MEMORANDUM DECISION

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

Cynthia Sue Shafer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 21, 2022

Court of Appeals Case No. 22A-CR-1001

Appeal from the Jackson Circuit Court

The Honorable Richard W. Poynter, Judge

Trial Court Cause No. 36C01-2101-F4-3

Brown, Judge.

[1] Cynthia Sue Shafer appeals her convictions for burglary as a level 4 felony and theft as a class A misdemeanor. We affirm.

Facts and Procedural History

[2] In December 2017, Lisa Engelking's house in Seymour caught fire, and she and her son temporarily relocated while the damage to her house was repaired. On March 11, 2018, Kathryn Martin, who lived in a house across the street from Engelking, noticed a truck in Engelking's driveway, which seemed unusual because there was no one living in the house at that time. She also observed a woman wearing a white ball cap with her hair pulled through the back taking things from the garage and placing them in the truck. Martin contacted Engelking and asked if there was supposed to be someone at her house taking things from her garage. Engelking replied in the negative and indicated that she was calling the police and on her way to the house.

[3] When Engelking arrived, the truck was gone. Engelking and Martin entered the house and observed that items were dumped out of drawers onto the floors and multiple items were missing. Engelking found cigarette butts on the floor near the doorway of her son's room which were not present earlier. A police officer arrived and collected the cigarette butts.

[4] On April 24, 2018, Engelking called Martin, stated that her niece, Montana Engelking, had seen someone outside her house who looked like the person she had described earlier, and asked Martin if she would visit Montana's house to determine if it was the same person. Martin drove to Montana's house and

noticed a truck parked on the street which matched the one she had seen earlier. Martin entered Montana's house, looked through the windows, and observed a woman wearing a white hat with her hair pulled through the back who had a very similar size and stature as the woman she had seen on March 11th. The police were contacted, and Seymour Police Officer Gilbert Carpenter arrived at the scene. Martin spoke with Officer Carpenter who then spoke with the woman whom he identified as Shafer. After Officer Carpenter left, Engelking and Montana followed the woman who drove the truck to a home where someone was wearing the "exact backpack" Engelking's son had owned before it was stolen on March 11th. Transcript Volume II at 93.

[5] On January 15, 2021, the State charged Shafer with burglary as a level 4 felony. On February 25, 2022, the State charged Shafer with the additional charges of Count II, theft as a level 6 felony, and Count III, criminal trespass as a class A misdemeanor.

[6] In March 2022, the court held a jury trial. The State presented the testimony of Martin, Engelking, her son, Montana, law enforcement officers, and Julie Mauer, a forensic scientist employed by the Indiana State Police Laboratory. Mauer testified that she conducted an analysis of one of the cigarette butts identified as State's Exhibit 1 and Shafer's DNA profile and that the DNA profile on the cigarette butt was "at least one trillion times more likely if it originated from Cynthia Shafer than if it originated from an unknown unrelated individual." *Id.* at 183.

[7] The jury found Shafer guilty as charged in Counts I and III and of theft as a class A misdemeanor as a lesser included offense of Count II. The court merged Count III, criminal trespass, into Count II, theft, and entered judgments of conviction for Counts I and II. The court sentenced Shafer to six years with three years suspended for Count I and a concurrent sentence of 180 days for Count II.

Discussion

[8] Shafer argues that her convictions for burglary and theft violate the statutory prohibition against substantive double jeopardy and Article 1, Section 14 of the Indiana Constitution. She asserts the facts "show only one single continuous crime with the burglary factually encompassing the theft." Appellant's Brief at 11.

[9] The Indiana Supreme Court has held that "our Double Jeopardy Clause should focus its protective scope exclusively on successive prosecutions for the 'same offense'" and that this conclusion "does not suggest that defendants enjoy no protection from multiple punishments in a single proceeding; it does, however, shift our analysis to other sources of protection—statutory, common law, and constitutional." *Wadle v. State*, 151 N.E.3d 227, 246 (Ind. 2020).

[10] The Court held:

> When multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutory language itself. (The mere existence of the statutes alone is insufficient for our analysis.) If the language of either statute

clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy.

If, however, the statutory language is not clear, a court must then apply our included-offense statutes to determine statutory intent. *See Collins v. State*, 645 N.E.2d 1089, 1093 (Ind. Ct. App. 1995) (noting that, to resolve a claim of substantive double jeopardy, our included-offense statutes guide judicial "analysis of legislative intent"), *aff'd in part*, *vacated in part on other grounds*, 659 N.E.2d 509 (Ind. 1995)[, *reh'g denied*]. Under Indiana Code section 35-38-1-6, a trial court may not enter judgment of conviction and sentence for both an offense and an "included offense."

* * * * *

If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy. If, however, one offense is included in the other (either inherently or as charged), the court must then look at the facts of the two crimes to determine whether the offenses are the same. *Richardson*, 717 N.E.2d [32, 67 (Ind. 1999)] (Boehm, J., concurring). *See also Bigler v. State*, 602 N.E.2d 509, 520 (Ind. Ct. App. 1992) (noting that "analysis of legislative intent" in Indiana, unlike the federal *Blockburger* test, "does not end with an evaluation and comparison of the specific statutory provisions which define the offenses")[, *reh'g denied*, *trans. denied*]. This brings us to the second step of our inquiry.

* * * * *

Once a court has analyzed the statutory offenses charged, it must then examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. *Bigler*, 602 N.E.2d at 521. Based on this information, a court must ask whether the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Walker v. State*, 932 N.E.2d 733,

> 735 (Ind. Ct. App. 2010), [*reh'g denied*,] *cited with approval by Hines* [*v. State*, 30 N.E.3d 1216, 1219 (Ind. 2015)].
>
> 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 prosecutor may charge these offenses only as alternative (rather than as 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. at 248-250 (footnotes omitted).

[11] The Court also stated:

> To reiterate our test, when multiple convictions for a single act or transaction implicate two or more statutes, we first look to the statutes themselves. If either statute clearly permits multiple punishment, whether expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply our included-offense statutes to determine whether the charged offenses are the same. *See* I.C. § 35-31.5-2-168. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor may charge the offenses as alternative sanctions only. But if the defendant's actions prove otherwise, a court may convict on each charged offense.

Id. at 253.

[12] The offense under Count I, burglary, is governed by Ind. Code § 35-43-2-1(1), which provides "[a] person who breaks and enters the building or structure of another person, with intent to commit a felony or theft in it, commits burglary" and "the offense is . . . a Level 4 felony if the building or structure is a dwelling." The offense under Count II, theft, is governed by Ind. Code § 35-43-4-2, which provided at the time of the offense "[a] person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class A misdemeanor."[1] We cannot say that these statutes necessarily permit multiple punishments.

[13] With no statutory language clearly permitting multiple convictions, we analyze the offenses charged under our included-offense statutes. *See Wadle*, 151 N.E.3d at 254 ("With no statutory language clearly permitting multiple convictions, we now analyze the offenses charged under our included-offense statutes.").[2] Ind. Code § 35-38-1-6 provides that "[w]henever: (1) a defendant is

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[1] Subsequently amended by Pub. L. No. 176-2018, § 6 (eff. July 1, 2018); Pub. L. No. 203-2019, § 6 (eff. May 2, 2019); Pub. L. No. 211-2019, § 46 (eff. July 1, 2019); Pub. L. No. 276-2019, § 6 (eff. July 1, 2019); Pub. L. No. 70-2021, § 3 (eff. July 1, 2021); Pub. L. No. 175-2022, § 7 (eff. July 1, 2022).

[2] *See also Morales v. State*, 165 N.E.3d 1002, 1007-1008 (Ind. Ct. App. 2021) (observing that the arson statute did not permit multiple punishments expressly or by unmistakable implication under the circumstances, holding that "[w]hether Indiana's burglary statute permits multiple punishments is a closer question," observing that "[t]he language of this statute establishes that a burglary does not occur unless the breaking and entering is accompanied by the intent to commit a different crime—that is, another felony," "the burglary statute necessarily contemplates the potential commission of a second offense, for which a second punishment would be appropriate," "[b]ut burglary does not *require* commission of a second offense," and holding that "[w]here, as here," the statutory language is not clear as to whether multiple punishments are

charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense." Ind. Code § 35-31.5-2-168 provides:

> "Included offense" means an offense that:
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> (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;
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> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
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> (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.

[14] We cannot say that the offense of theft is established by proof of the same material elements or less than all the material elements required to establish the commission of burglary. *See Jones v. State*, 519 N.E.2d 1233, 1235 (Ind. 1988) ("Comparing the elements of the two crimes reveals that proof of burglary with the intent to commit theft does not necessitate proof of theft, only proof of intent to commit theft. Theft is not inherently a lesser included offense of burglary."); *Morales*, 165 N.E.3d at 1009 ("Morales's burglary conviction did

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permitted, *Wadle* requires a reviewing court to apply our included-offense statutes to determine statutory intent), *trans. denied*.

not require proof of the arson—only proof of Morales's intent to commit arson when he was breaking and entering. Just as theft is not inherently a lesser included offense of burglary with intent to commit theft, arson is not a lesser included offense of burglary with intent to commit arson . . . ."") (citation omitted). Neither is theft a lesser included offense of burglary under the other subsections of the lesser included offense statute. Under *Wadle*, there is no need to further examine the specific facts of the case to determine whether Shafer's actions were compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.

[15] For the foregoing reasons, we affirm Shafer's convictions.

[16] Affirmed.

Altice, J., concurs.

Tavitas, J., concurs in result without opinion.