after the officer has, by visible or audible means . . . identified himself or herself and ordered the person to stop.” I.C. 35-44-3-3(a)(3) (Brief of Appellant, 19).

The SWAT negotiators instructed Graham to leave his house.<sup>4</sup> (Tr. 275-76). Once outside, the police ordered Graham to place his hands in the air. (Tr. 280-81, 320-21). Graham knew that these commands were made by police officers. (Tr. 403-05). After partially complying with their instructions, Graham turned to go back inside his house. (Tr. 280-81, 321). In short, Graham fled from the officers. In this regard the State would note that Graham has never claimed he was unprepared or misled in the nature of his defense. He did not move for a

directed verdict on the charge of resisting law enforcement, and has not argued on appeal that his trial counsel was ineffective. (Tr. 381-82). He put on evidence and made arguments directed at refuting the idea that he attempted to return inside his house. (Tr. 406, 459-60). While an argument may be made that the State's arguments, Graham's arguments, and the trial court's instructions defined the gravamen of the offense as refusal to obey (Tr. 447, 459-60, 480-81), flight under the elements set forth in I.C. 35-44-3-3(a)(3) is refusing to obey. While a variance may be found to exist in this case, Graham's conviction for resisting law enforcement should be affirmed. *Wallace*, 878 N.E.2d at 1275-77; *Winn*, 748 N.E.2d at 356.

## II.

**Graham, who did not object to the trial court's order of restitution and who invited the trial court to make such an order, may not appeal on the grounds that the trial court should not have made a restitution order without inquiring into his ability to pay restitution.**

The decision to order restitution is a matter of judicial discretion. *Mitchell v. State*, 559 N.E.2d 313, 315 (Ind. Ct. App. 1990). Judicial discretion is a "privilege allowed a judge within the confines of justice to decide and act in accordance with what is fair and equitable." *Stone v. State*, 536 N.E.2d 534, 538 (Ind. Ct. App. 1989). An abuse of discretion only occurs when the trial judge obviously acts against the logic and effect of the facts and circumstances addressed by his or her ruling. *Id.* Graham bears the burden of demonstrating that the trial court abused its discretion. *Id.*

Graham, however, has waived review of the restitution order because he did not object to the order at any time when the error he complains of could have been corrected by the trial court.

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<sup>4</sup> Graham testified: "I was told on the phone to come out on the porch that the police wanted to talk to me." (Tr. 405).

Graham did not object to the entry of the restitution order during his sentencing hearing and did not file a post-sentencing a motion, which would also have preserved the issue for review.<sup>5</sup> (Tr. 520; App. 137). Graham actually invited the trial court to enter a restitution order, although he attempted to cast doubt on the amount claimed by Sharp: “Lastly, Judge, the issue of restitution. [sic] Your Honor, is well prepared to make a decision based on what he’s heard. . . . I certainly would argue that Mr. Sharp is not entitled to the seventeen hundred because he had an opportunity to lessen that, that cost to himself.” (Tr. 520).

“When a defendant does not properly bring an objection to the trial court’s attention so that the trial court may rule upon it at the appropriate time, he is deemed to have waived that possible error.” *Mitchell v. State*, 730 N.E.2d 197, 201 (Ind. Ct. App. 2000) *see also Kellett v. State*, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999) (holding to the same effect). Graham must have objected to a restitution order at the first available opportunity in order to obtain review. *Ware v. State*, 816 N.E.2d 1167, 1179 (Ind. Ct. App. 2004). Graham did not object to the order of restitution as a condition of probation at any time and has therefore waived review, even assuming that the trial court erred in making the order. *See Markland v. State*, 865 N.E.2d 639, 644 (Ind. Ct. App. 2007), *trans. denied*; *see also Mitchell*, 730 N.E.2d at 201 (although trial court erred by entering a restitution order where there was no evidence to support such an order, the defendant waived review of that claim because he failed to object to the order) *and Kellett*, 716

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<sup>5</sup> Trial courts lose jurisdiction when an appeal is perfected. *Schumacher v. Radiomaha*, 619 N.E.2d 271, 273 (Ind. 1993); *Clark v. State*, 727 N.E.2d 18, 20 (Ind. Ct. App. 2000). But jurisdiction is only lost when the Clerk issues the Notice of Completion of Clerk’s Record. Ind. Appellate Rule 8. Graham, who has been represented by counsel throughout these proceedings, was sentenced on October 24, 2007. (App. 124). The Notice of Completion of the Clerk’s Record was issued on November 16, 2007. (App. 147-48). Graham had several weeks to bring this objection to the trial court and did not avail himself of the opportunity.

N.E.2d at 981 (holding that while the trial court erred by ordering restitution in an amount not based on the victim's actual costs, defendant waived review of that claim because he failed to object to the order).

Assuming that Graham has not waived review, the State acknowledges that courts ordering restitution as a term of probation must make some inquiry into a defendant's ability to pay and fix a manner of payment. *Jaramillo v. State*, 803 N.E.2d 243, 250 (Ind. Ct. App. 2004); Ind. Code § 35-38-2-2.3(a)(5). The focus of review is on the conduct of such an inquiry and not on any proportionality, or lack thereof, between ability to pay and the amount ordered. *See e.g. Savage v. State*, 655 N.E.2d 1223, 1224 (Ind 1995) (adopting, in part, Judge Sullivan's dissenting opinion in the Court of Appeals which authorized restitution of \$164,998.59 on evidence that the defendant had a monthly income of \$1,000 and expenses of \$800.00 to \$1,000.00 a month). There is no mandatory format for this inquiry, and trial courts may conduct it by examining information in the presentence report or testimony at a hearing. *Antcliff v. State*, 688 N.E.2d 166, 170 (Ind. Ct. App. 1997); *Smith v. State*, 655 N.E.2d 133, 134 (Ind. Ct. App. 1995). In this case, it appears that the presentence report contains only a criminal background check, and no evidence was taken at the sentencing hearing regarding Graham's education, employment, income, or living expenses. (Confidential App., 1-5; Tr. 506-07). Accordingly, should this Court find that Graham has not waived review of the trial court's restitution order, this case should be remanded for the limited purpose of re-examining the issue of restitution as a condition of probation or entering a simple judgment of restitution as part of Graham's sentence, rather than as a term of his probation. *See, e.g., Ladd v. State*, 710 N.E.2d 188, 192 (Ind. Ct. App.

1999) (holding that an inquiry into the defendant's ability to pay is not required to impose a judgment of restitution as part of an executed sentence).

### III.

**The Indiana Constitution does not protect Graham from punishment for criminal recklessness and criminal mischief because he fired a shotgun at a vehicle three times, damaging the vehicle in an amount over \$250.00, and posing a substantial risk of bodily injury to the driver.**

Graham's convictions for criminal recklessness and criminal mischief do not violate the prohibition against double jeopardy contained in the Indiana Constitution. Article I, Section 14 of the Indiana Constitution provides in part: "[n]o person shall be put in jeopardy twice for the same offense." Two or more offenses are the "same offense" prohibited by Article I, Section 14 if where, with respect to either the statutory elements of the challenged offense or the actual evidence used to convict, the essential elements of one offense also establish the essential elements of the other challenged offense. *See Richardson v. State*, 717 N.E.2d 32, 49, 56 (Ind. 1999). A double jeopardy claim is reviewed *de novo*. *Goldsberry v. State*, 821 N.E.2d 447, 458 (Ind. Ct. App. 2005). Graham does not argue the "same elements" prong of Article I, Section 14, but contends that the actual evidence used to convict him of criminal recklessness prohibits his conviction for criminal mischief. Accordingly, this Court will examine the record to determine if the challenged offenses are was established by proof of separate and distinct facts. *Thomas v. State*, 840 N.E.2d 893, 900 (Ind. Ct. App. 2006), *trans. denied*; *Goldsberry*, 821 N.E.2d at 459. Graham has the burden of demonstrating a reasonable possibility that the trier of fact used the same evidentiary facts to establish the essential elements of each offense. *See Patton v. State*, 837 N.E.2d 576, 582 (Ind. Ct. App. 2005). He must show more than a remote or speculative possibility that identical facts were used. *Goldsberry*, 821 N.E.2d at 459. In

examining the record, this Court will consider the matter from the jury's perspective. *Gillespie v. State*, 832 N.E.2d 1112, 1119 n. 9 (Ind. Ct. App. 2005). This Court will consider the evidence presented, the charging information, and arguments of counsel in making this determination. *See Gillespie*, 832 N.E.2d at 1119 n.9; *Goldsberry*, 821 N.E.2d at 459.

In this case, Graham was convicted of criminal mischief and criminal recklessness by proof that he fired three shots at the vehicle being driven by Sharp, damaging Sharp's vehicle and posing a substantial risk of bodily injury to Sharp. (Tr. 142-44, 200, 209-10, 367, 370). Graham wrongly argues that, as in *Stewart v. State*, 866 N.E.2d 858 (Ind. Ct. App. 2007), the "same evidence" was used to convict him of both offenses because the State proved that he fired the shotgun three times and that the blasts damaged Sharp's vehicle and created a substantial risk that Sharp would be injured. In *Stewart*, however, the defendant was convicted of attempted battery with a deadly weapon and criminal recklessness on proof that he fired a gun at a vehicle in which five persons were riding, thereby attempting to shoot each of them and thereby posing a substantial risk of bodily injury to each of them. *Id.* at 865-66.

In this case the charges, evidence, and the State's arguments below, some of which Graham quotes in his brief, clearly indicate that the State was using evidence of damage and resulting pecuniary loss only to convict Graham of criminal mischief. (App. 2-4; Tr. 115-16, 151, 446-47). As the State noted in its final argument:

Evidence of criminal mischief, well you have the victim's testimony that he took his vehicle and he got an estimate and it's gonna cost around twelve hundred and fifty dollars to repair. That's enough. You don't need more. You also have the testimony from the officer that the victim told him each of those tires cost three hundred. And you've got your common sense. You know how much tires cost. You know how much it costs to repair your vehicle. There's plenty of evidence that was presented and your own life experience to know that the element of two hundred fifty dollars was met.

(Tr. 475). This is a direct reference to evidence not required to prove criminal recklessness, but which was required to prove criminal mischief. *See* Ind. Code § 35-43-1-2(a)(1)(A)(I) (providing that criminal mischief is a class a misdemeanor if the defendant damages property resulting in a pecuniary loss of more than \$250.00 and less than \$2,500.00). The trial court also instructed the jury on the independent requirement of proof of pecuniary loss required to prove criminal mischief. (Tr. 481-82).

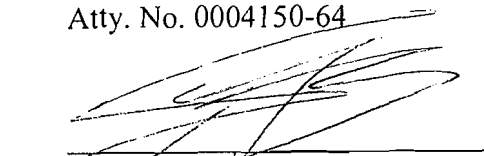
The “actual evidence” test is not satisfied when there is a reasonable possibility that some of the evidence used to prove one offense is also used to prove another offense: “[T]he Indiana Double Jeopardy Clause is *not* violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, *but not all*, of the essential elements of a second offense.” *Bald v. State*, 766 N.E.2d 1170, 1172 (Ind. 2002) (quoting *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002) (emphasis added by *Bald*)). In *Stewart*, proof that the defendant fired a gun into a car holding five people was used to convict him both of attempting to shoot the same people and of creating a substantial risk that the same people would suffer bodily injury. *Id.* at 865-66. Graham’s firing his shotgun is neither criminal recklessness or criminal mischief. The fact that he fired his shotgun was used to prove only one, *but not all*, the elements of criminal recklessness and criminal mischief. The Indiana Double Jeopardy Clause was not violated.

**CONCLUSION**

The State respectfully urges that the trial court be affirmed or, in the alternative, that this case be remanded with instructions to enter an appropriate restitution order.

Respectfully submitted:

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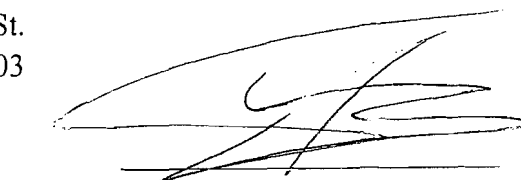


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**CERTIFICATE OF SERVICE**

I swear under the penalties for perjury that on June 13, 2008 I served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellee by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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