IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOSHUA CHEYENNE GILLILAND, *Appellant*.

No. 1 CA-CR 19-0631
FILED 11-19-2020

Appeal from the Superior Court in Maricopa County
No. CR 2019-108717-001
The Honorable Laura Johnson Giaquinto, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Casey Ball
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Scott L. Boncoskey
Counsel for Appellant

MEMORANDUM DECISION

Judge Michael J. Brown delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge David B. Gass joined.

B R O W N, Judge:

¶1 Joshua Cheyenne Gilliland appeals from his convictions on two counts of aggravated driving under the influence ("DUI"). He argues his Sixth Amendment rights were violated when out-of-court witness statements were admitted during trial. For the following reasons, we affirm.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts, resolving all reasonable inferences against Gilliland. *State v. Felix*, 237 Ariz. 280, 283, ¶ 2 (App. 2015).

¶3 On February 22, 2019, Gilliland spent the evening drinking. Around 10:00 p.m., Gilliland and his wife, along with their friend Robert Dykeman, went for a drive in a pickup truck. Soon thereafter the truck collided with a parked car. Gilliland was identified as the driver at the scene, arrested, and later charged with two counts of aggravated DUI. The State also charged Gilliland with one count of extreme DUI, but it was subsequently dismissed without prejudice.

¶4 At trial, Gilliland's defense was that he had been mistakenly identified as the driver. On the night of the incident, L.J. heard a loud noise while in his home. When he looked outside his window, he saw that a pickup truck had crashed into his car and immediately ran outside. Although it was dark, L.J. could see the truck's occupants because they were illuminated by streetlights located across the street and L.J.'s houselights. As the passengers exited the truck, the vehicle's interior lights turned on, further illuminating the driver. The two passengers attempted to get the driver to move the vehicle, but the driver was unresponsive and "just kind of sitting there, kind of dazed."

¶5 L.J.'s girlfriend and her parents also exited the home. Along with L.J., they tried to speak with the truck's occupants. However, Gilliland and Dykeman got back in the truck and refused to talk, while L.J.'s

girlfriend engaged in an argument with Gilliland's wife. After police arrived, L.J. identified Gilliland as the driver of the truck during the collision. L.J. told police the driver was wearing a black beanie, black hoodie, and blue jeans. Dykeman was also wearing a hoodie and blue jeans, and both Gilliland and Dykeman wore glasses. At trial, L.J. again identified Gilliland as the driver.

¶6 An officer placed Gilliland in the back of a police car because Gilliland was swaying back and forth and appeared off-balance. At the time, he denied driving the truck. Dykeman told police he could not remember who was driving. Gilliland's wife stated she was asleep during the drive.

¶7 Gilliland was transferred to a DUI van for a blood draw. During this procedure, an officer asked Gilliland a series of questions relating to the collision. Gilliland admitted he had been drinking that night, and he had operated a vehicle. He also admitted he could feel the effects of alcohol while driving, and it made him uneasy, but he denied being involved in a collision. At trial, the interviewing officer testified that Gilliland was wearing dark sweatpants, and not blue jeans, contrary to the description of the driver given by L.J. The blood draw revealed that Gilliland had an alcohol level of .299.

¶8 An officer at the scene of the accident interviewed L.J.'s housemates. At trial he explained the purpose and outcome of these interviews:

> Q. And when you spoke with them, what was your purpose in speaking with them?
>
> A. To gather -- since they were witnesses to everything, I just wanted to gather their statements to determine if we were -- in fact, had the correct person detained.
>
> Q. What did you conclude?
>
> A. That we did. In fact, they all identified the defendant as the person behind the wheel of the vehicle.

L.J.'s housemates were never called to testify. However, during closing statements, the prosecution referenced the witnesses' statements:

> All the witnesses [the officer] spoke with corroborate that the defendant, this defendant, was behind the wheel that crashed into the back of the vehicle.
>
> . . . .
>
> Additionally, Officer Walters, who arrives later on the scene, corroborates that this defendant was the driver when he speaks with all the other witnesses at the scene, that from what he heard from [L.J.], from what he heard from all the other witnesses, that this was the defendant. There was no mistake of person.
>
> . . . .
>
> Officer Walters continues to interview. Everyone is pointing towards this defendant.

Gilliland did not object at trial to the officer's testimony or the prosecutor's statements on either hearsay or Sixth Amendment grounds. The jury found Gilliland guilty on both counts, and the trial court sentenced him to concurrent presumptive prison terms of 4.5 years. Gilliland timely appealed.

DISCUSSION

¶9 Gilliland argues that the introduction of the bystanders' identifications violated the Confrontation Clause of the Sixth Amendment. Because Gilliland did not raise this objection at trial, we review for fundamental error only. *See State v. Alvarez*, 213 Ariz. 467, 469, ¶ 7 (App. 2006). Under that standard, we must first determine whether a trial error exists, and then decide whether the error is fundamental. *State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018).

A. Confrontation Clause

¶10 The Confrontation Clause of the Sixth Amendment states: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This constitutional provision prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Davis v. Washington*, 547 U.S. 813, 821 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

¶11 The bystander statements were testimonial. They were elicited after Gilliland was already in custody, and to confirm the correct man had been apprehended. *See Davis,* 547 U.S. at 826 (stating that interrogation directed at establishing the identity of the perpetrator falls within testimonial hearsay). However, in a footnote the State asserts no error occurred because the statements were admitted for a legitimate non-hearsay purpose—to rebut defense counsel's suggestions that the officers targeted Gilliland because of his personality, and they did not care if they had the correct person in custody. Testimony admitted for a purpose other than the truth of the matter asserted is not testimonial hearsay and does not violate the Confrontation Clause. *State v. Tucker,* 215 Ariz. 298, 315, ¶ 61 (2007). But the context in which the prosecution referenced the bystander identifications suggests that they were used for the truth of the matter asserted. In closing arguments, there is no reference to the defense's alleged mischaracterization. Rather, the prosecution relied on the out-of-court identifications for its argument "that [Gilliland] was the defendant. There was no mistake of person." Because the bystander statements were both testimonial and used for the truth of the matter asserted, and Gilliland had no opportunity to cross-examine the witnesses, the statements should not have been admitted.

B. Fundamental Error

¶12 Under fundamental error review, the defendant must establish fundamental error by showing "(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial." *Escalante*, 245 Ariz. at 142, ¶ 21. If established under prongs one or two, the defendant must also show prejudice, while prejudice is assumed under prong three. *Id.* The "defendant bears the burden of persuasion at each step." *Id.*

¶13 Gilliland argues the Sixth Amendment violation qualifies as fundamental error under prong one and two. Under prong one, "[a]n error generally goes to the 'foundation of a case' if it . . . directly impacts a key factual dispute, or deprives the defendant of constitutionally guaranteed procedures." *Id.* at 141, ¶ 18. Under prong two, "[a]n error takes away an 'essential right' if it deprives the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution's case." *Id.* at ¶ 19. The State does not dispute this argument, focusing instead on prejudice. Because the bystander statements directly impacted a key factual dispute in the case and deprived Gilliland of a constitutionally-protected procedure, admission of the bystander

statements constitutes fundamental error. *See Crawford*, 541 U.S. at 61 (noting the Confrontation Clause "is a procedural rather than a substantive guarantee").

¶14 A showing of fundamental error under prong one or two requires a separate showing of prejudice. In judging prejudice, "[t]he standard is an objective one, and requires a showing that without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *Escalante*, 245 Ariz. at 144, ¶ 31. The "could have" standard is not easily met, and "necessarily excludes imaginative guesswork." *Id.* To determine whether a defendant has shown prejudice, we must consider "the parties' theories, the evidence received at trial and the parties' arguments to the jury." *State v. Dickinson*, 233 Ariz. 527, 531, ¶ 13 (App. 2013). "Because that jury and a hypothetical 'reasonable jury' share the same presumptive traits, however, any questions posed by jurors during trial or deliberation may be pertinent in applying the standard objectively." *Escalante*, 245 Ariz. at 144, ¶ 32.

¶15 We reject the State's contention that Gilliland cannot show prejudice because the out-of-court identifications were cumulative to L.J.'s identification and Gilliland's admission of driving. The improper admission of evidence is harmless when the evidence is "entirely cumulative." *State v. Williams*, 133 Ariz. 220, 226 (1982). However, evidence is not cumulative when the fact it tends to prove is the issue in dispute. *State v. Romero*, 240 Ariz. 503, 510, ¶ 17 (App. 2016) ("Cumulative evidence supports a fact 'otherwise established by existing evidence'; that is, it is not enough to be simply corroborated by other evidence, and it cannot be the very issue in dispute."); *see also State v. Bass*, 198 Ariz. 571, 581, ¶ 40 (2000). Because identification of the driver of the truck was the principal issue in dispute, admission of three additional identifications cannot be characterized as cumulative.

¶16 Gilliland argues that without the admission of the three bystander statements, the jury could have reached a different result. He first points to his attempts to impeach L.J. at trial. L.J. testified he immediately ran to the window when he heard the collision and, after running outside, he saw Gilliland wearing a seatbelt. But L.J. did not relay these details to the officers at the scene. L.J. initially testified there was no yelling, but later stated an argument occurred between his girlfriend and Gilliland's wife. L.J. testified the accident happened around 10:00 p.m. and that it took the police 30 minutes to arrive. However, the first officer to respond testified he arrived within ten minutes of the call from dispatch, and the back-up officer testified he arrived at the scene around 11:30. L.J.

was also emotional because this was his first car. Upon exiting his home, L.J.'s attention was divided between the truck and assessing the damages to his car.

¶17 Gilliland also argues there was evidence to support a mistaken identity defense. He correctly notes that he and Dykeman were similar in appearance and dress on the night of the incident, creating the possibility of confusion. In particular, L.J. had told the police the driver was wearing blue jeans but testimony from officers suggests that Gilliland was actually wearing dark sweatpants, and Dykeman was wearing blue jeans. Dykeman also appeared to be intoxicated at the time of the collision, and the truck was registered to Dykeman's wife. Finally, although Gilliland admitted "he was driving from home to go get food," and agreed "he could feel the effects of alcohol," he denied he was "involved in a collision."

¶18 As previously stated, the defendant bears the burden of proving prejudice. *Escalante*, 245 Ariz. at 142, ¶ 21. Though we disagree with the State's assertion that the evidence was overwhelming, we are not convinced that Gilliland has met this substantial burden.

¶19 L.J. testified that Gilliland was the driver of the truck that crashed into his car, and Gilliland admitted to driving under the influence of alcohol. Although Gilliland's admissions fall short of a full confession, as he denied being in a collision, the State presented substantial evidence in support of the verdict. *See State v. Yonkman*, 233 Ariz. 369, 377, ¶ 27 (App. 2013) (holding that admission of an out-of-court statement was harmless because, in part, defendant's confession corroborated victim's testimony). To be sure, it is possible for a defendant to show prejudice "even if substantial evidence of guilt exists." *Escalante*, 245 Ariz. at 144, ¶ 34. However, "the amount of error-free evidence supporting a guilty verdict" is still important to a prejudice inquiry. *Id.* Further, the defendant "may not rely upon 'speculation' to carry his burden." *Dickinson*, 233 Ariz. at 531, ¶ 13. Although Gilliland attempted to impeach L.J.'s credibility, the inconsistencies revealed were not substantial. Further, Gilliland's evidence of mistaken identity, specifically the similarity in dress and appearance between Gilliland and Dykeman, is relatively minor compared to L.J.'s identification and Gilliland's own admissions.

¶20 Finally, although the jury asked a number of questions relating to identity of the driver, that does not necessarily mean a hypothetical reasonable jury could have found differently. Identity was the main issue in the case, so it is logical to expect the jury would be interested and engaged in the presentation of evidence relating to the issue. For these

reasons, we are not persuaded that a reasonable jury could have reached a different result.

CONCLUSION

¶21 We affirm Gilliland's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA