IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,764

TERRY KENNETH BROWN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, **TERRY KENNETH BROWN**, was the Petitioner in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, **THE STATE OF FLORIDA**, was the respondent in the trial court and the Appellee in the Third District Court of Appeal. The parties shall be referred to as they stood in the trial court.

STATEMENT OF THE CASE AND FACTS

The defendant was convicted of unlawfully possessing a firearm by a convicted felon, pursuant to Section 790.23, Florida Statute (1995), and sentenced to seven years as an habitual felony offender, pursuant to Section 775.084(4), Florida Statute (1995).

The defendant appealed his conviction and sentence to the Third District Court of Appeal, contending, among other things, that his conviction should be reversed because the trial court permitted the State to introduce into evidence at trial certified copies of two prior convictions in order to prove the "convicted felon" element of the charge.

The Third District Court of Appeal declined to find an abuse of discretion in the trial court's admission of the defendant's convictions, in light of clearly binding authority from this Court addressing the precise issue raised by the defendant regarding the admission of certified copies of prior convictions despite the defendant's offer to stipulate to his convicted felon status.

The Third District Court of Appeal specifically declined the defendant's invitation to apply the recent United States Supreme Court opinion in Old Chief v. United States, 519 U.S. , 117 S. Ct. 644, 136 L.Ed.2d 574 (1977) to the case and thus declined to

find an abuse of discretion in the trial court's admission of the convictions.

The Third District, in order to facilitate further review by this Court should it desire to revisit the decision in ~~Parker v.~~ State. 408 So. 2d 1037 (Fla. 1982), certified the following question as a matter of great public importance:

> SHOULD THE DECISION IN PARKER V. STATE, 408 So.2d 1037 (Fla. 1982) BE OVERRULED IN FAVOR OF THE ANALYSIS OF THE EVIDENTIARY REQUIREMENTS FOR PROOF OF CONVICTED FELON STATUS IN FIREARM VIOLATION CASES ESTABLISHED FOR FEDERAL COURTS IN OLD CHIEF V. UNITED STATES, 519 U.S. __, 117 s. ct. 644, 136 L.Ed.2d 574 (1997)?

QUESTION PRESENTED

SHOULD THE DECISION IN PARKER V. STATE, 408 So.2d 1037 (Fla. 1982) BE OVERRULED IN FAVOR OF THE ANALYSIS OF THE EVIDENTIARY REQUIREMENTS FOR PROOF OF CONVICTED FELON STATUS IN FIREARM VIOLATION CASES ESTABLISHED FOR FEDERAL COURT IN OLD CHIEF v. UNITED STATES, 519 U.S. ____, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997)?

SUMMARY OF THE ARGUMENT

The decision in Parker v. State, 408 So. 2d 1037 (Fla. 1982), should not be overruled. This Court should find no abuse in the trial court's admission of the defendant's prior convictions. This Court is not bound to follow a decision of a federal court. This Court should not follow the Supreme Court's decision in Old Chief v. United States, 519 U.S.--, 117 S. Ct. 644, 135 L.Ed. 2d 574 (1997). A prior conviction is a substantive element of the crime of possession of a firearm by a convicted felon. The State should not be barred from proving facts pertinent to its prosecution simply because the defendant offers to admit them. Old Chief is completely distinguishable from the case at hand. The jury, here, was not apprised as to the nature of the prior convictions. No evidence admitted detailed the nature of the prior felony convictions to the jury. The evidence did not inflame the jury and did not appeal strongly to the jury's prejudice. Any error in admitting the defendant's two prior felony convictions must be deemed harmless. Nothing in this case necessitates this Court to recede from Parker.

Many of the alleged areas of prosecutorial misconduct were not preserved for appellate review. None of the comments were so prejudicial that they vitiated the entire trial.

The investigating officer's testimony did not lead the jury to believe that a non-testifying witness had given the police evidence of the defendant's guilt. There was no such logical implication to be drawn from the testimony. The State would submit that the error complained of did not contribute to the verdict and further that there is no reasonable possibility that the alleged error contributed to the defendant's conviction. As such, any error must be deemed harmless.

ARGUMENT

THE DECISION IN PARKER V. STATE, 408 So. 2d 1037 (Fla. 1982) SHOULD NOT BE OVERRULED IN FAVOR OF THE ANALYSIS OF THE EVIDENTIARY REQUIREMENTS FOR PROOF OF CONVICTED FELON STATUS IN FIREARM VIOLATION CASES ESTABLISHED FOR FEDERAL COURTS IN OLD CHIEF v. UNITED STATES, 519 U.S. ___, 117 S. Ct. 644, 136 L.Ed. 2d 574 (1997).

The defendant asks this Court to apply the United States Supreme Court opinion in Old Chief v. United States, 519 U.S. , 117 S. Ct. 644, 136 L.Ed.2d 574 (1997) to this case and thus find an abuse of discretion in the trial court's admission of the defendant's prior convictions. This Court however, in State v. Barquet, 262 So.2d 431, 435 (Fla. 1972), specifically held that state courts are not bound to follow a decision of a federal court, even the United States Supreme Court, dealing with state law. See also, State v. Owen, 696 So. 2d 715, 719 (Fla. 1997), where this Court held that it had the authority to reaffirm its' decision in Owen v. State, 560 So. 2d 207(Fla. 1990), regardless of federal law.

The defendant argues that Rule 403, Federal Rules of Evidence, is virtually identical to Section 790.23, Florida Statutes (1995) and Section 90.403, Florida Statute (1995). He argues that the United States pronouncement in Old Chief, on the application of Rule 403, Federal Rules of Evidence, to prior felony convictions under a felon-in-possession statute which is identical to that of Florida compels this Court's re-examination

or clarification of Parker v. State, 408 So. 2d 1037 (Fla. 1982). The State, respectfully, does not agree.

This Court in State v. Barquet, held that where the federal and state statutes are similar and intended to accomplish like objects, state courts, in construing the state statute, are not bound to follow the construction put on the federal statute by federal court construction. This Court in State v. Barquet, in support of the holding stated as follows:

> As further stated in 21 C.J.S. Courts s205, pp.362-364:
>
> '(T)he state courts are free to decide for themselves all questions of the construction of state constitutions and statutes. An exception to this rule has been made, however, where the federal supreme court has decided that it is necessary to construe a state statute in a certain way to prevent its being violative of the federal constitution; and where the question presented is as to the construction or violation of a provision of the state constitution which is similar to a provision of the federal constitution, and the same question has been decided by the federal supreme court with respect to the federal constitution, the federal decision is strongly persuasive as authority, and is generally acquiesced in by the state courts, although it is not absolutely' binding.

262 So. 2d at 436.

The State would also point to the Supreme Court's decision in Estelle V. McGuire, 502 U.S. 62, 112 S. Ct. 475 (1991). In that case, the Court, was faced with the question whether the admission of evidence (evidence that infant victim suffered from

battered child syndrome) violated McGuire's federal constitutional rights. In holding that McGuire's due process rights were not violated by the admission of the evidence, the Court cited to its' earlier decision in Spencer v. Texas, 385 U.S. 554, 563-564, 87 S. Ct. 648, 653-654, 17 L. Ed.2d 606 (1967) as follows: "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial...But it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure" (citations omitted). 502 U.S. at 70.

The State would respectfully submit that the Third District Court of Appeal was correct in concluding that the holding in Old Chief was not binding on Florida courts construing Florida state statutes and rules, particularly in light of binding Florida Supreme Court precedent directly on point.

This Court should answer the certified question in the negative. There is no basis to overrule the well-reasoned opinion in Parker v. State in favor of the analysis in Old Chief. A prior conviction is a substantive element of the crime of possession of a firearm by a convicted felon. State v. Vazquez, 419 so. 2d 1088 (Fla. 1982). See also Williams v. State, 492 So. 2d 1051, 1052-1053 (Fla. 1986) (allowing the State to "introduce the particulars of a prior conviction for armed robbery in a

prosecution for possession of a firearm by a convicted felon since

In Parker, this Court held that the State may introduce into evidence the particulars of a defendant's prior felony conviction for breaking and entering with intent to commit grand theft in a prosecution for possession of a firearm by a convicted felon. In so holding, this Court noted that the State may introduce the particulars of a prior conviction when the prior conviction is an essential element of the crime charged unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. Id. at 1038.

In Williams v. State, 492 So. 2d at 1053, this Court took the opportunity to note that the above standard also applies when the State seeks to introduce the particulars of more than one prior felony conviction. In Williams, the defendant argued that he was particularly prejudiced by the evidence of the nature of his prior conviction when entered in conjunction with the comments of the State made to the jury during opening statement. The State informed the jury, in Williams, that the area in which the defendant was stopped was a high crime area where armed robberies had occurred. The defendant claimed that the combination of this evidence entered over objection, with his prior felony conviction of armed robbery, would cause the jury to

speculate whether the defendant was carrying a firearm to commit an armed robbery. This Court, stated that jury speculation is an uncontrollable, inherent factor of every jury trial. This Court held that the nature of the defendant's prior conviction, even when combined with the reference by the State to the fact that armed robberies had occurred in the neighborhood, did not comprise such substantial prejudice as to vitiate the entire trial. This Court further found, as is the situation in the instant case, that, "this is not an occasion where the state is trying to introduce multiple convictions for the same crime as that charged to establish a pattern of criminal behavior". This Court in Williams, held that the trial court did not abuse its discretion by allowing the nature of defendant's prior felony conviction into evidence. This Court in this case, has more justification for reaching a similar result. In this case, the nature of the defendant's prior felony convictions was not entered into evidence.

This Court's decision in parker, was based upon this Court's earlier holding in Arrington v. State, 233 So. 2d 634 (Fla. 1970). In Arrington, this Court pointed out that criminal defendants often seek to stipulate to the existence of certain evidence in an attempt to obviate "legitimate moral force" of such evidence. This Court held that the State is not barred from proving facts pertinent to its prosecution simply because the

defendant offers to admit them. The trial judge, this Court, held, always retains the authority to sustain objections to evidence upon traditional grounds.

In the instant case, there was no other evidentiary rule which rendered the evidence that was clearly relevant, inadmissible, as unnecessary in establishing the offense. This Court in Parker, concluded that the test of "legal relevancy", is set out in Section 90.403, Florida Statutes as follows:

> [P]roof of conviction is relevant evidence and is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless presentation of cumulative evidence.

408 So. 2d at 1038.

Applying the above test to the facts of this case, this Court must first determine whether it can be said that the probative value of defendant's prior convictions was "substantially outweighed" by the danger of unfair prejudice or the needless presentation of cumulative evidence. As with other discretionary evidentiary determinations which a trial court is called upon to make, a decision to admit evidence will not be disturbed absent a showing of abuse of discretion, See Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981), or in other words, a demonstration of prejudice to the substantial rights of the defendant. Brown v. State, 426 So. 2d 76, 79 (Fla. 1st DCA

1983). In the absence of such a demonstration, the erroneous admission of evidence may require the application of the harmless error rule, thus making reversal improper unless "the error committed was so prejudicial as to vitiate the entire trial. State v. Murray, 443 So. 2d 955 (Fla. 1984). See also Stephenson v. State, 634 so. 2d 1155 (Fla. 4th DCA 1994), where the appellate court held that although the court was approaching the outer limits of the harmless error doctrine explained in State v. Diguilio, 491 So. 2d 1129 (Fla. 1986), in a trial in which the State introduced copies of the defendant's four prior convictions, the State also made several references at various stages of the trial to crimes of which the defendant had been convicted, and referred to other criminal activity in which the defendant had been involved. Even if this Court finds that admitting the defendant's prior convictions was error, there are more reasons to find an error, harmless in this case.

In the case at hand, the trial court allowed the State to prove only two prior felony convictions, the defendant's other three prior convictions were stipulated to by the defense. Defense counsel, the State would note, did not even preserve the argument for appellate review. The trial court stated that it would instruct the jury that before the jury found the defendant guilty of unlawful possession of a firearm by a convicted felon, that the court would actually spell out the felony. Defense

counsel stated, "That's fine." (T. 365). The trial judge in the abundance of caution, reiterated that counsel could argue that the defendant was convicted of one or more felonies, and that after the conviction that the defendant knowingly possessed or controlled a firearm. (T. 365). Defense counsel did not object and only later asked about a curative instruction. (T. 368). The trial judge decided that he wasn't going to give a curative instruction, but that he instead would listen to closing argument, and if someone made a mistake and implied or inferred something, then the court would give such an instruction. (T. 371). Defense counsel never objected to the State's closing argument, and never renewed any earlier objections. As such, the issue should not even be deemed properly preserved for appellate review.

In any regard, it should be noted that the trial court only admitted two of the defendant's five prior felony convictions into evidence. The jury was not apprised as to the nature of the prior convictions.[1] Section 90.403, Florida Statutes, does not

[1] The defendant states on page 27 of his brief, that the State presented at trial, a trial exhibit with the actual names of all five of the prior felonies, including their severity and the number of points added. The defendant cites 'states ex 3 at 6". The State would note that this document is not included in the record on appeal. This point was never made to the Third District Court of Appeal. The record does reflect that the State properly admitted the certified copies of the defendant's previous convictions into evidence and that these were reviewed by the Court at the sentencing hearing. (R. 113). Documentary proof of the nature of the defendant's prior convictions is admissible on the charge of possession of a firearm by a convicted felon. Thomas v. State, 440 So.2d 581 (1983). There is no support in the record on appeal to support the proposition that the jury actually saw the names of the

bar this evidence. The evidence admitted did not inflame the jury and did not appeal strongly to the jury's prejudice. As such, the State would respectfully submit even if this Court maintains that the convictions should not have been admitted into evidence, a position the State does not agree with, any error must be deemed harmless. See Vidal v. State, 300 So. 2d 688 (Fla. 3d DCA 1974) (appellant was convicted of unlawful possession of a firearm by a convicted felon, evidence was submitted at trial to show that the appellant had been previously convicted not only of the felony crime of conspiracy to sell narcotic drugs but also of the crime of unlawful possession of a firearm while engaged in a criminal offense. The Court held that no reversible error occurred where the appellant claimed that he misunderstood the stipulation procedure and failed to object). The State would submit that there was no error in admitting the convictions in the instant case.

The State would further point out to this Court that the decision in Old Chief is completely distinguishable from the case at hand. Old Chief was charged with assault as well as possession of a firearm by a convicted felon under 18 U.S. C. Section 922(g)(1966). Defense counsel offered to stipulate to Old Chief's status as a convicted felon. The State introduced evidence of a past felony conviction for assault over defense

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prior felony convictions.

Counsel's objection. Upon review, the Supreme Court held that where alternative evidence such as a stipulation is available to establish the defendant's felony convict status AND **WHERE THE NATURE OF THE PRIOR CONVICTION INTRODUCED BY THE STATE IS LIKELY** TO SUPPORT A CONVICTION OF IMPROPER GROUNDS, the prior conviction must be excluded. Specifically, the Court reasoned as follows:

> In dealing with the specific problem raised by by Section 922(g)1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries risk of unfair prejudice to the defendant. That risk will vary from case to case... but will be substantial whenever the official record offered by the government would be arresting enough to lure a junior into a sequence of bad character reasoning. **WHERE A PRIOR CONVICTION WAS FOR A GUN CRIME OR ONE SIMILAR TO OTHER CHARGES IN A PENDING CASE THE RISK OF UNFAIR PREJUDICE WOULD BE ESPECIALLY OBVIOUS,** and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current charges alone, would take on added weight from the related assault charges against him. The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate...Old Chief's proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element... The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun and this point may be made readily in a defendant's admission... In this case, as in **any** other in which the **prior conviction is for an offense likely to support conviction** on some improper ground, the only reasonable conclusion was that

> the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.

117 S. Ct. at 652-655. (emphasis added).

Clearly, Old Chief, is distinguishable, since the prior conduct introduced by the State in this case, was not shown to be indistinguishable from the charged offense as was the situation in Old Chief. In this case, the jury was never apprised as to the nature of the previous convictions. The Court in Old Chief, specifically stated that the issue involved in the case was "whether a district court abuses its discretion if it spurns such an offer and admits **THE FULL RECORD OF** A **PRIOR JUDGMENT**, **WHEN THE NAME OR NATURE OF THE PRIOR OFFENSE RAISES THE RISK OF A VERDICT TAINTED BY IMPROPER CONSIDERATIONS**, and when the purpose of the evidence is solely to prove the element of prior conviction. Old Chief v. United States, 117 S. Ct. at 647 (emphasis added). See also United States v. Hernandez, 109 F.3d 1450 (9th Cir. 1997), where the court found the case to be on all fours with Old Chief. The court held that "the evidence of the **underlying facts of the defendant's prior conviction** was highly prejudicial to the defendant. Because the defendant offered to stipulate to the existence of the second element of Section 922(g), the district court abused its discretion when it rejected the stipulation and admitted evidence of the **NATURE** of Hernandez' prior felony

conviction." 109 F. 3d at 1452. (emphasis added) See also United States v. Wilson, 107 F.3d 774 (10th Cir. 1997), where the court held that it was error to admit the appellant's prior conviction for possession of cocaine in case where the appellant was charged with possession of cocaine with intent to distribute. The Court specifically stated as follows: "..as with the defendant in Old Chief, Mr. Wilson offered to stipulate to his prior conviction **solely to limit the prejudice that would result from the jury being informed that he had previously been convicted on an unrelated charge of possession of cocaine.** Because we find this case fits within the rule established in Old Chief, we hold that the district court erred in admitting Mr. Wilson's prior conviction for the purpose of supporting the prior felony element of the 18 U.S.C. 922(g)(1)" 107 F.3d at 784. (emphasis added). The court in United States v. Wilson, citing to Old Chief, went on to hold "[I]f , indeed, there was a justification for receiving evidence of the **nature of prior acts** on some issue other than status (ie., to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake OK accident'), Rule 404(b) guarantees the opportunity to seek its admission." 107 F.3d at 784. (emphasis added). The court in United States v. Wilson, held that the appellant's prior conviction was neither highly probative nor similar to the criminal activity for which he was currently

indicted. The conduct giving rise to Mr. Wilson's prior conviction occurred when he was arrested for driving with a suspended driver's license, and a subsequent search uncovered cocaine and marijuana on his person. 107 F.3d at 785.

In United States v. Taylor, 122 F. 3d 685 (8th Cir. 1997), the Court also relied upon the decision in Old Chief. when it held that the decision in Old Chief makes it probable that the district court abused its discretion when it spurned Taylor's offer to stipulate to his status as a felon. Prior to trial, in an attempt to keep from the jury evidence of his voluntary manslaughter conviction, Taylor had offered to stipulate that he was a felon. Taylor moved the district court in limine to prevent the Government from introducing evidence **related to the previous offense.** The Government declined the proposed stipulation, and the court denied the motion in limine. The Government introduced into evidence testimony and documents establishing Taylor's voluntary manslaughter conviction. The court found that reversal was not mandated and concluded that any error was harmless. 122 F. 3d at 689. (emphasis added).

Similarly in United States v. Horsman, 114 F. 3d 822 (8th Cir. 1997), the court relying on Old Chief, held that the district court erred in allowing the government to present evidence regarding the specific nature of Horsman's prior convictions, Even though the government elicited testimony from

Horsman's probation officer regarding the nature of Horsman's four prior felony convictions, and the government repeatedly stated the nature of Horsman's four felony convictions, the court still found the err to be harmless. 114 F. 3d at 827.

Relying on Old Chief, the court in United States v. Anaya, 117 F.3d 447 (10th Cir. 1997), held that the district court erred in denying the appellant's motion in limine to keep the government from presenting evidence of his conviction for possession of a controlled substance with intent to deliver, where the appellant offered to stipulate that he had previously pled nolo contendere to an aggravated felony. The court, nevertheless, found the error to be harmless since the appellant failed to demonstrate how the admission of is prior felony conviction at trial affected his substantial rights.

It is clear that unlike the situation in Old Chief, the jury in this case, was not apprised of the underlying facts of the defendant's prior convictions. There was no evidence admitted detailing the nature of the prior felony convictions to the jury.

The State would respectfully submit that there is nothing in this case which necessitates this Court to recede from its' holding in Parker v. State. A prior conviction is a substantive element of the crime of possession of a firearm by a convicted felon. State v. Davis, 203 So. 2d 160 (Fla. 1967). In charging possession of a firearm by a convicted felon, proof of the

conviction is relevant evidence. The defendant, in the instant case suffered no unfair prejudice or confusion of the issues. Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged," See Old Chief, 117 S. Ct. at 650. Unfair prejudice, however, does not include damage that occurs to a defendant's case because of the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis. United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir. 1997). The evidence in the instant case was not unfair, as it did not tend to support a decision on an improper basis. Proof of the prior convictions was both relevant and admissible.

The State would also submit to this Court that under either the rationale of Old Chief or under this Court's decision in Parker, any error in admitting the defendant's prior convictions into evidence must be deemed harmless since the evidence of the underlying facts of the defendant's prior convictions was never submitted the jury for consideration. In addition, the jury was not even apprised of the nature of the defendant's prior felony convictions.

The defendant also argues that the trial court should have given the jury a modified "Williams Rule" limiting instruction at the time the evidence was presented. The State would submit that

the trial court properly informed defense counsel on numerous occasions that the instant case did not involve any Williams rule issues. (T. 361-362,371). The law is clear, that the Williams[2] rule operates to forbid the admission into evidence of other separate offenses OK collateral crimes if the logical effect of such evidence IS SOLELY TO PROVE BAD CHARACTER OF DEFENDANT OR TO SHOW HIS PROPENSITY TO COMMIT CRIME CHARGED. See Jacobson State, 375 So. 2d 1133 (Fla. 3d DCA 1979). (emphasis added). Defense counsel in fact, acknowledged that the issues in the instant case did not deal with Williams Rule issues. (T. 370-371).

This Court has on numerous occasions explained that a trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. James v. State, 695 so. 2d 1229,1236 (Fla. 1997); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). In this case, the trial court properly instructed the jury pursuant to the Florida Standard Jury Instructions. It is not error to refuse to give a requested instruction, when, as here, the standard instructions given covered the requested instruction. Sandoval v. State, 689 So. 2d 1258 (Fla. 3d DCA 1997).

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[2] Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L.Ed.2d 86 (1959).

The defendant also argues that the prosecutor's argument, also served to prejudice the defendant. Initially, the defendant submits that the prosecutor committed prosecutorial misconduct when she pointed out to the jury that the only person to testify that the State's witness was a liar was the defendant's own sister. See defendant's brief page 16. A review of the record indicates that defense counsel failed, in any regard, to object to the now complained of statement, and as such any error was not preserved for appellate review. See Riechmann v. State, 581 So.2d 133 (Fla. 1991), cert. den,, 113 S. Ct. 405, 121 L.Ed.2d 331 (defendant's claims of prosecutorial misconduct are waived where defendant does not make contemporaneous objections at trial. See also Clark v. State, 363 So.2d 331 (Fla. 1978), where this Court established the "contemporaneous objection and motion for mistrial rule." In the absence of an objection, test is whether the prosecutor's comments are fundamentally tainted, Rhone v. State, 93 So.2d 80 (Fla. 1957). In this case, any error in admitting the above statement can not be deemed fundamental as the error did not amount to a denial of due process of law. The record reveals the following:

PROSECUTOR: . . . . [It was] the defense witness, Karen Hadley who says that Mr. Stewart, a 33 year retired individual who lives in the neighborhood, is a liar. And they rebut you evidence on the character of the truth and veracity of that witness, saying the Defendant's sister says that she heard he is a liar.

Now, I ask you to think about this again with your common sense. **The one person who came to Court to tell you that the State's witness Mr. Stewart, is a liar is the Defendant's sister. She wouldn't know Mr. Stewart if he stomped on her toe.** She wouldn't know the witness if he walked right in front of her the minute she was calling him a liar, but she got up here in open court and swore to tell the truth. And threw out an accusation as serious as that, and she told you she knows this through her husband and that's it.

(T. 380). (emphasis added--outlining defendant's alleged error)

The proper exercise of closing argument is to review evidence and to explicate those inferences which may reasonably be drawn from the evidence; it must not be used to inflame the minds and passisons of jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). It is proper for a prosecutor in closing argument, to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue. White v. State, 377 So.2d 1149 (Fla.

1979), cert. den., 449 U.S. 815, 101 S.Ct. 129, 66 L.Ed.2d 51 (1980). ('You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument." In the instant case, the prosecutor for the State continued her argument pointing to the evidence and the absence of evidence as follows:

> PROSECUTOR: . . in this case you have a defense witness who calls one of the other witnesses a liar. She doesn't know him and she just makes a bare allegation, nothing to substantiate it.
>
> There **is no evidence that this man is not anything but truthful except for this--for this witness who is this elderly sister of the Defendant who doesn't want you all to find him guilty.**

(T. 380). (emphasis added--detailing the complained about argument.)

The State would note again there was no objection voiced to the above argument, and this Court would need to find fundamental error in order to overcome contemporaneous objection rule.

It has been said that the sole purpose of closing argument is to assist the jury in analyzing the evidence. U.S. v. Iglesias, 915 F.2d 1524 (11th Cir. 1990) reh. den. 923 F.2d 867. The State would respectfully submit that the prosecutor in making the above closing argument did just that --she helped the jury analyze the evidence. There was no incident of prosecutorial misconduct.

In order to review the other statements made by the prosecutor which the defendant argues constituted prosecutprial misconduct, this Court has to review the record in its' entirety.

In opening argument, defense counsel argued as follows, in pertinent part:

> DEFENSE: the evidence is going to show that the Key Food Store had a video camera...And they are not going to produce the video tape, the testimony will show. And I should say, lak of testimony that Terry Brown did not have a gun on that day. Yes, he is a convicted felon. We presume and concede that, but he didn't have a gun.

(T. 209).

During closing argument, defense counsel argued as follows:

> DEFENSE: . . .I submit to you that Robert Stewart and the truth are complete strangers. Robert Stewart told Sherry Stephens in December, Mr. Brown's girl-friend, admittedly--and, of course, she has an interest in the case, but this doesn't alter what occurred. And what occurred, very simply, was Mr. Stewart who was not only a liar, but a stupid liar, told her that Terry did not have a gun.....

(T. 392).

Defense counsel later continued as follows:

> DEFENSE: ..Mr. Stewart testified that he only saw the butt of the gun, it was black and he didn't know if it was a toy gun or a real

gun. I submit to you also, that his story is crazy. ...

(T. 394).

Mr. Mohamaad didn't tell her (police officer) about the gun being pointed in his face, because it didn't happen. No matter what he testified to, and we know the truth of this other video, you would see that it didn't happen.

(T. 395).

The State argued that Ms. Hadley didn't know Mr. Stewart. So? News travels fast. The man's a liar. People know it. Okay. And she argues about, well, this notary seal wan't on this nonprosecution form. Maybe it was. Maybe it wasn't. We know that he signed it. He admitted it, and there is no evidence in the slightest that he was coerced. He said he did it out of the fulness of his heart, because he wanted to help Terry Brown's mother. I submit to you that he did it because he knows he is a liar, and he didn't want to come into court and lie and have six people determine that he was a liar.

(T. 396).

You cannot deprive a man of his liberty. You cannot convict a man on the testimony of Mr. Mohamaad and Mr. Stewart. I submit to you that Mr. Brown is innocent, and that the jury should acquit him.

The prosecutor said, I think, during jury selection, that this is a victimless crime. She was right. There is no victim. There is no crime. Send this man back to his family and acquit him.

(T. 399-400).

In response, the prosecutor for the State argued as follows:

> PROSECUTOR: What you've just heard is that this was a very elaborate scheme to frame the Defendant for a crime he didn't commit. That's basically what Defense counsel has told you. He has told you, on no certain terms, that Mr. Stewart's a liar. That you are supposed to rely solely on the Defendant's sister who has never met the man, who won't know the guy if she slapped him in the face, that he is a liar, so that one witness is supposed to completely turn you against another witness.
>
> Now, I submit to you all, if this was the elaborate scheme that Mr. **Jepeway has** just **provided you with---**
>
> DEFENSE: Your Honor, I object. I never mentioned 'scheme".
>
> COURT: Could you just rephrase your remarks.
>
> PROSECUTOR: Certainly.
>
> **If this was asked the way Mr. Jepeway said it was, let me suggest to you a few things. Number one would--be a video. The State and the police officers and the witnesses would have made sure to get one. Someone who talked about Terry Brown's height, weight, get like a grainy video going,...**

(T. 400-401). (Emphasis added--outlining defendant's claim of error.)

The State would again submit that the prosecutor was entirely correct in making the above closing argument. It is entirely proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue. White v. State, 377 So.2d 1149 (Fla. 1979), cert. den., 449 U.S. 815, 101 s. ct. 129, 66 L. Ed. 51 (1980). ('You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument.") Clearly the argument that the prosecutor erred in arguing that defense had suggested an elaborate scheme was not error. Courts have found no prosecutorial misconduct where a prosecutor who in closing argument repeatedly referred to the appellant's testimony as untruthful and even referred to the appellant as a liar. The court reasoned that the prosecutor was merely submitting conclusions which he alleged could be drawn from the evidence. Craig v. State, 510 So.2d 857 (Fla. 1987) cert. den. 558 So. 2d 19.

The defendant next argues that the prosecutor erred in making the following statements in closing argument:

> PROSECUTOR: Now, Mr. Jepeway also argues a few other things to you. Okay. If this was really a setup and these witnesses are completely lying--he said that Mr. Mohamaad is a liar. There is no evidence of that. Mr. Mohamaad is not a liar, and I am going to ask you to use your common sense, and look

> at the evidence.
> **There is no evidence to suggest that, for Defense counsel's statement, and we all agree what defense counsel says is not evidence. Mr. Mohamaad not a liar.** But this was a big scheme to frame him. If it **was, don't you think they'd have the gun, they'd throw it on him when they arrested him they'd smack his hands on it and bring you some fingerprint---**

(T. 401-402) (emphasis added--outlining complained of statements).

Again, the State would submit that the prosecutor in closing argument was entirely correct in pointing out the absence of evidence on the record that Mr. Stewart, the State witness was anything but truthful. Cases have found no error in far more egregious cases. In Gallon v. State, 455 So. 2d 473 (Fla. 5th DCA 1984) ; during closing argument the prosecutor stated: "[defense counsel] is going to get up and tell you that the evidence in the case supports [defendant's] story, What do you expect him to tell you, he's [the defendant's] attorney, not going to come in and say 'the state proved their **case** on this one send my client to jail.' If [defense] expects you to believe the defense in this case, he expects you to believe in the Easter Bunny." Defense motion for mistrial was denied. The appellate court held that prosecutor was trying to convey idea that defense was incredible in

light of substantial evidence presented by the State, and thus comment did not deny the defendant a fair trial.

The defendant next complains about the following argument made by the State:

> PROSECUTOR: . . .If Mr. Stewart wanted to come in here with such an elaborate lie, wouldn't he have told you that the Defendant fired the gun, the way it was totally described? But he came in here and he told you what he saw. He saw the butt of a gun. He didn't make it more than it was. He told you exactly what he saw, and I submit to you if he wanted it so desperately lie to you as you've been told and he so incredibly would have made it look better than he made it. He wouldn't have said the butt. He would have said a .35 magnum or automatic. He would have described it perfectly.
>
> .....
>
> If there is no gun in this case is because the Defendant hid it. For 30 minutes he was missing in action in his neighborhood. He was being looked for, wasn't in the apartment. Maybe he hid it so well, it's in a place where no one else could find it. Maybe he hid it under a rock. Maybe he hid it under a car. There is a million and one places in a three or four block radius that the defendant in 30 minutes could have hid a gun.
>
> I submit to you two things. Everyone is lying or the gun is not real. Well, which is it? Is it that everyone's lying or

> the gun's not real? **I submit to you that the gun is very real. That's why it was hidden. It was hidden because it was a real gun.** Do I know exactly what **gun it** was? No.,....

(T. 402-403) (emphasis added--outlining defendant's complained of testimony).

The State would respectfully submit that the above argument which was unobjected to and therefore not properly preserved for appellate argument, was nevertheless entirely proper and was made in response to defense counsel's closing argument that the state witness was making up a crazy story and that the witness didn't even know if it was a toy gun or a real gun. (T. 394). See Green v. State, 571 So. 2d 571 (Fla. 3d DCA 1990), (allegedly offensive comments by prosecutor during closing argument constituted proper rebuttal to defense counsel's own closing remarks).

The defendant next complains about the following statements made by the prosecutor in closing argument:

> **PROSECUTOR:** **Now**, we know it's not an elaborate scheme by anyone to frame anyone for this crime. why? Because it would be a lot better. We know that Mr. Stewart isn't lying because if he is going to lie, he is going to make it a lot better. We **know that the only witness that could tell you these are inconsistent statements by the** witness, **Mr. Stewart, are the defendant's** girlfriend---and isn't it

> interesting that everyone is now friends with someone who saw the crime after the crime occurs?....

(T. 404) (emphasis added--pointing to the complained statements),

As earlier argued herein, it was entirely permissible for the prosecutor to point to the absence of evidence in the case. Once again the State would note that the complained of statement was neither objected to by defense counsel nor made the subject of a motion for mistrial. As such, once again the alleged error was not preserved for appellate review.

The defendant next argues that various statements made by the prosecutor were made in error. Once again the complained of statements were not objected to, and defense counsel did not request a mistrial as a result of the prosecutor making such statements. Once again, this Court should not review the statements as they were not preserved for appellate review and the statements themselves do not constitute fundamental error.

First the defendant argues that the defendant should not have argued, 'this case is about judging the acts of the Defendant. That's what this case is all about." The State would respectfully submit that the prosecutor accurately informed. the jury what its' job was, what the jury's responsibility was and as such the statement was entirely proper.

The defendant also argues that the prosecutor should not have stated, "...but the State is provided with evidence of a crime, and the best evidence the State had was provided to you all. And the State is not required to prove this case with any special evidence. And we all know that and there is no best evidence rule. The best evidence is the evidence that's here in court. Did the State prove the case beyond a reasonable doubt, and is the doubt reasonable?"

The State would submit that the prosecutor again was merely informing the jury of its' duty. The State would also submit that even if this Court deems that this statement was made in error, the trial judge properly instructed the jury with regard to the reasonable doubt standard. This Court held in Cabrera v. State, 490 So. 2d 200 (Fla. 3d DCA 1986), that a prosecutor's misstatement of the law during closing argument was not grounds for a mistrial where the trial judge informed the jury prior to closing argument that the judge would instruct the jury on the law and that counsel's closing statements were merely argument.

The defendant also complains about the following statement made by the prosecutor, "The fact is, we couldn't provide you with the gun because the defendant hid it". Again the State would respectfully submit that the argument was made in response to the defendant's argument that no gun was found. Again, the statement

was not objected to and was therefore not preserved for appellate review.

The defendant lastly complains of the following statement:

> PROSECUTOR: . . .you decide on the merits whether or not the defendant is guilty beyond a reasonable doubt. **And** I **am** confident **that once you evaluate the evidence and you understand all the realities of the case--**
>
> .....
>
> you will come **back with a verdict that rings true of guilty** of the charge of possession of a firearm by **a** convicted felon beyond and to the exclusion of every reasonable doubt.

(T. 408-409).

The defendant actually objected to the first statement which the State has outlined in bold for this Court's convenience, the second statement however, was not objected to and **as** such was not preserved. In any regard, the statements were not improper. Merely arguing conclusion that can be drawn from the evidence is permissible fair comment in closing argument-m, 603 so. 2d 1141 (Fla. 1992) as modified on denial of rehearing, cert. den. 113 s. Ct. 1063, 122 L.Ed. 2d 368.

The State would respectfully conclude by submitting that most of the complained of statements were not even objected to by defense counsel and as such were not properly preserved. In any regard, none of the prosecutor's comments were so prejudicial that they vitiated the entire trial. Prosecutorial misconduct is the basis for reversing a defendant's conviction ONLY if in the context of the entire trial and in light of any curative instruction, the misconduct, may have prejudiced the substantial rights of the accused. United States v. Lopez, 899 F.2d 1505 (11th Cir. 1990). The State would submit that the defendant's rights were in no way violated by any of the prosecutor's arguments in the instant case. The State would note that although this issue was raised on appeal, the Third District apparently thought it of no consequence when it didn't even mention the prosecutorial misconduct issue in its' opinion.

The defendant next argues that the trial court erred in admitting the arresting officer's hearsay testimony. The defendant specifically complains that the following exchange was improper:

> Q. Did you come in contact with anyone else at the scene pursuant to your investigations?
>
> A. Yes, I did.
>
> Q. Did the complaining people tell you they knew the person that was involved with this situation?
>
> DEFENSE: Objection.
>
> COURT: Overruled.
>
> Q. Did they tell you that?
>
> A. Yes, ma'am.
>
> Q. How did they know this person?
>
> A. It was a relative.
>
> Q. Who was a relative?
>
> A. One of the witnesses was a relative to the Defendant.

(T. 297-298).

The defendant argues that the officer's testimony was prohibited by the holding in Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981) rev. den., 411, So.2d 384 (Fla. 1981). The defendant also relies upon this Court's decision in Trotman v. State, 652 So. 2d 506 (Fla. 3d DCA 1995) in support of his argument. The State would respectfully submit that this case is easily distinguishable from the above cases.

In Postell and Trotman, the court made clear that "when the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." 652 So. 2d at 506. In this case, however, there was no logical implication to be drawn from the testimony which would lead the jury to believe that the non-testifying witness had given the police evidence of the defendant's guilt. The testimony should, therefore, be allowed as it WAS NOT hearsay.

In Trotman v. State, supra , for example, the first witness in the case was the investigating and arresting police officer. Without any evidence concerning the circumstances of the offense, the witness in the case, was permitted to testify, that, after

speaking to an unidentified and non-testifying "juvenile," he went to the location of the victim's stolen car and arrested the defendant. The Court stated that it took no imagination whatever, to realize, that the only thing that the juvenile could have told the detective was that the defendant was involved in the crime. In this case, the same can not be said. Here, the officer merely was asked whether the complaining people told him that they knew the person involved with this situation. Moreover, the Court noted in Trotman that the only evidence against Trotman was a victim identification, the error was therefore not harmless. In this case, the State had the victim in addition to another witness who testified against the defendant. All parties agreed that in this case, identity was NOT an issue. (T. 299). In this case, even if this Court finds that the officer's testimony should not have been admitted into evidence, any error must be deemed harmless.

The State would note that the prosecutor for the State immediately asked the trial judge if he would like her to correct what had happened. (T. 299). Defense counsel said nothing at this point, and the court had a discussion with counsel outside of the presence of the jury. Defense counsel objected only to the officer referring to the victim. (T. 303). The

State would respectfully submit that the alleged error was therefore, not preserved for appellate review. The alleged error does not constitute fundamental error as any error here must be regarded as harmless. In this case, there is no inference that the defendant was arrested based upon information received from this unidentified witness. The witness only came on the scene after the crime. The prosecutor readily informed the trial judge that the witness was not a witness to the crime itself. (T. 298).

The defendant also relies upon the decision in Molina v. State, 406 So.2d 57 (Fla. 3d DCA 1981). In that case, over objection, the investigating police officers stated that, after interviewing two co-defendants who did not themselves testify, they arrested Molina and then placed his picture in a photo lineup for identification by the victim. In that case as well, the testimony was such that immediately after speaking to the co-defendants, the officer arrested the defendant. This was not the situation in the instant case. In Molina, the court noted that the only other evidence against Molina, as in Postell, was a severely challengeable eyewitness identification by the victim. Thus, in Molina, the court concluded that as in Postell, the admission of the hearsay testimony harmfully

affected Molina's trial and a new trial was required. The State would again submit that all the parties agreed here that there was no identification problem in the instant case. (T. 299-300). As such, again the State would submit that any error must therefore be deemed harmless.

The defendant also string cites to the decision in Barnes v. State, 576 So. 2d 439 (Fla. 4th DCA 1991), which can easily be distinguished. In that case, the court held that the testimony of the detective who interviewed the victim at the hospital was hearsay and its admission was harmful error although the testimony allegedly came in for the purpose of explaining how the defendant came to be arrested, the substance of that testimony corroborated the portion of the victim's testimony implicating the defendant. In this case, the officer did not testify as to what the victim had told him concerning the crime.

The State would respectfully submit that in this case there was no identification problem. In this case, the investigating officer's testimony&o not lead the jury to believe that a non-testifying witness had given the police evidence of the defendant's guilt. There was no such logical implication to be drawn from the testimony, which was the situation in all of the cases cited by the defendant. The State would submit that the

error complained of did not contribute to the verdict and further that there is no reasonable possibility that the alleged error contributed to the defendant's conviction. As such, any error must be deemed harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Once again, the State would note that the Third District did not even discuss this issue.

CONCLUSION

Based upon the preceding authorities and arguments, the Respondent respectfully requests that this Court enter an opinion answering the certified question in the negative. The case at hand, is completely distinguishable from Old Chief v. United States. This Court's decision in Parker v. State, is well-reasoned and sound and should not be disturbed.

Respectfully submitted,

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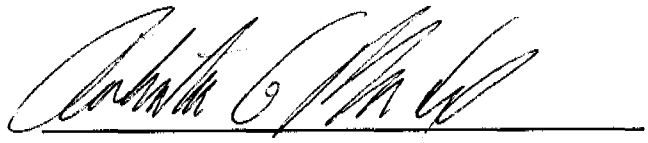

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **DOROTHY F. EASLEY, Special Assistant Public Defender,** SunTrust Building, 777 Brickell Avenue, Suite 950, Miami, Florida 33131, Florida, on this 26th day of January 1998.

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