IN THE SUPREME COURT OF FLORIDA

ART CRAWFORD, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,808

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the Appellee in the Fourth District Court of Appeal 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 and the Defendant, respectively, in the lower courts. In the brief, the parties will be referred to as they appeared in the trial court, i.e., State and Defendant.

The symbol "R" will be used to designate the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The Defendant was convicted following a jury trial, of the offenses of sexual battery with a deadly weapon and robbery without a weapon (R 547). On appeal, the court held a police officer/witness' statement that the Defendant was advised of his rights, denied being in the area or knowing the victim, and then decided not to answer any more questions, was an improper comment on the exercise of the right to remain silent.

Despite what it characterized as "overwhelming evidence of guilt," Crawford v. State, ___ So.2d ___, 4DCA Fla. (Op. filed 3/27/85), 10 FLW 814, the court reversed the conviction. However, it certified to this

Court a question of great public importance:

> May the harmless error doctrine be applied to cases in which a witness' testimony violated a defendant's right to remain silent under the Fifth Amendment?

In concurring, Judge Glickstein emphasized the strength of the evidence:

> The facts in this record establish without contradiction[1] that the young prosecutrix, who had never experienced sexual intercourse before the date in question, was terrorized by the defendant for hours, during which period he held a knife at her throat to force her out of an automobile and into an apartment; held her at knifepoint while he forced her to undress; placed his penis in her mouth, and forced him to make her ejaculate there; then forced vaginal intercourse with her; then forced her to go to the bank and withdraw $500 from the bank, which he took from her along with other money she had in her possession.

Crawford v. State, supra. The concurring judge concluded this case is an appropriate one for application of the "harmless beyond a reasonable doubt" test set forth in Chapman v. California, 386 U.S. 18 (1967).

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[1]The defense presented no evidence; the only "defense" was the argument that the victim fabricated her testimony for unknown reasons (R 414-430).

POINTS INVOLVED

POINT I

WHETHER THE HARMLESS ERROR DOCTRINE MAY BE APPLIED TO CASES WHERE A WITNESS HAS COMMENTED ON A DEFENDANT'S POST-ARREST SILENCE?

POINT II

WHETHER THE WITNESS' STATEMENT IN THIS CASE WAS IN FACT A COMMENT ON THE DEFENDANT'S POST-ARREST SILENCE?

SUMMARY OF ARGUMENT

This Court's per se reversal rule in the Fifth Amendment context has been abrogated by the decisions in State v. Murray, 443 So.2d 955 (Fla. 1984) and United States v. Hasting, ___ U.S. ___, 76 L.Ed.2d 96 (1983). A comment on an accused's post-arrest silence should be evaluated under the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), since Florida should decide this issue in harmony with federal decisions and the legislature has codified the harmless error rule. In this case the evidence was overwhelming. Accordingly, the convictions should be affirmed.

In any event, there was no Fifth Amendment violation in the present case. The Defendant did not remain silent. He answered two questions and then said he did not want to answer more. Thus, the court of appeal erred in reversing his convictions.

ARGUMENT

POINT I

THE HARMLESS ERROR DOCTRINE SHOULD BE APPLIED TO CASES WHERE A WITNESS HAS DISCLOSED A DEFENDANT'S POST-ARREST SILENCE.

The Defendant argues the harmless error rule is inapplicable to cases in which a witness reveals a defendant's post-arrest silence. The State relies on the United States Supreme Court's decision in United States v. Hasting, ___ U.S. ___, 76 L.Ed.2d 96 (1983), and this Court's opinion in State v. Murray, 443 So.2d 955 (Fla. 1984) which approved its reasoning, to support its contrary view.

In these two decisions, which dealt with the analogous area of prosecutorial comment on a defendant's failure to testify, the court in Murray stated:

> . . . 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 opinion here contains no indication that the district court applied the harmless error rule. The analysis is 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 . . .
>
> (Emphasis added).

In United States v. Hasting, supra (relied upon by this Court in Murray), 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, so 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, 386 U.S. 18 (1967), and reiterated

its holding therein that 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 so 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 one of these "basic" rights triggering that extraordinary protection.

This Court's opinion in State v. Murray, supra, clearly adopts 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, in the Fifth Amendment area of an arrestee's silence after Miranda warnings, the harmless error concept is likewise applicable. In fact, prior to

1975, this Court did not regard as impermissible the admission into evidence of a defendant's post-arrest silence. See, e.g., Albano v. State, 89 So.2d 342 (Fla. 1956). However, in Bennett v. State, 316 So.2d 41 (Fla. 1975), this Court quashed a district court's affirmance of a conviction on the basis that it conflicted with Jones v. State, 200 So.2d 574 (3DCA Fla. 1967). Jones had held the admission into evidence of testimony that an accused, while in custody, remained silent in the face of an accusation of guilt, was per se harmful reversible error which was so fundamental it could be reached on appeal despite the lack of an objection. Jones reached this conclusion based solely upon the United States Supreme Court's statement in Miranda that the prosecution may not "use" at trial the fact that a defendant has stood mute or claimed his privilege in the face of accusation; the Third District noted that its decision changed the law in Florida, including that announced by this Court in Albano, supra. In Bennett, this Court basically adopted the reasoning of Jones, and after examining certain testimony at trial, found that reversible error had occurred. This Court's position on the applicability of harmless error was not beyond per-adventure, however. While first noting that the error complained of was of constitutional dimension and warranted reversal without consideration of harmless error, this Court then went on to state that "in any event," the error should not be regarded as harmless if there was a reasonable

possibility that it might have contributed to the conviction. This Court then cited to certain federal precedents on harmless error, including Chapman v. California, supra, and stated that under no stretch of the imagination could it be said that the evidence against Petitioner was overwhelming. In a concurring opinion, Justice Overton noted the error was prejudicial and not harmless.

As previously noted, the federal courts--most recently in the Hasting decision[2]--have not accorded the Fifth Amendment the position granted by this Court in the Bennett dicta that became the per se reversal rule. The reason is clear: there is no basis for elevating the particular constitutional error at issue above any others. This Court has previously found the per se reversal rule inapplicable in certain respects. In Clark v. State, 363 So.2d 331 (Fla. 1978), it held an objection and motion for mistrial were necessary in order to preserve any point on appeal regarding an alleged improper comment on a defendant's silence. Similarly, in Jackson v. State, 359 So.2d 1190 (Fla. 1978) and Brown v. State, 367 So.2d 616 (Fla. 1979), this Court refused to reverse the convictions at issue where the defense, rather than the State, had

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[2]See also, 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, 449 U.S. 869; United States v. Whitaker, 592 F.2d 826 (5th Cir. 1979), cert. denied, 440 U.S. 950 (1979).

brought to the jury's attention a defense silence. Whereas such result is no doubt partly explainable in this Court's refusal to "reward" invited error, see also, Clark, supra, Petitioner contends that it is also a recognition that evidence of a defendant's silence does not per se irretrievably taint a trial to the extent that no fair verdict can be reached.

The State maintains it is time to hold that any claim of error in regard to an alleged comment upon a defendant's silence be eligible to be reviewed in terms of harmless error. The Defendant has shown no compelling reason which justifies the per se reversal rule. Since the underlying basis for the rule is reliance on the Fifth Amendment to the United States Constitution, and the United States Supreme Court has made it clear in Hasting that the Fifth Amendment does not require this remedy, the law in Florida should be no different. 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). In Jones, the district court created its per se reversal rule after giving "due consideration" to the views expressed by the Supreme Court with reference to Miranda; this Court should, as it apparently has done in Murray, give the same "due consideration" to the views expressed by the Supreme Court in Hasting and Chapman.

Moreover, 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. Section 924.33, Fla. Stat. (1981). 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." Section 59.041, Fla. Stat. (1981). 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--Article V, §4(b); Article V, §5(b); Article 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.

In the instant case, the district court characterized the evidence as "overwhelming" and was clearly of the view that application of the harmless error rule would be appropriate (see Judge Glickstein's recitation of the facts set forth in the Statement of the Case and Facts, supra). The Petitioner attempts to counter the evidence by arguing that he was convicted of a lesser offense on one charge and he was unduly restricted in his cross-examination of a state witness, Officer Tolbert. Regarding the latter claim, this matter was raised as a separate issue on appeal below and really is collateral to the harmless error issue. In any event, the trial court's ruling was correct because the proffer that Officer Tolbert had been demoted because she falsified a police report in an unrelated case (R 305) was immaterial to show that she testified falsely in a court of law under oath in this case. See, Washington v. State, 432 So.2d 44, 47 (Fla. 1983). The State submits the Defendant was convicted due to the strength of the evidence and not due to any error in Officer Tolbert's testimony or limitation on cross-examination. Concerning the conviction of the lesser offense on the robbery charge, the victim testified she knew the Defendant had a knife in his pocket, but he did not display it at the time he demanded money from her (R 261). Consequently, it is understandable

why the jury convicted him of robbery without a weapon.

Finally, the Defendant argues he was entitled to rely on the per se reversal rule since it had not been questioned at the time of his trial. However, in Doyle v. Ohio, 426 U.S. 610 (1976), the Supreme Court indicated very clearly it would be willing to consider application of the harmless error rule in the Fifth Amendment context. Id. at 619-620. Moreover, since the trial court sustained the defense objection and gave a curative instruction, but denied the motion for mistrial, the Defendant was clearly on notice that the State would seek to get convictions at the conclusion of the trial and would seek to have any convictions affirmed on appeal. There was nothing stopping him from choosing to testify had he wanted to. Thus, the harmless error rule should be considered in evaluating the witness' comment in this case, and having been considered, the convictions should be affirmed.

POINT II

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL SINCE THE WITNESS DID NOT COMMENT ON THE DEFENDANT'S EXERCISE OF HIS FIFTH AMENDMENT RIGHT.

Should this Court conclude in Point I that a comment on silence can be harmless error and in this case it was, then resolution of Point II will be unnecessary. However, if the court does not so hold, the State nevertheless maintains the Defendant's conviction must be affirmed because there was no Fifth Amendment violation.

As the State argued in the court of appeal, Officer Tolbert did not comment on the Defendant's exercise of his right to remain silent; her testimony was that the Defendant answered two questions and then told her he did not want to answer any more (R 299). Thus, the Defendant did not remain silent. In Whiteside v. State, 366 So.2d 1232 (2DCA Fla. 1979), the court held there was no impermissible comment when a police officer testified the Defendant after making certain statements, then made no more. Likewise, in State v. Prieto, 439 So.2d 288 (3DCA Fla. 1983), the court held that where the defendant had freely conversed with the police and refused to answer just two questions, there was no violation of his constitutional rights. As in the cited cases, the Defendant answered questions, so the testimony that he would not answer any more simply meant the conversation ended and not that the Defendant

chose to exercise his right to remain silent.

Therefore, the court of appeal erred in finding a Fifth Amendment violation and reversing the Defendant's convictions. Regardless of the disposition of Point I, the Defendant sub judice is not entitled to a new trial.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, the State of Florida respectfully requests that this Honorable Court reverse the decision of the Fourth District Court of Appeal with directions that the judgments and sentences entered by the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been sent by courier to Louis G. Carres, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, FL 33401, this 7th day of May, 1985.

Of Counsel