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ATTORNEY FOR APPELLANT:

TODD A. GLICKFIELD
Marion, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MELISSA M. FAULKNER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee.

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No. 27A04-0605-CR-255

APPEAL FROM THE GRANT SUPERIOR COURT 1
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0312-FD-154

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Melissa Faulkner, was convicted of Theft as a Class D felony¹ and False Informing as a Class A misdemeanor.² Upon appeal, Faulkner presents two issues for our review: (1) whether the jury's verdict finding her guilty of theft is inconsistent with the jury's verdict finding her co-defendant not guilty of the same offense; and (2) whether the admission of testimony elicited by the State that Faulkner refused to speak to police during the police investigation violated Faulkner's due process rights under the Fourteenth Amendment.

We affirm.

The facts most favorable to Faulkner's convictions reveal that on Sunday, December 15, 2002, Faulkner worked as an assistant manager at Pretzel Maker, a store located in the North Park Mall in Marion, Indiana. At some point on Sunday, Faulkner was informed by her manager that the deposit for Saturday remained in the store's safe and needed to be deposited that evening with the Sunday deposit. Following the close of business, Faulkner placed the store's earnings from Sunday in a deposit bag for the bank and grabbed the deposit bag for Saturday from the safe. Faulkner then placed both of the deposit bags inside a Pretzel Maker bag. Faulkner then met Brian Haynes, whom Faulkner had met and become friends with through her boyfriend Patrick Sivis, in the mall parking lot. Faulkner placed the Pretzel Maker bag containing the two days' bank deposits in Haynes's vehicle. Faulkner then returned to the mall and reported a theft to the police.

¹ Ind. Code § 35-43-4-2 (Burns Code Ed. Repl. 2004).

² Ind. Code § 35-44-2-2 (Burns Code Ed. Repl. 1998).

Officer Matt Kilgore of the City of Marion Police Department was dispatched to investigate the reported theft, and upon arrival at the mall, Officer Kilgore spoke with Faulkner. Faulkner claimed that while she was parked at the bank preparing to make a deposit, an unknown “black man” opened the passenger door to her car, grabbed the deposit bags which were sitting on the front seat, and ran. Faulkner reported that the deposit bags contained the Pretzel Maker’s deposits for Saturday and Sunday and that the total amount was approximately \$4,255.00. In further investigating the reported theft, Detective Dennis Huston, also of the City of Marion Police Department, interviewed Faulkner on December 17, 2002, at which time she provided a similar account of how she claimed the theft occurred as she had when she spoke with Officer Kilgore the night she reported the theft.

Shortly thereafter, Officer Kilgore received a Crime Stopper tip concerning the reported Pretzel Maker theft, thereby prompting Detective Huston to seek out a “Brian at American Woodmark.” Transcript at 300. Detective Huston learned that Brian Haynes worked at American Woodmark and subsequently learned that Haynes was connected to the Pretzel Maker store by virtue of his friendship with Sivis, who at the time of the theft of the Pretzel Maker store, was dating Faulkner. Detective Huston interviewed Haynes, who implicated Faulkner, Sivis, and himself in the Pretzel Maker theft. Following the interview with Haynes, Detective Huston attempted to speak with Faulkner a second time, but she refused.

Additionally, prior to the theft, Faulkner had discussed with her manager her frustration that she did not have enough money to buy her children anything for

Christmas. Following the alleged theft, Faulkner told her manager about several items she had purchased for her children for Christmas, claiming that she had used money her boyfriend had made from selling collectible cards.

Eventually, the State charged Faulkner with theft as a Class D felony, false informing as a Class A misdemeanor, and conspiracy to commit theft as a Class D felony.³ Under a separate cause, the State charged Sivis with theft as a Class D felony and conspiracy to commit theft as a Class D felony.⁴ Faulkner's case was later transferred to Grant Superior Court No. 1 to be joined with the cause under which co-defendant Sivis was charged.⁵ A joint jury trial was held on December 13 and 14, 2005. The jury returned a verdict of guilty against Faulkner on all three charges,⁶ but acquitted Sivis of any involvement in the theft or in the conspiracy to commit theft. On January 9, 2006, the trial court sentenced Faulkner to an aggregate sentence of one and one-half years with six months suspended and six months of probation.

Upon appeal, Faulkner argues that the jury rendered inconsistent verdicts when it found her guilty of theft but acquitted Sivis of the same offense. Faulkner maintains that she and Sivis were equally implicated in the theft of the night deposit bags from the Pretzel Maker store given Haynes's testimony that it was Sivis's idea to go to the mall to

³ The conspiracy charge alleged that Faulkner agreed with Sivis, Haynes, and/or another unknown individual to commit the theft.

⁴ The State also charged Haynes for his role in the theft. Haynes subsequently pleaded guilty to aiding theft, as a Class D felony.

⁵ Faulkner did not object to joinder of the two causes.

⁶ Although the court initially entered a judgment of conviction against Faulkner upon all three charges, the trial court later "vacated" the conviction for conspiracy to commit theft upon grounds that such conviction violated Indiana's double jeopardy clause. Appendix at 107, 111.

meet Faulkner the night the theft occurred, that Faulkner actually gave the two deposit bags to Sivis, and that Sivis retained the money from the bags. Faulkner claims that if this evidence was insufficient for the jury to find Sivis guilty of the theft, then the evidence was insufficient to find her guilty of the same crime.

In reviewing a claim of inconsistent verdicts, the determinative inquiry is whether the evidence is sufficient to support the conviction of the defendant who is appealing. Vela v. State, 832 N.E.2d 610, 614 (Ind. Ct. App. 2005). In other words, a verdict will survive a claim of inconsistency where the conviction being challenged is supported by sufficient evidence. Id. Upon appeal, we will not reweigh evidence and will only look to the evidence most favorable to the verdict and all reasonable inferences to be drawn therefrom to determine whether the evidence supports the verdict beyond a reasonable doubt. Burks v. State, 838 N.E.2d 510, 521 (Ind. Ct. App. 2005), trans. denied.

Our Supreme Court has before determined that there was no need for consistency where the separate trials of two defendants charged as principals in the same felony murder ended in the acquittal of one defendant and a guilty verdict as to the other defendant. Willard v. State, 272 Ind. 589, 400 N.E.2d 151 (1980), cited in Burks, 838 N.E.2d at 521. In this same vein, this court has held that it is not improper for one co-defendant who is charged with a joint crime to have been the only one convicted of that crime. Vela, 832 N.E.2d at 614 (citing Poling v. State, 740 N.E.2d 872, 881-82 (Ind. Ct. App. 2000)).

We agree with Faulkner that Haynes's testimony implicated both her and Sivis in the theft of the Pretzel Maker store. Haynes's testimony, however, was the only

testimony implicating Sivis in the theft. Additional testimony presented during the trial came from Sherrie Richerson, Faulkner's neighbor, who informed the jury that Faulkner had stated to her that Haynes "took" the money from Faulkner and that Faulkner and Haynes were friends. Ms. Richerson's testimony did not implicate Sivis in the theft, and indeed, she testified that Sivis had denied involvement in the theft to her.

It was the duty of the jury to weigh the evidence and judge the credibility of the witnesses. In so doing, the jury was free to credit portions of Haynes's testimony regarding Faulkner's involvement and discredit other portions of Haynes's testimony as it related to Sivis's involvement. See Madden v. State, 786 N.E.2d 1152, 1158 (Ind. Ct. App. 2003) (noting that verdicts which at first may seem inconsistent on some level are not legally inconsistent if they can be explained by the fact-finding body's exercise of its power to assign the proper weight to and either accept or reject certain pieces of evidence), trans. denied. Here, the jury had before it Haynes's testimony implicating both Faulkner and Sivis which was inconsistent with Richerson's testimony indicating that Faulkner and Haynes were involved in the theft and that Sivis was not involved. It was the jury's prerogative to decide which testimony to credit. Therefore, we conclude that based upon the nature of the evidence against Faulkner as compared to that against Sivis and the jury's ability to credit only portions of testimony, Faulkner's conviction for theft was supported by the evidence and not necessarily inconsistent with Sivis's acquittal.⁷

⁷ We would additionally note that even if the evidence pointed unerringly to the guilt of Sivis and yet the jury acquitted him, such would not dictate similar jury "error" as to Faulkner.

Faulkner also argues that her due process rights under the Fourteenth Amendment were violated when the State elicited testimony from Detective Huston regarding Faulkner's refusal to speak with police.⁸ "A violation of the Due Process clause of the Fourteenth Amendment occurs when a defendant's post-Miranda silence is used for impeachment purposes." Hightower v. State, 735 N.E.2d 1209, 1212-13 (Ind. Ct. App. 2000) (citing Doyle v. Ohio, 426 U.S. 610, 618 (1976)), trans. denied. "To find otherwise violates the inherent protections offered by the Miranda warnings that assure the accused that silence carries no penalty." Id. at 1213 (citing Bevis v. State, 614 N.E.2d 599, 602 (Ind. Ct. App. 1993)).

Acknowledging that she did not object to Detective Huston's testimony, Faulkner urges us to find that the admission of such evidence constitutes fundamental error. Fundamental error occurs when a substantial, blatant violation of basic principles of due process renders a trial unfair to the defendant. Id. A Doyle claim may amount to fundamental error. Id. (citing Taylor v. State, 717 N.E.2d 90, 93 (Ind. 1999)). To determine whether a Doyle violation denied a defendant a fair trial, we must examine five factors: (1) the use to which the prosecution puts the post-Miranda silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial

⁸ Faulkner signed a Miranda warning and waiver form on December 17, 2002, prior to her first interview with Detective Huston. (A-118) Faulkner signed a second Miranda warning and waiver form on January 13, 2003. (A-119) Officer Huston requested that Faulkner speak with him on a subsequent occasion after his interview with Haynes, which occurred on February 10, 2003.

court judge of an opportunity to grant a motion for mistrial or to give curative instructions. Id. (citing White v. State, 647 N.E.2d 684, 687 (Ind. Ct. App. 1995)).

Here, even assuming there was a Doyle violation, we conclude that such violation did not amount to fundamental error. On cross-examination of Detective Huston, Faulkner's counsel initiated a line of questioning attempting to establish that Faulkner was helpful and cooperative with Detective Huston's investigation. Officer Huston, however, responded to counsel's questions, testifying that Faulkner was not cooperative on the last occasion when he tried to speak with her. Upon re-direct examination of Officer Huston, the State was permitted to follow-up and elicit testimony as to what point in the investigation Faulkner became uncooperative. Specifically, the State elicited testimony from Detective Huston that after he had interviewed Haynes he asked Faulkner to come to the station to speak with him, but that she refused. So, while the State pursued a line of questioning regarding Faulkner's refusal to speak with police at a certain point during their investigation, the State's use of this evidence was not for purposes of allowing the jury an opportunity to draw the impermissible inference that Faulkner's silence suggested her guilt.⁹ Rather, the State pursued the line of questioning only to put into context Detective Huston's testimony which had been elicited by Faulkner and to dispel any attempt by Faulkner to show that she had cooperated during the investigation.

We further note that the State's line of questioning was made with minimal intensity and did not go further than establishing what transpired when Officer Huston

⁹ Indeed, while Detective Huston explained that he attempted to speak with Faulkner after his interview of Haynes, during which Haynes implicated Faulkner in the theft, Detective Huston testified that he did not inform Faulkner as to such fact when he asked her to come in and speak with him again.

had attempted to speak with Faulkner on the final occasion. Other than a few specific details of what transpired, the jury heard essentially the same evidence which was provided during Faulkner's counsel's questioning. As to the quantum of evidence indicative of guilt, we note the State presented Haynes's testimony directly implicating Faulkner in the theft and other circumstantial evidence suggesting Faulkner was involved. In light of this evidence, it is unlikely that the evidence that Faulkner had refused to speak with Detective Huston on a second occasion had any impact upon the jury. Finally, because Faulkner did not object to the State's line of questioning, the trial court did not have an opportunity to grant a motion for mistrial or to give curative instructions. Therefore, even assuming a Doyle violation, we conclude, after examining all of the factors listed above, that admission of the State's evidence concerning Faulkner's refusal to give a second statement did not constitute fundamental error.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.