IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ISAAC SHAQUILLE CISCO,
Appellant.

No. 2 CA-CR 2019-0065
Filed March 9, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20173413001
The Honorable Michael Butler, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Isaac Shaquille Cisco appeals from his convictions for first-degree murder and four counts of aggravated assault, contending (1) the trial court erroneously denied his motion to suppress evidence of a handgun found in his car because police lacked reasonable suspicion to initiate a traffic stop, and (2) the trial court erroneously allowed a detective to testify that an automated ballistics database matched the shell casings found at the shooting scene to a gun found in Cisco's car. We conclude the court erred in admitting the detective's testimony, but because other evidence rendered that testimony merely cumulative, the error was harmless. Detecting no other error, we affirm.

Factual and Procedural Background

¶2 We state the facts in the light most favorable to sustaining the jury's verdicts. *State v. Fitzgerald*, 232 Ariz. 208, n.2 (2013). On the night of April 23, 2017, Cisco and another man went looking for men who had just assaulted Cisco's brother at a fast-food restaurant. They went to the restaurant, and believing they had found the assailants there, followed them to an apartment complex and parked Cisco's older-model black Mustang behind the men's car. Cisco got out, approached the car, and shot the three occupants, killing A.V. and seriously injuring the two others.

¶3 Nineteen days later, Cisco crashed the black Mustang.[1] Police, who had been looking for the Mustang involved in the shooting, found a gun on the driver's side floorboard, which ballistics testing revealed to be the gun that had fired the fatal shots.

¶4 Cisco was indicted, and after a seven-day trial, a jury found him guilty as described above. The court sentenced Cisco to natural life for the murder, and concurrent and consecutive sentences for the aggravated

[1]The trial court suppressed evidence that Cisco was fleeing from police when the crash occurred, finding that the flight was remote from the shooting and interceding events may have triggered the flight.

assaults totaling eleven years, to be served consecutively to the murder sentence. Cisco timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Admission of Evidence from Cisco's Car

¶5 Cisco contends the trial court should have granted his motion to suppress evidence police collected from his car, including the gun linked to the murder, because police initiated a traffic stop without reasonable suspicion—conduct that ultimately led to discovery of the evidence. But Cisco concedes he never yielded when the police activated their sirens and lights; rather, he led police on a high-speed chase that ended only when Cisco crashed into another car. While the Fourth Amendment prohibits unreasonable seizures, our state and federal supreme courts have established that "absent physical force, an individual must yield to a show of authority for a seizure to occur." *State v. Rogers*, 186 Ariz. 508, 511 (1996) (citing *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991)). In his reply brief, Cisco effectively concedes that this is the applicable law but essentially argues that the cases that establish it were wrongly decided. But because the law comes from the United States Supreme Court's interpretation of the Fourth Amendment and our own supreme court's acknowledgment of that law, we are bound to apply it. *See Pool v. Superior Court*, 139 Ariz. 98, 108 (1984) (United States Supreme Court's interpretations of United States Constitution binding on Arizona courts); *State v. Long*, 207 Ariz. 140, ¶ 23 (App. 2004) (Arizona Supreme Court decisions binding on court of appeals). Because the attempted traffic stop did not constitute a seizure, no Fourth Amendment violation occurred, and the trial court did not err by denying Cisco's motion to exclude evidence. *See Hodari D.*, 499 U.S. at 629.[2]

Ballistics Match Testimony

¶6 During trial, Cisco objected under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), when the state began to elicit testimony from a detective about a "match" between shell casings found at the murder scene and the gun found in Cisco's car as indicated in "NIBIN,"

[2]We do not separately address this issue under Article 2, Section 8 of the Arizona Constitution, as Cisco merely mentions that provision without any argument independent of his Fourth Amendment claim. *See State v. Jean*, 243 Ariz. 331, ¶ 39 (2018) ("Merely referring to the Arizona Constitution without developing an argument is insufficient to preserve a claim that it offers greater protection than the Fourth Amendment.").

an automated ballistics database.[3] Cisco argued he could not cross-examine the detective on that testimony because the system incorporated a scientific test to determine matches and the detective did not understand how the system worked. After the state suggested it was offering the testimony merely to show why it did additional testing on the casings, Cisco argued it should not be admitted for that purpose because it would mislead the jury into believing that the system itself proved a match and the state's own test results were just "icing." The court overruled Cisco's objection, and the detective then testified that the NIBIN system had matched the casings to the gun.

¶7 Cisco contends that the court's ruling allowed the state to use the non-expert detective as a conduit to "back-door in testimony with the aura of scientific certainty," in violation of Rule 702, Ariz. R. Evid.[4] We review a trial court's ruling on the admissibility of evidence for an abuse of discretion, *State v. McGill*, 213 Ariz. 147, ¶ 30 (2006), but review de novo interpretation of evidentiary rules, *see State v. Bernstein*, 237 Ariz. 226, ¶ 9 (2015).

¶8 Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or

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[3]NIBIN, the National Integrated Ballistic Information Network, is a cooperative network of federal, state, and local law enforcement agencies. Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification*, 6 Colum. Sci. & Tech. L. Rev. 2, 72 (2005). Network members have access to the Integrated Ballistic Information System (IBIS), which allows agencies to input, store, and match images of ammunition components recovered from crime scenes or test-fired from a gun connected to a crime. *Id.* at 72, 78. The system's proprietary software performs automated comparisons of input images to other images in the database, returning a ranked list of images in the database that most closely match the input images according to scores calculated by the software. *Id.* at 75-76; Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 Stan. L. Rev. 1343, 1346-48 & n.10 (2018); Daniel L. Cork et al., *Some Forensic Aspects of Ballistic Imaging*, 38 Fordham Urb. L.J. 473, 486-87 (2010).

[4]Because we conclude that the testimony was inadmissible under Rule 702, we need not reach Cisco's Confrontation Clause claim, nor the state's contention that he waived that argument.

> education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) the testimony is based on sufficient facts or data;
> >
> > (c) the testimony is the product of reliable principles and methods; and
> >
> > (d) the expert has reliably applied the principles and methods to the facts of the case.

The rule, which mirrors Federal Rule of Evidence 702, incorporates principles established in *Daubert*. *See State ex rel. Montgomery v. Miller*, 234 Ariz. 289, ¶ 17 (App. 2014) (citing *Daubert*, 509 U.S. 579). It requires the trial court to play a "gatekeeping role" and "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 597. "This 'gatekeeper' function applies not only to scientific evidence, but 'also to testimony based on technical and other specialized knowledge.'" *State v. Romero*, 236 Ariz. 451, ¶ 11 (App. 2014) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)), *vacated in part*, 239 Ariz. 6, ¶ 31 (2016).

¶9 In *Romero*, we upheld a trial court's admission of testimony identifying firearms though toolmarks on shell casings where, as here, a witness testified to a match between shell casings and a specific firearm. *Id.* ¶¶ 12-16. There, the witness testified to his background, training, and experience, including membership in a professional association of firearm and toolmark examiners and completion of annual proficiency exams, on which examiners' error rate was only around one percent. *Id.* ¶ 15. The analyst indicated that the methodology he used was accepted in the scientific community as valid, and a second examiner reviewed his work and agreed with his conclusion before it was reported. *Id.* Thus, in *Romero*, the conclusion that the shell casings matched the gun was accompanied by assurances that the methods used were sound and reliably applied, and was provided by a witness who was qualified to assess those methods. *See* Ariz. R. Evid. 702(a), (c), (d).

¶10 Here, the detective who testified that the shell casings matched the gun possessed no such qualifications and provided no such assurances. Unlike in *Romero*, the testifying detective had not personally performed the analysis that produced the match. He admitted he had not been trained in the automated system and was not familiar with the procedures associated with it. When asked whether there had been an "exact" match, he replied, "You would have to ask the NIBIN people." Nonetheless, he reaffirmed that there had been a match, protesting that he had not used that term loosely and stating, "[I]t was a match. We use that [word] in testimony." As to whether the system was reliable, he stated, "I just know that [it] is protocol and that it has been proven and tested, and that is why we use them." In sum, the detective's testimony to a match was based on nothing more than an unsupported belief that the automated system produced accurate results. He provided no meaningful assurance that the reported match was reliable. He therefore was not qualified under Rule 702 to testify that there had been a match—a conclusion that would require scientific, technical, or other specialized knowledge to be reliable.

¶11 The state argues that the testimony was nonetheless admissible because the detective was testifying as a lay witness, not an expert, and was simply testifying to his personal knowledge that the NIBIN system had produced a match. But the conclusion that the shell casings matched the gun was of a type that requires scientific, technical, or other specialized knowledge and therefore required assurances that it was reliable. *See Romero*, 236 Ariz. 451, ¶ 11; *Daubert*, 509 U.S. at 589, 597. The state could not avoid this requirement and introduce a forensic conclusion simply by casting the presenting witness as a lay witness.

¶12 Nor was the testimony admissible to provide a basis for why the detective requested further analysis of the gun and shell casings, contrary to the state's contention. While the state is generally permitted to provide some background information explaining why it conducted its investigation as it did, "[t]he need for this evidence is slight, and the likelihood of misuse great." 2 Kenneth S. Broun et al., *McCormick on Evidence* § 249, at 136 (6th ed. 2006). Here, there was little need for the state to testify to a NIBIN match in order to explain why it conducted further analysis on the gun and casings; the detective could have simply testified he had acted on information he had received. *See id.* at 136-37. Meanwhile, the testimony of a match was highly incriminating, identifying Cisco's gun as the murder weapon. We conclude that the danger that the jury would

be misled by the detective's testimony of a NIBIN match was too great for the court to admit it for mere background purposes. *See* Ariz. R. Evid. 403.[5]

¶13 The state argues that any error in admitting the testimony of the NIBIN match was harmless because it was merely cumulative of other evidence identifying Cisco's gun as the murder weapon. We review errors in admitting evidence to determine whether they were harmless. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Id.* Erroneous admission of evidence is harmless if the evidence is entirely cumulative. *State v. Williams*, 133 Ariz. 220, 226 (1982). We will not reverse a conviction if an error is clearly harmless. *State v. Green*, 200 Ariz. 496, ¶ 21 (2001).

¶14 We conclude that the testimony of the NIBIN match was merely cumulative of other evidence that the gun found in Cisco's possession was the gun that fired the fatal shots. A well-qualified state firearms examiner testified to his own toolmark analysis, which involved comparing marks left on the gun's components by manufacturing processes to the marks left on spent ammunition by the firing process. He stated he test-fired Cisco's gun and then microscopically compared the shell casings from the test-fires to the shell casings found at the murder scene. From similar marks on the test-fired casings and the murder-scene casings, he concluded that all six murder-scene casings had been fired by Cisco's gun. Moreover, the examiner compared a bullet removed from the victim's body to the bullets test-fired from Cisco's gun, and concluded the bullet had also been fired by the gun. According to the examiner, the probability was "infinitesimally small" that a different gun would produce the same markings on the bullet or shell casings. Cisco did not meaningfully impeach the examiner as to his qualifications, methods, or conclusions, nor

[5]Furthermore, in closing argument the state mentioned "NIBIN" in a list of "the different types of evidence that's been presented," then argued that the list represented the "big picture" that should leave the jury firmly convinced of Cisco's guilt. This argument contradicts the notion that the NIBIN testimony was offered solely to show why the detective requested further ballistics testing. But because the reference was presented as but one piece of evidence in a long list and not emphasized, the comment does not undermine our conclusion that the error in admitting the detective's testimony was harmless.

did Cisco present an expert to challenge the reliability of his methods or conclusions.

¶15 And while Cisco claims that the "purported NIBIN match had the effect of bolstering" the firearms examiner's opinions, the examiner himself downplayed the significance of the NIBIN "match," reducing the risk of that effect. The examiner was familiar with the NIBIN system and testified that a NIBIN "hit" was "preliminary" to the state's own ballistics analysis such as the one he had performed. He clarified that sometimes his analysis would reveal that a result returned by the NIBIN system was not an actual match. By qualifying what had been characterized by the detective as a NIBIN "match" as merely preliminary to his own analysis, the examiner conveyed to the jury that the results from the NIBIN system were not to be treated as conclusive. And at any rate, the NIBIN match testimony would not have bolstered the examiner's conclusion of a match between the gun and the bullet from the victim's body, given that there was no such match in NIBIN.

¶16 Finally, the ballistics evidence was not the only substantial evidence that Cisco was the shooter. A witness testified he had been the other man with Cisco that night when Cisco was looking for the men who attacked his brother; they had found the men and followed them in Cisco's black Mustang to an apartment complex, where Cisco got out of the car to confront them and shots were fired. According to the witness, Cisco got back into the car and told him to "drive, drive, drive" and asked him to agree that "[t]his never happened." Although the witness was a convicted felon and his testimony was incentivized by an immunity agreement, other evidence corroborates his account. Surveillance video from the night of the shooting showed a dark Mustang at the fast-food restaurant, then at the apartment complex moments later, pulling up behind the victim's vehicle. The fast-food restaurant video shows the witness inside the restaurant shortly before the shootings, where he could have identified the victims, who were also there. The apartment complex video, while grainy and dark, shows a person getting out of the passenger's side of a dark car and approaching the victim's car; flashes then appear in the video, and the passenger quickly gets back in passenger side of the car and the car drives away. It shows that the shooter had not acted alone, supporting the witness's account of the shooting.

¶17 In sum, ample other ballistics evidence showed that Cisco's gun had fired the fatal shots, rendering the erroneously admitted testimony merely cumulative. Additionally, other testimony reduced the likelihood that the jury would give substantial import to the erroneously admitted

testimony. And finally, the ballistics evidence was not the only substantial evidence that Cisco was the shooter. Given these circumstances, we conclude beyond a reasonable doubt that the erroneously admitted testimony did not affect the verdict.

Disposition

¶18 We affirm Cisco's convictions and sentences.