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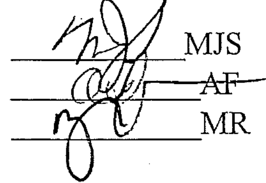

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO.: 14-222 AC

LOWER CASE NO.: 7088XEE

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FERNANDO VILLA,

Appellant/Petitioner,

vs.

THE STATE OF FLORIDA,

Appellee/Respondent.
______________________________________/

Opinion filed December 8th, 2015.

On Appeal from the County Court for Miami-Dade County, Florida.

Carlos F. Gonzalez, Esquire and Fausto Sanchez, Esquire of DIAZ REUZ & TARG, LLP, for Appellant.

Rebecca Gray, Esquire, as State Attorney for Eleventh Judicial Circuit, for Appellee.

Before SANTOVENIA, FINE and RUIZ, JJ.

RUIZ, Judge.

The Defendant was found guilty of driving under the influence and this appeal follows. The defense argues five issues on appeal: (1) the State commented on the Defendant's right to remain silent when the court admitted evidence that he refused to perform field sobriety tests and then denied a motion for mistrial, (2) the State shifted the burden by further asking Officer Zarraga

whether Mr. Villa gave a *reason, "whether medical or something,"* for not performing FST's and the court then denying a motion for mistrial, (3) the State shifted the burden when it asked Officer Zarraga "did you see any medical records?" and the court then denied a motion for mistrial, (4) the trial court erred in not granting the first motion for judgement of acquittal because the State failed to present substantial competent evidence inconsistent with every reasonable hypothesis of innocence in a circumstantial case, and finally (5) the court applied the wrong standard in the defense's second motion for judgment of acquittal. Because we find merit in the defense's arguments that the State shifted the burden and improperly commented on the Defendant's pre-arrest silence, we reverse.

I. Underlying Facts

On December 6, 2011, the Defendant, Fernando Villa, was found "passed out" in the driver's seat of his marked police cruiser. His vehicle was facing southbound, blocking the left turn lane of 137th avenue. Sgt. Richard Zahalka was patrolling 137th avenue northbound when he came upon the Defendant's vehicle. He saw that Mr. Villa was asleep and made a U-turn to check up on him. He tapped on the glass window to elicit a response but Mr. Villa remained unresponsive. He then opened the door and shook Mr. Villa with the same result. Officer Villa's head was tilted back and to the left. He observed Mr. Villa's foot on the brake pedal and his vehicle in "drive." Sgt. Zahalka put the car in the "park" position. Unable to wake Mr. Villa and fearing a diabetic episode, Sgt. Zahalka called rescue. In the meantime, Officers Gil and Sierra arrived on the scene. Officer Gil observed Mr. Villa's speech, noticed "something different" about it and smelled an odor of alcohol coming from inside the vehicle but could not determine that it was coming from Mr. Villa's person. Furthermore, Officer Gil testified that in spite of standing close to Mr. Villa, he did not notice an odor of alcohol coming from his breath.

Rescue took Mr. Villa's vitals and also tried to wake him, to no avail. Fire rescue personnel then conducted a sternum rub. A sternum rub is a painful procedure wherein the provider rubs his knuckles into the sternum plate of the patient. The pain usually wakes the individual. Unsuccessful thus far, rescue personnel proceeded to remove Mr. Villa from his vehicle and attempt to stand him up. Mr. Villa finally awoke.

Sgt. Zahalka next observed the Defendant's glassy eyes and a strong odor of alcohol emitting from his breath. Sgt. Zahalka called his supervisors. Mr. Villa asked the Sergeant to give him a ride home. Sgt. Zahalka refused which caused Mr. Villa to become agitated and angry. He called the Sergeant a "loser" and a "piece of garbage."

Specially trained in DUI detection, Officer Zarraga responded to the scene. Officer Zarraga witnessed an unsteady gate, bloodshot eyes, and an odor of alcohol. Having probable cause, Officer Zarraga requested that Mr. Villa perform field sobriety exercises [hereinafter FST]. The horizontal gaze nystagmus [hereinafter HGN] was conducted first. Nystagmus is the involuntary jerking of the eye when it reaches a certain angle. Officer Zarraga detected nystagmus in both eyes. Mr. Villa refused to perform any other field sobriety exercises. He was placed under arrest. Mr. Villa was transported to the police station. He was asked to perform a breathalyzer test three times and refused each time.

II. Comment on Defendant's Pre-arrest Pre-*Miranda* Silence

The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who asserts said right. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965). In *Jenkins v. Anderson*, the United States Supreme Court analyzed a defendant's pre-arrest silence

noting that "a defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." In *Jenkins,* the defendant fled the scene of the crime but turned himself in two weeks later. While testifying at trial, the prosecutor asked him about his pre-arrest silence, in that he told no one what had happened. *Jenkins* held that this impeachment was not a comment on the defendant's silence.

Recently, the Fourth District Court of Appeal was faced with this very question. In *Horwitz v. State*[1], 40 Fla. L. Weekly D474 (4DCA 2015), 2015 WL 671136, the court certified the following question of great public importance:

> WHETHER, UNDER FLORIDA LAW, THE STATE IS PRECLUDED FROM INTRODUCING EVIDENCE OF A DEFENDANT'S PRE-ARREST, PRE-*MIRANDA* SILENCE WHERE THE DEFENDANT DOES NOT TESTIFY AT TRIAL?

Donna Horwitz was accused of murdering her husband. While on the scene, she was asked several questions which she did not answer. Finally, she "put her fingers to her ears and said she couldn't hear...asked...if she was in the room when the gun went off, [she] did not answer." *Id* at *2. As the Defendant here, she did not testify at trial. The trial court admitted the testimony and the prosecution was allowed to argue that her silence was proof of consciousness of guilt. She was convicted.

[1] Notice: this opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

Lopez v. State, 97 So.3d 301, 304 (Fla. 4DCA 2012) and *McCray v. State*, 919 So.2d 647, 649 (Fla. 1DCA 2006) held that a trial court's ruling on the admissibility of evidence is reviewable by an abuse of discretion standard but that the court's discretion was still subject to the rules of evidence and applicable law. For example, if the Defendant's silence is sought to be introduced but it does not impeach him in any way, then it is not admissible. Or, if his silence is consistent with anyone's silence under similar circumstances, then his silence is not inconsistent, therefore not impeachment and not admissible.

Contrast *Salinas v. Texas*, 133 S.Ct 2174 (2013), where the United States Supreme Court held that a Defendant's pre-arrest, pre-*Miranda* silence is admissible against him unless he invokes the privilege against self-incrimination:

> Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question. It has long been settled that the privilege "generally is not self-executing" and that a witness who desires its protection " 'must claim it.' " *Minnesota v. Murphy,* 465 U.S. 420, 425, 427, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (quoting *United States v. Monia,* 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943)). Although "no ritualistic formula is necessary in order to invoke the privilege," *Quinn v. United States,* 349 U.S. 155, 164, 75 S.Ct. 668, 99 L.Ed. 964 (1955), a witness does not do so by simply standing mute. Because petitioner was required to assert the privilege in order to benefit from it, the judgment of the Texas Court of Criminal Appeals rejecting petitioner's Fifth Amendment claim is affirmed.

"Under *Salinas,* the prosecutor's use of appellant's pre-arrest, pre-*Miranda* silence, which occurred before he invoked her constitutional rights, did not violate the federal Constitution. The question therefore becomes whether the comment on appellant's silence was nonetheless inadmissible under Florida law. It is well-established that Florida courts are free to interpret the right against self-incrimination afforded under the Florida Constitution as affording greater protection than that afforded under the United States Constitution. *Rigterink v. State,* 66 So.3d 866, 888 (Fla.2011)... In *State v. Hoggins,* 718 So.2d 761, 765, 769–72 (Fla.1998), for example, the

Florida Supreme Court held that the use of post-arrest, pre-*Miranda* silence to impeach a defendant's testimony at trial violates Florida's constitutional privilege against self-incrimination, even though such impeachment evidence is not barred by the Fifth Amendment." Quoting *Horwitz* at *3[2].

"In *Hoggins,* at 765, 769–72, the Florida Supreme Court held that the use of post-arrest, pre-*Miranda* silence to impeach a defendant's testimony at trial violates Florida's constitutional privilege against self-incrimination, even though such impeachment evidence is not barred by the Fifth Amendment." *Id* at *3. The *Hoggins* court reasoned that although their holding did not protect pre-arrest silence, those pre-arrest statements would be admissible as impeachment evidence *only if* the defendant took the stand *and* the silence was inconsistent with his testimony at trial (emphasis added):

> In Florida, a defendant takes the stand in a criminal case subject to impeachment by prior inconsistent Statements to the extent that the probative value of the prior inconsistent Statements is not outweighed by the risk of unfair prejudice to the defendant. *The same rule applies to impeachment by prior silence, which is not precluded by the federal or State constitution. Thus, inconsistency is a threshold question when dealing with silence that may be used to impeach.* If a defendant's silence is not inconsistent with his or her exculpatory statement at trial then the [silence] lacks probative value and is inadmissible.
>
> *4 *Id.* at 770–71 (emphasis added; citations omitted).

Similarly, "[t]he prosecutor in this case (*Horwitz),* relied upon *Rodriguez v. State,* 619 So.2d 1031 (Fla. 3d DCA 1993), *disapproved in part by State v. Hoggins,* 718 So.2d 761 (Fla.1998), to argue that pre-arrest, pre-*Miranda* silence was admissible. But *Rodriguez* merely held that the use of pre-arrest silence to impeach a defendant's credibility did not violate the

[2] Westlaw citation page number.

Constitution.[3] *Rodriguez* did not hold that a defendant's pre-arrest silence could be admitted as substantive evidence of guilt.

Mr. Villa refused to perform the field sobriety tests and he refused to take a breathalyzer test. The State asked Sgt. Zarraga:

Q: Sgt. Zarraga, did Mr. Villa give you a reason why he didn't want to do the rest of the roadside exercises, whether medical or something else?

A: No he did not, no.[3]

Mr. Villa's statement was pre-arrest, he did not testify at trial, nor did he present any evidence, as was the case in *Horwitz.* This question seeks to draw the jury's attention to lack of evidence presented by Mr. Villa to justify his refusal. The Florida Supreme Court has already decided that the Defendant's refusal to perform roadsides is admissible against him at trial. *See State v. Taylor*, 648 So.2 701 (Fla. 1995). In fact, the State can argue that his refusal is proof of his consciousness of guilt. *Id.* at 705. But, here the State seeks to extend that holding to include shifting the burden to Mr. Villa to prove why he refused. Furthermore, the State introduced as substantive evidence, the fact that Mr. Villa has not produced evidence of any reason-other than intoxication- for his refusal. The question goes even further, it is a comment on Mr. Villa's right to remain silent. As Mr. Villa did not testify at trial, it cannot be impeachment. Nor did Mr. Villa assume the burden of production of evidence as in an alibi or self-defense case. The difference between refusing to perform roadsides and failing to give a *reason* for not performing them is that the State shifts the burden onto the Defendant to put on a defense. *Jackson*[4] forbids it (see below).

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[3] Page 906, Supp. App. at 902, 906

[4] *Jackson v. State,* 575 So.2d 181, 188 (Fla.1991).

III. Shifting the Burden

Mr. Villa next argues that the court committed error by denying a defense objection and request for a mistrial, when the State asked Sgt. Zarraga, "Did you see any medical records?"

Ramirez v. State, 1 So.3d 383 (Fla. 4DCA 2009) explains:

> The State is not permitted to "comment on a defendant's failure to produce evidence to refute an element of the crime." *Id.* at 894 (quoting *Jackson v. State,* 575 So.2d 181, 188 (Fla.1991)). "[D]oing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence." *Id.* An exception exists, however, "when the defendant voluntarily assumes some burden of proof by asserting the defense of alibi, selfdefense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state." *Id.*

Ramirez involved a woman stopped at the airport who became unruly. She was arrested and apparently bruised in the process. During her trial, the prosecutor asked the Defendant whether she had been injured. When she responded that she had, the prosecutor asked "Did you take any pictures of your injuries?" She said that her photographs had come out too light for the bruises to be seen. She was asked whether she requested that someone in the jail take pictures and whether she had any doctor's reports to prove she was injured. In closing, the prosecution argued to the jury that "the only picture evidence you have before you...is the picture that I have submitted to you." *Id.* at 385. The Fourth District explained that the only time the State can comment on the Defendant's failure to produce evidence is when they have undertaken some burden of proof as in an alibi or a self-defense case. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them and asserts a good excuse or reason." *Wright v. State*, 920 So.2d 21, 24 (Fla. 4DCA 2005). The Defendant in *Ramirez* never undertook such a burden, and neither did Mr. Villa. The Fourth District reversed the conviction because that the State shifted the burden.

The Court in *Hayes v. State*, 660 So.2d 257, (Fla. 1995), also reversed a conviction because the State was permitted to ask a witness whether the defense had requested DNA testing of blood samples, to contradict the defense theory that it was not the Defendant's DNA. The witness replied that they had not and added that the lab had performed these tests for other defense attorneys who had so requested them. Additionally:

> [i]n *Jackson v. State,* 575 So.2d 181, 188 (Fla.1991), we found that the State had erred when the prosecutor commented on the defendant's failure to call a particular witness to testify. We explained: It is well settled that due process requires the state to prove every element of a crime beyond a reasonable doubt, and that a defendant has no obligation to present witnesses. Accordingly, the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence.

In *Miele v. State*, 875 So.2d 812 (Fla. 2DCA 2004), also reversed, the State was permitted to ask a defense witness whether she had taken pictures of the jar from which the Defendant, her brother, had taken a $2 bill. Further, the other defense witness, the Defendant's other sister, was asked if she saw their father in the courtroom, insinuating that the defense failed to call him as a witness. The defense was that the jar belonged to their father, that the jar contained $2 bills, and that the Defendant had permission to take the bills.

Most recently, the Florida Supreme Court reversed *Warmington v. State,* 149 So.3d 648 (Fla. 3DCA 2014), on the same grounds. In *Warmington,* the lead detective went to the Defendant's home as part of his investigation. The detective asked the Defendant if he had any proof that the alleged missing money was the subject of a loan rather than a larceny. Unable to produce proof, the Defendant was immediately arrested. The Third District reasoned that the detective's testimony merely referred to "historical facts[:]"

> The Third District also distinguished the conflict cases of *Hayes, Ramirez,* and *Miele,* which each held that testimony concerning historical facts similar to the testimony elicited by the State in this case constituted impermissible burden

> shifting. *See id.* at 1190–92. The Third District concluded that all of those cases were distinguishable because each involved a situation where "a prosecutor's questioning *at trial* resulted in the burden *at trial* being less than it should be, where the jury is left with the impression that a defendant had an obligation to produce evidence of his innocence *at trial,* or when the burden *at trial,* is less than reasonable doubt." *Id.* at 1190.

In reversing, the Florida Supreme Court decided that there was no distinguishing *Warmington* from *Hayes, Ramirez, and Miele.* Each "invite[d] the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." *See Gore v. State,* 719 So.2d 1197, 1200 (Fla.1998).

Mr. Villa did not assume any burden of proof. In opening, the defense stated simply that the state would fail to meet its burden of proving beyond a reasonable doubt that Mr. Villa was driving under the influence. The defense presented no witnesses, no one to testify that the defendant had a head injury which caused nystagmus in his eyes. They produced no witness to testify that Mr. Villa had a medical condition that caused his sway or his deep sleep or unconsciousness. The defense never committed to presenting medical records to explain Mr. Villa's condition on the date of his arrest. Mr. Villa did not testify at his trial.

In spite of this, the State was permitted to ask Officer Zarraga, "did you *see* any medical records?" Where would the jury believe these medical records would have come from? The State is prosecuting Mr. Villa hence they would not be procuring medical records to exculpate him at trial. If the State had exculpatory medical records the case would not be *going* to trial. Only the defense would procure them. And in this case, the defense did not *because they had no burden to do so.* The question was not, "Officer, did you *find* any medical records?" or "did you *locate* any medical records?" This would at least place the burden of procuring them on the *officer*. Even these questions are troublesome, but "did you *see* any medical records?" leaves the trier of fact to conclude just one thing: did the defense procure medical records to show you that Mr. Villa's

condition was due to a medical condition and not intoxication? This is impermissible burden shifting.

The lack of medical records is significant because it tends to prove a negative, namely that Mr. Villa did not have a medical condition, therefore, he must have been drunk. The State shifted the burden to the defense to prove that there was a medical condition that caused Mr. Villa to act the way he did on December 6, 2011. Absent that proof, he should be convicted. *Gore v. State,* 719 So.2d 1197, 1200 (Fla.1998) specifically forbids a jury from finding guilt for any reason other than the State presented proof beyond a reasonable doubt.

The State's proof against Mr. Villa was circumstantial. The Florida Standard Jury Instructions in Criminal Cases 28.1 outlines the elements which the State must prove beyond a reasonable doubt:

28.1 DRIVING UNDER THE INFLUENCE

§ 316.193(1), Fla. Stat.

To prove the crime of Driving under the Influence, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) drove or was in actual physical control of a vehicle.

2. While driving or in actual physical control of the vehicle, (defendant)

Give 2a or b or both as applicable.

a. was under the influence of [alcoholic beverages] [a chemical substance] [a controlled substance] to the extent that [his] [her] normal faculties were impaired.

b. had a [blood] [breath]-alcohol level of .08 or more grams of alcohol per [100 milliliters of blood] [210 liters of breath].

Mr. Villa was asleep at the wheel, deeply. There is no telling how long he was there. He certainly fell asleep while driving but this does not prove beyond a reasonable doubt that he was under the influence. He could have had something to drink and fallen asleep. But for the HGN, this is a double refusal case (no breathalyzer test and no FST's). The strongest evidence against Mr. Villa is that he was in a deep sleep or that he "passed out" due to the effects of the alcohol.

This makes the HGN that much more important. Other than Mr. Villa's state, the HGN is the only direct evidence of intoxication. Officer Gil testified that he smelled a general odor of alcohol from the vehicle, not from Mr. Villa's person. Sgt. Zahalka, consistent with Officer Gil's testimony, did not smell a strong odor of alcohol while trying to wake Mr. Villa. In fact, (and consistent with Officer Gil's testimony), he believed Mr. Villa was having an epileptic episode. So much so that he immediately contacted fire rescue for assistance. Had the smell of alcohol been strong in the vehicle or from Mr. Villa's person, Sgt. Zahalka would have immediately suspected intoxication. It was not until Mr. Villa was awakened and he smelled alcohol on Mr. Villa's breath that the investigation turned to intoxication. Mr. Villa was not drooling, falling over or slurring his words. Officer Zarraga testified that his speech was "normal." The defense asked the witnesses how a head injury would affect the HGN. Medical records would certainly assist the trier of fact on this issue. "Did he give you a reason [for refusal to perform FST's,] medical or otherwise?" In other words, did he say he could not perform the FST's because he had a prior head injury?

Lastly, in closing argument, the prosecution emphasized that lack of medical records by arguing:

> "[Y]ou heard the defendant conveniently give an excuse. You know, ladies and gentlemen, I'm sure if you ask any police officer, they hear excuses from people trying to get off the hook all the time, which is why it's surprising that a fellow police officer couldn't come up with a better explanation for failing his exercises, for sluggish behavior other than, oh, I had some sort of head injury when I was in high school." Let's get this, let's put this in perspective. This is a man who puts his life on the line every single day, and yet is now saying that because of an injury that I had when I was in high school, I can't - -I can't- - that's the reason you're saying all this. Does this make sense? When you put that in perspective, does that make sense? You know, the defendant, then you heard, refuses all of the roadsides. Why is that important, ladies and gentlemen? Because it's evidence of guilt, just like…"

IV. Conclusion

In light of *Hayes*[5], *Horowitz*[6], *Ramirez*[7] *Warmington*[8] and *Miele*[9], we cannot conclude that the errors complained of cannot collectively be found to be harmless beyond a reasonable doubt. Therefore, we reverse Mr. Villa's conviction and remand for a new trial. The remaining issues are without merit.

REVERSED and REMANDED.

SANTOVENIA, FINE, JJ, Concur.

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[5] 660 So.2d 257 (Fla. 1995).
[6] 40 Fla. L. Weekly D474 (4DCA 2015), 2015 WL 671136.
[7] 1 So.3d 383 (Fla. 4DCA 2009).
[8] 149 So.3d 648 (Fla. S.Ct. 2014).
[9] 875 So.2d 812 (Fla.2DCA 2004).