

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

VANESSA DAVIS,

APPELLATE DIVISION (CRIMINAL)
Case No.: 2009AP900090AXX
Co. Court Case No.: 2008CT043820AXX

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed: **'AUG 05 2010**

Appeal from Judge Bonavita
County Court in and for Palm Beach County.

For Appellant, Barbara J. Wolfe, Esq., Office of the Public Defender, 421 Third Street, 6th Floor,
West Palm Beach, FL 33401.

For Appellee, Michelle Zieba, Esq., Office of the State Attorney, 401 N. Dixie Highway, West
Palm Beach, FL 33401.

PER CURIAM.

The lower court's decision is hereby AFFIRMED.

SMITH AND HOY, JJ. concur.

RAPP, J. concurs with opinion.

I agree with the majority opinion that the comment by the prosecutor during closing argument does not require reversal as argued by the defense. Although I agree with their conclusion, my rationale is different.

The defense frequently questions witnesses and argues theories of defense, which are not

supported by the evidence. They argue "this or that" may possibly be an explanation of some fact asserted by the prosecutor. It is equally commonplace for defense lawyers to cry foul when prosecutors respond to this type of argument by pointing out that there was absolutely no evidence presented at trial for "this or that." The jury is instructed not to speculate on matters outside of the evidence. Nevertheless, judges often sustain objections made by the defense or are reversed for failing to sustain such objections. I believe these are legitimate statements by prosecutors in response to arguments put forth by the defense during trial and/ or during argument. Typically the objection made is that the prosecutor's argument is an improper comment on the defendant's right to remain silent, which improperly shifts the burden of proof from the state to the defense.

Here, the defense made such an objection, which was sustained by the judge. Thereafter, the defense moved for a mistrial, which was denied by the judge. The defense declined a curative instruction. I do not believe that the objection should have been sustained. The transcript reveals that the prosecutor was not even talking about a lack of evidence to support a speculative theory put forward by the defense. She was clearly talking about the defendant's behavior, which the jury saw on video. To illustrate, the prosecutor stated, "That's what happened on December 27, 2008, the defendant played games. Why did she play games? Because she knew she had been drinking. It was 3:00 a.m. She was leaving club Safari and almost caused a collision." "At this point you heard throughout the video, and I urge you to watch the video again, she scoots over to the center console and tells Officer Hanton, 'I wasn't driving. I'm not driving.'" From the get go, she was playing games. "She was told to get out of the car by another officer, and she doesn't want to because she knows, 'I've been drinking.'"

The closing statement goes on in this vein and the prosecutor argues that a sober person would not behave this way. She maintains that a person who had not been drinking would probably

say, "Look, I'm the designated driver. I'm just taking my brother home; it was a mistake. I haven't been drinking. Sure, I'll do the field sobriety tests." The video was described as showing Davis' inability to stand or walk without leaning against the car for support. It was at this point that that the objection was made and sustained. It should have been overruled.