

County Criminal Court: CRIMINAL PROCEDURE—Prosecutorial Comment. Any improper prosecutorial comments in this case were cured by the trial court's curative instructions. The trial court did not abuse its discretion in denying the motion for mistrial or the motion for new trial. Affirmed. *Laurie Muzyka v. State of Florida*, No. 15-CF-1571-WS (Fla. 6th Cir. App. Ct. March 15, 2016).

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**

**LAURIE MUZYKA,
Appellant,
v.**

**UCN: 512015CF001571A000WS
Appeal No: CRC1501571CFAWS
L.T. No: 2014-MM-2810-WS**

**STATE OF FLORIDA,
Appellee.**

On appeal from County Court,
Honorable Frank Grey,
Serbo Simeoni, Esquire,
for Appellant,

Office of the State Attorney,
for Appellee.

ORDER AND OPINION

The trial court did not abuse its discretion in denying a motion for mistrial based on allegedly improper prosecutor comments. The trial court's order denying the motion for new trial is supported by competent evidence. Affirmed.

STATEMENT OF THE CASE AND FACTS

Appellant was charged with domestic battery pursuant to § 784.03(1)(a)(1), Fla. Stat. Appellant pled not guilty to the charges and a trial was had in the matter. Appellant moved for a judgment of acquittal after the conclusion of State's case, which was denied. Appellant testified that she called 911 after an altercation with her husband over their children communicating with the grandparents by phone. Appellant and her

husband gave conflicting testimony as to what occurred during the altercation and as to who was the aggressor.

Appellant's husband testified Appellant became upset when his parents called to talk to his son on his birthday. Appellant's husband testified Appellant lunged at him, grabbed his hair and ripped his shirt, and began hitting and kicking him. He denied ever pushing or striking Appellant.

The Deputy who responded to the 911 call testified that he spoke with the parties and did not observe any injuries to the parties, but that Appellant's husband appeared disheveled and agitated and had a torn shirt. The Deputy testified that at the conclusion of his investigation he determined Appellant to be the primary aggressor.

During closing argument the prosecutor commented:

Really what does the case come down to? It comes down to credibility, because you did, you heard two very different stories. You heard a story from the State's witnesses and you heard a story from the defendant, and those stories don't match up. So what does it come down to? Really, who do you believe more. You should believe the State's witnesses more.

Appellant objected and moved for a mistrial, alleging the comments improperly shifted the burden of proof to Appellant, and requested a curative instruction. The court issued a curative instruction by reading Standard Jury Instruction 3.7, Reasonable Doubt. The prosecutor then clarified the burden of proof by stating on the record:

I just want to emphasize in case there's been any confusion. The entire burden in the case is on this side of the courtroom. It is on the State to prove beyond a reasonable doubt that this defendant committed the battery as alleged.

The court released the jury and heard further argument on the motion for mistrial, which was denied. Appellant requested an additional curative jury instruction, and the jury was recalled and instructed that the standard of proof was not "who you believe more." Specifically, the court stated:

Ladies and gentlemen, I want to state to you that this case is not—a statement was made that this case is about who you believe more and that's not the case. The rule is, is what I gave you on the instructions. What evidence you're allowed to consider, what burden that the State has, are set forth in the instructions. And you are to follow those instructions

only. Okay. When making your decision. It's the State's obligation to prove each and every element of the crime beyond and to the exclusion of every reasonable doubt.

The jury returned a verdict of guilty. Appellant was sentenced to 12 months' probation, plus court costs, Batterer's Intervention Program, no contact with the victim and a psychological evaluation. Appellant filed a motion for new trial which the court denied.

STANDARD OF REVIEW

This Court reviews the trial court's denial of the motion for mistrial for abuse of discretion. See *Salazar v. State*, 991 So. 2d 364, 371 (Fla. 2008). Improper prosecutor comments warrant a new trial when the comments deprive the defendant of "a fair and impartial trial, materially contribute to the conviction," or are "so harmful or fundamentally tainted as to require a new trial, or . . . so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise." *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994). See *Morris v. State*, 988 So. 2d 120, 123 (Fla. 5th DCA 2008). This Court reviews the trial court's ruling on the motion for new trial for abuse of discretion. See *Stephens v. State*, 787 So. 2d 747, 754 (Fla. 2001); *Ferebee v. State*, 967 So. 2d 1071, 1073 (Fla. 2nd DCA 2007).

LAW AND ANALYSIS

Appellant contends State improperly shifted the burden of proof to Appellant by making comments during closing argument that guilt or innocence was dependent on whether the jury believed the State's or the defendant's witnesses. Appellant contends the evidence was insufficient to support the verdict in this case and the cumulative actions of the State were so harmful as to warrant a new trial. See *Cartwright v. State*, 885 So. 2d 1010, 1015 (Fla. 4th DCA 2004); *Chambers v. State*, 924 So. 2d 975, 978-79 (Fla. 2d DCA 2006).¹ "It is improper for the state to shift the burden of proof in closing argument." *Sempier v. State*, 907 So. 2d 1277, 1278-79 (Fla. 5th DCA 2005). The standard of proof "is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime

¹Appellant further contends State's case is based on conflicting testimony from two witnesses and improper witness testimony as to prior incidents of violence between Appellant and her husband. This testimony was not objected to at trial and therefore this issue was not preserved for appellate review. See *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005).

beyond a reasonable doubt,” and “it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.” *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998). In *Gore*, the Court found the prosecutor “enunciated an erroneous and misleading statement of the State’s burden of proof because it improperly asked the jury to determine whether [defendant] was lying as the sole test for determining the issue of his guilt.” *Id.* at 1201.

“A motion for mistrial should be granted when it is necessary to ensure that the defendant receives a fair trial,” and a curative instruction would be insufficient. *Henderson v. State*, 789 So. 2d 1016, 1018 (Fla. 2d DCA 2000). A curative instruction must “eradicate from the minds of the jury of laymen not only the offending evidence itself but the imputations and inferences which might be drawn therefrom.” *Stewart v. State*, 221 So. 2d 155, 157 (Fla. 3d DCA 1969). Appellant contends the curative instructions were insufficient and it was error to deny the motion for mistrial.

State responds that Appellant received a fair trial and the comments in this case did not amount to harmful error. “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. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). The test is whether the comments create a reasonable possibility that the error affected the verdict. See *id.* at 1136; *State v. Hoggins*, 718 So. 2d 761, 769 (Fla. 1998). Any error which may have occurred in this case was cured by the trial court’s curative instructions, in addition to the prosecutor’s statements clarifying the burden of proof. The “use of a harmless error analysis under *DiGuilio* is not necessary where . . . the trial court recognized the error, sustained the objection and gave a curative instruction.” *Goodwin v. State*, 751 So. 2d 537, 541, 547 (Fla. 1999). The question is “whether the single improper remark, to which the trial court sustained an objection and gave a curative instruction, was so prejudicial as to deny defendant a fair trial.” *Id.* Based on the record in this case, any error which occurred was cured by the trial court’s curative instructions. The trial court properly denied the motion for mistrial.

Appellant contends the trial court erred by not issuing factual or legal findings or articulating the standard applied when denying the motion for new trial. See *Geibel v. State*, 817 So. 2d 1042, 1045 (Fla. 2d DCA 2002). The “appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact.” *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981). The question on appeal is “whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.” *Id.* Appellant failed to demonstrate the trial court committed error when denying the motion for new trial. The record contains sufficient evidence to support the jury verdict.

CONCLUSION

Appellant failed to demonstrate error with the trial court’s denial of the motion for mistrial or the motion for new trial. The orders of the trial court are hereby AFFIRMED.

It is ORDERED AND ADJUDGED that the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 15th day of March, 2016.

Original order entered on March 15, 2016, by Circuit Judges Susan Barthle, Shawn Crane and Daniel D. Diskey.