

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

DEREK LENNON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____ /

Appeal from the County Court
of Orange County, Florida

Honorable Jerry L. Brewer,
County Judge

Terrance Kehoe, Esquire,
for Appellant

Christina J. Paterson, Assistant State Attorney
For Appellee

Before Powell, MacKinnon, and J. Adams, J. J.

FINAL ORDER AFFIRMING LOWER COURT

Lennon appeals from a conviction for the crime of stalking his ex-wife, contending that the trial judge erred by excluding certain evidence, and that the prosecutor made prejudicial comments in his closing argument. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. After careful consideration of the briefs filed by counsel, the record on appeal and the transcript of the trial proceedings, we affirm.

By failing to make a contemporaneous objection and motion for mistrial, appellant has waived his right to assert as error that the prosecutor made prejudicial arguments in his closing

argument to the jury. Further, we conclude that the comments were not so improper or inflammatory as to rise to the level of fundamental error. *See Fravel v. Haughey*, 727 So. 2d 1033 (Fla. 5th DCA 1999) (citing cases).

The trial judge granted the prosecutor's in-trial motion in limine to exclude as evidence the box and instruction manual which came with the tracking device found underneath appellant's ex-wife's car. Counsel argued in opposition to the motion that he planned to mark these items as demonstrative exhibits to show that the device was a "passive" and not an "active" one. He made no other proffer then (and makes none here) as to what more these items would prove. Appellant then took the stand in his own defense and without objection testified he purchased and installed the device, and that it was a "passive" device. He went on to testify extensively and in detail about the difference in the two devices and how they operated. In our view, if it was error to refuse to admit the box and instruction manual in evidence, the error was harmless. It is well settled that an appellate court will not reverse a judgment in a criminal case if the error is harmless. *See Carraballo v. State*, 35 Fla. L. Weekly S374 (Fla. June 24, 2010) for a good case applying the above rules to a prosecutor's closing argument.

Consequently, for the foregoing reasons, the judgment appealed from is

AFFIRMED.

DONE and ORDERED this 28th day of July, 2010.

/S/
Rom W. Powell, Senior Judge

/S/
Cynthia Z. MacKinnon, Circuit Judge

/S/
John H. Adams, Sr., Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Terrance Kehoe, Esq., attorney for appellant, 18 W. Pine St., Orlando FL 82801, and to Christina J. Patterson, Assistant State Attorney, attorney for appellee, 415 N. Orange Ave., Orlando FL 32801, by mail, this 28th day of July, 2010.

_ /S/ _____
Judicial Assistant