

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY  
APPELLATE DIVISION**

**CYNTHIA LEANNE HOLLOWAY,**  
**Appellant,**

**v.**

**UCN: 522013MM011400XXXXNO**  
**Case No: CRC 13-00059APANO**  
**Lower No: CTC13-11400MMANO**

**STATE OF FLORIDA,**  
**Appellee**

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Appeal from Pinellas County Court,

Honorable Susan Bedinghaus,

Thomas Matthew McLaughlin, Esq.  
Attorney for Appellant.

Berny V. Jacques, Esq.  
Office of the State Attorney  
Attorney for Appellee

KEN DURKE  
CLERK OF CIRCUIT COURT  
AND COMPTROLLER

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**ORDER AND OPINION**

We find the cumulative effect of the trial courts error when it allowed the state to impeach the defendant with evidence of prior crimes without having certified copies of the prior judgments and sentences, along with several prosecutor comments made during closing arguments in this case went directly to Appellant's main defense at trial, and created a reasonable likelihood that the jury was influenced by these comments, thereby

depriving Appellant of a fair and impartial trial. The order of the trial court is therefore reversed and remanded for further proceedings consistent with this opinion.

### **STATEMENT OF THE CASE AND FACTS**

The statement of the case and facts below were written by the Appellant and agreed upon by the Appellee.

On July 2, 2013, the Appellant was charged by misdemeanor information with one count of prostitution. She went to trial on October 2, 2013, the Honorable Susan Bedinghaus presiding, and a jury found her guilty as charged. The court sentenced her to sixty days in the Pinellas County Jail, with credit for fifty-nine days time served. The defendant filed a motion for new trial, and the court denied that motion on October 17, 2013. A timely notice of appeal was filed on October 28, 2013.

Officer Timothy McClintick is a member of the St. Petersburg Police Department street crimes unit, a special unit focusing on narcotics and prostitution. McClintick was working undercover specifically looking for prostitution crimes and approached the Defendant when she waved him over to where she was sitting on a bus stop bench. According to McClintick when he sat down next to Holloway, she began rubbing his arm and said to him "You look so good."

Holloway then told him that she had been kicked out of her motel and she had no money to pay rent, to which McClintick told her he had \$25.00, but she “had to earn it.” According to McClintick, Holloway agreed with those terms. When McClintick asked what he would get for his money, the Defendant allegedly told him he would “get head and some pussy.” Office McClintick asked if he would be allowed to ejaculate inside her and she reportedly said, “Yeah, baby. You can suck on these, too,” referring to her breasts. When she exposed her breasts, McClintick gave a visual cue for the police team to arrest the Defendant.

McClintick acknowledged that even though the SPPD has the ability to make an audio recording of these sting operations, it chose not to do so. McClintick also acknowledged that he was the first to imply that the money was for sexual acts, but Holloway was the first to actually confirm that she would engage in sex acts in exchange for money.

The defendant testified that she has a serious alcohol problem, and because of that, her fiancé left her. When he moved out of the hotel apartment, management of the hotel told Holloway she had two hours to get out. Holloway took her belongings and began wandering aimlessly down the street, hoping to find a drink.

Holloway denied ever waiving at McClintick, she denied touching him, she denied ever offering to engage in sex for money and she denied flashing her breasts. Instead, she testified that McClintick told her if she went to his apartment, he would give her some alcohol and money.

During cross-examination, the following occurred:

[Prosecutor]: Okay. And I want to talk to you about your encounter with Officer McClintick, you heard him when he was testifying here today, right? You were here? And you heard what he had to say about that day, correct?

A: Oh, God, yeah.

Q: And when stated that you waved him over, isn't that the truth?

A: No, that is not.

Q: Okay. So when he said that you waved him over, he was just making it up?

Q: Okay. So your testimony to the jury is that he was lying to the - - -

A: Yes.

[Defense Counsel]: Objection your Honor. Asking the witness to comment on another witness's testimony.

[The Court]: Sustained.

Q: And then you heard him say that when he sat next to you, you actually started rubbing his arm, didn't you?

A: I didn't rub that man's arm.

Q: Okay. So if he had said that, that would be untruthful.

A: That's very untruthful.

Q: Okay. And also, when he stated that you told him for \$25.00 that he can get some - - excuse my language - - some head and some pussy, he made that up too?

[Defense]: Objection, Your Honor. I object to the - -

A: He surely did.

- - - form of these questions, Your Honor.

[Prosecutor]: It's cross-examination.

A: He surely did.

[Defense]: Again, asking a witness to comment on another - -

[Court]: Okay

[Defense]: - - witness's testimony.

[Court]: Sustained as to the form of the question.

[Prosecutor]: Okay

[Court]: You can rephrase it.

[Prosecutor]: So that didn't happen is your testimony?

A: It absolutely didn't.

The State called McClintick as a "rebuttal" witness and was allowed to ask, over a defense objection, if he got "any special kind of accommodation or awards for making prostitution arrests," whether he had "any reason to make up what [he] documented in her report" or to "make up [his testimony here today as to your interactions with the Defendant." The officer was allowed to testify that he referred to his written report so as "to give credibility to the case [he] had."

#### Evidence of Prior Convictions

Prior to the Defendant testifying, the prosecutor informed the court that he did not have a certified copy of the judgment and sentence to prove the Defendant had prior convictions, but he did have a rap sheet. The defendant objected to this line of questioning because the state did not have judgments and sentences to establish that the priors were actual convictions. The court acknowledged that it would be an important factor to consider whether the priors involved a withhold or an adjudication, but nonetheless allowed the State to proceed even though it was never established whether the Defendant's prior record proceed even though it was never established whether the Defendant's prior record included actual convictions. The State

then impeached the Defendant by asking her if she had ever been convicted of a felony, to which she responded she had been convicted “several” times.

During closing argument, the prosecutor relied on these prior convictions to impeach the Defendant’s credibility. Specifically, the prosecutor stated, “And also, you’ll recall my first question was, ‘Have you been convicted of a felony?’ and again, I don’t do this to embarrass, but the reason why we’re able to ask that is because you can determine a person’s credibility based on whether or not they’ve been convicted of a felony.”

#### Closing Arguments

During closing arguments, defense counsel attempted to cast doubt on the officer’s version of the events by noting that the officer may be looking for intent of prostitution where none exists, that he had an interest in arresting prostitutes because that is his specific job, and that the officers did not use every measure available to preserve evidence.

In his rebuttal closing argument, the prosecutor made the following statements:

I know it was not without sacrifice that you all are here with us today and I want to thank you for this very important service and the oath that you took here today. And, you know, I got to tell you that having sit here [sic],

you all must be pretty upset. And the reason why I say that is because if we're to believe what [defense counsel] said –

Mr. Lancaster: Objection, Your Honor. Improper argument.

THE COURT: Okay. Sustained. You can disregard that.

Prosecutor: So if we are to go along with what's presented in closing arguments, two sworn officers came here, two sworn officers of the St.

Petersburg Police Department came here and lied straight to every one of you all's faces. That's what happened, if we are to believe what was just presented here just a moment ago, and that has got to leave you pretty upset.

If that's the case, if you believe some officers just came here and just made this whole thing up, violated the oath they made when they became officers, violated the oath they took today just to make a story up to convict

somebody of prostitution, then I am sure you have some grievances and

some things to address with the mayor of St. Pete because we have two

officers in the street right now who are crooked and are just making stuff up in trials.

But you know what? Thank goodness Judge Bedinghaus is going to tell you that what the lawyers say is not evidence. What I say, what Mr. Raiford said, what Mr. Lancaster said, that's not the evidence you're supposed to consider.



The evidence comes from that jury stand. And if you in your heart of hearts really believe they just made it all up, then fine, but if you sat through the same trial that we all did and you can base the credibility of the officers on their training and experience and see that there was no reason for them to make up this criminal investigation –

MR. LANCASTER: Objection. Improper bolstering.

THE COURT: Overruled.

PROSECUTOR: And if you have no reason to believe that they made up this whole criminal investigation, the law that Mr. Lancaster talked about, the law that none of us have the right to ignore compels you to consider what they said as evidence and to go back there and reach your verdict.

Opposing counsel also talked about that the officers you heard has an interest in this case. That it's his job, he's here to arrest prostitutes, and so he has a reason to be untruthful here today.

Members of the jury, when I called him back, I asked him, "do you get any special, you know, accommodations, do you get extra feather in your cap, in essence, for making prostitution arrests? I mean, do you get a kind of award?" He said no. He has no reason just to bring somebody in for prostitution. He's not getting anything out of this. There's no interest in this case.

Mr. Lancaster stated that the person with the biggest interest case is the defendant. The person who is on trial here today. So let's not lose sight of somebody who was just doing his job on the streets of St. Pete.

Now we're supposed to paint him as some type of a deceiver, you know, because he has an interest in this case and he's just going to make things up to you. Let's not go down that road. I find it appalling, I find it disturbing that this would be argued. Mr. Lancaster said –

MR. LANCASTER: I object to that, Your Honor. I just object to that.

THE COURT: Sustained. Disregard.

PROSECUTOR: Mr. Lancaster stated that, you know, had he not made that arrest, you know, he would not have had as good of a day. You know, it would have been a bad night for him because he didn't make that prostitution arrest.

Mind you, this happened around noontime. You know, it's not like it happened around midnight. Or midnight was going to strike and he had to get this arrest to meet his quota. First of all, there are no quotas. This happened in the middle of the day –

MR. LANCASTER: Objection, Your Honor. That's not evidence.

THE COURT: Overruled. I'm going to ask you all to rely on your own memory what the evidence was here today. You can proceed.

PROSECUTOR: This happened in the middle of the day. If we are to believe that it is the case, I mean, doesn't he had plenty of time to meet up his quota, if this is in the middle of the day? Why would he rush it at noon to try to get an arrest? If that is the case that not arresting is a wasted day.

Members of the jury, these are common sense [sic].

So do not be distracted by the fact that his device didn't have the capability of recording. And even if you were to believe that, you still have to believe that these officers came here and made the whole thing up.

If you believe what [the Defendant] told you, members of the jury, and if you don't believe what our officer's said, I know Mr. Lancaster said its not about who you believe, but isn't that what it comes down to?

The Defendant filed a timely motion for a new trial, arguing that the trial court erred in allowing the State to impeach her when it did not have certified copies of felony judgments and sentences. This motion was denied without elaboration.

### **STANDARD OF REVIEW**

The issue before us is "whether the evidence was sufficient to establish that the witness had been convicted of the prior offenses as required by the Florida Evidence Code." Therefore, the standard of review for this issue is de novo. *State v. Jouzdani*, 98 So. 3d 1264, 1268 (Fla. 1st

DCA 2012). Reversal is appropriate if there is a “reasonable possibility that the error contributed to the conviction.” *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)

“In reviewing errors made by a trial court regarding the overruling of objections to improper comments made during closing argument, the standard of review is abuse of discretion.” *Skaneles v. State*, 821 So. 2d 1102, 1105 (Fla. 5th DCA 2002). This court may reverse the decision of the trial court if the prosecutorial comments “deprive the defendant of a fair and impartial trial, materially contribute to the conviction,” 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 that it would have otherwise.” *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994).

### **LAW AND ANALYSIS**

#### **I. Improper Impeachment**

Appellant contends the conviction should be overturned due to the error made by the trial court when it allowed the state to impeach the Appellant with evidence of prior convictions even though the prosecutor did not have certified copies of the prior judgments and sentences. Appellant contends that because the witness’s credibility was crucial in this case, as the defendant’s version of the events was at odds with the police officer’s

version, the error in allowing this evidence of prior convictions cannot be found harmless.

“Section 90.608, Florida Statutes, (2008), lists the grounds for impeaching a witness. One of the permissible grounds for impeachment is to attack the character of the witness by showing that he or she had been convicted of a crime. This subject is addressed in more detail in section 90.610(1), Florida Statutes, (2008), which states in material part:

90.610 Conviction of certain crimes as impeachment.—

(1) A party may attack the credibility of any witness including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment[.]” *State v. Jouzdani*, 98 So. 3d 1264, 1268 (Fla. Dist. Ct. App. 2012).

“Questions regarding past convictions should not be asked unless counsel has knowledge of a conviction and possesses a certified copy of the judgment of conviction.” *Barcomb v. State*, 68 So. 3d 412, 415 (Fla. 4th DCA 2011) (citing Charles Ehrhardt, Florida Evidence, section 610.6 (2007 Ed.)). However, where counsel does not have certified copies of judgment of

conviction but does have a “good faith” reason for asking the question, than the impeachment with evidence of prior convictions is permissible. See *Alvarez v. State*, 467 So. 2d 455 (Fla. 3d DCA 1985) disapproved of by *Riechmann v. State*, 581 So. 2d 133 (Fla. 1991)); *Miller v. State*, 605 So.2d 492 (Fla. 3d DCA 1992); *Peterson v. State*, 645 So. 2d 10 (Fla. 4th DCA 1994); *Williams v. State*, 654 So. 2d 261, 262 (Fla. 2d DCA 1995). This good faith exception is only applicable in limited circumstances and is by no means the standard protocol for impeachment with evidence of prior convictions. *Id.*

Good faith basis was sufficient for impeachment without possession of the certified copy of conviction where the prior felony conviction occurred in Cuba. *Alvarez v. State*, 467 So. 2d 455 (Fla. 3d DCA 1985) disapproved of by *Riechmann v. State*, 581 So. 2d 133 (Fla. 1991)). The court reasoned that due to the fact that the convictions occurred in Cuba, records of such convictions may be non-existent or exceptionally difficult, if not impossible to obtain. *Id.* Records from United States based convictions do not carry the same difficulty to obtain.

The good faith exception is permissible where counsel makes a determined effort to obtain a certified copy of judgment of conviction but does not receive it. *Miller v. State*, 605 So.2d 492 (Fla. 3d DCA 1992). In

*Miller*, the court affirmed the trial court's admission of impeaching questions regarding a defendant's four prior federal felony convictions, where the prosecutor had an FBI rap sheet showing such convictions, and the prosecutor had made four different attempts to secure the certified copies but had been unable to obtain them prior to trial. The court found that this was sufficient to show good faith by the prosecutor. *Id.*

The good faith exception applies in situations where counsel has a rap sheet listing the witness's criminal record along with a sworn affidavit attesting to the truthfulness of the record. *Peterson v. State*, 645 So. 2d 10 (Fla. 4th DCA 1994). The court in *Peterson* affirmed the trial court's admission of impeaching questions regarding a defendant's prior convictions, where the prosecutor had an NCIC rap sheet listing Peterson's criminal record and a sworn affidavit attesting to the accuracy of the rap sheet. *Id.* The court reasoned that the prosecutor had a good faith basis to ask about prior convictions based on the affidavit attesting to the truthfulness of the record. *Id.*

The Good faith exception is permissible where the copies are in the possession of the state and are available to be introduced into evidence if necessary. *Williams v. State*, 654 So. 2d 261, 262 (Fla. 2d DCA 1995). In *Williams*, "the state possessed certified copies of William's prior

convictions, but did not have them in the courtroom at the time the defendant was initially questioned because the prosecutor had left them in another file which was downstairs.” *Id.* The court held that there was “no error for prosecutor to ask about convictions when certified copies of convictions were in office and, after a short recess, were introduced in evidence on rebuttal.” *Id.*

The present case falls short of the narrow “Good faith” exception. In the case at hand, the only evidence of a conviction the state had in their possession was an NCIC rap sheet. When the state requested permission from the court to impeach the defendant with evidence of prior convictions, the prosecutor stated to the court that he had in his possession “a rap [sheet]...except for the Judgment and Sentence never arrived.” The court found in error that the NCIC rap sheet provided the prosecutor with a good faith reason to question the defendant about the defendant’s prior convictions.

This court does not find that the prosecution had presented sufficient evidence to impeach the witness with evidence of prior convictions based on the fact that the prosecutor only had an NCIC rap sheet and did not have an affidavit attesting to the accuracy of the report, as in *Peterson*. Nor had the prosecutor attempted to secure a certified copy of the conviction several



times, as in *Miller*. One single effort to obtain the certified copy of conviction without any explanation as to what the results of that effort was or why that effort failed is not sufficient to satisfy a good faith basis. In contrast to *Alvarez*, the prior conviction questioned about in this case occurred in the United States; which does not carry the same hardship as obtaining a conviction record from Cuba. Unlike *Williams*, the prosecutor in this case did not have “constructive possession” of the certified copy of conviction. This case falls short of the narrow good faith exception. Therefore, the lower court erred in allowing the state to impeach without certified copies of Judgment and Sentences.

This court must now determine if the error in finding sufficient evidence was harmless error. The state argues that any error would have been harmless because the defendant answered in the affirmative when asked about prior convictions, which satisfies the good faith exception because there was no danger of misleading the jury. We are not willing to accept this argument because the impeachment should not have occurred without possession of certified copies of judgment and sentences.

Evidence of prior convictions is effective impeachment because “the mere fact that a defendant has been convicted a crime impacts his [or her] believability.” *See Barcomb v. State*, 68 So. 3d 412, 416 (Fla. 4th DCA

2011). The admissible evidence available to the jury consisted of the police officer's testimony and the defendant's testimony. Based on the fact that the defendant's version of the events was at odds with the police officer's version, the believability of the defendant was critical to her defense to the charge. *See Id.* After carefully examining the record, we find beyond a reasonable doubt that the trial courts error in allowing the state to impeach the Defendant with evidence of prior convictions without possessing certified copies of Judgment and Sentences contributed to the conviction.

## II

Counsel may not bolster the credibility of police officer witness testimony by stating that the witness has no interest in the case. *Servis v. State*, 855 So. 2d 1190, 1195 (Fla. 5th DCA 2003)(prosecutor stated during his closing argument "Let's talk about, we have law enforcement here that came in and testified and left. That's their job is to investigate an accident, and they came in here and told you what happened. *They have no interest in how it's decided.*" (emphasis added)).

In the present case, the state sought to bolster the credibility of the officers by stating that they had no interest in the case:

He has no reason just to bring somebody in for prostitution. He's not getting anything out of this. *There's no interest in this case*

(emphasis added).

“This attempt to bolster the officers' testimony was impermissible.”

*Id.*

### III.

“Closing arguments must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response rather than a logical analysis of the evidence and the applicable law.” *Id.* at 1197. “Except to the extent that an attorney bases his or her opinion on the evidence of the case, an attorney may not express a personal opinion on the merits of the case or the credibility of witnesses.” *Servis v. State*, 855 So. 2d 1190, 1194-95 (Fla. 5th DCA 2003). In addition, “[a] prosecutor may not ridicule a defendant or his theory of defense.” *Riley v. State*, 560 So. 2d 279, 280-81 (Fla. 3d DCA 1990).

In the present case, the prosecutor stated in closing:

If that's the case, if you believe some officers just came here and just made this whole thing up, violated the oath they made when they became officers, violated the oath they took today just to make a story up to convict somebody of prostitution, then *I am sure you have some grievances and some things to address with the mayor of St. Pete*

*because we have two officers in the street right now who are crooked and are just making stuff up in trials.*

...

Now we're supposed to paint him as some type of a deceiver, you know, because he has an interest in this case and he's just going to make things up to you. Let's not go down that road. *I find it appalling, I find it disturbing, that this would be argued.*

(emphasis added)

The prosecutor's comment regarding the Mayor of St. Pete and crooked officers was inflammatory and intended to evoke an emotional response from the jury. Furthermore, it was improper for the prosecutor to express his personal opinion ridiculing the defendant's theory of defense.

### **CONCLUSION**

The cumulative effect of the state's being allowed to ask the appellant about prior crimes without sufficient proof to justify the question, combined with numerous improper comments during closing argument denied the Appellant of a fair trial and created a reasonable likelihood that the errors contributed to Appellant's conviction. We therefore reverse the order of the trial court.

It is ORDERED AND ADJUDGED that the cause is hereby  
REVERSED.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County,  
Florida this 26 day of February, 2015.

Original Order entered on February 26, 2015, by Circuit Judges Thane B. Covert,  
Chris Helinger, and Nancy Moate Ley.