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

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 50-2018-AP-000067-AXXX-MB
L.T. NO.: 50-2016-MM-000377-AXXX-SB

VINTYRE FINNEY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: November 30, 2020

Appeal from the County Court in and for Palm Beach County;
Judge Caroline C. Shepherd

For Appellant: Logan T. Mohs, Esq.
Office of the Public Defender
421 Third Street
West Palm Beach, FL 33401
lmohs@pd15.state.fl.us
appeals@pd15.org

For Appellee: Joseph R. Kadis, Esq.
Office of the State Attorney
401 North Dixie Highway
West Palm Beach, FL 33401
jkadis@sa15.org

PER CURIAM.

AFFIRMED.

CARACUZZO and J. MARX, JJ., concur.
KROLL, J., dissents with an opinion.

KROLL, J., dissenting.

Appellant, Vintyre Finney, was charged and ultimately convicted of Soliciting Another to Commit Prostitution. He argues on appeal that the trial court committed reversible error by giving

the venire panel an improper instruction regarding his right to remain silent. The lower court acknowledged that the instruction was a mistake, but ultimately concluded that its later curative instruction—along with its repeated reminders to the venire panel that Appellant did not bear any burden of proof—rendered the instruction harmless. In affirming Appellant's conviction and sentence, the majority apparently adopts the reasoning of the trial court in finding the erroneous instruction to be harmless error. Because I do not agree that the error was harmless, I must respectfully dissent.

During voir dire, counsel for Appellant questioned the jury panel about their thoughts if Appellant did not testify or present any evidence during the trial. After defense counsel finished its questioning, the trial court followed up with the potential jurors who indicated their verdict might be affected if Appellant chose not to testify. While speaking with one such potential juror, the following exchange occurred:

> **Venire Person [C]:** I feel like hold it against him is a strong word but I think it will always be in the back of my mind why, why he didn't want to defend himself.
>
> **The Court:** And that's okay for it to be in the back of your mind. What's not okay is for you to say, well, because he didn't testify, I'm gonna vote guilty. Or because he didn't testify I'm gonna vote not guilty, that's what's not okay. It's okay for you to think, I wonder why he didn't testify. But you can't think, I wonder what he would have said. I wonder if he didn't testify because he's guilty, you can't do that. So it's okay for you to have that thought rumbling around in the back of your mind.
>
> **Venire Person [C]:** Then I—
>
> **The Court:** But would it, the question is, would it affect your verdict?

After the trial judge finished questioning Venire Person "C," defense counsel moved to strike the jury panel and objected to the instruction. The court denied the motion, but gave the following curative instruction once a jury was selected and sworn:

> **The Court:** I said something and I want to correct it to you, and—okay. When we were discussing whether or not you would like to hear from or whether or not

> [Appellant] should testify, the constitution requires the State to prove its accusations against the defendant. It is not necessary for the defendant to disprove anything. Nor is the defendant required to prove innocence. It is up to the State to prove the defendant's guilt by evidence. So you may not speculate, if he doesn't testify, on the fact that he may not have testified or what he might have said. So if I said anything that wasn't clear about that, that's the correct law.

After the trial concluded, defense counsel filed a Motion for New Trial arguing that the trial court's remarks were improper and that it was required to grant Defendant's motion to strike the panel. The trial court responded with a written order denying the motion and finding that any error it committed was harmless.

The United States Constitution provides criminal defendants with the absolute right to either testify or to remain silent during their trial. *Lott v. State*, 931 So. 2d 807, 817–18 (Fla. 2006). It is improper for the court, a prosecutor, a codefendant, or any other person to comment on a defendant's silence or right to silence. *See Burgess v. State*, 644 So. 2d 589, 592–93 (Fla. 1994). A comment becomes improper if it is "fairly susceptible of being interpreted by a jury as referring adversely to the defendant's failure to testify." *State v. Grissom*, 492 So. 2d 1324, 1325 (Fla. 1986). Although these improper remarks presumptively create a "high risk of error," the harmless error test is used to determine whether reversal is warranted. *State v. DiGuilio*, 491 So. 2d 1129, 1135–36 (Fla. 1986).

As the trial court conceded below, its comment to Venire Person C was improper since it easily could have been interpreted by the jury as an adverse comment regarding Appellant's decision not to testify. *See Grissom*, 492 So. 2d at 1325.[1] In my view, what precludes this comment from being harmless is that it came from the trial court itself rather than the State or a witness.

[1] Although Appellant did ultimately testify at trial, this does not prevent an otherwise improper comment on the right to silence from being reversible error. *Andrews v. State*, 443 So. 2d 78, 84 (Fla. 1983) (citing *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976)).

Unlike the other participants in a trial, the court has both the power and duty to instruct prospective jurors on the law and their duties. We presume that a jury follows all of the trial court's instructions unless there is evidence to the contrary. *See Garzon v. State*, 939 So. 2d 278, 285 (Fla. 4th DCA 2006). Accordingly, comments from the court contain an inherent "imprimatur of authority and credibility," and the district courts have consistently reversed lower courts when statements from the bench could have affected how the jury deliberates and weighs the evidence. *Cf. Osorio v. State*, 186 So. 3d 601, 609–08 (Fla. 4th DCA 2016) (citing cases and holding that the lower court's statement to the jury that a testifying chemist was "an expert in the field" was erroneous for conferring additional credibility on the witness). As the Third District Court of Appeal stated in *Del Sol v. State*:

> The firmly established rule in Florida is that the trial judge should avoid making directly to or within the hearing of the jury, any remark which is capable of conveying directly or indirectly, expressly, inferentially, or by innuendo, any intimation as to what view he or she takes of the case or as to what opinion the judge holds concerning the weight, character, or credibility of any evidence adduced.

537 So. 2d 693, 694 (Fla. 3d DCA 1989) (citations omitted). There is no case directly analogous to the instant appeal. However, these cases clearly stand for the proposition that the court's words have exceptional power and sway over laypersons who are summoned to perform jury service. A juror who is told by the court that he or she is allowed to speculate about why a defendant chooses not to testify will not easily disregard that instruction. Given the degree of control and authority the court has over a venire panel, I do not believe that the State has proven, or can prove, beyond a reasonable doubt that there was no reasonable probability the court's instruction affected the verdict. *See DiGuilio*, 491 So. 2d at 1135–36.

The fact the Court gave a curative instruction (after the jury was sworn) only shows further the Court's concern about her comments and the importance of the defendant's right to remain

silent. There are times that a defendant simply suffers so much prejudice that a curative instruction "is not sufficient to 'unring the bell.'" *Melehan v. State*, 126 So. 3d 1118, 1125 (Fla. 4th DCA 2012) (quoting *Graham v. State*, 479 So. 2d 824, 826 (Fla. 2d DCA 1985)). *See also Jones v. State*, 128 So. 3d 199, 201 (Fla. 1st DCA 2013). Because the trial court gave an improper instruction regarding a fundamental constitutional right, I cannot find that the error is harmless beyond a reasonable doubt and respectfully dissent.