FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5153

MARCUS MAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
Thomas V. Dannheisser, Judge.

August 26, 2021

NORDBY, J.

Marcus May appeals his fraud and racketeering convictions following a jury trial and raises seven grounds for reversal. May argues the trial court erred by: (1) excluding expert testimony; (2) limiting the expert's proffer; (3) excluding audit reports; (4) allowing—over objections—the State to use the terms "kickback" and "textbook case of fraud" throughout trial; and (5) allowing—without objections—the State to make other improper arguments. He also claims that: (6) the cumulative effect of errors deprived him of a fair trial; and (7) his convictions violated double jeopardy by relying on the same predicate offense. We affirm on all grounds and write only to address the first three issues.

I.

May was the CEO of Newpoint Education Partners, a management company that contracted with charter schools. The State alleged that May bought equipment from his friend, Steven Kunkemoeller, then sold the equipment to those schools after a high mark-up, splitting the profits with Kunkemoeller. The State also alleged that May paid for certain products with school funds and directed rebates to himself.

At trial, the State called David Bryant, a certified fraud examiner, to "trace" the funds at issue. Bryant explained that money is fungible, meaning it is interchangeable and loses its identity when commingled. Tracing methods rely on a specific assumption that allows someone to keep track of commingled funds. For example, the first in/first out method ("FIFO") assumes that the first dollar that goes into the account is the first dollar spent out of the account. And the lowest intermediate balance rule ("LIBR") assumes that the "bad money" sits in the account until the "good money" runs out.[1] Bryant applied FIFO to trace the funds in this case. The trial court noted that Bryant did not give opinion testimony on whether there was fraud; he simply traced the money to show which expenses were tied to which funds.

May tried to call Adam Magill as an expert witness to rebut Bryant's testimony, but the State objected. Although the State deposed Magill before trial and moved in limine to exclude his reports, no pretrial hearing occurred to resolve the matter. At the start of the tenth day of trial, as the court discussed the remaining trial schedule with counsel, the State conveyed it had "some

---

[1] To show each method, Bryant explained that under FIFO, "If you had $50 in the account and then you put another $100 in the account, you have $150 total, and you write, say, a $25 check, well, that $25 check comes out of that first $50, if you are trying to classify it." Under LIBR, however, "If you put $50 of bad money in the bank account and then the next day you put $100 of good money and then you spend $35," then, "because you had good money in the account, then the $35 comes out of the good money before you touch the bad money."

issues" with Magill that might require a *Daubert* hearing. Defense counsel responded the State "has been pretty upfront with me" about its concern with Magill's testimony and suggested to the court that it "give the jury an hour off in the morning" on the day of Magill's testimony to address the matter. Later in the same discussion about scheduling, defense counsel informed the court that "in a perfect world" Magill's testimony would take "probably two to three hours."

The next week, on the day Magill was to testify, the trial court began by addressing the State's objection to the defense witness. Defense counsel requested an entire day to proffer Magill's testimony. The trial court denied May's request for a full day and instead stated it would give him one hour.

Through the proffer, Magill testified that he is certified as a master analyst in financial forensics with experience in fraud examinations. Magill thought Bryant's analysis was flawed because Bryant's tracing method assumed there was fraud. In Magill's view, any tracing method requires a prior step or else fraud will be found every time. In conducting this prior step, Magill used generally accepted accounting principles ("GAAP") and applied a "reasonableness" test which superseded Bryant's analysis. When asked for authoritative support for his method, Magill answered, "I would have to put it together and basically you know, even as evidence here, you guys would have to be trained or go to a class in accounting to even understand it." Counsel maintained that Magill was applying LIBR to trace the funds.

On cross-examination, Magill admitted he did not review every transaction in the case but insisted that he reviewed all the ones listed in the statement of particulars. He also highlighted some transactions that Bryant counted more than once. When pointing to specific examples, he referred to an old draft of the statement of particulars. The trial court corrected Magill and explained that certain items were repeated to show that multiple expenses came from a single transaction. Finally, Magill did not dispute where the money eventually went, just that the amount was less than alleged because the State did not factor in the cost of goods.

The trial court ultimately excluded Magill's testimony. Ruling without prejudice, the trial court explained that it had significant questions about Magill's qualifications and was even more concerned about his methodology.

May also called Robert Walker, an accountant that participated in audits for the charter schools, to testify about the audit process. On cross-examination, Walker explained that the audits would not have detected the alleged fraud. May tried to introduce the audit reports to show that he was subject to oversight and that he loaned money to the schools. The State objected, arguing that the reports were not relevant. The trial court agreed and excluded the reports.

In the end, the jury found May guilty of all charges (one count of fraud and two counts of racketeering) and the trial court sentenced him to twenty years on each count to run concurrently. This timely appeal followed.

II.

May first argues the trial court erred in excluding Magill's testimony. Florida courts allow expert testimony if it will help the factfinder understand evidence or determine a fact in issue, but only if: "(1) The testimony is based upon sufficient facts or data; (2) [t]he testimony is the product of reliable principles and methods; and (3) [t]he witness has applied the principles and methods reliably to the facts of the case." § 90.702, Fla. Stat. (2018) (codifying *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

To make sure evidence meets the criteria, trial judges play the role of an evidentiary "gatekeeper." *Booker v. Sumter Cnty. Sheriff's Off./N. Am. Risk Servs.*, 166 So. 3d 189, 192 (Fla. 1st DCA 2015) (quoting *Daubert*, 509 U.S. at 597). This role ensures experts are held to the same standard in court as they are in the field. *Id.* Yet this gatekeeping function is not meant to replace the adversary system. *Vitiello v. State*, 281 So. 3d 554, 560 (Fla. 5th DCA 2019), *review denied*, No. SC19-2033 (Fla. May 11, 2020). Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional

and appropriate means of attacking shaky but admissible evidence." *Id.* (quoting *Daubert*, 509 U.S. at 596). "These tools remain the 'appropriate safeguards,' and not 'wholesale exclusion,' where the basis for expert testimony meets the standards set forth by the rules of evidence." *Id.*

That said, trial courts enjoy broad discretion as evidentiary gatekeepers. *Booker*, 166 So. 3d at 192. And we will not overturn a trial court's ruling absent an abuse of discretion. *Id.* at 194 n.2. This means we must affirm unless no reasonable person would adopt the trial court's view. *Salazar v. State*, 991 So. 2d 364, 372 (Fla. 2008).

We conclude that the trial court properly excluded Magill's testimony because it failed to satisfy all three *Daubert* requirements. First, Magill's testimony may not have rested on sufficient facts. He relied on an old draft of the statement of particulars and admitted he did not review every transaction. Still, he claims he reviewed every transaction the State provided. Admittedly, this prong is close, but the next two are not.

Even assuming Magill's testimony cleared the first hurdle, Magill did not use a reliable method. Although he claimed to use LIBR—which the State conceded was reliable—Magill created his own method. He applied GAAP and a "reasonableness" test, which, according to him, trumped Bryant's analysis. Yet Magill never explained what this reasonableness test was or why it negated Bryant's analysis. The implication seemed to be that Magill viewed the transactions at issue as leading to a reasonable amount of profits for a business like Newpoint. But Magill could not have used LIBR to reach his conclusion because LIBR is simply a tool to trace commingled funds from point A to point B.

May has not shown that Magill's alternative method is reliable. During the proffer, the trial court repeatedly pressed Magill to clarify his methodology, yet those explanations led to less clarity and more confusion. May cites no authority for Magill's method, and we have found none either. Plus, if the parties needed accounting training just to understand Magill's method, it follows that his testimony would not "assist the trier of fact in understanding the evidence or in determining a fact in issue." *See*

§ 90.702, Fla. Stat. As a result, we find that Magill's testimony was not the product of a reliable method.

Finally, Magill did not apply the method reliably to the facts because he relied on an old statement of particulars and mischaracterized Bryant's analysis. We conclude the trial court did not abuse its discretion in excluding Magill's testimony under the *Daubert* test.

May urges that some of Magill's testimony was still admissible, and thus the court denied him a fair trial by excluding the testimony wholesale. Not so. Essentially, Magill wanted to testify that Bryant's testimony was flawed because it assumed there was fraud. This is a straw man. Bryant never opined whether the transactions were fraudulent. Instead, he showed that money from a certain transaction went to a certain expense; the State relied on other witnesses to prove fraud. Since Magill did not disagree with Bryant about where the money ultimately went, his testimony would not rebut Bryant's. May has not shown that any of Magill's testimony was admissible even outside the *Daubert* context.

At bottom, we affirm because the trial court correctly performed its gatekeeping function in barring Magill's testimony.

III.

Next, May claims the trial court improperly limited Magill's proffer. Again, we review this decision for an abuse of discretion. *Booker*, 166 So. 3d at 194 n.2.

We first address the timeliness of the State's objection.[2] A court may refuse to consider an untimely *Daubert* objection. *Id.* at 193 (citing *Club Car, Inc. v. Club Car (Quebec) Import, Inc.,* 362 F.3d 775, 780 (11th Cir. 2004)). This is because *Daubert* should not act as a "gotcha" trial tactic. *Id.* (citing and quoting *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001)). But the

[2] May does not argue the State waived the objection. Instead, he argues that the timing of the objection limited Magill's proffer.

State's objection was no surprise to May. The State deposed Magill before trial and moved in limine to exclude his reports. As counsel acknowledged, the State had been "pretty upfront" with its concerns about Magill. Still, the State failed to formally object or schedule a hearing until the day Magill was set to testify. The trial court noted its analysis of Magill's testimony was "artificially constrained" by the timing of the objection.

Against this backdrop, we analyze whether the trial court improperly limited the proffer to one hour. "The primary purpose of a proffer is to include the proposed evidence in the record so that the appellate court can determine whether the trial court's ruling was correct." *Fehringer v. State*, 976 So. 2d 1218, 1220 (Fla. 4th DCA 2008). A court commits reversible error when it denies a party's request to proffer relevant testimony since there is no chance for effective appellate review. *Id.* And this issue is subject to a harmless error analysis. *See Mosley v. State*, 91 So. 3d 928, 930 (Fla. 1st DCA 2012).

The time limit was not an abuse of discretion for many reasons. First, the trial court did not refuse May's request entirely. Magill gave enough testimony in the allotted time to allow for sufficient review in this appeal of the admissibility of Magill's testimony under the *Daubert* standard. Second, May did not need a full day for the proffer. May at first told the trial court Magill's testimony would take only two or three hours. He offered no explanation why he suddenly needed a full day. Third, although the trial court stated it was limiting the proffer to one hour, the proffer went well beyond the one-hour time limit. The transcript shows that Magill's testimony took up roughly three hours. Plus, the trial court never cut off the proffer. Rather, it gave defense counsel multiple chances to elicit further testimony from Magill. And the trial court's ruling was without prejudice if the issue needed to be revisited before the defense rested.

Finally, even if the trial court erred by limiting the proffer, May's argument stops short; he fails to show what testimony was left out. Said differently, May has not shown how more time would have made a difference. As discussed, the flaws in Magill's testimony were substantive, so no amount of time would have

changed the outcome. Thus, any error in limiting the proffer was harmless beyond a reasonable doubt.

We conclude the trial court gave May enough time to proffer Magill's testimony. Although the timing of the State's objection was less than ideal, the point of a proffer is to allow for sufficient appellate review. *See Fehringer*, 976 So. 2d at 1220. Magill's proffer did just that. Courts have broad discretion when acting as evidentiary gatekeepers. *Booker*, 166 So. 3d at 192. The trial court did not abuse that discretion here.

IV.

May next argues the trial court improperly excluded financial audit reports despite their relevance to show oversight and lending agreements. Once more, we review under an abuse of discretion standard. *Mosley*, 91 So. 3d at 929.

Evidence is relevant if it tends to "prove or disprove a material fact." § 90.401, Fla. Stat. (2018). Relevant evidence must generally be admitted if it tends to establish a reasonable doubt. *State v. Clements*, 968 So. 2d 59, 60 (Fla. 1st DCA 2007) (citing *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990)). A close call should be resolved in the defendant's favor as long as there is a possibility of the evidence creating a reasonable doubt. *Id.* (citing *Vannier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998)).

The audit reports were not relevant to any material fact. May's own witness admitted the audits would not have detected the alleged fraud. So documentary evidence of the audits is not relevant to disprove fraudulent activity. And May draws no connection from evidence that he loaned money to the schools to any offense alleged by the State. This was not a close call where the tie goes to the runner, so to speak. Thus, the trial court did not abuse its discretion by excluding the reports.

V.

We affirm May's remaining claims without further comment.

AFFIRMED.

ROWE, C.J., and M.K. THOMAS, J., concur.

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

William R. Ponall of Ponall Law, Maitland, and Whitney S. Boan of Whitney S. Boan, P.A., Orlando, for Appellant.

Ashley Moody, Attorney General, and Benjamin Louis Hoffman, Assistant Attorney General, Tallahassee, for Appellee.