IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,828

THE STATE OF FLORIDA,

Petitioner,

vs.

ERNEST GRISSOM,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The defendant, ERNEST GRISSOM, was charged with aggravated battery.

At the trial, the victim, Linda Grissom, the wife of the defendant, testified that she and her husband were separated and that she was living with her parents at the time of the incident. (T. 160-165). She had left her husband because she was fed up because he would not work. (T. 162). On August 29, 1983, she got to work at about 3:25 P.M. (T. 163). When she returned home from work during the early morning of August 30, she found the defendant sitting on the front steps to her mother's house, and she spoke to him. (T. 163). He said that he had an argument and fight with his brother, and his mother asked him to leave the house. (T. 163). Linda Grissom said that he could stay in her mother's house for the night. (T. 168).

On August 31, she again went to work in the afternoon and returned home in the early morning hours of September 1. (T. 164). She ate a sandwich and went to bed in her bedroom, with her daughter, and her godsister. (T. 164). She went right to sleep, and the phone rang when Ernie called and he came over (T. 164-165). She went to sleep after a brief conversation with him. (T. 169-170). When she woke up on the morning of September 1, Ernie got their daughter ready for school and took her to school. (T. 171). When he returned, he asked to borrow her car, and when she refused,

he said "he didn't have to ask no bitch for anything." (T. 171).

She went back to sleep on a chair and hammock in the living room. (T. 174). She woke up when she felt someone cooking and burning grease. (T. 175). She saw Ernie in front of her, fully dressed, and he said he was going home and fixed her breakfast. (T. 175). After he went back to the kitchen, he again approached her in the living room. (T. 176). She thought he was going to throw water on her, to wake her up, as he used to do, because she was hard to wake up. (T. 177). He poured the contents of the pan on her, and it was grease or something hot and burning (T. 177). After the grease hit her, Ernie left. (T. 178). The grease hit her on the inside of her hands, which were peeling, and she had trouble turning the door knob. (T. 178).

On cross-examination, defense counsel asked whether she had discussed her testimony with the Assistant State Attorney. (T. 204, 298). She responded affirmatively. Shortly afterwards, defense counsel repeated the question (T. 208), and the State objected. The Court then stated:

> "Yes, it was asked and answered before. No need to emphasize it a second time.
>
> It's perfectly proper for the witness to discuss her testimony with the State Attorney as well as it is for your client to discuss his testimony with you [defense counsel] , and you may proceed."
> (T. 208 - 209).

During a bench conference, defense counsel moved for a mistrial and the court denied the motion. (T. 209). The court offered to give a curative instruction which defense counsel already had requested that the court give at the end of the case, as part of the standard instructions. (T. 210). The court then addressed the jury:

> "Ladies and gentlemen, as I just told you, it is entirely proper for a prosecutor to discuss with the witness the testimony that they are going to give at time of trial. There is nothing wrong with this.
>
> I also told you that it's proper for Mr. Landau [defense counsel] to discuss with his client, the defendant, in any case, whatever testimony if there is going to be any testimony or any of the facts of the case so that they can defend the defendant properly, but at no time--I told you this also-- is the defendant required to take the witness stand. The defendant need not prove anything and if the defendant does not take the witness stand, you are not to hold that against the defendant."
>
> (T. 210-211)

A neighbor, Eva Sharpe, then testified that she heard Linda scream, and then she saw Ernie walk away, and then started running, when he got further away. (T. 225-226).

Dr. Charles Gillon Ward treated Linda Grissom on September 1, 1983. (T. 248). She had received an acute injury, approximately 20 percent of the body surface area burned mainly with second degree in nature, her face, chest, shoulders, upper part

of her back and parts of her arms and hands. (T. 248). She was placed on rehabilitation therapy, (T. 248), with physical workouts to insure full range of motion of her neck and upper extremities. (T. 249). There was scarring to the upper parts of her body. (T. 249). After discharge from the hospital she was put in a special garment to prevent as much thickening of the burn wound as possible. (T. 249). It was made of an elastic expandable material, which is worn 24 hours a day. (T. 249). The scars were permanent. (T. 250).

The defendant did not testify.

The defendant was found guilty of simple battery. (R. 53). The defendant appealed from the judgment and sentence. The Third District Court of Appeal issued its opinion on March 26, 1985 and reversed, concluding that the trial court's comments to the jury were fairly susceptible of being interpreted as referring to the defendant's exercise of his right to remain silent. The district court further concluded that the per se rule of reversal set forth in Harris v. State, 438 So.2d 787 (Fla. 1983), David v. State, 369 So.2d 943 (Fla. 1979), and Trafficante v. State, 92 So.2d 811 (Fla. 1957), was still in effect, notwithstanding the opinion in State v. Murray, 443 So.2d 955 (Fla. 1984), which expressed agreement with the analysis of the harmless error doctrine by the Supreme Court of the United States, in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d. 96 (1983).

The opinion of the Third District Court of Appeal agreed "that application of the harmless error rule in this case would require affirmance of the conviction...." The following question was certified as one of great public importance:

> "Has the Supreme Court of Florida by its agreement in State v. Murray, 443 So.2d 955 (Fla. 1984), with the analysis of the supervisory powers of appellate courts as related to the harmless error rule as set forth in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d. 96 (1983), receded from the per se rule of reversal explicated in Harris v. State, 438 So.2d 787 (Fla. 1983), David v. State, 369 So.2d. 943 (Fla 1979), and Trafficante v. State, 92 So.2d 811 (Fla. 1957).

The State then filed a Notice to Invoke Discretionary Jurisdiction, thereby commencing this proceeding.

POINTS INVOLVED ON APPEAL

I. WHETHER THE SUPREME COURT OF FLORIDA, BY ITS AGREEMENT IN STATE v. MURRAY, 443 So.2d 955 (Fla. 1984), WITH THE ANALYSIS OF THE SUPERVISORY POWERS OF APPELLATE COURTS AS RELATED TO THE HARMLESS ERROR RULE AS SET FORTH IN UNITED STATES v. HASTING, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed. 2d 96 (1983), RECEDED FROM THE PER SE RULE OF REVERSAL EXPLICATED IN HARRIS v. STATE, 438 So.2d 787 (Fla. 1983), DAVID v. STATE, 369 So.2d 943 (Fla. 1979), AND TRAFFICANTE v. STATE, 92 So.2d 811 (Fla. 1957).

II. WHETHER THE TRIAL JUDGE'S COMMENTS WERE FAIRLY SUSCEPTIBLE OF BEING INTERPRETED AS REFERRING TO A DEFENDANT'S RIGHT TO REMAIN SILENT.

SUMMARY OF ARGUMENT

This Court's opinion in State v. Murray, 443 So.2d 955 (Fla. 1984), has strong language which recedes from a per se rule of reversal, and requires harmless error analysis in cases of constitutional error. The Supreme Court of the United States has clearly held that constitutional errors, including comments on silence, can be harmless. This Court has already taken several steps towards adopting that position. Jones v. State, 332 So.2d 615, 619 (Fla. 1976) acknowledged that constitutional errors maybe harmless. Clark v. State, 363 So.2d 331 (Fla. 1978), concluded that comments on silence do not constitute fundamental error and are not reversible in the absence of an objection. Nowlin v. State, 346 So.2d 1020 (Fla. 1977), permits questions about the defendant's Fifth Amendment rights on cross-examination of the defendant. Murray specifically approved of the analysis of the harmless error rule in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). No reasons exist to justify different criteria for the federal and state constitutional provisions.

Moreover, the comment in question should not be viewed as a comment on the defendant's right to remain silent. The purpose of the comment was to demonstrate that the prosecutor can prepare for trial by speaking to the State's witnesses just as defense counsel prepares for trial by reviewing the case with the defendant.

ARGUMENT

THE SUPREME COURT OF FLORIDA, BY ITS AGREEMENT IN STATE v. MURRAY, 443 So.2d 955 (Fla. 1984), WITH THE ANALYSIS OF THE SUPERVISORY POWERS OF APPELLATE COURTS AS RELATED TO THE HARMLESS ERROR RULE AS SET FORTH IN UNITED STATES v. HASTING , 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), RECEDED FROM THE PER SE RULE OF REVERSAL EXPLICATED IN HARRIS v. STATE, 438 So.2d 787 (Fla. 1983), DAVID v. STATE, 369 So.2d 943 (Fla. 1979), AND TRAFFICANTE v. STATE, 92 So.2d 811 (Fla. 1957).

The relationship between the harmless error doctrine and the exercise of an appellate court's supervisory powers was examined in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The Supreme Court noted three purposes for the use of the supervisory powers: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and as a remedy designed to deter legal conduct. 103 S.Ct. at 1978-79. The exercise of the supervisory power is unnecessary, however, when the error to which it is addressed is harmless. Id. Moreover, the Supreme Court reaffirmed that the harmless error rule can be applied to most constitutional errors, including the prosecutor's reference, in Hasting, to the defendant's failure to testify.

Subsequently, in State v. Murray, 443 So.2d 955 (Fla. 1984), in a case which did not involve an error of constitutional dimension, this Court approved of the analysis in Hasting:

> "When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation. [citations omitted]. 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. [Citation ommitted]. 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 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;...it is the duty of the appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations."
>
> 443 So.2d at 956.

The notion that the harmless error rule could apply to constitutional errors derives, initially, from Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967):

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

This Court, in Jones v. State, 332 So.2d 15 (Fla. 1976), concurred with this general principle, stating that when "the evidence of guilt is overwhelming, even a constitutional error may be rendered harmless."

As Hasting held that comments on a defendant's right to remain silent may be harmless, and as Murray approved of the analysis in Hasting, such comments should no longer be deemed reversible per se. Hasting and Murray have combined to undermine the per se

reversal rule set forth in Harris v. State, 438 So.2d 787 (Fla. 1983). David v. State, 369 So.2d 943 (Fla. 1979); Donovan v. State, 417 So.2d 674 (Fla. 1982); Bennett v. State, 316 So.2d 41 (Fla. 1975), and other similar cases.

Indeed, this Court inherently distanced itself from the per se rule of reversal in Clark v. State, 363 So.2d 331 (Fla. 1978). While the per se rule of reversal of Bennett, supra, was reiterated, it was further held that improper comments on a defendant's silence will not result in reversal in the absence of a contemperaneous objection. Although such comments were constitutional errors, they were not fundamental errors. Thus, such comments did not go "to the foundation of the case or...to the merits of the cause of action." Id. at 333. Having recognized that comments on a defendant's right to remain silent need not go to the foundation of the case, it is logical to conclude that such errors need not be of such magnitude as to preclude applicability of the harmless error rule. If an error is not of sufficient magnitude to obviate an objection, the harmless error doctrine should apply.

The per se rule of reversal, as it was enunciated in Bennett v. State, 316 So.2d 41 (Fla. 1975), relied on Jones v. State 200 So.2d 574 (Fla. 3d DCA 1967), to justify rejection of the harmless error rule. However, Jones arrived at its per se rule of reversal by concluding that a comment on a defendant's silence

was the fundamental error. Thus, the conclusion, in Clark , that the comment on silence was not fundamental error, is inconsistent with the continued application of the per rule of reversal.

Subsequent to Hasting, several state courts applied Hasting to comments on a defendant's failure to testify. James v. Commonwealth, 679 S.W.2d 238 (Ky. 1984); State v. Jackson, 454 So.2d 116 (La. 1984); Canaday v. State, 455 So.2d 713 (Miss. 1984). Moreover, prior to Hasting, many state courts recognized that comments on a defendant's failure to testify could be harmless. See, e.g., Commonwealth v. Lowery, 269 A.2d 724 (Pa. 1970); State v. Mata, 609 P.2d 48 (Ariz. 1980), Williams v. State, 566 P.2d 417 (Nev. 1977); State v. Macomber, 524 P.2d 574 (Or.App. 1974); State v. Ponds, 608 P.2d 946 (Kan. 1980); State v. Moraine, 475 P.2d 831 (Utah 1970); Davis v. State, 634 S.W.2d 366 (Tex. Ct. of App. 1982); State v. Martin, 624 S.W.2d 879 (Mo. App. 1981); State v. Spring, 179 N.W.2d 841 (Wis. 1970); People v. Crimmins, 367 N.Y.S.2d 213 326 N.E.2d 787 (Ct. of App. 1975).

This Court further lessened the scope of the per se rule of reversal in Nowlin v. State, 346 So.2d 1020 (Fla. 1977), which was based on Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). Harris held that statements which violated a defendant's Fifth Amendment rights (because they were obtained prior to the defendant's receipt of Miranda warnings), were properly usable for impeachment purposes at trial, after the

defendant testified. Nowlin applied Harris to Florida law, concluding that Harris type statements could be used to impeach the defendant if the defendant testifies and if they are voluntary, even if they are inadmissible in the State's case-in-chief due to Miranda violations. Thus, this Couurt acknowledged, in 1977, that Fifth Amendment violations need not always have a prejudicial effect on the defendant.

The Supreme Court of the United States, and lower federal courts, have applied the harmless error doctrine to the same, or other constitutional errors in numerous cases. Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed. 2d 208 (1973) (Bruton violation of constitutional right of cross-examination); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726 (1969); Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) (alleged involuntary confession); United States v. Pruitt, 719 F.2d 925 (9th Cir. 1983), cert. denied, 99 S.Ct. 154, 439 U.S. 850, 58 L.Ed.2d 153.

The same issue is presently pending before this Court in State v. Rowell, Case No. 65.417. The Fifth District Court of Appeal's opinion in Rowell v. State, 450 So.2d 1226 (5th DCA 1984), asserted that this Court relied on the per se rule of reversal after Murray, in State v. Strasser, 445 So.2d 322 (Fla. 1984). Strasser relied on the pre- Murray decision of State v. Burwick,

442 So.2d 944 (Fla. 1983), which held that a defendant's silence upon arrest did not indicate sanity, and thus could not be used to rebut the insanity defense. Neither Burwick nor Strasser discussed the harmless error rule, and from the Supreme Court and District Court opinions in Strasser it cannot even be determined whether the State argued the applicability of the harmless error doctrine, or, more importantly, whether the facts of the case were strong enough to argue the applicability of the harmless error doctrine. Indeed, due to the issue of insanity and the State's effort to use silence to rebut insanity probably it could not be deemed harmless in the context of the facts, because the State attempted to show that because of the silence, the defendant could not be insane. Since jurors could plausibly have viewed the defendant's silence as an indicia of sanity (per the prosecutor's questions and arguments), but for the comments on silence it could not be said that the jurors would necessarily have concluded that the defendant was sane. This Court has concluded that silence does not imply insanity, but after jurors heard prosecutorial arguments to the contrary, they may have believed otherwise. Thus, the facts of Burwick and Strasser are not consistent with an application of the harmless error rule, and it was therefore incorrect for the lower court, in Rowell to view Strasser as a repudiation of the harmless error rule.

Even more importantly, the Fifth District, in Barry v. State, __So.2d__ , 10 FLW 934 (5th DCA opinion filed April 11, 1985),

has again addressed the present issue and distinguished its own decision in Rowell. In Barry, the Fifth District held that assuming that the prosecutor's comment was "fairly susceptible of being construed as a comment on the defendant's failure to testify, it appears that in State v. Murray, 443 So.2d 955 (Fla. 1984), the Florida Supreme Court approved the application of the harmless error rule to comments on a defendant's failure to testify at trial." Id. at 935. Powell involved a comment on the defendant's silence at the time of arrest, which is more serious than a comment on the failure of the defendant to testify at trial. In concluding that the harmless error rule applies pursuant to Murray, due to the fact that Murray embraced the principles enunciated in Chapman and Hasting, the Fifth District stated:

> "...we can only conclude that the [Supreme Court of Florida] was holding as well that the type of error reviewed in these cases- a comment on defendant's failure to testify at trial- would be reviewed in the light of the harmless error rule." Id.

The Fifth District also pointed out that the principles adopted in Murray were inconsistent with the earlier cases setting forth the per se rule of reversal--David, Trifficante, etc.

The need for applicability of the harmless error rule is made painfully evident in the instant case. Defense counsel twice

inquired whether the prosecutrix discussed her testimony with the assistant state attorney. On the second inquiry, the State objected that the question had already been answered, and the trial judge stated:

> "Yes, it was asked and answered before. No need to emphasize it a second time.
>
> It's perfectly proper for the witness to discuss her testimony with the State Attorney as well as it is for your client to discuss his testimony with you [defense counsel]...." (T. 208 -209).

The obvious intent of the statement was that defense counsel prepares for trial by reviewing the case with the defendant. Common sense suggests that jurors are aware that defendants and defense counsel confer prior to trial. That the trial judge's comments were so intended is made apparent from his subsequent comments to the jury:

> "Ladies and gentlemen, as I just told you, it is entirely proper for a prosecutor to discuss with the witness the testimony that they are going to give at time of trial.
>
> I also told you that it's proper for Mr. Landau [defense counsel] to discuss with his client, the defendant, in any case, whatever testimony if there is going to be any testimony or any of the facts of the case so that they can defend the defendant properly, but at no time-- I told you this also-- is the defendant required to take the witness stand. The

> defendant is not required to take the witness stand. The defendant need not prove anything and if the defendant does not take the witness stand, you are not to hold that against the defendant."
>
> (T. 210-211).

The facts of the case, as set forth in the Statement of Case and Facts, reflect that the State's evidence was not refuted; the defendant poured a pan of hot grease on the victim. The Third District noted that "application of the harmless error rule in this case would require affirmance of the conviction...."

In conclusion, no reasons exist to apply a more stringent standard to the Florida Constitution's guarantees of rights than to the United States Constitution's guarantees of the same rights. In view of the same language in the federal and state constitutional guarantees, the defendant's rights should be construed in the same manner in the absence of a compelling reason for differentiation. Indeed, Florida Constitution, Article I, section 12, now mandates that that provision be "construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court." The absence of such a constitutional mandate does not prohibit the application of federal constitutional criteria to the similar Florida Constitutional

provision. In Thurman v. State, 116 Fla. 426, 156 So. 484 (1934), this Court emphasized the persuasive value of decisions of the Supreme Court of the United States.

Several cases from this Court, including Murray, Jones, and Nowlin, have either receded from the per se rule of reversal, or undermined its rationale. Section 924.33, Fla.Stat. (1983), specifically provides that "[i]t shall not be presumed that error injuriously affected the substantial rights of the appellant." (Emphasis added). The statute makes no distinction between constitutional and non-constitutional errors. A review of the relevant cases makes it readily apparent that constitutional errors can be rendered harmless. Jones, supra; Chapman, supra; Hasting, supra.

Accordingly, the question certified by the district court should be answered affirmatively, and Respondent's conviction and sentence should be reinstated.

II. THE TRIAL JUDGE'S COMMENTS WERE NOT FAIRLY SUSCEPTIBLE OF BEING INTERPRETED BY THE JURY AS REFERRING TO THE DEFENDANT'S RIGHT TO REMAIN SILENT.

David v. State, 369 So.2d 943, 944, (Fla. 1979), held that a "comment which is fairly susceptible of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error...." Comments should not be singled out and viewed in isolation; it is necessary to look to the context in which the comments were made. United States v. Betancourt, 734 F.2d 750 (11th Cir. 1984).

In this case, defense counsel had twice inquired of the victim as to whether she discussed her testimony with the prosecutor. After the second inquiry and a State objection, the trial judge made the comments which are fully set forth in the Statement of Case and Facts. The trial judge indicated that just as the prosecutor speaks to the victim, the defense counsel speaks to the defendant," so that they can defend the defendant properly." (T. 210-211). The purpose of the trial judge's comments was to show that there was nothing wrong with the attorneys speaking to their respective victims or clients, as the case may be, to adequately prepare for trial. It is a common sense observation that the defense counsel speaks to the defendant prior to trial. No reasonable juror would be shocked

by the notion that defense counsel prepares for trial by speaking to the defendant. While the judge's comment used the phrase "testimony" of the defendant, the manifest intent and purpose, as stated above, was to emphasize that defense attorneys and prosecutors prepare for trial by discussing the case with the defendant and prosecution witnesses, respectively.

The State would further urge this Court to adopt the federal test for comments on a defendant's right to remain silent. That test, enunciated in Samuels v. State, 398 F.2d 964, 968 (5th Cir. 1968), inquires as to whether:

> "it can be said that the prosecutor's manifest intention was to comment upon the accused's failure to testify" or whether it 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."

See also, Gains v. State, 417 So.2d 719 (Fla. 1st DCA 1982); State v. Bolton, 383 So.2d 924 (Fla. 2d DCA 1980). If judicial comments of the nature of those in the instant case can be deemed improper under David, supra, the State believes that the applicable criteria for review of such comments should be reconsidered. The federal test focuses on the intent of the party commenting and on the way a jury would "naturally and necessarily" view the comment, rather than on the more remote possibilities of the "fairly

susceptible" standard of David. application of the "fairly susceptible" criteria to the instant cases clearly reflects the remote possibilities for which that test enables a district court to conclude that a comment is improper.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal of the State of Florida, Third District, should be reversed and the judgment and sentence should be reinstated.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of April, 1985, to Rory Stein, Esq., Office of the Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125.

RICHARD L. POLIN
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