FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-83

EARL ANTHONY JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Gadsden County.
Barbara K. Hobbs, Judge.

August 19, 2020

SALVADOR, TATIANA R., ASSOCIATE JUDGE.

Earl Anthony Jackson appeals his conviction and sentence following a jury trial for lewd and lascivious battery. He raises two issues on appeal, both premised on claims of fundamental error. First, Mr. Jackson argues the trial court erred by allowing a witness to provide opinion testimony that she believed the victim's claim that she was sexually molested by Mr. Jackson. Second, Mr. Jackson argues that the prosecutor made improper comments in closing argument which denied him of his right to a fair trial. We find neither issue rises to the level of fundamental error and affirm Appellant's judgment and sentence.

I.

Appellant was charged by Information with lewd or lascivious battery. The case proceeded to a jury trial, where the following evidence was introduced.

T.H., who was 15 years old on the date of the sexual assault, testified that she stayed the night at Appellant's house on May 1, 2016, as she had occasionally before—Appellant was the uncle of T.H.'s friend. T.H. testified that in the middle of the night, Appellant took her to the bathroom, pulled down her pants and forced himself inside of her. She identified Appellant, in open court, as the person who attacked her. After disclosing the incident to Shemeika Johnson the next morning, T.H. was taken to the hospital and eventually to the Child Protection Team facility for an examination. The CPT team collected a sexual assault kit and T.H.'s clothes, and those items were entered into evidence. Additionally, the nurse practitioner for CPT who performed the sexual assault exam on T.H. testified that she noted genital trauma that was consistent with a sexual assault.

The FDLE analyst who examined the sexual assault kit testified that the vaginal swab from T.H. showed foreign DNA. Based on the data she had, she could not exclude Appellant as a contributor of the foreign DNA found on the vaginal swab. However, on the leggings that T.H. was wearing, the FDLE analyst found semen in the crotch and seat area which matched Appellant's DNA profile.

The defense called several witnesses at trial, two of whom testified that T.H. told them she fabricated the story about Appellant because Shemeika Johnson, the mother of Appellant's children, offered to help T.H. financially if she got the Appellant in trouble. On rebuttal, Shemeika Johnson denied ever offering T.H. money to make up a story about Appellant. Ms. Johnson also testified, without objection, that based on T.H.'s demeanor, Ms. Johnson believed T.H.'s allegation.

After the jury was instructed, the parties gave their closing arguments. There were no defense objections during the State's argument. Thereafter, the jury returned a verdict finding Appellant guilty of lewd or lascivious battery. Mr. Jackson now

appeals his conviction and sentence based upon claims of fundamental error.

II.

"This Court reviews a defendant's unpreserved claim that a trial court committed fundamental error *de novo*." *Croom v. State*, 36 So. 3d 707, 709 (Fla. 1st DCA 2010). Since both claims now raised by Appellant were unpreserved in the lower court, we consider only whether each claim rises 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 guilt could not have been obtained without the assistance of the alleged error.'" *Mendoza v. State*, 964 So. 2d 121, 131 (Fla. 2007) (quoting *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996)). As such, if the error can properly be described as harmless, it is not fundamental. *See Rutledge v. State*, 1 So. 3d 1122, 1133 (Fla. 1st DCA 2009) ("By definition, any harmless error cannot constitute fundamental error.").

Allowing Shemeika Johnson, a lay witness, to testify that she believed T.H.'s allegation was objectionable and erroneous. "Lay witnesses must confine their testimony to facts and may not give opinions and conclusions." *Williams v. State*, 257 So. 3d 1192, 1196–97 (Fla. 1st DCA 2018). It is error to permit a witness to comment on the credibility of another witness because it is solely within the province of the jury to determine the credibility of witnesses. *Calloway v. State*, 210 So. 3d 1160, 1189 (Fla. 2017). Such improper bolstering "can result in harmful error when the credibility of the bolstered witness is of critical importance to the State." *Id.* at 1190.

However, Ms. Johnson's testimony that T.H. was believable based on her demeanor was harmless error beyond a reasonable doubt. In addition to T.H.'s testimony, the physical evidence showed that the leggings T.H. was wearing when she was taken to the hospital contained semen found in the crotch area which matched the Appellant's DNA profile, and foreign male DNA was found in T.H.'s vagina. Moreover, the CPT nurse testified that T.H. exhibited recent genital trauma consistent with sexual assault. With this significant physical and medical evidence, "there is no

reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). And because the error is harmless, it cannot be fundamental. *See Rutledge*, 1 So. 3d at 1133. Therefore, Appellant is not entitled to relief on this claim.

III.

Mr. Jackson also asserts that the prosecutor made numerous improper statements in closing argument and rebuttal closing argument which misstated or mischaracterized the evidence, were comments on facts not in evidence, were the prosecutor's opinion, vouched for and bolstered the credibility of T.H., shifted the burden of proof, appealed to the emotions and sympathies of the jurors, and denigrated the defense. Appellant asserts that the cumulative impact of the errors rose to the level of fundamental error and denied Appellant of his right to a fair trial.

"Attorneys are permitted wide latitude in closing arguments but are not permitted to make improper argument. Closing argument is an opportunity for counsel to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007). When, as here, no objections are interposed, a prosecutor's improper comments during closing argument will constitute fundamental error when they are so egregious as to vitiate the whole trial. *See Johnson v. State*, 177 So. 3d 1005, 1008 (Fla. 1st DCA 2015). "For improper prosecutorial remarks to constitute fundamental error, the jury must not have been able to reach the verdict absent the remarks." *Id.* Whether this occurred depends upon the facts of each case.

In this matter, Appellant alleges that the prosecutor improperly shifted the burden of proof and denigrated his defense with the comment: "All this other stuff about who heard what or didn't hear what is smoke and mirrors nonsense until you hear an explanation for that." First, when read in context, we find that the prosecutor did not shift the burden of proof, but immediately followed that statement with a reminder that the State has to prove the elements of the crime to the jury. Additionally, while the reference to "smoke and mirrors" may have been objectionable, *see*

Brown v. State, 733 So. 2d 1128, 1131 (Fla. 4th DCA 1999) (holding prosecutor's ridiculing defendant's theory of defense as a "smoke screen" improper); *Waters v. State*, 486 So. 2d 614, 616 (Fla. 5th DCA 1986) (holding repeated references to defense's closing argument as "a smoke screen" were improper), when read in context, such a reference may not always be impermissible argument. *See Brown*, 733 So. 2d at 1131 ("Belittling a defense by the use of the term 'smoke screen' may not always be error . . . ."). Here, this reference would not constitute fundamental error on its own. This single reference to "smoke and mirrors" was not sufficient to vitiate the whole trial.

Additionally, Appellant contends that the following comment by the prosecutor was improper and constituted fundamental error:

> But we know from our existence, from our experience, from reading the news, we know that pedophiles exist, we know child molesters exist. And we hope we never come into contact with one, we hope we never see one, we hope we never have to call somebody one. But take a good look because one sits right there.

We agree that this statement was objectionable and improper. "It is improper for a prosecutor to refer to the accused in derogatory terms, in such a manner as to place the character of the accused in issue." *Kelly v. State*, 842 So. 2d 223, 227 (Fla. 1st DCA 2003) (quoting *Pacifico v. State*, 642 So. 2d 1178, 1183 (Fla. 1st DCA 1994)). The other district courts have specifically held that it is improper argument to call the defendant a pedophile. *See Rodriguez v. State*, 210 So. 3d 750, 754 (Fla. 5th DCA 2017); *Petruschke v. State*, 125 So. 3d 274, 279–80 (Fla. 4th DCA 2013). Such "[i]nflammatory labels used by a prosecutor to describe the defendant are improper invitations for the jury to return its verdict based on something other than the evidence and applicable law." *Rodriguez*, 210 So. 3d at 754. In *Rodriguez*, the prosecutor repeatedly referred to the defendant as a pedophile and made numerous other improper remarks. *See id.* at 754–55. Based on the totality of the argument the court found that the closing argument constituted fundamental error. *Id.* at 756. While improper, however, the prosecutor here only referred to Appellant as a

pedophile one time. Based on the totality of the arguments made by the prosecutor and invited by the defense, we do not find that it rises to the level of fundamental error.

In this case, T.H. testified that Appellant forced himself on her, and positively identified him as her attacker in court. She had physical injuries and genital trauma consistent with her version of events. Appellant's semen was found in the crotch and seat of her leggings, and foreign male DNA in her vagina, when she reported to the hospital and CPT. On these facts, we cannot conclude that that statement was so egregious as to vitiate the whole trial.

Appellant asserts that the prosecutor made other improper comments constituting fundamental error, either individually or cumulatively. However, when taken as a whole, we cannot conclude that the jury could not have reached the guilty verdict without the prosecutor's improper argument. *See Johnson*, 177 So. 3d at 1008. Thus, we conclude that Appellant has not demonstrated fundamental error.

IV.

Accordingly, we AFFIRM the judgment and sentence of the trial court.

KELSEY and NORDBY, JJ., 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 Damaris E. Reynolds, Assistant Attorney General, Tallahassee, for Appellee.