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

CASE NO: CJAP 09-45
Lower Court Case No: 2008-MM-14497

CHRISTINE L. MERCHANT,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.
_____/

Appeal from the County Court,
for Orange County, Florida,
Jerry L. Brewer, County Court Judge

Robert Wesley, Public Defender and Stephanie M. Maxwell,
Assistant Public Defender, for Appellant

No Appearance for Appellee

Before POWELL, THORPE, and MCDONALD, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant Merchant filed her petition for belated appeal which was granted. We have carefully considered the record on appeal, her initial brief, the state's response, and have read the transcript of the proceedings below. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Appellant argues that the trial court committed reversible error when it denied her motion for mistrial on the ground that the testimony of two state witnesses was irrelevant and prejudicial.

The record shows that one witness, Kelley Melville, testified to the storage and maintenance of the intoxilyzer breath testing machine and her duties at the DUI Center.[1] Melville did not see Appellant there. The other witness, Osvaldo Caner, testified that he observed Appellant at the DUI Center after her arrest and testified about her signs of alcohol impairment. Appellant's counsel never objected to Melville's and Caner's testimony while it was being given or after it was concluded. She did not make a motion to strike any of their testimony and request a curative instruction to the jury. Later, at a recess after all the evidence was closed and before the prosecutor commenced his closing argument, Appellant's counsel first made the motion for mistrial stating:

> MS. JOHNSON: At this time, (indiscernible) state has proven their case unless we can make an objection and actually ask for – ***they presented two officers that testified about the breathalyzer test.*** We think that's an undue prejudice that's left on the jury. We ask your Honor to consider that and recommend a mistrial at this time. ***I believe the breathalyzer results were admitted wrongly***.[2] The fact that they had two officers who testified that – (Italics and bold supplied.)
>
> THE COURT: I'll take it under advisement, Okay?

After the jury retired to deliberate, Appellant's counsel renewed the motion for mistrial on the same grounds previously stated. The trial judge denied the motion, making the findings that, in essence, the testimony of Melville was irrelevant; that Caner's testimony was relevant, but their testimony was not prejudicial and did not rise of the level of a mistrial.

By failing to object and moving to strike the Melville and Caner testimony, and by waiting until all the evidence had closed before making the motion for mistrial, appellant waived the alleged error and failed to preserve this point for appeal. *See German v. State*, 379 So. 2d 1013 (Fla. 4th DCA 1980), *cert. denied*, 388 So. 2d 1113 (Fla. 1980); *Leonard v. State*, 423 So.

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[1] Apparently, the prosecutor changed his mind in the middle of his direct examination of Melville and decided not to try to introduce the fact that Appellant had taken the test and what the results were. [Interestingly, Appellant's brief states that Appellant's breath test results were .106 and .108 blood alcohol level, well over the legal limit of .08.]

[2] The language in bold italics are misstatements of the evidence.

2d 594 (Fla. 3d DCA 1982).

Even if the point had been preserved for appeal and we were to consider the denial of the mistrial motion on the merits, we conclude that the trial judge did not abuse his discretion and did not commit error.

Appellant argues in her brief that Melville's and Caner's testimony was prejudicial because it allowed the jury to infer that a test was given and to speculate as to the results.

Whether improper evidence warrants granting a mistrial is a judgment call by the trial court, and trial courts have a very broad discretion to make such decisions. *Sireci v. State*, 587 So. 2d 450 (Fla. 1991); *Bohm v. State*, 826 So.2d 1041 (Fla. 5th DCA 2002). A motion for mistrial should be granted with great care and caution and only in cases of absolute necessity. *Salvatore v. State*, 366 So. 2d 745,750 (Fla. 1978), *cert. denied* , 444 U.S. 885 (1979); *Seibert v. State*, 923 So. 2d 460 (Fla. 2006). Motions for mistrial should be granted only where the error was so prejudicial as to vitiate the entire trial. *Seibert*, 923 So. 2d 460.

There was no reference in the prosecutor's opening statement, the questioning or testimony of the witnesses, the closing arguments of the prosecutor or the judge's instructions that a breath test of any sort was given to Appellant or the results of any such test. We agree with the trial judge and Appellant that Melville's testimony was irrelevant, but we conclude that Caner's testimony as to his observing Appellant at the DUI Testing Center and her signs of alcohol impairment was relevant. Appellant's argument is itself speculative and nowhere supported by the record. We think that if the jury ignored the judge's instruction that "...a reasonable doubt is not a ... speculative doubt...", and engaged in speculation, a more reasonable inference would be that for some unknown reason no test was given, because if one had been given, the results would have been introduced in evidence by the party the results favored, either

the prosecutor if she had flunked it or the Appellant if she had passed it.

We conclude that there was no prejudice, and that the trial judge did not abuse his discretion in denying the motion. Consequently, appellant's conviction is **AFFIRMED.**

DONE AND ORDERED at Orlando, Florida this _10th____ day of _____January_____, 2011.

_/S/_____
ROM W. POWELL
Senior Judge

__/S/_____
JANET C. THORPE
Circuit Judge

_/S/_____
ROGER J. MCDONALD
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Stephanie M. Maxwell, 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 Jerry L. Brewer**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this __10th__ day of ___January_____, 2011.

_/S/_____
Judicial Assistant