IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner relies on the preliminary statement contained in its initial brief.

STATEMENT OF THE CASE

Petitioner relies on the Statement of the Case contained in its initial brief.

STATEMENT OF THE FACTS

Petitioner relies on the Statement of the Facts contained in its initial brief.

SUMMARY OF ARGUMENT

Petitioner relies on the Summary of Argument contained in its initial brief.

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).

The Respondent, relying upon the doctrine of stare decisis argues that the per se reversal rule of Bennett v. State, 316 So. 2d 41 (Fla. 1975), and its progeny, remains a viable precept of appellate review in this state despite this Court's obvious acceptance of the holding in United States v. Hasting, ___U.S.___, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), and State v. Murray, 443 So. 2d 955 (Fla. 1984). However, although the doctrine of stare decisis should ordinarily be strictly adhered to, there are occasions, such as the instant case, when departure is rendered necessary to vindicate plain, obvious principles of law and to remedy outmoded precedents. McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323 (Fla. 1935). Petitioner therefore submits, that Respondent's assertion must be rejected by this Honorable Court.

Marshall casts about in his argument searching for an adequate legal foundation for a now defunct rule of law which required reversal in all cases, no matter how staggeringly overwhelming and uncontradicted the evidence of a defendant's guilt and despite the pronouncement of this nation's highest court that the type of constitutional error at issue does not mandate per se reversal if the error can be deemed harmless by an appellate tribunal.

Marsahll initially argues that the decision in Bennett,

is controlling and mandates reversal without regard to the harmless error rule where the State comments on the defendant's exercise of his right to remain silent. However, a review of the Bennett decision and its per se reversal rule reveals that that particular holding is far from unequivocal and is in fact mere dicta in light of the Court's conclusion that even if the harmless error doctrine were applied it would not save the conviction in that case because: "Under no stretch of the imagination can it be said the evidence was overwhelming against the defendant." 316 So. 2d at 44. In analyzing the decision, however, it is more important to note that the per se reversal rule and the rationale therefor sprang solely from the Fifth Amendment to the federal constitution and the then recent decision in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and more specifically from an opinion of the Third District Court of Appeal in Jones v. State, 200 So. 2d 574 (Fla. 3d DCA 1967), which the Bennett Court adopted as its own. The Jones decision and its apparent per se reversal rule likewise had as its sole legal rationale the Miranda decision's protection of the right to remain silent under the Fifth Amendment of the federal constitution. Indeed, it is worthy of note that the Jones court was of the opinion that a comment on a defendant's exercise of his right to remain silent constituted fundamental error justifying reversal of a conviction even absent a timely objection. In reaching its conclusion, the district court in Jones noted that it must give "due consideration to the views expressed by the Supreme Court of the United States in Miranda relating to the matter involved here." 200 So. 2d at 56.

Subsequent decisions by this Court applying and noting the per se reversal rule of Bennett have limited the legal rationale for this extraordinary protection to the Fifth Amendment of the Constitution of the United States and the Miranda decision.[1] See, Clark v. State, 363 So. 2d 331, 333 (Fla. 1978); State v. Burwick, 442 So. 2d 944, 947 (Fla. 1983). Further, the United States Supreme Court in Hasting and Chapman has made it clear that neither the Fifth Amendment nor Miranda justified this extraordinary remedy by an appellate court. Petitioner submits that this Court should, as it apparently has done, give "due consideration" to the views expressed by the Supreme Court in Hasting and Chapman.

Next Marshall, ignoring this Court's embrace of Hasting and Murray[2] and in Jones v. State, 449 So. 2d 253 (Fla. 1984) apparently claims that a violation of Fifth Amendment rights through improper comment may still require, under some unexplained

FOOTNOTES 1 & 2

1/ In Clark, this Court determined after review of the decisions in Miranda, Chapman, and Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), that an improper comment on the exercise of Fifth Amendment rights was not a fundamental error such that the State's contemporaneous objection rule should apply. This decision repealed by implication one of the two prongs of the decision in Jones v. State, 200 So. 2d 574 (Fla. 3d DCA 1967), which served as the basis for Bennett, i.e., that such a comment constituted fundamental error for which no objection was necessary. Thus, it can be said that the comment-type error at issue does not equate to a denial of due process or an error which goes to the "foundation" of the case since it is not fundamental. Ray v. State, 403 So. 2d 956, 960 (Fla. 1981).

2/ The Jones decision involved, inter alia, an alleged comment by a state witness on the defendant's refusal to take a polygraph examination and this Court determined that the alleged comment was insufficient to justify reversal due to the harmless nature of the error in light of the overwhelming evidence supporting conviction.

legal rationale, reversal in every case no matter how ludicrous the result. This argument clearly overlooks Florida's own binding statutory limitation on appellate reversals provided by §§ 59.041 and 924.33, Fla. Stat.(1983). These statutes provide clear legislative restriction on an appellate court's authority to reverse convictions where the errors asserted are "harmless" and have been applied by this Court in upholding convictions in even capital cases. See, Perri v. State, 441 So. 2d 606, 607 (Fla. 1983). Similarly, this contention fails to take into consideration this Court's utilization of the same harmless error standard applied by the United States Supreme Court in Hasting and Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705 (1967). Jones v. State, 449 So. 2d 253, 263 (Fla. 1984). Further, the State would also point out that Marshall's reliance on the fifth district's opinion in Rowell v. State, 450 So. 2d 1226 (Fla. 5th DCA 1984), is premature, since that decision is up for review before this Court. (State v. Rowell Case No. 65, 417).

Lastly, the tone of Marshall's entire argument seems to suggest that it is the State who should be punished for a prosecutor's comment on a defendant's Fifth Amendment right. This position however, ignores this very Court's opinion in Murray, which states that when there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate court to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to the Florida Bar for disciplinary investigation. This Court held:

> 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.

Murray at 956.

The State submits that in light of the pronouncement in Hasting accepted by this Court in Murray, it is now clear that the type of Fifth Amendment comment question raised in this case is subject to the application of the harmless error doctrine on Appellate review.

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.

Respondent essentially argues that the comment in the instant case is distinguishable from that made in White v. State, 377 So. 2d 1149 (Fla. 1980), and that the evidence of guilt adduced below was not overwhelming because Respondent was insane at the time of the offense.

The State maintains however, that the prosecutor's comments below were not directed at Respondent's failure to testify and were directed to the evidence as it existed before the jury. As such, this Court's decision in White is clearly controlling. The State would further point out that contrary to Marshall's assertions that the evidence in this case was not overwhelming, the district court expressly found that the evidence was indeed overwhelming in its written opinion. The evidence contained in the record amply supports this finding.

It was established at trial that Respondent purposefully concealed himself in the victim's car when she stopped and got out of the car for a few minutes (R.74-75). Respondent purposefully ordered the victim to drive around for a period of an hour and a half and then ordered her out of the car and proceeded to rape her (R.75-79). After the rape, Marshall told the victim that if she told anybody of the rape he would come back and get her (R.79,84).

Respondent was taken into custody after it was determined by police that he resembled the composite made of the victim's attacker, and after Respondent made statements to police indicating

that he was involved in a sexual assault. The victim 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.

Dr. Robert Bernston, a clinical psychologist appointed to evaluate Respondent 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.26). 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 Zager, a psychiatrist also agreed that the 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).

It should be noted that the test for the legal defense of insanity is not whether one is mentally ill but whether the accused is capable of distinguishing right from wrong. Ferguson v. State, 417 So. 2d 631 (Fla. 1982). Clearly, the evidence of Respondent's guilt was overwhelming as evidenced by the district court's finding. Thus, notwithstanding, the holding in Bennett, 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.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief was furnished by mail/courier to TATJANA OSTAPOFF, ESQUIRE, 224 Datura Street, Harvey Building, West Palm Beach, Florida 33401, this 12th day of March, 1985.

Carolyn V. McCann

OF COUNSEL