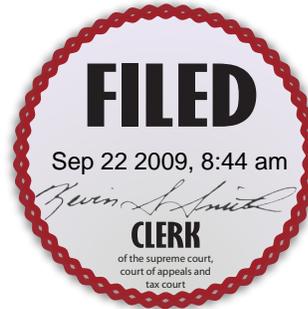


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LINDA S. GENTRY,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 23A04-0905-CR-275

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause No. 23C01-0704-FB-276

September 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Linda S. Gentry appeals her conviction for theft as a Class D felony.¹ She raises two issues that we restate as:

- I. Whether Gentry's conviction for theft is irreconcilable and impermissibly inconsistent with her acquittals of burglary and possession of a controlled substance; and
- II. Whether the testimony of the investigating officer constituted impermissible opinion testimony resulting in fundamental error.

We affirm.

FACTS AND PROCEDURAL HISTORY

During the afternoon on April 26, 2007, Wendy Soto ("Soto") left her mobile home in Attica, Indiana, and went to lunch with her boyfriend Reyna Nazario ("Nazario") and another male friend. When they returned about an hour later, Soto discovered that a number of items were missing: a prescription bottle of Nazario's hydrocodone pills, his cell phone, some of Soto's rings and earrings, and three bottles of her perfume. Soto did not have a working telephone, so she went to the nearby mobile home of Gentry, an acquaintance, to use her phone to call police.

When Soto arrived, Gentry was home, but resting on her couch. Gentry told Soto to "come on in," and she gave Soto permission to use the telephone. *Tr.* at 88. After finding that Gentry's landline phone did not work, Soto saw a cell phone sitting on the same table as the landline phone. Soto picked it up to use it and immediately recognized it as Nazario's phone because it displayed a Spanish statement that Soto had programmed into the phone.

¹ See Ind. Code § 35-43-4-2(a).

On the same table, Soto found a bottle of pills that she recognized as Nazario's hydrocodone. Initially, Gentry told Soto that she did not know how the items got there. Then, as Soto was leaving Gentry's home, Gentry said that an unknown Mexican male had stopped by Gentry's home looking for Soto and Nazario and that he must have left the items at Gentry's home. Soto called the police, then left Gentry's home taking the cell phone and pill bottle with her.

Officer Aaron French of the Attica Police Department responded to the dispatch call. He first interviewed Soto at her residence, then went to Gentry's mobile home, where Gentry gave Officer French permission to enter. While at Gentry's residence, which she shared with her mother, Officer French stood where Soto had earlier found the cell phone and pill bottle. He looked down and saw in plain view in the trash can a sticky prescription label bearing the name "Nazario." *Id.* at 26. He also found jewelry, later identified as belonging to Soto, at the bottom of the trashcan's plastic liner. During his investigation, Officer French later discovered more of Soto's jewelry in a plastic baggie that had been taped to one of the home's windows.

Gentry offered Officer French multiple explanations of how Soto's and Nazario's property ended up in her home, including that the items must have been placed there by the unknown Mexican man. Gentry could not provide a description of the man or what he was wearing. Gentry initially explained to Officer French that the unknown man came in, sat down briefly in the recliner chair and then left; Gentry later told Officer French that the man came in and walked around her mobile home but that Gentry did not know where the man went inside the home because she was groggy. Then, while Officer French was still there,

Soto came to Gentry's mobile home, and Gentry asked Soto to explain to police that she (Soto) had placed the various items in Gentry's home. Soto refused. Later that day, Officer French returned to the residence after Gentry's mother called to say that she had additional items for police. Gentry's mother gave Officer French two bottles of perfume, later identified as belonging to Soto and missing from her home.

On April 27, 2007, the State charged Gentry with Class B felony burglary, Class D felony theft, and Class D felony possession of a controlled substance. The theft charge alleged that Gentry knowingly exerted unauthorized control over property belonging to Soto and Nazario, with the intent to deprive Soto and Nazario of the items' use or value, namely: jewelry, a cell phone, three bottles of perfume, and a prescription bottle of hydrocodone. The jury found Gentry guilty of the theft charge only. She now appeals.

DISCUSSION AND DECISION

I. Inconsistent Verdicts

Gentry argues that we should reverse the theft conviction because it is inconsistent with the jury's acquittal on the charge of possession of a controlled substance. This court will review verdicts for consistency. *Parks v. State*, 734 N.E.2d 694, 700 (Ind. Ct. App. 2000), *trans. denied*. However, "perfect logical consistency" is not required. *Id.* Normally, where the trial of a defendant results in acquittal upon some charges and convictions upon others, the results will survive a claim of inconsistency where the evidence is sufficient to support the convictions. *Id.*; *Babar v. State*, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007) ("A jury verdict may be inconsistent or even illogical but nevertheless permissible if it is

supported by sufficient evidence.”), *trans. denied*. As triers of fact, the jury may attach whatever weight and credibility to the evidence it believes is warranted, and the jury is free to believe portions of a witness’s testimony but disregard other portions of the same testimony. *Parks*, 734 N.E.2d at 700. An acquittal on one count will not result in reversal of a conviction on a similar or related count, because the former will generally have at least one legal or factual element not required for the latter. *Barber*, 870 N.E.2d at 490. When an appellate court reviews a claim of inconsistent jury verdicts, it will take corrective action only when the verdicts are “extremely contradictory and irreconcilable.” *Parks*, 734 N.E.2d at 700.

Here, Gentry asserts that the theft conviction was inconsistent with the acquittal on the possession (of hydrocodone) charge, arguing that because the jury evidently determined she did not possess the hydrocodone, then she necessarily could not have exercised unauthorized control over it as alleged in the theft charge. Therefore, she argues, we must vacate the theft conviction. In support of her position, Gentry relies on *Owsley v. State*, 769 N.E.2d 181 (Ind. Ct. App. 2002), *trans. denied*. There, Owsley was charged with (1) possession of cocaine, (2) dealing in cocaine, and (3) conspiracy to commit dealing in cocaine. The three charges stemmed from the same set of facts: an undercover officer asked a man named Stallworth for rock cocaine and the officer watched Stallworth walk to Owsley, who placed something in Stallworth’s hand. Stallworth walked directly back to the officer and gave him a rock of cocaine in exchange for twenty dollars. The jury convicted Owsley of conspiracy to commit dealing in cocaine, but acquitted him of possession of cocaine and dealing in cocaine. He

appealed, arguing that the verdicts were inconsistent. This court agreed and vacated his conspiracy conviction. *Id.* at 186-87. Gentry argues that we should do the same and vacate her theft conviction. We disagree, as *Owsley* is factually distinguishable from Gentry's situation.

In this case, the State charged Gentry with theft for exerting unauthorized control over a number of items belonging to Soto and Nazario, one of which was Nazario's prescription hydrocodone. While in *Owsley* the evidence presented to establish the various charges was identical (*i.e.*, the piece of rock cocaine being given by Owsley to Stallworth to the officer), here the State presented evidence of theft of items separate and apart from the hydrocodone. Thus, unlike in *Owsley*, the jury's verdicts in Gentry's case can be explained on the basis that the jury accepted some portions of the State's evidence and rejected other portions; for instance, the jury reasonably could have credited the evidence regarding the theft of the jewelry and perfume, which Officer French found in her home, and could have discredited the evidence pertaining to Gentry's unauthorized control over the hydrocodone, which Officer French did not find in Gentry's home. *See Neuhausel v. State*, 530 N.E.2d 121, 123 n.2 (Ind. Ct. App. 1988) (noting that where jury convicted on one count and acquitted on another related count, jury was presumed to have doubted weight or credibility of evidence presented on legal or factual element of acquitted charge).

The jury was not required to find that Gentry possessed hydrocodone in order to find her guilty of theft; there were factual elements present in the theft charge that were not present in the possession of controlled substance charge. *See Babar*, 870 N.E.2d at 490.

Further, the evidence was sufficient to sustain the theft conviction. *See Parks*, 734 N.E.2d at 700 (acquittal upon some charges and convictions upon others will survive claim of inconsistency where evidence is sufficient to support convictions); *Neuhausel*, 530 N.E.2d at 122 (inconsistent verdicts do not merit reversal as long as conviction is supported by sufficient evidence). Accordingly, the jury's verdicts were not extremely contradictory and irreconcilable, and reversal of the theft conviction is not required.

II. Officer French's Testimony

Gentry next argues that portions of Officer French's testimony constituted impermissible opinion testimony under Indiana Evidence Rule 704(b), which precludes a witness from offering an opinion of guilt or innocence in a criminal trial and prohibits testimony about whether a witness has testified truthfully. In particular, Gentry cites to Officer French's testimony that during his investigation Gentry provided him with "several stories" and that he "didn't know which one to follow." *Appellant's Br.* at 8-9; *Tr.* 19-21, 25, 48, 75-77. Officer French stated, "It was almost impossible to keep them straight." *Tr.* at 48. Gentry argues that Officer French's testimony "makes clear that he did not believe Mrs. Gentry and he let the jury know that." *Appellant's Br.* at 9. Gentry argues that it was trial court error to allow such testimony into evidence at trial.

A trial court has broad discretion in ruling on the admissibility of evidence. *Hawkins v. State*, 884 N.E.2d 939, 943 (Ind. Ct. App. 2008), *trans. denied*. Therefore, we review admission of testimony for abuse of that discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances. *Id.*

As Gentry acknowledges, her attorney did not object at trial to the admission of Officer French's testimony. Claimed error in the admission of evidence generally is not available for appeal unless a timely and specific objection was made during trial. Ind. Evidence Rule 103(a); *Jones v. State*, 800 N.E.2d 624, 629 (Ind. Ct. App. 2003). Because Gentry failed to object during trial, her argument is waived.

Gentry seeks to avoid application of the waiver doctrine by urging that the admission of the evidence deprived her of a fair trial and thus constituted fundamental error. To qualify as fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Prewitt v. State*, 761 N.E.2d 862, 871 (Ind. Ct. App. 2002). The fundamental error rule is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Jones*, 800 N.E.2d at 629. In determining whether an alleged error rendered a judicial proceeding unfair, we must consider whether the resulting harm or potential for harm is substantial. *Prewitt*, 761 N.E.2d at 871. We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome. *Id.*

Gentry argues that the admission of Officer French's testimony was fundamental error because Officer French did not simply present to the jury what Gentry told him during his investigation; rather, he implied that she was lying and that her explanations were unbelievable. We disagree both with Gentry's characterization that Officer French's testimony rose to the level of impermissible opinion testimony and with her claim that

admission of his testimony constituted fundamental error. Here, Officer French testified about the course and scope of his investigation, which included Gentry's statements to him. His use of the words "story" or "stories" to describe Gentry's differing explanations of how and why various items belonging to Soto and Nazario were found in her home was not so prejudicial as to make a fair trial impossible. Therefore, we conclude that the admission of Officer French's testimony did not constitute fundamental error.

Affirmed.

NAJAM, J., and BARNES, J., concur.