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IN THE SUPREME COURT OF FLORIDA

CASE NO: 67,308

STATE OF FLORIDA,

Petitioner

v.

RICHARD LEON LOWRY,

Respondent

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellant in the Fourth District Court of Appeal and the Defendant in the criminal division of the Circuit Court of the Nineteenth Judicial Circuit in and for Okeechobee County, Florida; the Petitioner was the Appellee and Prosecution, respectively in those lower courts. In this brief the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will be used to denote the record on appeal. All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE

The Respondent will accept Petitioner's Statement of the Case with the following explanation.

The information charged the Respondent with committing a lewd and lascivious act upon a child, to-wit: [redacted] age 6 on August 5th, 1983. (R-193). [redacted] brother age 8 was originally thought to have observed the alleged act upon [redacted] and Count II of the information charged the Respondent with committing a lewd and sascivious act in the presence of the brother, [redacted] (R-193). Later, it was shown [redacted] was not home the night of the alleged act and apparently, for this reason, Count II was dropped by the State (R-72), the point made here is that the two counts of the information resulted from the same alleged act of the Petitioner.

STATEMENT OF THE FACTS

The trial of this case was held on December 7th and 8th, 1983. Witnesses for the Petitioner consisted of [redacted] and her Mother, [redacted]. Witnesses for the Respondent consisted of the Respondent, RICHARD LEON LOWRY and his Mother, LULABELLE LOWRY.

The Respondent, RICHARD LEON LOWRY, a dairy employee, met [redacted] on Good Friday of 1982 in Okeechobee County and in April of 1982 he moved in with her on a dairy. Mrs. [redacted] had three children who at the time of trial in this case were [redacted] age 9 years, [redacted] age 6 years and [redacted] age 3 years. Until on or about August 9th, 1983, the said [redacted] trusted the Respondent completely with her three minor children. (R-95). The Respondent worked on a dairy and [redacted] worked at a local bar and when she was working, the Respondent babysat her children. While living together, until this matter arose, the Respondent would bathe the children and cared for them as a father. [redacted], the complaining witness, developed chickenpox during this period of time and the Respondent had to rub lotion on the child's naked body. (R-58).

The Respondent's Mother, LULABELLE LOWRY, was the only witness, other than the Respondent, who testified for the Respondent in this case. She testified that before this matter arose, she and the said [redacted] had a conversation about marriage since Mrs. [redacted] and the Respondent were living together. Mrs. [redacted] told Mrs. Lowry that when she got enough money she was going to kick the Respondent out of the house and think of a way to throw him in jail. (R-87).

The Respondent is charged with committing this crime on August 5th, 1983, which was a Friday. The Respondent babysat Mrs. [redacted] three children on the evening of August 5th, 1983, while Mrs. [redacted] worked at a local bar. (R-95). The evidence is that the oldest boy, [redacted] age 9, spent the night with a neighbor and was not present on the evening at the home of the Respondent and Mrs. [redacted] Present in the home, was the Respondent, [redacted] the complaining witness, [redacted], Mrs. [redacted]s 3 year old son, and a 8 year old neighbor girl, [redacted] The Respondent testified that nothing out of the ordinary occurred that night and nothing was mentioned to him about any alleged molestation until Tuesday, August 9th, 1983. (R-99). Previous to this, the Respondent and had been taking [redacted] with him to work on the dairy. However, his employer had told him recently, not to bring [redacted] to work. (R-100-102). On the morning of August 9th, 1983, he had a fuss with Mrs. [redacted] over why he could not take [redacted] to work with him. He said the argument was more severe than the usual arguments they had had about this and when Mrs. [redacted] left him at the dairy, she drove away rapidly. (R-100).

The Respondent testified that later that day, Mrs. [redacted] called him at the dairy and advised him that the children said he had molested them. He denied the accusation and she discussed the possibility of getting back together and he indicated that he had had enough and he thought they should part company. (R-101-102). This was the Respondent's first knowledge that the children had ever accused him of molesting any of them.

On August 9th, 1983, after work, the Respondent moved out of the house and has not lived with Mrs. [redacted] or had

any dealings with her or her children since that time. (R-103).

On August 10th, 1983, the Respondent was arrested on the charges and remained in jail continuously up to trial. The information charged the Respondent with two counts, both on the same day of August 1983. Respondent is charged with unlawfully handle, fondle or make an assault upon a child, to-wit: [redacted] in a lewd, lascivious and indecent manner. Said child being 6 years of age. Count II accused Respondent of committing lewd and lascivious acts in the presence of [redacted], a child under the age of 14 years, without the intent to commit sexual battery.

The information was dated October 31st, 1983 and apparently at that time, the Petitioner believed that [redacted] had witnessed the lewd and lascivious acts on [redacted] and when it was discovered that [redacted] spent the night at a neighbors house on August 5th, 1983, the Petitioner nolle prossed Count II (R-160) and Respondent went to trial on Count I of the information.

The Petitioner upon Order furnished a Statement of Particulars to the Respondent stating as follows:

> In reference to the charges the acts constituting the lewd and lascivious charge consist of the defendant in an unclothed or semi-unclothed condition, fondling and handling the victim, also in an unclothed or semi-unclothed condition upon the bed in the residence of the defendant and the victim. Further, the defendant placed or attempted to place his penis in the victim's vagina. The acts took place at the residence of the defendant and the victim, [redacted] Okeechobee, Florida. The acts took place

on the date charged between 6:00 P.M. and midnight.

Two witnesses testified for the Petitioner: Six year old [redacted] and her Mother, [redacted] The Petitioner had other witnesses subpoenaed but did not call them.

The Petitioner offered no rebuttal testimony to the testimony of the Respondent or that of his Mother, LULABELLE LOWRY.

[redacted] was the first witness for the Petitioner. The Respondent's attorney, Assistant Public Defender, Jerald Bryant, moved that [redacted] be qualified as being competent outside the presence of the jury. The Motion was denied by Judge Geiger. (R-30-34). Mr. Young and Judge Geiger asked [redacted] questions going into her competency. These questions appearing on pages 35 through 39 of the record and these should be examined to fully understand the problem with establishing her competency. [redacted] testified well for Mr. Young regarding her age, name and her mother. Page 36, going into her competency, shows a series of questions by Mr. Young without any answer whatsoever. Judge Geiger then interrogated [redacted] on pages 38 and 39 of the record. These pages show several series of unanswered questions followed by (can you answer out loud? A: Yes). Whether [redacted] meant she could answer out loud or she was answering one of the preceeding questions and if so, which one, is unknown.

The only questions as to her qualifications that [redacted] answered without being asked at the end of the question, can you answer out loud, were as follows:

Q. Okay. Now do you ever go to church?

A. Some times. (R-38).

Q. Now, what kind of punishment happens like to children in school if they are bad?

A. The teacher talks to them.

Q. What other punishments?

A. Or stand them in the corner.

Q. What kind of punishment happens at home if you are bad?

A. You get whippings. (R-39).

[redacted] did not testify that she knew what an oath was, what a lie was, that lying was bad or what she knew that any punishment could be imposed her for lying.

Thereafter, Mr. Young commenced examining the witness concerning the charges against the Respondent.

Most of Mr. Young's questions going to the merits of the charges were either not answered or her answers followed a, "can you answer out loud." She answered "don't remember" to a series of questions going to Respondent's identity in the courtroom, whether or not the Respondent lived with her and her family. (R-40 lines 1-11). To the question, "if something happened to her just before the Respondent left her home", her answer was "no". (R-40 line 15).

[redacted] remembered going to Dr. Brown's office after talking to deputy sheriffs and that he checked her. (R-54). Dr. Brown was not called as a witness and there was no testimony or evidence introduced showing any penetration or injury to [redacted]

After leading and persistent questioning by Mr. Young, [redacted] did state Rick got on top of her on all the beds in all of the bedrooms and rubbed it, put something in her, but

she did not remember if it hurt or not and after that she went to bed. (R-43-44).

Many of her answers were preceeded by "can you answer out loud" and again what her answers applied to is questionable. She could not remember if she told her Mother about it or not. (R-43 line 22).

[redacted] testified that she liked the Respondent. (R-45 line 20). She testified that sometimes he whipped her when she was bad and she would get mad at him and she was mad at him now. (R-47).

After the foregoing, Mr. Young asked [redacted] again if what she told the people here, what Rick did to you, is that the truth? Her answer was "I don't know." (R-48).

On cross examination by Mr. Bryant, [redacted] stated that she did not remember whether [redacted] was in the room when Rick did that and she said her brothers, [redacted] and [redacted] were watching television and then said [redacted] was not at her house that night. (R-50). She further stated that when Rick was on top of her, God and Jesus were in the room. (R-51 lines 4-10).

Again, on cross examination, [redacted] stated that she was in her bed when Rick was on top of her and not on all the beds as she previously testified. (R-56).

She did not remember her Mother asking her about it and she remembered having chickenpox and remembered Rick, the Respondent, rubbing lotion on the dots with her clothes off. (R-58 lines 1-7). She did not remember whether it was before or after her birthday when Rick got on top of her. (R-58). Later, on page 59 of the record, she testified it was after

her birthday and that it was after she started back to school and she was sure of this. (R-59). She again testified that [redacted] was not spending the night at her house that night. (R-59).

This completes the testimony of [redacted] She did not identify the Respondent in the courtroom, she did not remember whether or not the Respondent lived with her and her family and while giving testimony that might indicate he molested her and other questions from Mr. Young and Mr. Bryant, she stated "No" to whether what she had told them about Rick was true. At no point did she state when this happened and in Okeechobee County, I think anyone can take judicial notice that school is not is session on August 5th.

The second and last witness for the Petitioner was [redacted] She stated she became aware of the accusation because of something [redacted] told [redacted] (R-69) and she called the Respondent at work on either Monday or Tuesday following the alleged episode on Friday.

Mrs. [redacted] stated on cross examination that she was now living with another man, (R-69) and on the night of the alleged offense, [redacted] was spending the night with a friend and [redacted] was sleeping at her house. (R-69-70). She stated that she had no previous knowledge of the charges and never suspected anything of this nature until the specific episode. (R-71).

Mr. Bryant, on cross examination, asked Mrs. [redacted] as follows:

"But [redacted] wasn't home when it happened was he?" Mrs. [redacted] replied, "No, but he had been home beforehand the times it happened before." (R-72).

Mr. Bryant asked for a mistrial based on Mrs. [redacted] answer. The Judge's ruling is not discernible but was later denied. (R-72).

Mrs. [redacted] admitted on cross examination that when the law enforcement officers were trying to interrogate [redacted] did not want to talk and then Mr. Bryant asked her the following question:

"Was it you who told [redacted] that if [redacted] didn't talk then Rick would not go to jail?" Mrs. [redacted] responded, "I said [redacted] has to talk in order for this to get Ricky help. I never did say jail. I tell my children that they need to talk to get Ricky help, not to put him in jail. I don't want them to look at that for the rest of their lives, no, I didn't say that." (R-72).

Mrs. [redacted] said she didn't remember if she was present when [redacted] told [redacted] if she didn't talk Rick would not go to jail. (R-75).

Mrs. [redacted] testified that when she came home, after midnight from the bar, on the night of the alleged crime, that [redacted] and [redacted] were sleeping in the boys bedroom and the Respondent was in "our bed". (R-70). On direct examination, Mr. Young asked Mrs. [redacted] if in June of 1982 she had moved to a certain address and she stated, "No, he went to jail at that time."

The Respondent's attorney asked for a mistrial based on her comment and the Court's response is indiscernible again, but apparently the Motion for Mistrial was denied. (R-63).

Mrs. [redacted] testified that she did not remember if she told LULABELLE LOWRY that she was going to kick the Respondent

out of the house and find a way to put him in jail previous to the alleged molestation. (R-70-71).

Mrs. [redacted] as was true of the only other Petitioner's witness, never testified as to what day, month or year the supposed molestation took place and the Petitioner rested its' case without any evidence going to the date or time of the alleged crime.

The Petitioner rested its' case and Mr. Bryant moved for a Judgment of Acquittal on the grounds the Petitioner did not prove the date or time of the offense as the Petitioner had listed in its' Bill of Particulars and on an insufficiency of evidence going to the offense. (R-79). This Motion was denied by the Court. (R-82).

Respondent's first witness was LULABELLE LOWRY, the Mother of the Respondent, who testified that Mrs. [redacted] told her, previous to these charges, that she was going to kick the Respondent out of the house and find a way to throw him in jail. (R-80-88).

The Respondent was the second and last witness for the defense. He stated that he babysat Mrs. [redacted]s three children while they were living together and on August 5th, 1983, Mrs. [redacted] returned to work after being off for six weeks. (R-95).

The Respondent confirmed the testimony of Mrs. [redacted] that on the date of the alleged crime, [redacted] slept at a neighbor's house and [redacted] [redacted] 8 years old, spent the night at their house. (R-96).

The Respondent specifically denied the charges against him and denied molesting any of Mrs. [redacted]s three children and that he had, during his live in relationship with Mrs.

[redacted] bathed the children repeatedly, in the nude and had done so at times when Mrs [redacted] was present. (R-97).

The Respondent also testified that the three children developed chickenpox and he had to rub lotion all over their naked bodies on several occasions during their sickness and stated that before the accusation against him by Mrs. [redacted] on August 9th, 1983, he had never had any problem with Mrs. [redacted]s children complaining of misconduct on his part. (R-97).

The Respondent testified that he played games with the children and on the night of the alleged offense, the children got him to play house with them. Participating in the play were [redacted] (R-98).

The Respondent testified that on August 8th, 1983, three days after the alleged offense and on Monday, he spent the night at the house and there was no mention of the matter. On Tuesday, August 9th, 1983, he had a very hot argument with Mrs. [redacted] over not taking her son, [redacted], to work with him at the dairy. He stated that [redacted] had often gone to the dairy with him and played around the dairy while he worked. But, his employer had advised him that because of the danger of [redacted] being hurt and the dairy being held responsible, he could no longer bring [redacted] to work with him. He stated that Mrs. [redacted] became inflamed over him not taking [redacted] to work and when she took the Respondent to work, she sped away rapidly in the automobile. The Respondent testified that this was a more severe argument then the couple usually had and that up to this point, no mention of molestation had been made to him by anybody. (R-98-100, R-108).

Respondent testified that several hours after going to work, Mrs. [redacted] called him on the telephone and said the children had accused him of molesting them. (R-102). He denied the charges and he also stated that after Mrs. [redacted] told him about the charges she stated that she thought they should get back together. He told her he had had enough and felt like they should separate. (R-102). He stated that he called her back that morning and they argued some more and she advised him that she was going to the police. (R-113).

After the Respondent's testimony, the defense rested and the Petitioner offered no rebuttal. There was no rebuttal or testimony by the Petitioner denying the serious argument the Respondent and Mrs. [redacted] had on the morning that she called him about the charges.

The Petitioner did not call [redacted], DR. BROWN or any of the people who had interrogated [redacted] during the investigations of the charges. (R-114).

After both parties rested, Mr. Bryant moved for a Judgment of Acquittal (R-117) which was denied. (R-118).

The Court reserved ruling on the Motion for Mistrial involving Mrs. [redacted]s comments that [redacted] had seen the Respondent on other occassions until post trial proceedings. (R-117).

In his final closing argument to the jury, the Assistant State's Attorney, Mr. Anthony Young, stated to the jury as part of his summary:

"It might have been but that is not the case. You heard Mr. Bryant say that he has talked to the witnesses in this case many times and that is true. Until Mr. Lowry testified

in here the other day I had no idea whatsoever what he was going to say but he knew exactly what all of the State witnesses were going to say before he ever got up and testified. They had no idea what he was going to say. Keep that in mind."

"Yes, I read off a list of witnesses and I think I told you when I read them at the Judge's request that all of these people would not be called. The people Mr. Bryant is referring to, you saw them sitting here yesterday. You see one of them still here."

The Respondent's attorney moved for a mistrial based upon Mr. Young's comment to the jury that the State had no knowledge to what Mr. Lowry was going to say at the trial. This was the third Motion for Mistrial and the Motion was denied. (R-141-142).

The trial was concluded on December 8th, 1983 with a verdict holding the Respondent guilty of "Lewd and Lascivious Acts". (R-203).

In the post trial proceedings held on August 5th, 1983, the Court denied the Motion for Mistrial of the Respondent regarding Mrs. [redacted]s comments. (R-157-163).

On February 8th, 1984, the Respondent elected to be sentenced under the new sentencing guidelines (R-189) and the Court adjudicated the Respondent guilty, recommended that he be classified as a mentally disordered sex offender under Chapter 917 Florida Statutes, announced the Court was deviating from the guidelines and rather than sentencing the Respondent to four and one-half to five and one-half years called for in the guidelines, gave the Respondent a ten year sentence (R-190) and entered a judgment adjudicating the Respondent guilty and

sentenced him to the ten years. (R-207-210). The Court entered an Order dated February 15th, 1984, setting forth reasons for deviating from the guideline sentence. (R-212-213).

The trial proceedings in this cause were recorded by mechanical means and there was no court reporter. The record has many places in it where the transcriber states proceedings are inaudible, which we will go into more fully in this brief.

The Respondent timely appealed his conviction to the Fourth District Court of Appeals raising issues whether Respondent's two Motions for Judgment of Acquittal were properly denied, whether Respondent's three Motions for Mistrial were properly denied and whether the trial court properly denied the Respondent's Motion to determine the competency of the alleged victim to testify outside the presence of the jury and properly allowed the alleged victim to testify.

The Fourth District Court held that the remarks by the prosecutor, that until the trial he did not know what the Respondent would testify to though the defense attorney knew what the State's witnesses would testify to, was fairly suscetible of construction as a comment upon Respondent's right to remain silent and is reversible without resort to the harmless error.

The opinion of the District Court also stated that it was not reversing on the issue of the competency of the alleged victim because Respondent's trial attorney failed to preserve it by timely objection but noted that the witness was unable to make clear responses to questions and instructed the trial judge on remand to ensure that the victim's responses demonstrate her competency. Lowry v. State, 468 So.2d 298.

The Respondent has remained in jail and prison since his original arrest on this charge on August 10th, 1983. (R-103).

After the District Court denied Respondent's Motion for Rehearing this appeal ensued on the petition of Petitioner.

SUMMARY OF ARGUMENT

POINT I

The improper comment by the Prosecutor going to Respondent's right to remain silent is reversible error after applying the harmless error rule. The record discloses evidence of guilt against Respondent was extremely weak and a definite reasonable doubt exists as to whether the comment was harmless. The District Court's reversal of the Trial Court should be sustained.

POINT II

The Prosecutor's comment that the jury keep in mind that he did not know what the Respondent would testify to until he testified at the trial was an improper comment or was fairly susceptible as a comment upon the Respondent's refusal to testify in pre-trial proceedings. The District Court's reversal of the Trial Court should be sustained.

ARGUMENT

POINT I

THE IMPROPER COMMENT BY THE PROSECUTOR GOING TO THE PETITIONER'S RIGHT TO REMAIN SILENT CONSTITUTES REVERSIBLE ERROR EVEN IF THE HARMLESS ERROR DOCTRINE IS APPLIED TO THE CASE BECAUSE OF AN INSUFFICIENCY OF EVIDENCE OF PETITIONER'S GUILT AND BECAUSE THERE IS A REASONABLE DOUBT THAT THE COMMENT WAS HARMLESS.

In State v. Marshall, 476 So.2d 150 (Fla 1985), this Court adopted the harmless error rule in connection with improper comments by the prosecutor on the defendant's failure to testify. The opinion in the Marshall case stated:

> "Any comment on or which is fairly susceptible of being interpreted as referring to a defendant's failure to testify is error and is strongly discouraged."

This opinion further stated that such an error should be evaluated according to the harmless error rule with the State having the burden of showing the comment to have been harmless beyond a reasonable doubt.

The Marshall case was remanded to the District Court for reconsideration in light of the rule prenounced. The opinion did not disclose if this Court had been furnished with a record or brief showing how strong the evidence was against the defendant. The instant case is distinguished from the Marshall case and State v. Murray, 443 So.2d 955 (Fla 1984) in which this Court adopted the harmless error rule in a prosecutor's comment on the state of the mind of the defendant. The Marshall case does not disclose the evidence

against the defendant and in the Murray case the evidence was overwhelming. In the instant case the evidence was extremely weak. So weak in fact that had the District Court not reversed the trial court on the improper comment counsel would have felt obligated to appeal on the District Court's failure to reverse the trial court's denial of Respondent's Motions for Acquittal. The evidence against the Respondent was the testimony of a six year old child who was never shown to be qualified as a competent witness. She never identified the Respondent in the court room. She did not remember whether the Respondent ever lived with her Mother and her. She did not remember talking with her Mother about the alleged offense. She did not know when the alleged offense happened. After repeated coaching by both the Judge and attorneys to answer questions she answered only a few questions without being instructed to answer yes or no. In order to argue that the evidence in the record would sustain a conviction one would have to argue that when a question was asked the witness, with no response and then when a second question was asked "can you answer yes or no" or "can you answer out loud" with a "yes" answer that the "yes" answer was a reply to the first question rather than the last one. Petitioner's brief states that the evidence was overwhelming against the Respondent. This is absolutely wrong. After many leading questions the prosecutor finally got the witness

to say that the Respondent got on top of her and then assuming that several yeses by her refer not to "can you answer yes or no" but to a preceeding question that he put his thing in her (R-41-44). After this series of questions the prosecutor asked and the witness answered:

Q. Okay. Now, what you just told us, told these people here, what Rick did to you, is that the truth?

Can you answer, honey, yes or no.

A. I don't know.

Even though [redacted] was examined by a physician for evidence of being seduced several days after the alleged crime, the doctor was not called to testify and there was no evidence presented at the trial of any physical sign of penetration. The girl was six and the Respondent was a grown man and all reason would indicate that if the Respondent seduced [redacted] or "put his thing in her" that there would have to have been some physical signs.

The only other witness for the Petitioner-State, [redacted]s Mother, [redacted] testified she was at work at the time of the offense and learned of the incident from her eight year old son [redacted] (R-65) three days after the incident. This testimony is revealing in that originally and until at least October 27th, 1983, the Petitioner-State thought that [redacted] the brother, witnessed the alleged molestation of [redacted] The information dated September

1st, 1983, contained a second count accusing the Respondent of committing a lewd and lascivious act in the presence of [redacted] on the same date, August 5th, 1983, when [redacted] was supposedly molested. The attorneys were still arguing both Counts in a hearing on October 27th, 1983. (R-3).

Mrs. [redacted] testified at the trial that [redacted] was not home at the time of the offense, but was spending the night with a friend. (R-69). [redacted] was not called as a witness by the State and the State nolle prossed Count II apparently after discovering that [redacted] was not home the night of August 5th, 1983. Mrs. [redacted] testified after talking to [redacted] on August 8th, 1983, that she called the Respondent at work and confronted him with the accusation. She did not testify that on that date she talked to [redacted] and when asked on cross examination how many times she talked with [redacted] about the incident she answered, "not very often". (R-74). After talking to [redacted] on August 8th, 1983, she immediately called the Respondent and confronted him with the accusation (R-65). Apparently, Mrs. [redacted] and the investigating officers were confused as to whether [redacted] was present. The unrebutted testimony of the Respondent was that on the morning of August 9th, 1983, that he and Mrs. [redacted] had a bad quarrel and after the quarrel she called him at work and advised him of the accusations regarding [redacted] He denied the charges and she suggested

they get back together and he said no, he had had enough. Mrs. [redacted] did not deny telling the Respondent's Mother previous to the incident that when she was tired of the Respondent she would throw him out and think of a way to have him put in jail. (R-71). She testified she did not remember making the statement. She did not testify she did not make the statement while Respondent's Mother, Lulabelle Lowry testified she did make the statement to her. (R-80-88).

Anybody would have to consider from the above, the possibility that Mrs. [redacted] became bitter toward the Respondent and induced [redacted] to tell the officers that he saw the Respondent seduce [redacted] commencing this matter.

The following took place on cross examination of Mrs. [redacted]:

Q. Was it you who told [redacted] that if [redacted] didn't talk then Rick would not go to jail?

A. I said [redacted] has to talk in order for this to get Ricky help. I never did say jail. I tell my children that they need to talk to get Ricky help, not to put him in jail. I don't want them to look at that for the rest of their lives, no, I didn't say that.

Q. Well, do you have any idea where [redacted] got the idea that the whole purpose of this was to put Ricky in jail?

A. No.

MR. YOUNG: Your Honor, I would object to that. I don't think there has been any testimony that that was the child, Michael's statement.

THE COURT: The objection is sustained.

Q. Were you present when Michael made such a statement?

A. I don't remember.

Q, How old is Michael?

A. Nine. (R-75-75).

Both Michelle and the Respondent testified that when Michelle had chickenpox that the Respondent rubbed lotion all over Michelle's naked body. (R-58, R-97). The only competent evidence to the charges against Respondent in Michelle's testimony is her testimony that when Respondent got on her he rubbed it. (R-43-44). The child may have been referring to the chickenpox rubbing and the questions by both attorneys to Michelle referred to the incident as "it", "this" and "that". (R-44, 46, 59). What "it", "this" and "that" meant to Michelle is questionable. A lot of incidents came out at the trial, the chickenpox occassion, spankings of Michelle, birthdays and there is no proof as to what Michelle thought the lawyers were referring to.

The cases decided by the United States Supreme Court and the Court in establishing the harmless error rule in connection with prosecution misconduct at the trial held that whether such misconduct constitutes reversible error is

determined by the degree of proof introduced at the trial to the charges and whether there is a reasonable doubt that the prosecutional misconduct did not influence the jury and that the burden is upon the State to prove beyond reasonable doubt that it had no influence on the jury. Chapman v. California, 386 U.S. 18 (1967), United States v. Hastings, 461 U.S. 499, 103 S.ct. 1974, 76 L.Ed 2d 96 (1983), State v. Murray, 443 So.2d 955 (Fla 1984), and State v. Marshall, 476 So.2d 150 (Fla 1985).

The Marshall case cited above held that when evidence is strong and when we know beyond a reasonable doubt that the Defendant will be convicted again, it makes no sense to order a new trial. In the instant case it is highly questionable that the State could get past a Motion for Judgment of Acquittal with the evidence presented in this case. At any rate, the evidence is extremely weak and conflicting. In State v. Murray, 443 So.2d 955, 956, this Court held the error harmless because the evidence against the Defendant was overwhelming. Quite different from the instant cse. United States v. Hastings, 461 U.S. 499 103 S.CT 1974, 76 L. Ed 2d 96 (1983), involved evidence of guilt expressed by the Court as establishing a compelling case of guilt, page 1976 of 103 S. Ct. And who can say that the Assistant State's Attorney's comment in closing argument that neither he nor the State's witnesses knew what the Respondent -Defendant was going to

testify to at the trial while the Respondent-Defendant knew exactly what they were going to say - did not cause some members of the jury to think something to the effect that if this man is not guilty of this crime why didn't he go talk to the police or the prosecuting attorney or to Mrs. [redacted] and tell her he did not do it. After making the comment the prosecutor emphasized by saying "keep that in mind". In other words, he impressed upon the jury of the need to remember that the Respondent would not make a statement concerning the crime previous to the trial. (R-141-142). The comment was obviously a comment on Respondent's Fifth Amendment right to remain silent at all stages of a criminal investigation and proceeding.

Add this prejudicial remark to the unresponsive remarks by Petitoner's witness, [redacted] that the Respondent had been in jail on a previous matter and that while [redacted] did not see Respondent molest [redacted] on August 5th, 1983, he saw Respondent do it on previous occassions and you can easily see how the jury could have been extremely prejudiced against Respondent and could have entered its verdict of guilty on prejudice rather than on any competent evidence and in considering the proof of guilt consideration should be given to the probability that a six year old child used to spankings would testify to the way her Mother or her older brother told her to. Mrs. [redacted] admitted telling [redacted] that [redacted] had to testify against Ricky. (R-74-75).

In summary on this Point, even if the harmless error doctrine is applicable to this case the prosecutorial remark that Respondent refused to talk about the charges against him until the trial is reversible error because the evidence against Respondent was extremely weak and because a definite reasonable doubt exists as to whether the comment was harmless.

POINT II

THE TRIAL COURT COMMITTED ERROR IN DENYING RESPONDENT'S MOTION FOR A MISTRIAL BECAUSE THE REMARKS AT LEAST ARE FAIRLY SUSCEPTIBLE OF CONSTRUCTION AS A COMMENT UPON RESONDENT'S RIGHT TO REMAIN SILENT

This Court has held for many years that any comment that directly or indirectly can be construed as a comment upon a Defendant's right to remain silent is error.

In Trafficante v. State, 92 So.2d 811 (Fla 1957), the prosecutor's remark that testimony here is uncontrodicted where defendant did not testify were held by this court to be reversible error because even though they might be construed as a comment on something else they easily could have been considered by a jury as at least an indirect comment on the fact the Defendant did not take the witness stand.

On page 814 of the opinion, this Court pronounced the following rule:

> "In summary, our law prohibits any comment to be made, directly or indirecIty, upon the failure of the defendant to testify. This is true 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. The comment of the State Attorney herein might merely have been lapsus linguae in the heat of argument, but it constituted a violation of F.S. Section 918.09."

The Supreme Court reiterated the above quoted rule in David v. State, 369 So.2d 943. In this case the prosecutor

made a comment that there was no evidence of a business failure. This Court in reversing the District Court and trial court held that the comment was reversible error and on page 944 of the opinion stated:

> "Any comment which is "fairly susceptible" of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error, without resort to the harmless error doctrine."

State v. Marshall, 476 So.2d 150 was the first Florida decision by this Court holding that the harmless error doctrine should be applied to improper comments on Defendant's failure to testify. In this case the prosecutor stated that the only person you heard from in this courtroom with regard to the events on November 9th, 1981, was Brenda Scavone. The opinion remanded the case back to the District for application of the harmless error doctrine to the facts because apparently, the Supreme Court did not have a complete record. This Court did not reverse on the grounds that the comment was not error and held that any comment on or which is fairly susceptible of being interpretated as referring to defendant's failure to testify is error.

Rule 3.250 Florida Rules of Criminal Procedure provides that no accused can be compelled to give testimony against himself and that prosecuting attorneys are forbidden to comment on a defendant's failure to testify.

In the instant case, the comment was a reference to the failure of the Respondent to give a statement to the law enforcement officers and prosecuting attorney and witnesses for the Petitioner-State before the trial.

The United States Supreme Court in Mirando v. Arizona 384 U.S. 436, 16 L.Ed 2nd 319, 98 S. Ct. 1091 (1966) held that the prosecution may not use at a trial the fact that an individual stood mute, or claimed his privilege against self incirmination in face of an accusation and during pre-trial proceedings.

Petitioner, in its brief, cites authority that a mistrial is addressed to the sound discretion of the court and should only be done in cases of absolute necessity and cites Furguson v. State, 417 So. 2d 639 (Fla 1982), Jackson v. State 419 So. 2d 394 (Fla 4th DCA 1982) and salvadore v. State 366 So. 2d 745 (Fla 1978). Neither of the three cited cases involves a prosecutorial comment on the Defendant's right to remain silent. This Court has always held it is error to comment on the accused's silence and that a Motion for Mistrial should be granted by the trial court because of such a comment. I can find no authority that the trial court has discretion to deny a mistrial on a motion based on a prosecutor's comment on the defendant's remaining silent. Now, since this Court in State v. Marshall, supra, has established a rule that requires the application of the

harmless error doctrine to such comments, the trial court would have to apply this rule and determine the evidence in the case and the reasonable doubt principle in making its decision. As previously shown, there was an obvious improper comment and the evidence of guilt was weak and there was a reasonable doubt that the comment was harmless so the trial court committed reversible error in failing to grant the Respondent's Motion for Mistrial.

The Petitioner, in its brief, argues that if the prosecutor's argument was placed in context it is clearly a comment on the respondent's credibility and argues that it is a fair reply to defense counsel's closing remarks to the jury that the victim's mother lied, that the victim's testimony was unreliable, and that the Petitioner failed to call many witnesses whose testimony could have had a bearing on the case, the examining physician, the people who questioned [redacted] for the Petitioner, and the child, [redacted] who was stated to have been present when the incident occurred. The defense attorney had every right to attack the credibility of the Petitioner's case. No objection by the Petitioner was made to these comments. The prosecutor's comments that he did not know how the Respondent would testify until hearing him at the trial is not a rebuttal to any of the comments made by defense counsel and the remarks did not explain the Petitioner's lack of credible evidence.

It was brought out at the trial that [redacted], an eight year old neighbor, was present at the incident and told [redacted] of it and her absence as a witness needed commenting upon. The examining physician's absence as a witness was a point on the credibility of the Petitioner's case and the absence of the officers and HRS employee who talked and took statements from both [redacted] and [redacted] needed to be considered by the jury and as shown, none of this had anything to do with the Respondent remaining silent until trial.

Relton v. State, 383 So.2d 924 (2nd DCA 1980) cited by Petitioner on this point expressly states that remarks about the defendant remaining silent constitute reversible error.

The District Court of Appeal 4th District in reversing the trial court in the instant case held that the comments were fairly susceptible of being interpretated as comments on the Respondent's right to remain silent and they obviously were comments on Respondent's failure to testify or give statements in pretrial proceedings. Lowry v. State, 468 So.2d 298.

We agree with Petitioner on one point that the comments were an attack upon Respondent's credibility and the credibility of Respondent's testimony. The average juror might well consider that the failure of the Respondent to talk or give statements to the prosecuting attorney and to the investigating officers was because he was guilty. This

is the very reason why such comments are unfair to a defendant and should be reversible error except when evidence is overwhelming of guilt and there is no reasonable doubt that the comment was harmless.

In conclusion on this point, the comment was obviously a comment on the Respondent's silence during pre-trial proceedure and the trial court's denial of respondent's Motion for Mistrial was error.

CONCLUSION

In conclusion on Points I and II the comments made to the jury by the prosecuting attorney were comments on Respondent's pre-trial silence and were improper and that after applying the harmless error dectrine to the trial proceeding the comments constituted reversible error. This Court has the total record in this case and can apply the harmless error doctrine without remand.

Respondent respectfully prays this Honorable Court to affirm the decision of the District Court of Appeals, Fourth District.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to SARAH B. MAYER, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 27th day of Janary, 1986.

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