IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

DARROLL BUGG,

Appellant,

v. Case No. 5D19-2108

STATE OF FLORIDA,

Appellee.

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Opinion filed May 8, 2020

Appeal from the Circuit Court
for Orange County,
John M. Kest, Judge.

James S. Purdy, Public Defender, and
Andrew Mich and Roman Faizorin,
Assistant Public Defenders, Daytona
Beach, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Deborah A. Chance,
Assistant Attorney General, Daytona
Beach, for Appellee.

LAMBERT, J.

Darroll Bugg appeals his convictions and sentences for manslaughter with a firearm and aggravated battery with a firearm. Bugg argues that the trial court erred in overruling his objection to an allegedly-improper comment made by the State during its closing argument and in allowing, over a hearsay objection, a detective to testify about

the physical descriptions of the suspect that were separately provided to him by two of the State's material witnesses. Bugg also asserts that the trial court erroneously limited him from impeaching one of the State's witnesses with a prior inconsistent statement. Lastly, Bugg argues that if this court finds two or more of these errors to have been harmless, reversal is still warranted because their cumulative effect denied him a fair trial.

For the most part, the State does not dispute that the trial court erred. Instead, it argues that the first two errors were harmless and that the third error was not preserved for appellate review. For the following reasons, we agree with the State. We also conclude that the cumulative nature of the preserved harmless errors did not deny Bugg a fair and impartial trial.

BACKGROUND AND TRIAL EVIDENCE—

Kelly Darish was shot in the bedroom that she was renting in a large home that was owned by Robert and Ashley Scott. Darish's friend, Kenneth Russell, was also shot while in the bedroom. Russell[1] survived his gunshot wound, but Darish did not. Following its investigation, the Orange County Sheriff's Office arrested Bugg, and the State charged him with second-degree murder and aggravated battery.

The State's first two witnesses at trial were Donald McCiskill and Ennis Williams. McCiskill was friends with both Darish and Russell, and he was visiting the house the night that they were shot. McCiskill testified that he saw Darish and Russell in Darish's bedroom together with another man whom he did not know. McCiskill stated that while

[1] Russell was subpoenaed by the State to testify at trial. By the time of the trial, Russell was apparently homeless and living in the Jacksonville area, as indicated by a recent arrest record. Russell left the area without providing the State with further contact information and did not testify at trial.

in the adjoining kitchen, he heard the two men in Darish's bedroom talking in a loud, aggravated manner, and then heard the unknown man say, "I don't want to have to shoot nobody." Almost immediately thereafter, McCiskill heard two or three gunshots. McCiskill quickly left the kitchen and did not wait to see this other man leave the house.

Less than twenty-four hours after the shooting, McCiskill positively identified Bugg in a photo array prepared by law enforcement as the individual that he saw in Darish's bedroom the previous evening. McCiskill also affirmatively identified Bugg in the courtroom as the person that he saw in the bedroom.

Ennis Williams was the State's second witness. Like Darish, Williams rented a room in the Scotts' home. He testified that he saw Darish and Russell in Darish's bedroom that evening, together with a short, bald, black male[2] that he did not know, and that it appeared that the three were involved in some type of negotiation. Williams testified that he then went to his own room to watch TV and, while there, heard four to five gunshots coming from Darish's bedroom. Williams did not see the other man in the bedroom leave the house; however, when he opened the front door to the house, Williams observed a large maroon van "hauling ass out of there." Williams described that the van "was going so fast [that] it didn't go down the driveway getting out. It ran over the curb and hit the road."

Williams also picked Bugg out of a photo array prepared by law enforcement as the person that he saw in Darish's bedroom that evening, doing so with "85% certainty."

Ashley Scott, one of the co-owners of the home, was present in a different part of

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[2] Bugg is an African-American male with a bald head who was five feet, seven inches tall.

the house when the shootings occurred. Scott testified at trial that although she did not see the shooter, she did hear "two pops." Upon hearing this sound, Scott went upstairs to check on the safety of her children. While doing so, she saw a maroon or burgundy van speeding away from her home.

A 911 call reporting the shooting was placed that evening at 8:47 p.m. Ten minutes earlier, Darish's husband had received a voicemail message left on his phone by his wife from a phone number that he did not recognize. This phone call was traced back to Bugg's cellphone.

Based upon the information elicited from its investigation, the Orange County Sheriff's Office distributed to the public the day after the shooting a crime bulletin regarding this incident that included a picture of the maroon van that it believed was the suspect's vehicle. The bulletin did not include Bugg's name, and the trial evidence showed that, at the time, the Sheriff's Department did not know whether Bugg owned a maroon van.

Bugg saw the bulletin and called the Sheriff's Office. He spoke to detective Robert Riley, who was the lead investigator. Bugg inquired "why [Riley] was identifying him as a suspect [in the shooting] and why and how [Riley] put a picture of his van on the bulletin." Bugg also told Riley that he had come in contact with Darish at a liquor store the prior evening and that he had let her use his phone after Darish had asked him for some change and a cigarette. Bugg said that Darish then walked off and he drove home. Bugg would later add that Darish had gotten into his van that night.

Riley testified at trial that it would take less than one minute to drive from the liquor store to Darish's residence. Riley also testified that between the liquor store and the

residence was a business called Young's Market and that he was able to secure surveillance video from the market. This video, admitted into evidence at trial and played for the jury, showed a maroon van traveling in the direction of the house shortly before the shooting occurred. Bugg owned a maroon 1999 Dodge van.

Bugg's cellphone was later searched. A picture of a semiautomatic handgun of the same caliber as the weapon used in the shooting was found on Bugg's phone.

Bugg elected not to testify at trial or to present any evidence. Bugg was found guilty of the lesser included offense of manslaughter with a firearm regarding Darish's death and guilty of aggravated battery with a firearm for shooting Russell.

CLOSING ARGUMENT—

In his first argument on appeal, Bugg contends that the trial court erred in overruling his objection to the following comment made by the prosecutor during his initial closing argument:

> [T]hat takes me to my second point. Talking about illusions, smoke screens, distractions, things that aren't relevant, because throughout opening statement and the questions of witnesses there were a number of illusions made by the defense.

The trial court should have sustained the objection. While it is entirely permissible for a prosecutor to argue that certain facts or arguments raised by defense counsel are not relevant or germane to the issues for determination by the jury, comments suggesting that opposing counsel is blowing smoke or using smoke and mirrors in an effort to distract improperly denigrate counsel and the theory of defense. *See Servis v. State*, 855 So. 2d 1190, 1194 (Fla. 5th DCA 2003) (recognizing that it is well-established that a "prosecutor may not ridicule a defendant or his theory of defense"); *Scala v. State*, 213 So. 3d 1085,

1089 n.3 (Fla. 3d DCA 2017) (holding that it was error when "the prosecutor told the jury, on at least two occasions, that the defense attorneys were 'simply blowing smoke in your face'" because "[s]uch characterizations denigrate opposing counsel and are improper"); *Brown v. State*, 733 So. 2d 1128, 1131 (Fla. 4th DCA 1999) (holding the prosecutor's ridiculing of the defendant's theory of defense as being a "smoke screen" was improper); *Olbek v. Kraut*, 650 So. 2d 1138, 1138 (Fla. 5th DCA 1995) (Griffin, J., concurring) (commenting that the lower court should have sustained the objection to the inflammatory "smoke and mirrors" sort of argument "and let counsel know such improper comments would not be tolerated").

In its answer brief, the State commendably does not endorse the prosecutor's comment during closing argument. Instead, it argues that the trial court's error in overruling the objection is harmless because there is no reasonable possibility that the comment affected the verdicts. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986) (holding that in determining whether an error is harmless "[t]he question is whether there is a reasonable possibility that the error affected the verdict").

Here, the prosecutor's comment was isolated and limited, and it was not mentioned any further in the State's initial closing argument nor mentioned, at all, during the State's rebuttal closing argument. As such, we are convinced, beyond a reasonable doubt, that, on this record, this error did not affect the verdicts returned by the jury. *Cf. Lammons v. State*, 246 So. 3d 524, 525–26 (Fla. 3d DCA 2018) (holding that "calling defense counsel's attack on the voluntariness of the confession a 'tactic' improperly denigrated the defense" but concluding that the error was harmless beyond a reasonable doubt because the comment was isolated, not repeated, and not made a feature of the State's closing

arguments); *Wellons v. State*, 87 So. 3d 1223, 1225 (Fla. 3d DCA 2012) ("The isolated comment made by the prosecutor during closing, while certainly improper, was, in this case, harmless error." (footnote omitted)).[3]

DETECTIVE RILEY'S TESTIMONY OF WITNESSES' PHYSICAL DESCRIPTIONS OF THE SUSPECT—

The State called Detective Riley to testify at trial. By this time, both McCiskill and Williams had concluded with their testimony. Riley was asked by the prosecutor on direct examination to provide the description of the suspected shooter that Williams had given to him. Over defense counsel's hearsay objection, Riley testified that Williams told him that the suspect "was a light-skinned, black male, about five-eight to five-nine, about 180 to 185 pounds, I believe with black frame glasses" and a bald head. Riley was then asked, over a similar hearsay objection, to provide the description of the suspect that McCiskill gave him. Riley provided similar testimony. In addressing defense counsel's objection, the trial court first questioned whether Riley's aforementioned testimony was hearsay before ruling that, even if it was hearsay, the testimony was admissible under an exception to the hearsay rule.[4] Bugg argues in this second ground of his appeal that his hearsay objections were proper and should have been sustained.

"The standard of review of a trial court's decision on the admissibility of evidence is generally an abuse of discretion standard. However, the question of whether evidence

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[3] Accordingly, the trial court did not abuse its discretion in denying Bugg's later motion for mistrial based on this error. *See Smith v. State*, 818 So. 2d 707, 710 (Fla. 5th DCA 2002) ("A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review.").

[4] The trial court did not articulate which hearsay exception it believed applied to this testimony.

falls within the statutory definition of hearsay is a matter of law, subject to *de novo* review." *Anderson v. State*, 230 So. 3d 175, 176 (Fla. 4th DCA 2017) (quoting *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006)).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2017). In response to Bugg's hearsay objection, the State, while not providing the trial court with any specific authority, argued that Riley's testimony was admissible as a statement of identification of a person. The State's argument appears to have been based on section 90.801(2)(c), Florida Statutes (2017), which provides that a "statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . [o]ne of identification of a person made after perceiving the person."

In *Puryear v. State*, 810 So. 2d 901, 903 (Fla. 2002), the Florida Supreme Court addressed the precise question before us, namely, whether, under section 90.801(2)(c), "a third party may testify to a declarant's out-of-court description of an assailant where the declarant testified at trial and is subject to cross-examination." The court specifically held that section 90.801(2)(c) does not apply to statements about the physical description of a suspect, writing:

> [A] description is not an identification. An "identification of a person after perceiving him," subsection 90.801(2)(c), is a designation or reference to a particular person or his or her photograph and a statement that the person identified is the same as the person previously perceived. The witness in this case never made an identification of the person he had seen; he only gave a description. This testimony does not meet the definition of "identification" as used in subsection 90.801(2)(c).

Id. at 904 (quoting *Swafford v. State*, 533 So. 2d 270, 276 (Fla. 1988)).

Based on *Puryear*, we conclude that the trial court erred in overruling defense counsel's hearsay objection. *See also Livingston v. State*, 219 So. 3d 911, 914 (Fla. 2d DCA 2017) ("Testimony concerning a victim's or a witness's out-of-court description of an assailant is classic hearsay and is generally not admissible into evidence unless it falls under a hearsay exception." (citing *Puryear*, 810 So. 2d at 906) (further citations omitted)). Put somewhat differently, Riley's testimony in recounting the descriptions of the suspect provided to him by McCiskill and Williams did not qualify as non-hearsay statements of identification under section 90.801(2)(c). *See Johnson v. State*, 199 So. 3d 433, 435–36 (Fla. 4th DCA 2016).

To its credit, the State does not argue here that Riley's testimony of the suspect's physical description was admissible. Rather, much like its argument on Bugg's first claim, it asserts that the trial court's admission of this hearsay testimony was harmless error. We agree.

In *English v. State*, 43 So. 3d 871, 873 (Fla. 5th DCA 2010), this court concluded that although the trial court had erred in admitting into evidence a deputy sheriff's description of a suspect, the error was harmless because, prior to the deputy's testimony, the victim had testified to the same description of the suspect. Thus, we determined that the erroneously-admitted hearsay testimony from the deputy sheriff was harmless because it was cumulative to the victim's testimony. *Id.* We also recognized that other courts had found the improper admission of similar hearsay testimony to be harmless error "when an overwhelming amount of evidence of the defendant's guilt existed." *Id.* at 872–73 (citing *Presley v. State*, 839 So. 2d 813, 813–14 (Fla. 4th DCA 2003) (determining

the erroneous introduction of the victim's out-of-court description to be harmless error when the suspect was found carrying a bag containing items stolen from the victim's refrigerator)).

In the instant case, prior to Riley's testimony of McCiskill's physical description of the suspect, McCiskill had already testified to (1) picking Bugg out of a law enforcement photo array, (2) seeing his friends, Darish and Russell, in the bedroom with a third person and hearing this person state that "he did not want to have to shoot nobody," and (3) immediately thereafter hearing gunshots that left Darish dead and Russell wounded. McCiskill also identified Bugg in court as the person that he saw that evening in Darish's bedroom.

Williams also testified at trial before Riley. He testified that the man he saw in Darish's bedroom with Darish and Russell that night was black, short, and bald, which generally matched Bugg's description. Williams also picked Bugg out of a law enforcement photo array, and both he and Ashley Scott testified to seeing a maroon van rapidly leave the home right after the shootings. The trial evidence further established that the day after the shooting, Bugg saw a crime bulletin issued by the Orange County Sheriff's Department about a maroon van being possibly involved in the shooting, and he called the Sheriff's Office to inquire why his van was in the bulletin. Bugg did own a maroon van, and surveillance film that was admitted into evidence showed such a van traveling in the direction of Darish's residence shortly before she was killed. Finally, the evidence also established that approximately ten minutes before she was shot, Darish had used Bugg's cell phone to make a call to her husband.

When evaluating whether improperly-admitted evidence was harmless, the focus is on the effect the error may have had on the trier of fact: in this case, the jury, *DiGuilio*, 491 So. 2d at 1139, with the State here having the burden of showing that the error was harmless. Under *DiGuilio*, the question before us is whether there is a reasonable possibility that Riley's hearsay testimony relating the descriptions of Bugg provided to him by McCiskill and Williams affected the verdicts. If so, then the State has not met its burden, and the error is not harmless. *See id.* ("If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful."). Applying this test, we are convinced, beyond a reasonable doubt, that the trial court's error in allowing the hearsay testimony of the suspect's physical description was harmless.

ATTEMPTED IMPEACHMENT OF STATE'S WITNESS WITH PRIOR INCONSISTENT STATEMENT—

Bugg's third argument for reversal is that the trial court erred when it sustained the State's objection to his effort to impeach McCiskill's trial testimony with a purportedly-inconsistent written statement that McCiskill had previously provided to law enforcement. We review a "trial court's limitation of cross-examination and exclusion of evidence for an abuse of discretion." *Elmer v. State*, 114 So. 3d 198, 201 (Fla. 5th DCA 2012) (citing *Boyd v. State*, 910 So. 2d 167, 185 (Fla. 2005); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000)).

In addressing this claim, we begin with the recognition that "[a] criminal defendant should be afforded wide latitude to cross-examine the State's witnesses, especially when cross-examining a key prosecution witness." *Id.* (citing *McDuffie v. State*, 970 So. 2d 312,

325 (Fla. 2007)). Moreover, it is "fundamental to our system of justice that a party may impeach a witness by introducing statements of the witness which are inconsistent with the witness's present testimony." *Id.* at 202 (citing § 90.608(1), Fla. Stat. (2010); *McBean v. State*, 688 So. 2d 383, 384 (Fla. 4th DCA 1997)).

As previously alluded to, McCiskill was the State's first witness at trial. He was clearly a key witness, having testified on direct examination to being in the kitchen area and having heard, but not seen, Darish and Russell being shot and later identifying Bugg both in court and in a photo array as the man that he saw and heard in Darish's bedroom at the time Darish and Russell were shot.

On cross-examination, Bugg's counsel provided McCiskill with a copy of a written statement that McCiskill purportedly had given to law enforcement on January 20, 2018 (the date of the shooting). McCiskill was given the opportunity to review the statement, and he testified that the statement was in his handwriting. Bugg's counsel asked McCiskill to confirm his earlier testimony that he was not in Darish's bedroom at the time of the shooting. McCiskill stated that he was not in the bedroom. Counsel then asked McCiskill if he remembered having previously written that he was in the bedroom when the shooting occurred. McCiskill did not directly respond to this question. Instead, he again reiterated that he was never in the room with Darish. At this point, the prosecutor objected to "improper impeachment," and the trial court sustained the objection. Bugg's counsel then pursued another line of questioning.

We see nothing objectionable with Bugg's effort to impeach McCiskill with his prior written statement. As the Third District Court of Appeal explained:

> In order for one to impeach a witness with a prior inconsistent statement, a predicate must first be established by calling the

> attention of the witness to be impeached to the allegedly contradictory statements and to the occasion when it is alleged said statements were made. In addition, opportunity must be given the witness to examine, explain, confess, or deny such contradictory statements. *Hancock v. McDonald*, 148 So. 2d 56 (Fla. 1st DCA 1963); *Urga v. State*, 104 So. 2d 43 (Fla. 2d DCA 1958).

Garcia v. State, 351 So. 2d 1098, 1099 (Fla. 3d DCA 1977).

Here, Bugg's counsel appeared to lay the predicate by first providing McCiskill with a copy of his written statement and then referencing that the statement had been given by McCiskill to law enforcement on January 20, 2018. Counsel then tried to call McCiskill's attention to purported language in his statement (of being in the bedroom) that appeared to contradict his trial testimony of being in the kitchen at the time of the shooting, at which point, the trial court sustained the State's objection.

The State's primary argument on appeal in response to this claimed error is that Bugg did not adequately preserve this issue for appellate review because Bugg did not proffer the testimony that he sought to elicit.[5] *See Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990) (finding that a claim that the trial court erred in not allowing the defendant to pursue a line of questioning with a State witness was not preserved for review because "[t]he defense did not proffer what the witness would have said if allowed to answer the question").

Bugg's attempt to impeach McCiskill with a purported prior inconsistent statement that he *may* have given about his location at the time of the shooting was improperly circumvented by the State's objection and the trial court's sustaining of the objection. At that point, however, it was necessary for Bugg's counsel to provide a proper proffer of

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[5] Bugg did not file a reply brief responding to this argument.

this evidence to preserve the error for review. *See id.* In his answer to counsel's specific question, McCiskill neither admitted nor denied that his earlier written statement contradicted his trial testimony; rather, he provided a nonresponsive reiteration that he was not in the bedroom with Darish when she was shot. Absent a proffer that McCiskill in fact wrote a prior inconsistent statement, the issue of whether the trial court erred in sustaining the State's objection has not been properly preserved for review. *See id.*

WHETHER THE CUMULATIVE HARMLESS ERRORS DEPRIVED BUGG OF A FAIR TRIAL—

Lastly, Bugg argues that if this court finds that two or more of the trial court errors asserted in this appeal were harmless, the cumulative effect of these errors nevertheless deprived him of a fair trial. *See Penalver v. State*, 926 So. 2d 1118, 1137 (Fla. 2006) (explaining that when an appellate court finds multiple harmless errors, it must still consider whether "the cumulative effect of [the] errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation" (quoting *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005))). Such an evaluation requires that we consider whether: (1) the errors were fundamental, (2) the errors went to the heart of the case, and (3) the jury would still have heard substantial evidence in support of the defendant's guilt. *Id.*

Applying these factors, we conclude that the two preserved harmless errors determined here did not have the cumulative effect of prejudicing Bugg to the extent that his right to a fair trial was denied. The prosecutor's one-time "smoke and mirrors" comment during closing argument neither was fundamental nor went to the heart of the case. Second, irrespective of Detective Riley's hearsay testimony relating McCiskill and

Williams's physical description of the suspect, the State presented other substantial evidence of Bugg's guilt at trial, as outlined in this opinion. *See Whitton v. State*, 649 So. 2d 861, 865 (Fla. 1994) ("[I]n the context of the totality of the evidence, the cumulative effect of the two testimonial statements and the prosecutor's comment did not prejudice Whitton's right to a fair trial.").

Accordingly, we affirm Bugg's convictions and sentences in this case.

AFFIRMED.

EVANDER, C.J., and WALLIS, J., concur.