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

LAKEYTHA MURRAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLATE DIVISION (CRIMINAL)
Case No.: 502012AP900035AXXXMB
Co. Court Case No.: 502011CT031534AXXXMB

Opinion filed: APR 2 2 2013

Appeal from Judge, Peter Evans
County Court in and for Palm Beach County.

For Appellant: Richard Greene, Esq., Office of the Public Defender, 421 3rd Street, West Palm Beach, FL 33401.

For Appellee: Stephanie Dutko, Esq., Office of the State Attorney, 401 North Dixie Highway, West Palm Beach, FL 33401.

(BURTON, J.) THIS CAUSE comes before the Court, sitting in appellate capacity, upon Appellant's timely appeal of the trial court's final judgment and sentence adjudicating Appellant guilty of driving under the influence. Having considered the briefs filed by the parties, the trial court record, applicable law, and being otherwise fully advised in the premises, this Court finds as follows:

Appellant, Lakeytha Murray, was arrested and convicted for driving under the influence of an alcoholic beverage to the extent her normal faculties were impaired. Prior to trial, the Appellant filed a motion in limine in which she requested Criminal Standard Jury Instruction 28.1, which sets forth the standards for the presumption of impairment where a breath reading is 0.05 or less, in excess of

0.05 but less than 0.08, or is 0.08 or higher. In this case the Appellant had breath alcohol readings of .104 and .094. The requested jury instruction would have provided in part:

> If you find from the evidence that while driving or in actual physical control of a motor vehicle, the defendant had a blood or breath alcohol level of .08 or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcoholic beverages to the extent that her normal faculties were impaired. But this evidence may be contradicted or rebutted by other evidence demonstrating that the defendant was not under the influence of alcoholic beverages to the extent that her normal faculties were impaired.
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> Crim. Std. Jury Instr. 28.1.

The State argued that they were going forward on a .08 blood alcohol theory and requested to keep presumptions out of the jury instructions. The court ruled that although defense counsel was not prohibited from bringing in evidence in any way, presumptions would not be part of the jury instructions and denied defense counsel's request for the standard jury instruction.

During voir dire, the trial court told the jury panel, "Now, each of you may have your own belief as to what it means to be driving under the influence. But I'm going to read you the applicable law on what driving under the influence means." The trial court then instructed the jury that in addition to driving or being in actual physical control, the state had to prove that normal faculties were impaired or a blood alcohol level of 0.08 or higher.

During the State's questioning of the jury, the prosecutor then explained to the panel that as the judge mentioned, there were two ways to prove DUI and proceeded to address impairment and blood alcohol level. The prosecutor concluded this point by asking the panel, "Does everyone understand that there's two different ways that the State can show and prove a DUI? Does everyone understand that?" The State then went on to "break it down a little further" and once again explained impairment and blood alcohol level. Finally, during the testimony of the arresting officer the State

introduced the officer's opinion that the defendant was impaired.

The sole issue presented in this appeal is whether the trial court abused its discretion in denying defense counsel's request to give the standard jury instruction on the presumption of impairment. Appellant maintains that her defense was that she was not impaired and therefore, the Intoxilyzer reading that her breath test sample was over .08 must be inaccurate. Appellant argues that the jury instruction was required because the theory of impairment had been repeatedly placed before the jury.

The State contends that the instant case is analogous to Euceda v. State, 711 So. 2d 122 (Fla. 1998), where the court held that the defendant was not entitled to an instruction that the defendant's blood alcohol level of 0.11 created a rebuttable presumption of impairment; the defendant was charged with driving under the influence under both subdivisions of the statute, one of which required only a showing that the defendant's blood alcohol level was 0.08 or greater, and the other of which required a showing that the defendant's normal faculties were impaired.

A party is entitled to have the jury instructed on their theory of the case when there has been evidence to support that theory. Seaboard Coastline R.R. v Addison, 502 So.2d 1241, 1242 (Fla. 1987). The Appellant presented evidence that she was not impaired. Appellant argued that her driving was not erratic, she responded appropriately to questions and she followed and understood directions. Appellant's defense was that the reading was not accurate and that she was therefore entitled to the rebuttable presumption instruction.

The State correctly asserts that when there is evidence of a breath alcohol reading above 0.08 no evidence of impairment is necessary. Euceda v. State, 711 So.2d 122 (Fla. 1998). As a general rule, the State can prove the crime of DUI by showing impairment **or** an unlawful breath reading. 11

Fla. Prac., DUI Handbook § 1:6 (2012-2013 ed.)(emphasis added). Here, impairment was placed in issue by the trial court and by the State. Having placed the matter in issue, failure to give the requested instruction was not harmless error. Diguilio v. State, 491 So.2d 1129 (Fla. 1986).

Accordingly, it is **ORDERED AND ADJUDGED** that this matter is **REVERSED AND REMANDED** to the trial court for a new trial. (McSORLEY and MILLER, JJ., concur.)