FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2817

JIHAD ABDUL SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Mark Borello, Judge.

November 18, 2020

OSTERHAUS, J.

Jihad Abdul Smith appeals his convictions and sentences for first-degree murder and tampering with evidence. He argues, among other things, that the trial court failed to consider certain sentencing factors required by section 921.1401, Florida Statutes, and that it erroneously excluded evidence that a now-deceased individual confessed to the murder. We affirm.

I.

This case involves a victim murdered while sitting in a car, shot from behind seven times in the head and neck. The State charged Appellant with first-degree murder, tampering with evidence, and a juvenile firearms-related charge. Before trial,

Appellant disclosed Deshawn Gailyard as a potential witness for the defense. The State deposed Gailyard who testified that his friend Khamoi Peterson (now deceased) told him that he shot the victim with a .380 pistol from the rear driver's side seat of the victim's vehicle at a dead-end street in Jacksonville. Appellant sought to introduce this third-party confession at trial, but the trial court excluded it because it wasn't corroborated by other evidence. At trial, Appellant was found guilty of first-degree murder and tampering with evidence. Because Appellant was a juvenile offender, the trial court conducted a sentencing hearing pursuant to section 921.1401, Florida Statutes, to determine if a life sentence was appropriate. The trial court ultimately sentenced Appellant to life for first-degree murder with a twenty-five-year mandatory sentence review hearing. This timely appeal followed.

II.

A.

Appellant raises five issues on appeal, three of which we address here. We affirm the other two without comment.

Appellant argues that the trial court erred in rendering a life sentence because it failed to consider one of the factors enumerated in § 921.1401, the possibility of the defendant's rehabilitation. Appellant did not make a contemporaneous objection as to this alleged error at sentencing, so we review it for fundamental error. *See Simmons v. State*, 267 So. 3d 1067, 1069 (Fla. 1st DCA 2019).

Section 921.1401, Florida Statutes, "requires the trial court to 'consider factors relevant to the offense and the defendant's youth and attendant circumstances' when determining whether a life sentence is appropriate for a juvenile murderer." *Jackson v. State*, 276 So. 3d 73, 76 (Fla. 1st DCA 2019) (quoting § 921.1401(2), Fla. Stat.); *see also* Fla. R. Crim. P. 3.781(c)(1). The statute lists ten non-exclusive factors that courts must consider in sentencing a juvenile defendant, including the possibility of rehabilitation. *Id.* Here, the trial court stated on the record that it reviewed and considered § 921.1401(2)'s factors. We take the court at its word on this point. In *Dortch v. State*, 266 So. 3d 1240, 1243 (Fla. 1st DCA 2019), we said that § 921.1401 does not require the trial court to

make detailed findings on all ten factors. Rather, courts must only find on the record that they have "(1) 'reviewed' and (2) 'considered' all relevant factors prior to imposing a life sentence." *Id.* at 1243–44.

As to one of the rehabilitation factors in § 921.1401(2), the trial court stated that "any possibility of rehabilitation can be adequately addressed by the 25-year mandatory sentence review hearing." Appellant interprets this statement to mean that the trial court did not consider the Appellant's possibility of rehabilitation as the statute requires, and, instead, left its consideration to the twenty-five-year mandatory sentence review hearing. A more reasonable interpretation is that (a) the trial court explicitly considered the statutory factor of rehabilitation but (b) decided that it didn't require anything more in Appellant's case other than the opportunity at a future date to demonstrate rehabilitation at a sentence review hearing. The trial court clearly stated that it extensively considered all statutory factors and applied them. This is all that was required to conduct an adequate sentencing hearing. *Cf. Dortch*, 266 So. 3d at 1244 (finding that the trial court conducted an adequate resentencing hearing when it went over the statutory factors, heard evidence about them, and then acknowledged that it had "reviewed and considered" all relevant factors); *Dubon v. State*, 295 So. 3d 259, 280 (Fla. 4th DCA 2020) (finding that the trial court considered all relevant factors despite not using the magic language "all relevant factors have been reviewed and considered by the court" and despite it making specific findings as to some factors but not others). Fundamental error is not shown.

For the same basic reason, we reject Appellant's argument that the trial court did not conduct a proportionality analysis pursuant to *Phillips v. State*, 286 So. 3d 905 (Fla. 1st DCA 2019). The court satisfied the proportionality requirement of § 921.1401 by giving "extensive consideration" to all of the statutory factors. *See Phillips*, 286 So. 3d at 912 (noting that a trial court's consideration of statutory factors satisfies the proportionality review required by *Graham* and *Miller*). Appellant hasn't demonstrated fundamental error stemming from the trial court's consideration of these sentencing factors.

B.

Appellant next argues that the trial court erred in excluding Gailyard's testimony as to Peterson's confession to the murder. We review a trial court's ruling regarding the admissibility of evidence for an abuse of discretion. *Payton v. State*, 239 So. 3d 129, 131 (Fla. 1st DCA 2018).

Appellant argued that the third-party confession should be admitted under the hearsay exception applicable to a statement against penal interest. *See* § 90.804(2)(c), Fla. Stat. "The admission of a statement against interest hinges on 'whether (1) the declarant is unavailable, (2) the statements are relevant, (3) the statements tend to inculpate the declarant and exculpate the defendant, and (4) the statements are corroborated.'" *Payton*, 239 So. 3d at 132 (quoting *Dort v. State*, 175 So. 3d 836, 840 (Fla. 4th DCA 2015)). In deciding whether to admit evidence of a declaration made against penal interest, "the trial judge should consider 'the language used and the setting in which the statement was made,' and decide whether the statement is 'consistent with both the defendant's general version of events and the other evidence presented at trial.'" *Dewolfe v. State*, 62 So. 3d 1142, 1145 (Fla. 1st DCA 2011) (quoting *Masaka v. State*, 4 So. 3d 1274, 1282 (Fla. 2d DCA 2009)).

We recognize that the statement satisfies more than one of the admission-against-interest test elements. The declarant Peterson was unavailable (he died shortly after the crime in this case occurred), and his supposed confession was relevant, inculpating him and exculpating Appellant. But the supposed confession does not pass the last prong of the test. That is, other evidence failed to corroborate Peterson's statement and validate its trustworthiness. *See* § 90.804(2)(c), Fla. Stat. Other than the confession itself, Appellant cites no evidence linking Peterson to the murder.

We have also considered Appellant's argument that "a trial judge may be required to admit a third-party confession under constitutional principles, even if it does not qualify as a declaration against penal interest under the state law of evidence." *Curtis v. State*, 876 So. 2d 13, 21 (Fla. 1st DCA 2004). Florida courts have used four factors from *Chambers v. Mississippi*, 410 U.S. 284

(1973), to review such confessions or statements, reviewing whether:

> (1) the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the confession or statement is corroborated by some other evidence in the case; (3) the confession or statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of-court confession or statement, the declarant must be available for cross-examination.

Bearden v. State, 161 So. 3d 1257, 1265 (Fla. 2015); *Payton*, 239 So. 3d at 132. But here, too, the circumstances surrounding the supposed confession in this case cuts against its admission. Peterson supposedly confessed to Gailyard in private and more than a month after the murder. Evidence doesn't corroborate the confession. Given the reliability questions surrounding the hearsay to which Gailyard would have testified, under both rule- and *Chambers*-based analyses, the trial court cannot be considered to have abused its discretion by excluding the supposed third-party confession.

C.

Finally, Appellant argues that the prosecutor made an improper presumption-of-innocence comment during closing argument that entitles him to reversal. The prosecutor said the following:

> Well, the defendant cannot run today, and he cannot hide today from what he did. The evidence that's been presented to you from the State has lifted that presumption of innocence from this man. That cloak of innocence that he came in here wearing piece by piece, rip by rip has been ripped away from him by each and every one of those witnesses that took the stand and by each and every piece of evidence the State put in, physical evidence, ballistics evidence, cell site location evidence that he can't run from and he can't hide from 'cause it's right there in black and white.

Appellant did not object to the comment, and so we review it for fundamental error. *See Breeden v. State*, 226 So. 3d 336, 336–37 (Fla. 1st DCA 2017).

Appellant relies on *Nurse v. State*, 932 So. 2d 290, 292 (Fla. 2d DCA 2005), where the prosecutor stated that the defendant no longer had the presumption of innocence. But the Second District in *Nurse* did not hold that the objected-to comment was reversible error; it merely cautioned prosecutors against the use of this kind of argument. *See id.* In this case, moreover, the prosecutor linked the comment to specific evidence. The situation here is more like our decision in *Easterly v. State*, 22 So. 3d 807, 816 (Fla. 1st DCA 2009), where the prosecutor commented that the evidence removed the defendant's presumption of innocence. We concluded in *Easterly* that no error occurred because the prosecutor tied the comment to the State's strong evidence. *Id.* at 817. As in *Easterly* we find no error here.

III.

The judgment and sentence are AFFIRMED.

MAKAR and M.K. THOMAS, 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 Justin F. Karpf, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Virginia Chester Harris, Assistant Attorney General, Tallahassee, for Appellee.