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

VICTORIA ELMIZADEH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLATE DIVISION (CRIMINAL)
Case No.: 502007AP900038AXXXMB
Co. Court Case No.: 502006CT038978AXXXSB

June 27 - 2007

Opinion filed:

Appeal from Joseph Marx,
County Court in and for Palm Beach County.

For Appellant, Christine C. Geraghty, Esq., Assistant 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.

WENNET, J.

Victoria Elmizadeh ("Defendant") appeals her judgment entered by the trial court after a jury found her guilty of Driving Under the Influence. Defendant challenges the unobjected-to comments made by the prosecutor during closing argument and argues that such statements rise to fundamental error. We disagree and affirm.

Defendant was arrested for DUI after performing field sobriety exercises during a traffic stop. She was processed at the police department and then transported to the county jail for a breath test. Over three hours after the initial traffic stop, Defendant provided breath samples showing an alcohol level of .081 and .077. During closing argument, the prosecutor made several comments which

Defendant challenges as improper. No objection was made.

The control of prosecutorial comment is within the trial court's discretion and will not be disturbed absent a clear showing of abuse. *Smith v. State*, 866 So. 2d 51, 64 (Fla. 2004) citing *Esty v. State,* 642 So. 2d 1074, 1079 (Fla. 1994). Furthermore, appellate relief is only available if the unobjected-to comments rose to the level of fundamental error. *Montanye v. State*, 976 So. 2d 29, 31 (Fla. 5th DCA 2008); *See also Merck v. State*, 975 So. 2d 1054 (Fla. 2007). Fundamental error is error which "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." *Montanye*, 976 So. 2d at 31 citing *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996) (quoting *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991)). Next we will analyze the prosecutor's statements to determine if any such comments were improper, and if so, whether they rise to the level of fundamental error.

Comments

Field Sobriety Test Comments

Defendant challenges the comment referring to the field sobriety test as an invasion of the province of the jury. The comments are as follows:

> These [field sobriety exercises] are things that FDLE has developed to let the officer know whether or not . . . [suspects] have their normal mental faculties and physical faculties, enough that they can make judgment without the level of intoxication.
>
> You heard the roadsides. . . . These are giving the officer evidence which he can use to determine whether or not he had probable cause for an arrest. After all these roadsides – yeah, sure, he didn't do twenty roadsides. But after he had done two, he felt he had enough. . . . [A]nd the breath result that he got three hours later confirmed his original suspicion that she was driving under the influence.

(Tr. 186, 198). These comments are based on testimony that is relevant, material, and admissible. The Officer's opinion testimony that Defendant's normal faculties were impaired is proper,

especially in light of the Officer's previous testimony as to her appearance, conduct, and statements. *See City of Orlando v. Newell*, 232 So. 2d 413 (Fla. 4th DCA 1970). The prosecutor can comment on the properly admitted evidence; therefore, the comments are proper. *See Rogers v. State*, 957 So. 2d 538, 549 (Fla. 2007).

Comment on Timing

Defendant challenges the following as comments on her silence:

> Who knows how long that was [sic] when she was stopped driving from the last time she had a drink?

(Tr. 189). Prosecutorial comment that is fairly susceptible of being interpreted as a comment on silence will be treated as such. *Watts v. State*, 921 So. 2d 722, 724 (Fla. 4th DCA 2006). Comments on silence are high risk because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict. *Id.* In *Miller v. State*, 847 So. 2d 1093, 1095 (Fla. 4th DCA 2003), the court found error when the prosecutor stated "the defendant has the right to remain silent. And he does. He did not take the stand in this case. But there were two witnesses." Also, in *Watts*, a prosecutor's question, "Did you hear anybody else testify to dispute the officer's story?" was considered error. 921 So. 2d at 724.

Here, the prosecutor's comment referred to the timing and results of the breath test. The prosecutor argued that Defendant's alcohol level registered lower on the breath test because it was three hours later, urging the jury to reason that it would have been higher had the test been administered earlier. This case involves two main witnesses similar to *Watts* and *Miller*; however, unlike those cases, this case did not hinge on the credibility of one witness over another. When read in context, it is clear the prosecutor's comments on the timing of the breath test are proper.

Conflicting Evidence Comment

Next, Defendant points to the following as a comment on her silence:

I didn't hear any conflicting evidence. . . . I don't see any conflicting evidence.

(Tr. 199). In isolation, or in connection with the comment above, this comment may seem to indirectly relate to Defendant's decision not to testify. However, it is important to place the comments in the proper context. The conflicting evidence comment was made in the prosecutor's rebuttal of closing argument while the comment on timing was made in the prosecutor's initial closing. Further, the conflicting evidence comment was made in direct reference to the following comments by defense counsel during its closing:

> [O]ne way to judge the credibility of a person's testimony is whether their testimony today is consistent with testimony they had previously. . . . Well, that wasn't [Officer Bisson's] to me earlier at a deposition. . . . That's inconsistent.
>
> The evidence is also conflicting. The government has stated that in the video, Victoria almost falls over. That's not in the video. . . . That is a gross exaggeration.

(Tr. 192-93). Clearly the prosecutor's comments refer to relevant, material, and admissible evidence because the comments were made while discussing the breath test results and the signs of impairment as examples of consistent evidence. This was not the case of two witnesses providing two sides to a story. The truthfulness of the witnesses was not at issue; but rather, whether the testimony and evidence was enough to find Defendant guilty.

The conflicting evidence comment is also challenged as an improper personal opinion by the prosecutor. This comment is not improper; it is a permissive conclusion or deduction by the prosecutor of the sufficiency of the evidence to establish the defendant's guilt. *See Coleman v. State*, 215 So. 2d 96, 98 (Fla. 4th DCA 1968) (finding comments proper that stated "and if you believe the same way I do" and "I feel the state has proved this case beyond a reasonable doubt"). In contrast,

cases that have found it improper for the prosecutor to give a personal opinion as to the guilt or innocence of the accused generally have dealt with strong language voicing opinion. *See Sempier v. State*, 907 So. 2d 1277 (Fla. 5th DCA 2005) (finding reversible error because the prosecutor expressly asserted that defendant did the crime, was guilty, and should be convicted). Here, the prosecutor permissibly commented on the sufficiency of the evidence. Even taking a view strictly disallowing personal opinions, by no means, did the prosecutor's comment rise to fundamental error.

Additionally, Defendant challenges the prosecutor's comment that stated the following:

> You heard a lot about reasonable doubt, but I don't think any doubt in this case is reasonable

(Tr. 199). Like the comment in *Coleman*, this comment was a permissible conclusion of the sufficiency of the evidence.

Comment on Regret

Defendant challenges the following comment as being an attack on her character: "[t]he only person who should have any regret in this case is the defendant, who should regret getting in the car after drinking." Counsel is permitted to submit to the jury a conclusion that may reasonably be drawn from the evidence and it is not a personal opinion so long as the evidence supports such a characterization. *Elisha v. State*, 949 So. 2d 271, 273 (Fla. 4th DCA 2007). It is undisputed that Defendant had alcohol in her system when she drove; therefore, the improper part of the statement is the part suggesting Defendant should feel regret. It is improper because it is a comment on Defendant's character; however, this is such a mild comment that it probably had little effect on the jury and it is clearly not fundamental error.

Comments Providing Opinion on Credibility

Defendant challenges the following comment as a personal opinion on credibility:

> [W]hat I want you to focus on is whether or not [the Officer] was honest with you. . . . He was completely honest with you. . . . He was completely honest with you and forthright.
>
> You've all heard from credible people, from honest people, from trained people that Ms. Elmizadeh was driving that night, that her normal faculties were impaired, and she had a . . . breath alcohol content of around .08.

(Tr. 198, 200). It is improper for an attorney to express a personal opinion as to the credibility of a witness, *Johnson v. State*, 801 So. 2d 141 (Fla. 4th DCA 2001), such as arguing that a police officer must be believed simply because he is a police officer, *Johnson v. State*, 858 So. 2d 1274, 1276 (Fla. 3d DCA 2003). Here, the prosecutor improperly commented on the credibility of the witnesses so the question is whether the comment amounts to fundamental error. We find it does not. The prosecutor should have used verbiage such as "I submit" that the witnesses were honest and credible but failing to do so does not rise to fundamental error. *See e.g., Montanye*, 976 So.2d at 31 (finding there was no fundamental error where prosecutor accused the defendant of lying and urged the jury to use lying as a test for guilt). The prosecutor in *Montanye* went even further saying "I was expecting them to say that the sun was in their eyes and the dog ate their homework" and explaining why the wife did not testify by saying "Maybe one perjurer in the family was enough." *Id.* The comments in *Montanye* did not rise to fundamental error. Here, there was no battle of credibility and the case did not turn on which witness the jury believed. There were breath test results and video of Defendant's conduct that showed impairment. Therefore, these comments do not rise to fundamental error.

Comment on Conduct

Lastly, Defendant argues that the golden rule was violated when the prosecutor, in referring to Defendant's conduct, stated:

> This is a sobering experience, ladies and gentlemen. . . . Would you be joking there?

. . . [S]he can't keep a straight face.

(Tr. 188). The golden rule is violated when a prosecutor asks the jury to put themselves in the defendant's position. *Cleveland Clinic Florida v. Wilson*, 685 So. 2d 15, 16 (Fla. 4th DCA 1996). However, a common-sense inference as to mental state may be the basis of proper argument. *Merck*, 975 So. 2d at 1064 (quoting *Banks v. State,* 700 So. 2d 363, 366 (Fla. 1997), finding argument was proper in context because it was based on facts in evidence). The comment about joking may therefore be proper; however, even if improper, it does not rise to fundamental error when viewed in context. *See Wilson*, 685 So. 2d at 16, finding that comments were proper, but even if the comments were improper, they were subject to harmless error test. The comment was made while describing Defendant's conduct at the breath test facility. The breath test was video recorded so the jury could rely on the actual video to examine Defendant's conduct. Also, the statement was fair comment upon whether Defendant was impaired.

Based on the foregoing, we hold that the unobjected-to comments by the prosecutor, individually or cumulatively, do not rise to the level of fundamental error. Therefore, the judgment of the trial court should be affirmed.

(MILLER, J., concurs.)(MCSORLEY, J. dissents with opinion.)

In my judgment, the cumulative effect of the prosecutor's repeated and improper statements made during closing argument rises to the level of fundamental error, and, therefore, the conviction should be reversed.