NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SEAN McSWEENEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-2217

Opinion filed December 13, 2019.

Appeal from the Circuit Court for Polk County; Mark F. Carpanini, Judge.

Howard L. Dimmig, II, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Helene S. Parnes, Senior Assistant Attorney General, Tampa, for Appellee.

SILBERMAN, Judge.

Sean McSweeney appeals the probation order that withholds adjudication and places him on probation for (1) attempted deriving support from proceeds of prostitution; (2) possession of synthetic cannabinoids, cathinones, or synthetic phenethylamines; and (3) possession of drug paraphernalia. Because the trial court

erred in allowing a detective's testimony regarding his opinion on what a statement by McSweeney meant and the State has failed to establish that the error was harmless, we reverse and remand for a new trial.

Detective Gonzalez was working undercover with the vice unit which does prostitution stings when he responded to an ad on the website backpage.com. Adults would post ads for various types of services on the website, but the website was also used for human trafficking to facilitate females meeting males for sexual intercourse. The detective responded to an ad listed under Orlando dating, woman seeking men, and he then communicated via a number of text messages and phone calls with Kiana Herron. They did not speak specifically about sex, but she agreed to come and meet Detective Gonzalez. She stated that her "hour is a hundred" and that he would have to pay for gas. She later stated that she would need a little more because it was almost a two-hour drive. In another text she referred to her driver (who turned out to be McSweeney). In a call regarding trouble finding the address, she told the detective that it would be 250 because she had to give her driver 50. The detective heard her talking to the driver and asking him how much he wanted.

Herron arrived at the detective's location and went to the door. McSweeney was walking up to the door when Herron said that he wanted the gas money. The detective said that he would not pay until he was done. McSweeney got to the door and said he wanted half the money. The detective said he would not pay up front. McSweeney then said, "[G]ive me half, you feel me. She can go in and do her thing." The detective did not give McSweeney any money. McSweeney went back to

the car, and the detective went inside with Herron. She was arrested after she agreed to have sex for money.

On cross-examination, the detective admitted that he did not tell McSweeney that he planned to have sex with Herron or that it was a prostitution operation. On redirect examination, the prosecutor asked, "Based on your training and experience, when he says, she can go in and do her thing, what do you interpret that to mean?" The defense objected based on "speculation as to what the statement means." The trial court overruled the objection and the detective responded, "To me, it was my understanding that he knew why she was here." After eliciting that the detective had done "lots" of undercover prostitution operations, the prosecutor again asked, "And she can go in and do her thing, what does that mean based on your training and experience?" The trial court again overruled the defense objection based on speculation. The detective answered, "That means she can go in and have sex with me."

When McSweeney was later arrested, narcotics and paraphernalia were found on his person. In a postarrest interview with Detective Stroud, McSweeney said that Herron offered him money for gas to take her to see a friend. He did not know what Herron did for work and thought she was unemployed. He met her at the pool at the hotel where he was staying. Detective Stroud told McSweeney that Herron had already told law enforcement that she was there for prostitution. McSweeney said, "Well, I would guess, you know, that that's what's going on but—" Detective Stroud interjected and then said that McSweeney would not get Herron in trouble because "she already said what she was doing." McSweeney said, "I don't know, you know. She was going

to see a friend and she was going to give me money, you know. I was in the conversation for the ride." McSweeney said he went to the door and asked for money because he had driven all that way. He said, "I ain't know as far as what they have going on behind closed doors. Like you said, I'm not about that."

On appeal, McSweeney argues that the trial court erred by allowing Detective Gonzalez to speculate as to what McSweeney meant when he said that "she can go in and do her thing." He argues that the detective's response that he took it to mean "she can go in and have sex with [him]" invaded the province of the jury by giving his opinion on an ultimate element that the State had to prove beyond a reasonable doubt.

McSweeney was convicted of attempted deriving support from proceeds of prostitution. The completed crime is defined as follows: "It shall be unlawful for any person with reasonable belief or knowing another person is engaged in prostitution to live or derive support or maintenance in whole or in part from what is believed to be the earnings or proceeds of such person's prostitution." § 796.05(1), Fla. Stat. (2017). The element at issue is whether McSweeney had a reasonable belief or knew that Herron was engaging in prostitution.

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion; however, that discretion is limited by the rules of evidence and relevant case law. See Hayward v. State, 183 So. 3d 286, 325 (Fla. 2015). A lay witness is generally not permitted to "testify about their subjective interpretations or conclusions as to the meaning of another person's statements." Jones v. State, 95 So. 3d 426, 429 (Fla. 4th DCA 2012) (citing Thorp v. State, 777 So. 2d 385, 395-96 (Fla

2000)). Although the evidence rules permit a witness to interpret "coded conversations," witness testimony that interprets clear conversations does not aid the jury, and such testimony is inadmissible. Id. Rather than a witness, it is the jury that should draw any inferences from a defendant's statements. Id. (citing Thorp, 777 So. 2d at 395-96).

In Thorp, an inmate who had been housed with the defendant testified regarding a statement that the defendant made. 777 So. 2d at 388. The witness testified that the defendant said "that he and another man 'took a hooker down by the bridge and did her.' " Id. The defendant said that he expected to be blamed for her murder. Id. The witness interpreted "did a hooker" to mean that the defendant killed her. Id.

The Florida Supreme Court determined that the trial court erred in allowing the witness to testify regarding what he believed the defendant's statement meant. Id. at 395. The court explained that the jury should have been allowed to draw any inferences from the testimony that the defendant "did a hooker" and that "there was no need to resort to testimony concerning [the witness's] interpretation of [the defendant's] words." Id. at 395-96.

In Jones, a detective was allowed to interpret the meaning of a defendant's statement made during an interrogation. 95 So. 3d at 427. The detective opined "that the reason [the defendant] said he was in another location was because he knew where the robbery took place." Id. at 429. Although "the detective did not offer an ultimate opinion regarding [the defendant's] guilt, the officer's testimony as to her interpretation of the interrogation improperly bolstered the state's case and was

inadmissible." Id. The officer's testimony was not necessary to interpret "any 'coded' words." Id. Thus, any interpretation should have been left to the jury. Id. at 430.

Similar to the situations in Thorp and Jones, there was no need for Detective Gonzalez to interpret any coded words. This is in contrast to a situation dealing with, for example, drug sales where an officer testifies to a street name for a drug. Here, the jury heard that when McSweeney came to the door he asked for half the money up front and said, "She can go in and do her thing." By allowing Detective Gonzalez to testify that it meant "she can go in and have sex with [him,]" it usurped the jury's function to determine the ultimate fact of whether McSweeney knew or had a reasonable belief that Herron was attempting to engage in prostitution. The detective's testimony that "do her thing" meant have sex with him turned McSweeney's statement into an admission that he knew Herron was there to have sex with the detective.

The State acknowledges that Thorp and Jones prohibited opinion testimony that interpreted a defendant's statements but argues that the opinion testimony was invited by the defense. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990) (determining that a witness's comment was not "invited" by the defense when "it was unresponsive to defense counsel's question").

The State cites to cases such as Mese v. State, 824 So. 2d 908 (Fla. 3d DCA 2002), to support its argument that any error was invited by the defense. However, in Mese, the challenged testimony was given in response to questioning by defense counsel, and the Third District determined that the defense invited the error. Id. at 916; see also Louidor v. State, 162 So. 3d 305, 311 (Fla. 3d DCA 2015) (determining

that error was invited when the defense stipulated to the admission of the evidence and relied on it); Buggs v. State, 640 So. 2d 90, 91 (Fla. 1st DCA 1994) (concluding that error was invited as the testimony was responsive to defense counsel's questioning). Here, defense counsel did not ask the question and did not invite the error. In fact, defense counsel objected to the State's question before the detective answered.

The State also argues that any error was harmless. We cannot agree. The comment by the detective told the jury that McSweeney knew that Herron went inside to engage in prostitution. The State has the burden to prove harmless error beyond a reasonable doubt, and it must demonstrate "that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. . . . The focus is on the effect of the error on the trier-of-fact. . . . The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Tolbert v. State, 154 So. 3d 1141, 1143 (Fla. 2d DCA 2014) (quoting DiGuilio, 491 So. 2d at 1139). Focusing on the effect of the error on the jury, the State did not meet its burden when a detective essentially testified that the State proved an element of the crime that was at issue.

Therefore, we reverse the order withholding adjudication and the sentences of probation and remand for a new trial in which the detective is not permitted to interpret the statement at issue.

Reversed and remanded.

MORRIS, J. Concurs.

LUCAS, J., Dissents with opinion.

LUCAS, Judge, Dissenting.

Mr. McSweeney drove a woman he met at a Days Inn hotel in Orlando to another hotel room in Polk County. During the drive, his passenger asked over the phone "This is not a setup or anything, right? You're not the police or anything like that?" When they arrived, Mr. McSweeney told an undercover detective to "give me half" of the money and then his passenger "can go in and do her thing." Allowing the detective to briefly tell the jury what he understood that latter statement to mean based upon his training and experience was not an abuse of the trial court's discretion under the facts of this case. Nor do I think it came anywhere near the severity (or the potential for different interpretations) of the statement that confronted the Florida Supreme Court in Thorp v. State, 777 So. 2d 385, 395-96 (Fla. 2000). The detective did not "essentially testif[y] that the State proved an element of the crime that was at issue." Mr. McSweeney's statement had already been admitted without objection (along with a not inconsiderable amount of other circumstantial evidence that proved his "reasonable belief or knowing," § 796.05(1) Fla. Stat. (2017), that his driving companion was engaged in prostitution). And regardless of whether "go in and do her thing" was common parlance, colloquial slang, or coded conversation for a prostitute having sex, I

am certain that calling it what it clearly was would have been harmless in this case.

Therefore, I respectfully dissent.