IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502016AP900088AXXXMB
L.T. NO.: 502015CT026485AXXXMB

KEVIN A. PRATT,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: APR 0 1 2019

Appeal from the County Court in and for Palm Beach County,
Judge Marni Bryson.

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PER CURIAM.

Appellant and Defendant below, Kevin A. Pratt ("Defendant"), appeals his conviction for Driving under the Influence Causing or Contributing to Injury to Person or Property. Defendant argues the trial court erred by (1) improperly commenting on the evidence during voir dire; (2) improperly limiting defense counsel's questioning of the venire during voir dire; (3) improperly limiting Defendant's testimony at trial; (4) failing to remain neutral and impartial at trial; and (5) improperly denying defense counsel's cause challenge of a prospective juror. We find Defendant's

final issue requires reversal and a new trial. However, because we find the trial court committed several other errors below, we address each of the issues raised in turn.

I. Comments on the Evidence During Voir Dire

Defendant first argues the trial court improperly commented on the evidence during voir dire. A judge may not sum up the evidence or comment to the jury on the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. § 90.106, Fla. Stat. (2015). "It is error for the judge to make any remark in front of the jury that might be interpreted as conveying the judge's view of the case or an opinion on the weight, character, or credibility of the evidence." *Jacques v. State*, 883 So. 2d 902, 905 (Fla. 4th DCA 2004). Here, Defendant argues that the trial court improperly commented on the evidence by informing the venire about the implied consent laws, and specifically stating that a person's refusal to provide a breath sample does not mean they are "automatically guilty" of DUI, but that it's "just a piece of evidence that you must consider along with all the other evidence presented during the case."

Because Defendant did not contemporaneously object to the trial judge's voir dire statement, it is subject only to a fundamental error analysis. *Walden v. State*, 123 So. 3d 1164, 1166 (Fla. 4th DCA 2013). A fundamental error is one "that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Mathew v. State*, 837 So. 2d 1167, 1170 (Fla. 4th DCA 2003) (quoting *Rimmer v.* State, 825 So. 2d 304, 323 (Fla. 2002)). Nonetheless, having reviewed the trial court's statements in their entirety, we find the trial court did not impermissibly comment on the weight of the evidence or Defendant's guilt. Indeed, the comment was made during voir dire, when no evidence had yet been presented. It is partly for this reason that we find the cases on which Defendant relies distinguishable. *See, e.g.*, *Walden*, 123 So. 3d 1164 (holding that after

deliberations had begun, trial court improperly answered a juror's question of whether it was "fair to say that [the defendant] was armed within a structure with a dangerous weapon" by stating, "He was armed or armed himself, yes."); *Edwards v. State*, 603 So. 2d 89 (Fla. 5th DCA1992) (holding trial court improperly instructed jury at close of case that defendant's refusal to take an approved chemical test "may be shown into evidence as a circumstance from which guilt may be inferred"). The trial court's comments here also were merely part of its explanation of the two theories for proving DUI, and ultimately led to the court striking one juror for cause who did not believe he would be able to follow the law. Accordingly, we find the trial court did not impermissibly comment on the evidence or Defendant's guilt.

II. Limitation on Defense Counsel's Examination of Prospective Jurors During Voir Dire

Defendant next argues the trial court erred by limiting defense counsel's questioning of the venire during voir dire. A trial court's limitation of voir dire questioning is reviewed for an abuse of discretion. *Blevins v. State*, 766 So. 2d 401, 402 (Fla. 2d DCA 2000). "The purpose of voir dire is to ensure a fair and impartial jury." *O'Hara v. State*, 642 So. 2d 592, 593 (Fla. 4th DCA 1994). Thus, "a trial judge must allow counsel the opportunity to ascertain latent or concealed prejudgments by prospective jurors." *Campbell v. State*, 812 So. 2d 540, 542 (Fla. 4th DCA 2002) (quoting *Miller v. State*, 683 So.2d 600, 602 (Fla. 2d DCA 1996)). Moreover, a trial judge "may not preclude a party from inquiry into bias bearing on a matter that is at the heart of the defendant's case." *Ingrassia v. State*, 902 So. 2d 357, 359 (Fla. 4th DCA 2005). If a trial court abuses its discretion in this regard, however, a conviction will not be reversed for harmless error. *Blevins*, 766 So. 2d at 402.

During voir dire, defense counsel attempted to question the potential jurors about whether they believed "[i]f a police officer asks you to do something you should just do it," and "whether

"there's ever a time . . . where it might be okay not to do that." The trial court called the attorneys up to the bench and precluded defense counsel from asking the question, stating that it was inappropriate to question the jurors as to whether it is okay to "disobey a lawful command," and that the question was not relevant to any theory of defense or complex legal issue in the case.

Having reviewed the record, we believe the trial court mischaracterized defense counsel's question, which we further find directly related to Defendant's theory of defense—that Defendant refused to submit to roadside field sobriety tasks and a breath test because he felt he was being treated unfairly by the police officers investigating him. Because Defendant did not provide a breath sample and did not participate in roadside field sobriety tasks, the State relied on Defendant's behavior at the scene of the accident and his refusal to participate in the DUI investigation as evidence of guilt. By questioning the venire about whether it is ever appropriate to disregard a police officer's commands, defense counsel was attempting to discover prospective jurors' prejudices about defendants who refuse to comply with an officer's request. Thus, we find the questions did relate to Defendant's theory of defense and the trial court abused its discretion by precluding defense counsel from asking them.

However, we also find the trial court's error was harmless. An error is harmless if "the error complained of did not contribute to the verdict . . . or . . . there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Although the trial court limited defense counsel's questioning of the jurors on their opinions about refusing to submit to a police officer's request, prior to being limited by the trial court, defense counsel elicited responses from the venire on whether any prospective jurors believed that "if someone doesn't provide a [breath or blood] sample they have something to hide." The Court also asked whether any of the jurors would automatically think someone was guilty because he or she

did not give a breath sample, and none of the jurors indicated they would. Thus, despite the trial court's improper limitations on defense counsel's questions about refusing to submit to a police officer's request, we find defense counsel was able to ask the jurors other questions aimed at revealing their potential biases related to Defendant's theory of defense. Accordingly, we find the trial court's error was harmless.

III. Limitation on Defendant's Testimony at Trial

Defendant argues the trial court improperly limited his testimony when it prevented defense counsel from questioning him on redirect examination about whether Defendant believed he was treated unfairly by the arresting officers. A "party may re-examine a witness about any matter brought up on cross-examination, and a trial court has broad discretion in determining the proper scope of the examination of witnesses." *Johnston v. State*, 497 So. 2d 863, 869 (Fla. 1986). A trial court also has broad discretion in determining the relevancy of evidence. *Wright v. State*, 19 So. 3d 277, 291 (Fla. 2009). A trial judge abuses its discretion when "the judicial action is arbitrary, fanciful, or unreasonable . . . [and] . . . no reasonable man would take the view adopted by the trial court." *LaMarca v. State*, 785 So. 2d 1209, 1212 (Fla. 2001) (quoting *Huff v. State*, 569 So.2d 1247, 1249 (Fla.1990)).

On direct examination, Defendant testified that the reason he refused to submit to the officer's tests was that he believed he was not "getting a fair deal from the very beginning of the crash site investigation." On cross-examination, the State asked Defendant whether the dash-cam video showed the officers treating him unfairly, and Defendant acknowledged that it did not. On redirect examination, defense counsel sought to question Defendant further about why he felt he was being treated unfairly during the DUI investigation, but the State objected based on relevance. The court then called the parties up for a bench conference:

THE COURT: I don't understand why do you keep asking him about how he felt.

. . .

THE COURT: Doesn't he have a previous DUI -- doesn't he have a previous DUI?

STATE: Yes, Judge.

THE COURT: Did he do roadsides?

STATE: No, he refused.

THE COURT: I mean this is so -- this whole fair shake thing. This is so disingenuous. I would caution you to stop. He's going to open the door and I'm going to let them Redirect on his previous DUI. This whole thing about getting a fair shake, I don't even know what that means. There's nothing that's been spoken about relative to this investigation that would be an actual example of how he wasn't getting a fair shake.

DEFENSE: I believe on Direct, Your Honor, he testified from the second of the crash investigator [sic] from the start they talked to other people and it was already (Indiscernible).

THE COURT: But there's been other than him talking to the other party first there's been no testimony as to not getting a fair shake. That's what I keep hearing. Fair shake. Fair shake. Fair shake. I don't --

DEFENSE: What would you like me to do?

THE COURT: Stop asking that question because it's disingenuous and misleading. And don't open the door of your client because it's going to be real bad. Go ahead.

When defense counsel then asked the court for a ruling on the State's relevance objection, the court responded:

THE COURT: I'm talking about my own objection to your questioning because like I said I don't think that -- first of all, it's asked and answered. Secondly, you are opening the door to something that could get really bad for your client. I'm trying to save you from a 3850.

Because the State asked Defendant on cross-examination whether the dash-cam footage supported his position that he was being treated unfairly, defense counsel was permitted to question Defendant on redirect about his perceived treatment prior to the dash-cam recording and to clarify any uncertainty that may have resulted from the State's questioning. Defendant may have provided additional testimony not previously stated during direct examination that further explained why he believed he was treated unfairly, or clarified why the video footage was not representative of his interactions with the police officers at the scene. Further, the trial court's remark that Defendant's testimony was "disingenuous" appears to address the credibility of Defendant's testimony, and not its relevancy. Therefore, we find the trial court abused its discretion in limiting Defendant's testimony. However, because Defendant was previously able to testify extensively on direct and cross-examination that he did not participate in the DUI investigation because he believed he was being treated unfairly, we also find the trial court's error was harmless.

IV. Neutrality and Impartiality of Trial Court

Defendant asserts the trial judge failed to remain neutral and impartial at trial because the trial court: (1) commented on the evidence as discussed in section I, *supra*; (2) limited defense counsel's questioning of the venire as discussed in section II, *supra*; and (3) informed defense counsel that it would permit the State to introduce evidence of Defendant's prior DUI conviction if defense counsel continued to question Defendant about why he felt he was treated unfairly by the investigating officers, as discussed in section III, *supra*.

Every litigant is entitled to "the cold neutrality of an impartial judge . . . ." *Grant v. State*, 764 So. 2d 804, 806 (Fla. 2d DCA 2000). When evaluating whether a trial judge has departed from the role of neutral arbiter, the reviewing court must focus on "actions 'from which a litigant

may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially.'" *Williams v. State*, 160 So. 3d 541, 543 (Fla. 4th DCA 2015) (quoting *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla.1983)). For instance, a judge that fails to maintain impartiality may become an active participant at trial, rather than a neutral arbiter. *Lee v. State*, 789 So. 2d 1105, 1106 (Fla. 4th DCA 2001) (holding trial court improperly prompted the prosecutor to embark on a line of questioning during trial). A trial judge's failure to remain impartial is subject to harmless error analysis. *Id.*

We determined earlier that the trial court did not improperly comment on the evidence during voir dire, and we find nothing in the record that indicates the trial judge limited defense counsel's voir dire questioning in order to favor the State. Thus, we find the trial court did not depart from its impartial role in either of these instances.

However, during Defendant's redirect examination, the trial judge informed defense counsel it would permit the State to introduce evidence of Defendant's prior DUI conviction if defense counsel "open[ed] the door" to such evidence by continuing its line of questioning. By making such comments in the State's presence with no motion regarding impeachment by the State, the trial judge essentially informed the State of a trial strategy at its disposal. For that reason, we find the trial court failed to maintain its neutrality and impartiality.

Nevertheless, we again must find the trial court's error harmless because the State did not utilize the trial court's implicit strategy recommendation regarding Defendant's prior DUI. Thus, we find there is no reasonable probability that the trial judge's failure to remain impartial contributed to Defendant's conviction.

V. Denial of Defense Counsel's Cause Challenge of a Prospective Juror

In Defendant's final issue, Defendant argues the trial court reversibly erred in denying

defense counsel's cause challenge of prospective Juror Evans and by refusing to grant an additional peremptory challenge to strike another identified juror when defense counsel was forced to use one of Defendant's peremptories to strike Juror Evans. On this point, we agree.

When counsel seeks to strike a prospective juror for cause, the trial court must grant the strike if there is any reasonable doubt as to whether the juror can render an impartial verdict based solely on the evidence and the law. *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007). A juror is not considered "impartial when one side must overcome a preconceived opinion in order to prevail." *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985).

In assessing whether a juror can set aside bias, prejudice, or preconceived opinions and serve with impartiality, the trial court should carefully examine "all of the questions and answers posed to or received from the juror." *Banks v. State*, 46 So. 3d 989, 995 (Fla. 2010). While Florida law permits rehabilitation of jurors whose voir dire responses raise concerns about their impartiality, *Juede v. State*, 837 So. 2d 1114, 1115 (Fla. 4th DCA 2003), courts must remember that "[i]nitial reactions and comments from a prospective juror offer a unique perspective into whether an individual can be fair and unbiased," *Matarranz v. State*, 133 So. 3d 473, 490 (Fla. 2013). Thus, "a juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes." *Rodas v. State*, 821 So. 2d 1150, 1153 (Fla. 4th DCA 2002). "Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his impartiality." *Bryant v. State*, 765 So. 2d 68, 71 (Fla. 4th DCA 2000). When the record reveals a reason to doubt a juror's impartiality, an abuse of discretion has occurred. *Montozzi v. State*, 633 So. 2d 563, 565 (Fla. 4th DCA 1994).

During voir dire, when discussing burden of proof and Defendant's right to not testify at

trial, defense counsel asked whether any of the jurors felt that they would be unable to make a fair determination if they did not hear any evidence presented by the defense. Several jurors, including Juror Evans, raised their hands. When the trial court asked Juror Evans to elaborate, she replied, "Well I always think there's two sides to every story." After explaining again that the State bears the burden of proof, the trial court asked Juror Evans, "So do you think that you could follow the law in a case and evaluate whether or not the State fulfilled their duty to prove the elements beyond a reasonable doubt?" The following exchanged ensued:

JUROR EVANS: I think I could.

THE COURT: You think you could or you know you could.

JUROR EVANS: I don't think --

THE COURT: It doesn't take a special skill set to be a juror, ladies and gentlemen. I don't want to make it too confusing you're going to know when you are read the law and after you evaluate the evidence and you go back to collectively decide a verdict, you're going to figure that out as far as whether or not you think the State proved the case beyond a reasonable doubt.

But I need to go back to Mr. Pratt. I mean he is not you cannot -- you cannot assign any feelings of guilt or that he's hiding something if he doesn't testify. I mean the lawyers are going to cross-examine these witnesses. They are. That's what they're going to do. But he doesn't need to testify. So can you accept that?

JUROR EVANS: I can accept it. It's just that I have never been in this type of situation before.

THE COURT: Right. And when people start asking you questions it becomes like we're leading you into answers. We just want you to be honest. But I hear kind of different answers like when I talk to you and now when you're talking like I need to hear the other side of the story. But I just need to make sure what is your real feeling about that?

JUROR EVANS: I don't know. I think I can but until I hear things I don't know to be honest with you.

THE COURT: Well you know what, that's right. Until you hear the State's case,

you're not going to know whether or not they prove the case beyond a reasonable doubt. At the end of it that's a decision you have to make. You can't look to Mr. Pratt to see why he didn't answer questions they didn't answer. Can you do that?

JUROR EVANS: Yes.

Although Juror Evans ultimately agreed she would not look to Defendant for answers when determining whether the State had proved its case beyond a reasonable doubt, that agreement did not negate her earlier-expressed reservations about rendering an impartial verdict in a case where the defendant refused to testify. Because Juror Evans' eventual acquiescence to the trial court was insufficient to overcome her own express doubts about her ability to serve with impartiality and reservations over a defendant who does not testify, we find the trial court abused its discretion when it improperly denied defense counsel's cause challenge. We further find that because this issue was properly preserved, it cannot be considered harmless. *See Thomas*, 958 So. 2d at 1050 ("errors in the structure of the jury are reversible without proof of harm"); *Carratelli v. State*, 915 So. 2d 1256, 1258 (Fla. 4th DCA 2005) ("On direct appeal, the erroneous denial of a preserved cause challenge is reversible error, without any inquiry into harmless error or prejudice."). Defendant's conviction therefore must be reversed, and Defendant is entitled to a new trial.

Accordingly, we REVERSE Appellant's conviction and REMAND this case for a new trial.

KELLEY, CARACUZZO, and COLBATH, JJ., concur.

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Opinion/Decision filed: APR 0 1 2019

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Marni Bryson

Appealed: April 13, 2016

_____/

DATE OF PANEL: October 23, 2017

PANEL JUDGES: KELLEY, CARACUZZO, COLBATH

AFFIRMED/REVERSED/OTHER: REVERSED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	DISSENTING: With/Without Opinion	CONCURRING SPECIALLY: With/Without Opinion
DATE: 3/29/19 J.	J.	J.
DATE: 3/29/19 J.	J.	J.
DATE: 4/1/19 J.	J.	J.