

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

OSEE BOB PAUL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2025-0899

[September 2, 2026]

Appeal from the County Court for the Fifteenth Judicial Circuit, Palm Beach County; Frank S. Castor, Judge; L.T. Case No. 502024MM005878AXXXSB.

Daniel Eisinger, Public Defender, and Devin Johnson, Assistant Public Defender, West Palm Beach, for appellant.

James Uthmeier, Attorney General, Tallahassee, and Joseph Mollica, Assistant Attorney General, West Palm Beach, for appellee.

GERBER, C.J.

The defendant appeals from his county court conviction for driving under the influence (“DUI”). The defendant argues that, during the state’s rebuttal closing argument, the state made a comment which improperly shifted the burden to him to prove his innocence. The defendant objected, but the county court overruled the objection. We conclude no reasonable possibility exists that the jury would have interpreted the comment as shifting the burden to the defendant to prove his innocence. Thus, the county court did not err in overruling the defendant’s objection. We affirm.

Trial Proceedings

At trial, the state presented three witnesses: the detaining officer, the DUI investigator, and the breath technician. All three testified as to the defendant’s physical appearance and behavior indicating his impairment. The state supported the testimony with video evidence. The state also introduced evidence that the defendant had refused to perform roadside

exercises or provide a breath sample, after being warned that refusal to submit to the latter would result in his driver's license being suspended.

During the state's initial closing argument, the state repeatedly emphasized it had the burden to prove the defendant guilty of DUI beyond a reasonable doubt, and that the witnesses' testimony and video evidence had satisfied the state's burden of proof.

However, after defense counsel's closing argument had challenged the state's evidence that the defendant was impaired, the state's rebuttal closing argument included these comments:

[I]f he wasn't impaired, there is one sure way he could have shown us, isn't there? He could have done the roadside exercises, but he refused. He could have definitely given us a breath sample, but he refused.

That, ladies and gentlemen, is called consciousness of guilt. When you refuse to do something because it shows exactly what the other person believes.

Defense counsel objected, but the objection's basis was indiscernible from the audio record. The county court overruled the objection. Defense counsel then requested the county court to provide an instruction to the jury, but the requested instruction also was indiscernible. In any event, the county court did not provide an instruction to the jury at that time. Nor did defense counsel move for a mistrial. The state resumed its rebuttal closing argument, continuing to emphasize that it had the burden to prove the elements of the crime charged.

After closing arguments, the county court provided the jury with the following standard instruction, among others:

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.

(emphases added). This instruction also was given to the jury in writing, along with the other written instructions. The jury convicted the defendant of DUI as charged.

The Parties' Arguments on Appeal

This appeal followed, raising the following summarized argument:

The [county court] reversibly erred by allowing the prosecutor to make improper remarks in rebuttal closing. The State's comments put the onus on [the defendant] to prove his innocence, arguing that if [the defendant] was truly innocent, "he could have shown us" by doing roadside exercises and providing a breath sample. This [comment] improperly shifted the burden of proof to [the defendant], requiring reversal for a new trial.

Although the audio record does not discernibly reveal the basis for defense counsel's objection to the state's rebuttal closing, or that defense counsel moved for a mistrial, the state has not argued lack of preservation. Instead, the state responds to the defendant's appeal as follows:

The prosecutor's rebuttal closing comment was proper because it focused on the [defendant's] refusal to submit to roadside field sobriety exercises and a breath test, along with the evidence of the [defendant's] refusal. The comment did not address, let alone focus on, whether the [defendant had] demanded any DUI-related testing to prove his innocence. Thus, the [county] court did not abuse its discretion in overruling defense counsel's objection and denying the request for a curative instruction. Any error was harmless because the comment was isolated. Any error was also harmless because the [county] court accurately instructed the jury that the State had the burden to prove that the [defendant] committed DUI beyond a reasonable doubt and that the [defendant] had no burden of proof at all.

Our Review

"[An appellate court] review[s] trial court rulings regarding the propriety of comments made during closing argument for an abuse of discretion." *Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016).

Applying abuse of discretion review, we conclude the county court did not err in overruling the defendant's objection to the state's rebuttal comment. The fact that the defendant had refused to perform roadside exercises or provide a breath sample had been properly admitted into evidence. See § 316.1932(1)(a)1.a., Fla. Stat. (2024) ("The refusal to

submit to a chemical or physical breath test upon the request of a law enforcement officer ... is admissible into evidence in any criminal proceeding.”). Thus, the state’s reference to those refusals was a proper comment on both the evidence and the defendant’s consciousness of guilt.

While the state’s rebuttal should have been more careful to avoid using the words “he could have shown us” before referring to the defendant’s refusals to perform roadside exercises or provide a breath sample, the full context of that comment is important. Immediately after making that comment, the state permissibly explained how those refusals demonstrated the defendant’s consciousness of guilt. As our sister court recently observed in *Osorio v. State*, 428 So. 3d 220 (Fla. 3d DCA 2026):

Consistent with [section 316.1932(1)(a)1.a.], it has long been settled that impairment and consciousness of guilt may be inferred from the defendant’s refusal to submit to a breath-alcohol test. The prosecutor may therefore properly argue that the refusal is positive evidence, supporting the conclusion that the test would have revealed the presence of alcohol. Likewise, the more specific assertion that the defendant refused to submit to testing because he knew his breath-alcohol concentration would be over the legal limit is authorized.

Id. at 223 (emphases added) (internal citations omitted).

Having reviewed the state’s comment in context, no reasonable possibility exists that the jury would have interpreted the state’s comment as shifting the burden to the defendant to prove his innocence. Our conclusion is bolstered by the fact that the state—both before and after the comment—repeatedly emphasized it had the burden to prove the defendant guilty beyond a reasonable doubt, and that the witnesses’ testimony and video evidence had satisfied the state’s burden of proof. Thus, the county court did not err in overruling the defendant’s objection.

Even if we were to conclude the county court had erred in overruling the defendant’s objection, “[i]mproper burden-shifting remarks are subject to a harmless error analysis.” *Id.* Under such analysis, the state bears the burden of proving “beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated ... there is no reasonable possibility that the error contributed to the conviction.” *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)).

Here, no reasonable possibility exists that overruling the defendant's objection contributed to his conviction, for three reasons: (1) the comment was isolated in comparison to the state's repeated emphasis that it had the burden to prove the defendant guilty beyond a reasonable doubt, and that the witnesses' testimony and video evidence had satisfied the state's burden of proof; (2) the comment did not expressly indicate the defendant had any burden of proof, much less the burden to prove his innocence; and (3) the county court clearly instructed the jury that the state had the burden to prove the defendant guilty beyond a reasonable doubt, and the defendant was not required to present evidence or prove anything.

The state's isolated comment here distinguishes this case from *Osorio*, upon which the defendant relies. *Osorio* involved a defendant who had performed poorly on roadside exercises, but later refused to provide a breath sample. 428 So. 3d at 222. The state's initial closing argued:

If you believe that he's sober—if someone was sober in this situation, why would you not blow? (Claps hands). You'd be done with it, proved innocence beyond a reasonable doubt, we're out of here. There's one reason you don't blow. It's because it's better not to blow and gamble than it is to blow and remove all doubt. Even if it means your license is going to be suspended.

Id. (emphases added). Defense counsel objected, but the trial court overruled the objection. *Id.* Defense counsel's closing then argued that the arresting officer had failed to adequately investigate the case, and the defendant had pre-existing injuries which precipitated his poor roadside performance. *Id.* The state's rebuttal closing countered by arguing:

[T]he part that I really want to emphasize is, [the officer] did investigate the injuries. He gave the defendant a chance to prove that due to poor performance—that his poor performance was due to anything other than alcohol. All he had to do was blow.

Id. (emphases added) (brackets in original).

In reversing, our sister court held:

The State properly argued that if [the defendant] was not impaired, he would have agreed to submit to a breathalyzer. But by invoking the quantum of proof and further suggesting that [the defendant] waived the opportunity to prove his

innocence, the remarks strayed beyond consciousness of guilt and into impermissible territory. ... Given the nature of the remaining evidence, we are not persuaded there is no reasonable possibility that the error contributed to the conviction. Accordingly, we reverse and remand for a new trial.

Id. at 224-25 (emphases added).

Here, unlike in *Osorio*, the state’s rebuttal comment did not “invoke the quantum of proof” or argue the defendant had the burden to “prove his innocence.” Quite the opposite, the state here maintained—in both its initial and rebuttal closings—that the state carried the burden to prove the defendant guilty of DUI beyond a reasonable doubt. Thus, the state’s comment never “strayed beyond consciousness of guilt and into impermissible territory.”

The other two decisions from this court upon which the defendant here relies—*Sheely v. State*, 392 So. 3d 576 (Fla. 4th DCA 2024), and *Concha v. State*, 972 So. 2d 996 (Fla. 4th DCA 2008)—are similarly distinguishable.

In *Sheely*, “[d]uring closing argument, the prosecutor emphasized several times that the defendant did not seize the opportunity to dispel the officers’ suspicions that he was driving while impaired.” 392 So. 3d at 577. The prosecutor also stated: (1) “the defendant ‘says no’ when taken to ‘a room safely designated for him [to perform sobriety exercises] to dispel the suspicions’”; (2) the defendant “had an ‘opportunity ... to ... dispel the suspicions’”; and (3) the defendant “also ‘declined’ to ‘dispel the officers’ suspicions’ by submitting to a breathalyzer test.” *Id.* (brackets in original).

We reversed, because the comments “shifted the burden of proof by suggesting that the jury should infer the defendant’s guilt because ‘he did not ... take other affirmative steps to prove his innocence.’” *Id.* at 578 (quoting *Morris v. State*, 988 So. 2d 120, 123 (Fla. 5th DCA 2008)). We reasoned “the prosecutor went beyond arguing that the defendant’s failure to submit to field sobriety exercises constituted evidence of consciousness of guilt. [The prosecutor] emphasized that the defendant declined the opportunity to dispel the officers’ suspicions that he was impaired.” *Id.*

Here, in contrast, as the state argues, “[t]he [state’s] comment ... was made only once and focused on both the [defendant’s] refusal to submit to either test and the evidence, not on whether the [defendant had] demanded any testing.” In other words, the focus here was on consciousness of guilt.

In *Concha*, the state elicited testimony that the defendant initially had demanded to perform roadside exercises and provide a breath sample, but when provided the opportunity for both at a law enforcement facility, the defendant refused both. 972 So. 2d at 997–98. The state relied on that evidence to argue in closing:

This is a person with a guilty conscience ... who knew full well if he gave a breath test, you all would know how guilty he was. I'm not drunk he says. Okay. Prove it. No, no, no. No, no, no. I'm not going to let the jury see that. No, no, no, the jury is not going to see how I'm going to perform on the video.

Id. at 998 (emphases added).

We reversed, determining the state impermissibly had suggested the defendant “knew he was intoxicated because he did not ask to perform the sobriety tests when he had the opportunity at the ... facility.” *Id.* We reasoned such a suggestion was “fairly susceptible of being interpreted as a comment on [the defendant’s] right to remain silent,” because the defendant “had a right ... not to demand an exculpatory procedure.” *Id.*

Here, in contrast, as the state argues, it “never elicited testimony from any witness regarding the [defendant’s] demand, or lack thereof, for any DUI-related testing.” Instead, the state commented only on the defendant’s refusals of testing, and permissibly explained how those refusals demonstrated the defendant’s consciousness of guilt.

Conclusion

Based on the foregoing, we conclude no reasonable possibility exists that the jury would have interpreted the state’s isolated comment as shifting the burden to the defendant to prove his innocence. Thus, the county court did not err in overruling the defendant’s objection. We affirm.

Affirmed.

MAY and SHAW, JJ., concur.

* * *

Not final until disposition of timely-filed motion for rehearing.