FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-2532

GLENDA T. HAMILTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Walton County.
Kelvin C. Wells, Judge.

December 12, 2022

PER CURIAM.

A jury found Appellant guilty of aggravated battery and made the special finding that she caused great bodily harm by discharging a firearm. Appellant argues that she is entitled to a new trial based on the trial court's failure to give a requested jury instruction and the cumulative effect of certain comments the State made during its closing argument. We affirm as to both issues and write to address the second.

I.

Timothy Frymire and Jayda Barrineau drove to visit some friends. While they were standing outside socializing, Appellant emerged from inside a nearby residence. She carried a gun and

asked Frymire if he was going to reimburse her for breaking her car's windshield during an earlier confrontation. Frymire answered negatively. Appellant then fired her gun in the direction of Barrineau's SUV, but the round did not hit the vehicle.

Appellant went back inside the residence before returning with an exercise weight, which she used to smash the windshield of Barrineau's SUV. Barrineau retaliated by dropping the exercise weight on Appellant's cell phone, which Appellant had left unattended. Appellant struck Barrineau with the gun, causing Barrineau's ear to bleed.

Frymire and Appellant then wrestled for control of Appellant's gun. Frymire prevailed. When Appellant lunged at him to try to regain control of the gun, Frymire hit her in the head. Frymire and Barrineau walked toward Barrineau's SUV with the intention of leaving the scene. However, Appellant obtained a second firearm from a nearby onlooker. As Frymire and Barrineau approached the SUV, Appellant fired three shots, all of which struck Frymire in the leg. Frymire fell to the ground.

Appellant stood over Frymire while pointing the second gun at him. She ordered him to return the first gun to her and to beg for his life. Frymire complied. Appellant then allowed Frymire and Barrineau to leave. They went to a nearby hospital, where Barrineau received stiches on her ear and Frymire had surgery to place a rod in his leg. His leg suffered scarring from the shooting.

Barrineau discovered that Appellant posted on Snapchat about the incident. In one video, Appellant boasted about shooting Frymire in the leg three times, pointing a gun to his head, and making him beg for his life. Appellant said:

> You a bitch. I hit you with a gun and I still make you get on the ground and beg for life. Shot you in your leg three times. Made you beg for your shit. Put the gun to your head, bro. Don't fucking try me like no bitch. I'm not scared to shoot nobody, bro. If I go to jail today, bro, it was self-defense all day. . . . I shot you in your leg three times. I spared you. I spared you and made you beg for your life and made you apologize to me.

Appellant's Snapchats included text banners. Among them was the statement, "Yeah, he hit me with a gun in my face but you got shot three times" followed by a sunglasses emoji.

Appellant later surrendered to authorities at the DeFuniak Springs Police Department. In a recorded interview with the Walton County Sheriff's Office, Appellant admitted that she "busted" the windshield of Barrineau's SUV with the exercise weight and that she shot Frymire. Appellant also admitted that she knew the first gun (the one that Frymire wrestled away from her) was unloaded at the time that Frymire had it. However, she maintained that she acted in self-defense because she was afraid that Frymire would hit her again with the unloaded gun. Her account of whether Frymire was moving toward her at the time of the shooting was somewhat ambiguous:

> INVESTIGATOR EMBRY: I got you. Okay. But so your reasoning for shooting him is because he had your gun, right?
>
> THE DEFENDANT: He hit me with it.
>
> INVESTIGATOR EMBRY: Right. When he hit you with the gun?
>
> THE DEFENDANT: Yeah, and he was coming back towards me with my gun again.
>
> INVESTIGATOR EMBRY: Okay. But you knew that the gun was unloaded, correct, because you said it was empty and you had one bullet in your pocket?
>
> THE DEFENDANT: You see how tall he is, right?
>
> INVESTIGATOR EMBRY: Right. Yeah, yeah, I understand. I just want to clarify.
>
> THE DEFENDANT: I understand. He came towards – well, he hit me with the gun first and I was coming

towards – after he hit me (unintelligible), just go. You know what I'm saying?

INVESTIGATOR EMBRY: Yeah.

THE DEFENDANT: He didn't want to give it back (unintelligible). He said you come back to me again, I'll rap you again and so I get the gun and start shooting.

INVESTIGATOR EMBRY: I got you. So that's when you picked the other gun up and started shooting at him?

THE DEFENDANT: Yeah.

Officers found four nine-millimeter shell casings on the ground at the scene of the shooting. FDLE analysis confirmed that Appellant's sweatshirt tested positive for the presence of blood and that both Frymire's and Barrineau's DNA were on the sweatshirt.

Appellant testified at trial. She again made several concessions: the altercation began when Appellant damaged the windshield on Barrineau's SUV, the first gun was not loaded when Frymire had control of it, the only injury Appellant suffered was a cut above her eye, she shot Frymire, and she published her Snapchat videos before surrendering to police. However, she maintained that she acted in self-defense because she feared that Frymire—who previously hit her in the face with the unloaded gun—was advancing toward her to hit her again.

After the jury found Appellant guilty, the trial court sentenced her to thirty years in prison, including a twenty-five-year mandatory minimum term pursuant to section 775.087, Florida Statutes. This appeal followed, in which Appellant contends that the State's closing argument entitles her to a new trial.

II.

The purpose of closing argument is to review the evidence and illuminate the reasonable inferences the jury may draw from that evidence. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Lawyers have "wide latitude" during closing argument. *Merck v.*

State, 975 So. 2d 1054, 1061 (Fla. 2007). Counsel may "argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." *Miller v. State*, 926 So. 2d 1243, 1255 (Fla. 2006).

A new trial is warranted "only in those cases in which it is reasonably evident" that a prosecutor's remarks during closing argument "might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done or in which the comment is unfair." *Darden v. State*, 329 So. 2d 287, 289 (Fla. 1976); *see also Bertolotti*, 476 So. 2d at 134 (cautioning that closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law."). To preserve such a claim for appellate review, trial counsel must contemporaneously object to the prosecutor's allegedly improper comments. *Merck*, 975 So. 2d at 1061. Comments to which trial counsel failed to object "are grounds for reversal only if they rise to the level of fundamental error." *Id.* The appellate court "considers the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial." *Id.*

Appellant first contends that the State erroneously said that an unloaded gun cannot be a deadly weapon. Appellant distorts the State's argument, which was only that Appellant's self-defense claim was weakened by her knowledge that the gun was unloaded:

> [STATE]: And don't forget this too; it's an important point. The gun [Frymire] had wasn't even loaded. He basically had a paperweight at that point. He couldn't shoot –
>
> [DEFENSE]: Objection. Mischaracterization.
>
> THE COURT: The jury will be the one to decide what the facts are.
>
> [STATE]: That weapon could not be shot. He had no bullets. There was not [sic] bullets in it so there was

nothing he could do with it to actually shoot her with it. But she got the [second] gun, came around and shot him.

The State did not suggest that the gun being unloaded was an absolute bar to any claim of self-defense or that an unloaded gun is legally incapable of being a deadly weapon. Instead, the State proposed a reasonable conclusion—that Appellant's use of deadly force in this case was disproportionate to the alleged threat—for the jury to consider based on Appellant's testimony that she knew the gun was unloaded. As such, the court was right to overrule Defense Counsel's objection.

Appellant next complains about the State mentioning that she did not call law enforcement after she shot Frymire. Appellant argues that by doing so, the State shifted the burden of proof to her. Again, Appellant overstates the scope of the State's argument:

> [STATE]: [Appellant] was able to film multiple videos and texts instead of calling law enforcement. If she was really that scared and that concerned about what happened, she could have easily called law enforcement out to the scene there. Instead –
>
> [DEFENSE]: Objection. Burden shifting.
>
> THE COURT: Overruled.
>
> [STATE]: She could have easily called law enforcement if she was able to do Snapchat videos. Instead she left the scene.

The State did not claim that Appellant had a legal duty to call the police. Instead, the State—in rebuttal to Defense Counsel's contention that Appellant was frightened by the shooting—suggested that such fear, if genuine, would have motivated her to contact the police. *See State v. Ling*, 212 So. 3d 530, 533 (Fla. 1st DCA 2017) ("Where defense counsel places an issue before the jury in closing argument, the prosecution is permitted to respond, and the defense may not be granted a new trial because the state 'rose to the bait.'") (quotation omitted). Moreover, it is also fair to suggest that someone who believes she lawfully shot another

person would promptly report the shooting instead of posting on Snapchat and leaving the scene. *See, e.g.*, *Morales v. State*, 251 So. 3d 167, 172 (Fla. 4th DCA 2018) (holding that among other facts, a defendant's failure to "call the authorities" after a shooting allowed the jury to infer that the defendant's claim of self-defense was not credible); *Jacobson v. State*, 248 So. 3d 286, 289 (Fla. 1st DCA 2018) (holding that a defendant's failure to "call 911 or seek medical attention" for the victim that he shot was evidence of the defendant's ill will toward the victim); *Bogart v. State*, 114 So. 3d 316, 318 (Fla. 4th DCA 2013) (holding that in a case where the defendant claimed self-defense, "his refusal to call 911 or the police" after killing the victim was "relevant for the jury to infer consciousness of guilt.").

Finally, Appellant alleges that the State shifted the burden of proof by maintaining that its witnesses were "honest," "straightforward," and "truthful." Appellant concedes that Defense Counsel did not object to these comments.

In making these credibility arguments, the State never claimed that the standard of proof to obtain a conviction was merely which side's version of events was more believable. The prosecutor also never said that he *personally* found the State's witnesses to be forthright. *See Jackson v. State*, 89 So. 3d 1011, 1018 (Fla. 4th DCA 2012) (noting that "it is improper for an attorney to express a personal opinion as to the credibility of a witness," and explaining that such improper vouching occurs when a prosecutor tethers his credibility arguments to matters outside the record) (quotation omitted).

Instead, the State argued that based on the evidence presented at trial, its witnesses were credible, whereas Appellant was not. *See, e.g., id.* at 1019 ("Contrary to Jackson's arguments, the prosecutor was not expressing her own opinion on Dingle's credibility; rather, she was explaining why the jury should believe Dingle was a credible witness based on the evidence."). This is a conventional, unremarkable assertion that is well within the lawful scope of closing argument (and certainly does not rise to the level of fundamental error). *See Miller*, 926 So. 2d at 1255 (establishing that counsel may "argue [the] credibility of witnesses"). Indeed, Defense Counsel offered a competing

assessment of the State's witnesses during his closing argument when he twice said that the State's witnesses were "really bad."

III.

In sum, Appellant cannot show that the cumulative effect of any of the State's comments during closing argument violated her right to a fair trial by inflaming or prejudicing the jury against her. *See Merck*, 975 So. 2d at 1061; *Bertolotti*, 476 So. 2d at 134; *Darden*, 329 So. 2d at 289. Because Appellant has failed to demonstrate reversible error, we affirm her judgment and sentence.

AFFIRMED.

B.L. THOMAS, ROBERTS, and JAY, JJ., concur.

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

Jessica J. Yeary, Public Defender, and Ross Scott Haine II, Assistant Public Defender, Tallahassee, for Appellant.

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