

County Criminal Court: CRIMINAL PROCEDURE—Prosecutorial Comment. The improper prosecutorial comment in this case created the perception that Appellant had a burden to produce evidence of innocence. The State has not demonstrated on appeal that the error was harmless. Reversed and Remanded. *Latina Olson v. State of Florida*, No. 14-CF-3570-WS (Fla. 6th Cir. App. Ct. August 18, 2015).

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 PASCO COUNTY
APPELLATE DIVISION**

LATINA OLSON,
Appellant,

UCN: 512014CF003570A000WS

Appeal No: CRC14003570CFAWS

v.

L.T. No: 2013-4825-XGTT-WS

STATE OF FLORIDA,
Appellee.

_____/

On appeal from County Court,

Honorable Marc Salton,

Leslie Sammis, Esquire,
for Appellant,

Office of the State Attorney,
for Appellee.

ORDER AND OPINION

The Court finds a reasonable probability that improper prosecutorial comment indicating Appellant had an affirmative obligation to produce evidence of innocence affected the verdict in this case. The cause is reversed and remanded for further proceedings.

STATEMENT OF THE CASE AND FACTS

Appellant was charged with driving under the influence in violation of § 316.193(1), Fla. Stat. Appellant was stopped by a Pasco Sheriff's Deputy based on the Deputy's observation of Appellant weaving between lanes of traffic, driving too slowly,

and making an improper turn. The Deputy testified as to having concern about Appellant's well-being due to the driving pattern observed. When the Deputy initially made contact with Appellant, he observed the smell of cigarette smoke. A second Deputy then arrived on the scene and took over the investigation. The second Deputy detected an odor of alcohol from Appellant's vehicle and on Appellant's person but that the odor was masked by the smell of cigarette smoke. The Deputy performed field sobriety tests and found Appellant was impaired and placed her under arrest. After the field tests Appellant requested a breath-alcohol test, but was informed that a breath test machine was not available at the scene.

Appellant was taken to the jail and read the implied consent warning, after which Appellant agreed to take a breath-alcohol test. The Deputy testified that after a 20 minute observation period the Deputy gave the packaged mouthpiece for the breathalyzer test to Appellant and requested she open it. Appellant opened the package, set the mouthpiece on the counter and it fell to the floor. The Deputy testified he asked Appellant to pick up the mouthpiece, and that Appellant did not respond but just stared at the Deputy. The Deputy asked if Appellant would provide a breath sample, and again received no response. The Deputy again read the implied consent warning and asked Appellant if she would provide a breath sample, and Appellant did not respond. On appeal, Appellant alleges the Deputy's testimony as to Appellant's alleged refusal to submit, as well as prosecutorial comments on Appellant's refusal deprived Appellant of a fair trial by improperly commenting on Appellant's right against self-incrimination, and that prosecutorial comments improperly shifted the burden of proof to Appellant to provide evidence of innocence.

STANDARD OF REVIEW

The standard of review for an alleged error in commenting on a defendant's silence is the harmless error test. See *State v. DiGuilio*, 491 So. 2d 1129, 1134-35 (Fla. 1986). The question is whether there is a reasonable possibility that improper comments on a defendant's right against self-incrimination influenced the jury verdict. See *id.* The 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.” *Id.* at 1135. “The focus is on the effect of the error on the trier-of-fact,” and asks “whether there is a reasonable possibility that the error affected the verdict.” *Id.* at 1139. The Court reviews the issue of whether prosecutorial comments improperly shifted the burden of proof to the defendant pursuant to a similar standard. See *Morris v. State*, 988 So. 2d 120, 123 (Fla. 5th DCA 2008).

LAW AND ANALYSIS

Appellant contends it was improper for both the Deputy and the prosecutor in this case to comment on Appellant’s silence in response to the Deputy’s questions regarding the breath-test. The Court finds no error with the Deputy’s testimony. However, the record in this case demonstrates improper prosecutorial comments which gave the appearance that Appellant had the burden to provide affirmative evidence of innocence, and the cause is reversed and remanded based on this issue.

The prosecutor made several comments during closing arguments on Appellant’s refusal to submit to the breath test, and commented on Appellant’s failure to respond to the Deputy’s inquiries. “Comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial.” *DiGuilio*, 491 So. 2d at 1136. A comment that is “fairly susceptible of being construed by the jury as a comment on the defendant’s exercise of his or her right to remain silent” violates that right. *State v. Hoggins*, 718 So. 2d 761, 769 (Fla. 1998). “The test is whether the comments create a reasonable possibility that the error affected the verdict.” See *id.* at 772. The prosecutor further stated during closing arguments:

But when she’s presented with the ultimate chance, here’s the mouth piece, blow into this machine, finally, no questions, this is the time, *if you’re—if you can provide what it is, that’s going to make a huge difference.* She lets it fall to the floor. She doesn’t ask, oh, can I get another one? I’m sorry. She just stares straight at him. (emphasis added)

Appellant contends that the cumulative or individual effect of the comments in this case resulted in harmful error requiring reversal.

State responds that Appellant received a fair trial and the comments by the Deputy and prosecutor in this case were not improper comments on Appellant’s

constitutional right to remain silent. State claims that cases involving a refusal to submit to breath testing in a DUI case are distinguishable because the refusal itself is not an invocation of a defendant's right to remain silent. A lawful request for a breath sample does not elicit a testimonial response invoking a defendant's Fifth Amendment right against self-incrimination. *State v. Busciglio*, 976 So. 2d 15 (Fla. 2d DCA 2008). We agree and find no error on this issue. State further contends the comments made in this case did not create an impermissible perception that the defendant had the burden of proof as to any elements of the crime charged. "[T]he state cannot comment on a defendant's failure to voluntarily produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant had the burden of introducing evidence." *Morris v. State*, 988 So. 2d 120, 123 (Fla. 5th DCA 2008) (holding that although the prosecutor may argue to the jury that defendant's "refusal to perform the field sobriety exercises and submit a breath sample evidenced consciousness of guilt," the prosecutor violated defendant's Fifth Amendment rights by arguing "that an innocent person would speak up and protest his innocence," which "improperly shifted the burden of proof by arguing that an innocent person would volunteer to take a breath test to prove his or her innocence").

State contends the prosecutor's comments during closing arguments on Appellant being presented with a chance to demonstrate her breath-alcohol level, and refusing to do so, were intended as a rebuttal to the suggestion that Appellant was not provided a true opportunity to take the breath test, and that the lack of test results as evidence was due to the Deputy's actions. State contends that when considered in context, the prosecutor was commenting on Appellant's consciousness of guilt, and that the comments were proper. See *Morris*, 988 So. 2d at 123.

We find the prosecutorial comment in this case, stating that "if [the defendant] can provide what it is, that's going to make a huge difference," impermissibly created the perception that Appellant had the burden to provide evidence of innocence in this case. Although the State is permitted to comment on consciousness of guilt, we find the specific comment in this case was outside the realm of such permissible comment. Once the court identifies error, the State then has the burden "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.” *Marston v. State*, 136 So. 3d 563, 571 (Fla. 2014).¹ State failed to meet this burden on appeal. The cause is reversed and remanded based on this issue.

CONCLUSION

The record demonstrates improper prosecutorial comment which created the perception that Appellant had a burden to produce evidence of innocence in this case. State has not demonstrated on appeal that this error was harmless pursuant to the applicable standard. The cause is therefore REVERSED AND REMANDED for further proceedings.

It is ORDERED AND ADJUDGED that the cause is hereby REVERSED AND REMANDED to the trial court for proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 18th day of August, 2015.

Original order entered on August 18, 2015, by Circuit Judges Linda Babb, Shawn Crane and Daniel D. Diskey.

¹ The harmless error “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,” and it “is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.” *Marston*, 136 So. 3d at 571 (citing *DiGuilio*, 491 So. 2d at 1138-39).