MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Fredrick R. Dees, II,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

March 28, 2024

Court of Appeals Case No.
23A-CR-1605

Appeal from the Brown Circuit Court

The Honorable Mary Wertz, Judge

Trial Court Cause No.
07C01-2203-F1-122

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

[1] Fredrick R. Dees, II, appeals his convictions for burglary and aggravated battery. He claims the admission of certain testimony constituted fundamental error, the evidence is insufficient to sustain his convictions, and the prosecutor committed misconduct during closing argument which resulted in fundamental error. We affirm.

Facts and Procedural History

[2] On March 10, 2022, Joshua Wilborn and Dees had a "fight" concerning "some type of disrespect" where Wilborn was not responding to Dees, Wilborn told Dees not to disrespect him, and Dees pulled out "a great big sword and slashed [Wilborn's] buddy's tires and then went running down the road." Transcript Volume III at 151. Wilborn texted Dees and told him he was a "b---- for running away," they exchanged text messages, and Dees told Wilborn "he was going to f--- [his] world up." *Id.* at 152.

[3] On March 20, 2022, Dees told Christina Gilvin, whom he knew through mutual friends and had been staying with for less than two weeks, that he was heartbroken over his ex, Brandy Couch. At some point, Dees asked Gilvin about flares, and she told him to ask Jason.

[4] On the night of March 20, 2022, Wilborn partied and "did some meth." *Id.* at 155. On March 21, 2022, Dees asked Gilvin to drive him to his mother's house to obtain clothes to leave town "after he got his paychecks." *Id.* at 211. After stopping at the home of Dees's mother, Gilvin drove him to "[s]omewhere with

a lot of junk" where Dees "went off" with a "tall guy," and she thought she heard gunshots. *Id.* at 212-213. Gilvin also drove Dees to Couch's house and then drove him to "[t]he Fruitdale house on 135." *Id.* at 214. Gilvin parked in the driveway, played with her radio, and texted her children. Dees exited the car.

[5] That same afternoon, Wendy East woke up Wilborn at his residence on State Road 135 and told him someone was at the door. Wilborn went to the door to "see who was kicking on it and banging on it." *Id.* at 155. He observed a maroon Buick with a driver in it who "just turned around." *Id.* Wilborn then observed someone walk past his kitchen window. He observed Dees, who was wearing a hoodie and a black bandana on his face, lean through the window and point a double-barreled shotgun at him. Dees then shot Wilborn twice. Wilborn said: "[W]hy are you shooting me for, dude? We're homies. Why are you trying to killing me for?" *Id.* at 157. Dees broke the barrel down, "locked it back down and pulled a third time." *Id.* When Dees reloaded the shotgun, his mask or bandana fell down. Wilborn's "arm dropped" and he was in pain, and Dees shot him in the back. *Id.* Dees also "pulled up the other shotgun and tried to shoot [him] with some boat flares." *Id.* at 158. When Dees started to walk away and pulled his mask back up, he stated: "[T]hat was for Brandy." *Id.* at 159.

[6] Meanwhile, Gilvin thought she heard two shots and thought: "Oh, s---, I got to get out of here." *Id.* at 216. She looked up and "couldn't see really anything but the side of the building and [Dees's] rear end." *Id.* Gilvin "went back out

slowly" and "[i]n the middle of [her] three-point turn," Dees came to the door of her car with a shotgun in his hand. *Id.* at 218. When Dees opened the door, Gilvin heard screaming. When Dees entered the car, he said "a lot of, 'Oh, s----.'" *Id.* at 219. Gilvin drove away and said: "We got to separate. You got to get out of my car." *Id.* at 220. Dees threw his phone out of the window.

[7] A call regarding a male shot by a someone was made at 2:57 p.m., and Brown County Sheriff's Sergeant Austin Schonfeld arrived at the scene at 3:02 p.m. Brown County Sheriff's Sergeant William Pool also responded to the scene. Sergeant Schonfeld walked into the living room and kitchen area and observed approximately three ash piles. He walked to the bedroom and observed Wilborn's right arm "basically just hanging on by flesh," an injury to his right shoulder, and burn marks to his lower back. *Id.* at 116. Wilborn stated that he had been shot by "Rob Dees." *Id.* at 127. Sergeant Schonfeld found some shell casings next to a kitchen window "that had been punched out." *Id.* at 117.

[8] Brown County Sheriff's Chief Deputy Paul Henderson arrived at the scene. While Wilborn was on a stretcher, Chief Deputy Henderson asked Wilborn who shot him, and Wilborn said "Rob Dees" and that "it was over Brandy." *Id.* at 235. He also obtained a search warrant for J.P. Bock's residence, which had "[a] lot of junk," where he showed the warrant to Bock. Transcript Volume IV at 15. Bock then showed him the ends of flare casings and an area

where he said Dees had fired a flare round.[1] Chief Deputy Henderson compared the flare casings collected at the site where Wilborn was shot to the casings collected at Bock's property and determined that they all shared the same brand, lot number, and expiration date.

[9] Brown County Sheriff's Detective Brian Shrader obtained a video recording from a neighbor, obtained a vehicle image from the video, and obtained a name connected with that vehicle through a confidential source which led him to Gilvin. On March 22, 2022, Detective Shrader contacted Gilvin who told him that she had been at the scene, she drove Dees, she dropped him off there, and then he returned to her car. While he was speaking with Gilvin, she answered a phone call from Dees and gave Detective Shrader one of her earbuds so he could listen to the call. During the call, Dees asked her if she had heard anything and said: "Don't worry. The cops are looking for a black car. They're not looking for us. . . . Don't say s---." Transcript Volume III at 201.

[10] On March 25, 2022, the State charged Dees with: Count I, burglary as a level 1 felony; Count II, aggravated battery as a level 3 felony; Count III, battery by means of a deadly weapon as a level 5 felony; and Count IV, battery resulting in serious bodily injury as a level 5 felony.

[11] In April 2022, law enforcement arrested Dees in a trailer owned by Chelsea McPeek and discovered shotgun shells beside a backpack of which Dees

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[1] At trial, Chief Deputy Henderson testified that Bock was deceased.

claimed ownership. Inside the backpack, law enforcement discovered a shotgun cleaning kit and a newspaper article about "the burglary that began this case." Transcript Volume IV at 39. They also discovered a "pistol-grip-style shotgun" wrapped in a pair of sweatpants on the top shelf of a closet. *Id.*

[12] In March 2023, the court held a jury trial. The State presented the testimony of multiple witnesses including Sergeant Schonfeld, Sergeant Pool, Wilborn, Detective Shrader, Gilvin, and Chief Deputy Henderson.

[13] Gilvin testified that when Dees entered the vehicle he said: "I just meant to scare him" and "I didn't mean to hurt him." Transcript Volume III at 219. She also testified that Dees stated that he did not know "there was a . . . live round in there." *Id.* at 220.

[14] Wilborn testified that he remembered four shots and Dees loading the shotgun with two yellow shells. He stated that his arm was shot and he tried to "catch most of the . . . shooting in my arm because I knew that was the only way I could save my life because he was definitely trying to kill me." *Id.* at 161. When asked if he still had "shot from the shot in [his] arm and back," he answered: "Yeah. On every X-ray you could see there's hundreds and hundreds of pellets all inside." *Id.* at 163. When asked on cross-examination if he believed Dees was friendly with Alexandria, the mother of his children, he answered affirmatively. When asked how that made him feel toward Dees, he stated: "I [sic] don't really bother me because she has contact with several other people." *Id.* at 183. He also indicated that the shooter pushed a double-

barreled shotgun through the screen and shot two times, reloaded, shot two more times, and then used a pump action black shotgun, a flare "[w]ent off inside of the barrel," the shooter flicked it at him, loaded another shot, fired another flare that came out of the barrel but "not very far," and then shot two more flares. *Id.* at 185-186. He indicated there were eight total shots including four flares. He also testified that he had sexual relations with Couch between the time he "squared off" with Dees on March 10th and the time he was shot on March 21st. *Id.* at 154.

[15] On cross-examination, Chief Deputy Henderson indicated that Gilvin described the shotgun as having a wooden stock, she said she saw Dees ditch his phone, and she initially did not say she heard any shots when she was at the location on State Road 135. He also testified that the shotgun retrieved from the trailer contained slugs and not flares, there was no birdshot in the gun, and the retrieved shells were red and gray.

[16] After the State rested, Dees presented the testimony of Couch. She testified that she had known Dees for about ten years, she had a relationship with him at some point, and she had been to Wilborn's residence on March 10, 2022. She stated that Dees arrived that day and they argued "because he thought that [she] had other places that [she] should have been," Wilborn told them they could stay if they quit arguing, and she left. Transcript Volume IV at 228. She also testified that she did not have sexual relations with Wilborn.

[17] During closing argument, defense counsel argued that Gilvin told Chief Deputy Henderson that she saw a gun with a wooden stock and "the gun that we have seen did not have a wooden stock" and "[t]here's a lot we don't know." Transcript Volume V at 32. He also argued: "[I]s . . . he/she/it coming out the back door or coming from around the window on the north side. Is it the shooter? We simply don't know." *Id.* at 40. During the prosecutor's rebuttal argument, he made a number of statements without objection. Specifically, he argued: "I believe a fourth shot was fired, birdshot, and I believe that – with the gun; that's what I believe. We don't have to prove any of that." *Id.* at 44. He stated: "As he's cowering getting shot in broad daylight in his own home, giving you a reasonable theory as to what we believe happened." *Id.* at 45. He also stated: "Remember, we have the burden. We know it's Dees. We tried everything to present the best case we could. And Detective Henderson followed down every lead that he could to bring you everything we had, whether it was beneficial or not." *Id.* at 48.

[18] The jury found him guilty as charged. The court found double jeopardy precluded the entry of judgments of conviction on Counts III and IV, entered judgments of conviction on Counts I and II, and sentenced Dees to consecutive sentences of thirty-five years for Count I and thirteen years for Count II.

Discussion

I.

[19] Dees argues that he was denied his fundamental right to a fair trial because no objection was made to the State's introduction of hearsay evidence. He asserts that "[n]o objection was made to the State's introduction of Bock's out-of-court statements, and Bock did not testify." Appellant's Brief at 25. He argues that Chief Deputy Henderson related a number of statements made by Bock including that Dees "had been there and shot some flares" and "Bock's statements were the only ones connecting Dees with flare rounds." *Id.* at 25-26. He asserts that "[t]hey likely would not have been admitted over objection. But no objection was made." *Id.* at 26. He asserts "that flare rounds were used was a prominent feature of the State's case throughout the trial and during final argument." *Id.* He contends that "[a]dmission of Bock's statements is fundamental error and apparent on the face of the record, it resulted in grave peril to Dees" and "[i]t should have been prevented by trial counsel but it was not."[2] *Id.*

[20] Generally, we review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Roche v. State*, 690 N.E.2d 1115, 1134 (Ind.

[2] Dees phrases his first issue as: "Whether [he] was denied his fundamental right to a fair trial because an objection or motion for mistrial was not made in response to the prosecutor's improper statements of personal belief during the State's closing argument, and no objection was made to the State's introduction of hearsay evidence." Appellant's Brief at 4. In his argument section under the heading for the first issue, he argues fundamental error related to the alleged prosecutorial misconduct during closing argument as well as the admission of Chief Deputy Henderson's testimony related to Bock's statements. He asserts that his argument regarding the prosecutor's closing argument and the evidence related to Bock's statements "is presented in the framework of fundamental error and not ineffective assistance of counsel." Appellant's Brief at 20. Thus, we do not address whether Dees's counsel was ineffective. The State argues that Dees improperly combined his prosecutorial misconduct claim with his admission of evidence claim, and the State addresses the issues separately.

1997), *reh'g denied*. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*. Failure to timely object to the erroneous admission of evidence at trial will procedurally foreclose the raising of such error on appeal unless the admission constitutes fundamental error. *Stephenson v. State*, 29 N.E.3d 111, 118 (Ind. 2015). The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible. *Boatright v. State*, 759 N.E.2d 1038, 1042 (Ind. 2001).

[21] The record reveals that Dees did not object to Chief Deputy Henderson's testimony regarding Bock's statements. The record also reveals that Gilvin testified that Dees asked her about flares. Wilborn testified that Dees "tried to shoot [him] with some boat flares." Transcript Volume III at 158. Chief Deputy Henderson testified that flare casings were collected at the site where Wilborn was shot. We cannot say that Chief Deputy Henderson's testimony related to Bock's statements to him resulted in fundamental error or made a fair trial impossible.

II.

[22] Dees argues that the identity of the shooter was at issue, Gilvin described to Chief Deputy Henderson seeing what she thought was a shotgun with a wooden grip, and the grip on the gun found with him was not made of wood. He asserts the only person who claimed to be able to identify the shooter was Wilborn but his account of the shooting did not match the physical evidence.

Specifically, he asserts that Wilborn claimed "a total of eight shots were fired – four with a double barrel shotgun and four with a pump action shotgun – and four of those shots were flare rounds." Appellant's Brief at 27. He asserts that the "[p]hysical evidence supported a conclusion that, at most, only four were fired." *Id.* He argues that Wilborn testified that the shooter ejected two rounds from the double barrel and reloaded it with yellow shells but only three red flare casings were found. He contends that "Henderson said it looked like Wilborn had been shot with birdshot, but no shot casings were found at the scene." *Id.* at 27-28 (citation omitted). He asserts the statements he allegedly made to Gilvin did not foreclose the possibility of an accident. He also cites the incredible dubiosity rule with respect to Wilborn's testimony.

[23] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. We look to the evidence and the reasonable inferences therefrom supporting the verdict. *Id.* We will affirm the conviction if evidence of probative value exists from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. *Id.*

[24] Ind. Code § 35-43-2-1 provides that a person who breaks and enters the building or structure of another person, with intent to commit a felony or theft in it, commits burglary, and the offense is a level 1 felony if the building or structure is a dwelling and it results in serious bodily injury to any person other than a defendant. Ind. Code § 35-42-2-1.5 provides that a person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or

causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ commits aggravated battery as a level 3 felony.

[25] Identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. *Cherry v. State*, 57 N.E.3d 867, 877 (Ind. Ct. App. 2016), *trans. denied*. Identification testimony need not necessarily be unequivocal to sustain a conviction. *Id.* Inconsistencies in identification testimony impact only the weight of that testimony because it is the task of the trier of fact to weigh the evidence and determine the credibility of the witnesses. *Gleaves v. State*, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether identification evidence is sufficient to sustain a conviction. *Holloway v. State*, 983 N.E.2d 1175, 1178 (Ind. Ct. App. 2013).

[26] To the extent Dees asserts the incredible dubiosity rule requires reversal, we note that this rule applies only in very narrow circumstances. *See Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). The rule is expressed as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id. (citations omitted).

[27] Dees fails to show that the testimony of Wilborn was inherently contradictory or so inherently improbable that no reasonable person could believe it. The record reveals that Wilborn identified Dees as the shooter and that Dees's "face mask kept falling off." Transcript Volume III at 158. During direct examination of Wilborn, the following exchange occurred:

> Q . . . Can you identify the man that shot you through your kitchen window on March 21st of 2022?
>
> A Yeah, 1,000 percent.
>
> Q And who was that?
>
> A Fredrick Robert Dees sitting right there.
>
> Q And how sure are you that the shooter was Fredrick Robert Dees?
>
> A Beyond a shadow of a doubt.

Id. at 171-172.

[28] During direct examination, Sergeant Pool testified that Wilborn mentioned that he had been shot by "Rob Dees." *Id.* at 127. The prosecutor asked: "And do you recall asking him a question to make sure that he knew it was Rob Dees?" *Id.* Sergeant Pool answered: "Yeah, just to clarify. Are you sure? Did you see him? He said, yes." *Id.* The court also admitted bodycam video in which Wilborn asserted that he had been shot by Dees. Gilvin testified that she drove

Dees to "[t]he Fruitdale house on 135," Dees exited the car, and she thought she heard a shot. *Id.* at 214.

[29] To the extent there is any conflict between Wilborn's testimony regarding the number of shots fired and other evidence, this is an issue of witness credibility, and we do not assess witness credibility or reweigh the evidence. *See Jordan*, 656 N.E.2d at 817. Based upon our review of the evidence as set forth above and in the record, we conclude the State presented evidence of a probative nature from which a trier of fact could find beyond a reasonable doubt that Dees committed the charged offenses.

III.

[30] Dees argues that he was denied his fundamental right to a fair trial because an objection or motion for mistrial was not made in response to the prosecutor's improper statements or personal belief. Dees points to the prosecutor's following statements during the final rebuttal argument: "I believe a fourth shot was fired, birdshot, and I believe that – with the gun; that's what I believe," Transcript Volume V at 44, "[a]s he's cowering getting shot in broad daylight in his own home, giving you a reasonable theory as to what we believe happened," *id.* at 45, and "[w]e know it's Dees." *Id.* at 48. He contends that the prosecutor's statements vouch for the veracity of Chief Deputy Henderson's opinion that the items recovered from Wilborn during surgery were birdshot and the testimony of Wilborn and Chief Deputy Henderson that Wilborn

blocked a shot with his arm. He argues that the prosecutor's assertion that he knew he was the shooter was a personal opinion about his guilt.

[31] In reviewing a properly preserved claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct and, if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id.*

[32] The Indiana Supreme Court has held that "a prosecuting attorney may not state his personal beliefs in closing argument." *Miller v. State*, 623 N.E.2d 403, 407 (Ind. 1993) (citing *Lopez v. State*, 527 N.E.2d 1119 (Ind. 1988)), *reh'g denied*. Expression of a personal opinion is not improper where the prosecutor is commenting on the credibility of the evidence as long as there is no implication that he had access to special information outside the evidence presented to the jury and that such outside information convinced the prosecutor of the guilt of the accused. *Id.* at 408.

[33] When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. *Cooper*, 854 N.E.2d at 835. If the party is not satisfied with the admonishment, then he or she should move for mistrial. *Id.* Failure to request an admonishment or to move for mistrial results in waiver. *Id.* Dees did not request an admonishment or a

mistrial. Where a claim of prosecutorial misconduct has not been properly preserved, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. *Id.* Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. *Id.* It is error that makes a fair trial impossible or constitutes clearly blatant violations of basic and elementary principles of due process presenting an undeniable and substantial potential for harm. *Id.* We presume the jury followed the trial court's instructions and applied the law to the evidence. *Fox v. State*, 997 N.E.2d 384, 390 (Ind. Ct. App. 2013), *trans. denied*.

[34] The trial court instructed the jury that "[y]ou are the exclusive judges of the evidence which may be either witness testimony or exhibits," and "[s]tatements made by the attorneys are not evidence." Transcript Volume V at 55, 57. With respect to Dees's argument regarding the prosecutor's statement mentioning birdshot, during direct examination of Chief Deputy Henderson, the prosecutor referenced State's Exhibit 5, a photograph of Wilborn's lower arm, and asked: "[D]o you see what appears to be evidence of either buck or birdshot on there?" Transcript Volume IV at 211. Chief Deputy Henderson answered: "Yes, I do." *Id.* He also stated: "So here you see the darker stippling. All these little dark marks are consistent with birdshot, just like was in that last round that I fired, which spread out some." *Id.* The prosecutor referenced State's Exhibit 4 and asked if he saw "similar-looking birdshot indications," and he answered affirmatively. *Id.* at 212. The prosecutor's comment was a comment on the

evidence. With respect to the prosecutor's other arguments, we cannot say they resulted in fundamental error or made a fair trial impossible.

[35] For the foregoing reasons, we affirm Dees's convictions.

[36] Affirmed

Riley, J., and Foley, J., concur.

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