IN THE SUPREME COURT OF FLORIDA

RONALD R. CARDENAS, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-1264

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

ROBERT L. MARTIN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0075744

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

ISSUE I

IS IT FUNDAMENTAL ERROR TO GIVE A JURY INSTRUCTION ON THE PRESUMPTION IMPAIRMENT IN VIOLATION OF THE PRECEPTS OF *STATE v. MILES*, 775 So. 2d 950 (Fla. 2000)? 4

A. JURISDICTION 4

B. *STATE v. MILES* 4

C. FUNDAMENTAL ERROR 6

D. MERITS 7

ISSUE II

DID ANY OF THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS CONSTITUTE REVERSIBLE ERROR? (Restated) . . 13

A. JURISDICTION 13

B. PRESERVATION 13

C. STANDARD OF REVIEW 15

D. MERITS 15

CONCLUSION 22

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE 22

CERTIFICATE OF COMPLIANCE 22

TABLE OF CITATIONS

CASES **PAGE(S)**

FEDERAL CASES

Carella v. California, 491 U.S. 263 (1989) 6

Chapman v. California, 386 U.S. 18 (1967) 6

Griffin v. United States, 502 U.S. 46 (1991) 10

Neder v. United States, 527 U.S. 1 (1999) 5

Pope v. Illinois, 481 U.S. 497 (1987) 6

Rose v. Clark, 478 U.S. 570 (1986) 6

STATE CASES

Abbott v. State, 334 So. 2d 642 (Fla. 3d DCA 1976) 17

Austin v. State, 700 So. 2d 1233 (Fla. 4th DCA 1997) . . . 19

Begley v. State, 483 So. 2d 70 (Fla. 4th DCA 1986) 9

Buenoano v. State, 527 So. 2d 194 (Fla. 1988) 16, 18

Cardenas v. State, 816 So. 2d 724 (Fla. 1st DCA 2002) . . . . . 4, *passim*

Castor v. State, 365 So. 2d 701 (Fla. 1978) 6

Chandler v. State, 702 So. 2d 186 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998) 15, 21

Gibson v. State, 194 So. 2d 19 (Fla. 2d DCA 1967) 8

Gonzalez v. State, 503 So. 2d 425 (Fla. 3d DCA 1987) . . . 18

Groover v. State, 489 So. 2d 15 (Fla. 1986) . . . 14, 16, 20

Hopkins v. State, 632 So. 2d 1372 (Fla. 1994) 6, 7

Kearse v. State, 770 So. 2d 1119 (Fla. 2000) . . . 14, 16, 20

King v. State, 623 So. 2d 486 (Fla. 1993) 15

Knight v. State, 746 So. 2d 423 (Fla. 1998) 17

Lewis v. State, 780 So. 2d 125 (Fla. 3d DCA 2001) 20

Lopez v. State, 555 So. 2d 1298 (Fla. 3d DCA 1990) 20

Mitchell v. State, 678 So. 2d 1362 (Fla. 1st DCA), rev. denied, 686 So. 2d 580 (Fla. 1996) 19

Morris v. State, 557 So. 2d 27 (Fla. 1990) 5, 7

Neering v. State, 155 So. 2d 874 (Fla. 1963) 13

Palmes v. State, 397 So. 2d 648 (Fla. 1981) 9

Puentes v. State, 658 So. 2d 171 (Fla. 3d DCA 1995) 14, 16, 20

Ray v. State, 403 So. 2d 956 (Fla. 1981) 6

Reed v. State, 783 So. 2d 1192 (Fla. 1st DCA 2001), rev. granted No. SC01-1238 (Oct. 16, 2001), ... 7, 9

Robertson v. State, 604 So. 2d 783 (Fla. 1992) 10

Rodriguez v. State, 753 So. 2d 29 (Fla. 2000) 18

San Martin v. State, 717 So. 2d 462 (Fla. 1998) . . 10, 11, 12

Smith v. State, 486 So. 2d 685 (Fla. 3d DCA 1986) 18

Smith v. State, 521 So. 2d 106 (Fla. 1988) 8, 9

Spencer v. State, 133 So. 2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962) 18

Spencer v. State, 645 So. 2d 377 (Fla. 1994) . . . 13, 15, 20

State v. Burns, 491 So. 2d 1139 (Fla. 1986) 11

State v. Clark, 614 So. 2d 453 (Fla. 1993) 9

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) . . 5, *passim*

State v. Fritz, 652 So. 2d 1243 (Fla. 5th DCA 1995) . 17, 18

State v. Marshall, 476 So. 2d 150 (Fla. 1985) 11

State v. Miles, 775 So. 2d 950 (Fla. 2000) 4

State v. Murray, 443 So. 2d 955 (Fla. 1984) 14, 20

State v. Smith, 240 So. 2d 807 (Fla. 1970) 6, 8

Tibbs v. State, 397 So. 2d 1120 (Fla. 1981) 21

Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210 (1992) 15

Wilson v. State, 294 So. 2d 327 (Fla. 1974) 14, 20

Zack v. State, 753 So. 2d 9 (Fla. 2000) 7

COURT RULES

Fla. R. App. P. 9.210 22

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, RONALD R. CARDENAS, JR., the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of five (5) volumes containing the Clerk's record, and eight (8) volumes of trial transcripts. The trial transcripts will be referenced according to the respective volume number designated in the Index to the Record on Appeal, followed by any appropriate page number(s). The Clerk's record will be designated by the letter "R," followed by the appropriate page number(s). "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number(s) in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's Statement of the Case and Facts, subject to the inclusion of these additional facts from the record on appeal:

During pre-trial motions, the trial court found that the blood draw from Appellant by the Florida Marine Patrol (FMP) was based on probable cause, and allowed the evidence to be admitted at trial. [Vol. I. 65] At trial, witness David Pittman testified that the beer “ran out” around three or three-thirty that afternoon. [Vol. III. 403]

SUMMARY OF ARGUMENT

ISSUE I: IS IT FUNDAMENTAL ERROR TO GIVE A JURY INSTRUCTION ON THE PRESUMPTION IMPAIRMENT IN VIOLATION OF THE PRECEPTS OF *STATE v. MILES*, 775 So. 2d 950 (Fla. 2000)?

The giving of the presumption instruction was not fundamental error. Fundamental error occurs only in that very narrow range of cases in which a defendant is entirely denied the right to a fair trial.

At trial, the jury had two sources, one which Petitioner concedes was properly admitted, to base any conclusion as to Petitioner's blood alcohol content. There was ample evidence presented at trial to convict Petitioner under either theory presented. Moreover, unpreserved errors involving improper jury instructions have been found to be harmless error by this Court. Petitioner's conviction should be affirmed.

ISSUE II: DID ANY OF THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS CONSTITUTE REVERSIBLE ERROR? (Restated)

None of the commentary of which Petitioner complains was preserved for appellate review. Only three of the comments were met with an objection at trial. Petitioner did not seek a mistrial or request a curative instruction for any of these statements below. Moreover, none of the alleged errors, even if properly preserved, were of such prejudicial nature as to warrant reversal. Prosecutorial error alone does not warrant

reversal unless the error was so prejudicial as to vitiate the entire trial. The alleged errors do not require a new trial.

ARGUMENT

ISSUE I

IS IT FUNDAMENTAL ERROR TO GIVE A JURY INSTRUCTION ON THE PRESUMPTION IMPAIRMENT IN VIOLATION OF THE PRECEPTS OF *STATE v. MILES*, 775 So. 2d 950 (Fla. 2000)?[1]

A. JURISDICTION

Pursuant to Article V, § 3(b)(4) of the Florida Constitution, this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal."

B. STATE v. MILES

In State v. Miles, supra, this Court held that the administrative rule governing labeling and sampling of blood samples did not give rise to statutory presumptions associated with implied consent law, and that state was not entitled to the legislatively created presumptions of impairment. The case *sub judice* can be distinguished from Miles in that the issue was not preserved for appellate review, as found by the First District Court of Appeal. Cardenas v. State, 816 So. 2d at 726.

---

[1] Issue as certified by the Florida First District Court of Appeals in Cardenas v. State, 816 So. 2d 724 (Fla. 1st DCA 2002).

Even assuming *arguendo* that this issue had been preserved by Petitioner, under the facts of the instant case, the giving of the presumption instruction did not constitute fundamental error. Cardenas at 726-727. Unpreserved errors involving improper jury instructions have been found to be harmless error by this Court. See e.g. Morris v. State, 557 So. 2d 27 (Fla. 1990).

In Morris, that defendant asserted on appeal that the trial court committed error in instructing the jury on felony murder by aggravated child abuse. Morris, 557 So. 2d at 29. This Court found that the instruction given by the trial court erroneously informed the jury that it could find Morris guilty of first-degree murder by aggravated child abuse if it found an underlying offense of simple battery. Id. However, as in the instant case, Morris failed to object to the instruction at trial and argued on appeal that the error was fundamental. Id. This Court disagreed and found, based on the evidence of guilt presented at trial, that there was no reasonable possibility that the jury could have determined that Morris intended only to strike the victim rather than to hurt him seriously and held the error harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Morris at 29.

In addition to our state courts, the United States Supreme Court has held that the “harmless error” rule applies to cases involving improper jury instructions. See e.g. Neder v. United States, 527 U.S. 1 (1999)(Trial court's error in

failing to charge jury on one element in a tax fraud prosecution did not render the trial fundamentally unfair, so as to preclude harmless-error review); Carella v. California, 491 U.S. 263 (1989) (*per curiam*) (mandatory conclusive presumption); Pope v. Illinois, 481 U.S. 497 (1987) (misstatement of element); Rose v. Clark, 478 U.S. 570 (1986) (mandatory rebuttable presumption).

This issue is further addressed below.

C. FUNDAMENTAL ERROR

Fundamental error occurs only in that very narrow range of cases in which a defendant is entirely denied the right to a fair trial. See e.g. Chapman v. California, 386 U.S. 18 (1967). As this Court stated in State v. Smith, infra:

> For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process.

State v. Smith, 240 So. 2d 807 (Fla. 1970). See also Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978); Ray v. State, 403 So. 2d 956 (Fla. 1981). This was reiterated in Hopkins v. State, infra, where this Court stated:

> Fundamental error is “error which goes to the foundation of the case or goes to the merits of the cause of action." If a procedural defect is declared fundamental error, then the error can be considered on appeal even though no objection was raised in the lower court. However, this Court has cautioned that the fundamental error doctrine should be used "very guardedly." "[F]or an error to be so fundamental that it

> can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process."

Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994) [citations omitted]. Moreover, a fundamental error must be such that it is always harmful and cannot be analyzed for harmlessness. See State v. DiGuilio, supra.

In light of the definition of fundamental error and this Court's application of the doctrine, Petitioner's claims must be rejected.

D. MERITS

In the instant case, the giving of the impairment instruction was not fundamental error. Cardenas at 726-727. In cases where there is some evidence that an innocent person may have been convicted or the prosecutor has misused the improper instruction, application of the doctrine of fundamental error to the giving of inaccurate jury instructions may be justified. Reed v. State, 783 So. 2d 1192 (Fla. 1st DCA 2001), rev. granted No. SC01-1238 (Oct. 16, 2001).[2]

There are numerous cases holding improper jury instructions are subject to a harmless error analysis. See e.g. Morris v. State, supra; Zack v. State, 753 So. 2d 9 (Fla.

[2] Reed, supra, is relevant here. The State's position in Reed and this case should be taken together.

2000)(Even if giving instruction on burglary was error for purpose of felony murder conviction, error was harmless beyond a reasonable doubt, as conviction for first-degree murder and felony murder aggravator could be sustained based on sexual battery or robbery conviction, and based on strength of state's case there was no reasonable possibility that either conviction or death sentence would have been different but for argument and instruction on burglary).

In State v. Smith, supra, the defendant was convicted of a permissible lesser included offense that was not mentioned in the accusatory pleading. Smith, 240 So. 2d at 808. Smith raised no objection to the giving of a jury instruction on this offense and on appeal argued that the error was fundamental. Id. at 809. This Court disagreed. To explain the fundamental error rule, this Court relied in part on the following language quoted from a lower court's decision:

> The Florida cases are extremely wary in permitting the fundamental error rule to be the "open sesame" for consideration of alleged trial court errors not properly preserved. Instances where the rule had been permitted by the appellate courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial court itself to the extent that a verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to jurisdiction of the trial Court.

Smith at 810 (*quoting* Gibson v. State, 194 So. 2d 19 (Fla. 2d DCA 1967)).

In a more recent case, Smith v. State, 521 So. 2d 106 (Fla. 1988), this Court reaffirmed its earlier interpretations of the fundamental error rule. The error raised in Smith related to the giving of a standard jury instruction on the insanity defense, which was later disapproved. Smith at 107. The defendant neither objected to the jury instruction nor requested a special jury instruction. Id. This Court concluded that the error was not fundamental, since the jury instruction actually given was constitutionally permissible. Id. at 108.

In this case, as in Reed, supra, utilization of the doctrine of fundamental error is not justified in light of the evidence of guilt and absence of any evidence that the inaccurate instruction was misused. See State v. DiGuilio, supra. This Court has previously determined that even fundamental error may in fact be harmless. See e.g. State v. Clark, 614 So. 2d 453 (Fla. 1993).

At trial, evidence was presented from the law enforcement and the medical blood draws. [Vol. IV. 708-710; Vol. V. 957, 959-960] Even assuming *arguendo* that the blood draw by the Florida Marine Patrol had been improper or inadmissible, in the District Court appeal Petitioner readily conceded that the medical blood draw was properly admitted. [Brief of Appellant at 45] Therefore, the jury had two sources, one of which

Petitioner concedes was properly admitted, to base any conclusion as to Petitioner's blood alcohol content (BAC).

An error in admitting evidence is harmless when substantially the same evidence was presented to the jury through the testimony of other witnesses. Palmes v. State, 397 So. 2d 648, 653 (Fla. 1981); Begley v. State, 483 So. 2d 70 (Fla. 4th DCA 1986). Under the specific facts of the case *sub judice*, the claim of reversible error is without merit. As this Court held in San Martin v. State, infra:

> While a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory, reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient.

San Martin v. State, 717 So. 2d 462, 470 (Fla. 1998) [footnotes omitted]. The trial court explicitly found that the blood draw was based on probable cause, and was therefore properly admitted at trial. [Vol. I. 65]

Moreover, in Griffin v. United States, 502 U.S. 46 (1991), the Supreme Court held that even if the evidence does not support the specific verdict, any error in charging the jury on that theory is harmless where the evidence supports a conviction for the general verdict. See also Robertson v. State, 604 So. 2d 783, 792 n. 14 (Fla. 1992)(". . . the presumption of impairment created by [section 316.1934(2), Florida Statutes] is a moot concern if the state proves beyond

a reasonable doubt that the defendant operated a motor vehicle with an unlawful blood-alcohol level.").

In the instant case, there was ample evidence presented at trial to convict Petitioner under either theory presented. In addition to the medical and law enforcement blood draws, there was, ***inter alia***, the opinion testimony of the State's expert that Petitioner was the operator of the boat as well as Petitioner's admission that he was the driver made to Lt. Gomez. [Vol. IV. 708-710, 787-793; Vol. V. 854-855, 868, 957, 959-960] All of this evidence supports the jury's verdict, notwithstanding the presumption instruction.

In State v. Burns, 491 So. 2d 1139 (Fla. 1986), the Court discussed the obligation of an appellate court in applying the harmless error test. If the appellate court believes beyond a reasonable doubt that the error did not affect the verdict, then the verdict should be upheld. Burns at 1140 (*quoting* DiGuilio, supra). This Court also stated in State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985):

> It makes no sense to order a new trial, because of a nonfundamental error committed at trial, when we know beyond a reasonable doubt that the defendant will be convicted again.

In other words, a defendant is entitled to a fair trial, not a perfect one.

In San Martin v. State, supra, the defendant was convicted of first degree murder by general verdict but contended that there was insufficient evidence of

premeditation. This Court agreed that premeditation was not proved but upheld the conviction saying:

> We agree with San Martin that the evidence in this case does not support premeditation, but do not find that reversal is warranted on this basis. ***While it may have been error to instruct the jury on both premeditation and felony murder (citation omitted) any error in this regard was clearly harmless. The evidence supported conviction for felony murder and the jury properly convicted San Martin of first degree murder on this theory.***

San Martin at 469 [Emphasis added]. In the case *sub judice*, there was ample evidence to support Petitioner's conviction.

In light of the foregoing facts and authority, there was no error below. The certified question should be answered in the negative and Petitioner's conviction should be affirmed.

ISSUE II

DID ANY OF THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS CONSTITUTE REVERSIBLE ERROR? (Restated)

A. JURISDICTION

The State acknowledges that once this Court has accepted jurisdiction on any ground, the entire case is before the Court for review. See e.g. Neering v. State, 155 So. 2d 874 (Fla. 1963). However, the State urges the Court to decline review of this issue. This same unpreserved issue was presented to the First District Court of Appeal, who apparently rejected it and did not even address it in their opinion disposing of the instant case. See Cardenas v. State, supra.

B. PRESERVATION

The commentary complained of was not preserved for appellate review. Of the numerous comments made by the prosecutor of which Petitioner complains, only three were met with objections. [Vol. VIII. 1368, 1382, 1451] The three objections appear to have been sustained by the trial court, however, there was no motion for mistrial nor were any curative instructions requested by Appellant for any of the comments. [Vol. VIII. 1368, 1382, 1451] While a defendant need not request a curative instruction in order to preserve an improper comment issue for appeal, the issue is preserved

"***if the defendant makes a timely specific objection and moves for a mistrial***." Spencer v. State, 645 So. 2d 377, 382 (Fla. 1994)[emphasis added]; Kearse v. State, 770 So. 2d 1119, 1129 (Fla. 2000). See also Puentes v. State, 658 So. 2d 171 (Fla. 3d DCA 1995) (Challenge to prosecutor's alleged improper comments during closing argument concerning credibility of state's witness was not preserved for appellate review, as defendant's objection was sustained and defense counsel did not thereafter make request for curative instruction or motion for mistrial). Thus, none of the commentary of which Appellant complains was preserved for appellate review.

The failure to object to improper prosecutorial comments will not preclude reversal where the comments are so prejudicial to the defendant that neither rebuke nor retraction would destroy their influence in attaining a fair trial. Wilson v. State, 294 So. 2d 327, 328-329 (Fla. 1974). However, none of the alleged errors were of such prejudicial nature as to warrant reversal. See State v. Murray, 443 So. 2d 955, 956 (Fla. 1984) (prosecutorial error alone does not warrant reversal unless trial error was "so prejudicial as to vitiate the entire trial"). The alleged errors were not so fundamental as to require a new trial. See Groover v. State, 489 So. 2d 15 (Fla. 1986) (defendant barred from claiming error on appeal in absence of objection at trial to prosecutor's statements where statements did not amount to

fundamental error). Therefore, this issue is not cognizable on appeal.

C. STANDARD OF REVIEW

When an issue is unpreserved, the standard of review is one of fundamental error. For an error to be raised for the first time on appeal, the error must be so prejudicial as to vitiate the entire trial. Chandler v. State, 702 So. 2d 186, 191 n. 5 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998) .

D. MERITS

Assuming *arguendo* that any of the commentary was error, improper prosecutorial comment is subject to a harmless error analysis, and will give rise to the reversal of a conviction only if the comment is so prejudicial ***that it vitiates the entire trial.*** King v. State, 623 So. 2d 486 (Fla. 1993) [emphasis added]; Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210 (1992).

1. Comments met with an objection.

Of the numerous comments of which Petitioner now complains, only three were met with an objection at trial. [Vol. VIII. 1368, 1382, 1451] Petitioner did not seek a mistrial or request a curative instruction for any of these statements below. Therefore, even those statements met with an objection were not preserved for appeal. Thus, none of the commentary of which Petitioner complains was preserved for appellate review. See Spencer v. State, 645 So. 2d at 382 (the issue is preserved only "if the defendant makes a timely

specific objection and moves for a mistrial."); Kearse v. State, 770 So. 2d at 1129; Puentes v. State, supra. See also Groover v. State, supra (defendant barred from claiming error on appeal in absence of objection at trial to prosecutor's statements where statements did not amount to fundamental error). However, assuming *arguendo* that these comments had been preserved, none of them amounted to any type of reversible error.

One of statements met with an objection dealt with Petitioner's blood alcohol level (BAC). [Vol. VIII. 1368] Notwithstanding Petitioner's assertions to the contrary, the record shows that witness David Pittman testified that the beer "ran out" around three or three-thirty that afternoon. [Vol. III. 403] Therefore, Petitioner's claim that this argument was "wholly unsupported by any record evidence at all" is clearly without merit.

Moreover, the trial court sustained Petitioner's objection and instructed the jury that they had "no evidence" to determine if Petitioner's BAC was rising or falling. [Vol. VIII. 1368] This Court has held that the use of a curative instruction to dispel the prejudicial effect of an objectionable comment is sufficient to do so. See Buenoano v. State, 527 So. 2d 194 (Fla. 1988). Petitioner requested no further curative instruction nor did he move for a mistrial. [Vol. VIII. 1368]

In spite of that fact, Petitioner now complains on appeal that no "effective curative action was taken." [Brief of Petitioner at 24] Had Petitioner believed that the trial court's curative instruction was insufficient, he was required to seek another curative instruction or move for mistrial. See e.g. State v. Fritz, 652 So. 2d 1243, 1244 (Fla. 5th DCA 1995)(to preserve a claim of improper prosecutorial misconduct, an objection must be made and if the objection is sustained, the ***defendant must then request a curative instruction or mistrial***; he cannot await the outcome of the trial to seek the relief of a new trial - [emphasis added]). To allow Petitioner to litigate this claim on appeal, where no request for further curative action was made, would be violative of the rule of invited error. See e.g. Knight v. State, 746 So. 2d 423 (Fla. 1998)(a party cannot invite error and then complain about it on appeal).

Petitioner also argues that the comment related to the damaged windshield was improper. [Petitioner's Brief at 18] The record indicates that Petitioner admitted that the "wall" was gone and that the "upper wall before you get to the top of the bow" was gone. [Vol. VII. 1252] The State then continues to go through the pictures of the boat with Petitioner. [Vol. VII. 1253-1257] The prosecutor's comment was that Petitioner's admission was "through the pictures" and not by his testimony. [Vol. VIII. 1382] It must be inferred that the photographs depicted the damage described by the prosecutor in

his closing comments. See e.g. Abbott v. State, 334 So. 2d 642, 647 (Fla. 3d DCA 1976)(The verdict arrives in the appellate court clothed with a presumption of correctness, all inferences to be drawn from the evidence are to be in favor of the verdict or judgment of guilt). Moreover, the rule is that considerable latitude is allowed in arguments on the merits of the case and logical inferences from the evidence are permissible. Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), cert. denied, 369 U.S. 880 (1962).

Again, the trial court sustained Petitioner's objection and gave a curative instruction [Vol. VIII. 1382-1383]. See Buenoano v. State, supra (The use of a curative instruction to dispel the prejudicial effect of an objectionable comment is sufficient to do so). No further objections were made, no mistrial was requested, and no further action by the trial court was requested by Petitioner. [Vol. VIII. 1382-1383]

Had Petitioner believed that the trial court's curative instruction was insufficient, he was required to seek another curative instruction or move for mistrial. See e.g. State v. Fritz, 652 So. 2d at 1244. Even assuming *arguendo* that this comment was improper, any error would be harmless. See e.g. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000)(Prosecutor's comments on defendant's right to remain silent were improper but were harmless error); Gonzalez v. State, 503 So. 2d 425, 427 (Fla. 3d DCA 1987)(Prosecutor's allusion to facts not in evidence was harmless where the trial court cured the error by

instructing the jury to disregard the comment as defense counsel had requested); Smith v. State, 486 So. 2d 685 (Fla. 3d DCA 1986)(Prosecutorial comments on defendant's failure to call a witness constituted harmless error where the jury was instructed to ignore the comment).

The only other comment which Petitioner objected to during closing arguments is related to finding blood on the boat. [Vol. VIII. 1451] Petitioner objected to this comment as shifting the burden of proof to the defense. [Vol. VIII. 1451] The State fails to see any merit in this argument or any way to construe the prosecutor's comment as an attempt to the shift the burden of proof.

The State's comment below was merely commentary in response to Petitioner's closing argument. [Vol. VIII. 1409-1410] The prosecution could lawfully respond that the defense's closing argument is not what the evidence shows. See Mitchell v. State, 678 So. 2d 1362, 1363 (Fla. 1st DCA), rev. denied, 686 So. 2d 580 (Fla. 1996) (stating in *dicta* that the prosecutor's closing remarks were an invited, fair reply to defense counsel's remarks and did not constitute prejudicial error when considered in context). The state has a right, and even a duty, to respond to the defense's argument and to ignore it gives it credence. Austin v. State, 700 So. 2d 1233, 1235 (Fla. 4th DCA 1997). This comment was not improper.

2. Statements Made Without Objection.

The remaining alleged improper comments were not objected to, no curative instructions were requested, nor was any motion for mistrial made by Petitioner. None of these statements were preserved for appellate review. In order to preserve an improper comment issue for appeal, the issue is preserved only "***if the defendant makes a timely specific objection and moves for a mistrial***." Spencer v. State, 645 So. 2d at 382 [emphasis added]; Kearse, supra. See also Puentes v. State, supra.

The State acknowledges that the failure to object to improper prosecutorial comments will not preclude reversal where the comments are so prejudicial to the defendant that neither rebuke nor retraction would destroy their influence in attaining a fair trial. Wilson v. State, supra. In Lopez v. State, the Third DCA held that in order for a prosecutor's comment to merit a new trial, the comment must be of such a nature as to:

> 1) deprive the appellant of a fair trial; 2) materially contribute to his conviction; 3) be so harmful or fundamentally tainted as to require a new trial; or 4) be so inflammatory that it might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise.

Lopez v. State, 555 So. 2d 1298, 1299 (Fla. 3d DCA 1990); Lewis v. State, 780 So. 2d 125, 131 (Fla. 3d DCA 2001). However, none of the alleged errors, even if properly

preserved, were of such a prejudicial nature as to warrant reversal under this standard.

Prosecutorial error alone does not warrant reversal unless trial error was "so prejudicial as to vitiate the entire trial." State v. Murray, 443 So. 2d at 956. The alleged errors below were not so fundamental as to require a new trial. See Groover v. State, supra (defendant barred from claiming error on appeal in absence of objection at trial to prosecutor's statements where statements did not amount to fundamental error).

D. CUMULATIVE ERROR

As argued above, the State contends that none of these comments, alleged to be improper, constituted error. Even assuming *arguendo* that any or all of Appellant's complaints were valid, none of the alleged errors, standing alone or cumulatively, rise to a level that would vitiate the entire trial. See Chandler v. State, supra.

As for the argument that the cumulative effect of all the comments constituted error, that State contends that considering such an argument would be contrary to Tibbs v. State, 397 So. 2d 1120 (Fla. 1981). In Tibbs, the Supreme Court held that as

> a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts

> in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Tibbs, 397 So. 2d at 1124 [footnotes omitted].

None of the comments made below, even if preserved for review, constituted any type of error, let alone reversible error. This issue is without merit and Petitioner's conviction should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 816 So. 2d 724 should be approved, and the judgment entered below should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to EUGENE K. POLK, Esquire, Law Offices of Terence A. Goss, 917 North Palafox Street, Pensacola, Florida 32501, by MAIL on September 2, 2002.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 325791

_____
ROBERT L. MARTIN
Assistant Attorney General
Florida Bar No. 0075744

Attorneys for State of Florida
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)
[AGO# L02-1-8666]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____

Robert L. Martin
Attorney for State of Florida