IN THE SUPREME COURT OF FLORIDA

RONALD R. CARDENAS, JR.

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

A Petition for Review of a Question Certified by the First District Court of Appeal to be of Great Public Importance

PETITIONER'S REPLY BRIEF

Eugene K. Polk,
Attorney for the Petitioner
Fla. Bar No. 0998850
The Law Offices of Terence A. Gross
917 North Palafox St.
Pensacola FL 32501
(850) 433-3357

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PREFACE

The parties shall be referred to by name, or by their most descriptive roles in these proceedings. Usage will be governed by the goal of maximum clarity.

One caution is in order. Three members of the petitioner's family, all with the Cardenas name, were aboard the ill-fated boat when the accident giving rise to this case happened. All use of the "Cardenas" name shall refer to the petitioner, unless expressly stated otherwise.

This brief will use the citation standards prescribed in Fla.R.App.P. 9.800. With the intent of being as consistent with Fla.R.App.P. 9.800 as possible in all citation, the following additional citation formats will be used.

(X. R. y)	Citation to volume "X", page "y" of the Record on Appeal. Line numbers may be added, if appropriate, in the same manner as in a citation to the trial transcript.
(X. T. a/b)	Citation to volume "X", page "a", line "b" of the transcript of trial.
(Ans. Brf. x)	Citation to the Answer brief in this case. References to briefs will be to those briefs filed ***with this Court***. Citations to briefs in lower courts will be designated as such.

STATEMENT OF THE CASE AND FACTS

The Respondent-State emphasized in its Statement of the Case and Facts the fact that trial testimony was to the effect that the "beer ran out" around 3:00 p.m. or 3:30 p.m. (Ans Brf. 2). This fact can be misleading, unless put in full and proper perspective.

The record also contains undisputed and uncontradicted testimony that both the Petitioner and passenger David Pittman admitted during trial testimony that they together consumed a significant quantity of ***whiskey*** only minutes before the accident, and several hours after the beer had run out. VIII. T. 1368/3-10.

ARGUMENT IN REPLY

FIRST POINT ON REVIEW – CERTIFIED QUESTION

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

A. Preservation.

The State simply assumes that the Petitioner failed to preserve the presumption of impairment instruction issue for review. Despite the District Court's finding to this effect, this position overlooks two basic facts. First, the Petitioner *did actually object to the challenged instruction*, although his objection was held insufficiently specific, because his counsel did not explicitly cite the pending Miles[1] case. Cardenas v. State, 816 So. 2d 724, 726 (Fla. 1st DCA 2002). The State now argues for what is essentially an impossible and unattainable standard for preservation of this issue.

Neither the State nor the District Court explain why such an objection ***should*** have been required in order to preserve this issue. Even if the Petitioner had made a precise objection as the District Court ruled he should, the outcome would have been the same. At the time of trial, the Circuit Court was duty bound to give the

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[1] Miles v. State, 732 So.2d 350 (Fla. 1st DCA 1999) (Miles I)

challenged instruction. Even if confronted with the more specific objection that the District Court held is necessary, the trial court could only have overruled the objection and given the same instruction anyway.

In other words, making the specific objection required by the District Court would have been a classic ***futile gesture***. Florida law, however, generally does not require futile gestures. Department of Revenue v. Nemeth, 733 So. 2d 970 (Fla. 1999); Johnnides v. Amoco Oil Company, 778 So. 2d 443 (Fla. 3d DCA 2001); Kirkland v. State, 633 So. 2d 1138 (Fla. 2d DCA 1994); Huffman v. State, 611 So. 2d 2 (Fla. 2d DCA (1993); Webb v. Priest, 413 So. 2d 43 (Fla. 3d DCA 1982).

The classic reason for requiring a contemporaneous objection to preserve an issue for review is to put the trial judge on notice of an alleged error and give the court a chance to dissipate any harm. Franqui v. State, 804 So.2d 1185 (Fla. 2002); A.F. v. State, 718 So.2d 260 (Fla. 1st DCA 1998); Norton v. State, 709 So.2d 87 (Fla. 1998). This purpose is simply not implicated here, because on the facts of this case, the trial judge was essentially ***without discretion*** on the issue of whether or not go give the presumption instruction. Thus, there was ***no reason*** to give the trial judge a chance to make a correction he had no authority to make.

In a closely analogous situation, this Court has explicitly condemned what it characterized as "charades in trial". Dosdourian v. Carsten, 624 So.2d 241 (Fla.

1993). In Dosdourian, the "charade" involved permitting the parties to portray a tort case in a misleading way through the use of so-called "Mary Carter" agreements.

The rationale of the Dosdourian applies in this case as well. The State suggests that the Respondent, in order to raise the issue of the fatally flawed jury instruction, must have engaged in the in-trial charade of foreseeing the outcome of a case which would be decided six months later. Further, he would then have had to argue, disingenuously, a position which was ***in direct contradiction of then-existing law***.

B. Was Giving the Presumption Instruction Fundamental Error?

In arguing that this is not a situation of fundamental error, the State overlooks several key points. For example, whether or not an error is "fundamental" depends in large part upon the context in which the error happens. Cedars Medical Center v. Ravelo, 738 So. 2d 362 (Fla. 3d DCA 1999); Cochran v. State, 711 So. 2d 1159 (Fla. 4th DCA 1998) (holding that the ***cumulative effects of summation abuse "reached the critical mass of fundamental error"***); Fravel v. Haughey, 727 So. 2d 1033 (Fla. 5th DCA 1999).

The context in this case is critical. This was by all accounts, a very close case, even to the point of the two officers who simultaneously interrogated Mr.

Cardenas disagreeing as to whether or not he admitted he was driving at the time of the accident. Opposing experts disagreed about how the accident happened. The Respondent had a relatively low BAC of 0.099%. One of the disagreeing investigating officers had purchased a boat from the deceased's wife, for a reduced price, and with interest free financing, and it was not until after this transaction, almost three years after the accident, that the Respondent was charged. The defendant-petitioner took the stand, and denied he had been driving at the time of the accident. See Cardenas v. State, 816 So. 2d 724, 728-729 (Fla. 1st DCA 2002) (in which Browning, J. *dissenting* sets forth the facts in detail). It is in this ever-so-close context that the giving of an erroneous presumptive finding instruction, on a necessary element of the charge, must be considered.

Finally, in its brief, the State entirely side-stepped the line of cases holding that inaccurate instructions on the law are fundamental error where they relate to the elements of the offense, and where there is a reasonable probability that the court's instruction affected the verdict. Hubbard v. State, 751 So. 2d 771 (Fla. 5th DCA 2000); Ward v. State, 655 So. 2d 1290 (Fla. 5th DCA 1995); Willis v. State, 583 So. 2d 699 (Fla. 1st DCA 1991). In this case, as close as it was, there can be little doubt that a presumptive instruction on a key element of the charged offense probably did affect the verdict.

C. Harmlessness Analysis:

On this issue, the State bears a burden it can not meet: to prove beyond any reasonable doubt that this error was harmless. Since it can not, this error warrants a new trial. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The State rests its claim of harmlessness upon a comparison of cases in which first degree murder convictions are affirmed because, while the record is insufficient to sustain conviction on one theory (i.e. premeditation or felony murder), the evidence is sufficient on the other theory. (Ans. Brf. 10). The State extends this reasoning, arguing that since the jury could have convicted upon the admitted ***medical*** blood evidence, the erroneous presumption instruction given with respect to the ***implied consent*** blood test, was harmless.

With all due respect, the State's reasoning is unsound, because the situations are not comparable. Unlike a case of truly alternate bases for conviction, such as felony and premeditated murder, in this case the error inherent in giving the presumption instruction was ***compounded*** because of the presence of the other evidence. Confronted with the medical evidence ***and*** the presumption instruction, the jury was even more likely to make impermissible use of the improperly invited presumption of impairment. The State bears the burden of proving otherwise, beyond any reasonable doubt. Id.

SECOND POINT FOR REVIEW

WHETHER THE PROSECUTOR'S REPEATED IMPROPER COMMENTS IN CLOSING ARGUMENT WERE SUFFICIENTLY DAMAGING TO REQUIRE REVERSAL OF MR. CARDENAS' CONVICTIONS IN AND OF THEMSELVES, OR WHERE IT IS MOST PROBABLE THAT THEY SIGNIFICANTLY CONTRIBUTED TO THE POTENTIAL CONFUSION OF THE JURY, THUS MAKING THE CASE EVEN CLOSER THAN IT WOULD OTHERWISE HAVE BEEN, IN TURN, MAKING THE ERRONEOUS JURY INSTRUCTION EVER MORE CRITICAL.

A. The Merits:

The Petitioner respectfully submits that the Respondent has missed the point of his argument on this point, for several reasons. First, while it is the Petitioner's request that this Court review the summation issues raised in his Initial Brief, the Petitioner also offered this argument to demonstrate how delicate the balance in this trial was, making the erroneous presumption instruction all the more critical. With the numerous, harmful distortions of the facts by the State in summation, it cannot be said with any degree of confidence, that the jury retired to the deliberation room with a clear view of the actual facts of this accident.

First, as to preservation, trial defense counsel certainly could and should have been more assertive in stating his ***four*** objections[2] to the prosecutor's abusive

[2] The State persists in its erroneous claim that the Petitioner's counsel made only three objections during summation. (See Ans. Brf. 13). The

summation. On the other hand, the trial court did not clearly sustain the objections of defense counsel. The State tacitly admits as much when it argues that the objections "***appear*** to have been sustained by the trial court. . ." (Ans. Brf. 13, emphasis added). When an objection is overruled, neither a motion for a curative instruction nor mistrial is necessary to preserve the objection for review. These objections were hardly "sustained" in the traditional sense. Rather, the record shows that defense counsel was left to guess as to where exactly the Court stood, and to decide whether to risk antagonizing the trial court and jury by "pestering" for a clearer ruling.

On the other hand, even if ***none*** of the State's abusive summation tactics were preserved for appeal, they are so fundamentally erroneous that they should result in a new trial. In a appeal decided after the trial in this case, the District Court of Appeal, Third District, reversed for a new trial in a ***civil case*** in which the offending closing argument was similar to the one in this case. Johnnides v. Amoco Oil Company, 778 So. 2d 443 (Fla. 3d DCA 2001). While the Johnnides Court noted that the abusive argument had been preserved, it also held that it would have reversed ***even absent objection***. Id at 444.

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record reveals otherwise: VIII T. 1368/11, 1369/13, 1382/24, 1451/17. The State was notified of its error through the appellate Reply Brief, yet it continues to ignore both that notice, and ultimately, the Record itself.

As in Johnnides, The prosecutor below repeatedly misstated and distorted the facts in the State's favor, and attacked trial defense counsel to further diminish the impact of defense case. A trial is supposed to be a sifting search for the truth. ***Nothing could be more fundamentally wrong or unfair than for the prosecutor, clothed in the prestige and respect inherent in representing the State, to distort and misstate the facts in the State's favor***. This prosecutor went a step further, inventing new, unproven facts to bolster his case. VIII. T. 1369/8-12, VIII. T. 1382/24, VIII. T. 1231/13 - 1232/11, VIII. T. 1377/19 - 1378/2, VIII. T. 1451/1-3. The average juror has far more respect for, and admiration of, the prosecutor than he does for the criminal defense lawyer. This prosecutor exploited that advantage to push his arguments far beyond what the facts of record actually supported.

There is no excuse for an officer of the court, regardless of employer, to repeatedly misstate the facts, and the State has offered no excuses or justifications for its prosecutor's actions. All the State has done is raise purely procedural points, and then declare that these egregious errors were not really that harmful. Yet the State never explains ***why*** or ***how*** these errors are harmless, nor why they are not fundamental.

As the District Court of Appeals, Fourth District, held in Mattek v. White,

695 So. 2d 942, 944 (Fla. 4th DCA 1997)[3], "when a trial lawyer leads a judge into an obvious error ... cries of harmless error on appeal are likely to fall on deaf ears." In this case, the experienced prosecutor indulged in numerous abusive arguments in an environment where it was clear that he would not be stopped. Now, the ***same party***, the State of Florida, trying to sustain a fifteen year prison sentence, suggests that these abusive tactics were harmless. The State's argument should get the same reception as the appellee's in Mattek.

B. Basic Factual Mistakes in the State's Brief.

Apart from the merits, the Respondent is critically mistaken as to other important facts. In particular, the State labors hard to defend its prosecutor's misleading argument regarding when Mr. Cardenas had actually stopped drinking. VIII T. 1368/3-10.[4] The State stresses the admittedly true fact that it was undisputed that the ***beer*** (as compared to other beverages) had run out at about 3:00 p.m. (Ans. Brf. 2). It then used this isolated fact to undermine the Petitioner's

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[3] This Court recently cited this language in Mattek with approval, in Sheffield v. Superior Insurance Company, 800 So. 2d 197 (Fla. 2001).

[4] The prosecutor's actual words were: "[y]ou ask yourself (*sic*) whether or not that story about them stopping at 3 o'clock in the afternoon makes sense. Because it was a .09 – between a .09 and .12 two hours after the accident. It was a .09 at 9 o'clock at night, which was four hours after the accident. So he was on the downward slope at that time. His blood alcohol was a lot higher at the time of the accident –" At this point, defense counsel objected.

objection to the prosecutor's fictitious argument that the Petitioner had claimed he stopped drinking in the mid-afternoon. (Ans. Brf. 16). In fact, ***Mr. Cardenas never said this***. This argument was highly prejudicial, inflammatory, and misleading since the prosecutor used it to suggest a ***very high BAC*** when there was no true factual support for such a suggestion.

The ***whole truth***, however, is that both the Petitioner, and a passenger admitted that only minutes before the accident (at least three hours after 3:00 p.m.), they together consumed a substantial quantity of ***whiskey***. VII T. 1165/1; 1198/25 - 1190/18. Thus, the prosecutor's argument was both mistaken and deceptive. Its ultimate effect, however, was to suggest that at the time of the accident, Mr. Cardenas had a much higher BAC than he did later when his blood was drawn for testing. In the context of a BUI Manslaughter case, this improper argument went to the core of a necessary element of the offense.

The State should not persist in supporting this argument. The State made ***the same argument*** in its Answer Brief on direct appeal, more than a year ago. It was met with a complete explanation in the Petitioner's Reply Brief, also filed ***over a year ago***, which pointed out that the State had overlooked the undisputed later drinking of whiskey. There is simply no valid reason for continuing to argue this plainly mistaken and unsupported position before this Court.

C. Invited Error:

The Respondent relies upon Knight v. State, 746 So. 2d 423 (Fla. 1998), suggesting that its rule of invited error prevents Mr. Cardenas from seeking review of the State's abusive summation tactics. Such reliance is grossly misplaced. In Knight, the capital murder retrial defendant (who had already been on death row for 22 years) was expelled daily from the courtroom as a result of his refusal to conform his behavior to accepted standards. After conviction, he raised, *inter alia*, his expulsion from the courtroom on appeal, and it was held in part, that he had invited any error through his misconduct.

Knight bears no comparison whatsoever with the instant case. Mr. Cardenas did nothing but rely upon his lawyer to defend him. The trial record, all eight volumes of it, is utterly devoid of any indication that Mr. Cardenas did anything to invite the prosecutor's abusive summation tactics. If any party invited error, scrutiny, or both on this issue, it was the State, which chose to employ impermissible, abusive summation tactics, rather than choosing to follow well established standards for making final arguments.

CONCLUSION

The decision of the District Court of Appeal should be quashed, and this case remanded to the Circuit Court for a new trial.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to Robert L. Martin, Assistant Attorney General, Attorney General's Office, PL-01, The Capitol, Tallahassee, Florida 32399-1050, and to Ronald R. Cardenas Jr., c/o The Florida Department of Corrections, by regular U.S. Mail this _____ day of September, 2002.

CERTIFICATE OF COMPLIANCE WITH FLA.R.APP.P. 9.210

I further certify that I have read and complied with the most current version of Fla. R. App. P. 9.210. This brief is printed in the 14-point Times Roman font generated through this office's computers and printers.

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EUGENE K. POLK
Law Offices of Terence A. Gross
917 N. Palafox Street
Pensacola, FL 32501
850-433-3357
Attorney for Appellant
Florida Bar No. 0998850