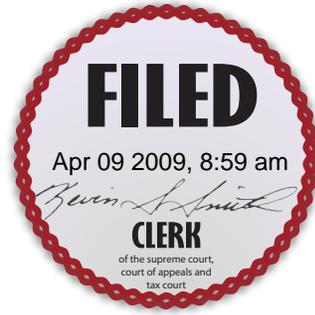


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JASON L. KEIGLEY, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 32A01-0805-CR-229

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APPEAL FROM THE HENDRICKS SUPERIOR COURT  
The Honorable Karen M. Love, Judge  
Cause No. 32D03-0704-FC-12

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**April 9, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Jason L. Keigley (“Keigley”) appeals his convictions of Sale of an Unregistered Security, as a Class C felony,<sup>1</sup> Transacting Business by an Unregistered Broker-Dealer, as a Class C felony,<sup>2</sup> and Loan Broker Fraud, as a Class D felony.<sup>3</sup> We affirm in part, reverse in part, and remand with instructions.

## Issues

Keigley raises two issues on appeal, which we restate as:

- I. Whether the trial court had a duty to instruct the jury, sua sponte, on a good-faith-belief defense; and
- II. Whether the convictions of Fraud in Connection with the Offer or Sale of a Security and Loan Broker Fraud violated Keigley’s Double Jeopardy rights.

## Facts and Procedural History

David and Phyllis Stinson first communicated with Keigley in their attempt to obtain financing to purchase a pool. Keigley worked in the finance department of a pool company, but was unable to arrange financing as the Stinsons had filed for bankruptcy. In working for a different employer, Prestige Mortgage Corporation (“Prestige Mortgage”), on an unrelated matter, Keigley helped Jeri and Richard Jones refinance their mortgage.

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<sup>1</sup> Ind. Code § 23-2-1-3. Indiana Code Chapter 23-2-1 was repealed and replaced by the Indiana Uniform Securities Act in P.L. 27-2007, effective July 1, 2008. The parties agree, however, that Indiana Code Chapter 23-2-1 applies to Keigley’s conduct.

<sup>2</sup> Ind. Code § 23-2-1-8.

<sup>3</sup> Ind. Code § 23-2-5-20.

Later, Keigley recontacted Jeri and Richard, encouraging them to invest in his new company, 1<sup>st</sup> Place Mortgage, Inc. (“1<sup>st</sup> Place”). They agreed and, to do so, took out a \$30,000 home equity loan. On November 26, 2003, Keigley entered a “Sales Agreement” with Jeri and Richard, whereby they invested \$30,000; he agreed to repay them the \$30,000 and \$7500 in interest within one year, constituting a twenty-five percent return. Exhibit 104.

Keigley also recontacted the Stinsons, described his new business, and encouraged them to enter what he described as a “reverse mortgage.” Transcript at 743. Because 1<sup>st</sup> Place did not have enough money to buy the Stinsons’ home, Keigley asked Jeri and Richard Jones to purchase the Stinsons’ home. Jeri and Richard agreed.

On February 3, 2004, the parties entered the following arrangement:

The Stinsons sold their home to Jeri and Richard for \$225,000;

Jeri and Richard agreed to an adjustable rate mortgage with Decision One Mortgage Company with a principal of \$225,000;

Jeri and Richard would treat the home as their rental property for property tax purposes;

Keigley received the \$33,300 in equity and would invest it in 1<sup>st</sup> Place;<sup>4</sup>

The \$33,300 would be available to the Stinsons for their use;

This would allow the Stinsons to shelter the \$33,300 from the bankruptcy court;

The Stinsons agreed to pay 1<sup>st</sup> Place \$600/month for two years;

The Stinsons would live in the home for the rest of their lives;

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<sup>4</sup> Amounts are approximated for simplicity.

1<sup>st</sup> Place would own the home after the Stinsons died; and

Keigley would pay the mortgage, taxes and insurance on the home.

The settlement agent was Nations Title Agency of Indiana (“Nations Title”).

According to Phyllis Stinson, after two years, “the reverse mortgage was to take place because [Keigley] would have the money in his business to purchase our home.” Tr. at 751.

The U.S. Department of Housing and Urban Development “Settlement Statement” listed Geneva Plank d/b/a Prestige Mortgage as the mortgage broker; two mortgage-broker fees totaled \$11,750. Ex. 2. However, the State offered a photocopy of a check for \$11,750 payable to 1<sup>st</sup> Place Mortgage, which referenced a loan to Jeri and Richard. The name on the account is not clear, but the top of the photocopy includes the following: “To: NATIONS TITLE AGENCY . . . From: Photocopy Research.” Id. A credit union’s stamp on the back of the check is dated February 4, 2004. Keigley signed the check. Plank testified that she was not aware of the transaction, did not collect a commission on the loan, and had never before seen the HUD statement.

The day after the closing, the Stinsons asked Keigley for \$10,000; he gave them \$5000. Keigley refused them any additional repayment of the sale proceeds. From February 2005 through November 2006, the Stinsons paid 1<sup>st</sup> Place \$12,000 in what they understood to be rent. Keigley testified as follows regarding how he invested the money he received:

So basically that allowed me to buy the house like I mentioned, like I said that I was living in to basically grow my business and give me a place to stay, give me furniture that I needed, I says [sic] get my truck and everything so I can drive there and here.

Tr. at 1564.

Keigley was not registered with the Indiana Secretary of State as a Broker-Dealer; 1<sup>st</sup> Place had not registered any securities with that agency. Keigley repaid Jeri and Richard most, but not all, of the money he owed them. He failed to make all of the mortgage and tax payments, resulting in the commencement of foreclosure proceedings against Jeri and Richard on December 5, 2006.

Initially, the State charged Keigley with twelve offenses; eight counts were dismissed prior to trial. The remaining four counts were amended and tried as follows: (1) Sale of an Unregistered Security, as a Class C felony; (2) Transacting Business by an Unregistered Broker-Dealer, as a Class C felony; (3) Fraud in Connection with the Offer or Sale of a Security, as a Class C felony;<sup>5</sup> and (4) Loan Broker Fraud, as a Class D felony.

Upon Keigley's motion, he represented himself with the assistance of standby counsel. After a seven-day jury trial, he was found guilty of all four counts, and the trial court entered judgments of conviction on each. Keigley now appeals.

## **Discussion and Decision**

### **I. Jury Instruction**

Keigley argues that the trial court had a duty to instruct the jury, sua sponte, that a "good faith belief that the transaction at issue was not a security was an affirmative defense

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<sup>5</sup> Keigley does not challenge his conviction of count three, Fraud in Connection with the Offer or Sale of a Security.

to both the sale of an unregistered security and transacting business as an unregistered broker-dealer of securities.” Appellant’s Brief at 8. However, he failed to preserve this alleged error by not proffering such an instruction to the trial court. Keigley acknowledges that he “did not offer a good faith instruction.” Id. at 10.

In reviewing jury instructions, we “consider the instructions ‘as a whole and in reference to each other’ and do not reverse the trial court ‘for an abuse of that discretion unless the instructions as a whole mislead the jury as to the law in the case.’” Helsley v. State, 809 N.E.2d 292, 303 (Ind. 2004) (quoting Carter v. State, 766 N.E.2d 377, 382 (Ind. 2002)). Where, as here, the issue is not raised at trial, the defendant must establish fundamental error. Fundamental error “applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006).

The State alleged that Keigley offered or sold an unregistered security and that he transacted business as a broker-dealer or agent without being registered. The preliminary and final instructions accurately reflected the relevant statutes. Indeed, Keigley does not challenge their accuracy or the sufficiency of the evidence. Appellant’s Br. at 14.

Instead, Keigley contends that he did not need to register himself or the contract because “he believed that the contract did not meet the legal definition of a security.” Appellant’s Br. at 9. The preliminary and final instructions stated precisely the opposite.

The State is not required to prove that the defendant knew his alleged acts or alleged omissions were against the law.

The State is not required to prove that the defendant knew the legal definition of security, loan, loan broker, loan brokerage business or any other legal definition.

Appendix at 352, 396. As he acknowledges in his Reply Brief, “Keigley is asking this Court to carve out an exception to the rule and find that under the very narrow set of circumstances set forth in this case, a good faith instruction should have been given.” Reply Brief at 2. The trial court had no duty to pursue a novel proposition of law, especially when it was not presented with argument on the matter. The trial court’s instructing of the jury did not constitute fundamental error.

## II. Double Jeopardy

Second, Keigley argues that his convictions of Fraud in Connection with the Offer or Sale of a Security (“Fraudulent Act”) and Loan Broker Fraud violated his Double Jeopardy rights.<sup>6</sup> “No person shall be put in jeopardy twice for the same offense.” IND. CONST. art. I, § 14. Under the actual evidence test,<sup>7</sup> we review whether there was “a reasonable possibility that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Bradley v. State, 867 N.E.2d 1282, 1285 (Ind. 2007). To apply this test, we consider the essential elements of the challenged crimes, charging informations, jury instructions, evidence, and

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<sup>6</sup> The trial court ordered the sentences for counts three and five to be served concurrently. However, a Double Jeopardy violation cannot be remedied by the imposition of concurrent sentences. Jones v. State, 807 N.E.2d 58, 67 (Ind. Ct. App. 2004), trans. denied.

<sup>7</sup> Keigley concedes that these offenses each require a unique element. Accordingly, he does not argue within the context of the same-elements test. Appellant’s Brief at 15 n.10.

arguments of counsel. Lee v. State, 892 N.E.2d 1231, 1234 (Ind. 2008). After reviewing Indiana cases, the Lee Court wrote,

These precedents instruct that a “reasonable possibility” that the jury used the same facts to reach two convictions requires substantially more than a logical possibility. This does not reflect a “literal” or “relaxed” application of the actual evidence test. Rather, “reasonable possibility” turns on a practical assessment of whether the jury may have latched on to exactly the same facts for both convictions. See Griffin v. State, 717 N.E.2d 73, 89 (Ind. 1999) (“To establish that two offenses are the same offense under the actual evidence test, the possibility must be reasonable, not speculative or remote.”), cert. denied.

Id. at 1236. Where a single act forms the basis of two convictions, the two cannot stand. Davis v. State, 770 N.E.2d 319, 324 (Ind. 2002).

This Court has upheld convictions where distinct acts supported each conviction. For example, in Lohmiller v. State, the defendant was not a licensed nurse, but signed twenty-seven different documents as “Rebecca Lohmiller RN, MSN.” Lohmiller v. State, 884 N.E.2d 903, 906 (Ind. Ct. App. 2008). The documents included contracts, grants, a grant request, vaccine order forms, and other records. The Lohmiller Court held that the defendant’s rights under Indiana’s Double Jeopardy Clause were not violated because the evidence included the twenty-seven documents she signed. Id. at 914. See also Scott v. State, 867 N.E.2d 690, 697-98 (Ind. Ct. App. 2007), trans. denied. In Scott, this Court upheld convictions for forgery and money laundering because Scott presented a forged check and agreed to facilitate a broader scheme, including wiring funds overseas. Id.

In contrast, Indiana courts have reversed judgments where convictions arose from the same act. In one case, the defendant was convicted of attempted arson, attempted arson for

hire, and attempted arson with the intent to defraud. As all of the convictions “arose from a single act of burning,” this Court struck two of the convictions. Clark v. State, 732 N.E.2d 1225, 1229 (Ind. Ct. App. 2000).

In Tyson v. State, Tyson twice communicated with a buyer and then sold him cocaine. The two separate incidents resulted in four convictions: two convictions of dealing in a narcotic drug and two convictions of conspiracy to do the same. Our Supreme Court vacated both of the conspiracy convictions, concluding that it was “reasonably possible that the evidence used by the jury to establish the essential elements of the conspiracy charge . . . were also used to prove the essential elements of dealing.” Tyson v. State, 766 N.E.2d 715, 717 (Ind. 2002).

The Fraudulent Act and Loan Broker Fraud statutes are very similar and feature, in part, identical language. The former prohibits three types of conduct “in connection with the offer, sale or purchase of any security,” while the latter prohibits eight types of conduct “in connection with a contract for the services of a loan broker.” Ind. Code §§ 23-2-1-12 and -5-20. Each statute prohibits both “mak[ing] any untrue statements of a material fact” and “engag[ing] in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.”<sup>8</sup> Id.

The charging informations, as well as the jury instructions, included both of the above

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<sup>8</sup> As to the second phrase, the Fraudulent Act statute employs one fewer comma and uses the word “which,” rather than the word “that.” I.C. § 23-2-1-12(3) (“engage in any act, practice[] or course of business which operates”). We do not believe the General Assembly intended these nominal variances to reflect different meanings.

provisions for both counts three and five. The State alleged that Keigley,

Second Amended Count Three [Fraudulent Act]

did, in connection with the offer or sale of a security, either directly or indirectly make an untrue statement of material fact, to-wit: told Phyllis and David Stinson that he would place funds acquired from the sale of their home in an account that they would have access to and be able to draw upon, or engaged in an act, practice, or course of business that operated as a fraud or deceit on Phyllis and David Stinson.

Second Amended Count Five [Loan Broker Fraud]

did, in connection [with a contract] for services as a loan broker, either directly or indirectly make an untrue statement of material fact, to-wit: told Phyllis and David Stinson, Jeri A. and Richard Jones, Decision One Mortgage, and/or Nations Title Agency of Indiana that the loan he procured on behalf of Phyllis and David Stinson was being brokered through 1<sup>st</sup> Place Mortgage when in fact the loan was brokered through Prestige Mortgage, or engaged in an act, practice, or course of business that operated as a fraud or deceit on Phyllis and David Stinson, Jeri A. and Richard Jones, Decision One Mortgage, and/or Nations Title Agency of Indiana.

App. at 22, 27 (emphases added). Though emphasizing different misrepresentations (where the funds would go and who the mortgage broker was), the two charges were part of the same fraudulent scheme.

Jeri and the Stinsons were the State's main witnesses as to counts three and five. They described Keigley's misrepresentations and the financial losses they experienced. In closing argument, the State emphasized the consequences they experienced.

[W]e care because this kind of things [sic] ruins lives . . . hurt people. We care because of the Stinsons. You saw the Stinsons up there. You saw them testify . . . and you heard what this kind of conduct does to people. You heard how their house is going to foreclosure. You heard how their money is gone. We care about things like this because [of] Jeri Ann Jones. She works hard, she tries to make a good life for herself and she got duped. That is why we care.

Tr. at 1842. In fact, in discussing count five, the mortgage-broker misrepresentation, the State acknowledged its nexus with Keigley's control of the Stinsons' \$28,300.

[The owners of Prestige Mortgage] came in here and testified, we never saw any of that paperwork. We never knew anything about it. It wasn't something that was brokered through us. Yet that's what he told everybody. That was what was on the HUD 1. When he got the check, [he] kept it himself. Okay? It was misleading, misleading false statement. So there it is, folks.

Id. at 1858.

Based upon our review of the offenses, charges, evidence, jury instructions, and the State's closing argument, we conclude that there was a reasonable possibility that the jury used the same facts to establish both Loan Broker Fraud and Fraud in Connection with the Offer or Sale of a Security. We remand with instructions to vacate the judgment of conviction for count five, Loan Broker Fraud.

### **Conclusion**

The trial court did not have a duty to instruct the jury, sua sponte, on a good-faith-belief defense. Keigley's rights under Indiana's Double Jeopardy Clause were violated by his convictions for both Loan Broker Fraud and Fraud in Connection with the Offer or Sale of a Security.

Affirmed in part, reversed in part, and remanded with instructions.

MATHIAS, J., and BARNES, J., concur.