NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

ADAM LAWRENCE CATON
Appellnt,

v. Appeal No. CRC 12-00056APANO
UCN: 522012AP000056XXXXCR

STATE OF FLORIDA
Appellee.
_____/

Opinion filed November 18, 2013.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Dorothy Vaccaro

Walter L. Grantham, Jr., Esquire
Attorney for Appellant

Shawn N. Crane, Esquire
Assistant State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Adam Lawrence Caton's, appeal from a conviction, after a jury trial, of Driving Under the Influence. Appellant argues the State Attorney engaged in improper burden shifting in rebuttal closing

argument and his Motion for Mistrial should have been granted. After review of the record and the briefs, we affirm.

Background

The Appellant was charged by Misdemeanor Information with Driving Under the Influence of a controlled substance. On the morning of the trial, the Assistant State Attorney filed and argued a Motion in Limine that sought, in part, first, to not allow any reference to Mr. Caton's post-Miranda statements made to police that he had a prescription for the Xanax he had just admitted to them that he had taken. The state argued such statements were "self-serving." Secondly the State argued there should be no introduction of any written prescription for any controlled substance because no such prescriptions had been discovered to the state and such prescriptions "would constitute inadmissible hearsay unless a records custodian witness is able to establish the prescriptions as a business record." In arguing the motion the State Attorney stated he never received a copy of a prescription. Defense counsel responded that she had handed an exact copy of the prescription she was holding to another Assistant State Attorney at an earlier hearing. Defense counsel then conceded she did not have a records custodian to admit the written prescription and would not seek to do so. At the end of the arguments on the motion the trial court ruled Mr. Caton's post-Miranda statements made to police that he had a prescription would be allowed into evidence through the rule of completeness. However no written prescription would be admitted into evidence as defense counsel had no doctor.

During the trial, in the prosecution case, the State Attorney presented the testimony of one of the involved police officers that, post-Miranda, Mr. Caton said he

had taken .5 milligrams of Xanax, and later also admitted that he had taken a Xanax bar that night. During cross-examination that officer also testified Mr. Caton, post-Miranda, had stated that he had a prescription for the Xanax.

In the prosecution's initial closing argument, the Assistant State Attorney argued generally that consuming Xanax was the basis of the DUI prosecution of Mr. Caton. In part, the State argued:

> This case represents the new face of DUI when it comes to controlled substances impairing someone's normal faculties and their ability to drive a vehicle. …
>
> He was driving that way because he was impaired by Xanax. …
>
> And that's what this Defendant told the officer: I took Xanax. …
>
> Now, specifically, the Defendant stated that he took his Xanax, took 0.5 milligrams as prescribed, but then later as they're waiting for the transport, he tells the officer that he had a bad day so he took a whole bar. A whole bar of Xanax, and he hadn't taken it in about a month. …
>
> [T]here's no reasonable doubt that he was under the influence of Xanax and he was impaired that night when he was driving.

In response, Mr. Caton's trial counsel in her closing argument, mentioned *prescription medication* three times:

> There is a urine sample that tests positive for Xanax. Essentially, that's what it is. We already know that Mr. Adam Caton admitted to taking a *prescription* for Xanax. So we knew that there was going to be a urine result with it. That urine is not quantified; we don't know how much of the Xanax is in his system. …
>
> We have evidence of a *prescription medication* and Mr. Adam Caton admitting openly and honestly that he took it. …
>
> If they want to say he is so impaired by *prescription medication*, I submit to you where is the quantification of this urine to tell you how much exactly of the Xanax is in his system?

These arguments of Mr. Caton's trial counsel were directed to trial testimony from prosecution witnesses.

After that, in the prosecution's rebuttal closing, the Assistant State Attorney responded presenting arguments about the evidence presented and then stated:

> Now, let's talk just for a moment about some of the things that the Defense brought up in her closing. Now, you -- you heard I can't even count how many times today about a prescription for Xanax. And in her closing, the Defense just told you, Yeah, that the -- that this Defendant was -- had a -- had a valid prescription for Xanax. She stood before you and told you that. …
>
> But do you know what you never did hear today? Do you know what you aren't going to get a chance to take a -- take back to that jury room is an actual prescription.

Mr. Caton's trial counsel immediately objected and moved for a mistrial arguing the State's comments amounted to burden shifting. During the ensuing argument, the trial court instructed the State Attorney to make no further such comments; to do so would be burden shifting. "You're putting it on them to show something … they have no obligation in our … constitution to do." The trial court stated it would not give a curative instruction.[1] The motion for mistrial was denied.

Among the instructions on the law given to the jury after the closing arguments was the following:

> To overcome the Defendant's presumption of innocence, the State has the burden of proving the crime with which the Defendant is charged was committed and the Defendant is the person who committed the crime. The Defendant is not required to present evidence or prove anything. …
>
> The Constitution requires the State to prove its accusations against the Defendant. It is not necessary for the Defendant to disprove anything. Nor is the Defendant required to prove his innocence. It is up to the State

[1] A trial court has the discretion not to give a curative instruction if it believes that doing so would draw further attention to the improper comment. *See Salazar v. State*, 991 So.2d 364, 372 (Fla. 2008); *Israel v. State*, 837 So.2d 381, 389 (Fla.2002).

to prove the Defendant's guilt by evidence.

The jury returned a verdict of guilty.

Standard of Review

Given the circumstances of the present case, the appropriate standard of review is harmless error. *See State v. DiGuilio,* 491 So.2d 1129, 1134 -1137 (Fla. 1986); *Jackson v. State,* 575 So.2d 181, 188 (Fla.1991); *Evans v. State*, 26 So.3d 85, 91 -92 (Fla. 2nd DCA 2010); *Ealy v. State,* 915 So.2d 1288, 1291 -1292 (Fla. 2nd DCA 2005); *Miele v. State*, 875 So.2d 812, 814 -815 (Fla. 2nd DCA 2004); *Rodriguez v. State,* 27 So.3d 753, 757 (Fla. 3rd DCA 2010); *Hill v. State*, 980 So.2d 1195, 1199 (Fla. 3rd DCA 2008).

To determine if a mistake was harmful, the appellate court must perform a harmless error analysis. *Hojan v. State,* 3 So.3d 1204 (Fla. 2009). The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt 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. *See Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). 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. *State v. Lopez*, 974 So.2d 340, 351 (Fla. 2008).

Burden Shifting

It is well settled that due process requires the state to prove every element of a crime beyond a reasonable doubt, and that a defendant has no obligation to present witnesses. Accordingly, the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. *Jackson v.*

State, 575 So.2d 181, 188 (Fla. 1991); *See Gore v. State*, 719 So.2d 1197, 1200-1201 (Fla.1998). The types of comments that may constitute improper burden shifting have one thing in common, that being the prosecutor's invitation to convict the defendant for a specific reason other than the state's proof of the elements of the crime beyond a reasonable doubt, i.e., because the defendant failed to mount a defense by not testifying, presenting evidence to prove his or her innocence, or refuting an element of the crime. *Ealy v. State*, 915 So.2d 1288, 1291 -1292 (Fla. 2nd DCA 2005).

Improper Closing Argument

"In order for [a] prosecutor's comments [during closing argument] to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Robards v. State*, 112 So.3d 1256, 1268 -1272 (Fla. 2013); *Robinson v. State*, 989 So.2d 747, 750 (Fla. 2nd DCA 2008).

An improper remark that is an isolated and singular comment by a prosecutor in closing argument may or may not be harmless error. [2] As more fully explained below,

[2] *See Fitzpatrick v. State*, 900 So.2d 495, 517 (Fla.2005) ("Based upon the review of the record, this Court concludes that this isolated and singular comment does not constitute harmful error."); *Jones v. State*, 748 So.2d 1012, 1022 (Fla.1999) (holding improper comment on defendant's right to remain silent was harmless error because the evidence was overwhelming and "the remark was neither repeated nor emphasized"), *cert. denied*, 530 U.S. 1232, 120 S.Ct. 2666, 147 L.Ed.2d 279 (2000); *Merck v. State*, 664 So.2d 939, 941 (Fla.1995) (holding that the trial court did not abuse its discretion in denying motion for mistrial based upon an isolated reference to the first trial of the case); *Haeussler v. State*, 100 So.3d 732, 735 (Fla. 2nd DCA 2012) (holding no fundamental error where the prosecutor shifted the burden of proof during closing argument by asserting that Mr. Haeussler failed to present witnesses to support his testimony because the trial court was well versed in the burden of proof and unlikely to be misled by the argument); *Rodriguez v. State*, 27 So.3d 753, 756 (Fla. 3d DCA 2010) (holding that prosecutor's argument improperly shifting the burden of proof to the defense was not fundamental error because it was a brief, isolated

the prosecutor's single comment in the present case does not meet any of the above cited requirements to merit a new trial.

The Present Case

The disputed comment by the Assistant State Attorney was burden shifting. It was not invited error or in response to any defense impropriety. That same Assistant State Attorney, on the morning of trial, filed and successfully argued a motion in limine asserting that no written prescription should be admitted into evidence unless a record custodian was able to establish the prescription as a business record. Having done all that, it is surprising, to put it kindly, that he would later that same day in his rebuttal closing call attention to the fact that there was no written prescription in evidence, clearly meaning that Mr. Caton had failed to put a written prescription into evidence to verify his claim of having a valid prescription. That comment would obviously lead the jury to believe that the defendant carried a burden of introducing evidence or proving something; it was burden shifting. It was improper and inappropriate.

All that said the improper remark was a brief, isolated comment made in the State's rebuttal closing argument. It did not address an essential element of the crime and it was not repeated or emphasized. A defense objection interrupted the prosecutor before any further argument could be developed and the trial court sustained the objection at the bench conference. Shortly thereafter the court twice instructed the jury on the correct burden of proof in the court's jury instructions. Considering the totality of the evidence, the prosecutor's single comment did not deprive Mr. Caton of a fair trial. It was not

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comment and the jury was repeatedly told the correct burden of proof); *Conner v. State*, 910 So.2d 313, 317 (Fla. 5th DCA 2005).

fundamental error in the circumstances of the present case. *See footnote 2.* The trial court did not err in denying the motion for a mistrial.

Conclusion

After review of the record and the briefs, this Court concludes the prosecution improper comment was harmless. Mr. Caton's Motion for Mistrial was properly denied. The judgment and sentence entered by the trial court should be affirmed.

IT IS THEREFORE ORDERED that the conviction of the Appellant is affirmed.

ANDREWS, Judge, Concurs

GROSS, Judge, Dissenting.

Respectfully, I dissent.

The argument of the Assistant State Attorney which is the issue in this appeal, simply stated, was that defense counsel had repeatedly told the jury about a prescription for Xanax yet there was no actual prescription in evidence. That is not just improper burden shifting; the argument implies there was no such prescription and that the jury was being misled. The record before this court provides no good faith basis to support such insinuations. I would reverse and remand for a new trial.

ORDERED at Clearwater, Florida this 18th day of November, 2013.

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Michael F. Andrews
Circuit Court Judge

_____

Raymond O. Gross
Circuit Court Judge

_____

R. Timothy Peters
Circuit Court Judge

cc: Honorable Dorothy Vaccaro
Walter L. Grantham, Jr., Esquire
Office of the State Attorney