



ATTORNEY FOR APPELLANT

Yvette M. LaPlante
LaPlante LLP
Evansville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Nicole D. Wiggins
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Kimberly S. Vanderveer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 26, 2022

Court of Appeals Case No.
21A-CR-1688

Appeal from the Vanderburgh
Circuit Court

The Honorable Celia M. Pauli,
Magistrate

Trial Court Cause No.
82C01-1910-F5-006949

May, Judge.

- [1] Kimberly S. Vanderveer appeals her convictions of Level 5 felony using false information to obtain a handgun¹ and Level 6 felony making a false statement

¹ Ind. Code § 35-47-2-17(a)(1)(A).

on a criminal history information form.² Vanderveer first asserts double jeopardy principles prohibit her simultaneous conviction of both crimes, as both allegations were based on a single answer that she provided on a single criminal history form. Vanderveer also asserts the State failed to prove her false statement on the form was made knowingly or intentionally. The State concedes Vanderveer’s Level 6 felony conviction must be vacated under the framework adopted in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), and we hold the evidence was sufficient to support Vanderveer’s conviction of the Level 5 felony. Accordingly, we vacate in part and affirm in part.

Facts and Procedural History

- [2] On an undisclosed date prior to these events, Vanderveer inherited a Smith & Wesson .357 caliber revolver (hereinafter “the handgun”) from her grandfather. Vanderveer pawned the handgun at Fares Pawn Shop on April 11, 2019.
- [3] On July 10, 2019, Vanderveer was arrested following a traffic stop, and two days later, under Cause Number 82C01-1907-F6-4784 (hereinafter “F6-4784”), the State charged Vanderveer with five crimes, including one felony. On July 16, 2019, Vanderveer appeared in court on F6-4784 and entered a plea of not guilty. The trial court advised her of her rights, the charges against her, and the possible penalties therefor, which included the possibility of a two-and-a-half-

² Ind. Code § 35-47-2.5-12.

year sentence for the Level 6 felony. *See* Ind. Code § 35-50-2-7 (defining sentencing range for Level 6 felony). On August 1, 2019, Vanderveer again appeared in court for a status hearing on F6-4784.

[4] On August 2, 2019, Vanderveer returned to Fares Pawn Shop to redeem the handgun. To obtain the handgun, Vanderveer had to complete “ATF Form 4473” from the Bureau of Alcohol, Tobacco, Firearms and Explosives. (Ex. Vol. (Electronic) at 6.) Form 4473 required Vanderveer to sign to “certify that [her] answers in Section A are true, correct, and complete[.]” (*id.* at 7), and to acknowledge understanding “that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law.” (*Id.*) In Section A, Vanderveer had to check “Yes” or “No” to answer a series of questions, one of which –Question 11.b.—asked: “Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year?” (*Id.* at 6.) Vanderveer checked the box for “No[.]” (*Id.*) Fares Pawn Shop submitted Vanderveer’s Form 4473 for government review, and then, on August 5, 2019, “NICS or the appropriate State agency” denied Vanderveer’s request to obtain the handgun. (*Id.* at 7.)

[5] Because Vanderveer had, in fact, been charged in F6-4784 with a felony that could result in imprisonment longer than one year, the State charged Vanderveer with Level 5 felony using false information to obtain a handgun and Level 6 felony making a false statement on a criminal history information

form. A jury found Vanderveer guilty of both crimes. The trial court entered the convictions, imposed a two-year sentence for the Level 5 felony and a one-year sentence for the Level 6 felony, suspended both sentences to probation, and ordered the sentences served concurrently.

Discussion and Decision

I. Double Jeopardy

[6] Vanderveer first asserts her simultaneous convictions of the Level 5 and Level 6 felonies violate double jeopardy principles because both convictions were based on a single checkmark placed on a single information form. Both Vanderveer and the State agree we analyze this issue using the analytical framework adopted in *Wadle* for instances “when a defendant’s single act or transaction implicates multiple criminal statutes[.]” *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020).

First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another charged offense. Second, a court must look at the underlying facts—as alleged in the information and as adduced at trial—to determine whether the charged offenses are the “same.” If the facts show two separate and distinct crimes, there’s no violation of substantive double jeopardy, even if one offense is, by definition, “included” in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions. The State can rebut this presumption only by showing that the statute—either

in express terms or by unmistakable implication—clearly permits multiple punishment.

Id. To determine whether an offense is “included” in another, we use the definition provided by our legislature. *Id.* at 248.

“Included offense” means an offense that:

(1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;

(2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or

(3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

Ind. Code § 35-31.5-2-168.

- [7] The Level 5 felony of which Vanderveer was convicted is defined by statute: “No person, in purchasing or otherwise securing delivery of a firearm . . . , shall knowingly or intentionally: (1) give false information on a form required to: (A) purchase or secure delivery of a firearm” Ind. Code § 35-47-2-17(a). The charging information for the Level 5 felony alleged “Vanderveer did knowingly or intentionally give false information on a form to purchase or secure delivery of a firearm” (Appellant’s App. Vol. 2 at 14.)

[8] The Level 6 felony of which Vanderveer was convicted is defined by statute: “A person who knowingly or intentionally makes a materially false statement on Form 4473 completed under section 3 of this chapter commits a Level 6 felony.” Ind. Code § 35-47-2.5-12. The charging information alleged:

Vanderveer did knowingly or intentionally make a materially false statement on Bureau of Alcohol, Tobacco, Firearms and Explosive Form 4473 completed under I.C. 35-47-2.5-3, to wit: Kimberly S. Vanderveer signed ATF Form 4473 certifying that her answers were true, correct, and complete, when in fact [her] answers were not true, correct, and complete[.]

(Appellant’s App. Vol. 2 at 14.)

[9] As the State acknowledges, “the evidence presented at trial was that [Vanderveer] falsified a singular form[.]” (Appellee’s Br. at 14.) Accordingly, as the State concedes, Vanderveer’s convictions were “established by proof of the same material elements[.]”³ (*id.*), such that one is “included” in the other. *See* Ind. Code § 35-31.5-2-168(1) (defining included offense as one “established by proof of the same material elements or less than all the material elements” of another). Because neither the statute defining the Level 6 felony nor the statute defining the Level 5 felony permits multiple punishments, expressly or by implication, we agree with Vanderveer and the State that Vanderveer’s Level 6 felony conviction should be vacated on double jeopardy grounds. *See, e.g.,*

³ For both convictions, as proven at trial, the State had to demonstrate: (1) Vanderveer; (2) knowingly or intentionally; (3) falsified an answer on Form 4473; (4) to retrieve the handgun from the pawn shop.

Wadle, 151 N.E.3d at 253 (vacating one of two OWI convictions where “[n]either statute clearly permits cumulative punishment and the latter offense is an included offense of the former”).

II. Sufficiency of Evidence

[10] Next, Vanderveer claims the State failed to prove she knowingly or intentionally falsified Form 4473. Claims of insufficient evidence

warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility. Rather, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt.

Powell v. State, 151 N.E.3d 256, 262-63 (Ind. 2020) (internal citations omitted).

[11] Vanderveer argues her falsification was neither knowing⁴ nor intentional⁵ because she misunderstood the meaning of the question to which she gave the false answer. The question that Vanderveer answered falsely asked: “Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year?” (Ex. Vol.

⁴ “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” Ind. Code § 35-41-2-2(b).

⁵ “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” Ind. Code § 35-41-2-2(a).

(Electronic) at 6.) Vanderveer testified she did not know what “indictment” meant, but she thought it meant “found guilty[.]” (Tr. Vol. II at 91-92.) Based on this testimony, Vanderveer argues she answered the question correctly according to her mistaken understanding of the question, and therefore, she did not intend to provide a false answer.

[12] However, intent is a mental function, *Laughlin v. State*, 101 N.E.3d 827, 829 (Ind. Ct. App. 2018), and unless a defendant confesses, a trier of fact must infer intent from the circumstances surrounding the act at issue. *Id.* Like intent, knowledge is also a mental state and “the trier of fact must resort to reasonable inferences of its existence.” *Leonard v. State*, 80 N.E.3d 878, 883 (Ind. 2017) (quoting *Young v. State*, 761 N.E.2d 387, 389 (Ind. 2002)). Accordingly, here, where Vanderveer denied having knowingly or intentionally falsified the form, direct evidence of her mental state is unlikely. Instead, we must “look to all the surrounding circumstances . . . to determine if a guilty verdict is proper.” *Villagrana v. State*, 954 N.E.2d 466, 468 (Ind. Ct. App. 2011).

[13] Vanderveer testified she knew what it meant to be “charged” with a felony, (Tr. Vol. II at 92), and she claimed she would have admitted she had been charged with a felony if that is what the question had asked. In support of her assertion that she believed “‘indictment’ meant being found guilty[.]” (Appellant’s Br. at 9), Vanderveer testified “I thought it was [sic] meant found guilty of like O.J. Simpson was indicted. I thought he you know didn’t, he got charged but he didn’t get found guilty, so he wasn’t indicated [sic]. I thought that was what that meant.” (Tr. Vol. II at 91.) Whether this convoluted testimony would have

supported her argument in the eyes of the jury is unclear; nevertheless, the record contains other evidence that supports Vanderveer's conviction.

[14] Indiana State Trooper, Detective Toni Walden, testified Form 4473 has been used for several years and, in her many investigations, no one else has ever suggested they did not understand the meaning of being “under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year?” (Ex. Vol. (Electronic) at 6.) She also testified that firearm dealers cannot help purchasers fill out the forms, but dealers are required to provide instruction sheets to assist purchasers fill out the forms. The general manager of Fares Pawn Shop, Stevie Kessler, testified she was present when Vanderveer came in to redeem the handgun and she filled out the seller portions of Vanderveer's Form 4473. Kessler also testified every purchaser receives three additional pages of instructions about Form 4473⁶ and those instructions include definitions.⁷ Kessler indicated that, although she has watched nearly one thousand people fill out a Form 4473, she has “never had somebody ask for a definition of a word.” (Tr. Vol. II at 85.) Above the space for certification by a buyer, Form 4473 informs buyers that “a person who answers ‘yes’ to any of the questions 11.b. through 11.i. . . . is prohibited from

⁶ We note Vanderveer testified she was not given the instruction pages, but the jury was not required to believe her testimony. *See Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004) (“As a general rule, factfinders are not required to believe a witness's testimony even when it is uncontradicted.”).

⁷ The instruction pages were not attached to the copy of Vanderveer's Form 4473 that Fare's Pawn Shop gave to police, so we do not know whether the instructions included a definition of “indictment” or “information.”

purchasing or receiving a firearm.” (Ex. Vol. (Electronic) at 6.) Vanderveer testified she “did not want to lose” the firearm that she had inherited from her grandfather. (Tr. Vol. II at 90.)

[15] While the record before us would have permitted the jury to determine Vanderveer’s falsification of the form was neither knowing nor intentional, we may not invade the province of the jury to reweigh that evidence. The record permitted the jury to determine Vanderveer purposefully falsified Form 4473 because she wanted to retrieve the handgun that had belonged to her grandfather, and we therefore affirm. *See, e.g., Purvis v. State*, 87 N.E.3d 1119, 1125 (Ind. Ct. App. 2017) (affirming conviction where evidence and reasonable inferences allowed factfinder to determine defendant acted knowingly or intentionally), *aff’d on reh’g*.

Conclusion

[16] The State appropriately concedes Vanderveer’s simultaneous convictions violated her right to be free from double jeopardy, and we vacate her Level 6 felony conviction. However, we affirm her Level 5 felony conviction because the evidence and inferences therefrom most favorable to the jury’s verdict could lead a reasonable jury to conclude Vanderveer’s falsification of Form 4473 was knowing or intentional. We accordingly vacate in part and affirm in part.

[17] Vacated in part; Affirmed in part.

Brown, J., and Pyle, J., concur.