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IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

Case No. SC12-1050, Lower Court Case No. 3D10-1028

JAMES WARMINGTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON APPEAL FROM THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

Procedural History

On May 21, 2007, the Petitioner was charged by information with grand theft of coin or currency valued at $100,000.00 or more, in violation of § 812.014(1) and (2)(a), and § 777.011, Fla. Stat. (R. at 14-16).

On February 9, 10, 11, 12, and 16, 2010, a jury trial was held to address that charge. (T. at 1-930). The State argued that the victims had loaned money to the Petitioner, which was supposed to be secured by a mortgage; the Petitioner made some payments on the loan; the payments started arriving late, and then not at all. The defense argued that the victims made a personal loan to the Petitioner, which was unsecured by a mortgage. After deliberations, the Petitioner was found guilty of grand theft over $20,000.00 but less than $100,000.00. (R. at 908, 931-33; T. at 922). On April 14, 2010, he was sentenced to two years of community control, followed by ten years of probation, as well as payment of restitution to the victims. (R. at 942-47).

FACTS ADDUCED AT TRIAL

The facts taken in the light most favorable to the State established that Robert Pistol's wife, Christine Pistol, was taking a real estate course, at the Gold Coast School of Real Estate, taught by the Petitioner. (T. at 244-46, 385, 423). On April 6, 2002, the Pistols went to the Petitioner's office to discuss the idea of

investing in mortgages wherein the Pistols could receive a high interest rate if they loaned their money to third parties. (T. at 247-49). The Petitioner would be the middleman or the arranger of the transaction; he would find individuals who were willing to pay nine to thirteen percent interest if the Pistols would loan them money. (T. at 248-49, 387-89).

Several months later, the Pistols received documents from the Petitioner explaining how the mortgage was to be set up, when the payments would begin, and the rates of interest. (T. at 250-52). On August 2, 2002, the Petitioner sent them a letter concerning a mortgage. (T. at 252-53). The Petitioner told the Pistols that an individual named Rene Sardina was interested in borrowing money, and in return, Sardina would pay nine percent interest. (T. at 254-55, 389-90, 424).

On September 10, 2002, the Pistols drove to the Petitioner's house, where they met with the Petitioner; the Petitioner's wife, Grace Warmington; and Rene Sardina. (T. at 256, 390, 416). Mr. Pistol testified that he had never met Sardina before but was dealing with him because he trusted the Petitioner's knowledge and judgment. (T. at 255-57). The Pistols gave the Petitioner two $75,000.00 dollar checks and then signed a mortgage. (R. at 42; T. at 256, 261-66). After signing and completing the paperwork, the Pistols accompanied Sardina to the Petitioner's bank, where the money was deposited in the Petitioner's bank account. (T. at 267-69, 392-93, 426-27, 457-58). Mr. Pistol did not know why the money had been

deposited in the Petitioner's account but testified that since the Petitioner was handling the transaction and coordinating the mortgage, "[he] figured that this was just normal procedure." (T. at 268).

Beginning on October 1, 2002, the Pistols received payments on the loan and continued to receive these payments until 2005. (T. at 269, 273, 276, 395, 551, 438).[1] "The first few checks were written by James Warmington on Washington Mutual official checks. Subsequently they started coming from Bank of America from personal checking accounts signed by Grace Warmington." (T. at 277, 438-39). The Pistols did not receive any of the payments from Rene Sardina but assumed that since the Petitioner had drawn up the papers and initiated the deal, this was how the arrangement was to work. (T. at 277-78). Sardina was supposed to be making the payments to the middleman on a monthly basis; this was for a mortgage, not a personal loan. It was never discussed that the money would be for anything other than a mortgage, and there was nothing to indicate that the terms of the agreement had changed. (T. at 283-84, 292-93, 394, 401-03, 417, 425-26, 447, 464).

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[1] The State's investigative accountant, Tracey Preito, reviewed the Petitioner's bank statements and confirmed that these payments came from the Petitioner's accounts. (T. at 530-45). According to the records, the Petitioner paid the Pistols $59,309.71 over a three-year period from 2002-2005, with a balance of $90,690.20 still owed to the Pistols. (T. at 546, 555).

The Pistols testified that by 2005, the checks started to arrive late. (T. at 276-78, 396). The checks "started to become staggered and started to back up one payment into two payments." (T. at 276, 278). As a result, Mr. Pistol attempted to reach the Petitioner by phone at home and at work. However, the Petitioner would not return his calls, so Mr. Pistol went to see him personally. (T. at 278). When Mr. Pistol asked the Petitioner why the checks were coming in late and why Sardina was not paying on time, the Petitioner said it was "[w]ay too complicated for you to understand" and "[l]et me see what I can do about this." (T. at 277, 279). The Pistols received subsequent checks, but they did not continue on time. (T. at 279). Eventually, the Pistols stopped receiving checks at all, and the Pistols contacted Sardina. (T. at 280, 284-85, 287, 396-99, 443-44).

Sardina had been told that the Pistols had withdrawn their financing for the mortgage; the closing on the house never occurred, and he never received the $150,000.00. (T. at 458-59, 466, 468-69). Sardina testified that in 2002, he was trying to buy a house, but he was unable to obtain a mortgage from the bank. (T. at 452). Sardina indicated that the Petitioner told him he could get him a second mortgage in the amount of $150,000.00. (T. at 452). Sardina testified that he met the Pistols a week prior to the closing on the loan at the house he was attempting to buy. (T. at 452-53). Sardina met the Pistols a week later, on September 10, 2002, at the Petitioner's house to sign the loan and mortgage papers. (T. at 453, 455-56).

Sardina testified that he was under the impression that the loan being made to him was going to be secured by a mortgage on his house. (T. at 451-52, 456). Sardina testified that he never received the $150,000.00. "Mr. Warmington said that the Pistols had withdrawn their finances of the second mortgage. Without that I couldn't do the closing." (T. at 458-59, 466, 468-69).

Stuart Abolsky, a retired detective with the Miami-Dade Police Department Economic Crimes Unit, had been the lead detective on the case. (T. at 221-22). Abolsky interviewed the Pistols and Sardina and then went to interview the Petitioner. (T. at 224-30). On direct examination, the State asked Abolsky about his interview with the Petitioner, during which, the following discussion occurred:

> **Q** When you interviewed Mr. Warmington, how far is it that it came about?
>
> **A** Well, what I believed to be the complete case file, I went to his home to visit with him.
>
> **Q** What is the purpose of your visit?
>
> **A** The purpose of my visit was to allow him to dispel any alarms that I may have or concerns that he did anything wrong.
>
> **Q** And was he able to do that?
>
> **MR. PONT:** Objection. Burden shifting.
>
> **THE COURT:** Sustained.
>
> **MR. PONT:** We have a motion to object, Judge.
>
> **THE COURT:** Yes.

BY MS. BAILEY

Q When you went and spoke to him, what was the extent of your investigation?

A I advised him of the nature of the investigation. We spoke outside his residence. I began explaining to him what the allegations were and I offered him an opportunity to –

MR. KRYPEL: Objection.

THE COURT: Sustained.

MS. BAILEY: Your Honor.

THE COURT: Continue on.

BY MS. BAILEY

Q And what was the result of that conversation?

A Well, Mr. Warmington had indicated to me that a loan had been funded to Mr. Rene Sardina and that Mr. Sardina was no longer paying on the loan. The loan was comprised basically [of] a mortgage or something and as a result he had explained this to the Pistols and subsequently it was a matter he was trying to take care of.

Q Was the defendant able to produce any documentation?

MR. PONT: Objection. Burden shifting.

We reserve –

THE COURT: Overruled.

BY MS. BAILEY

Q Was there documentation that day with regards to this explanation he gave you?

A No, in fact, he represented that his home was also his office. And when I asked for him to provide any documentation, he couldn't.

MR. PONT: Objection.

THE COURT: Same objection as previously noted. We reserve the motion.

THE COURT: Continued objection.

Go ahead.

BY MS. BAILEY

Q When you had that conversation with Mr. Warmington, what happened?

A I placed him under arrest.

MS. BAILEY: Thank you, Judge. No further questions.

THE COURT: Cross.

MR. KRYPEL: Can we have a moment, please.

THE COURT: Yes.

(T. at 230-32).

After Detective Abolsky finished testifying, the court addressed defense counsel's motion for mistrial. (T. at 238-41). The defense argued that it had lodged its "objection and preserved the motion based upon the burden shifting that occurred between the State's question and the detective's answers in reference to dispelling alarms and producing documents. It is a violation of the defendant's

[F]ifth [A]mendment rights. He has no burden to prove anything and totally they shifted the burden. We move for a mistrial based upon those questions and the detective's answers." (T. at 239-40). The State responded that Detective Abolsky responded to "questions about his investigation itself and what steps he took and what he actually did. We stopped the detective short of answering or saying anything about what others told him other than the defendant." (T. at 240). The State also disagreed that there had been any burden shifting, noting:

> **MS. BAILEY:** I disagree. It is not a case here Mr. Warmington was asked to necessarily defend himself. The detective went there because part of his investigation was to speak to Mr. Warmington and he reported what happened when he got there. He did not tell him, "You need to prove yourself to me. Therefore, I am not going to do certain things." And the detective answered the events that happened.

(T. at 240-41). The trial court denied the motion for mistrial, explaining:

> **THE COURT:** All right.
>
> One comment made by the detective that, "Mr. Warmington did not dispel my concern enough to proceed further not to arrest him." I don't believe that was burden shifting. Respectfully the motion is denied.

(T. at 241). At the conclusion of the State's case, the Petitioner's motion for judgment of acquittal was denied. (T. at 568-80).

The Defense Case

The Petitioner called several witnesses to support his defense that at the time the loan was completed, everybody knew that the loan was not going to be secured

by a mortgage since Sardina no longer had the right to buy the house he was renting because the option to buy had expired prior to September 10, 2002.

Eduardo Lima testified that he knew the Petitioner and Sardina, and that, a year and a half after the loan was made, he saw both Ms. Pistol and Sardina at the Petitioner's house. (T. at 587-88). He also testified that during the summer of 2003, Sardina was at the Petitioner's house "every day," and "[t]hey were there all the time." (T. at 589).

Margaret Gonzalez, a notary, knew the Petitioner, Ms. Pistol, and Sardina, and she testified that she used to see Ms. Pistol and Sardina at the Petitioner's house all the time. (T. at 603, 607-08). She also testified that she prepared an affidavit of identity which was never signed by Sardina in her presence. (T. at 604-06). Elizabeth Almansa, who was also a notary, testified that she notarized a document signed by Sardina on November 13, 2002, wherein Sardina agreed to indemnify the Petitioner if Sardina defaulted on the loan. (T. at 610-12). She also testified that she saw the Pistols and Sardina at the Petitioner's house. (T. at 614).

Teddy Reyes testified that she took care of the Petitioner's children during the time period involved in this case. (T. at 619-20). According to Ms. Reyes, Sardina was a good friend of the Petitioner, and he was always at the Petitioner's house. Ms. Reyes and Grace Warmington's sister, Gladys Boyer, testified that Ms. Pistol and Sardina were at the Petitioner's house at the same time. (T. at 620-23,

628-30). Finally, Ms. Reyes told the jury that she saw Grace Warmington give Sardina an ATM card. (T. at 623-24).

Pedro Fernandez, a real estate broker, was the listing agent for the house that Sardina wanted to buy. (T. at 598). He testified that according to the agreement between the buyer and Sardina, the closing date on the sale of the house was supposed to be July 30, 2002, and there were no extensions. (T. at 599). Sardina, who had been renting the house, defaulted on his rent payments. Thus, on August 15, 2002, he no longer had an option to buy the house which he claimed was going to be the collateral on the loan from the Pistols. (T. at 600).

Grace Warmington, the Petitioner's wife, testified that around June 2, 2002, she met Ms. Pistol at the Gold Coast School of Real Estate. (T. at 634-35). In July 2002, she met Mr. Pistol and Sardina at her house, and they discussed the fact that Sardina wanted to purchase a house and needed a second mortgage. (T. at 636-37). Subsequently, Sardina learned that he could not qualify for the first mortgage, and therefore, the deal fell through.

According to Ms. Warmington, on September 10, 2002, the Pistols lent her husband and Sardina $150,000.00, which was meant to be a personal loan not secured by a mortgage, since Sardina was no longer purchasing the house that was meant to secure the loan. (T. at 645-47, 663-64, 667). Ms. Warmington testified that during the three years that her husband was paying back the loan, she would

give Sardina money from the loan. (T. at 650). Ms. Warmington testified that she gave Sardina cashier's checks and Jose Rodriguez checks to pay for Sardina's rent. (T. at 651-58, 677). Finally, she testified that after her husband received a letter from the Pistols' attorney threatening a lawsuit, her husband still continued to pay off the loan. (T. at 658-59).

The Petitioner testified that in 2002, he was a real estate instructor and broker. He met Sardina in 1999 after Sardina and his partner had purchased distressed property that they intended to refinance and sell. (T. at 690-92, 695, 778). Sardina and his partner were also involved in a development project in South Miami wherein Sardina was going to build duplexes, and the Petitioner was going to be the broker. (T. at 692-97).

In April 2002, the Petitioner learned that eviction proceedings had been lodged against Sardina. As a result, the Petitioner contacted the owner's attorney and realtor to help Sardina negotiate to purchase the property. (T. at 706-08). In June 2002, the Petitioner met Ms. Pistol at the school where he was teaching. In the same month, the Petitioner also met Robert Pistol. (T. at 709, 712-14). In July 2002, the Petitioner met with the Pistols, Sardina, and Sardina's partner at the Petitioner's house, where they discussed the Pistols giving Sardina a second mortgage on the house to pay for the down payment. (T. at 715-16). All the parties knew that the closing on the house was supposed to be July 30, 2002. (T. at 716-

17). It was agreed that an appraisal would be done on the house and that the Pistols would loan Sardina $75,000.00, which would be a secondary mortgage. (T. at 721-26).

When it was learned that Sardina could not get the original loan for the first mortgage, the Pistols agreed to loan the $150,000.00. (T. at 728, 759). When the deal on Sardina's house fell through, the Petitioner called Mr. Pistol and informed him that Sardina was not going to buy the house. (T. at 761). The Petitioner testified that once the Pistols were informed that the deal on the house had fallen through, they nonetheless agreed to make a $150,000.00 personal loan to the Petitioner and Sardina. (T. at 763-64). On September 10, 2002, the Pistols came to the Petitioner's house, and the Petitioner signed a promissory note. (T. at 764-65, 769, 810). The Petitioner deposited the money in the bank and started to repay the loan. (T. at 773-76).

The Petitioner testified that he made payments to the Pistols. The Petitioner said that he received a threatening letter from the Pistols' lawyer but continued to make payments. (T. at 790-93). The Petitioner testified that he attempted to resolve the situation and denied that he ever stole or attempted to deprive the Pistols of their money. (T. at 794-95). After the Petitioner finished testifying, the defense rested its case. (T. at 818). The defense subsequently moved for judgment of dismissal, which was denied. (T. at 820-29).

After deliberations, the Petitioner was found guilty of grand theft over $20,000 but less than $100,000. (R. at 908, 931-33; T. at 922). On April 14, 2010, the Petitioner was sentenced to two years of community control, followed by ten years of probation, and was ordered to pay restitution to the victims. (R. at 942-47).

In case number 3D10-1028, the Petitioner filed his direct appeal. On April 27, 2012, the Third District Court of Appeal affirmed the judgment and sentence in a written opinion. *Warmington v. State*, 86 So. 3d 1188 (Fla. 3d DCA 2012). Citing to this Court's decision in *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998), the majority opinion in *Warmington* explained that "[b]urden shifting occurs when the State 'invite[s] the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.'" 86 So. 3d at 1190. The majority noted:

> An investigating officer's testimony concerning what he saw, observed, or discovered during the course of his investigation does not shift the burden of proof. It is evidence. In this case, the investigating officer discovered that Warmington did not have copies of certain mortgage documents signed by Sardina at the closing of the transaction at his home. The testimony may or may not have been significant; one might argue that Warmington, who, after all, merely was the middleman in the transaction, would have no need to have a set of the mortgage documents. On the other hand, the fact certainly was material for the jury to hear. FN1.
>
> FN1. Warmington seeks to analogize the testimony in this case to a defendant's pre-arrest refusal to respond to an investigator's inquiry concerning whether the defendant committed the crime. That

> question, of course, raises a different concern. *See* U.S. Const. amend. V. The inquiry made in this case is no different than an officer's testimony of the inability of a defendant to produce his registration during the course of an investigatory stop.

86 So. 3d at 1190.

The majority in *Warmington* distinguished the cases cited by the Petitioner as "cases 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." 86 So. 3d at 1190 (emphasis in original). The majority in *Warmington* noted that Detective Abolsky was permitted to testify about the "historical facts" surrounding his investigation. The majority additionally explained:

> Finally, we are not moved by the fact Warmington was arrested immediately after he told Detective Abolsky he did not have a copy of the mortgage documents. This again is a matter of historical fact. The testimony, taken as a whole, was prejudicial to Warmington. However, all defendants are arrested at some point, and the fact of arrest regularly makes its way into testimony at trial. The State at all times had the burden to prove the case against Warmington beyond a reasonable doubt. We do not believe this burden was lessened by Detective Abolsky's testimony.

86 So. 3d at 1192.

Judge Ramirez wrote a dissenting opinion, arguing that the prosecution had been impermissibly allowed to elicit statements which shifted the burden at trial

and that the majority's opinion conflicted with the decisions in *Hayes*, *Ramirez*, and *Miele*. 86 So. 3d at 1192-93.

The Petitioner subsequently sought review in this Court, which accepted jurisdiction.

STANDARD OF REVIEW

This Court has held that the following standards of review apply to trial court rulings:

> The following standards of review apply to trial court rulings in general: If the ruling consists of a pure question of fact, the ruling must be sustained if supported by competent substantial evidence. *See, e.g.*, Philip J. Padovano, *Florida Appellate Practice* § 9.6 (2nd ed.1997). If the ruling consists of a mixed question of law and fact addressing certain constitutional issues (e.g., probable cause, reasonable suspicion, the "in custody" requirement under *Miranda*, ineffectiveness of counsel), the ultimate ruling must be subjected to de novo review but the court's factual findings must be sustained if supported by competent substantial evidence. *See, e.g.*, *Stephens v. State*, 748 So.2d 1028 (Fla.1999). If the ruling consists of a mixed question of law and fact addressing other issues (e.g., the dependency of a child, the propriety of a departure sentence, the presence of an aggravating circumstance), the ruling must be sustained if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence. *See, e.g.*, *In re M.F.*, 770 So.2d 1189, 1192 (Fla.2000); *Banks v. State*, 732 So.2d 1065, 1067 (Fla.1999); *Willacy v. State*, 696 So.2d 693, 695 (Fla.1997). If the ruling consists of a pure question of law, the ruling is subject to de novo review. *See, e.g.*, Philip J. Padovano, *Florida Appellate Practice* § 9.4 (2nd ed.1997).

Twilegar v. State, 42 So. 3d 177, 192 (Fla. 2010) (citing *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001)).

SUMMARY OF ARGUMENT

The district court properly found that no burden shifting occurred. Burden shifting typically refers to things that occur at trial, not to out of court evidence of conversations which are introduced into evidence. This Court has explained that burden shifting occurs, if at all, when the prosecution invites the jury to convict a defendant for some reason other than the fact that the State has proven its case beyond a reasonable doubt. However, what a party says during a voluntary, non-custodial interview out of court has nothing to do with shifting the burden of proof. Further, this Court has noted, in related cases, that during trial, the State often responds to matters that the defense interjects, by pointing out that there is no evidence of a matter, and those references were not deemed to constitute burden shifting.

By way of comparison, the instant case is even more remote, since it refers to matters which all occurred prior to trial. Even more significantly, the question about whether the Petitioner was able to produce any documentation came in the immediate aftermath of his statement that the Pistols' money had been used to fund a $150,000 loan. The absence of documentation about this sum was after the Petitioner had expressly asserted that there had been such a loan. This is analogous to those cases in which the defense referenced something, and the State was permitted to retort, in court, that there was no evidence of it.

The State also notes that police officers routinely testify about what they found during the course of a search of a defendant's premises, and they will establish that the seized items were all that were obtained and/or that no other items were found. Such references to nothing else having been found would not mean that the burden was shifted.

The Petitioner's argument about burden shifting and the right to silence is equally unavailing. While burden shifting comments and comments on silence have some similarities, they are distinct. There are many cases where defendants are involved in pretrial interrogations, where it is voluntary because of waivers of *Miranda*, and the defendants answer many questions, but refuse to answer one or more. Many courts have expressly found that the failure to answer one or more questions when there has been a waiver is not a comment on silence; it is merely part and parcel of an otherwise admissible conversation or questioning between a police officer and a defendant out of court. If a refusal to provide documents or answer some questions during a consensual interview constituted improper burden shifting, all of these cases about comments on silence would have been academic, as they would have constituted improper burden shifting, and it would not have mattered whether they were also comments on silence.

The Petitioner's reliance on case law is inapposite and has nothing to do with a voluntary, non-custodial interview out of court. Moreover, the cases are

distinguishable from what an officer may have said or thought, prior to the trial, while talking to a defendant during the course of an investigation. Finally, the trial court did not abuse its discretion in denying the defense's motion for mistrial, and alternatively, any error, if at all, was harmless.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY FOUND THAT NO ERROR OCCURRED IN DENYING THE PETITIONER'S MOTION FOR MISTRIAL, AND THAT NO IMPROPER BURDEN SHIIFTING OCCURRED DURING DETECTIVE ABOLSKY'S TESTIMONY.

The Petitioner alleges that the district court erred in affirming the trial court's decision. Specifically, he contends that during the State's case, on direct examination, the prosecutor elicited a comment from Detective Abolsky that shifted the burden of proof to the defense by asking if the Petitioner had produced documents during the initial investigation. The Petitioner argues that this testimony was improper, as it suggested that he was required to, or failed to produce evidence of, his innocence.

a. No Burden Shifting Occurred in this Case.

This Court has explained that burden shifting occurs, if at all, when the prosecution "invite[s] the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." *Gore*, 719 So. 2d at 1200-01 (citing *Northard v. State*, 675 So. 2d 652, 653 (Fla. 4th DCA 1996)); *see*

Paul v. State, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008) ("The prosecutor's comment improperly shifted the burden to the defendant because it insinuated that the defendant needed to prove that the prosecutor's witness was lying in order to be found not guilty."); *Atkins v. State*, 878 So. 2d 460 (Fla. 3d DCA 2004); *cf. Whittaker v. State*, 770 So. 2d 737 (Fla. 4th DCA 2000):

> There are limited exceptions to the rule, none of which applies in this case. *Id.* (comments on the defendant's failure to produce evidence are allowed when the "defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state").

Id. at 739 (citing *Jackson*, 575 So. 2d 181, 188 (Fla. 1991)).

Unlike the instant case, burden shifting refers to things that occur at trial, ***not*** to out-of-court evidence of conversations which are introduced into evidence. In *United States v. Leeseberg*, 767 F. Supp. 1091 (D. Kan. 1991), for example, a jury returned a verdict finding a defendant guilty of willful misapplication of bank funds. *Id*. at 1092. On appeal, he argued that the Government violated his Fifth and Sixth Amendment rights:

> Leeseberg contends that the Government, during direct examination of a Government witness, asked a question which inferred that Roger Leeseberg had a duty to produce a note located at Leeseberg's home to prove his innocence, thus commenting on Leeseberg's right to remain silent and shifted the burden of proof to the defendant.
>
> During the Government's case-in-chief, Dan Gipple, an examiner with the Office of the Comptroller of the Currency, testified to statements made by the defendant during the bank's board of director's meeting

> on December 7, 1988. It was at this meeting that the board confronted Leeseberg with evidence of the $100,000 Galvin transaction.[FN1] Gipple testified that Leeseberg said the $100,000 transaction was a gift from Leo Galvin to be used for the bank. According to Gipple, Leeseberg claimed he considered the gift to be a loan and had prepared a note which evidenced his claim. Mr. Gipple and other witnesses testified that when they requested Leeseberg to retrieve the document from his home in Independence, Kansas, Leeseberg either refused to do so or did not respond to the request.
>
> During cross-examination, the defendant's attorney explored Gipple's testimony concerning the note. The defendant's attorney inquired as to whether Gipple understood that the written document was a promissory note or a "note" in the common usage of the word. Counsel also inquired into the purpose and tenor of the meeting. It is clear that the meeting was called not only to confront Leeseberg with the $100,000 transaction, but unless a satisfactory explanation of the transaction was given, to request his resignation or in the alternative fire him. A letter of resignation was apparently prepared for Leeseberg's signature prior to the time the meeting began.
>
> On redirect, the Government asked Gipple if he would expect one accused of misappropriating monies would retrieve a document that the accused person claims to possess in order to prove the existence of the document. The defendant objected to this question and the court sustained the objection. Immediately after that question was asked, the defendant, in chambers, made a motion for mistrial based upon that question, basically making the same argument presented in this motion.

Id. at 1093-94 (footnote omitted). In rejecting the defendant's contentions, the district court found that the "question, while improper as it call[ed] for speculation, [did] not constitute an unconstitutional comment upon [the defendant's] right to remain silent, nor [did] the question impermissibly shift the burden of proof to the defendant." *Id*. at 1094. The district court explained:

> The question asked related to [the defendant's] attitude and demeanor on December 7, 1988, and ***was not a comment on [his] failure to produce the note at trial. At the time the bank examiners asked for the note, [the defendant] was not under arrest.*** The court is not persuaded that the question, in the context in which it was asked, was a comment on the defendant's right to remain silent, nor did the question shift the burden of proof from the Government.

Id. (emphasis added). In addition, the court noted that the jury had been adequately instructed on the burden of proof. As such, the court concluded that the defendant's argument was without merit. *Id*. Thus, what the defendant said during a voluntary, non-custodial encounter with examiners out of court had nothing to do with shifting the burden of proof.

Similarly, this Court has noted that during trial, the State often responds to matters that the defense interjects, by pointing out that there is no evidence of a matter, and those references were not deemed to constitute burden shifting. *See e.g.*, *Scott v. State*, 66 So. 2d 923 (Fla. 2011):

> [T]he prosecutor's commentary, which stated that Scott's alibi witnesses were never asked about whether the recorded voice was Scott's, went no further than to point out the lack of evidence to support Scott's alternative theory and that the State's evidence on this matter was uncontradicted. *See Poole*, 997 So.2d at 390 (concluding that a prosecutor's remark regarding a lack of evidence that someone else could be responsible for causing injury to the victims was a proper, invited response to Poole's denial of guilt for only the crimes involving injury). Thus, the State's comments did not constitute impermissible burden-shifting, but were rather invited responses to Scott's own suggestion that Bolling could have scripted the recording in an effort to frame Scott for the murder. Accordingly, we conclude that the comments did not constitute reversible error, and Scott is not entitled to relief on this claim.

66 So. 3d at 930.

By way of comparison, the instant case is even more remote, since it refers to matters which all occurred prior to trial. Even more significantly, the question about whether the Petitioner was able to produce any documentation came in the immediate aftermath of his statement that the Pistols' money had been used to fund a $150,000 loan. The absence of documentation about this sum was after the Petitioner had expressly asserted that there had been such a loan. This is analogous to those cases in which the defense referenced something, and the State was permitted to retort, in court, that there was no evidence of it.

The State also notes that police officers routinely testify about what they find during the course of a search of a defendant or a defendant's premises, and they will establish that the seized items were all that were obtained and/or that no other items were found. *See e.g.*, *Horton v. California*, 496 U.S. 128, 128 (1990) ("Upon executing the warrant the officer did not find the stolen property but did find the weapons in plain view and seized them."). Such references to nothing else having been found would not mean that the burden was shifted.

b. The Petitioner's Right to Silence Was Not Violated.

The Petitioner also raises an argument about burden shifting and the right to silence. However, while burden shifting comments and comments on silence have some similarities, they are distinct. There are many cases where defendants are

involved in pretrial interrogations, where it is voluntary because of waivers of *Miranda*, and the defendants answer many questions, but refuse to answer one or more. Many courts have expressly found that the failure to answer one or more questions when there has been a waiver is not a comment on silence; it is merely part and parcel of an otherwise admissible conversation or questioning between a police officer and a defendant out of court. *See, e.g.*, *United States v. Pando Franco*, 503 F.3d 389 (5th Cir. 2007):

> Here, Pando does not dispute that he voluntarily waived his *Miranda* rights with full knowledge that anything he said could be used as evidence against him. Nor does he dispute that during his interrogation he answered questions about his post-arrest, pre-and post-*Miranda* silence. In fact, the officers specifically asked Pando why he never questioned the fact that he was being detained and interviewed or if there was a problem with the table, to which Pando responded, the "table must contain drugs." We conclude that by answering these questions after having knowingly received proper *Miranda* warnings, Pando waived his right to have the entire conversation, including the implicit references to his silence contained therein, used against him as substantive evidence of guilt.

Id. at 396-97 (citing *United States v. Burns*, 276 F.3d 439, 442 (8th Cir. 2002) (holding that evidence of defendant's silence and refusal to answer post-arrest questions is admissible because they were ***"part of an otherwise admissible conversation"*** pursuant to defendant's *Miranda* waiver) (emphasis added).[2]

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[2] Some federal courts have held that pre-arrest, pre-*Miranda* silence may be introduced as substantive evidence. *See United States v. Rivera*, 944 F.2d 1563,

The *Pando-Franco* court also cited to *United States v. Goldman*, 563 F.2d 501, 503 (1st Cir. 1977):

> A defendant cannot have it both ways. ***If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to.*** This was not a case where the government commented upon ... a prior exercise of rights. The government asked the jury to measure what the defendant said when he had no rights because he had voluntarily waived them.

503 F.3d at 397 (emphasis added) (citing 563 F.2d at 503); *see also People v. Hart*, 828 N.E.2d 260, 273-74 (Ill. 2005) (citing language from *Burns* – defendant's eventual refusal to respond to officers' questioning was/were "part of an otherwise admissible conversation" and related cases and noting "Our research has revealed numerous cases that have sanctioned the admissibility of testimony regarding a defendant's silence or nonverbal conduct during questioning subsequent to a valid waiver of rights.")).

If a refusal to provide documents or answer some questions during a consensual interview constituted improper burden shifting, then all of these cases about comments on silence would have been academic, as they would have

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1568 (11th Cir. 1991) ("The government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings.") (citing *Jenkins v. Anderson*, 447 U.S. 231 (1980)); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996).

constituted improper burden shifting, and it would not have mattered whether they were also comments on silence.

c. The Cases Cited by the Petitioner Are Distinguishable.

In support of his arguments, the Petitioner cites to a number of separate, but distinguishable cases. For example, he analogizes his case to *State v. Ecker*, 311 So. 2d 104 (Fla. 1975), which found that it was impermissible to ask a defendant to explain his or her presence and conduct in a prosecution for loitering and prowling. However, *Ecker* and its progeny involved defendants who were in custody and who did not necessarily waive *Miranda*. Further, those cases involved comments on silence, not burden shifting.

The Petitioner also refers to *Hayes v. State*, 660 So. 2d 257 (Fla. 1995); *Miele v. State*, 875 So. 2d 812, 814 (Fla. 2d DCA 2004); *Ramirez v. State*, 1 So. 3d 383, 385 (Fla. 4th DCA 2009); and *Cribbs v. State*, 111 So. 3d 298 (Fla. 1st DCA 2013), all of which are distinct from what an officer may have said or thought, prior to the trial, while talking to a defendant during the course of an investigation.

In *Hayes*, the prosecution elicited testimony, at trial, "over defense objection, concerning the failure of the defense to request testing of various pieces of scientific evidence." 660 So. 2d at 265. "The State called as a witness an employee of the Broward County Sheriff's Office crime lab who testified

concerning various pieces of physical evidence found at the scene of the murder, including clothing stained with blood." *Id*.

"On cross-examination, the defense brought out the fact that the State had never requested a test of the blood stains. The apparent goal of this line of questioning was to cast doubt on the thoroughness of the State's investigation and to imply that a test of the blood could have eliminated [the defendant] as a suspect." *Id*. "Then, on redirect, the trial judge overruled a defense objection and allowed the State to inquire whether the defense had requested any testing of the blood stains. The witness replied that the defense had not asked the crime lab to test the blood stains and added that the lab had complied with such requests in the past for other defense attorneys." *Id*.

Similar comments were also made by the prosecutor in closing argument concerning the failure of the defense to test hairs found at the scene of the murder. 660 So. 2d at 265. This Court noted, "The prosecutor's questions and statements in the instant case may have led the jury to believe that [the defendant] had an obligation to test the evidence found at the scene of the murder and to prove that the hair and blood samples did not match his own." *Id*. This Court also rejected the contention that any error was remedied by a curative instruction. "The curative instruction informed the jury that, although the defense had no *obligation* to test the evidence collected at the crime scene, it did have the *opportunity* to have it

tested. 'Opportunity' in this context implies an obligation and we are unwilling to assume that the jury could have found a measurable distinction between the terms." *Id*. at 266 (italicized in original).

In *Ramirez*, the Fourth District reversed a defendant's conviction for battery on a law enforcement officer. In that case, the defendant was arrested and taken to jail for leaving her baggage unattended at the airport. The charged crime occurred during a female detention deputy's booking and processing of the defendant. 1 So. 3d at 384. On appeal, the Fourth District reasoned that the trial court abused its discretion when it allowed the State to ask questions and comments that implied the defendant should have produced photographic evidence and medical reports "to refute an element of the crime" – the physical touching or the battery. 1 So. 3d at 385. "After ***reemphasizing that*** the ***defendant had no pictures*** supporting her testimony, the ***prosecutor confirmed that the only pictures belonged to the State*** and they showed no injury. The State re-emphasized this point in closing. No curative instructions were given to alleviate the harm." *Id*. at 386 (emphasis added). The Fourth District found that burden shifting occurred and reasoned that the error was not harmless, since the burden-shifting questions and comments were neither isolated nor negligible in emphasis. *Id*. at 386.

In *Miele*, the State commented on a defendant's failure to present evidence through the trial testimony of his and his former girlfriend. 875 So. 2d at 814. The

defendant had been charged with burglary of a dwelling from which he was alleged to have taken coins and currency from a five-gallon jug. *Id*. at 813-14. His defense was that the money came not from a jug in the victim's house, but rather from a jug at his father's house. *Id*. at 814.

On cross-examination by the prosecutor, the defendant's girlfriend was asked, over defense objection, whether the defendant's father was present in the courthouse. The defendant's sister, in turn, was asked whether she had a camera, and whether she had taken pictures of her father's jug money. She testified she took some photos after the defendant asserted the alternate source of the money to police, but that she gave them to her father. *Id.* The Second District reversed the defendant's burglary conviction on the ground that the line of questioning was a comment on the defendant's failure to produce photographs of his father's money jug. *Id.*

In *Cribbs*, the Petitioner was harassing female customers in a store and was subsequently asked to leave. The storeowner/victim went outside to make sure that the Petitioner was leaving the premises. 111 So. 3d at 299. "On his way back to the store, the victim was hit in the back of the head and sustained serious injuries from the blow." *Id*. "The only contested issue in [that] case was Petitioner's identity as the perpetrator." *Id*. During trial, the defense called an investigator, who was examined and cross-examined by the parties. During closing arguments, the

prosecutor criticized the investigator's failure to take certain investigative steps.

The district court found that these comments implied that the defense had a duty to investigate. Further, the error was not harmless. The "comment invited the jury to compare investigations rather than hold the State to its burden to establish the elements of the offense beyond a reasonable doubt, and the trial court did not dispel the notion that a comparison of investigations would be proper." *Id*. at 301.

Here, unlike *Hayes*, *Ramirez*, *Miele*, and *Cribbs*, the testimony at issue from the detective simply concerned a matter of fact; the detective's discussion with the Petitioner, prior to trial, and the resulting questions provided the context for an inquiry that was conducted during the course of a criminal investigation. As Abolsky was merely performing the duties for which he had been hired as a police officer, investigator, and detective, it cannot be said that there was any error to ask about these matters.

d. The Trial Court Did Not Abuse Its Discretion in Denying the Petitioner's Motion for Mistrial.

The Petitioner alleges that the trial court erred in denying his motion for mistrial. In Florida, a mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. *Johnsen v. State*, 332 So. 2d 69 (Fla. 1976). "A ruling on a motion for mistrial is within the sound discretion of the trial court and should 'granted only when it is necessary to ensure that the defendant

receives a fair trial.'" *Rivera v. State*, 859 So. 2d 495, 512 (Fla. 2003) (quoting *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001); *see also*, *Kivett v. State*, 629 So. 2d 249, 250 (Fla. 3d DCA 1993) (A ruling on a motion for mistrial "is addressed to the sound discretion of the trial judge and should only be granted in cases of absolute necessity.").

In this case, Detective Abolsky's comment did not warrant a mistrial. Under Florida law, a motion for mistrial should be granted only when the complained-of error is so prejudicial that it vitiates the entire trial. *Overton v. State*, 801 So. 2d 877, 897 (Fla. 2001) (citing *Brooks v. State*, 868 So. 2d 643, 645 (Fla. 2d DCA 2004) ("Reviewed for abuse of discretion, a motion for mistrial should be granted only when the error is so prejudicial as to vitiate the entire trial."); *Duest v. State*, 462 So. 2d 446, 448 (Fla. 1985).

Further, even assuming that the denial of the motion for a mistrial was error, the court did not abuse its discretion. *See Villanueva v. State*, 917 So. 2d 968 (Fla. 3d DCA 2005) (citing to *Smithers v. State*, 826 So. 2d 916, 930 (Fla. 2002) ("The use of a harmless error analysis under *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), is not necessary where 'the trial court recognized the error, sustained the objection and gave a curative instruction.'").

Without a request for mistrial or a curative instruction, the trial judge presumes that the objecting party has been satisfied and that the error has been

cured. *See Wilson v. State*, 436 So. 2d 908 (Fla. 1983) (explaining that when a litigant's objection is sustained and he does not thereafter ask for a curative instruction or move for a mistrial, the objecting party is "held to have been satisfied by the trial court's ruling") (citing *State v. Cumbie*, 380 So. 2d 1031 (Fla. 1980); *Clark v. State*, 363 So. 2d 331 (Fla. 1978), *rev'd on other grounds*; *see also Nixon v. State*, 572 So. 2d 1336, 1340 (Fla. 1990) ("[T]o preserve a claim based on improper comment, counsel has the obligation to object *and* request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver."); *see also Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (noting that a jury is presumed to follow a curative instruction to disregard inadmissible evidence inadvertently presented to it).

Here, the defense objected during the detective's testimony; the initial objections (i.e., the purpose of the detective's visit and the nature and extent of the investigation) were sustained, and the later ones (the Petitioner's ability to produce documentation) were overruled. Although the defense subsequently moved for a mistrial, the defense did not seek a curative instruction. Thus, as to the initial objections about the purpose of the visit and the investigation, counsel was deemed to have been satisfied with the court's ruling, and no mistrial was warranted.

e. Harmless Error

However, to the extent that the trial court overruled the objections about documentation, the harmless error standard would apply. Errors subject to harmless-error review require the beneficiary of the error "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *See e.g.*, *Chapman v. California*, 386 U.S. 18, 24 (1967). Under the harmless-error test set forth in *Chapman*, the State, as beneficiary of the error, must prove "that there is no reasonable possibility that the error contributed to the conviction." *DiGuilio*, 491 So. 2d at 1135 (citing *Chapman*, 386 U.S. at 24)). The focus of the harmless-error analysis is on the effect of the error on the trier of fact. *Id*. at 1139.

In the instant case, Detective Abolsky was the State's first witness, at the onset of a multi-day trial, in which numerous witnesses testified. Further the trial court and the parties explained the burden of proof on multiple occasions, noting that the Petitioner was presumed innocent and that the State had the burden of proving guilt beyond a reasonable doubt. (T. at 5-11, 73-75, 129, 188, 859, 874, 880-81, 908, 914).

The Petitioner relies on *Cribbs*, which is both factually and legally distinguishable. 111 So. 3d at 299-300. There, the prosecutor's questions during cross-examination implied that the defense had a duty to investigate the case. The

State later emphasized this point in its closing argument. The appellate court found that the error was not harmless, as it "invited the jury to compare investigations rather than hold the State to its burden to establish the elements of the offense beyond a reasonable doubt, and the trial court did not dispel the notion that a comparison of investigations would be proper." *Id*. at 301. Further, the court appeared to endorse the prosecutor's comments. Here, on the other hand, there was no unfair comparison to what the defense did or did not do at trial, and there were no improper comments. The focus of closing arguments was not on the results of Detective Abolsky's investigation and Petitioner's arrest, but to consider testimony about a complicated set of facts and the demeanor and credibility of the witnesses, all of which was proper.

Based on the above, given the permissible evidence that had been presented, the nature of Abolsky's testimony, the isolated reference during a five-day trial where many witnesses testified, the fact that the trial court explained the burden of proof on multiple occasions, the fact that defense counsel did not seek a curative instruction and was deemed to have been satisfied with the court's ruling, and the fact that a jury is presumed to disregard inadmissible evidence that is inadvertently presented to it, the trial court did not abuse its discretion and its ruling did not contribute to an impermissible verdict or vitiate the fairness of his trial, or was

harmless. For any and all of the reasons mentioned above, the district court's decision should be approved.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court approve the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits was e-mailed to Assistant Public Robert Kalter, Esquire, at appellatedefender@pdmiami.com, and e-mailed to rxk@pdmiami.com, this 7th day of August, 2013.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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