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 PINELLAS COUNTY

KYLE R. GIBSON
Appellant,

v.

Appeal No. CRC 14-00005 APANO
UCN: 522014AP000005XXXXCR

STATE OF FLORIDA
Appellee.
_____/

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge John Carballo

Ricardo Rivera, Esquire
Attorney for Appellant

Berny V. Jacques, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

Andrews, Judge.

THIS MATTER is before the Court on Appellant, Kyle R. Gibson's appeal from a conviction, after a jury trial, of Driving Under the Influence. Appellant argues the trial court erred in preventing him from arguing Appellant refused to participate in sobriety tests because his license was already suspended. Additionally, he argues the office of the State Attorney denied him a fair trial by making an improper closing argument. Because we find no error in

the trial judge's ruling and we find the challenged portion of the state's closing argument an invited response, we affirm.

Facts:

On November 18, 2012, Appellant was pulled over by Officer Stephen Zulauf, of the St. Petersburg Police Department for driving on a suspended license. Upon making contact with Appellant, Officer Zulauf observed signs of impairment including a strong odor of alcohol, slurred and mumbled speech, and glassy, watery, bloodshot eyes. Suspecting Appellant may be driving while impaired, he elected to call the DUI unit to further assess Appellant's level of impairment.

Officer Leonard E. Cox has worked for the St. Petersburg Police Department for eight years. He has participated in over 500 DUI investigations and is a certified Drug Recognition Expert. He observed Appellant to display the classic signs of impairment including a strong odor of an alcoholic beverage coming from his breath, bloodshot, watery eyes and soft, mumbled slurred speech. Appellant had a blank and dazed expression on his face. He administered the horizontal gaze and nystagmus test (hereinafter HGN) and the vertical gaze and nystagmus test (hereinafter VGN). Appellant refused the opportunity to perform field sobriety tests (hereinafter FSTs). The purpose of FSTs and the fact that a jury would be informed of his refusal was explained to Appellant. When offered another opportunity to complete FSTs Appellant's again refused stating, "Absolutely not!"

Officer Jeff Gosnell is a breath test operator with seven years' experience with the SPPD. He was previously employed as a state police officer in Ohio. He has participated in more than 1000 DUI investigations and has completed multiple DUI related basic and advanced courses. He also observed Appellant to exhibit multiple signs of impairment. When he offered

Appellant the opportunity to take a breath test the Appellant stated, "I refuse." On three separate occasions Appellant refused even after he was told he would suffer a suspended license and could be charged with a crime for refusing.

Standard of Review:

"The standard of review of a trial court's ruling on a motion in limine is abuse of discretion. Such discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an 'erroneous view of the law or on a clearly erroneous assessment of the evidence.'" (citation omitted). *Patrick v. State*, 104 So.3d 1046 (Fla. 2012). A trial judge's rulings on objections made in closing argument are reviewed under the abuse of discretion standard. *Moore v. State,* 701 So.2d 545, 551 (Fla.1997).

Issue, Law and Analysis:

Issue 1. Motion in Limine to Limit Argument:

Prior to trial the office of the State Attorney filed a Motion in Limine to prohibit the defense from mentioning the basis for the stop, i.e. Appellant's suspended license. The state argued that the Appellant had pled to the criminal charge of driving while license suspended or revoked and there was no cause to bring the suspended license before the jury. The prosecutor expressed concern that the jury would be placed on notice that the defendant had received two separate new criminal charges (driving on a suspended license and refusal to submit to field sobriety tests). Defense counsel objected. He argued the jury should know the basis for the stop. Defense counsel argued that the state wanted to be able to exclude information about the suspended license but also argue consciousness of guilt. The trial court, in its ruling, struck a balance by: 1) allowing the mention of the Appellant's suspended license as the basis for the stop as Appellant requested and over the state's objection, 2) prohibiting Appellant from

arguing the reason he refused to participate in FSTs was because his license was already suspended unless there was some evidence to support the argument, 3) not allowing the state to mention Appellant's collateral charges as a result of the driving and Appellant's refusal to participate in FSTs and 4) allowing the state to argue consciousness of guilt for Appellant's refusing to participate in FSTs. Appellant argues that the court's decision deprived him of the opportunity to argue a reasonable inference that can be drawn from the evidence.

It is undisputed that Appellant was stopped because he had a suspended license. It is also undisputed that Appellant was advised that the reason for the stop was because his license was suspended. In his brief, Appellant asserts that the trial court erred prohibiting him from attempting to rebut the state's consciousness of guilt argument by asserting the reasonable inference that "Appellant *might* have refused testing because … his license had already been suspended." (Emphasis added). Appellant complains that the trial court's ruling that there be "direct testimony" or something "in the evidence to support" his assertion presented him with the Hobson's choice between maintaining his right to remain silent and his right to allocution at sentencing.

It is axiomatic that counsel should be allowed to discuss fully at trial and argue all reasonable and logical inferences that can be drawn upon the evidence presented during the trial. *Bertolotti v. State,* 476 So.2d 130, 134 (Fla.1985); *Dessaure v. State,* 891 So.2d 455 (Fla. 2004). "[C]ourts of this state allow attorneys wide latitude to argue to the jury during closing argument. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." *Patrick v. State,* 104 So.3d 1046, 1065 (Fla. 2012) (citations omitted). Wide latitude in the closing argument does not come without limitations. *See Davidoff v. Segert*, 551 So.2d 1274, 1275 (Fla. 4 DCA 1989) ("While counsel is accorded great latitude in making

argument to the jury, this leeway is not unbridled."). The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. *Teffeteller v. State,* 439 So.2d 840, 845 (Fla. 1983); *Brooks v. State*, 762 So.2d 879 (Fla. 2000) (Wells, J. concurring in part, dissenting in part). "Trial judges do have a long-standing responsibility to protect jurors from improper closing arguments, even in the absence of a proper objection, despite the near Sisyphean effort such protection seems to require." *Thomas v. State,* 752 So.2d 679 (Fla. 1 DCA 2000). Arguments that mislead the jury are improper. *See Linic v. State,* 80 So.3d 382, 393 (Fla. 4 DCA 2012) ("[T]he prosecutor improperly injected facts and inferences that were not supported by the evidence on multiple occasions, which could only mislead and distract the jury from considering the evidence it had heard."). Further, permissible wide latitude is not a license for counsel to advance arguments that are not supported by the evidence. *Patrick v. State,* 104 So.3d 1046, 1065 (Fla. 2012) ("counsel may not urge the jury to consider facts not in evidence.").

A. Pre-Arrest Field Sobriety Test:

Chapter 316.1932 Florida Statutes governs the administration of tests to determine blood alcohol content post-arrest and the admissibility of those tests into evidence in a criminal case. Chapter 316.1932 does not govern the administration of pre-arrest field sobriety tests or the admissibility into evidence of a defendant's refusal to participate in FSTs. There are no statutory requirements that compel anyone to participate in FSTs. *State v. Taylor*, 648 So.2d 701, 705 (Fla. 1995).

Field sobriety tests are an investigative tool permissible under the Fourth Amendment when administered based on an officer's reasonable suspicion that criminal activity is afoot. *Taylor* at 703. Where a suspect, who is stopped by police while driving a car, exhibits signs of

impairment, "[t]he officer was entitled under section 901.151 to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest." *Id.* at 703-704. In *Taylor,* the defendant argued that his refusal should not be admissible because it was not probative of the issue of his guilt since the refusal "*may* have been motivated by a factor other than guilt." *Id.* at 704 (emphasis added). Similar to the case at bar, when Taylor encountered the police, he exhibited all of the classic signs of impairment including slurred speech, strong odor of alcohol and bloodshot watery eyes. *Id.* The officer explained the purpose of the test to Taylor and told him that if he refused to take the test he would be forced to make his decisions solely based upon his observations. *Id.* Rejecting the defendant's assertion that his refusal was not evidence of consciousness of guilt the Court stated:

> Taylor had ample incentive to take the tests: He was aware of the circumstances surrounding the officer's request; he knew the purpose of the tests; and he had ample warning of possible adverse consequences attendant to refusal. … Given the strong incentives to take the tests, Taylor's claim that his refusal was an innocent act loses plausibility. In short, he knew that refusal was not a "safe harbor" free of adverse consequences and acted in spite of that knowledge. His refusal thus is relevant to show consciousness of guilt. *If he has an innocent explanation for not taking the tests, he is free to offer that explanation in court.*

Id. (emphasis added). Unlike the refusal to submit to a post-arrest breath test there is no statutory sanction for refusing to participate in pre-arrest FSTs. However, as the Court makes clear in *Taylor,* failure to submit to field sobriety tests is admissible as evidence of consciousness of guilt in a criminal proceeding. *Id.* at 704. Here, Appellant sought to argue that his refusal to participate in field sobriety tests was not evidence of consciousness of guilt, but instead based upon the reality that he could suffer no greater sanction than the suspension of an already suspended driver's license. Such a statement, as it relates to field sobriety tests, is untrue, misleading and therefore improper. *See Linic v. State,* 80 So.3d 382, 393 (Fla. 4 DCA 2012) (lawyers may not make arguments that mislead the jury). There is no license suspension

for the failure to participate in FSTs. There was no testimony presented at trial that Appellant was told that one of the potential sanctions for failing to perform FSTs was a suspension of his license. At trial Officer Cox, testifying about offering Appellant FSTs, specifically stated, "You don't have to do them, but it's just something that we ask to better help evaluate and gauge somebody's impairment." Thus, having an already suspended license cannot serve as a reasonable inference for why Appellant chose to refuse to participate in FSTs since losing his license was not a potential consequence. Here, Appellant's assertion that he should have been allowed to argue that he "*might*" have refused to take the FSTs for reasons other than consciousness of guilt is the same speculation the Court was presented with in *Taylor,* with no evidentiary foundation at trial or in Appellant's words or actions at the time of the stop. As the Court stated in *Taylor,* if Appellant had "an innocent explanation for not taking the tests, he [was] free to offer that explanation in court." *Id.*

B. Post-Arrest Breath Test (Implied Consent):

Chapter 316.1932 Florida Statutes[1] requires the suspension of driving privileges for anyone who was arrested for driving under the influence and refuses to participate in a post-

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[1] Chapter 316.1932 Florida Statutes states:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, ***deemed to have given his or her consent to submit to an approved chemical test or physical test*** including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. ***The chemical or physical breath test must be incidental to a lawful arrest*** and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. The administration of a breath test does not preclude the administration of another type of test. ***The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months*** if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she ***commits a misdemeanor in addition to any other penalties. The refusal to submit to a chemical or***

arrest breath test. It also prescribes the imposition of a separate criminal charge for refusing to submit to a breath test. Opposing any suggestion or argument that Appellant had a reason other than consciousness of guilt for refusing any tests, the prosecutor argued:

> This is dangerous grounds because we'd be left in a position to say – you know, there is additional conscious (sic) of guilt, Your Honor, the fact that he was informed that there could be a misdemeanor out of this from refusing. And if they want to take that lesser blow away, Your Honor, we can go down a more dangerous road.

Defense counsel continued to argue that the "lesser blow" (lesser consciousness of guilt argument) should be taken away by allowing him to assert the refusal was because Appellant's license was already suspended. However, counsel also insisted that any suggestion of more significant consciousness of guilt where the jury would be informed that the Appellant refused even after he was told he could face criminal charges should be kept from the jury. He stated:

> And, as far as this, oh, so we get to go into a refusal and a criminal charge, you know, I don't think we can get there. That's not admissible and one thing doesn't have anything to do with the other.

On three separate occasions Appellant was given an opportunity to take the breath tests and he refused. At no time during any of the three occasions he was asked to provide a breath sample and refused did Appellant suggest that his reason for refusal was related to his already suspended license. To suggest the same would not be a reasonable inference that could be drawn from the evidence presented during the trial. It is relevant that Appellant would rather accept a criminal charge then to have the jury know what his breath alcohol content was on the night in question. The prospect of an extension of the suspension on an already suspended license is one thing. The prospect of a criminal charge with the attendant costs and possible jail sentence is wholly another. Appellant had ample incentive to take the breath test. The

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physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding.

prejudice that Appellant may have suffered by the jury being informed that he was also told he could be criminally charged or that he had in fact been criminally charged was not superficial. It was impactful. The balance struck by the trial court took into consideration the statutory authority that allows the state to argue consciousness of guilt for refusing to submit to testing while at the same time leaving the door open for Appellant to argue his actions were not the result of consciousness of guilt if evidence was presented to support the argument.

Issue II. Prosecutor's "Veiled" Appeal to Conscience of Community

In his brief, Appellant asserts that during closing argument the state improperly argued a "veiled 'conscious of the community'" and "don't let DUI suspects refuse and get away with it argument." The state asserts that its argument was an invited response to the defense closing argument.

A. Conscience of the Community:

> Florida courts have repeatedly condemned arguments by counsel which impermissibly appeal to the jury's "community conscience" or its sense of "civic responsibility". *See Del Rio v. State,* 732 So.2d 1100, 1101 (Fla. 3d DCA 1999) (citations omitted). An argument which tells the jury that it sits as the conscience of the community has specifically been found to be inflammatory and impermissible. *See Williard v. State,* 462 So.2d 102 (Fla. 2d DCA 1985); *Carr v. State,* 430 So.2d 978 (Fla. 3d DCA 1983).

Otero v. State, 754 So.2d 765, 770 (Fla. 3 DCA 2000). A conscience of the community argument "extends to all impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation." *Ocwen Financial Corp. v. Kidder*, 950 So.2d 480, 482 (Fla. 4 DCA 2007). *See e.g., Fleurimond v. State*, 10 So.3d 1140 (Fla. 3rd DCA 2009) (prosecutor improperly appealed to jurors that it was not "fair" that the people of Miami-Dade County had to have drug dealers living among them); *Moore v. State,* 74 So.3d 547 (Fla. 5 DCA 2011) (prosecutor improperly argued that "[n]o parent, no mother, no father, no child should have to drive down any street" and see the open display of firearms); *Eure v. State*, 764

So.2d 798 (Fla. 2nd DCA 2000) (prosecutor referred to drug dealing as the bane of the community's existence); Brown *v. State,* 754 So.2d 188 (Fla. 5th DCA 2000) (prosecutor argued defendant stood accountable to the jury for distributing cocaine); *Urbin v. State*, 714 So.2d 411 (Fla. 1998) (prosecutor implored jury to recommend death by asking what kind of message would a life sentence send); *Campbell v. State,* 679 So.2d 720, 21 (Fla. 1996) (prosecutor asked members of the jury to impose death as "a message sent to a number of members of our society who choose not to follow the law."*); Harris v. State,* 619 So.2d 340 (Fla. 1 DCA 1993) (prosecutor implored jury to convict defendant so that another drug dealer was not let back on the street).

In his brief Appellant narrows in on what he believes was the error in the state's closing argument stating:

> The state's argument was that if all it took for a jury to find a DUI suspect not guilty of DUI was for the suspect to not allow 'officers to get into phases that might help them determine whether they are impaired,' then the state of Florida should 'pack up' with regard to DUI cases because they would never be able to prove any DUI case.

The entire referenced part of the state's closing argument went as follows:

> Members of the jury, if all it took was for people who were suspected of DUI is to just not cooperate, and prevent the officers from going into phases that will help them to determine whether somebody's impaired, if that's all it took, members of the jury, the State Attorney's Office might as well -- we might as well pack, and -- My office might as well pack up far as -- as it pertains to DUIs because all it takes is for you to just not cooperate at all and just hide the fact that you're impaired, then we might as well close down the shop. Members of the jury, you know that's not the case because you know your conscience tells you that somebody can still be found guilty of DUI because you can base it off of that decision. It's not enough for this defendant to hide what he was doing to a law enforcement officer. It's not enough for this defendant to try to play games in essence and to come here to say, oh, the State doesn't have the evidence when, clearly, that is evidence. In fact, the law calls that consciousness of guilt.

The prosecutor's argument focused on in Appellant's brief is not a conscience of the community argument. Nor is the full text of the argument. The single use of the word "conscience" without more is not necessarily evidence of an appeal to the conscience of the community. The prosecutor's comment, "you know that's not the case because you know your conscience tells you that somebody can still be found guilty of DUI because you can base it off of that decision," refers specifically to the Appellant's decision to refuse to participate in sobriety tests. There is nothing in the prosecutor's comments that qualifies as an impassioned plea "intended to evoke a sense of community law through common duty and expectation." *Birren v. State*, 750 So.2d 168 (Fla. 3 DCA 2000). Further, the comment was isolated never to be repeated again and even if improper it was not so egregious as to vitiate the entire trial. *See Card v. State,* 803 So.2d 613 (Fla.2001) (prosecutor's isolated reference to the conscience of the community argument was not so prejudicial as to vitiate the entire trial); *Otero v. State,* 754 So.2d 765 (Fla. 3d DCA 2000) (concluding that isolated impermissible conscience of the community argument did not warrant a reversal).

B. Invited Comment:

The United States Supreme Court has addressed this concept known as "fair reply" or "invited response".

> The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials-the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments-two apparent wrongs-do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule. (citation omitted).

> In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.
>
> [T]he issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's "invited response," taken in context, unfairly prejudiced the defendant.

U.S. v. Young, 470 U.S. 1, 11-13, 105 S.Ct. 1038, 1044-1046 (1985); *See also, Vazquez v. State,* 635 So.2d 1088 (Fla. 3d DCA 1994); *McKenney v. State,* 967 So.2d 951, 955 (Fla. 3rd DCA 2007). *See also Young v. State,* 137 So.3d 532, 534 (Fla. 4 DCA 2014) ("When reviewing the impropriety of a prosecutor's comments, the court must consider the comments in context. The comments are not improper if they were "invited" by defense counsel's preceding argument on the same topic.") (citations omitted).

During his closing argument, defense counsel lamented the state's failure to produce direct evidence of the Appellant's impairment. Even though Appellant refused to participate in field sobriety tests defense counsel told the jury, "It's [the state's] obligation to present evidence. And if they don't have it, you have to vote not guilty because they didn't prove their case." Counsel for Appellant acknowledged for the jury that the tests are a determining factor, and that police use it as an "objective criteria." He pointed out that Officer Cox stated if people stopped for DUI do well on the FSTs they won't be arrested. Referring to FSTs counsel argued:

> So, this is the whole show, folks. This is where he determines whether the person's impaired, okay? This is the biggest part of the puzzle. Now, the State tells you, well, we don't have that part of the puzzle because it's Kyle Gibson's fault. But you know what, folks? You promised that you weren't going to go there. He was uncooperative that day. Guess what? He went to jail for being uncooperative. But you don't get to convict him for being DUI.

Counsel then proceeded to go through each of the required field sobriety tests. He pointed out that "no witness" testified that he could not or would not have successfully completed the tests. Counsel speculated that Appellant "might have been able to do just fine" on the field sobriety tests. Counsel went over the alternative field sobriety tests that were not offered to Appellant, i.e. finger to nose test and the alphabet test. He argued Appellant "could have done well on it ... we don't know." Later, still referring to FSTs, counsel argued:

> They have every ability to gather that evidence, to bring that evidence in this court today, and they chose not to. And they don't get to say take my word for it, he was impaired. They've got to bring you evidence to overcome that presumption.

Referring to Appellant's refusal to take a breath test counsel argued the suggestion the Appellant did not "blow because he knew he was guilty" was not testified to by "any witness." Counsel later argued:

> Folks, if you go back there and you say, you know what, I think he was hiding something that day, and I think if he would have blown -- if he would have blown, he would have been over the legal limit, and, therefore, I'm going to convict him, shame on you. Your job is not to create evidence for the State of Florida. No one said that.
>
> If you go back there and say, you know what? I think if he would have done these exercises, I think he would have done poorly; therefore, his normal faculties were impaired, shame on you again. Again, no witness said that. In fact, the witness said the opposite. I really don't know if he would have passed or failed the exercises.

Finally, in the summation of his closing argument counsel stated:

> Folks, you go back there and you say, you know what? I really don't like the fact that Mr. Gibson was completely uncooperative that evening. I can understand that, but that doesn't give you the right to convict him. They've got to prove that his normal faculties were impaired. And the evidence shows a complete lack of evidence on the issue of normal faculties.

Appellant's entire closing argument sought to place the blame for Appellant's refusal to participate in FSTs and therefore on the state's inability to present FSTs, as a defect in the state's case and not evidence of Appellant's guilt.

In light of Appellant's closing argument, prosecutor's comments were invited. The effect of Appellant's argument was to suggest that if a defendant refuses to participate in FSTs or provide a breath sample the state could not meet its burden of proving that defendant was driving while impaired. The argument suggested that a defendant's refusal should not be considered as evidence of guilt because the potential results of the FSTs or breath tests are unknown for which the defendant should be held harmless. The failure to respond to counsel's comments would only serve to mislead the jury as to the state's obligation, the state's burden and how to evaluate the evidence. When comments by defense counsel will mislead the jury regarding the evidence presented or the charges that must be proven the prosecutor not only has the right but the duty to respond because to ignore the argument is to give it credibility. *State v. Dix*, 723 So.2d 351, 352 (Fla. 5th DCA 1998). *See also, Austin v. State,* 700 So.2d 1233 (Fla. 4th DCA 1997) ("The state has a right, and even a duty, to respond to the defense's suggestion. To ignore it gives it credence.").

Improper Closing Argument:

We take the opportunity to call attention, without fully discussing, the subject of improper closing arguments and to urge the trial court to take an active role in the control over improper argument while, at the same time, we caution counsel "not cross the line from zealous advocacy to impermissible emotional and inflammatory arguments." *Wade v. State,* 41 So.3d 857, 881 (Fla. 2010). The closing arguments presented here by both the state and defense were improper in a number of ways all of which are not mentioned here. In his closing defense counsel improperly castigated the jury and literally tried to shame them into ignoring relevant admissible evidence, accused a witness of not being truthful without foundation and offered his

personal opinion as to the validity of the evidence. The prosecutor improperly commented on the defendant's right to a jury trial, made argument that shifted the burden of proof, and denigrated the defense. None of these comments were the subject of objection. Nor were they sufficient to vitiate the trial or to serve as a basis for granting a new trial. "As Judge Blue so aptly stated: 'Trial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of The Florida Bar.'" *Luce v. State,* 642 So.2d 4, (Fla. 2d DCA 1994) (Blue, J., concurring specially). *Williams v. State,* 10 So.3d 218 (Fla. 3 DCA 2009).

Conclusion:

This court concludes that the judgment and sentence of the trial court should be affirmed.

IT IS THEREFORE ORDERED that the order of the trial court judgment and sentence is affirmed.

ORDERED at Clearwater, Florida this ____ day of December 2014.

Original Order entered on December 3, 2014, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

Copies furnished to:
Honorable John D. Carballo
Ricardo Rivera, Esq.
Office of the State Attorney