ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 1999-53

SECOND DISTRICT COURT OF APPEAL CASE NO. 97-4845

GEORGE W. GARBUTT,

Petitioner,

vs.

ROSEMARY LaFARNARA,

Respondent.

On Certified Question of Great Public Importance from the Second District Court of Appeal for the State of Florida

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PETITIONER'S REPLY BRIEF ON THE MERITS

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In April of last year, this Court reversed and remanded a first degree murder conviction based upon, inter *alia*, improper comments of counsel which accused the defendant of lying and asking the jury to consider evidence outside the record. Ruiz v. State, 24 Fla. Law Weekly S157 (Fla. 1999). In so ruling, this Court referred the recalcitrant attorneys to the Bar for disciplinary proceedings and noted:

> The role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence. . . . To the extent an attorney's closing argument ranges beyond these boundaries, it is improper.

Id. at 5157. The particular comments which this Court found to have exceeded the boundaries of professional conduct included comparing the defendant to Pinocchio and inviting the jury to consider the prosecutor's family history of military service. Id. at S158. To remind the Court, the improper comments in the case at bar include comparing defense counsel to a used car salesman selling a car without an engine, (R. 108, p. 8977), to a "dog that won't hunt," (R. 108, p. 8977), to "hogwash," (R. 108, p. 8079), to "blowing smoke" (R. 108, p. 8981), to a "huge, blossoming weed," (R. 108, p. 8982), as a "fraudulent defense," (R. 108, p. 8983), as

"cock and bull" and that "pigs don't fly," (R. 108, p. 8984).[1] The comments also included improper references to events which were outside the evidence, such as the Respondent, Ms. LaFarnara, breaking down in the hallway during trial, (R. 107, p. 8827), and referring to a specific document not used in a prior proceeding (R. 109, p. 9045).

Ms. LaFarnara now claims that these comments were all proper conclusions to be drawn from the evidence, relying on Craig v. State, 510 So.2d 857 (Fla. 1987). In rejecting such a contention in Ruiz, this Court pointed out that the "Pinocchio" comment "crossed the line of acceptable advocacy by a wide margin." 24 Fla. Law Weekly at 5158. Clearly, if the Ruiz comments warranted reversal, so do those in the case at bar. In fact, the trial court specifically found that 15 comments made by Ms. LaFarnara's attorney were improper. (R. 46, p. 7375-77, Appendix B, p. 48-50)[2]. The Second District agreed. (Appendix A, p. 4-5). The trial court below specifically found that the argument directly impugned the integrity of defense counsel and accused him of lying to the jury, and confessed that the court should have intervened. (R. 46, p. 7378, Appendix B, p. 51). Ms. LaFarnara would now have this Court

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[1]Citations to the record are contained in a parenthetical beginning with the letter "R" followed by the volume and page number. Citations to the trial transcript will be referenced by the record volume number, not the transcript volume number, followed by the page number.

[2]References to the Appendix are to the Appendix to Petitioner's Initial Brief on the Merits, filed in this Court on or about January 7, 2000.

find that the extensive, egregious violations of the boundaries of acceptable professional conduct which comprise this closing argument should be dismissed as fair comment on the evidence.[3] A reading of the record and the opinions of the trial and appellate courts in this case clearly indicate that LaFarnara's counsel was not "commenting on the evidence," but was accusing defense counsel of lying and perpetrating a fraud on the court, all of which is impermissible under the authority cited by the Petitioner, Mr. Garbutt, in his Initial Brief on the Merits.[4] This Court should soundly reject Ms. LaFarnara's tortured and convoluted reinterpretation of her counsel's argument as fair comment on the evidence. It simply is not.

II. THE ISSUE OF IMPROPER COMMENT WAS PROPERLY PRESERVED FOR APPEAL BY A CUMULATIVE OBJECTION AND TIMELY MOTION FOR MISTRIAL.

Just as Ms. LaFarnara argues in this case, the prosecution in Ruiz v. State claimed that the defense waived any objection to the

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[3]Ms. LaFarnara also argues that the comments made by her attorney are not objectionable because similar comments were made by Mr. Garbutt's counsel. While Mr. Garbutt would certainly dispute such a claim, it is not necessary to examine any comments made by his attorney. It has been uniformly held that prejudicial conduct by an objecting party does not excuse the guilty party from his error, nor does it obviate the need for a new trial. Hvster Co. v. Stephens, 560 So.2d 1334 (Fla. 1st DCA 1990) ; Borden, Inc. v. Young, 479 So.2d 850 (Fla. 3d DCA 1985) .

[4]The extensive authority which prohibits accusing defense counsel of fraud includes Ruiz, as well as Riley v. State, 560 So.2d 279 (Fla. 3d DCA 1990); Maercks v. Birchansky, 549 So.2d 199 (Fla. 3d DCA 1989); Kendall Skatins Centers v. Martin, 448 So.2d 1137 (Fla. 3d DCA 1984); Vennins v. Roe, 616 So.2d 604 (Fla. 2d DCA 1993); and Carnival Cruise Lines v. Rosania, 546 So.2d 736 (Fla. 3d DCA 1989).

improper comments by failing to object. 24 Fla. Law Weekly at 5159. Interestingly enough, the defense in Ruiz objected to one comment and moved for a mistrial. In the instant case, Mr. Garbutt objected to six comments contemporaneously, (R. 107, p. 8767, 8807, 8814; R. 108, p. 8984; R. 109, p. 9025, 9039), to ten comments during a recess, (R. 109, p. 8998), and moved for a mistrial based upon cumulative error, (R. 109, p. 8997). In rejecting the waiver argument in Ruiz, this Court pointed out that the properly preserved comments should be reviewed in the context of all of the alleged misconduct which, in that case, warranted reversal. 24 Fla. Law Weekly at S159. Thus, in the instant case, this Court can, and should, review the objected-to improper comments (including that defense counsel was "blowing smoke") in the context of all of the improper comments.

In addition, this Court should be mindful that the improprieties of Ms. LaFarnara's attorney did not end with improper comment.[5] The record is replete with improper and inflammatory questions on cross-examination, including a question to Mr. Garbutt's son whether Mr. Garbutt had ever told him he could be "replaced by a nigger," despite the fact that counsel knew that he had answered "no" to the question on deposition and that there was an African-American member of the jury. (R. 46, p. 7367; R. 90, p. 6206). Ms. LaFarnara's attorney also asked questions concerning

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'Judge Blue characterized this case as "unusual if not bizarre" with "epic" problems. (Appendix A, p.3).

Mr. Garbutt's history of DUI arrests, despite a court ruling to exclude them. (R. 70, p. 3365). The court sustained an objection to that question, (R. 71, p. 3346), but counsel asked the questions again despite the ruling, (R. 99, p. 7592). Continual attempts were made to demonstrate that Mr. Garbutt treated his deceased wife poorly, (R. 38, p. 4976; R. 97, p. 7210, 7234; R. 100, p. 7722, 7724-28; R. 103, p. 8132; R. 105, p. 8454; R. 106, p. 8510), that Mr. Garbutt was hiding assets, (R. 100, p. 7648), that he carried a blackjack to collect rents in south St. Petersburg, (R. 101, p. 7760), that he made his second wife pay for half of the marriage license, (R. 100, p. 7698) and that he crushed people's cigarettes, (R. 101, p. 7763), when counsel knew there were three smokers on the jury, (R. 51, p. 417). This improper and inflammatory campaign of character assassination is discussed in more detail in the Petitioner's Initial Brief on the Merits at pages 43-48.[6]

When taken in the context of the litany of improper comments, the improper questioning discussed above, and the generation and admission of surprise evidence during the trial (See, Petitioner's Initial Brief on the Merits, p. 33-43), this Court is bound by Ruiz to find that Mr. Garbutt did not receive a fair trial, and that

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[6]It should be noted that Ms. LaFarnara's tactic of using inflammatory and emotional hyperbole continues even in this Court. For example, at page 21 of her Answer Brief on the Merits, Ms. LaFarnara claims that Mr. Garbutt waited in the hallway during the trial to "surprise, shock, and terrorize" her. Her actual testimony was "I came out of the ladies' room, and I went to turn right, and he was standing against the back wall of the elevator." (R. 103, p. 8190).

reversal is warranted. The facts on this record completely undermine Ms. LaFarnara's claim that this case should be analogized to Nixon v. State, 572 So.2d 1336 (Fla. 1990), which involved no objection or motion for mistrial, and Craig v. State, 510 So.2d 857 (Fla. 1987), which was distinguished in Ruiz, 24 Fla. Law Weekly at S158. In other words, this case can be closely analogized to Ruiz, which involved a partial objection and consideration of cumulative error, rather than Nixon, which involved no objection or consideration of the cumulative prejudicial effect against the defense.

This Court should, of course, view these authorities in the context of the certified question, which asks:

> To preserve error, is a contemporaneous objection required for *each instance* of improper argument or can the issue be preserved by a motion for mistrial before the case is submitted to the jury.

(emphasis added). As pointed out above, the issue in the instant case concerns six contemporaneous objections followed by a cumulative objection to ten comments coupled with a cumulative and timely motion for mistrial. This Court reversed Ruiz with far less on the record to preserve the error, and therefore implicitly answered the certified question in the affirmative. In other words, it is clearly not necessary to object to *each instance* of improper comment. As this Court found in Ruiz, an objection to one improper comment and a timely motion for mistrial can preserve the error when viewed in the context of all of the misconduct in the case. This Court can therefore answer the certified question in

the affirmative on the authority of Ruiz. It is not necessary to object to each instance of improper comment. A cumulative objection and motion for mistrial is sufficient. Therefore, the issue was preserved for review in this case, and, as urged by Judge Blue, reversal for a new trial is warranted.

Ms. LaFarnara incorrectly assumes that answering the certified question in the affirmative would constitute an abandonment of the contemporaneous objection requirement. To the contrary, the question asks, and Mr. Garbutt urges, that this Court simply follow its ruling in Ruiz and hold that it is not necessary to contemporaneously object to *each* instance of improper comment in order to preserve the issue. In other words, the objection to the "blowing smoke" comment (and five others), together with the later motion for mistrial pointing out ten improper comments, should be sufficient to preserve the error. As Judge Blue points out, Mr. Garbutt's attorney should not be required to annoy the jury with 34 objections interrupting counsel's arguments. A few objections coupled with a motion for mistrial outside the jury's presence should suffice.

Ms. LaFarnara also erroneously claims that answering the certified question in the affirmative would deprive the court of the opportunity to correct the error as it occurred, and deprive the offending party of the opportunity to correct and/or restate the offending comment. However, as pointed out repeatedly, it is not necessary to ask the court for a curative instruction after an

improper comment, because to do so merely serves to re-emphasize the inflammatory remark which the jury has already heard once. See, James v. State, 695 So.2d 1229, 1234 (Fla. 1997). Furthermore, to argue that the offending party should have the opportunity to restate the improper comment begs the question. As pointed out by Judge Blue in the concurring opinion below, attorneys should be responsible for adhering to the rules during their own argument; the burden should not be placed on the party being victimized by an improper argument to force the offending party to correct it. The impropriety should not occur in the first place. The policy of this Court and of this State should be to emphasize that improper, inflammatory arguments will result in new trials or reversals on appeal, thereby discouraging their use. This is particularly true in cases such as Ruiz and the instant case where the victimized party does object and move for a mistrial, but does not necessarily make 34 contemporaneous objections during an improper attack against the credibility of defense counsel.

Furthermore, it is unavailing under the facts of this case to argue that Ms. LaFarnara's attorney should have been given the opportunity to correct himself. It is clear from the record that even after the court sustained the objection and after the motion for mistrial was made, (R. 109, p. 8994-9003), counsel for Ms. LaFarnara directly accused defense counsel of lying to the jury with the following comment:

> And quite frankly, ladies and gentlemen, if - if defense counsel wants to stand up here, either for his lack of comprehension or his zeal for representing his client - I don't know. I'm not suggesting he's lying, but if he wants to stand up here and tell you, time and time again, that the earth is flat, it doesn't make it flat, and you have a duty to reject that argument.

(R.109, p.9031). The trial court agreed that these comments were improper. (R. 46, p.7378, Appendix B, p. 51). Ms. LaFarnara's counsel also referred to Mr. Garbutt's defense as having been "concocted" after the "blowing smoke" objection, (R. 109, p. 9056), and mocked defense counsel's argument with the phrase "yah-dee-dah," (R. 109, p. 9041), to which defense counsel lodged an additional objection, (R. 109, p. 9048).[7] Thus, even after counsel had heard the objection, received the ruling, and argued against a mistrial, he still continued to disparage the defense attorney. The policy of requiring contemporaneous objections obviously did not prevent this attorney from violating the rules, and this Court should remedy the error with a reversal.

This Court should also be mindful that the "contemporaneous objection" requirement was applied by the trial court in its consideration of the Motion for New Trial below. (R. 46, p. 7365-81, Appendix B, p. 39-54). However, the Fourth District Court of Appeal recently held that the preservation of error rule does not apply to motions for new trial. Niaro v. Brady, 731 So.2d 54, 56

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[7]There is an editing error on pages 5-6 of the Petitioner's Initial Brief on the Merits, in that the three comments quoted on page 6 were made before, not after, the "blowing smoke" objection, as is evident from the record citations. The remainder of pages 6 and 7, however, are correct.

(4th DCA 1999). Thus, in considering the motion for new trial below, the trial court erroneously applied this standard and erroneously found that the objections were waived. In actuality, then, the improper comments by Ms. LaFarnara's counsel were preserved for appeal by the extensive motion for new trial filed below in this case (R. 35, p. **5429-45;** amended R.37, p. 5785-5804). Thus, this issue is not being raised for the first time on appeal. It was raised in the trial court by a timely objection to one comment, by a cumulative objection during a recess, by a motion for mistrial, and ultimately by a motion for new trial. Of course, Mr. Garbutt claims that the denial of the motion for new trial was erroneous because the trial court should not have applied the contemporaneous objection standard and found that the objections were waived. This Court, then, can find that the denial of the motion for new trial was erroneous, and reverse the judgment, regardless of any contemporaneous objection.

III. THE IMPROPER COMMENTS IN THIS CASE WARRANT REVERSAL EVEN ABSENT CONTEMPORANEOUS OBJECTION, AS THEY CONSTITUTE FUNDAMENTAL ERROR.

This Court is presently considering the issue of whether improper comment can be reviewed on appeal absent a contemporaneous objection, if the same constitutes fundamental error. Murphy v. International Robotics Systems, Inc., case no. 92,837.[8] As pointed out in the Petitioner's Initial Brief on the Merits, p. 32-33, no

[8]Murphy is an appeal from Murphy v. International Robotics Systems, Inc., 710 So.2d 587 (Fla. 4th DCA 1998), rev. granted, **722** So.2d 193 (Fla. 1998).

contemporaneous objection is necessary to preserve for appeal improper comments which constitute fundamental error. If this Court adopts the standard established by the First, Third and Fifth District Courts, then improper arguments in violation of the rules of professional conduct will be subject to reversal even absent contemporaneous objection.[9] Borden, Inc. v. Young, 479 So.2d 850, 852 (Fla. 3d DCA 1985). The comments made in this case clearly meet that standard, and reversal is warranted even without any contemporaneous objection. Of course, because Mr. Garbutt did object in this case, and did move for a mistrial, any concern over whether the objections were timely is obviated by a fundamental error analysis. If the comments did indeed constitute fundamental error, then clearly the steps taken by Mr. Garbutt at the trial level were sufficient to preserve this issue for appeal and reversal is warranted.

IV. THE RECORD IN THIS CASE INDICATES THAT THE VERDICT WAS BASED ON PASSION AND PREJUDICE, RATHER THAN AN OBJECTIVE VIEW OF THE FACTS.

Ms. LaFarnara claims that all of the error raised at various points in these proceedings is harmless, because the verdict is supportable by the evidence. This, of course, begs the question. As in Ruiz v. State, this case was a hotly contested battle involving serious issues of credibility from both sides. At its

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[9]The Florida Rules of Professional Conduct prohibit commenting on matters outside the evidence or asserting personal knowledge at trial, Rule 4-3.4(e), and disparaging or humiliating litigants, witnesses or other lawyers on any basis, Rule 4-8.4(d), all of which were violated by the comments in this case.

core, the trial was a "he said-she said" contest between the parties as to allegations of abuse, and a battle of experts as to injuries.[10] All of the witnesses were extensively cross-examined for credibility and bias. It is Mr. Garbutt's position that, instead of viewing the facts in an objective and dispassionate manner, the jury was inflamed by Ms. LaFarnara's trial strategy employing improper arguments, improper cross-examination of witnesses, character assassination, and trial by ambush with surprise evidence. This strategy convinced the jury that Mr. Garbutt was not worthy of a fair consideration of the facts, and resulted in an exorbitantly high verdict of over 1.75 million dollars. This is clearly indicated by the jury's award of $10,000.00 in damages for injury to reputation, which the trial judge found to be without any support in the evidence. (R. 46, p. 7335; Appendix B, p. 10). It does not require an extensive leap of logic to conclude that, if the jury was moved to award defamation damages without any evidentiary support, then the jury was also moved to find liability and/or award excessive damages contrary to what was warranted by the evidence. Thus, it can be reasonably concluded from the record that it was Ms. LaFarnara's trial tactics of improper comment, improper questioning, character assassination

[10]It should be noted that the vast majority of Ms. LaFarnara's recitation of the facts of the case in her Answer Brief on the Merits is drawn solely from her own self-serving testimony. Mr. Garbutt denied all of the allegations of abuse at trial, and substantially challenged Ms. LaFarnara's credibility (See, Petitioner's Initial Brief on the Merits, p. 3-4).

and surprise evidence which led the jury to its verdict, and not an objective view of the evidence.

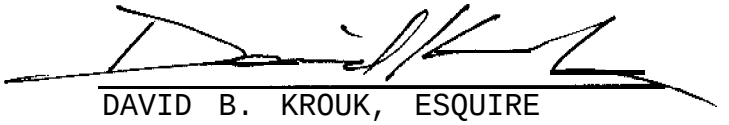
CONCLUSION

For the reasons stated herein and in Petitioner's Initial Brief on the Merits, this Court should, under existing authority, answer the certified question in the affirmative, by holding that it is not necessary to make a contemporaneous objection to each instance of improper comment, but that a cumulative objection followed by a timely motion for mistrial is sufficient to preserve the error for review, and that under the facts of this case the improper argument of counsel, coupled with the other prejudicial error in this case, warrants a new trial. This Court should thus reverse this case and remand it for a new trial on all issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Initial Brief on the Merits was mailed this 27th day of February, 2000, to DAVID J. PLANTE, ESQUIRE, 5510 West LaSalle Street, Tampa, Florida 33607.

PIPER, ESTEVA, GREEN, KARVONEN & LEWIS



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