

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

**County Case No.: TT02-01883-XX
Appeal No.: EE-25**

MICHAEL WILLIAMS,

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 Mary Catherine Green presiding. The Appellant, Michael Williams, appeals the judgment and sentence of the lower court. This court has jurisdiction. Fla. R. App. P. 9.030(a). The ruling of the county court is affirmed.

I.

Appellant appeals his conviction for driving under the influence in violation of §316.193, Florida Statutes (2001). After a jury convicted Appellant, the trial court adjudicated him guilty and sentenced him to 364 days in county jail in addition to suspending his license for five years. 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 his motion for judgment of acquittal. 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 was lacking as none of the witnesses could identify him as the driver of the truck. However, the record contains ample testimony showing that Appellant was the only person in the truck and that no one got out of the truck after the accident. Therefore, the Court finds that the trial court's decision was supported by competent substantial evidence

III.

Second, Appellant asserts that the trial court erred in not giving a curative instruction when the defense objected to the prosecution's improper shifting of the burden of proof. Control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. Franqui v. State, 804 So.2d 1185 (Fla. 2001).

At trial, Appellant testified that someone else was driving the truck at the time of the crash though he did not know the supposed driver's name nor has he seen him since then. During closing arguments, the prosecutor referred to Appellant's testimony and repeatedly remarked "If not you, then who?" Defense counsel objected, claiming that the comment improperly shifted the burden of proof by implying that Appellant should have brought forth other evidence. The Court finds that in light of the entire record, the prosecutor's comments did not improperly shift the burden of proof onto the defendant. That being said, the trial court did not abuse its discretion in refusing Appellant's request for a curative instruction.

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

ORDERED August 19, 2003.

RONALD HERRING, Chief Judge