IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. JAY FRENCH MARSHALL, Respondent.	)	CASE NO. 66,374

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the District Court of Appeal, Fourth District, and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The Respondent was the Appellant in the Fourth District and the defendant in the trial court.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State

The following symbols will be used:

"R" Record on Appeal

"PA" Petitioner's Appendix

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Respondent was charged in a three count information on December 14, 1981 with burglary of a conveyance while armed with a dangerous weapon (Count I), Kidnapping with intent to commit sexual battery (Count II), and sexual battery with the use of threat to use a deadly weapon (Count III) (R.340). He was tried by jury on January 19, 1983 (R.353), and found guilty on all three counts as charged (R.350,351,352).

Respondent was thereupon adjudged guilty of burglary (Count I), kidnapping (Count II), and sexual battery (Count III) (R.354-355). His motions for judgment of acquittal (R.356-358) and for new trial (R.359-360) were denied, and on March 17, 1983, he was sentenced to serve three concurrent 99 year prison terms (R.361-364). Respondent filed his notice of appeal to the District Court of Appeal, Fourth District, on April 5, 1983 (R.365).

On December 28, 1984, the district court rendered its opinion in this cause, determining that an improper comment upon the Respondent's right to remain silent had been made by the prosecutor during closing argument in violation of Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965). The district court held that this comment required reversal under the per se rule followed by this Court in previous decisions, even though there was overwhelming evidence of guilt. At the same time however, the district court noted that the United States Supreme Court's decision in United States v. Hasting, ___U.S.___, 103 S.Ct. 1974, 76 L.Ed. 2d 96 (1983), permitted the application of the harmless error rule in an analogous case. The district court therefore certified the following question as one of great public importance:

May the harmless error doctrine be applied to cases in which a prosecutor has violated a defendant's Fifth Amendment rights under Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106?

Marshall v. State, 10 F.L.W. 88 (Fla. 4th DCA December 28, 1984).

STATEMENT OF THE FACTS

On November 9, 1981 Brenda Scavone, the victim of the burglary, kidnapping and sexual assault, went to Bair Middle School in Fort Lauderdale at 6:45 p.m. for an adult education course (R.73-74). Ms. Scavone got out of her car at the school, noted that the school was closed for a holiday, then returned to her car (R.74). After she got into her car, a person came out from behind the backseat brandishing a knife (R.75). Ms. Scavone identified Respondent as that person (R.76-77). Respondent told Ms. Scavone to "Start driving" and climbed into the front seat (R.75). Ms. Scavone asked Respondent if he wanted a ride to some-place and offered him her wallet (R.79). Respondent declined and told Ms. Scavone that he had other things in mind (R.79). After driving around for an hour and half, Respondent directed Ms. Scavone to a deserted area and ordered her out of the car (R.79-80). Respondent held a knife to Ms. Scavone and raped her twice (R.81-84). Respondent told Ms.Scavone that if she told anybody about the crime he would come back and get her (R.79,84). Respondent ran from the scene and Ms. Scavone then drove to the Oakland Park Fire Station and reported the attack (R.85). Based upon Ms.Scavone's description of Respondent a composite was made and distributed to law enforcement officers (R.86,115).

On November 15, 1984, a few days after the attack Respondent was spotted by police standing in the middle of Oakland Park Boulevard (R.114). The police determined that Respondent resembled the composite (R.116). While speaking with police Respondent made several remarks indicating that he had been involved in a sexual

assault (R.117-118). Respondent was then taken into custody pursuant to the Baker Act (R.124-125). His picture was taken and placed into a photo line-up which was shown to Ms. Scavone (R.135). Ms. Scavone was unable to identify Respondent as her attacker from the photo line-up (R.87,97,136). Shortly thereafter, Respondent was placed in a live line-up and Ms. Scavone was able to identify him (R.88, 139).

Dr. Robert Bernston, a clinical psychologist appointed to evaluate Respondent, testified on behalf of the defense (R.189-192). Dr. Bernston saw Respondent on February 13, 1982 (R.192). He performed tests on Respondent. The Wechsler adult intelligence scale test, the Rorschack ink blot test, and the Reitan trial making test (R.192-194). Dr. Bernston opined that Respondent was insane at the time of the offense (R.197). Asked if Respondent could appreciate the consequences of his act, Dr. Bernston responded:

> This is a very difficult thing for me to respond to clearly and succinctly. I think he has a vague awareness of rightness and wrongness, but the difficulty bringing his behavioral impulses into integrated compliance with what he knows is one symptom of his difficulty. So he may have some vague cognitive awareness of rightness or wrong, but he cannot produce integrated behavior consistent with that cognitive knowledge. (R.204).

On cross examination Dr. Bernston agreed that someone mentally ill is not necessarily legally insane (R.206). He also testified that Respondent had some awareness of right from wrong (R.209). Dr. Bernston testified he believed if Respondent were

asked whether it was wrong to commit a rape that Respondent would be able to say it was wrong (R.210). In addition, Dr. Bernston opined that Respondent's statement to the victim not to tell anyone of the rape indicated an awareness of the consequences of the act (R.211-212).

Dr. Arnold S. Zager, a psychiatrist, also testified on behalf of Respondent (R.213-227). Dr. Zager opined that Respondent was insane at the time of the commission of the crime (R.226-227). However, on cross examination, he agreed that Respondent's statement to the victim not to tell anyone of the rape or he(Respondent) would come and get her, was consistent with knowing right from wrong (R.232-233).

SUMMARY OF ARGUMENT

POINT I

The State respectfully submits that the harmless error doctrine is and should be applicable to situations such as that alleged *sub judice*, involving claims of improper comment on an accused's exercise of his right to remain silent. Accordingly, this Court should reject the *per se* error rule and should answer the question certified by the district court in the affirmative.

POINT II

The prosecutor's comment during closing argument was not an improper comment on the Respondent's failure to testify. Rather, the comment amounted to nothing more than a comment on the evidence as it existed before the jury and was entirely proper.

POINTS ON APPEAL

POINT I

WHETHER THE HARMLESS ERROR DOCTRINE SHOULD BE APPLIED TO CASES IN WHICH A PROSECUTOR HAS VIOLATED A DEFENDANT'S FIFTH AMENDMENT RIGHTS UNDER GRIFFIN V. CALIFORNIA, 380 U.S. 609 (1965)?

POINT II

WHETHER THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION FOR MISTRIAL SINCE THE PROSECUTOR'S REMARKS AMOUNTED TO NOTHING MORE THAN A COMMENT ON THE EVIDENCE AS IT EXISTED BEFORE THE JURY?

ARGUMENT

POINT I

THE HARMLESS ERROR DOCTRINE SHOULD BE APPLIED TO CASES IN WHICH A PROSECUTOR HAS VIOLATED A DEFENDANT'S FIFTH AMENDMENT RIGHTS UNDER GRIFFIN v. CALIFORNIA, 380 U.S. 609 (1965).

In Griffin v. California, 380 U.S. 609 (1965), the United States Supreme Court held that any comment on a defendant's failure to testify violates his Fifth Amendment privelege against self-incrimination. Soon after Griffin, however, the Supreme Court in Chapman v. California, 386 U.S. 18 (1967) declined to apply a per se rule requiring several in all cases where Griffin errors were alleged to have occured and instead held that a conviction could be affirmed if the reviewing court concluded that, on the whole record, the error was harmless beyond a reasonable doubt. The harmless error principles announced by the Court in Chapman, supra, were reaffirmed by the United States Supreme Court in United States v. Hasting, ___U.S.___, 103 S.Ct. 1974, 76 L. Ed. 2d 96 (1983). In United States v. Hasting, supra, the Supreme Court made it clear that notwithstanding the protections afforded by the Fifth Amendment of the federal constitution a prosecutor's comment upon the failure of the defendant to testify (i.e., upon the exercise of his right to remain silent) is not per se reversible error such that a reviewing court must, before reversing upon this basis, review the appellate record to determine if the error was harmless beyond a reasonable doubt, i.e., if the evidence of guilt presented at trial was overwhelming. The Hasting Court noted that it had previously rejected the per se reversal rule in Chapman v. California, supra, and reiterated its holding therein tha the harmless error rule governs

even constitutional violations under certain circumstances. In reaching its conclusion, the Court recalled the Chapman court's acknowledgment that certain constitutional errors involved "rights to basic to a fair trial that their infraction can never be treated as harmless error", but clearly determined that an improper comment on the exercise of a defendant's Fifth Amendment right to remain silent was not on of these "basic" rights triggering that extraordinary protection. 103 S. Ct. at 1980, n.6.

In State v. Murray, 443 So. 2d 955, 956 (Fla. 1984), this Court adopted the reasoning of the United States Supreme Court in United States v. Hasting, ___U.S.___, 103 S.Ct. 1974, 76 L. Ed 2d 96 (1983). In holding that improper prosecutorial argument could and did in that instance constitute mere harmless error:

> ...Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb, 376 So. 2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, ___U.S.___, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations. The opin-

> ion here contains no indication that the district court applied the harmless error rule. The analysis if focused entirely on the prosecutor's conduct; there is no recitation of the factual evidence on which the state relied, or any conclusion as to whether this evidence was or was not dispositive.
>
> We have reviewed the record and find the error harmless. The evidence against the defendant was overwhelming...

(underscoring supplied)

This Court's opinion in State v. Murray, supra, clearly embraces the Hasting and Chapman opinions and rationale and similarly determines that prosecutorial misconduct through improper comment does not involve any error "so basic to a fair trial" that it can never be treated as harmless. 443 So. 2d at 956. Given this Court's acceptance of the Hasting decision and rationale in Murray, it has been made clear that an improper comment by a prosecutor - including an improper comment on the exercise by a defendant of his Fifth Amendment right of silence does not mandate, per se, reversal of a conviction by an appellate court in its supervisory power, but that rather the error must first be evaluated in light of the evidence presented to determine if the offensive conduct was in fact harmless. Accordingly, the per se reversal rule reiterated in Harris v. State, 438 So. 2d 943 (Fla. 1979), David v. State, 369 So. 2d 943 (Fla. 1979), Bennet v. State, 316 So. 2d 41 (fla. 1975), and similar decisions.[1]

FOOTNOTE 1

1 Clark v. State, 363 So. 2d 331 (Fla. 1978); Trafficante v. State, 92 So. 2d 811 (Fla. 1957); Brazil v. State, 429 So. 2d 1339 (Fla. 4th DCa 1983); Wilson v. State, 371 So. 2d 126 (Fla. 1st DCA 1978); Willinsky v. State, 360 So. 2d 760 (Fla. 1978); Shannon v. State, 335 So. 2d 5 (Fla. 1976); See also State v. Burwick, 442 So. 2d 944 (Fla. 1983).

have lost their import due to this Court's embracing of the Supreme Court's clear pronouncement that the harmless error doctrine is applicable to appellate review in the context of the Fifth Amendment rights and an alleged comment on a defendant's exercise of his right to remain silent.

Before the district court, the Respondent argued that any comment on accused's failure to testify constituted per se reversible error without regard to the harmless error doctrine under David v. State, supra, and its progeny. Respondent's emphasis on this Court's determination that the harmless error doctrine is inapplicable in such improper comment cases is understandable in the present context for if such error as alleged did occur at the trial below - which the state submits it did not (see Point II herein) - this case would be an obvious one for applying the harmless error rule in light of the overwhelming evidence of Respondent's guilt. Indeed, the district court's opinion includes the same factual conclusion, and the evidence of record amply supports that finding.

Respondent was taken into custody after it was determined by police that he resembled the composite made of Ms. Scavone's attacker, and after Respondent made statements to police indicating that he was involved in a sexual assault. Ms. Scavone positively identified Respondent as her attacker. No evidence was presented even tending to contradict the testimony of the State's witness, and the obvious and certain implication of that testimony, i.e., that Respondent had committed the burglary, kidnapping and rape in which Ms. Scavone was the victim. Thus, notwithstanding, the holding

in Harris and David, the State asserts that the comment at issue here, even if it constituted error, clearly had no affect whatsoever on the jury's verdict given the overwhelming and uncontroverted evidence of Respondent's guilt.

As previously noted, the federal courts - most recently in the Hasting decision - have themselves failed to elevate the Fifth Amendment to the lofty heights afforded it by this Court in numerous decisions that became the per se reversal rule. The obvious question is WHY? Why should this particular type of constitutional error be raised above other constitutional protections which when transgressed in the trial setting can nevertheless be determined to constitute mere harmless error, i.e., error which did not infect the jury's verdict of guilt given the circumstances of the case and particularly the overwhelming nature of the evidence presented? Why should a mere, careless, comment doom an otherwise proper and lawful conviction to certain reversal despite ironclad testimony and physical and circumstantial evidence which provides unequivocal and uncontroverted proof of the accused's guilt.

The obvious answer is that there is no basis for elevating the particular constitutional error at issue above any others. The Hasting decision and its predecessor opinion - Chapman v. California, supra - clearly indicate the applicability of the harmless error concept even in those cases where the error alleged is an improper comment on an accused's exercise of his right to remain silent - a denial of his Fifth Amendment

protections. Other federal courts have repeatedly applied the harmless error doctrine and upheld convictions despite a finding of improper comment or testimony regarding a defendant's invocation of his Fifth Amendment right of silence. United States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980); United States v. Staller, 616 F.2d 1284 (5th Cir. 1980), cert. denied 101 S.Ct. 207, 449 U.S. 869, 66 L.Ed.2d 89 (1980); United States v. Whitaker, 592 F.2d 826 (5th Cir. 1979), cert. denied 100 S.Ct. 422, 440 U.S. 950, 62, L.Ed.2d 320 (1979).

Why then does Florida have a per se reversal rule in light of the Hasting, Chapman, and other federal decisions. The law in Florida should be no different for there is no differing state law rationale to distinguish Florida's interpretation of the Fifth Amendment right to remain silent and due process protections from that of the United States Supreme Court; indeed, the United States Supreme Court's interpretation of the provisions and protections of a provision of the United States Constitution is controlling, and it is the duty of this Court and other state courts to apply the rationale of the United States Supreme Court decisions interpreting the federal constitution to the degree applicable in a particular case. See, Miami Herald Publishing Company v. Ane, 423 So.2d 376 (Fla. 1983); Chaney v. State, 267 So.2d 65 (Fla. 1972); State ex rel Hawkins v. Board of Control, 83 So.2d 20 (Fla. 1955).

It is worthy of note that this Court has already retreated somewhat from the fundamental error/per se reversal

rule in Clark v. State, supra, where, noting that the United States Supreme Court had held that the federal constitution does not "mandate the adoption of an absolute rule requiring reversal in every case . . .", the Court held that an improper comment on a defendant's exercise of his right to remain silent was not fundamental error, i.e., an error which goes to the very foundation or merits of the case. Thus, upon finding that the federal constitution and the holdings of the United States Supreme Court in Chapman and Doyle v. Ohio, 426 U.S. 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), did not require reversal in every case the Clark Court held that a contemporaneous objection was necessary to preserve the issue for appellate review thus finding that in certain respects the fundamental error rule not applicable. Accord; Simpson v. State, 418 So.2d 984 (Fla. 1982); State v. Cumbie, 380 So.2d 1031 (Fla. 1980).

The State submits that it is time for the Court to specifically reject the per se reversal rule and adopt the harmless error doctrine set forth in Hastings. The Florida legislature has decreed that no judgment shall be reversed on appeal unless the error asserted "injuriously affected the substantial rights of the appellant"; furthermore, there is no presumption that error injuriously affects said substantial rights. § 924.33, Fla. Stat. (1983). In addition, the legislature has specifically provided in a section to be liberally construed, that no judgment shall be set aside or reversed

on the basis of the improper admission of evidence unless it shall appear that the error complained of has resulted in a miscarriage of justice, i.e., no judgment shall be reversed if the error alleged was merely "harmless". § 59.041, Fla. Stat. (1983). These requirements as announced by the legislature serve as clear restrictions on a criminal defendant's right to appeal which is also accorded [as provided by the State Constitution- Art. V, § 4(b); Art. V, § 5(b); Art. V, § 6(b)] by general law. Thus, the legislature's accompanying proviso that appellate courts once vested with jurisdiction must consider the applicability of the harmless error doctrine before reversing a conviction must not be transgressed.

Accordingly, the State respectfully submits that the harmless error doctrine is and should be applicable to situations such as that alleged sub judice, involving claims of improper comment or testimony on an accused's exercise of his right to remain silent. Indeed, is it not preposterous to reverse a defendant's conviction where evidence of guilt is overwhelming merely because of a prosecutor's careless comment on the defendant's right to remain silent? Given the publics awareness of the Fifth Amendment and the constant "taking the Fifth" in everything from television police shows and soap operas to novels and magazine articles is it not safe to assume that the average juror is well aware of an individual's right to remain silent under the Fifth Amendment in exercise of the Fifth Amendment right when the defendant fails to take the stand? Where then is the great prejudice that justifies this

extraordinary prophylactic rule that each year dooms many otherwise proper convictions based on overwhelming evidence of guilt to reversal and retrial, if possible, at great expense in time and money when the United States Supreme Court (the sole interpreter and protector of federal constitutional rights) specifically held that such protection is unnecessary, and the Florida legislature has likewise specifically decreed that no criminal conviction should be reversed if the error alleged is harmless?

The question certified by the district court should be answered in the affirmative, and the Respondent's convictions and sentences reinstated.

POINT II

THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION FOR MISTRIAL SINCE THE PROSECUTOR'S REMARKS AMOUNTED TO NOTHING MORE THAN A COMMENT ON THE EVIDENCE AS IT EXISTED BEFORE THE JURY.

It is well established that a motion for mistrial is addressed to the sound discretion of the trial judge and that the power to declare a mistrial and discharge a jury should be exercised with great care and caution and only in cases of absolute necessity, i.e., where the alleged error is so prejudicial as to vitiate the entire trial. State v. Murray, 443 So. 2d 955 (Fla. 1984); Cobb v. State, 376 So. 2d 230 (Fla. 1979); Salvatore v. State, 366 So. 2d 745 (Fla. 1978).

In this case, the Respondent successfully argued to the district court that his motion for mistrial should have been granted because of an allegedly improper comment by the prosecutor regarding the Respondent's exercise of his right to remain silent. The State respectfully disagrees with the district court's determination that the comment at issue was "fairly susceptible" of being interpreted by the jury as referring to Respondent's failure to testify at trial and that the trial court should therefore have granted the motion for mistrial. To the contrary, the State submits that the comment at issue was nothing more than a reference to the evidence as it existed before the jury and was clearly not an improper comment "impermissibly highlighting" the Respondent's decision not to testify.

During closing argument before the jury, the prosecutor made the following comment:

> Ladies and gentlemen, the only person you heard from in this courtroom with regard to the events on November 9, 1981, was Brenda Scavone (R.269).

then following objections the prosecutor resumed:

> [T]he only person who saw, who was there, who testified to us as to what occurred on November 9, 1981, which is all that you can legally consider in this case...(R.270).

It is clear that the prosecutor's comments were not directed at Respondent's failure to testify and were directed to the evidence as it existed before the jury. This Court has held that it is firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury. White v. State, 377 So. 2d 1149 (Fla. 1980). Thus, a prosecutor may comment on the general lack of defense evidence, and such comment is not improper. Snowden v. State, 449 So. 2d 332 (Fla. 5th DCA 1984); Helton v. State, 424 So. 2d 137 (Fla. 1st DCA 1982), pet.rev.denied, 433 So. 2d 519 (Fla. 1983); also see, Smith v. State, 378 So. 2d 313 (Fla. 5th DCA 1980).

The comments complained of were merely comments on the evidence as it existed before the jury. The prosecutor's comments herein are remarkably similar to the comments made by the prosecutor in White v. State, supra. In White there was only one witness to the crime other than the defendant, as it is in the case sub judice. In referring to the testimony of the eye witness the prosecutor in closing argument said:

> You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument.

White at 1150. The defendant objected and sought a mistrial. The motion for mistrial was denied. The District Court of Appeal, Fourth District affirmed, White v. State, 348 So. 2d 368 (Fla. 4th DCA 1977), and this Court affirmed stating:

> It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue. (cites omitted). It is thus firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury. (cites omitted)

White, 377 So. 2d at 1150. Petitioner would also point out that this Court's decision in White was decided after David v. State, 369 So. 2d 943 (Fla. 1979), which enunciated the "fairly susceptible to being interpreted by the jury as referring to a criminal defendant's failure to testify" standard. Thus, it is apparent that this Court does not view comments such as those made by the prosecutor as being reversible as comments on a defendant's right to remain silent.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fourth District.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits was furnished by mail/courier to TATJANA OSTAPOFF, ESQUIRE, 224 Datura Street, Harvey Building, West Palm Beach, Florida 33401 this 31st day of January, 1985.

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