FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5064

JOHN LYNCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Bay County.
Michael C. Overstreet, Judge.

October 23, 2020

B.L. THOMAS, J.

John Lynch appeals his judgment and sentence for lewd or lascivious battery (Count I) and lewd or lascivious molestation (Count II). Appellant argues that the prosecutor's comments during closing argument require reversal. Appellant also argues that the trial court erred in denying Appellant's motion for mistrial when the prosecutor shifted the burden of proof to Appellant. We disagree and affirm.

Appellant was a youth leader at the First Baptist Church in Panama City. Between May 14, 2008, and May 13, 2010, the victim was between eleven and thirteen years old and a member of the youth group of the church.

At trial, the victim testified that when she was eleven years old, Appellant grabbed her waist and kissed her on the lips. The victim also testified that when she was twelve years old, Appellant texted her during youth group to go upstairs to get her Bible. When the victim went upstairs, Appellant entered the room and kissed her. The victim stated that Appellant guided her to her knees and put his penis in her mouth. When she tried to leave, Appellant put his hand inside her underwear and digitally penetrated her vagina. The victim stated that she did not tell her family or friends about what Appellant had done until nearly six years later.

In 2017, the victim contacted Appellant on Facebook. The Facebook messages were read at trial. In the messages, Appellant admitted that his wife knew about what he had done to the victim and agreed that his wife "freaked out because of [the victim's] age . . . ." Appellant messaged that he knew the victim still loved him. The victim responded that Appellant had said he loved her since she was twelve or younger. Appellant never denied these actions, but messaged that the victim did not have any proof. In addition, when the victim asked Appellant how he was "so sexually attracted to a 12-year-old," Appellant replied, "I can't explain it and you wasn't[sic] 12." Appellant further messaged, "[a]nd let's be honest, you developed very quickly."

After the victim obtained the incriminating messages, she gave the messages and her statement to Lieutenant Mathis who obtained an arrest warrant for Appellant and went to Appellant's place of business. Appellant voluntarily spoke to Lieutenant Mathis. He admitted to messaging the victim over Facebook and touching the victim's vagina. However, he denied engaging in oral sex with the victim.

Lieutenant Mathis then took Appellant to the sheriff's office. Appellant was read his *Miranda* rights but waived them. A recording of the interview was played for the jury. In the recording, Appellant admitted to digitally penetrating the victim's vagina but consistently maintained that he had never received oral sex from her.

Appellant testified as the only defense witness. He denied that he had received oral sex, penetrated the victim's vagina with his finger, or exchanged messages with the victim on Facebook. He

further testified that law-enforcement officers had threatened him behind the sheriff's office and his confession was, therefore, involuntary. The law-enforcement officers involved denied threatening Appellant.

Analysis

Appellant argues that the prosecutor made five improper comments during closing arguments. We review for fundamental error because the arguments were not properly preserved. *See Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007) ("Unobjected-to comments are grounds for reversal only if they rise to the level of fundamental error."). "Fundamental error is error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty . . . could not have been obtained without the assistance of the alleged error.'" *Williams v. State*, 213 So. 3d 1123, 1125 (Fla. 1st DCA 2017) (quoting *Salazar v. State*, 188 So. 3d 799, 822 (Fla. 2016)).

First, Appellant argues that the prosecutor's comments—that it was difficult for a twelve-year-old girl to keep this dark secret, that the victim remembered Appellant as the first person who kissed and touched her, and that Appellant was an authority figure who broke the victim and the victim's trust—evoked sympathy for the victim and encouraged hostile emotions toward Appellant. A prosecutor may not "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused." *Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016) (quoting *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998)). "Thus, a prosecutor is prohibited from making repeated references asking for 'justice' for the victim." *Fountain v. State*, 275 So. 3d 253, 255 (Fla. 1st DCA 2019) (citing *Cardona*, 185 So. 3d at 520). However, a prosecutor may "review the evidence and . . . explicate those inferences which may reasonably be drawn from the evidence." *Merck*, 975 So. 2d at 1061.

When considered in the context of the entire closing argument, the prosecutor's comments were not improper appeals to the "prejudice and passions of [the] jury." *See Cardona*, 185 So. 3d at 520 (quoting *Urbin*, 714 So. 2d at 421). The prosecutor's statements were comments on the evidence and in response to the defense's arguments. *See Merck*, 975 So. 2d at 1062–63 (holding

that the prosecutor's statement was not improper given its context as a response to the defense's presentation of mitigating evidence).

The prosecutor's comment that it was difficult for a twelve-year-old girl to keep this dark secret was in response to the defense's argument that it was difficult to defend against the claim when the victim had waited years before coming forward. The prosecutor's comment that the victim remembered Appellant as the first man to kiss and touch her was in response to the defense's challenge of the victim's memory. And, although the prosecutor misstated that the victim remembered Appellant as her first kiss, the statement did not "inflame[] the passions of the jury as to impel a guilty verdict." *See Fountain*, 275 So. 3d at 255. Finally, the prosecutor's comment that Appellant was an authority figure who broke the victim and her trust was a comment on the evidence. The victim testified that she and others looked up to Appellant as an older-brother figure and that the victim "was having a really hard time."

Second, Appellant argues that the prosecutor's comment that Appellant never said "it didn't happen" improperly shifted the burden of proof to the defense to proclaim his innocence. However, when taken in context, the prosecutor was commenting on the recorded interview and stating his contention relative to what conclusions may be drawn from Appellant's statements. *See Bell v. State*, 108 So. 3d 639, 648 (Fla. 2013) ("A prosecuting attorney may comment on the jury's duty to analyze and evaluate the evidence and state his or her contention relative to what conclusions may be drawn from the evidence.") (quoting *Evans v. State*, 838 So. 2d 1090, 1094 (Fla. 2002)). Jurors are instructed that they may accept or reject any witnesses' testimony, which includes a criminal defendant's testimony or admissions. *See* Fla. Std. Jury Instr. (Crim.) 3.9.

During closing arguments, the prosecutor stated that the jury could watch the recorded interview from the sheriff's office. The prosecutor asked the jury to "listen carefully, pay attention, watch [Appellant]'s body movements, [and] listen to his words." The prosecutor asked the jury to pay attention to Appellant's different statements before and after the audio recorder "came out." The prosecutor commented that in the recording, Appellant was asked

why the victim would say she had given him oral sex, to which Appellant responded he had "no clue." And, on the recording, Lieutenant Mathis noted that it was a far cry from "it didn't happen." Therefore, the prosecutor's comments did not improperly shift the burden of proof because they were comments on the evidence. *See id.*

Third, Appellant argues the prosecutor created a straw-man defense during closing argument by stating that "[the] [d]efense would like to submit to you that a psych major can't be molested. So I guess a police officer couldn't be molested as a kid either, because then they go into law enforcement. Maybe a lawyer [] couldn't be molested, because you go into the law." The prosecutor's comment was an improper straw-man defense because it raised an assertion never made by the defense in order to easily rebut the assertion. However, when considered against the weight of all the evidence presented, we find that the comment does not constitute fundamental error because it does not "go to the heart of the case [and was] not critical to the jury's verdict." *See Salazar*, 188 So. 3d at 822 (quoting *Davis v. State*, 136 So. 3d 1169, 1204 (Fla. 2014)). The victim testified and was subject to cross examination; the jury could fairly evaluate her credibility regardless of the comment.

Even when these comments are considered cumulatively, they do not constitute fundamental error. *See Salazar*, 188 So. 3d at 821-22. The cumulative effect of any errors in the State's closing argument did not compromise the integrity of Appellant's trial.

Appellant also argues that the trial court erred by denying his motion for mistrial after the prosecutor improperly shifted the burden of proof to Appellant by asking Lieutenant Mathis whether the defense had requested a video of the back of the sheriff's office.

> "A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial." *Cole v. State,* 701 So. 2d 845, 853 (Fla. 1997). . . . Thus, "[i]n order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to

> reach a more severe verdict than that it would have otherwise." *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994).

Salazar, 991 So. 2d at 372. The denial of a motion for mistrial is reviewed for abuse of discretion, and a trial court's ruling will be upheld unless the judicial action is "arbitrary, fanciful, or unreasonable." *Id.*

Appellant relies on *Hayes v. State* for the proposition that burden-shifting errors are not harmless and require a new trial. 660 So. 2d 257 (Fla. 1995). In *Hayes*, the State asked a witness whether the defense had requested any testing of blood stains taken from the scene of a murder. *Id.* at 265. The witness replied that the defense had not made any requests and that the lab had complied with similar requests in other cases. *Id.* The prosecutor later commented on the defense's failure to test certain physical evidence, and the supreme court held that the prosecutor's comments were prejudicial because the statements "may have led the jury to believe that Hayes had an obligation to test the evidence found at the scene of the murder and to prove that the hair and blood samples did not match his own." *Id.*

The present case is distinguishable because Lieutenant Mathis did not respond to the prosecutor's question. Before Lieutenant Mathis could respond, a sidebar was held, during which Appellant's counsel made an oral motion for mistrial. The trial court denied the motion for mistrial, and the State ended its questioning. Therefore, any error from the prosecutor's question was not "so prejudicial as to vitiate the entire trial" where the witness did not answer the alleged burden-shifting question. *See Salazar*, 991 So. 2d at 372 (quoting *Hamilton v. State*, 703 So. 2d 1038, 1041 (Fla. 1997)).

AFFIRMED.

RAY, C.J., and ROBERTS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Daren L. Shippy, Assistant Attorney General, Tallahassee, for Appellee.