County Criminal Court: **CRIMINAL PROCEDURE**—Prosecutorial Comment. Although it appears the State did make improper prosecutor comments in this case, the comments were not contemporaneously objected to, and do not rise to the level of fundamental error. Judgment and sentence affirmed. *Kenneth G. Peters v. State, No. 12-CF-8109-WS* (Fla. 6th Cir. App. Ct. January 13, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

KENNETH G. PETERS,
Appellant,

v.

UCN: 512012CF008109A000WS
Case No: CRC1208109CFAWS
Lower No: 12-1176MMAWS

STATE OF FLORIDA,
Appellee.
_____/

Appeal from Pasco County Court

County Judge Debra Roberts

Walter L. Grantham, Jr., Esq.
For Appellant

Bryan Doeg, A.S.A.
For Appellee

ORDER AND OPINION

Appellant raises three issues on appeal. First, Appellant contends that the cumulative effect of several prosecutor comments warrants a reversal. Second, Appellant claims the trial court erred by not granting Appellant's motion for judgment of acquittal. Finally, Appellant asserts the trial court erred by denying Appellant's motion in limine and by admitting testimony concerning the content of text messages received by the victim. This Court finds that although some prosecutor comments may have been improper, Appellant did not contemporaneously object to the comments, and even

considering the comments' cumulative effect they do not constitute fundamental error. Further, this Court finds no error in the trial court's denial of Appellant's motion for judgment of acquittal, or the denial of the motion in limine. The trial court is therefore AFFIRMED.

STATEMENT OF THE FACTS

Appellant was charged by information with misdemeanor stalking, in violation of § 784.048(2), Fla. Stat., for offenses occurring between November 1, 2011 and December 31, 2011.

At the October 31, 2012 trial held before Judge Roberts, Appellant presented an oral motion in limine to prevent the State from introducing witness testimony concerning the substance of any text messages allegedly sent by Appellant to the victim, because the messages were not preserved and copies of the messages could not be introduced as evidence. The trial court withheld ruling on the motion in limine, and allowed evidence in the form of witness testimony as to the content of the messages.

The victim, Brian Kowalski, testified at trial that he received text messages from Appellant, and that he knew they originated from Appellant because they were sent from Appellant's phone number. Mr. Kowalski testified he deleted the messages because he blocked the number and wanted nothing more to do with Appellant. Mr. Kowalski testified Appellant made threats to him personally that included that if Appellant ever saw Mr. Kowalski in public, he would not make it home; that Appellant would break his legs; and that Appellant would have killed him by now if he was not the type of person that he was. The threats were all made over the phone and by text message. The messages allegedly began over a dispute regarding $90.00 owed to Brendon Andrews, the victim's step-son, from a previous trip to Busch Gardens with Appellant's daughter.

Brendon Andrews testified that he received a phone call from Appellant in the presence of Deputy Harrington. Deputy Harrington testified that he was present when Brendon Andrews received a phone call which Mr. Andrews identified as being from Appellant, and identified Appellant by voice to the Deputy. After the phone call, Deputy

Harrington responded to Appellant's address and questioned him. Deputy Harrington testified that he recognized Appellant's voice as the voice he heard over the phone. Deputy Harrington testified that at that time Appellant first admitted that he sent threatening messages to Mr. Kowalksi, but then changed his story by claiming that he did not recall sending the messages, and then further stating that his daughter may have sent the messages.

After the State rested, Appellant moved for judgment of acquittal, which was denied. During closing argument, the State made several comments which Appellant challenges on appeal, although no contemporaneous objections to the comments were made. After deliberations, the jury returned a verdict finding Appellant guilty as charged. Appellant was sentenced to 60 days Pasco County Jail, followed by 10 months of probation on October 31, 2012. Appellant filed a timely notice of appeal on November 27, 2012.

STANDARD OF REVIEW

Challenges to un-objected-to prosecutorial comments are waived on appeal, unless the comments rise to the level of fundamental 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." *Brooks v. State*, 762 So. 2d 879, 898-99 (Fla. 2000). This Court reviews a ruling on a motion for judgment of acquittal pursuant to a de novo standard, to determine whether "a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt," and the Court "will not reverse a conviction which is supported by competent, substantial evidence." *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002). A trial court's decision to admit or exclude evidence is reviewed pursuant to an abuse of discretion standard. *Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991).

ANALYSIS

I. Prosecutor Comments

Appellant contends the conviction should be overturned due to the cumulative effect of the improper prosecutor comments, which he claims amount to fundamental error in this case. During closing argument, the State asked the jurors to think about how the victim said he felt when all of this happened. (Trial Tr. 121) The State also characterized the defense as wanting to muddy the waters and confuse the jurors. (Trial Tr. 127) The State commented on the defense using what it characterized as a "tactic of attacking law enforcement," (Trial Tr. 129) and asked what type of person Appellant was for first admitting to the crime, then denying the crime, and then throwing his daughter "under the bus." (Trial Tr. 131) The State commented on defense counsel's comment about Deputy Harrington's trial demeanor, given that Appellant was smug, smiling, smirking, and had a snarl on his face during trial, and characterized this as demonstrating what type of person Appellant is. (Trial Tr. 131) Defense counsel never objected to these comments.

The most objectionable of the prosecutor comments in this case were the references to Appellant's demeanor during the trial, at which he did not testify, attempting to characterize Appellant as a certain type of person. It was indeed improper for the prosecutor to comment on Appellant's demeanor in the manner that occurred in this case. *See Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). The repeated references to Appellant's demeanor, including Appellant's smiling and smirking at witnesses, and having a snarl on his face are the type of comments that are prohibited characterizations of a defendant as "a certain criminal type." *See Johns v. State*, 832 So. 2d 959, 962 (Fla. 2d DCA 2002). The State's comments characterizing Appellant as a certain type of person for admitting the crime and then later denying it and throwing his daughter under the bus were likewise improper. In addition, it was improper to comment on defense counsel's tactic of attacking law enforcement in a manner that discredited a proper legal defense. *See Miller v. State*, 712 So. 2d 451, 453 (Fla. 2d DCA 1998). We find nothing improper in the State's comments asking the jury to consider the victim's statements regarding how he felt after receiving the messages from Appellant. Viewing the closing arguments as a whole, these comments appear to have been made in reference to the victim's emotional distress, an element at issue in the trial, rather than a bare attempt to inject emotion into the jury's considerations.

Appellant made no objection at trial to any of the alleged improper prosecutor comments. In order to preserve any alleged error in the form of improper prosecutor comments made during closing arguments, a defendant must contemporaneously object to the comments. *Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000). When a defendant fails to contemporaneously object, this Court may not grant relief unless the comments rise to the level of fundamental error, which calls into question the validity of the trial itself, such that it appears a guilty verdict could not have been reached "without the assistance of the alleged error." *Id.* at 898-99.

Although it appears the State did in fact make improper prosecutor comments in this case, the comments did not rise to the level of fundamental error. Considering the cumulative effect of these comments, we find they do not call into question the fundamental fairness of Appellant's trial and do not warrant reversal of Appellant's conviction.

II. Motion for Judgment of Acquittal

Appellant claims it was error for the trial court to deny his motion for judgment of acquittal because the State failed to prove a prima facie case of guilt for the offense of stalking. Appellant bases this claim on the fact that none of the text messages which form the basis for the stalking charge were preserved or admitted into evidence. The only evidence introduced was Brian Kowalksi's testimony that he received some messages, specifically four threatening phone calls and/or text messages from Appellant. Mr. Kowalksi testified the text messages came from the phone number that he had stored in his cell phone as Appellant's phone number. Appellant contends there was no competent evidence to establish that Appellant was the one who sent the text messages, and reversal is warranted on that basis. *See Murphy v. Reynolds*, 55 So. 3d 716 (Fla. 1st DCA 2011).

Appellant concedes that Deputy Harrington testified that he listened to a phone conversation between Appellant and Brendon Andrews, and subsequently interviewed Appellant at his residence. Deputy Harrington testified that the voice he heard over the phone was the same voice of the person he interviewed, and that the person he

interviewed admitted to sending the threatening messages. However, Appellant claims this testimony is insufficient evidence because Deputy Harrington never identified Appellant during the trial as the person previously interviewed. Therefore, Appellant contends there was no competent evidence that Appellant actually sent the text messages and the judgment of acquittal should have been granted.

When viewing the evidence in the light most favorable to the State, as is the standard when deciding a motion for judgment of acquittal, Appellant's argument lacks merit. To prove a prima facie case of misdemeanor stalking, it is sufficient that the State demonstrate repeated, unwanted communications from the defendant that cause substantial emotional distress to the victim and do not serve any legitimate purpose. *See* § 784.048, Fla. Stat. We find the State presented sufficient evidence that Appellant was the source of the communications to allow the jury to consider the case. The record contains evidence that the communications originated from Appellant, including testimony that the text messages were sent from a phone number identified by a witness who testified as to having personal knowledge that the number was Appellant's phone number, and witness testimony that identified Appellant as the caller during the conversation that Deputy Harrington overhead. We therefore affirm the trial court's denial of the motion for judgment of acquittal.

III. Motion in Limine

Finally, Appellant contends it was error to deny Appellant's motion in limine and to permit testimony as to the substance of the text messages received by the victim. Appellant objected at trial to such testimony because the text messages themselves were not available to be introduced as evidence. The State indicated that they did not have the messages and anticipated having their witnesses testify as to the details of the messages. Appellant cites § 90.952, Fla. Stat., providing that the original writing or recording is required to prove the contents of such writing or recording, and § 90.951, stating that electronic recordings are considered writings or recordings covered by the statute. Appellant claims that testimony as to the substance of the messages constituted inadmissible hearsay and therefore it was error for the trial court to deny Appellant's motion in limine.

We find the argument without merit. Evidence that is not offered to prove the truth of the matter asserted is not hearsay. *See id.* § 90.801. The evidence objected to does not constitute hearsay because it was not introduced to prove the truth of the matter asserted, but rather, to demonstrate that Appellant sent the messages to the victim.[1] In order to prove a charge of misdemeanor stalking, the State must prove Appellant sent the victim repetitive, unwanted communications that serve no legitimate purpose and cause "substantial emotional distress." § 784.048(1)(d), Fla. Stat.

CONCLUSION

We find no error in the trial court's admission of the evidence objected to. We further find no error in the denial of the motion for judgment of acquittal. Finally, the un-objected-to prosecutor comments in this case do not rise to the level of fundamental error.

It is therefore ORDERED that this cause is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 13th day of January 2014.

Original order entered on January 13, 2014 by Circuit Judges Daniel D. Diskey, Shawn Crane and Linda Babb.

[1] The communications would further be admissible as a party admission. *See Chacon v. State*, 937 So. 2d 1177, 1178 *(*Fla. 3rd DCA 2006) (citing § 90.803(18), Fla. Stat.).