

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: CJAP 08-51
Lower Court Case No: 2008-MM-2807

OLLIE JOHNSON,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.

_____/

Appeal from the County Court,
for Orange County, Florida,
Leon B. Cheek, III, County Court Judge

William R. Ponall, Esq.,
for Appellant

No Appearance for Appellee

Before POWELL, WHITEHEAD, and THORPE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant Johnson appeals from a conviction for Domestic Violence Battery and Resisting Officer Without Violence. We have carefully considered Appellant's initial brief, the record on appeal and have read the transcripts of the trial and the hearing on his motion for new trial. We dispense with oral argument on our own motion pursuant to Florida Rule of Appellate Procedure 9.320.

Appellant raises three points, but since we find reversible error as to the first point we need not address the other two.¹

¹ However, since the case may be re-tried and for future guidance, we make the following suggestions. We have noticed, as have the higher appellate courts in Florida, that there is an increasing number of appeals involving bad final argument by prosecutors. It would seem a good project for the Ninth Circuit State Attorney, or the Florida

In his first point, Appellant contends that the trial judge erred in denying his motion for new trial because the prosecutor made fundamental impermissible comments in his closing argument. The comments were

Now, is it reasonable to believe that – that the story Ms. Lewis (appellant’s girl friend) gave you? Not really. So if the doubt is between that – the more logical story and her more unreasonable story, you have to decide if that doubt is really a reasonable doubt.

Now. The bottom line is if you find that the State’s witness is credible, you believe what they say and you believe that all of those elements came out of their mouth or came on the 911 call, then you can – then you find – you must find the defendant guilty because that’s your job.

This case is controlled by the case of *Freeman v. State*, 717 So. 2d 105 (Fla. 5th DCA 1998) which was reversed where the prosecutor made a similar comment by telling the jury, among other things, that if they believed the police officers instead of the defendant, they should find the defendant guilty and that the “question” they had to decide was who they wanted to believe. The Fifth District Court of Appeal held that this was an impermissible shifting of the burden of proof to the defendant and was fundamental error. The *Freeman* court cited *Clewis v. State*, 605 So. 2d 974 (Fla. 3d DCA 1992) where the prosecutor’s single statement in final argument that reasonable doubt required the jury to believe the defendant and disbelieve the officers in order to acquit was held prejudicial fundamental error requiring reversal. In *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998) the court noted that the standard for a criminal conviction is not which side is the more believable, but whether, considering all the evidence, the State has proven every essential element of the crime charged beyond a reasonable doubt. It

Prosecuting Attorneys Association, to have the issue of good and bad arguments researched and a comprehensive memorandum prepared and distributed to all prosecutors in the state. The trial judge in this case may wish to check to see if the standard instruction on resisting officers has been amended. Further, if in entering an order on a motion a judge makes findings and conclusions of law on the record or in a written order, he or she should cover all grounds of the motion.

should also be noted that, as here, a timely objection is not required where the prosecutor's comments in argument constitute fundamental error. *See Sempier v. State*, 907 So. 2d 1277 (Fla. 5th DCA 2005).

Consequently, this case is reversed and remanded for a new trial.

REVERSED and REMANDED.

DONE AND ORDERED at Orlando, Florida this __10th__ day of
__January_____, 2011.

_____/S/_____
ROM W. POWELL
Senior Judge

_____/S/_____
REGINALD WHITEHEAD
Circuit Judge

_____/S/_____
JANET C. THORPE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **William R. Ponall, Esq.**, 1150 Louisiana Avenue, Ste. 1, P.O. Box 2728 Winter Park, Florida 32790-2728; **Lawson Lamar, State Attorney**, 415 N. Orange Avenue, Orlando, Florida 32801; and **Honorable Leon B. Cheek, III**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this __10th__ day of __January_____, 2011.

_____/S/_____
Judicial Assistant