IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,888

THE STATE OF FLORIDA,

Petitioner,

vs.

GEORGE BURNS,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

JULIE S. THORNTON
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS
(CONTINUED)

INTRODUCTION

The Petitioner, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court of Appeal. Respondent was the defendant at trial and the Appellant in the District Court. The parties will be referred to as they stood in the trial court. The symbol "R" will be used to refer to the record on appeal. The trial transcript will be referred to by the letter "T". All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE

On February 13, 1984, the defendant was charged in a three-count information with sexual battery with a deadly weapon, kidnapping and robbery. (R.1-3A). After being tried by a jury on the above charges, a verdict was returned finding the defendant guilty as to all counts as charged. (R.30-32). The defendant was thereafter adjudicated guilty and sentenced to forty (40) years on Count I, ten (10) years on Count II (consecutive), and ten (10) years on Count III (consecutive). (R.33-34, 36-39).

On February 24, 1984, the defendant filed a motion for a new trial, which was denied by the trial court. (R.35, T.541). The defendant then filed a Notice of Appeal to the Third District Court of Appeal. (R.40).

On April 9, 1985, the District Court rendered its opinion in this cause, finding that a State witness had made an impermissible comment upon the defendant's post-arrest silence. The court reversed the conviction "[d]espite the overwhelming evidence of Defendant's guilt" (footnote omitted) because the court felt "bound by the per se reversal rule" set forth in cases such as Donovan v. State, 417 So.2d 674 (Fla. 1982) and Bennett v. State, 316 So.2d 41 (Fla. 1975). (Appendix 1-5). The court did note, however, that this Court, in State v. Murray, 443 So.2d 955 (Fla. 1984), expressly approved of the analysis by the United States Supreme

Court in United States v. Hasting, 461 U.S.499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (a decision in which the United States Supreme Court affirmatively rejected a per se reversal in the context of prosecutorial comments on a defendant's exercise of his right to remain silent in favor of a harmless error analysis). Nonetheless the court held that this Court in Murray "did not expressly recede from the entrenched rule that any comment on the exercise by the accused of his right to remain silent is reversible error without regard to the harmless error doctrine" because the harmless error doctrine was reviewed only in the context of prosecutorial misconduct during closing argument where an attack had been made on the credibility of the defendant who did testify during trial. (Appendix, p.4). Accordingly, the Third District Court of Appeal certified the following question to this Court as one of great public importance:

> Has the Supreme Court, 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 by implication from the per se rule of reversal explicated in Donovan v. State, 417 So.2d 674 (Fla. 1982)?

STATEMENT OF THE FACTS

On the evening of July 17, 1981, Lisa Almodovar was walking across the parking lot of a Winn Dixie grocery store after completing her shopping. (T.97-100). While walking to the side

of the parking lot, she observed three black males walking towards her. (T.100). The men suddenly ran up to her and one stated, "Let's ger her pocket book." (T.100). The men proceeded to brandish a knife, place it at Ms. Almodovar's side and instruct her to "Freeze, don't move." (T.101).

At this point, Ms. Almodovar dropped the grocery bags that she was carrying. (T.101). One of the men there ran behind her and put her in a headlock, while another man continued to hold the knife at her side. (T.101). The men picked her up and carried her to a wooded area behind the store. (T.101).

After searching Ms. Almodovar's purse for money and failing to discover any, they threw her on her back and began to search her person. (T.103). The men soon discovered approximately $65.00 to $100.00. (T.103). During the entire events, one of the men remained at Ms. Almodovar's head, holding her down, while the other two men, one of whom was the defendant, were stationed at her feet, one holding the knife. (T.103-104, 134).

One of the two men at her feet then stated, "Give me some pussy", and began to pull her underpants down. (T.104). The other person at her feet assisted in the removal of Ms. Almodovar's undergarments. (T.104). Both men then proceeded to penetrate her vagina with their fingers. (T.104-108). Ms. Almodovar, fearing for her life, grabbed

one of the men by the genitals and kicked the other man in the groin. (T.106, 108). At this point, a vehicle turned down the side street and the headlights were directed toward them. (T.108). The vehicle stopped and turned toward the wooded area. (T.109). The men, fearing detection, fled from the area in different directions. (T.109).

Ms. Almodovar ran into the street and entered the vehicle. (T.110). She then observed an off duty police officer and advised him of what had occurred. (T.110-111). The officer and Ms.Almodovar proceeded to drive around the area in an effort to locate the men who had abducted her. (T.111). Approximately three blocks from the scene, Ms. Almodovar positively identified one of the men, Ronald Mobley, who was placed under arrest. (T.112-113). A knife was concealed within Mr. Mobley's sock. (T.210).

After questioning, Mr. Mobley gave the name of the defendant as one of the accomplices on the night of July 17, 1981. (T.402). As a result, the defendant's photograph was placed in a photo line-up, and the defendant was identified by Ms. Almodovar. (T.124, 260-265). She also identified him in court as one of the men who had fondled her vagina. (T.134).

Mr. Mobley testified at trial, and admitted that he, the defendant, and another person had been involved in an encounter with a woman on July 17, 1981. (T.342). He stated that they were attempting to "make a bank." (T.345).

POINT I

WHETHER THE FLORIDA SUPREME COURT, 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 BY IMPLICATION FROM THE PER SE RULE OF REVERSAL EXPLICATED IN DONOVAN v. STATE, 417 SO. 2d 674 (FLA. 1982).

POINT II

WHETHER THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS WHERE SUCH STATEMENTS WERE NOT A COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT, AS THEY DID NOT REFER TO THE DEFENDANT DECLINATION TO ANSWER QUESTIONS DURING INQUIRY BUT, RATHER WERE AFFIRMATIVE EXCULPATORY STATEMENTS MADE BY THE DEFENDANT.

ARGUMENT

POINT I

THE FLORIDA SUPREME COURT, 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 BY IMPLICATION FROM THE PER SE RULE OF REVERAL EXPLICATED IN DONOVAN v. STATE, 417 SO.2d 674 (FLA. 1982).

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, this Court 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. . .

In United States v. Hasting, supra, (relied upon by this Court in Murray), the Supreme Court held that notwithstanding the protections afforded by the Fifth Amendment of the federal constitution, a comment upon the defendant's exercise of his right to remain silent is not per se reversible error. It was held that a reviewing court must, before reversing upon this basis, review the entire 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, 87 S.Ct. 824, 17 L.Ed.2d 705 (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 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. 103 S.Ct. at 1980, n. 6.

This Court's opinion in State v. Murray, supra, clearly embraces the Hasting and Chapman analysis 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, it is clear that an improper comment - 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. Rather, the error must be evaluated in light of the evidence presented to determine if the offensive conduct is harmless. Accordingly, the per se reversal rule set forth in Donovan v. State, 417 So.2d 674 (Fla. 1982), has lost 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 Fifth Amendment rights and an alleged comment on a defendant's exercise of his right to remain silent.

In Barry v. State, ____ So.2d ____, Case No.84-485 (Fla. 5th DCA April 11, 1985) [10 F.L.W. 934], the Fifth District recently held that this Court in Murray, approved the application of the harmless error rule to comments on a defendant's failure to testify at trial. In so doing, the Court stated:

> Although the defendant in Murray did testify so that the complained of comment was not on his failure to testify, the Murray court could, have applied the "harmless error" rule to the facts of that case without embracing the philosophy of Hasting, because Florida courts have long recognized the application of the harmless error rule to many trial errors. See, e.g., Cobb v. State, 276 So.2d 230 (Fla. 1979). But by holding that:

> [N]evertheless, 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. Murray at 956.
>
> and by embracing the principles of Chapman and Hasting, we can only conclude that the court was holding as well that the type of error reviewed in those cases -- a comment on defendant's failure to testify at trial--would be reviewed in the light of the harmless error rule.
>
> Unfortunately, Murray does not discuss Trafficante v. State, 92 So.2d 811 (Fla. 1957), or David v. State, 369 So.2d 943 (Fla. 1979), which stand for the proposition that a comment on defendant's failure to testify warrants reversal without consideration of the harmless error rule. But the principles adopted in Murray are inconsistent with these earlier cases, and so it appears that the earlier cases no longer apply.

Barry v. State, supra at 935.

The Fifth District had earlier held that because Murray did not concern a prosecutorial comment on a defendant's exercise of his right to remain silent, this Court did not necessarily retreat from the per se reversal rule set forth in Bennett v. State, 316 So. 2d 41 (Fla. 1975) and Donovan v. State, supra. Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984) and DiGuilio v. State, 451 So.2d 487 (Fla. 5th DCA 1984). Rather than retreat from these earlier cases, however, the court in Barry made a weak attempt to distinguish Rowell and DiGuilio on their facts. The court attempted to distinguish between a comment upon the defendant's exercise of his

right to remain silent at the time of arrest as compared to a comment upon the defendant's exercise of his right to remain silent during trial. There is absolutely no basis, however, for an iron-clad rule that a comment concerning post-arrest silence, irrespective of the severity of the comment, is necessarily more prejudicial than a comment upon silence at trial. Rather, each comment should be reviewed in regard to each trial and the evidence adduced therein, to determine if the error is harmful.

At one time, this Court held that a comment on a defendant's exercise of his right to remain silent constituted fundamental error justifying reversal of a conviction even absent an objection. Bennett v. State, supra and Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967). In Clark v. State, 363 So.2d 331, 333 (Fla. 1978), however, this Court retreated from the absolute fundamental error rule with regard to a comment upon the exercise of a defendant's right to remain silent. It was held that a comment upon the exercise of the defendant's right to remain silent was not fundamental error, i.e., an error that goes to the very foundation or merits of the case. As such, a contemporaneous objection is necessary to preserve the issue for appellate review. See, Simpson v. State, 418 So.2d 984 (Fla. 1982); State v. Cumbie, 380 So.2d 1031 (Fla.1980). Clearly, there is no rationale for a rule which would require an objection to an error because it is not fundamental, yet when preserved, mandate reversal despite the fact that the error was not prejudicial to the defendant.

Indeed, 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.

Application of the harmless error rule, in the instant case, reveals that the comment which the Third District held to be an impermissible comment on the defendant's post-arrest silence,[1] was not prejudicial in light of the overwhelming evidence establishing

---

[1] The State, in Point II, demonstrates that the comment in fact was not a comment upon the defendant's exercise of his right to remain silent.

the guilt of the defendant. The victim, Lisa Almodovar, testified as to the events that took place on July 18, 1981. Ms. Almodovar stated that she was walking along the street when three black males approached her brandishing a knife. (T.101). The knife was placed at her side and she was advised not to move. (T.101). One of the men then came behind her and put a headlock on her. (T.101). She was carried to a "little wooded area behind the store" by all three men. (T.101). The men then searched through Ms. Almodovar's purse and her clothes for money. (T.103). While two of the men searched, one continued to restrain her in a headlock and place a knife to her throat. (T.103).

The two gentlemen who had searched and seized her money then began to fondle her vaginal area. (T.104-105). She testified that her body was penetrated by the fingers of the men. (T.107). Shortly thereafter, she was able to escape. (T.108-109). She identified one of the men near the scene of the crime and gave police officers a description of the other two men. (T.112-119). She later positively identified the defendant, from a photo line-up and in court, as one of the two men who was near her feet fondling her vaginal area. (T.124, 133-134). The Detective placed the defendant's picture in the photo line-up as a result of information received from a co-defendant. (T.402-403). In addition, the co-defendant testified at trial that the defendant was present with him at the scene of the crime. (T.342-345).

It is clear from the opinion rendered by the Third District in this case, that it felt bound to reverse the defendant's conviction "despite the overwhelming evidence of guilt" because of the per se reversal rule applied to comments on a defendant's exercise of his right to remain silent. This rule has been receded from by the United States Supreme Court in Hasting, and should likewise be receded from by this Court. The comment at issue sub judice, if error, had no affect whatsoever on the jury's verdict in light of the overwhelming evidence of the defendant's guilt. As such, the question certified by the District Court should be answered in the affirmative, and the defendant's convictions and sentences reinstated.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS WHERE SUCH STATEMENTS WERE NOT A COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT, AS THEY DID NOT REFER TO THE DEFENDANT'S DECLINATION TO ANSWER QUESTIONS DURING INQUIRY BUT, RATHER WERE AFFIRMATIVE EXCULPATORY STATEMENTS MADE BY THE DEFENDANT.

In the instant case, the defendant successfully argued that testimony of a police officer constituted a comment on defendant's right to remain silent. The State respectfully disagrees with the District Court's determination that the statement at issue was a comment as to defendant's right to remain silent. To the contrary, the State submits that the State merely introduced affirmative statements made by the defendant which were elicited not to show that the defendant remained silent, but to show the content of the statement. As such, the trial court properly denied the defendant's motion to suppress.

In Antone v. State, 382 So.2d 1205 (Fla. 1980), the defendant claimed that the trial court committed reversible error in allowing the introduction of testimony which he claimed was an impermissible comment on his right to remain silent. The testimony which the defendant objected to was that of a police officer who testified:

"I thereafter went into the room and was, during this period from 1:10 until 1:20, the time I left the room

> and Mr. Antone did not volunteer any information except he made one statement. Mr. Antone told me that he was a hundred percent Sicilian and Sicilians do not fink."
>
> 382 So.2d at 1213.

In upholding the admissibility of the statements, this Court found that the testimony was permissible as it recounted Antone's affirmative statement and was not a comment on Antone's silence but on what he said.

In Peterson v. State, 405 So.2d 997 (Fla. 3d DCA 1981), the Third District Court of Appeal discussed the Antone decision. The Court noted that the statements in Antone were properly admitted because "there was no reference whatever to the crucial factor that the defendant had asserted his Fifth Amendment right to decline to answer an inquiry during the course of questioning and, indeed no indication that any such questioning had ever taken place." Peterson v. State, supra at 1000, n.3. As pointed out by the Third District, in Antone, the fact that a Miranda situation was involved was not even implied to the jury. As such, the statements were not a comment on silence.

The State would submit that the reasoning and decision in Antone controls in the instant case. During trial Detective Bigler testified as follows:

> Q. When you advised the defendant of the charges that were being placed against him and the date of this incident, did he respond in any way?
>
> A. Yes, he--
>
> . . .

A. Yes, he did.

Q. Advise the members of the jury exactly how it was that George Burns responded to that notice.

A. When I advised him that information, he spontaneously stated, "I'm not making any kind of statement. It couldn't be none of me. I went in the job corps in Georgia in November of 1981."

(T.289-290)

Later during the trial, Detective Chambers, who was present when the defendant made the statement, testified:

Q. Were you present at the time when Detective Bigler had an initial conversation with the Defendant, George Burns?

A. Yes, I did.

Q. Did you hear Detective Bigler....advise the Defendant of the charges against him?

A. Yes, I did.

Q. Did you hear Detective Bigler advise the Defendant that the offenses had taken place in the summer of 1981?

A. Yes, I did.

Q. Did the Defendant respond in any way?

. . .

Did he say anything at all?

A. He made one statement, which I will read from my records.

The statement was, "I ain't making no kind of statement at all. It couldn't have been none of me, because I went into the job corps in Georgia in November of 1981."

(T.331-332).

The above testimony, just as the testimony in Antone, makes no reference at all to an asserted Fifth Amendment right to decline to answer an inquiry during questioning. Additionally, as in Antone, there was no indication that a Miranda situation was even involved. As such, the testimony was not an impermissible reference to the defendant's exercise of his right to remain silent. The statements were affirmative, exculpatory statements offered to prove their content.

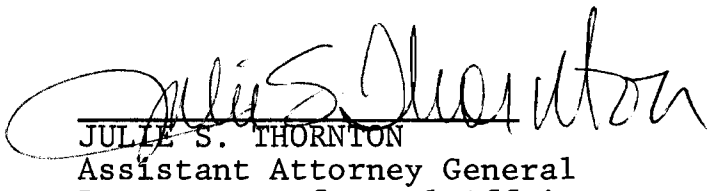
The purpose for the prohibition against comments upon a defendant's exercise of his right to remain silent is to preclude the jury from concluding that the defendant, if innocent, could explain the circumstances, but if guilty, would not. David v. State, 369 So.2d 943 (Fla. 1979). That the invocation of a defendant's right to remain silent should not be used as evidence against him is well established. Griffin v. California, 380 U.S.609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965); Chapman v. California, 386 U.S.18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In the instant case, however, the comment made by the police officer relating the statement of the defendant after arrest would in no way provide a presumption of guilt as a result of silence. Indeed, the statement offered an exculpatory explanation. As in Antone, the comment was not on silence, but on what the defendant said.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Petitioner respectfully prays that this Court reverse the decision of the Third District Court of Appeal of the State of Florida and reinstate the conviction and judgment of the trial court.

Respectfully submitted,

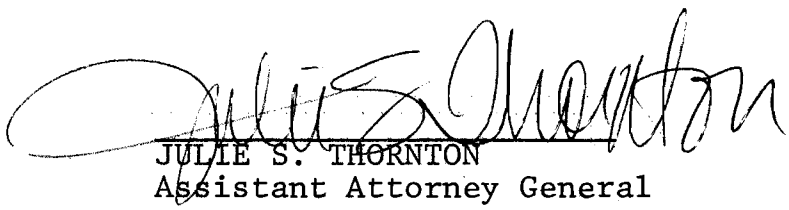
JIM SMITH
Attorney General



JULIE S. THORNTON
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF THE PETITIONER was furnished by mail to MAY L. CAIN, Esquire, Special Assistant Public Defender, 11755 Biscayne Boulevard, Suite 401, North Miami, Florida 33181, on this 7th day of May, 1985.



JULIE S. THORNTON
Assistant Attorney General

/pg