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

CASE NO: CJAP 09-33
Lower Court Case No: 2008-CT-18589

TIPHANIE G. CARTER,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.
_____/

Appeal from the County Court,
for Orange County, Florida,
Michael W. Miller, County Court Judge

Robert Wesley, Public Defender and Justin Bleakley,
Assistant Public Defender, for Appellant

No Appearance for Appellee

Before POWELL, DAVIS, and T. TURNER, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant Carter appeals a conviction for Driving While Under the Influence after a jury trial. She contends that the trial court erred reversibly by denying her motion for mistrial, arguing that testimony and prosecutor argument regarding a racial slur Appellant made to one of the officers should not have been allowed because it was inadmissible and highly prejudicial.

We have carefully considered Appellant's initial brief (the State Attorney did not appear to represent the State), the record on appeal and have read the transcript of the trial proceedings.

We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320, and affirm.

After jury selection (one juror was an African-American) and prior to opening statements, Appellant's counsel, noting that the charging affidavit contained the "N" word, made a motion in limine to exclude any reference to any racial slur Appellant made to the officers. After hearing argument, the trial judge denied the motion, holding the testimony could be relevant to the issue of impairment but ruled that neither side mention "that word", and that the breath test operator "could simply say that she uttered a racial slur directed at me or someone else."

During the trial, the prosecutor called the breath test operator, who was an African-American, and after coming to the point where he said that Appellant had urinated in the testing cell, his testimony continued as follows:

* * * * *

Q Okay. You were asking her why she did that, is that what you said?
A Yes.
Q And what did she respond?
A Well, she made a nasty slur –

At this point defense counsel made an objection, there was argument at the bench, and the judge told the prosecutor to proceed.

Q What did she say sir?
A Well, she made a nasty slur towards me and Officer Kelly. And then she stated I hate you people.

* * * * *

Q Officer Harden, just based on your experience, do people normally refer to as a racial slur?

MR. BLEAKLEY: Objection, your Honor, this is not relevant.

THE COURT: Overruled.

* * * * *

Q Do people, based on your experience, normally say to you I hate you people?
A No, Sir.

Q Were you offended by these statements?

MR. BLEAKLEY: Objection, relevance.
THE COURT: Sustained.

In his closing, after summarizing all of the other incriminating evidence, the prosecutor made the following comments:

> *****And then you realize, you remember, to top it all off - - folks, do sober people when dealing with a law enforcement officer who is trying to help them, do they usually direct racial slurs towards them and say I hate you people?**
> **Is that what sober people who are in control, is that what they do? Well, that is what Ms. Carter did. *****

After the jury retired to consider its verdict, Appellant's counsel made his motion for mistrial. The trial judge heard argument on the motion, and it was denied. This appeal followed.

In her brief, Appellant cited three cases: *Jones v. State*, 748 So.2d 1012 (Fla. 2000); *McBride v. State*, 338 So.2d 567 (Fla. 1st DCA 1976) and *Heller v. State*, 14 Fla. Law Weekly Supp. 119a (Fla. 9th Cir.Ct.2006). These cases can be distinguished on their facts. In *Jones*, the actual words of the slur were not used but "the deputy testifying made clear that Jones "was talking about black guys" and "made a racial slur". *Jones*, 748 So.2d at 1022. This testimony was not repeated and was not highlighted. The Court found there was no deliberate attempt to inject race as an issue in the case, and held that the reference to Jones using a racial slur was harmless error. *Id.* at 1023. The Court did, however, go on to caution prosecutors about testimony regarding racial slurs in the future. *Id.* In *McBride*, where there were two black jurors, there was a reversal because of insufficient evidence. There was testimony from a deputy that McBride made an "obscene slur of the deputy's wife that she was having sexual relations with 'niggers'". *McBride*, 338 So.2d at 567. Most importantly, not only were the actual words used, but they had no relevancy to any issue in the case. In *Heller*, the Appellant was convicted

of Battery and Disturbing the Peace aboard an airplane. An FBI agent, who was Hispanic, was called as a witness and testified that well after she was in custody and away from the public, during his independent interrogation, Appellant told him that he was a "fucking Spick." *Heller*, 14 Fla. Law Weekly Supp. 119a. The prosecutor in his closing argument said "Then the FBI agent came up. Just so happens he was Hispanic. And what do you tell an FBI agent when he comes up to you, you f-----g Spick." *Id.* Again, not only were the actual words of the slur brought out in testimony and highlighted in argument, but the racial slur was totally irrelevant to any issue in the case and a deliberate attempt to inject the race issue to prejudice the defendant.

There are four cases which have been affirmed where the racial slur was relevant to an issue in the case, and in three the actual words were used. *See Phillips v. State,* 476 So.2d 194 (Fla. 1985)(admission of inmate's testimony that Phillips used racial slurs when referring to victim and victim's family relevant to discredit alibi and explain context of incriminating admissions not error); *Clinton v. State*, 970 So.2d 412 (Fla. 4th DCA 2007) (evidence that after stabbing victim, defendant screamed "I'm going to kill you nigger" properly admitted to show premeditation); *Rich v. State.*, 18 So.3d 1227 (Fla. 4th DCA 2009) (permitting testimony and argument regarding defendant's use of the word "cracker" was not relevant but was harmless error); *Wimberly v. State*, 41 So.3d 298(Fla. 4th DCA 2010) (defendant's remark "yeah, that's the n----r" relevant to the issue of premeditation).

Finally, as did the court in *Rich,* we examine closely the permissible evidence on which the jury could have relied, as well as whether the racial slur might have influenced the jury's verdict. In doing so we find that there was evidence that Appellant Carter rear-ended the car in front of her; a beer can came rolling out of her car; another fresh beer was found in her car; she admitted to drinking until 2:00 o'clock in the morning (the accident occurred at 7:00 a.m.); there

was an odor of alcohol about her person and in her car; she had bloodshot, glassy eyes; she performed poorly on some of the field sobriety tests and did not complete others; she blew a .58 on the breathalyzer; she urinated on the floor of the testing room although previously given an opportunity to use the restroom, and was uncooperative.

Although in this case the racial slur was highlighted in the prosecutor's closing, the actual "N" word was not used, it was relevant on the issue of impairment, it was not repeated by any other witness, and there was overwhelming permissible evidence of her guilt. For these reasons, we do not find there was a deliberate attempt to prejudice the jury or that the testimony and argument vitiated the entire trial. Thus we cannot say that the trial judge abused his discretion in denying the motion for mistrial or that the testimony and argument was prejudicial reversible error. Therefore, Appellant's conviction is **AFFIRMED.**

DONE AND ORDERED at Orlando, Florida this __1st___ day of __March_____, 2011.

_/S/_____
ROM W. POWELL
Senior Judge

__/S/_____
JENIFER M. DAVIS
Circuit Judge

_/S/_____
THOMAS W. TURNER
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Justin Bleakley, Assistant Public Defender,** 435 N. Orange Avenue, Ste. 400, Orlando, Florida 32801; **Lawson Lamar**, **State Attorney**, 415 N. Orange Avenue, Orlando, Florida 32801; and **Honorable Michael W. Miller**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this _1st___ day of __March_____, 2011.

_/S/_____
Judicial Assistant