IN THE SUPREME COURT OF FLORIDA

WALTER RUIZ, :

Appellant, :

vs. : Case No. 89,201

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER 0236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

This reply brief is directed to the state's "invited error" argument in Issue One. Appellant will rely on his initial brief with regard to all other aspects of Issue One, and as to issues Two, Three, Four, and Five. As anticipated, the state has argued "harmless error" as to all five Points on Appeal (state's answer brief, p. 40-41,46,61-66,70,73). The harmfulness of the prosecutor's misconduct and the trial court's rulings has been fully addressed in appellant's initial brief (see, e.g., p. 52-53,57-63,64,76,79-81,99-102), and will not be repeated here.

ARGUMENT

ISSUE I

APPELLANT SHOULD RECEIVE A NEW TRIAL AS A CONSEQUENCE OF FLAGRANT PROSECUTORIAL MISCONDUCT WHICH COULD WELL HAVE CONTRIBUTED TO HIS CONVICTION IN THIS CLOSELY CONTESTED CREDIBILITY CASE.

In this trial, where the outcome depended on the jury's assessment of the credibility of numerous state and defense witnesses, each side in closing argument challenged the credibility of the other side's testimony. Defense counsel did so in a much more temperate and professional manner than did the prosecutors. Defense counsel did not find it necessary to indulge in name-calling or to argue matters not in evidence. Nevertheless, the state on appeal contends that the prosecutor's patently improper comment -- to the effect that she and her office, as representa-

tives of the citizens of Hillsborough County, had no interest in convicting anyone but the person responsible for this horrible crime -- was "invited error" (SB 27-32). Since the comment, in the context in which it was made (9/975-76), does not appear to be responding to anything, the state has combed defense counsel's entire closing argument and come up with the following statements made by defense counsel, which the state theorizes could have provoked the prosecutor into doing what she did:

> The challenged comment came in response to the defense argument that Mickey Hammonds should not be believed because the plan by the kidnapper-killers "doesn't made sense" (Vol. 11. TR 945), that the identification made by Mary Hahn was questionable (". . . can you imagine a more suggestive identification procedure . . . " -- vol. 11, TR 947) and that there was "tremendous pressure on people to be a good citizen, to be a hero. There's a presumption of guilt in the real world" -- Vol. 11, TR 948). The defense further argued that the police did not check Delio Romanes' foot size ("It became obvious that it was of no use in confirming their theory; the blinders go on. We don't disconfirm out theory" -- Vol. 11, TR 953), and did not look for trace evidence in the recovered automobile ("you don't look; you don't find" -- Vol. 11, TR 954). The defense further intimated that Detective Rockhill was a coercive influence (". . . and while I'm not suggesting Detective Rockhill said we'll arrest anyone who testifies for you, it sounded like that. It sounded like that to a scared man sitting in the Orange County jail or the Orange County sheriff's office" -- Vol. 11, TR 971). [Footnote omitted].

(SB, p. 27)

Contrary to the state's contention, these statements were not "unfair assaults" (see SB, p. 29); they were neither objected to nor objectionable, and they basically amounted to garden variety

closing argument in a credibility trial. Compared to the totality of the prosecutor's closing arguments,[1] the totality of defense counsel's argument was a model of decorum and playing by the rules. Nothing said by defense counsel could remotely have justified the prosecutor's unfair and prejudicial tactic to influence the jury's credibility determination. Fryer v. State, 693 So. 2d 1046 (Fla. 3d DCA 1997). See also Williams v. State, 673 So. 2d 974 (Fla. 1st DCA 1996); Harris v. State, 570 So. 2d 397, 399 (Fla. 3d DCA 1990); Williamson v. State, 459 So. 2d 1125, 1127 (Fla. 3d DCA 1984).[2]

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[1] See Pope v. Wainwright, 496 So. 2d 798, 801 n.1 (Fla. 1986); Pollard v. State, 444 So. 2d 561, 563 (Fla. 2d DCA 1984) (cumulative impact of totality of prosecutor's closing argument can be considered in assessing the harmfulness of those comments which were objected to).

[2] United States v. West, 680 F. 2d 652, 655-56 and n.3 (9th Cir. 1982) discusses the concept of "invited error" as to a claim of improper vouching by the prosecution, and states:

> In United States v. Praetorious [622 F. 2d 1054, 1061 (2d Cir. 1979)], for example, defendant's counsel had characterized the government's case and conduct as "[i]ncredibile," "totally absurd," "lies," "fraud." The government's attorneys and agents were called "conniver[s]," "deceiver[s]," "cheat[s]," and "swindler[s]." 622 F. 2d at 1060 n.2. It is chiefly this sort of vituperation that may invite otherwise improper rebuttal.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 17th day of March, 1998.

Respectfully submitted,

Steven L Bolotin

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/ddv