

**IN THE TENTH JUDICIAL CIRCUIT
COURT FOR HARDEE, HIGHLANDS
AND POLK COUNTY, FLORIDA**

**County Case No.: TT01-00227-LW
Appeal No.: DD-111**

BERNETA FINNEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

OPINION OF THE COURT

This is an appeal of a ruling in the county court of Polk County, Judge James A. Yancey presiding. The Appellant, Berneta Finney, appeals her judgment and sentence. This court has jurisdiction. Fla. R. App. P. 9.030(a). The ruling of the county court is AFFIRMED.

I.

On July 18, 2001, Appellant was involved in a single-car accident in Lake Wales after her Ford Probe struck a tree. When the witness, Sonny Johnson, arrived at the scene, he saw Appellant in the driver's seat attempting to start the engine. Further, he did not see anyone else in the car or running away from it. When Lake Wales Police Officer Griffin Crosby arrived, he saw that Appellant was attempting to leave the scene. He noticed that she appeared extremely intoxicated and had an abrasion to her right hand. Appellant told him that another man drove the car when it crashed, though she could not remember the man's name. Appellant was placed under arrest and given two Breathalyzer tests, which resulted in blood alcohol levels of .233 and .227 respectively. Appellant has two issues on appeal, each of which will be addressed in turn.

II.

First, Appellant argues that the trial court erred in denying defense counsel's motion for mistrial because of discrepancies between the evidence at trial, and the prosecutor's opening statement. During the State's opening argument, the prosecutor told the jury that Appellant indicated to three individuals, including Sonny Johnson that she was going to tell police that someone else was driving. However, Mr. Johnson testified that the only statement Appellant made to him was that she needed a boost getting her car started. When asked by the prosecutor on re-direct, he stated that Appellant never mentioned to him the fact that she was not driving. Later, during Appellant's testimony, the prosecutor asked her if she told Mr. Johnson that someone else was driving, and she said that she did not remember speaking to him.

It is based on this inaccurate statement that the motion for mistrial was grounded. Appellant argues that this case is on point with Jackson v. State, 818 So.2d 539 (Fla. 2nd DCA 2002), where during opening statements the prosecutor indicated that a passenger had gestured to the police officer that there was contraband in the defendant's groin area. However, during his testimony the officer never indicated that any gesture was made and the passenger never testified at all. In granting the motion for mistrial, the Second District Court of Appeals held that:

“[t]he prosecutor improperly suggested to the jury that there was a non-record evidence tending to corroborate the officer's testimony that Jackson possessed drugs at the time of stop. See Hazelwood v. State, 658 So.2d 1241, 1244 (Fla. 4th DCA 1995). The error was not harmless because his case boiled down to a credibility contest between Jackson and the officers. The State's suggestion that there was other evidence in support of its case, coupled with its failure to offer it and thereby subject it to cross-examination by the defense and evaluation by the jury, prejudiced Jackson. See Voorhees v. State, 699 So.2d 602 (Fla. 1997).”

Appellant argues that the prosecutor's statement was meant to suggest that Appellant was lying, and that she was making up a story about someone else being the driver. Also, it allegedly suggested to the jury that the prosecutor had some special information that he had not introduced into evidence, and used the prestige of the State Attorney's Office to suggest that she really had said that; therefore, she should be found guilty. Appellant further contends that this error was especially prejudicial since the State relied heavily on circumstantial evidence to prove their case.

In response, the State argues that the prosecutor's statement was based on a good faith belief that the evidence supporting the statement would be presented during trial. Further, the Court had previously cautioned the jury “the opening statement gives the attorneys a chance to tell you what evidence they believe will be presented during the trial. What the lawyers say is not evidence and you are not to consider it as such.” When it became clear after Mr. Johnson's and Appellant's testimony that this evidence would not be presented regarding the alleged statement, the prosecutor got away from the subject and never mentioned the alleged statement in closing argument nor throughout the rest of the trial. The State further argues that this case is distinguishable from Jackson because the passenger in Jackson was never called to testify, whereas here Mr. Johnson testified and was available for cross-examination by defense counsel and in fact, was never asked by defense counsel about the alleged statement.

A mistrial on improper prosecutorial comments is appropriate only when the error is so prejudicial as to vitiate the entire trial. Duest v. State, 462 So.2d 446 (Fla. 1985). When there is no reasonable probability that the error contributed to the conviction, the error is harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); King v. State, 623 So.2d 486 (Fla. 1983). The purpose of opening statements is to outline what an attorney expects the evidence will establish, and a mistrial should be granted only when an error during trial is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. Bush v. State, 809 So.2d 107 (Fla. 4th DCA 2002).

The Court finds that although the prosecutor's comment was ultimately never supported, upon realizing that the evidence would not be presented, he never mentioned the alleged

statement in closing argument. Therefore, the court's denial of the motion for mistrial did not rise to the level of reversible error.

III.

Second, Appellant argues that the trial court erred by not granting defense counsel's motion for judgment of acquittal and allowing the case to be decided by the jury. The directing of verdicts is within the sound discretion of the trial judge. Shea v. State, 167 So.2d 796 (Fla. 3d DCA 1965). If there is substantial evidence to support the verdict, the verdict should not be disturbed on appeal. Substantial evidence has been defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." Cohen v. State, 99 So.2d 563, 564 (Fla. 1957). If there is not substantial error showing an abuse of discretion, the ruling of the trial court must be affirmed. Shea. Moreover, by moving for a judgment of acquittal, the defendant accepts as proven all facts in evidence and every conclusion favorable to the state. A motion for directed verdict of acquittal should not be granted unless it is apparent that no legally sufficient evidence has been submitted upon which a jury could convict. Brown v. State, 294 So.2d 128 (Fla. 3d DCA 1974). The evidence must be reviewed in a light most favorable to the state. Cochran v. State, 547 So.2d 928 (Fla. 1989); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974).

Appellant argues that the circumstantial evidence presented by the State was legally insufficient to sustain a conviction for driving under the influence. Specifically, Appellant claims that the only evidence presented by the State placed Appellant at the scene some time subsequent to an accident, sitting on the driver's seat. This raises the inference that she had the opportunity to drive her vehicle while it was still operable. However, Appellant contends that the remainder of the evidence did not exclude Appellant's reasonable hypothesis of innocence that she was not driving her vehicle when the accident occurred. Two independent witnesses also confirmed Appellant's testimony that another man entered the driver's seat of her car while she entered the passenger seat.

The State argues that it is not required to rebut conclusively every possible variation of events that could be inferred from the evidence, but only to introduce competent evidence that is inconsistent with the defense's version or theory of events. If the trial court determines that the State has presented legally sufficient evidence that is inconsistent with the defense's version or theory of events, then it becomes the jury's duty to determine whether the circumstantial evidence is inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1989).

Based on the evidence presented by the State, the Appellant was found sitting in the driver's seat with the door closed trying to start the engine. Further, there did not appear to be anyone running from the area. According to Appellant's evidence, she had met a man at a bar earlier that night and left with him. This is corroborated by several witnesses who saw them leave together, with the man sitting in the driver's seat. Appellant claimed that the man crashed the car, then left Appellant in the vehicle and ran away. It was allegedly at this time that she moved into the driver's seat and tried to start the car.

Since these theories appear to be in direct conflict, it is up to the jury to weigh the evidence and determine the credibility of witnesses. It is clear that the jury chose to accept the

State's theory and the Court finds that there was substantial evidence to support its verdict. That being said, the trial court did not abuse its discretion in denying the motion for judgment of acquittal.

Accordingly, it is ORDERED that the judgment and sentence of the county court is AFFIRMED.

ORDERED April 28, 2003.

RONALD HERRING, Chief Judge