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

ISABELLE ARANGO
Appellant,

Appeal No. CRC 12-00032APANO
UCN 522012AP000032XXXXCR

STATE OF FLORIDA
Appellee.
_____/

Opinion filed _____.

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

Simone A. Lennon, Esquire
Attorney for Appellant

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CORRECTED ORDER AND OPINION

ANDREWS , Judge.

THIS MATTER is before the Court on Appellant, Isabelle Arango's appeal from a conviction, after jury trial, of Driving Under the Influence of Alcoholic Beverages or Controlled Substances. Appellant argues that she is entitled to a new trial because the prosecutor made an improper comment during closing argument in which he vouched for

the credibility of the arresting deputy in an effort to bolster the credibility of the deputy. After reviewing the briefs and record, this Court affirms the judgment.

Factual Background and Trial Court Proceedings

On February 6th, 2011, Deputy Stephen West of the Pinellas County Sheriff's Office, while on duty and working in his official capacity as a Pinellas County Sheriff's Deputy, observed Appellant, Isabelle Arango, traveling eastbound on Park Street in her 2003 brown Pontiac minivan. At the time Deputy West was stationary at a traffic light. Deputy West then witnessed Ms. Arango's minivan drive through the intersection of Pasedena Avenue and Park Street. Upon exiting the intersection Ms. Arango swerved into the lane of a black Jaguar. The maneuver caused the Jaguar to swerve into oncoming traffic to avoid a collision with Ms. Arango. Believing Ms. Arango had committed a traffic infraction Deputy West proceeded to conduct a traffic stop. Activating his emergency lights Deputy West took position behind Ms. Arango's minivan. Deputy West followed the minivan for two or more blocks with his emergency lights on. Deputy West eventually had to use his siren to get Ms. Arango's attention and to get her to stop. Upon making contact with Ms. Arango, Deputy West observed her eyes to be glassy, watery and bloodshot. Ms. Arango's speech was slow, slurred and there was an odor of alcohol coming from her breath. As Ms. Arango exited her car she had to use the car door for assistance. A DUI investigation was conducted and two field sobriety exercises, the "one leg stand" exercise and the "walk and turn" exercise, were performed on video. Ms. Arango failed to successfully complete either exercise. Ms. Arango was not offered the "finger to nose" exercise or the "alphabet" exercise. Post *Miranda* Ms. Arango acknowledged drinking a beer and then trying to drive home afterwards. Appellant was

arrested for DUI and transported to the Central Breath Testing Unit for breath testing. The test registered a breath alcohol reading of .114 and .109.

During closing argument, on three separate occasions, defense counsel argued that deputies whom he termed the "government" were "hiding" evidence. In response the prosecutor rejected the notion of a conspiracy by the government and then began to argue that the deputy would not put his "career on the line . . ." However, before the prosecutor was able to finish his statement defense counsel objected. The trial court sustained the objection. The comment was never fully expressed.

Issue

In its closing argument, and in response to the argument of defense counsel, the prosecutor stated:

> Then they started to suggest that the officer in this case, or Deputy West, was hiding things, as if this is some sort of big conspiracy. *This officer or this deputy is going to put his career on the line –*

Ms. Arango argues on appeal that the prosecutor committed reversible error by attempting or beginning to advance that the deputy would not put his career on the line. In so doing the prosecutor bolstered the credibility of the deputies.

Standard of Review

A trial judge's rulings on objections made in closing argument are reviewed under the abuse of discretion standard. *Moore v. State,* 701 So.2d 545, 551 (Fla.1997).

Closing Argument

In this case this court is again called upon to address the issue of improper comments made during closing argument. We state, at the outset, that closing argument is a time for robust, vigorous challenging of the opponents ideas, evidence and argument.

Diaz v. State, 797 So.2d 1286 (Fla. 4 DCA 2001). Lawyers are allowed to advance all legitimate arguments within the limits of their forensic talents. *Spencer v. State,* 133 So.2d 729, 731 (Fla.1961). In this regard lawyers are entitled to considerable latitude. *Crump v. State,* 622 So.2d 963, 972 (Fla.1993). However, while counsel should be allowed to prosecute or defend a case with earnestness and vigor they are not allowed to strike "foul blows." *Delhall v. State*, 95 So.3d 134, 169 (Fla. 2012); *Gore v. State,* 719 So.2d 1197 (Fla. 1998). In this case, counsel for both the state and the defense presented, in part, closing argument that strayed beyond the rules of professional conduct.

1. ***Purpose of Closing Argument:***

The purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." *Hill v. State,* 515 So.2d 176, 178 (Fla.1987). *See also, Geralds v. State*--- So.3d ----, 2010 WL 3582955 (Fla., 2010.) (*Opinion Revised on Denial of Rehearing* Feb. 2, 2012); *McGee v. State,* 83 So.3d 837 (Fla. 4 D 2011). Closing argument presents an opportunity for both the State and the defendant to argue all reasonable inferences that might be drawn from the evidence. *Bertolotti v. State,* 476 So.2d 130, 134 (Fla.1985) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence"). *See also, Dessaure v. State,* 891 So.2d 455 (Fla. 2004). A criminal trial is a neutral arena wherein both sides present evidence for the jury's consideration; "the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence[.]" *Johns v. State,* 832 So.2d 959 (Fla. 2 DCA 2002). *See also, Ruiz v. State*, 743 So.2d 1 (Fla. 1999).

2. ***Rules Regulating the Bar:***

The *Rules Regulating the Florida Bar* state in rule 4-3.4(e):

> A lawyer shall not ... in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused.

The expression of personal opinion in this case by both counsel violate this rule. "When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation." *State v. DiGuilio,* 491 So.2d 1129, 1139 (Fla. 1986). "As Judge Blue so aptly stated: 'Trial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of The Florida Bar.'" *Luce v. State,* 642 So.2d 4, (Fla. 2d DCA 1994) (Blue, J., concurring specially). *Williams v. State,* 10 So.3d 218 (Fla. 3 DCA 2009).

3. ***Judicial Responsibility:***

"Trial judges do have a long-standing responsibility to protect jurors from improper closing arguments, even in the absence of a proper objection, despite the near Sisyphean effort such protection seems to require." *Thomas v. State,* 752 So.2d 679 (Fla. 1 DCA 2000) (internal quotations omitted). Closing argument provides the opportunity and is fertile ground for overzealous advocacy or misconduct on the part of either the prosecutor

or defense lawyer. It is here that trial judges must be most vigilant in policing attorney behavior. *See State v. Murray,* 443 So.2d 955 (Fla. 1984). *See also, Brooks v. State,* 762 So.2d 879 (Fla. 2000) (Wells, J. concurring in part dissenting in part) (The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown). Because the jury looks to the trial judge as the only neutral, impartial, detached participant in the trial it is the trial judge who must make certain jurors are not mislead by improper argument. "[W]hat the trial judge says and does in the presence of the jury very often gives the jury a better perspective of the case." *Gomez v. State,* 751 So.2d 630, (Fla. 3d DCA 1999). In order to protect the integrity of the trial and to protect jurors from improper argument trial judges are charged with the responsibility of insuring that expression of personal opinion, inflammatory comments and other improper comments are not placed before a jury. In *Gomez,* the court stated,

> 'In our view, it is no longer-if it ever was-acceptable for the judiciary to act simply as a fight promoter, who supplies an arena in which the parties may fight it out on unseemingly terms of their choosing....' There comes a point and time in the conduct of a trial that the trial judge should and must intervene in the egregious conduct, whether it has been challenged or not. (citations omitted)

Id. at 632-633. If the trial court is witness to a lawyer making improper comments before a jury that may mislead or distract the jury from considering the evidence it has heard the "trial court should affirmatively rebuke the offending [party] so as to impress upon the jury the gross impropriety of being influenced by improper arguments and specifically [instruct] the jury contemporaneously there to, that the comments made during closing argument do not constitute evidence." *Linic v. State,* 80 So.3d 382, 393 (Fla. 4 DCA 2012). *See also, Harding v. State,* 736 So.2d 1230 (Fla. 1999) (Trial court affirmed

when it interrupted defense counsel's closing argument, without objection from the state, to prevent defense counsel from continuing with an improper "ignore the law" argument. Trial court admonished defense counsel and told jury they would be in violation of their oath if they did as counsel requested.)

4. ***Invited Response:***

"A defendant is not at liberty to complain about a prosecutor's comments in closing argument when the comment is an invited response." *Bell v. State*, 758 So.2d 1266 (Fla. 5th DCA 2000) *See also, Pitts v. State,* 307 So.2d 473 (1st DCA 1975) (Defense counsel may not make statements during summation which reasonably invite response and then complain when his opponent's response is such as would be reasonably expected to be elicited by defense counsel's own prior remarks.) When comments by defense counsel will mislead the jury regarding the evidence presented or the charges the prosecutor not only has the right to respond but the duty to respond because to ignore the argument is to give it credence. *State v. Dix*, 723 So.2d 351, 352 (Fla. 5th DCA 1998). *See also, Austin v. State,* 700 So.2d 1233 (Fla. 4th DCA 1997) ("The state has a right, and even a duty, to respond to the defense's suggestion. To ignore it gives it credence"). Counsel must be accorded wide latitude in making arguments to the jury, particularly in retaliation to prior improper comments made by opposing counsel. *Schwarck v. State,* 568 So.2d 1326, 1327 (Fla. 3rd DCA 1990). The United States Supreme Court has addressed this concept known as "fair reply" or "invited response".

> The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials-the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments-two

> apparent wrongs-do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule. (citation omitted).
>
> In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.
>
> [T]he issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's "invited response," taken in context, unfairly prejudiced the defendant.

U.S. v. Young, 470 U.S. 1, 11-13, 105 S.Ct. 1038, 1044-1046 (1985); *See also, Vazquez v. State,* 635 So.2d 1088 (Fla. 3d DCA 1994); *McKenney v. State,* 967 So.2d 951, 955 (Fla. 3rd DCA 2007). If defense counsel attacks an officer's credibility in closing argument, it is not improper bolstering for the State to argue that the officer had no motive to lie. *Rodriguez v. State,* 906 So.2d 1082, 1090 -1091 (Fla. 3rd DCA 2004). *See also, Johnson v. State,* 858 So.2d 1274 (Fla. 3rd DCA 2003); *Johnson v. State,* 801 So.2d 141 (Fla. 4th DCA 2001); *Mitchell v. State,* 771 So.2d 596 (3rd DCA 2000). The reply offered by the state cannot exceed bounds necessary to "right the scale" in view of the offending initial salvo. *Fryer v. State,* 693 So.2d 1046, 1048 (Fla. 3rd DCA 1997).

5. ***Improper Bolstering:***

"Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *Valentine v. State,* 98 So.3d 44 (Fla. 2012) (citations omitted); *Spann v. State,* 985 So.2d 1059, 1067 (Fla.2008). Prosecutor vouching for the credibility

of a police officer by asserting that the officer would not put his career on the line by providing untruthful testimony is improper bolstering. *Mazile v. State,* 798 So.2d 833 (Fla. 3rd DCA 2001).

6. ***Reply Considered in Context:***

The doctrine of invited reply requires that the comments of the replying party be viewed in light of the improper argument to which they reply. *Fryer v. State*, 693 So.2d 1046 (Fla. 3rd DCA 1997). "A prosecutor's argument should be examined in the context in which it is made." *Stancle v. State,* 854 So.2d 228, 229 (Fla. 4th DCA 2003); *Lot v. State*, 13 So.3d 1121(Fla. 3rd DCA 2009). *See also, Bright v. State* 90 So.3d 249, 260 (Fla. 2012) "[I]t is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation"). Likewise, where the prosecutor has bolstered the credibility of a witness the court must consider the totality of the evidence presented prior to granting a new trial. *State v. DiGuilio,* 491 So.2d 1129, 1139 (Fla. 1986) (Harmless error analysis requires examination of the entire record).

Analysis

During closing argument defense counsel made the following argument regarding the testimony of Deputy West:

> Now, *you also heard him say that he had heard that if you bend your knee during the exercise it's a little easier to do.* Well, if that's the case, maybe he was bending his knee when he was giving that demonstration. And if he's trying to see really what her normal faculties are, then why didn't he tell her that that could help? *Why didn't he tell her that if you lock your knee it's a whole lot harder to do that exercise? Seems like he might be trying to hide something.* (emphasis added).

At trial regarding this subject the following exchange took place:

> Q Okay. And you're actually taught that if you bend your knee a little bit it's a lot easier to do the exercise?

A You're talking about the leg I hold off or?
Q The leg -- your plant foot.
A Okay.
Q It's much easier if your knee is bent.
A I've heard that. *I can't say we were taught that. That's not what we were taught in our training. No, sir.*
Q Okay. And you didn't tell Ms. Arango that that was the case?
...
Q You never told Ms. Arango that that was --
A *I did not. That's not standardized, sir.* (emphasis added).

Defense counsel's suggestion that the deputy was "trying to hide something" from the Ms. Arango by not instructing her to bend her knee is without foundation. Defense counsel argues as fact what the deputy acknowledges he has heard. Deputy West was clear that bending your knee is not a part of the standard instruction. That Deputy West was trying to "hide" the possibility that bending your knee may help complete the test is not a reasonable inference that can be drawn from the evidence presented at trial. Arguing that the deputy was "trying to hide something" is the presentation of improper personal opinion.

Further in his closing argument defense counsel commented on the testimony of Deputy Deane stating the following:

> The problem is in this case is that gas sample that tests to give the control was not the right gas sample. It's a high-altitude gas sample, which means that when they're calibrating the machine they're calibrating it totally wrong. And he said, well, you know, if there's control tolerances, sure, we take it off the line if those are messed up. He said that. But then Mr. Grupp got up here and he said, well, look at this, the control tolerances are outside what they're supposed to be and you didn't take it off the line. Well, he said, no, no, because you have to have two tests and I did one that showed me it was off the line. He said, well, what about the second test, did you do the second? And he said, no, I did that independently. *Think about what that means. What that means is he took it out of public record, he did it on his own, and then he put it back so he didn't have to take it off the line.* (emphasis added).

During cross examination Deputy Deane testified that he complied with the FDLE rules

and sent the very document defense counsel used to conduct this line of questioning to FDLE where it became a part of the public record. The exchange went thusly:

Q Okay. And you had no knowledge of either of these documents?
A Oh, I had knowledge of those documents. I had to report to FDLE of the problem.
Q Okay.
A Which I did.
Q You had no knowledge that they were -- they were sent?
A They go electronically out to the general public, public record after 30 days.

Defense counsel continued with his closing argument stating the following:

> And the significance of that is that for this entire month that that's been on the line giving these readings it has not been calibrated properly and he's *been letting state attorneys prosecute people based on what a machine says when he knows it's not accurate. Folks, that's unethical. This is your own government hiding the ball from you.* That is why people are presumed innocent. Now – (emphasis added).

Regarding these comments the following testimony was offered at trial.

Q Okay. And now the result of that was that control outside tolerance was the result from the instrument?
A Yeah, the instrument worked. It did what it was supposed to do. It was supposed to detect that.
Q Now, at no time did you take that machine offline; isn't that true?
A You have two tries on that test to do that successfully. *You have to* (sic) *separate tries to do a control outside tolerance before you have to take it offline, per rule 11D-8.*
Q *And you never did a second test, right?*
A There are things you can troubleshoot in the field, such as checking the regulator to make sure it's not the instrument versus the tank, *and in this case it was the tank not the regulator.*
Q And you never did a second test on these documents, did you?
A *I did a separate independent test that determined that the tank was high-altitude gas.*
Q So you wouldn't have to take it offline?
A *Correct. I didn't have to. I was not required to take it offline because it*

never failed the second control outside tolerance.

Q Which was under --

A *I changed another cylinder out, a valid cylinder.* (emphasis added).

In deference to defense counsel there appears to be more than one way to read the testimony as presented. The Deputy is either admitting that he intentionally found a way around doing the second controlled outside tolerance test or he is saying he is allowed to trouble shoot between the tests and in so doing found the error alleviating the need for the second controlled outside tolerance test. Specifically, the error was the type of tank and not the regulator i.e. the instrument itself. The "valid cylinder" solved the problem. However, even with the deference afforded defense counsel this portion of his closing argument was improper in every conceivable way. Offering his personal opinion that a witness is "unethical" and that the "government" was "hiding the ball" is well outside the limits of permissible closing argument. Suggesting that Deputy Deane had "been letting state attorneys prosecute people based on what a machine says when he knows it's not accurate" was unsupported by any evidence presented and is not a reasonable inference that can be drawn from the evidence presented. In addition, it suggests that defense counsel is aware of evidence that has not been presented at trial. Using highly charged words like "unethical" and "government hiding the ball" was by design to appeal to the passions of jurors and to make the jurors decide the case on emotional terms unrelated to the evidence presented. *See Serrano v. State,* 64 So.3d 93 (Fla. 2011) ("[C]losing arguments 'must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.'" *See also, King v. State,* 623 So.2d 486 (Fla.1993); *Bertolotti v. State,* 476 So.2d 130 (Fla.1985).

It was only after defense counsel had, on three separate occasions, accused the

deputies/government and by extension the office of the State Attorney of hiding evidence that the prosecutor objected. At the bench conference defense counsel argued that it was the "theory of defense . . . [t]hey're hiding evidence and not being forthright with the jury." While the trial court sustained the objection the trial judge did not give a curative instruction leaving before the jury the suggestion that the unethical government was hiding the ball. The prosecutor's failure to respond to this argument would lend credence to the suggestion. The prosecutor's mistake was to respond by attempting to bolster the credibility of his witness.

Harmless Error

Any error in prosecutorial closing argument is harmless if there is no reasonable probability that the comments affected the verdict. *Hitchcock v. State*, 755 So.2d 638, 643 (Fla.2000) (citing *King v. State,* 623 So.2d 486, 487 (Fla.1993)). When evaluating whether prosecutorial statements are harmless the court must examine the entire record. *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986).

> In order for the prosecutor's comments 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.

Anderson v. State, 18 So.3d 501 (Fla.2009).

It is noteworthy that the prosecutor never finished his improper comment. The comment was interrupted, the objection was sustained and the prosecutor did not return to the topic. We find, that in light of Ms. Arango's driving pattern, her performance on the field sobriety tests, her admission to drinking and then driving and the evidence that she drank well in excess of the legal limit, the state's isolated incomplete comment

attempting to bolster the credibility of a state witness did not in any way deprive the defendant of a fair and impartial trial.

Conclusion

This court concludes that the judgment and sentence of the trial court should be affirmed.

IT IS THEREFORE ORDERED that the order of the trial court judgment and sentence is affirmed.

ORDERED at Clearwater, Pinellas County, Florida this 6th day of March, 2013.

Original order entered on March 6, 2013, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Dorothy Vaccaro
Office of the State Attorney
Office of the Public Defender