

IN THE SUPREME COURT OF FLORIDA

STEVEN MITCHELL BARRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,031

FILED

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CASE NO. 67,091
(Consolidated)

MARSHALL CHRISTOPHER LONG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts and adopts the petitioner's recitation of the case and facts with the following additions:

The evidence presented in both cases overwhelmingly established the guilt of each petitioner. The state established beyond and to the exclusion of every reasonable doubt that petitioner Long was guilty of burglary of a conveyance (RL 252), and petitioner Barry was guilty of manslaughter (RB 857-860).¹

In petitioner Long's case, the state established that at approximately 10:40 in the evening of February 11, 1984, the silent alarm on Michael Kuzmono's car was activated outside of his home in Cocoa, Florida (RL 19-21). When Kuzmono went to investigate, he saw two black males inside his automobile and a third black male standing outside between the car door and the doorwell (RL 26-27, 29). He observed the three for about one minute from the distance of about one hundred feet (RL 27-28). Kuzmono identified the third black male as petitioner Long, and testified that Long was looking from left to right over his shoulder and back to the car (RL 29-30). The three then left the car and got on bicycles parked nearby (RL 31). As they left, one of the subjects that had been inside the car dropped some change (RL 31-32). Long picked up the change and put it in his pocket (RL 31-32). The three rode away together for a distance, and Long then separated

¹(RL) refers to record on appeal in Long v. State,
(RB) refers to record on appeal in Barry v. State and
(SRB) refers to supplemental record in Barry.

from the other two black males (RL 32). Kuzmono chased the subjects in his car and was able to catch Long (RL 34). Approximately \$4.00 in change was taken from the car (RL 42).

Long exercised his constitutional right not to testify at trial. The prosecutor remarked during his closing statement to the jury: "Yet, Mr. Kessel (defense counsel) asks you to allow his client to walk out of here a free man with no record and never having had to admit that he committed a crime" (RL 145).

In petitioner Barry's trial, the state's case overwhelmingly proved guilt beyond a reasonable doubt. The state established that in the early morning hours of September 8, 1983, Robert Sutphin was awakened by a thumping noise (RB 455). He looked out the window of his apartment in Orlando, Florida, and saw the defendant dragging the body of a young man towards the apartment garage (RB 456-459). The young man appeared to be dead (RB 458). Sutphin telephoned the police (RB 464). When the police arrived at 6:14 a.m. they found the body of Melvin Geiger in the back of his pick-up truck parked in the garage (RB 519). Geiger had died as a result of stab wounds to the heart and lungs (RB 584).

The police followed a trail of blood spatters from the truck to the third floor of the apartment building (RB 525-529). The blood trail appeared to end at the top of the stairs of the third floor (RB 535). From there the police followed drag marks which led to the defendant's apartment (RB 536). Defendant answered the door when the police knocked and agreed

accompany them to the station (RB 619). Defendant asked if he could get dressed (RB 619). The police told him that he could and followed him into the apartment (RB 619). They observed what appeared to be fresh blood on the floor near the front door and in the bathroom (RB 619, 541).

At the station the defendant gave consent to search his apartment (RB 545). Blood stains and splatters consistent with the victim's blood type were found in the apartment (RB 576). The defendant gave a tape-recorded statement at 9:30 that morning and a second tape-recorded statement that evening in which he admitted killing Geiger (SRB 4, 10-11).

The medical examiner found fifteen stab wounds in the chest area of Geiger's body and one wound in the back (RB 584). No defensive wounds were found on the body, but according to the examiner injuries on the head could indicate a struggle took place (RB 588, 593-595).

The defendant did not take the stand at trial. The two tape-recorded statements given by the defendant to the police were introduced by the state at trial (RB 627,628). Based on the taped statements, defense counsel argued in both his opening statement and closing argument that Barry had killed the victim in self-defense, and that appellant "told the truth to the police." In response, the state, during its closing argument, argued as follows:

On his first statement, you'll notice that the first statement, this is the first taped statement. The first statement absolutely deny everything. He didn't do

anything. He just went home and went to sleep and we have the first taped statement, the second taped statement. And they are inconsistent in and of themselves. If he told the truth in the first statement then he lied in the second statement and he also lied in the very very first statement. So he didn't tell the truth. He still hasn't told the truth.

In petitioner Barry's direct appeal to the District Court of Appeal, Fifth District, he contended that this remark was an impermissible comment upon his constitutional right not to testify. The Fifth District held that this remark was not a comment on his failure to testify, but was a comment on the inconsistencies and conflicts within statements that were in evidence. In petitioner Long's case comments were deemed improper. In both cases, the Fifth District certified the same question for resolution by this honorable court.

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. State v. Murray, infra, which cites with approval United States v. Hastings, infra, held that prosecutorial comments that are improper do not warrant automatic reversal of a conviction unless they are so prejudicial as to vitiate the entire trial. In cases where proof of guilt is overwhelming, the interests of the victims and the prompt administration of justice requires affirmance of the conviction. The threat of personal rebuke and disciplinary action by the Florida Bar would be a very effective tool to curb improper prosecutorial comments. The case by case analysis necessary to apply the harmless error rule will ensure that where the comment prejudiced substantial rights of the defendant and could have effected the verdict, the conviction will be reversed. By adopting the harmless error analysis, the court brings comments upon the defendant's exercise of his constitutional right not to testify in line with all other errors of constitutional dimension.

ISSUE

HAS THE FLORIDA SUPREME COURT, BY ITS AGREEMENT IN STATE V. MURRAY, 443 So.2d 955 (Fla. 1984) WITH THE ANALYSIS OF THE SUPERVISORY POWERS OF APPELLATE COURTS AS RELATED TO THE HARMLESS ERROR RULE AS SET FORTH IN UNITED STATES V. HASTINGS, 461 U.S. 944 (1983) RECEDED BY IMPLICATION FROM THE PER SE RULE OF REVERSAL OF DAVID V. STATE, 369 So.2d 943 (Fla. 1979) AND TRAFFICANT V. STATE, 92 So.2d 811 (Fla. 1957), WHERE THE PROSECUTOR COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY AT TRIAL.

ARGUMENT

Petitioner implies that a positive response to this certified question will have the effect of declaring prosecutorial open season on the constitutional right to silence. Respondent contends that this obituary is premature. Should this honorable court recede from the automatic reversal rule and adopt a harmless error analysis, review of this constitutional error will be aligned with all other alleged constitutional violations.

At the outset, respondent maintains the position that the two comments complained of in these cases are proper comments upon the evidence, or lack thereof. White v. State, 377 So.2d 1149 (Fla. 1979). In Barry, the prosecutor was discussing the two taped confessions which were admitted into evidence. Highlighting the internal inconsistencies of the two statements, the prosecutor concluded with the statement

"he still hasn't told the truth" (RB 800). In Long, the defense argued that there was no evidence of intent, even though the defendant did not take the stand to illuminate his motive or contrary contentions. In response to this argument of lack of intent, the prosecutor made the statement that defense counsel was asking the jury to "allow his client to walk out of here a free man with no record and never having had to admit that he committed a crime" (RL 145). A defense based on lack of intent admits that the act occurred, but the act is not a crime because for some reason the defendant lacks the requisite intent. Respondent does not wish to run afoul of this court's admonition in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), wherein this court stated that it would not accept a case for review then construe the evidence so as to avoid ruling on the issues that invoked the court's jurisdiction. Nevertheless, respondent must reassert the position that both these comments are wholly proper as permissible comments upon the evidence, and were invited by the defense's argument. White, supra. Pope v. State, 441 So.2d 1073 (Fla. 1983).

Respondent agrees that Florida Rule of Criminal Procedure 3.250 creates a mandatory prohibition upon prosecutorial comments on the failure of the accused to testify on his own behalf. However, petitioners forget that violation of a rule of criminal procedure does not require a reversal of the conviction unless the noncompliance with the rule results in harm or prejudice to the defendant. Leeman v. State, 357 So.2d 703, 705 (Fla. 1978). Assessing the prejudicial impact

to the defendant is the essence of the harmless error rule.

Furthermore, section 924.33, Florida Statutes (1983), states:

No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Respondent respectfully submits that a rule requiring automatic reversal without reference to the sufficiency of the evidence has the effect of presuming error that injuriously affects the appellant's substantial rights.

No other constitutional right is elevated to the same level of importance so that its violation mandates reversal. Violations of all other constitutional rights are treated as harmless where there is overwhelming evidence of guilt. Drake v. State, 441 So.2d 1079 (Fla. 1983); Palmes v. State, 397 So.2d 648 (Fla. 1981); Salvatore v. State, 366 So.2d 745 (Fla. 1978). There is no logical reason why a comment upon silence singularly occupies such an exalted position. If the comment is not prejudicial, then judicial and administrative resources are squandered because the retrial will undoubtedly produce exactly the same result - a guilty verdict.

Respondent is not advocating that prosecutors be given any more encouragement to comment upon a defendant's silence. The question of disciplining prosecutorial misconduct, however, is a different question than whether reversal of a

conviction is mandated. State v. Murray, infra. Respondent is merely suggesting, that when comments are deemed improper, that appellate court's take the additional step of determining what impact, if any, the comment could have had on the verdict. If the evidence of guilt is overwhelming, such that no comment could have possibly influenced, let alone vitiated, the entire trial, then there is no reason for reversal.

There is more than one kind of comment on a defendant's silence. Certain kinds of comments on silence are not reversible per se, but currently apply the harmless error analysis. The harmless error rule is applied when the prosecutor comments upon the defendant's silence at a former proceeding. State v. Hines, 195 So.2d 550 (Fla. 1967). Defense comments on silence are not reversible error. Jackson v. State, 359 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979). An objection and motion for mistrial are required to preserve any point on appeal regarding improper comment, so it cannot be fundamental error. Clark v. State, 363 So.2d 331 (Fla. 1978). In State v. Galasso, 217 So.2d 326 (Fla. 1968), this honorable court expressly applied the harmless error statute, section 924.33, Florida Statutes (1967), and found that it was not reversible error to admit into evidence, for impeachment purposes, the defendant's pretrial statements that were tainted for failure to give Miranda warnings. See also, Barfield v. State, 402 So.2d 377 (Fla. 1981). Comments upon a defendant's refusal to take a polygraph are permissible in some circum-

stances. Jones v. State, 449 So.2d 253 (Fla. 1984). Respondent respectfully suggest that applying the harmless error rule to the last bastion of automatically reversible errors, the resulting uniformity will be much easier to enforce.

The issue of whether a comment upon an arrestee's silence after Miranda warnings is governed by the harmless error rule is presently pending decision in this honorable court. Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984), cert. accepted, case no. 65,417; Diguilio v. State, 451 So.2d 487 (Fla. 5th DCA 1984), cert. accepted, case no. 65,490. A comment upon post-arrest silence is more prejudicial to the defendant than a comment upon his silence at trial. If the defendant does not take the stand or put on a defense, that fact is readily apparent to the jury. The jury is repeatedly instructed that the defendant need not prove anything, that the state has the complete burden of proof, and that the defendant has an absolute right to remain silent. Fla. Std. Jury Instr. (Crim.) 1.01, 2.03, 2.04(d).

The question certified by the Fifth District suggests that this honorable court has already determined this issue in State v. Murray, 443 So.2d 955 (Fla. 1984). Although Murray involved a prosecutor's improper comment upon a testifying defendant's motives, the analysis is equally applicable here. Murray apparently stands for the proposition that appellate courts must consider harmless error in relation to any claim of error, including alleged constitutional errors.

(P)rosecutorial error alone does

not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed is so prejudicial as to vitiate the entire trial." Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18 (1967) and its progeny. Id. at 956.

The duty of the reviewing court is to consider the record as a whole and to ignore errors that are harmless, including most constitutional violations. State v. Murray, supra; United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). "The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" Id. 103 S.Ct. at 1981. The federal courts insist on a case by case review of allegedly improper prosecutorial comments. United States v. Dixon, 593 F.2d 626 (5th Cir. 1979), cert. denied, 444 U.S. 861; United States v. Davis, 546 F.2d 583 (5th Cir. 1977), cert. denied, 431 U.S. 906.

As both decisions point out, it is a separate question whether the prosecutorial overzealousness warrants disciplinary action. These interests must be balanced against the interests of the victims and the prompt administration of justice. Re-

spondent submits that once it very clear that improper comments by prosecutors will subject the offender to personal sanction or discipline by the Florida Bar, overzealousness will be effectively restrained. Surely the threat of professional rebuke will be a more potent personal proscription than remanding for retrial. In cases where the evidence is less than overwhelming, if the comment is prejudicial the conviction will still be reversed. The constitutional right to silence will remain a cherished freedom; it will simply join the ranks of all other alleged constitutional errors and be subjected to harmless error analysis. Accordingly respondent respectfully requests that the certified question be answered in the affirmative.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court answer the certified question in the affirmative.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Belle B. Turner
BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on the Merits has been furnished, by mail, to James R. Wulchak, Assistant Public Defender for petitioners, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 12th day of July, 1985.

Belle B. Turner
BELLE B. TURNER
COUNSEL FOR RESPONDENT