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

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502015AP900022AXXXMB
L.T. NO.: 502013CT028211AXXXMB

DANIEL K. GENTRY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: APR 25 2017

Appeal from the County Court in and for Palm Beach County,
Judge Sheree D. Cunningham

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PER CURIAM.

Appellant Daniel K. Gentry appeals his conviction for Driving Under the Influence. While we affirm Appellant's conviction, we write to discuss the impropriety of the prosecutor's comments made during closing arguments of Appellant's trial.

On appeal, Appellant argues that the trial court erred in overruling defense counsel's objections to the following comments made by the prosecutor during trial:

> The defendant who is so aware of his surroundings is continuously repeating himself, pleading for mercy, pleading, begging, begging the trooper to let him go, give him a break. But one thing you notice the defendant doesn't do, he doesn't say, I'm not impaired, he's looking for alternatives. He doesn't say, I don't feel under . . . the influence of alcohol . . . . I don't feel under the influence.

Because "it is a constitutional error to penalize an individual for exercising the Fifth Amendment privilege" to remain silent, a prosecutor may not comment on an individual's reliance on this protection. *Ventura v. State*, 29 So. 3d 1086, 1088 (Fla. 2010) (citations omitted). When a prosecutor's comment is "fairly susceptible of being interpreted by the jury as a comment on silence, it violates the defendant's right against self-incrimination under Florida law." *Cowan v. State*, 3 So. 3d 446, 450 (Fla. 4th DCA 2009) (citation omitted).

In the instant case, we find that the State's comments were clearly improper in this regard. Reviewing the comments within the context of the State's closing argument, we believe the State went beyond arguing the evidence presented at trial to impermissibly suggesting that Appellant must have been impaired because he never argued otherwise to the arresting officer. Such comments, which seem to be occurring more often in this Circuit, violate a defendant's Fifth Amendment privilege against self-incrimination and have no place in Florida's courtrooms. Accordingly, we find the trial court abused its discretion in overruling Appellant's objections to the State's argument.

Nevertheless, we affirm Appellant's conviction because we find the error was harmless in light of the evidence presented by the State. *See, e.g.*, *Ochacher v. State*, 987 So. 2d 1241, 1243 (Fla. 4th DCA 2008) (finding the lower court's error harmless beyond a reasonable doubt in light of "the totality of the evidence and the direct observations of the defendant by the officers"); *Concha v. State*, 972 So. 2d 996, 999 (Fla. 4th DCA 2008) (finding that without overwhelming evidence presented of defendant's impairment, the lower court's errors could not be considered

harmless). At trial, the following evidence of Appellant's impairment was presented, through the arresting officer's testimony regarding his observations of Appellant, and the video evidence provided by the State: two cans of beer—one of which was lying on its side open, with beer left inside—were found on the floorboard of Appellant's vehicle, as well as a plastic cup filled with beer in the center console; an odor of alcohol was emanating from the car when the officer made contact with Appellant; Appellant's face was flushed, his eyes bloodshot and watery, and he was slow in responding to the officer's requests; Appellant admitted to the officer that he had drank approximately "four and a half to five beers" at a friend's home; Appellant performed poorly on the field sobriety tasks; Appellant had a rapid change in attitude (begging and pleading to be let go and then anger) toward the arresting officer during his transport to the BAT facility; and Appellant refused to submit to the breath alcohol test at the BAT facility. *See, e.g.*, *State v. Busciglio*, 976 So. 2d 15 (Fla. 2d DCA 2008) (finding that if defendant refused to submit to a breath test, the State can elicit testimony at trial regarding that refusal as evidence of defendant's consciousness of his or her guilt.)

Thus, given the evidence presented, we feel compelled to affirm Appellant's conviction. But we caution the State from making such arguments in the future, noting that had there been less evidence of Appellant's guilt presented below, this case would have had a very different outcome. *See, e.g.*, *Concha*, 972 So. 2d at 998-99; *Morris v. State*, 900 So. 2d 120, 122-23 (Fla. 5th DCA 2008).

AFFIRMED.

K. MARX, KELLEY, and VOLKER, JJ., concur.

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Opinion/Decision filed: APR 25 2017

Appeal from County Court in and for Palm Beach County, Florida;
Sheree D. Cunningham

Appealed: April 16, 2015

DATE OF PANEL: March 28, 2017

PANEL JUDGES: K. MARX, KELLEY, VOLKER

AFFIRMED/REVERSED/OTHER: AFFIRMED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	DISSENTING: With Opinion	CONCURRING SPECIALLY: With/Without Opinion
4/17/17 J.	_____ J.	_____ J.
4/18/17 J.	_____ J.	_____ J.
4/20/17 J.	_____ J.	_____ J.