IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	
vs.	)	CASE NO.: 66,906
JAMES B. KEARSE,	)	
Respondent.	)	

PETITIONER'S BRIEF ON THE MERIT

JIM SMITH
ATTORNEY GENERAL
Tallahassee, Florida

Barbara Ann Butler
Assistant Attorney General
Suite 521
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Counsel for Petitioner

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OTHER AUTHORITIES

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PRELIMINARY STATEMENT

Since the filing of the jurisdictional brief, the opinion of the Court of Appeal, First District, has been reported as follows:

> Kearse v. State, 464 So.2d 202 (Fla. 1st DCA 1985)

The opinion is appendixed hereto.

Jurisdiction was accepted and oral argument disallowed by Order of this Court dated July 18, 1985

SUMMARY OF ARGUMENT

The issue presented by this appeal is whether State v. Murray, 443 So.2d 955 (Fla. 1982), modified the absolute rule that "any comment on the accused's exercise of his right to remain silent is reversible error without regard to the harmless error rule", Donovan v. State, 417 So.2d 674 (Fla. 1982), or whether the harmless error doctrine may apply to cases where the challenged comment was a spontaneous, unsolicited remark from a state witness and there is independent and overwhelming evidence of guilt.

STATEMENT OF THE CASE

Respondent was charged with unarmed robbery in the Circuit Court of Duval County (R-5). The information stated that Respondent "unlawfully by force, violence, assault or putting in fear" took "a purse and its contents, the property of Kathy E. Ross, as owner or custodian, from the person or custody of Kathy Ross" Id. On December 13, 1983, Respondent moved to dismiss the information because it failed to allege non-consent of the victim (R-12). This motion was heard (T-9-11) and denied (R-18; TR-11, 12).

The record does not reflect a request to file a belated motion to dismiss. However on January 25, 1984, a second motion to dismiss was filed. R 21. This pleading advanced the same insufficiency argument, but substituted lack of intent to permanently deprive for lack of consent. Compare, R 21,12. The motion was discussed on January 27, 1984 but this transcript is not been brought forward for review.

From the instant record it appears that on January 27th, the trial court reserved ruling on the motion and Respondent was to prepare a memorandum. T 16. On January 30, 1984, the day of trial, the memorandum had not yet been filed. Id. Counsel was given until the afternoon to provide authority so that the trial court would determine whether or not to consider the motion. T 20 [The court was concerned with whether fundamental

error was involved.] Jury selection began. Id. On February 2, 1984, the motion was denied as untimely. R 31 The Court stated:

> ...I have read the memorandum which you have prepared....However, I do find that your motion to dismiss is not timely filed for reason that a prior motion to dismiss was filed pursuant to leave to file such a motion following arraignment. The rules appear quite clear to me, contrary to your fine argument that the Court need not entertain a second motion to dismiss and, in fact, every ground must be asserted in that motion to dismiss. I further find that -- and let me state that in order to reach this conclusion I first had to review your motion just to see if I consider it to be fatally defective as the Green[1] case, some authority which you cite such allegations can be imperfect and yet not be fatally defective. I find, therefore, and I will deny the motion in that I will not even consider the motion.

T 106-7.

Jury trial commenced and testimony as set forth in the Statement of Fact, infra, was adduced. During the testimony, Officer Davis described how Respondent behaved after being taken into custody. Davis stated:

> [H]e was very uncooperative and wouldn't talk.

T. 183. The statement was not offered in response to a direct question. Respondent's counsel immediately moved for a mistrial "based on the officer's testimony that my

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1 Green v. State, 414 So.2d 1171 (Fla. 5th DCA) pet. for rev. denied, 422 So.2d 842 (Fla. 1982).

client refused to talk to him upon being arrested" T-184. The trial judge denied the motion, finding that although he considered appellant to have been arrested, "there was no interrogation, it was part of the statement that he was uncooperative" T-184.

Respondent was convicted by jury of unarmed robbery as charged. R 43. The post-trial motion for arrest of judgment [premised on the ground that the information would not support a conviction] was denied R-46-47.

At the first scheduled sentencing hearing on February 10, 1984, Respondent requested proof of his prior convictions by means of certified copies from court records. T 281. The State was prepared with certified copies of the prior felony convictions, but did not have copies of the "extensive misdemeanor record". T 281-2. The prosecutor requested that Respondent make a "formal election" for the record indicating a desire to be sentenced pursuant to the guidelines. T 283. The record does not contain a statement specifically electing guidelines treatment; however, the sentencing hearing was postponed at the State's request in order to obtain certified copies of the misdemeanor convictions to be relied upon by the State. T 281-284.

Respondent did not object to guidelines treatment on February 10, 1984 or on March 15, 1984 the day of sentencing. T 281-300. The State notes that the cause was also before the trial court on February 22 and 29, 1984 and

those transcripts were not brought before the district court by Respondent.

Respondent objected to prior misdemeanor convictions being used to compute his guidelines score when the record offered by the state to establish them did not show voluntary and intelligent waivers of the rights to counsel to jury trial, and against self-incrimination. R-51-54; TR-293-295. The trial judge allowed all prior misdemeanor convictions proffered by the state to be counted in the scoring. R-56; TR-295. When the prior misdemeanors were counted the guidelines sentence was increased from a range of 30 months - 3½ years to 3½ - 4½ years. The trial judge departed by imposing a sentence of 5½ years because respondent was a "major participant" and "induced another to commit a crime". R-73.

On appeal, Respondent argued that he was sentenced under the guideline provisions of Rule 3.701, F.R.Crim.P., without the required express election. The issue was not addressed in the first district court's opinion as the conviction was reversed on other grounds. Kearse v. State, 464 So.2d 202, (Fla. 1st DCA 1985).

In its opinion, the First District noted that the language of the information "is not worded as clearly as it could be" but a charging document which substantially albeit imperfectly charges a crime is not fundamentally defective. Kearse v. State at 204. The district court

held such imperfections to be harmless when not attacked by a motion to dismiss. Id.

Reversal and remand for a new trial was predicated upon the police officer's spontaneous comment which the district court concluded was a comment upon the silence of the accused in violation of the Fifth Amendment to the United States Constitution. Id. Acknowledging the instant cause was "factually dissimilar" from Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984) cert. pending, State v. Rowell, No. 65,417, which had been certified to this Court to determine whether the harmless error doctrine as set forth in State v. Murray, 443 So.2d 955 (Fla. 1984) had modified the absolute rule requiring reversal, Judge Shivers, writing for the district court felt bound and constrained to follow Donovan v. State, 417 So.2d 674 (Fla 1982). See, Kearse v. State at 204.

The State filed for rehearing and also requested certification of the issue to this Court. Rehearing was denied on March 25, 1985; certification was not addressed. The State's motion to stay the mandate was denied on April 16, 1985; the mandate issued the same day.

Notice to invoke the discretionary jurisdiction of this Court was filed on or about April 19, 1985. Following submission of jurisdictional briefs, jurisdiction was accepted by this Court's order of July 18, 1985. The same order dispensed with oral argument.

This brief on the merit follows.

STATEMENT OF THE FACTS

At approximately 6:00 P.M. on September 17, 1983, Kathy Ross was approached by two black men at a Jacksonville post office. The men asked for directions to a shopping mall but then did not seem to understand the information given them. Ms. Ross repeated the directions. T-124-127. As she did so, one man looked around and grabbed for her purse. T -127. Ms. Ross "pulled away, jerked away" and then:

> They ended up beating my chest and then went for my purse again and I pulled away again but they were stronger than I was and they forcibly took it out from underneath me and ran.

T-128.

Ms. Ross screamed and chased after the men. The commotion attracted the attention of the occupants of a nearby car and the driver backed up almost to the heels of one of the men, who was running on the road. That man, who had the purse, then ran into the nearby woods. T-129, 130.

The man and woman got out of the car and instructed Ms. Ross to call the police T-130. She made the call from the front of the post office. When Ms. Ross returned, the man from the car was coming out of the woods holding her purse which was now dirty. T-131. The purse still contained personal belongings, however the money, which

consisted of several dollars in change and a couple of one dollar bills, was gone. T-132.

Two police officers drove around looking for the suspect while a third officer stayed with Ms. Ross. The two officers eventually returned with a man in the car whom Ms. Ross identified as the Respondent. T-129, 133.

Larry Thurne testified that he and his wife were in their car near the post office and heard Ms. Ross scream. Mr. Thurne saw two black men, one of whom had something in his hand, being chased by a woman. Thurne pursued the two running men by backing his car after them. One man went across a ditch into the adjacent woods. T-142. Thurne walked into the woods, following a path, and found a man laying on the ground underneath a palmetto T-144. As the man got up and began walking away, Thurne noticed a purse on the ground. The man ran away when Thurne retrieved the purse T-144. Thurne called to the police who were nearby and then took the purse to Ms. Ross T-144-146. Thurne identified the Respondent in court as the man he saw in the woods. T-145.

Respondent was apprehended by police officers in the woods and then taken to Ms. Ross, who identified Respondent as one of the men who had taken her purse and run T-155-194. Ms. Ross also identified Respondent at trial T-129.

Respondent had eighteen dollars and 45 cents cash in his pocket when arrested, five dollars was in quarters T-162-163.

Respondent presented no evidence at trial and was found guilty as charged by the jury.

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL ALLEGING A COMMENT ON RESPONDENT'S SILENCE.

ARGUMENT

The law is clear that if an individual, after being given Miranda warnings, indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease because the fifth amendment privilege has been exercised. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.E.2d 313 (1975); Thompson v. State, 386 So.2d 264 (Fla. 3d DCA 1980), pet. for rev. denied, 401 So.2d 1340 (Fla.1981). Reversible error occurs in a jury trial when a prosecutor improperly comments upon or elicits an improper comment from a witness concerning the defendant's exercise of the right to remain silent in the face of accusation, without consideration of the harmful effect of such comment or testimony. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 47 L.Ed.2d 91 (1976); Clark v. State, 363 So.2d 331 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla.1976); Washington v. State, 388 So.2d 1042 (Fla. 5th DCA 1980)

The comment challenged by Respondent on direct appeal was:

> Yes, sir, he was very uncooperative and wouldn't talk.

(T 183). The following was an unsolicited spontaneous remark by a state witness and was not a comment upon a defendant's right to remain silent pursuant to fifth amendment safeguards.

The entire colloquy between the prosecutor and the law enforcement officer is appendixed hereto for this Court's consideration. (See, Appendix, Exhibit B) Upon review, it is obvious that the comment was not relevant to an assertion of the fifth amendment[1] right to decline to answer questions. Indeed the record does not reflect the comment was made in relation to mention of advisement of rights, questioning, or attempted questioning by police officers. It is also apparent that the remark was not a comment upon Respondent's failure to testify at trial.

Contrary to defense representations, the instant circumstances did not constitute an attempt by the prosecution to penalize Respondent for standing mute and exercising his right to remain silent. [See, Respondent's brief before the district court at pp. 12-14]. The authority cited on direct appeal is factually distinguishable. cf. Diguilio v. State, 451 So.2d 487 (Fla 5th DCA

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[1] In the transcript, Respondent's objection and request for mistrial was premised upon the "first" amendment. T 183 Presumably this is an error in transcription. If not, the instant issue was not properly preserved for appeal.

1984) (Did the defendant indicate he was willing to answer questions? Did he make any statements?); Kaplow v. State, 157 So.2d 862 (Fla 2d DCA 1963) (State's attempt to call one of the defendants at trial as a state witness); David v. State, 369 So.2d 943 (Fla 1979); (Prosecutor's closing comment regarding lack of evidence regarding a business failure: if there had been a failure, why didn't he say anything about it); Trafficante v. State, 92 So.2d 811 (Fla 1957) (Indirect comment by prosecutor in closing that defendants failed to take stand and testify in their own behalf.); Demick v. State, 451 So.2d 526 (Fla 4th DCA 1984) (Prosecutor's statement in closing that state's chief witness had, unlike the defendant, voluntarily given a detailed statement admitting involvement); Simpson v. State, 418 So.2d 984 (Fla 1982) (During cross-exam of the defendant, the prosecutor elicited testimony concerning failure to testify before the grand jury.); Bennett v. State, 316 So.2d 41 (Fla 1975) (State witness testified that defendant refused to sign waiver of Miranda rights); Lee v. State, 422 So.2d 928 (Fla 3d DCA 1982) rev. denied 431 So.2d 989 (Comment by prosecutor in closing to effect that if defendant had been beaten, he would have told someone at the hospital); State v. Strasser, 445 So.2d 322 (Fla. 1984) (Prosecutor elicited from a state witness that defendant had exercised his right to remain silent); Jones v. State, 200 So.2d 574 (Fla 3d DCA 1967) (Police

officer testified that victim identified the defendant and he did not say anything); Shannon v. State, 335 So.2d 5 (Fla 1976) (Comment on right to remain silent - specific comment not included); Donovan v. State. (Police officer testified about defendant's actions when first read the Miranda warning during explanation of events leading to the initial statement; court concluded that defendant did not elect to exercise his right to remain silent); Brock v. State, 446 So.2d 1170 (Fla. 5th DCA 1984) ("Today is the day he has to stand up and 'fess to what happened and pay for what he did" where defendant did not take the stand.)

Comment "fairly susceptible" of interpretation by the jury as a comment on a defendant's exercise of his right against self-incrimination mandates reversal. David v. State. Trafficante v. State. Yet in Gaines v. State, 417 So.2d 719 (Fla. 1982), rev. den. 426 So.2d 26 (Fla. 1983), the standard set forth in State v. Bolton, 383 So.2d 924 (Fla 2d DCA 1980) was adopted as the appropriate test for measuring such a remark:

> The test in determining whether such transgression has occurred is whether the remark is manifestly intended or 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'.

Gaines v. State at 724[2]. When this standard is used in conjunction with the instant comment, it clearly fails. In Demick v. State, the Fourth District noted variant interpretations of the applicable standard by the First District in Gaines v. State and by the Second District State v. Bolton. Conflict review was sought but the petition was dismissed by this Court as untimely. State v. Demick, No. 65,763 (dismissed as untimely on 8/17/84) (Motion to reinstate denied 10/3/84).

The Fourth District's line of cases relied upon below by Respondent all stem from Kinchen v. State, 432 So.2d 586 (Fla 4th DCA 1983) which states in its entirely:

> PER CURIAM:
> Upon review of the record we conclude that the appellant is entitled to a new trial because a comment was made during closing arguments which was fairly susceptible of being interpreted by the jury as referring to the appellant's failure to testify. The Florida Supreme Court has held that such comments require the granting of a motion for mistrial or, if such motion is denied, a reversal for new trial. David v. State, 369 So.2d 943 (Fla.1979); Trafficante v. State, 92 So.2d 811 (Fla.1957); Sublette v. State, 365 So.2d 775 (Fla.3d DCA 1979); DeLuna v. State, 308 F.2d 140 (5th Cir. 1962).

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[2] Review of Gaines was sought on the basis of conflict but was denied in February, 1983.

> Accordingly, the judgment is reversed and this cause is remanded for further proceedings in accord herewith.

Id. Neither Demick v. State nor Thornton v. State, 442 So.2d 1104 (Fla 4th DCA 1984) elaborated on the concept beyond stating that if the comment is "fairly susceptible," reversal is required. Thornton at 1106; Demick at 527.

In David v. State, the Florida Supreme Court addressed the conflict between David v. State, 348 So.2d 420 (Fla 4th DCA 1977) (where business failure was the defense..." if he had a business failure, why didn't he say anything about the Jozefyks, about the Groves and about the Foxes?) and Childers v. State, 277 So.2d 594 (Fla 4th DCA 1973) (Where defendant did not take the stand, the prosecutor queried in closing argument "...what reasonable hypothesis has been offered to you, other than the one which indicates...[Motion for mistrial was made].") Both David and Childers involved prosecutorial closing comment, not the unsolicited spontaneous response of a state witness. Additionally, both involved comment on the failure of the witness to testify at trial.

In this regard, Judge Owen, writing for the Fourth District, stated

> It has been consistently held that the prohibition [against any comments on the failure of the defendant to testify] applies without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an

> interpretation which would bring it within the statutory prohibition, and regardless of its susceptibility to a different construction.

Childers v. State at 595 (bracket in original) (citations omitted). The Fourth District reversed and remanded for new trial stating that the rhetorical question immediately preceded by the prosecutor's statement of the applicable law, "is fairly susceptible of being interpreted by the jury as a statement to the effect that 'an innocent man would attempt to explain the circumstances but the defendant offered no such explanation.'" Id. It did not matter to the appellate court that the prosecutor had not intended this interpretation or that the comment was also susceptible to a construction which did not violate the rule. Id; but see, dissenting opinion of Judge Mager. ([W]e do not further this concept if we indulge in conjecture and extrapolation in order to glean susceptibilities, inferences or interpretations not otherwise fairly or reasonably apparent from the circumstances.)

In reviewing David and Childers, this Court advised resorting to the following for "determining whether a conflict exists:"

> ...if the prosecutorial comment [in closing]:
>
> 'is fairly susceptible of being interpreted by the jury as a statement to the effect that "an innocent man would attempt to explain the circumstances but the defendant offered no such explanation . . ."'

> "then the comment thus interpreted or construed violated the prohibition of the rule. What could be a clearer reference to the defendant's silence than the prosecutor's comment: 'Why didn't he [referring to the defendant] say anything about . . .' There is no need to resort to possible interpretations or constructions of the prosecutorial comment when there is such a direct reference to the defendant's silence."

David v. State at 944 quoting David v. State 348 So.2d at 421 (J. Mager, dissent).

In Gaines v. State, or State v. Bolton there was no such direct reference; hence the "test" set forth is in accordance with David's instruction in accessing the impact of a challenged comment. Gaines at 724. Certainly in the instant case, a direct or clear-cut reference to Respondent's silence is not apparent. Moreover the comment was not made in closing argument and did not refer to the Respondent's failure to testify at trial or exercise of his fifth amendment protection against self-incrimination. This Court has not ruled on this precise question, but the question is presently pending in State v. Rowell, No. 65,417.[3]

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[3] Briefs on the merit have been submitted on the following certified question.

> Has 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, __U.S.__,

At best, the challenged comment was nothing more than an unsolicited slip of the tongue by a state's witness. It was under near identical circumstances that the Fifth District held in Rowell v. State, that the harmless error doctrine should apply. In Rowell, the prosecutor during trial questioned the arresting officer as to whether he ever attempted to take a statement from the defendant after his arrest. The answer was:

> Ah, I never asked him that. I never ... I asked him, but he refused to give me any information as far as...

Id at 1226. The comment in Rowell is more directly a comment on exercise of the right to remain silent that is the comment challenged herein. Even so, the State on appeal advanced application of the harmless error doctrine, set forth in United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); State v. Murray; Chapman v. California, 386 U.S. 18 (1967), asking:

> Why should a mere, unintentional slip of the tongue by a State's witness... doom an otherwise proper and lawful conviction to certain reversal despite ironclad testimony and physical and circumstantial evidence which provide

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[3] continued

> 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)?

Rowell v. State at 1228.

> unequivocal and uncontroverted proof of the accused's guilt?

Rowell v. State at 1228. The query is particularly apt under the instant facts.

Assuming arguendo that this Court should conclude that the statement challenged herein is properly construed as a comment upon silence, the State submits the harmless error doctrine should be applied. Admittedly Donovan v. State, decided by this Court in 1982, holds to the contrary.

> Any comment on an accused's exercise of his right to remain silent is reversible error without regard for the harmless error doctrine. Bennett v. State, 316 So.2d 41 (Fla. 1975)

Id. at 675.

Interestingly, even though Donovan v. State sets forth an ironclad rule of reversibility, the conviction in Donovan was affirmed. This Court concluded Donovan had not invoked his right to remain silent and the challenged comment[4]

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[4] Officer Smith's testimony is set forth in its entirety in Donovan v. State, 400 So.2d 1306, 1307-1308 (Fla 1st DCA 1981). However the two comments to which Donovan objected are as follows:

> Timmy denied having any knowledge of knowing what we were talking about
>
> ...
>
> No, sir, Tim didn't say anything.

Donovan, 417 So.2d at 675-676. The latter comment was made in response to a question of whether Donovan understood the Miranda warnings.

> ...could be interpreted as an exercise of his right [to remain silent], but when read in context it becomes clear that the answer is not objectionable....Deputy Smith's answers were clearly relevant to the final determination of the voluntariness of the statement.

Id. at 676. [footnote and citations omitted]. Seemingly each case must be analyzed on its particular facts.

In State v. Murray, this Court addressed the propriety of a prosecutor's closing argument in which the following comment was uttered:

> I suggest to you, ladies and gentlemen, that here is a man who thinks he knows the law; thinks he can twist and bend the law to his own advantage and lie to you in court so that he is acquitted and not sent to prison as a result or otherwise adjudicated in any fashion.

Id. at 956. The Fourth District reversed as a plain unprovoked and unjustified violation of the Code of Professional Responsibility. Murray v. State, 425 So.2d 157, 158 (Fla 4th DCA 1983). This Court applied the harmless error rule as set forth in Chapman v. California and United States v. Hastings, and held that 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. State v. Murray at 956. Justice Shaw, writing for this Court, stated:

> 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.

Id. at 956 [emphasis added]. When this reasoning is applied to the instant case, it is readily apparent that reversal is not required due to the ambiguous slip of the tongue challenged herein. c.f. Molina v. State, 447 So.2d 253, 255-6 (Fla. 3rd DCA 1983) (harmless error doctrine not applied where question intended to elicit response concerning silence.) Samosky v. State, 448 So.2d 509 (Fla. 3rd DCA 1983) (harmless error not applied to comment by prosecutor in closing construed as an indirect comment on failure to testify.

The per se reversible error doctrine has been repeatedly questioned by Florida's district court of appeal. In addition to Rowell v. State, the Fifth District has certified near identical questions in Barry v. State, 467 So.2d 434 (Fla 5th DCA 1985, cert. pending, Barry v. State, No. 67,031; Long v. State, 469 So.2d 1 (Fla 5th DCA 1985) cert. pending; Long v. State, No. 67,091[5].

In Barry v. State, the defendant did not testify at trial, but had given the police three separate statements, two of which were recorded and played to the jury. Defense

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[5] Long and Barry have been consolidated by this Court.

counsel argued in both opening and closing argument that Barry had acted in self defense and had told the truth in the statements. During closing arguments, the prosecutor commented upon the inconsistencies in the statements to which defense counsel objected and requested a mistrial. The Fifth District agreed with the trial court that the statement was not a comment upon the right to silence. Further the Fifth District concluded that even assuming the complained of comment was fairly susceptible of being construed as a comment upon the failure to testify, State v. Murray, approved the application of the harmless error doctrine to such comments.

> In Murray, the court stated its agreement with the analysis of the Court in United States v. Hasting, 461 U.S. 99, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), on remand, United States v. Hasting, 739 F.2d 1269 (7th Cir.1984), (a case involving a comment on a defendant's failure to testify), and held that the appropriate test to determine if error is prejudicial, i.e., so prejudicial as to vitiate the entire trial, 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. Prior to Chapman, the United States Supreme Court had ruled in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) that a California statute permitting a prosecutor to comment on a defendant's failure to testify at trial was unconstitutional. Chapman had been tried and convicted in California prior to Griffin, and argued to the Supreme Court that a per se reversal was required because of the extensive comments made by the prosecutor on his failure to testify at trial. The Chapman court rejected the idea that reversal was mandatory,

and held instead that the harmless error rule would apply.

In Hasting, supra, the Supreme Court again was faced with the question of whether prosecutorial comment on defendant's failure to testify at trial warranted reversal of his conviction. In reversing the circuit court of appeals which had earlier reversed the conviction, the Court said:

> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations... The goal, as Chief Justice Traynor of the Supreme Court of California has noted, is 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.' Traynor, supra, at 81.

103 S.Ct. at 1980, 1981. [citations omitted]

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, 376 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.

Barry v. State at 436.

The Fifth District ultimately concluded that the proposition of per se reversibility set forth in Trafficante v. State and David v. State was inconsistent with the principles adopted in State v. Murray "and so it appears that the earlier cases no longer apply". Id. at 436-437.

In Long v. State, the Fifth District evaluated the following closing argument by a prosecutor in which reference was made to failure to testify at trial:

> ...(defense counsel) asks you to allow his client to walk out of here a free man with no record and never having had to admit that he committed a crime.
>
> ...

> I haven't heard any evidence that he thought this car belonged to one of his friends.

Id. at 1. Specifically disapproving the improper behavior of the assistant state attorney, the district court concluded the evidence was sufficient, applied the harmless error rule set forth in State v. Murray and United States v. Hastings, and certified the same question as set forth in Barry v. State. See, Barry v. State, No. 67,031 and Long v. State, No. 67,091.

In Burns v. State, 466 So.2d 1207 (Fla 3 DCA 1985) cert pending, State v. Burns, No. 66,888, the Third District reviewed the testimony of a police officer indicating the defendant, upon being informed of the charges against him, had spontaneously stated "I ain't making no statements. It couldn't be none of me, I went into the Job Corps in Georgia in November of 1981." Burns at 1208. Prior to the officer's testimony, the State was instructed not to mention the Miranda warnings so as to avoid comments on the right to remain silent. Id. Burns alleged reversible error arguing it did not matter whether the jury actually heard testimony concerning the warnings, the jury could easily infer such a reference from the circumstances. Id. at 1209. The Third District concluded that despite the overwhelming evidence of guilt, reversal was mandated by the per se reversal rule. Id. The issue was certified as a question of great public importance and is pending before this Court. State v. Burns, No.

66,888.[6]

In Marshall v. State, No. 83-709 (Fla 4th DCA December 28, 1984) [10 FLW 88] cert. pending, State v. Marshall, No. 66,374, the Fourth District reversed for a new trial based on the prosecutor's closing argument:

> Ladies and Gentlemen, the only person you heard from this courtroom with regard to the events of November 9, 1981, [the date of the alleged crimes] was Brenda Scavone [the victim]... [mistrial motion made and denied]...as I was saying before I was interrupted, the only person who testified... [second objection was denied]...If I am ever going to be permitted to finish this thought, ladies and gentlemen. The 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...

Id. At this point, a third objection was voiced whereupon defense counsel was instructed not to repeat the objection again.

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[6] 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. Hastings, 461 US 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).

Burns v. State, at 1210.

The Fourth District reviewed the record in its entirety and concluded that since only two people witnessed the events in question and one chose not to testify, the prosecutor's argument could not be construed as comment on the evidence as it existed before the jury. Instead the comment impermissibly highlighted the defendant's decision not to testify. Id. The district court followed the per se reversal cases despite its finding of overwhelming evidence of guilt. A question of great public importance was certified to this court.[7] State v. Marshall, No. 66,374.

In Crawford v. State, No. 83-1322 (Fla 4th DCA March 27, 1985) [10 FLW 814] cert. pending State v. Crawford, No. 66,808, a police officer in response to a question by the assistant state attorney testified:

> ...that the defendant, having been advised of his Miranda rights and having answered a few preliminary questions 'decided not to answer any more of my questions.'

Id. at 10 FLW 814. The Fourth District concluded that the officer's comments impermissibly directed the jury's attention to the defendant's exercise of his right to

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[7] May the harmless error doctrine be applied to cases in which the prosecutor has violated a defendant's Fifth Amendment rights under Griffis v. California, 380 U.S. 689, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)?

Marshall v. State at 10 FLW 88.

remain silent. Noting the harmless error doctrine was inapplicable despite overwhelming evidence of guilt, the district court reversed but certified a question of great public importance.[8] In a specially concurring opinion, Judge Glickstein set forth the evidence adduce at trial which clearly demonstrated guilt beyond a reasonable doubt which justified affirmance.

> Stated another way, again using language from Chapman, absent the constitutionally forbidden comments, honest, fair-minded jurors could hardly have brought in not guilty verdicts. Further again, paraphrasing Chapman, we can safely say, in my view, that the error did not contribute to the defendant's conviction.

Id at 815 (specially concurring). The opinion also notes that Florida's harmless error standard is stricter that the federal counterpart thereby affording greater protections than that afforded by the Fifth Amendment. Id.; See, also Section 924.33, Florida Statutes; Thornton v. State; Boatwright v. State, 452 So.2d 666, 669 (Fla 4th DCA 1984).

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> May the harmless error doctrine be applied to cases in which a witnesss' [sic] testimony violated a defendant's right to remain silent under the Fifth Amendment.

Crawford at 814.

The most recent case to discuss this issue is Knox v. State, No. 84-1007 (Fla 5th DCA April 25, 1985) [10 FLW 1053] which on rehearing, [10 FLW 1671] (July 3, 1985), certified the identical question set forth in Marshall v. State. Noting the similarity to Crawford v. State, the district court, in an opinion authored by Judge Glickstein, found overwhelming evidence of guilt upon which, absent the prosecutor's forbidden comment, honest, fair-minded jurors could hardly have brought in a not guilty verdict.

> Accordingly were we able to do so we would find the federal constitutional error here to be harmless as the error did not contribute to appellant's conviction.

Knox at 10 FLW 1053 citing Chapman v. California.

As the foregoing clearly indicates the majority of the cases pending before this Court on this issue involve prosecutorial reference in closing argument to the uncontroverted testimony of witnesses which is construed, or is fairly susceptible to being construed as comment upon the defendant's failure to testify. Florida district courts of appeal are of the opinion that the harmless error doctrine should apply under such circumstances.

The instant comment is not so egregious. It was not uttered during closing argument to the jury. It was not offered in response to a direct question. Instead the instant comment was the spontaneous unsolicited remark of a state witness. To apply the per se reversal rule in any

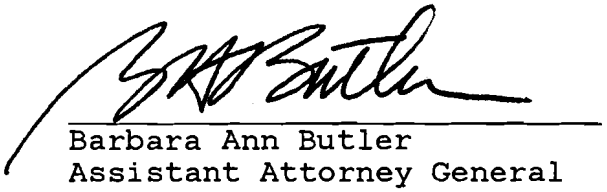
of the foregoing cases, where there is overwhelming evidence of guilt, is improper under State v. Murray, Hastings and Chapman. However to apply the per se rule in the instant case, where there is independent and overwhelming evidence of guilt as demonstrated by two eyewitness identifications, physical and circumstantial evidence, is both unwarranted and prejudicial to the State. Accord, Rowell v. State.

CONCLUSION

The record contains substantial competent evidence to support the trial court's findings and Petitioner, the State of Florida, respectfully requests that this Honorable Court quash the district court's reversal thereby affirming Respondent's conviction and sentence.

Respectfully submitted,

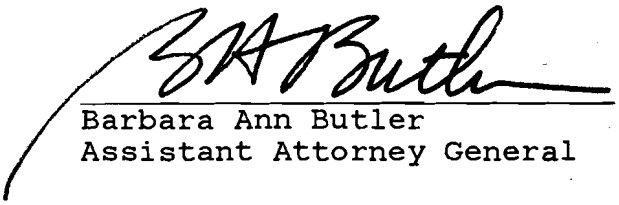
JIM SMITH
ATTORNEY GENERAL



Barbara Ann Butler
Assistant Attorney General
Suite 521
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 7 day of August, 1985.



Barbara Ann Butler
Assistant Attorney General

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