

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Selena Balder,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 6, 2023

Court of Appeals Case No.
22A-CR-1826

Appeal from the Owen Circuit
Court

The Honorable Lori Quillen, Judge

Trial Court Cause No.
60C01-2008-F4-451

Memorandum Decision by Judge Riley

Chief Judge Altice and Judge Pyle concur

STATEMENT OF THE CASE

[1] Appellant-Defendant, Selena Balder (Balder), appeals her convictions for burglary, a Level 4 felony, Ind. Code § 35-43-2-1(1); auto theft, a Level 6 felony, I.C. § 35-43-4-2(a)(1)(B)(ii) (2019); theft of a firearm, a Level 6 felony, I.C. § 35-43-4-2(a)(1)(B)(i) (2019); and theft, a Level 5 felony, I.C. § 35-43-4-2(a)(2)(A) (2019).

[2] We affirm.

ISSUE

[3] Balder presents this court with one issue, which we restate as: Whether the trial court abused its discretion when it allowed the State to cross-examine Balder about the use immunity granted to her and to other participants in the offenses.

FACTS AND PROCEDURAL HISTORY

[4] In August 2020, Kevin Bixler (Bixler) resided in a home on Valley Hills Drive in a semi-rural area of Owen County, Indiana. Bixler was dating Balder's mother, who would sometimes stay with Bixler when he was at home from his job as an over-the-road trucker. On August 17, 2020, Bixler was at home and was spending time with Balder's mother. That day, Bixler gave permission for Balder to stay for three days at his home while he was there because Balder's husband, Cory Balder (Cory), was in police custody and Balder needed a place to stay. During Balder's time at Bixler's house, she asked Bixler details about his home's security system, including its image quality, data storage, and night vision capacity. Bixler also observed Balder walking around his yard. During

the evening of August 18, 2020, Balder provided her associate Michael Couch (Couch) with Bixler's address. Balder also sent Couch images of Bixler's home and some of his more valuable property. Balder was aware that Bixler was scheduled to leave for a five-day work assignment early on August 19, 2020.

[5] Around 3:00 a.m. on August 19, 2020, Balder's mother reported to work at the Casey's convenience store in Spencer, Indiana, and, as planned, Balder went with her. Bixler dropped off Balder and her mother at the store, went back home, and then left home again at 5:30 a.m. to report to his own job. In the meantime, around 4:00 a.m., Couch arrived at Casey's in a green Ford pickup truck with his wife, Jenna Owen (Owen), and Michael Lovins (Lovins), both of whom Balder also knew. The group, including Balder, left in the green Ford truck and drove around Owen County ingesting methamphetamine for several hours.

[6] Around 7:00 a.m., the group arrived in the green Ford truck at Bixler's house where they were spotted by Bixler's neighbor. A short time later, the neighbor observed the green Ford pull away laden with items that had not been in the truck's bed previously. The neighbor also saw two men drive away with Bixler's white F150 Ford pickup truck with a sixteen-foot trailer attached that was loaded with Bixler's possessions. Bixler was alerted and returned from work to find that at least \$55,000 worth of his property had been removed from his home, including his truck and trailer, a riding lawn mower, generators, tools, firearms, a home safe, coins, and medication. The DVR which Bixler had indicated to Balder stored his security camera footage was also taken.

After the burglary, the group of four drove to Couch's boss's house on the east side of Indianapolis and divided the stolen items. Levins retained a generator and other property from the burglary and gave Balder \$200. Balder stayed at Couch's boss's house for several days, and she posted Cory's bail on August 21, 2020.

[7] After speaking with Bixler and learning that Balder had just stayed in his home, investigators listened to a jailhouse call between Balder and Cory that had taken place during the evening of August 19, 2020, after the burglary in which they discussed raising Cory's \$600 bail. Balder told Cory that she would have to wait to tell him how she was raising the money until after he was released but that she still had "to move" some other things. (Exh. 6). Couch is also heard on the call assuring Cory that Balder was "busting ass" for him to raise the bail. (Exh. 6). Investigators recognized Couch's voice on the call and learned that he had an active warrant for his arrest in Morgan County. On August 21, 2020, Couch was driving Lovins' mini-van in Morgan County with Owens as a passenger when the vehicle was subject to a traffic stop. Bixler's generator and other items from the burglary were found in the vehicle, and Owen had Bixler's medication in her purse. Couch, Owen, Lovins, and Balder were all identified as suspects in the Bixler burglary and property theft.

[8] On August 27, 2020, the State filed an Information, charging Balder with Level 4 felony burglary, Level 5 felony theft, Level 6 felony auto theft, and Level 6 felony theft of a firearm. Couch, Owen, and Lovins were also charged in Owen County with offenses related to the events of August 19, 2020. On September

1, 2020, Balder was arrested, and, after receiving her *Miranda* advisements, Balder spoke with investigators. Balder initially stated that she was in Morgan County on the day of the burglary but acknowledged she had been in Owen County after being confronted with the fact that she was seen on the Casey's surveillance footage with Lovins that morning. Balder then said that she had been with Couch, Owen, and Lovins but that, at her request and after refusing their offer to ingest methamphetamine, they had left her down the road prior to the burglary. After being told that the authorities had information to the contrary, Balder admitted that she was present on Bixler's property, but only to retrieve some of her property that she had left there. However, Balder also stated that "I'm telling the truth at this point, I told them I didn't want to do it. I did not. My husband's bail was not that important . . ." and "I had gave [sic] them the address to come get me the night before . . . and I then told them that day that I did not want to go through with it. They hit me up with it." (Exh. Vol. VII, pp. 42, 50). Balder noted at one point that her mother had accused her in the past of stealing. Balder reported the location of Couch's boss's home, where some of Bixler's property was subsequently found. At no time during her September 1, 2020, statement did Balder report that she had been forced at gunpoint or threatened to participate in the offenses.

[9] The State procured use immunity for Balder's testimony in relation to Lovins' criminal case stemming from the burglary and thefts. Balder did not meet with prosecutors prior to Lovins' trial date, and Lovins subsequently pleaded guilty without Balder providing any trial testimony. On June 7, 2022, the trial court

convened Balder's four-day trial. Couch, Owen, and Lovins all implicated Balder as an active and voluntary participant in the offenses, which they testified was done, at least in part, to raise Cory's bail. All three denied that they were armed during the offenses. Lovins told the jury that he had given Balder \$200 after the burglary and that he had kept Bixler's generator. Balder's mother testified that, prior to the offenses, she and Balder spoke on the telephone almost daily but that after the offenses she had never heard from Balder again. Balder testified on her own behalf that Couch, Owen, and Lovins had pointed firearms at her to compel her presence during and after the offenses and that she had not left or reported the offenses because Owen had threatened to kill her family if she did. Balder explained that she had not told Cory about being forced into the burglary and thefts during their jailhouse call later in the evening of the day of the burglary because Owen was sitting next to her and had warned her not to tip off Cory. Balder acknowledged in her direct examination that she had never previously disclosed being forced at gunpoint and under threat to commit the offenses.

[10] During Balder's cross-examination, which spanned several hours, the prosecutor questioned Balder in great detail about her reasons for being at Bixler's home, her reasons for leaving, why and when she had provided Couch with Bixler's address, why she had questioned Bixler about his security system, and how she had procured Cory's bail money. When confronted with other witnesses' testimony, Balder denied ever walking around Bixler's yard during her stay there, knowing Bixler's work schedule and that he would be gone,

being on her cellphone frequently during her stay at Bixler's home, sending Couch photos of Bixler's property, or receiving \$200 from Lovins. When pressed by the prosecutor, Balder could not explain why she had said during her September 1, 2020, statement that her mother had accused her in the past of stealing. Contrary to her prior statement to law enforcement, at trial Balder admitted that she had ingested methamphetamine with Couch, Owen, and Lovins the morning of the offenses. Balder acknowledged several times that she had never reported being forced at gunpoint or threat to commit the offenses. Toward the end of this cross-examination, the prosecutor asked Balder, "Now, in Mr. Lovins' case you had [u]se [i]mmunity and at no time when you had [u]se [i]mmunity did you volunteer any of the details that you testified to under direct and cross-examination. Is that correct?" which prompted the following objection by Balder's counsel:

You know, I'm going to object because [u]se [i]mmunity is at the trial. What he is asking her is, is she going to go to the Prosecutor and tell her stuff that had happened before the [u]se [i]mmunity is in effect which is at a trial. I think it is a very inappropriate and tricky question. I object to that question. That is the way I see what he [is] asking her. You had [u]se [i]mmunity, you could never go to trial so why didn't you tell us this stuff.

(Tr. Vol. V, p. 56). The trial court allowed the prosecutor to rephrase the question, and the following dialogue took place between the prosecutor and Balder:

Q: Okay. You were aware that in this particular case, prior to trial, I filed a motion with the Judge, and you got what is called [u]se [i]mmunity for my witnesses. Right?

A: Correct.

Q: And you were aware that I met with [Couch, Lovins, and Owen] prior to trial. Right?

A: To my trial or to when I was given [u]se [i]mmunity?

Q: Your, trial, to your trial.

A: I know you given [sic] the [u]se [i]mmunity. I didn't know you had met with them.

Q: They even said how many times they met with [me] so . . .

A: I know this now, yes.

Q: So you know how [u]se [i]mmunity works. Right?

A: Yes, I have been advised by my lawyer.

Q: And it is not just at the start of trial. It is part of witness prep and trial prep as well. Right? You know that now. Right?

A: I know that as of just now.

Q: Okay.

(Tr. Vol. V, pp. 56-57). Balder's counsel then objected to the prosecutor's implication that Balder had met with the prosecutor to prepare for Lovins' trial but had not reported the new details of her version of the events and that the prosecutor should ask Balder if she had ever met with the prosecutor while she had use immunity. The trial court overruled Balder's objection and noted that the issue of whether Balder had actually met with the prosecutor could be brought out on re-direct examination. The prosecutor then asked Balder why she was willing to tell her story now, despite the fact that Owens and Couch were not in custody, to which Balder replied, "They are not hearing it." (Tr. Vol. V, p. 58). On re-direct, Balder clarified that she had been scheduled to meet with the prosecutor while she had use immunity for Lovins' criminal case but that she had not actually done so because Lovins had pleaded guilty before

she had the chance. At the conclusion of the evidence, the jury found Balder guilty as charged.

- [11] On July 5, 2022, the trial court held Balder’s sentencing hearing. The trial court “merge[d]” Balder’s convictions for Level 6 felony auto theft and Level 6 felony theft of a firearm into her Level 5 felony theft conviction. (Tr. Vol. V, p. 230). The trial court sentenced Balder only for her burglary and Level 5 felony theft convictions to ten years and to six years, respectively, to be served concurrently.
- [12] Balder now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

- [13] Balder contends that the trial court erred when it allowed the State to cross-examine her regarding the use immunity granted to her and other witnesses. As a general matter, “we assess claims relating to admitting or excluding evidence for abuse of discretion,” but “to the extent those claims implicate constitutional issues, we review them de novo.” *Ramirez v. State*, 174 N.E.3d 181, 189 (Ind. 2021). Balder claims that the prosecutor’s cross-examination violated her state and federal constitutional rights.¹

¹ Balder claims her “rights to due process and a fair trial and her right against self-incrimination under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve, Thirteen, Fourteen, and Thirty-Seven of the Indiana Constitution” were violated. (Appellant’s Br. p. 19). However, as explained more fully below, she only develops an argument based on the Due Process clause of the Fourteenth Amendment, and, therefore, she has waived any argument based on additional

II. *Analysis*

A. *Waiver*

[14] As a threshold issue, we observe that Balder did not object on constitutional grounds at trial. A “[f]ailure to assert an objection during trial waives the issue on appeal.” *R.J.H. v. State*, 12 N.E.3d 879, 882 (Ind. Ct. App. 2000) (concluding that R.J.H. had waived his claim that his post-*Miranda* silence had been impermissibly used against him by failing to object). Therefore, in order to obtain reversal of her convictions, Balder must establish that the claimed error was fundamental error, which occurs when “a substantial, blatant violation of basic principles of due process renders a trial unfair to the defendant.” *Id.*

B. *Doyle Violation*

[15] Balder claims that the State violated her federal and state constitutional rights by using her “post-arrest, post-*Miranda* warning silence as substantive and impeachment evidence against her at trial.” (Appellant’s Br. p. 19). Balder’s claim is based on *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), in which the Court held that “a prosecutor may not use the silence of a defendant who’s been arrested and Mirandized to impeach the defendant.” *Trice v. State*, 766 N.E.2d 1180, 1182 (Ind. 2002). The gravamen of *Doyle* “is that a defendant’s silence after he has been advised of his rights cannot be used

constitutional authority. See Ind. Appellate Rule 46(A)(8); *Griffith v. State*, 59 N.E.3d 947, 958 n.5 (Ind. 2016) (finding the defendant’s constitutional arguments waived for failing to provide cogent argument).

to obtain a conviction by implying that the silence is rooted in guilty knowledge.” *Allen v. State*, 686 N.E.2d 760, 774 (Ind. 1997). In *Wainwright v. Greenfield*, 474 U.S. 284, 291 n.7, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), the Court observed that a *Doyle* violation implicates the Due Process Clause of the Fourteenth Amendment and its prohibition against fundamental unfairness, not the Fifth Amendment’s prohibition against self-incrimination. The Indiana Supreme Court adopted *Doyle* the year it was handed down. *Trice*, 766 N.E.2d at 1182 (citing *Jones v. State*, 265 Ind. 447, 355 N.E.2d 402 (1976)); *Sylvester v. State*, 698 N.E.2d 1126, 1130 (Ind. 1998) (observing that Indiana recognizes the *Doyle* rule and does not allow prosecutors to use a defendant’s post-*Miranda* silence to impeach). For *Doyle* to apply, the defendant must exercise his right to remain silent. See *Sylvester*, 698 N.E.2d at 1130-31 (finding no *Doyle* violation where the defendant did not exercise his *Miranda* right, did not remain silent, and spoke to law enforcement); *Trice*, 766 N.E.2d at 1183-84 (concluding that the prosecutor’s impeachment of Trice with her prior inconsistent statement was not an impermissible “use of her later decision to stop answering questions.”).

- [16] Here, even if Balder had not waived her *Doyle* claim, we would have found no violation. The prosecutor attempted to impeach Balder on cross-examination by asking her whether, prior to her trial testimony and while she had use immunity in the Lovins matter, she had ever disclosed that she had been forced at gunpoint and under threat to commit the offenses. This question did not violate the *Doyle* rule because the fact that Balder did not disclose these details

while she had use immunity was not the product of her exercise of her *Miranda* rights; rather, it was the product of the circumstance that Lovins pleaded guilty before she had any chance to make any additional statements. Balder never invoked her right to remain silent during her September 1, 2020, police interview, and her *Miranda* rights did not come into play again because she did not speak to the police or the prosecutor prior to her own trial. Indeed, because she had been granted use immunity in Lovins' case, she would have exposed herself to a contempt charge had she attempted to remain silent if asked to provide testimony.² See I.C. § 35-37-3-3(c) ("If a witness refuses to give the evidence after the witness has been granted use immunity, the court may find the witness in contempt."). Therefore, this question did not violate *Doyle*, and although it was misleading in that it implied that Balder had an opportunity to speak with the prosecutor in the Lovins matter, her counsel's objection was sustained on that basis. As to the other cross-examination cited above and relied upon by Balder to support her claim of a *Doyle* violation, the prosecutor asked Balder a series of questions regarding her understanding of the scope of the use immunity granted to Couch, Owen, and Lovins in Balder's criminal case, and he asked her why she chose to tell her story at trial. As a factual

² As an ancillary issue, Balder claims that any statements she might have made in Lovins' criminal case in preparation for trial would not have been immunized because her use immunity only covered in-trial testimony. Because Balder never made any pretrial statements in Lovins' case, this issue is not ripe, and we decline to address her argument. See *Reed v. State*, 796 N.E.2d 771, 775 (Ind. Ct. App. 2003) (noting that "[t]his court does not issue advisory opinions.").

matter, neither of these lines of questioning involved Balder's post-*Miranda* silence. Therefore, we find no *Doyle* violation.

C. Harmless Error

[17] Even if the challenged cross-examination had constituted a *Doyle* violation, any such error is subject to harmless error analysis. A *Doyle* violation may be harmless if it is clear to us beyond a reasonable doubt that the violation did not contribute to the defendant's conviction. *Kubisch v. State*, 784 N.E.2d 905, 914 (Ind. 2003). We will consider the following factors to determine whether a *Doyle* violation is harmless beyond a reasonable doubt:

- (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.

Id. at 914-15. Here, while the prosecutor elected to pursue the line of questioning, the prosecutor could not fully exploit the question to Balder about her failure to provide exculpatory details while she had use immunity because she never answered the question. Any confusion about whether Balder had the opportunity to provide a statement while she had use immunity was ameliorated on re-direct examination. In addition, as noted above, we do not accept Balder's characterization of the remainder of the challenged cross-examination as a comment of her post-*Miranda* silence. We also observe that there was substantial evidence of Balder's guilt in the form of Bixler's testimony

about her pre-offense behavior, her jailhouse call to Cory which supported a reasonable inference she was selling stolen goods to raise Cory's bail, her own statement in which she presented multiple versions of the events, seriously calling her credibility into question, and in which she inculpated herself by admitting that she had helped plan the offenses but had purportedly backed out, and the testimony of Couch, Owen, and Lovins who implicated her as a voluntary participant before, during, and after the offenses. While no curative instruction or mistrial was requested, we are satisfied that the prosecutor's one-time reference during a multiple-hour cross-examination to Balder's failure to provide her exculpatory details while she had use immunity, which was not repeated in the State's closing argument, did not contribute to Balder's convictions. Balder does not even attempt to argue that her claimed error constituted fundamental error. Accordingly, even if the prosecutor had violated the *Doyle* rule, we would not have disturbed Balder's convictions.

CONCLUSION

[18] Based on the foregoing, we conclude that the trial court did not abuse its discretion in allowing the challenged cross-examination which did not violate the *Doyle* rule.

[19] Affirmed.

[20] Altice, Chief Judge and Pyle, J. concur