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IN THE
COURT OF APPEALS OF INDIANA

JOMISHA WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1011-CR-578
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland Chamblee, Jr., Judge
Cause No. 71D08-0907-FC-171

June 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jomisha Williams appeals her conviction for possession of cocaine as a Class C felony. We affirm.

Issue

Williams raises one issue, which we restate as whether the deputy prosecutor committed misconduct amounting to fundamental error by commenting on Williams's right to remain silent.

Facts

On July 9, 2009, Indiana State Police Trooper John Wilson was patrolling in South Bend when he noticed a vehicle with large cracks across the windshield. Trooper Wilson activated his emergency lights and stopped the vehicle. When he approached the vehicle, he saw that Williams was the driver, her boyfriend, Sylvester Mayes, Jr., was in the passenger seat, and a child was in the backseat. Trooper Andrew Barker then arrived on the scene to assist Trooper Wilson.

The troopers discovered that Mayes had two outstanding warrants for his arrest. They gave Miranda warnings to both Mayes and Williams, removed Mayes from the vehicle, and handcuffed him. During a search of Mayes, they found cocaine in his front pocket. Williams gave the troopers consent to search the vehicle, and they found pills in her purse. Williams said that she had a prescription for the pills but was unable to identify the pills. The troopers then arrested Williams.

During a strip search at the jail, jail personnel asked Williams if she had "anything on [her,]" and Williams removed two baggies containing a brown substance from the

front of her underwear and handed them to the jailer. Tr. p. 198. Testing revealed that the baggies contained 7.68 grams of cocaine.

The State charged Williams with Class C felony possession of cocaine. At the jury trial, Williams's defense was that she did not knowingly possess the cocaine. She also relied on Indiana Code Section 35-41-2-1(b), which provides: "If possession of property constitutes any part of the prohibited conduct, it is a defense that the person who possessed the property was not aware of his possession for a time sufficient for him to have terminated his possession."

During the State's questioning of Trooper Wilson, he testified, without objection, as follows:

> Q What happened when you got to the jail?
>
> A When we take people into the jail especially for drug crimes we always tell them that you are going to be searched, strip searched at the jail just to make sure you are not bringing any contraband into the jail. If you have anything in your possession that is going to be reviewed [sic] as contraband we need to know about it just so we know ahead of time so it is not going to be a surprise because we eventually are going to find it.
>
> Q Did you tell Ms. Williams that on July 9th?
>
> A I did.
>
> Q Did she indicate to you that she had anything on her person?
>
> A She did not.
>
> * * * * *

> Q At any point during any of this did the defendant indicate to you she had anything on her person?
>
> A She did not.
>
> Q Did she indicate anything to you about what the deputies had said they found on her during the strip search?
>
> A She did not.

Id. at 171, 173. The deputy prosecutor also elicited the following testimony from Trooper Barker without objection:

> Q Did you talk to her at all on the trip over to the jail?
>
> A There was light conversation but nothing about the case.
>
> Q At any point did she indicate to you whether or not she had anything on her person?
>
> A No.

Id. at 188.

Williams later testified that, when they were pulled over by Trooper Wilson, Mayes started pulling things out of his pocket and tried to hand them to her. According to Williams, when she refused, Mayes said "that he wasn't about to go down for no dope." Id. at 237. Williams testified that Mayes set the baggies next to the gear shift, and she grabbed the baggies so the troopers would not see them. Williams then placed the baggies in her underwear. When asked on cross examination if she knew the baggies contained something she was not supposed to have, Williams responded, "The way he [Mayes] was acting I'm quite sure it was something." Id. at 245.

During closing arguments, the deputy prosecutor stated:

> We can talk about whether or not she had a fair chance there. He hands it to her and she says she is scared she is going to get in trouble. If it's in the car she is going to get in trouble no matter what. She says I hid it. I didn't want to get in trouble. I didn't want him to get in trouble. She never tells the officers what she has. She said she is worried about getting in trouble and she never says this isn't mine. There is a reason. Is it reasonable to keep that there for that whole time, that amount of cocaine knowing it's something you are not supposed to have.

Id. at 257. Williams stated, "We object to this line of argument, comment about the exercise of right," and the trial court overruled the objection. Id. The deputy prosecutor later said, "She is standing there with cocaine in her pants. Now, what did she say?" Id. at 266. The deputy prosecutor also stated:

> What else was in her car? The pills she didn't have the prescription for. What did she say to the police? . . . . She said, no. I have a prescription for those, call my grandmother. She protested her innocence at that point. But this substance she claims not to know what it was that she hid in her underwear that she is not going to talk about.

Id.

The jury found Williams guilty as charged, and the trial court sentenced her to a four-year suspended sentence with two years on probation. Williams now appeals.

Analysis

Williams argues that the deputy prosecutor committed misconduct amounting to fundamental error by commenting on her right to remain silent. We note that Williams made no objection during the deputy prosecutor's questioning of Trooper Wilson and Trooper Barker, and her one objection during the deputy prosecutor's closing argument

was based on a "comment about the right," which was too vague to preserve the argument. Tr. p. 257.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct. Id. The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. Id.

Where, as here, a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. Id. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Id. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. Id. It is error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. Id.

Williams's claim is based on Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240 (1976). In Doyle, the United States Supreme Court held that "under the Fourteenth Amendment a prosecutor may not use the silence of a defendant who has been arrested" and given Miranda warnings "to impeach the defendant." Trice v. State, 766 N.E.2d 1180, 1182

(Ind. 2002) (citing Doyle, 426 U.S. at 619, 96 S.Ct. at 2245). "Miranda warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him." Id. at 1183 (quoting Anderson v. Charles, 447 U.S. 404, 407-08, 100 S. Ct. 2180, 2182 (1980)). Doyle is not limited solely to the use for impeachment purposes of a defendant's silence. Kubsch v. State, 784 N.E.2d 905, 914 (Ind. 2003) (citing Wainwright v. Greenfield, 474 U.S. 284, 292, 106 S. Ct. 634, 639 (1986)), cert. denied. "Rather, it also applies to the use of a defendant's silence as affirmative proof in the State's case in chief." Id.

Even if the State's comments were deemed to constitute Doyle violations, the comments would have to constitute fundamental error for Williams to prevail. See Barton v. State, 936 N.E.2d 842, 852 (Ind. Ct. App. 2010), trans. denied. In the harmless error context, our supreme court has held that, in analyzing whether a Doyle violation is harmless beyond a reasonable doubt, we examine five factors: (1) the use to which the prosecution puts the post-arrest 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 court of an opportunity to grant a motion for mistrial or give a curative instruction. Kubsch, 784 N.E.2d at 914-15.

Here, the State raised the issue of Williams's silence briefly during its questioning of Trooper Wilson and Trooper Barker and during its closing argument. The State used Williams's silence in an attempt to rebut her claim based on Indiana Code Section 35-41-2-1(b) that she was not aware of her possession of the cocaine for a time sufficient for her to have terminated her possession. The State was attempting to show that Williams had

sufficient time to inform the officers of the cocaine that allegedly belonged to Mayes and to terminate her possession.

Indiana Code Section 35-41-2-1(b) "does not provide a defense for those who knowingly possess illicit drugs in order to aid someone else's illegal drug sales or use." McClendon v. State, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996). Rather, it "provides a defense for those unwittingly duped into possession of illegal drugs because such drugs have been planted on their person or hidden on their property without their knowledge." Id. "Indiana Code § 35-41-2-1(b) was designed to create a defense in the situation where the person is not aware of his or her possession of illegal property at the time it is found." Randolph v. State, 695 N.E.2d 615, 616 (Ind. Ct. App. 1998).

Williams's own testimony established that, when she was pulled over by Trooper Wilson, Mayes started pulling things out of his pocket and tried to hand them to her. According to Williams, when she refused, Mayes said "that he wasn't about to go down for no dope." Tr. p. 237. Williams testified that Mayes set the baggies next to the gear shift, and she grabbed the baggies so the troopers would not see them. Williams then placed the baggies in her underwear. When asked on cross examination if she knew if was something she wasn't supposed to have, Williams responded, "The way he [Mayes] was acting I'm quite sure it was something." Id. at 245. Clearly, the cocaine was not planted on Williams or hidden on her without her knowledge. Further, Williams was aware that the baggies contained "dope," and she was aware of her possession of the "dope" at the time it was found. Id. at 237. When subjected to a strip search at the jail, Williams pulled the cocaine out of her underwear and handed it to the jailers.

Under these circumstances, we cannot say that the State's brief mentions of Williams's silence made a fair trial impossible or presented an undeniable and substantial potential for harm. Consequently, we conclude that, even if the State's questions and comments were made in violation of Doyle and prosecutorial misconduct occurred, no fundamental error occurred.

Conclusion

The deputy prosecutor's questions during the examination of Trooper Wilson and Trooper Barker and his comments during closing arguments regarding Williams's silence did not result in fundamental error. We affirm Williams's conviction for possession of cocaine as a Class C felony.

Affirmed.

RILEY, J., and DARDEN, J., concur.