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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,369

THE STATE OF FLORIDA,

Petitioner,

vs.

RICHARD WAYNE SHEPHERD,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Richard Wayne Shepherd, was the defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida and the appellant in the District Court of Appeal of Florida, Third District. Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the district court. In this brief, the parties will be referred to as they appear before this Court.

The symbol "R" followed by a page number will constitute a page reference to the record on appeal. The symbol "T" will be used to designate the transcript of the proceedings. The appendix to this brief will be referred to as "App." All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE

A three-count information was filed in Case No. 81-13841 in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County on July 8, 1981, charging Respondent with the commission of a sexual battery upon one Kimberly Brames (Count I), burglary of a structure (Count II) and with the attempted first-degree murder of

Kimberly Brames (Count III). (R. 1-3A). A jury trial was held before the Honorable Fredricka G. Smith, Circuit Judge, commencing on August 17, 1982. (T. 11). The jury returned verdicts of guilty of sexual battery, burglary and attempted second-degree murder. (R. 72-74). Respondent was adjudicated guilty of these crimes on August 20, 1982. (R. 75-76). On September 21, 1982, Respondent was sentenced to serve sixty (60) years in prison pursuant to his convictions as to Count I. Sentence as to Count II was suspended. The sentence as to Count III was fifteen (15) years. (R. 78-79). The trial court retained jurisdiction over one-third of the sentence and credited Respondent with time served prior to sentencing. (R. 78-79).

Respondent appealed to the District Court of Appeal of Florida, Third District, contending that the following statement made by the prosecutor during closing argument was improper:

> We've heard a lot of allegations with respect to a defense and I must confess to you, when I sat down to prepare my closing remarks, I had a lot of difficulty in trying to figure out exactly what the defense was going to be, because, frankly, for my purpose, I haven't heard any.
>
> (App. 1).

The Third District filed an opinion on July 5, 1983, reversing the case and remanding the cause for a new trial. (App. 1). Shepherd v. State, 436 So.2d 232 (Fla. 3d DCA 1983). The Court stated that it reversed the case "because the prosecutor's comment was clearly susceptible of being interpreted by the jury as referring to the defendant's failure to testify." (App. 1).

A motion for rehearing was filed on or about July 18, 1983. Said motion was denied on September 7, 1983. On August 5, 1983, Respondent filed a Notice Invoking the Discretionary Jurisdiction of this Court. Jurisdictional briefs were subsequently filed. This brief is being filed in response to this Court's Order, Accepting Jurisdiction and Dispensing with Oral Argument, dated April 19, 1984.

STATEMENT OF THE FACTS

The victim, Kimberly Lynn Brames, testified at Respondent's trial as to the events that transpired on June 14, 1981. (T. 30). Ms. Brames stated that shortly after midnight, on that date, she was home in her apartment (where she lived alone). (T. 30). She returned home from working at a Winn-Dixie Store and fell asleep on her living room couch. She was awakened at approximately 2:30 a.m. by someone who called her by name, "Kim." (T. 32). She awoke to

find a naked man standing over her and began screaming. (T. 32-33).

The man told her not to scream as he tried to "choke" her and to "smother" her mouth. He then removed her underpants and raped her by forcibly "entering" his penis into her vagina. (T. 32, 36). He pulled a knife and started stabbing at her chest. (T. 36). The man then remarked that he had to kill her because she knew him and could recognize him. (T. 37). She was stabbed in the chest area, the neck, the back of the head and on her cheek. He also bit her nose. (T. 37, 38).

The assailant kept insisting that the victim could recognize him. (T. 39-42). As the victim lay bleeding on the floor, her assailant got dressed and held his sunglasses in his hand. (T. 40). He got her a sheet and pretended to call for help, then proceeded to wipe off things that he had touched in the apartment. (T. 43-45). The man left through the "spare bedroom" and the victim managed to call her uncle. Fire Rescue subsequently arrived and transported the victim to James Archer Smith Hospital. (T. 47).

The victim went on to testify that she was "pretty sure" at the time of the incident that she knew her assailant. She had known him as "Wayne Shepherd." He had

been a bagboy at a Winn-Dixie Store in Homestead, where she had previously worked. (T. 43). Ms. Brames had given a description and first name of her assailant to police Detective Shipes while she was at the hospital. (T. 53). She later identified Respondent as her assailant in open court. (T. 61).

Officer Tom Helms, Metro-Dade Police Department, responded to the scene of the crimes. (T. 144-45). When he arrived on the scene, he found the victim sitting on the couch. (T. 146). She was trembling and covered with blood. The apartment was also covered with blood. (T. 146). Officer Helms corroborated the victim's testimony to the effect that she knew her assailant. (T. 149). Detective Norman Shipes corroborated the victim's testimony as to her identification of her assailant by the name "Wayne." (T. 190).

Respondent subsequently made a full confession to Detective Shipes. (T. 399-413; R. 49-58). A discarded knife used in the attack as well as the sheet were recovered pursuant to Respondent's statements. (R. 59; T. 423). Latent fingerprints removed from the crime scene by police technician Ed Stone (T. 234, 241-42, 308) were compared to standards of Respondent's fingerprints by fingerprint technician Richard Laite. (T. 638). The technician made a positive

comparison between the latent fingerprints obtained from the crime scene and Respondent's fingerprints. (T. 637).

Petitioner respectfully reserves the right to argue additional facts in the argument portion of this brief.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN REVERSING RESPONDENT'S CONVICTIONS BASED UPON A STATEMENT MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT?

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING RESPONDENT'S CONVICTIONS BASED UPON A STATEMENT MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT.

Petitioner submits that the District Court of Appeal of Florida, Third District erred in holding that a statement made by the prosecutor during closing argument was improper and required reversal of Respondent's convictions. It is initially noted that the test applied by the Third District in reaching its ultimate conclusion is not the appropriate test to be used for determining whether a prosecutorial comment constitutes an improper comment as to a defendant's constitutional right to remain silent. The test applied by the Third District was whether the comment "was clearly susceptible of being interpreted by the jury as referring to the defendant's failure to testify." Shepherd v. State, 436 So.2d 232 (Fla. 3d DCA 1983) (App. 1) Although Petitioner must acknowledge that this test was followed by this Court in David v. State, 369 So.2d 943 (Fla. 1979), this Court is nonetheless urged to revisit[1] that decision in light of contrary, prevailing federal authority.

[1]This precise issue is also presently before this Court in State v. Kinchen (Case No. 64,043) on discretionary review from the Fourth District Court of Appeal's decision in Kinchen v. State, 432 So.2d 586 (Fla. 4th DCA 1983).

Both the First and Second District Courts of Appeal have followed the test enumerated in federal case law for ascertaining whether prosecutorial comments constituted comments on silence of the defendant. In State v. Bolton, 383 So.2d 924, 928 (Fla. 2d DCA 1980), the Second District followed the test enumerated by the United States Court of Appeals for the (Former) Fifth Circuit in Samuels v. United States, 398 F.2d 964 (5th Cir. 1968), cert. den., 393 U.S. 1021, 89 S.Ct. 630, 21 L.Ed.2d 566 (1969), namely:

> The test in determining whether such a transgression has occurred is whether the remark was manifestly intended or was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." [citation omitted].

The First District adopted this test in its decision in Gains v. State, 417 So.2d 719 (Fla. 1st DCA 1982). This test is in accord with the test applied in numerous federal cases. See, e.g. United States v. Johnson, 713 F.2d 633, 651 (11th Cir. 1983); Duncan v. Stynchombe, 704 F.2d 1213 (11th Cir. 1983); United States v. Fogg, 652 F.2d 551 (5th Cir. 1981), cert. den., 456 U.S. 905, 102 S.Ct. 1751, 72 L.Ed.2d 162 (1982); United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983); United States v. Vera, 701 F.2d 1349 (5th Cir. 1983); Williams v. Wainwright, 673 F.2d 1182 (11th

Cir. 1982); United States v. Garcia, 655 F.2d 59 (5th Cir. Unit B, 1981).

The federal test should be followed as it is clearer and more definitive then the test enumerated in David v. State, supra, thereby providing trial courts with a less ambiguous standard. Secondly, it is clear that federal courts have adopted their test for determining whether Federal Constitutional provisions have been violated. Since federal courts are obviously proper forums for determining constitutional issues, their decisions as to those issues should be afforded great weight. Although courts of this state are technically free to adopt more stringent standards or interpretations of certain issues than federal courts, the public will is apparently to the contrary. This is evidenced by the recent amendment to Article I, Section 12 of the Florida Constitution wherein Florida's own exclusionary rule was eliminated and the language of §12 was changed to provide that rights against unreasonable searches and seizures are to be construed in accordance with the provisions of the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. This Court is therefore urged, for the above-noted reasons, to recede from its decision in David, supra, and adopt the federal test.

Even if this Court should decline to follow the test enumerated in Gains and Bolton, supra, the Third District of Appeal's decision in this cause should nonetheless be reversed. When the comment in question in the cause sub judice is viewed in its proper context (See, T. 733-772), it is clear that it is not a comment on the silence of the accused under either test. It is well established that in reviewing prosecutorial comments for possible prejudice, a court must not consider the comments in isolation. The comments must be evaluated in the context not only of the prosecutor's entire closing argument, but of the trial as a whole. Cobb v. Wainwright, 609 F.2d 754, 755, n. 1 (5th Cir. 1980), citing to Donnelly v. DeChristoforo, 416 U.S. 637, 643-47, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

The statement in question was as follows:

> We've heard a lot of allegations with respect to a defense and I must confess to you, when I sat down to prepare my closing arguments, I had a lot of difficulty in trying to figure out exactly what the defense was going to be, because, frankly, for my purpose, I haven't heard any.
>
> Now, I heard a lot of defenses suggested. . .

(T. 736).

Under both tests, this particular statement is nothing more than a statement as to the uncontradicted nature of the evidence. In both White v. State, 377 So.2d 1149 (Fla. 1979), cert. den. 449 U.S. 845 (1980) and Wilson v. State, 436 So.2d 908 (Fla. 1983), this Court made it clear that it is firmly embedded in the jurisprudence of this state that it is proper for prosecutors to comment during argument to the jury on the uncontroverted nature of the evidence.

A comment on the failure of the defense as opposed to the defendant to rebut evidence introduced by the prosecution is different than a comment as to the defendant. See, United States v. Fogg, supra at 652 F.2d 557; United States v. Hawkins, 595 F.2d 751, 754 n. 8 (D.C. Cir. 1978); United States v. Dearden, 546 F.2d 622, 625 (5th Cir. 1977). See also: Duncan v. Stynchombe, supra at 704 F.2d 1216. The comment in question in the instant case is analogous to the comment dealt with in United States v. Downs, 615 F.2d 677 (5th Cir. 1980). In Downs, the prosecutor told the jury that the defendant's attorney "chose not to present a defense." The court interpreted the comment as the prosecutor's attempt to point out to the jury that the government's case was unrebutted. Likewise, in this case the prosecutor's comment should be viewed in a similar light. Thus, the comment was clearly manifestly intended or of such a character that the jury would naturally and necessarily

take it as a comment on the failure of the accused to testify. Moreover, the reference to the defense as opposed to the defendant takes the comment out of the purview of David, supra. This language cannot be properly found to have been clearly susceptible of being interpreted by the jury as referring to the defendant's failure to testify. The district court of appeal's erroneous conclusions to this effect should therefore be reversed.

Respondent further urges this Court to recede from the language in David v. State, supra, which holds that if the test in question is met, the error renders the case reversible per se (without resort to the harmless error doctrine). Assuming arguendo that this Court should determine that the comment in question is improper, this Court is requested to order reinstatement of Respondent's convictions in light of the fact that the prosecution presented overwhelming evidence of Respondent's guilt.

In United States v. Hasting, ___U.S.____, 103 S.Ct. 1974, 1980, ___L.Ed.2d___(1983), the United States Supreme Court has recently noted that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. See, Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). In Hasting, supra, included

in the defendant's claims was an allegation that a comment by the prosecutor was a comment on his failure to testify. The comment in question in Hasting was found to be harmless in light of the record's demonstration of overwhelming evidence of the defendant's guilt.

In State v. Murray, 443 So.2d 955 (Fla. 1984) this Court recently noted that it agreed with the analysis in Hasting and found a prosecutorial comment to constitute harmless error. Although the comment in question in Murray was different than the comment in question in this case, the instant comment is more directly analogous to the comment dealt with in Hasting itself. Thus, the holding in Murray should not be viewed as limited to the particular facts involved in that case.

In the case sub judice, there can be no dispute that the prosecution presented overwhelming evidence of Respondent's guilt. The victim, Kimberly Lynn Brames, testified at Respondent's trial as to the events that transpired on June 14, 1981. (T. 30). Ms. Brames stated that shortly after midnight, on that date, she was home in her apartment (where she lived alone). (T. 30). She returned home from working at a Winn-Dixie Store and fell asleep on her living room couch. She was awakened at approximately 2:30 a.m. by someone who called her by name, "Kim." (T. 32). She awoke

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comparison between the latent fingerprints obtained from the crime scene and Respondent's fingerprints. (T. 637).

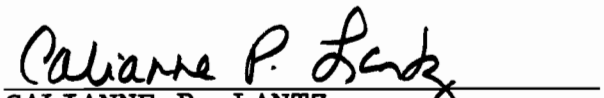
The evidence noted above is clearly overwhelming. There is virtually no doubt that Respondent committed the crimes of which he was convicted by the trial court. Even if this Court finds, contrary to Petitioner's assertions, that the prosecutor's comment was improper, the overwhelming evidence of Respondent's guilt will clearly render error, even of constitutional magnitude, harmless. Reversal of the opinion of the Third District Court of Appeal is therefore urged.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this Court should reverse the decision of the Third District Court of Appeal and remand the case for reinstatement of the convictions and sentences imposed by the trial court.

Respectfully submitted,

JIM SMITH
Attorney General



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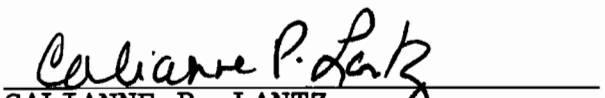
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to N. JOSEPH DURANT, Esq., and STEPHEN A. GLASS, Esq., GELBER, GLASS, DURANT, CANAL & GRANDE, P.A., 1250 N. W. 7th Street, Suite 202-205, Miami, Florida 33125, on this 9th of May, 1984.



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