

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

County Case No.: TT03-000029-LW

Appeal No.: FF-37

ROBERTO MARTINEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

OPINION OF THE COURT

This is an appeal from the county court of Polk County, Judge Mark Carpanini presiding. This court has jurisdiction. Fla. R. App. P. 9.030(c). The ruling of the county court is affirmed.

Appellant was charged with driving under the influence, in violation of §316.193, Florida Statutes (2002). A jury found Appellant guilty and the trial court sentenced him to serve 364 days in jail and suspended his driver's license for ten years.

I.

The Appellant argues that the trial court erred in allowing the prosecutor to make improper statements and ask improper questions. During opening statements, the prosecutor argued:

But what you're going to find out, ladies and gentlemen, as you hear the testimony that's going to be presented and as it unfolds today is that the daughter, the five-year old daughter of the defendant, didn't make it home on her scheduled time. And she didn't make it home on her scheduled time because on the way there, her dad after drinking alcohol, feeling the effects of that alcohol, getting in his car with Misty Dawn Martinez in the passenger seat, wrecked his car into a ditch about a mile or so from his mother's – from her mother's home. So Misty Dawn didn't get there on schedule. (V1: T28-29).

And I'm going to ask you to go back to the deliberation room, talk about it, and find the man accountable. Show him that the choices that he made that day when he got in the car, when he drove with his daughter in there, while being impaired by alcohol, was a bad choice. (V1: T34-35).

During closing arguments, the prosecutor made these comments:

His little daughter—cute little girl—came in here, took the stand and talked to you. Answered some questions from me. And said her daddy was driving that day. And of course, she couldn't remember the dates. The day that this incident occurred, her daddy was driving and ran into the ditch. And the drink that he had, that he brought with him, fell onto the floorboard. And she didn't remember what the drink was. (V2: T225).

It is well settled that control of the prosecutor's comments to the jury is a matter within the trial court's discretion and will not be disturbed absent a clear showing of abuse of discretion. Crump v. State, 622 So.2d 963, 972 (Fla. 1993). However, counsel for defense failed to make a contemporaneous objection to these comments at trial, therefore appellate review is procedurally barred. Allen v. State, 662 So.2d 323 (Fla. 1995). In absence of fundamental error, a claim of allegedly improper prosecutorial comments is not preserved for appellate review. Kilgore v. State, 688 So.2d 895 (Fla. 1996). In order to determine whether or not the cumulative effect of the comments complained of constitute fundamental error, the court must look at the entire trial record, taking into consideration the circumstances surrounding the comments complained. Breedlove v. State, 413 So.2d 1 (Fla. 1982). Having reviewed the record and having considered the totality of the circumstances in which the statements were made, the Court finds that the comments by the prosecutor did not rise to the level of fundamental error.

II.

Next, the Appellant contends that the trial court erred in allowing the State to present evidence that the Appellant refused to allow the horizontal gaze nystagmus test to be administered during the DUI investigation. Appellant argues that the officer was not qualified as an expert to conduct this testing and therefore the testimony should not have been admissible. Counsel for defendant again failed to make a contemporaneous objection, and appellate review is barred due to the absence of fundamental error.

III.

Finally, Appellant argues and the Appellee agrees that the trial court erred in imposing a \$3000 fine without appropriate statutory authority. The case is remanded to the trial court with instruction to reduce Appellant's fine to not less than \$1,000 or more than \$2,500, pursuant to §316.193(2)(b)(2).

Accordingly, it is ORDERED and ADJUDGED that the ruling of the county court is AFFIRMED. This matter is REMANDED to the trial court to adjust Appellant's fine within the statutory range.

DONE and ORDERED August 23, 2005.

RONALD HERRING, Chief Judge