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## Criminal Procedure—Veiled References to Failure of Defendant to Testify Constitutes Reversible Error

Craig Lambert

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**CRIMINAL PROCEDURE—VEILED REFERENCE TO FAILURE OF DEFENDANT TO TESTIFY CONSTITUTES REVERSIBLE ERROR. *Bailey v. State*, 287 Ark. 183, 697 S.W.2d 110 (1985).**

As fifteen year-old Doris Watson walked past a pool hall in North Little Rock on the afternoon of April 15, 1984, she was accosted by her former boyfriend, Bruce Bailey. Bailey forced her into a room at the Oasis Motel, where she was tied up, beaten with an extension cord, and raped three times. After twenty-four hours, Watson managed to escape.

Bailey was arrested and tried for rape and kidnapping. He did not take the stand at trial. The prosecutor made the following statements to the jury in his closing argument: "The only thing that we've heard here today about which occurred in that room is from Doris Watson. She's the only one. These two ladies that were called, they weren't in that room."<sup>1</sup>

Defense counsel, after objecting to the statement as an improper reference to the failure of the defendant to testify, moved for a mistrial. The court denied the motion. The jury convicted Bailey on both counts and sentenced him to two concurrent fifty-year prison terms.<sup>2</sup>

Bailey appealed to the Arkansas Supreme Court and argued that the prosecutor violated his federal fifth amendment right to be free from self-incrimination by making an improper reference to his failure to testify. The court reversed the conviction, holding that the comment constituted a veiled reference to Bailey's failure to testify and thus violated the state statutory provision which provides that no presumption shall be created when an accused fails to testify. *Bailey v. State*, 287 Ark. 183, 697 S.W.2d 110 (1985).

The fifth amendment to the United States Constitution provides that no person shall be compelled to be a witness against himself in a criminal case.<sup>3</sup> However, early Supreme Court decisions established that a defendant could not claim this protection in a state criminal proceeding unless state law so provided. The Supreme Court made it clear that a criminal defendant's fifth amendment right to be free from self-incrimination was not made applicable to the states by virtue of the

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1. *Bailey v. State*, 287 Ark. 183, 184, 697 S.W.2d 110 (1985).

2. Record at 16, *Bailey*.

3. U.S. CONST. amend. V provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

fourteenth amendment.<sup>4</sup> The Court also rejected a contention that a state statute which authorized a prosecutorial comment on the defendant's failure to testify violated the defendant's right to a fair trial embodied in the due process clause of the fourteenth amendment.<sup>5</sup>

In 1964, the Supreme Court overruled its prior holdings and held that the fifth amendment privilege against compulsory self-incrimination is applicable to the states by virtue of the fourteenth amendment.<sup>6</sup> One year later in *Griffin v. California*,<sup>7</sup> the Court was faced with a prosecutor's comment concerning the defendant's failure to testify rather than a defendant who was forced to testify. The Court extended fifth amendment protection to the defendant in this situation and held that the comment was impermissible.<sup>8</sup>

The decision dealt state prosecutors a harsh blow, but the Court later limited the severity of the rule. In *Chapman v. California*<sup>9</sup> the Court was faced with a clear violation of the rule it had established in *Griffin*. Rather than automatically reversing the conviction, however, the Court formulated a "harmless constitutional error" rule:<sup>10</sup> an error of constitutional proportions may be deemed harmless error and the conviction left undisturbed if the state can meet its burden of proving beyond a reasonable doubt that the error did not contribute to the verdict obtained.<sup>11</sup>

The Court further extended the harmless constitutional error rule in *United States v. Hasting*.<sup>12</sup> There, the Court reversed the Seventh Circuit's order of a new trial<sup>13</sup> and stated: "Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations . . . ."<sup>14</sup> The Court em-

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4. *Twining v. New Jersey*, 211 U.S. 78 (1908). The Court held that neither the privileges and immunities clause nor the due process clause secures an exemption from compulsory self-incrimination in a state proceeding.

5. *Adamson v. California*, 332 U.S. 46 (1947).

6. *Malloy v. Hogan*, 378 U.S. 1 (1964).

7. 380 U.S. 609 (1965).

8. *Id.* at 615. Specifically, the Court held that California's constitutional provision and practice of placing a penalty on the exercise of a person's right not to be compelled to be a witness against himself violated the fifth amendment.

9. 386 U.S. 18 (1967).

10. *Id.* at 22.

11. *Id.* at 23-24.

12. 461 U.S. 499 (1983).

13. *United States v. Hasting*, 660 F.2d 301 (7th Cir. 1981). Specifically, the prosecutor alluded to the failure of the defendants to deny raping and kidnapping the three victims.

14. 461 U.S. at 509. The Court cited *Brown v. United States*, 411 U.S. 223 (1973) (erroneously admitted testimony held harmless error); *Milton v. Wainwright*, 407 U.S. 371 (1972) (erro-

phasized that "the interest in the prompt administration of justice and the interests of the victims" should be weighed in passing upon the applicability of the harmless constitutional error rule.<sup>15</sup>

The Supreme Court's early decision in *Twining* and its subsequent holding in *Griffin*, which overruled it, have actually done little to affect Arkansas law. In 1885 the Arkansas legislature provided for statutory protection of the criminal defendant's fifth amendment rights.<sup>16</sup> The Arkansas Supreme Court subsequently handed down a series of decisions holding that any comment by a prosecutor concerning a defendant's failure to testify created a presumption against the defendant in violation of the statute and required automatic reversal.<sup>17</sup>

The court was faced with the obvious dilemma of determining exactly when a comment constituted a reference to the defendant's silence. In *Blackshare v. State*<sup>18</sup> the court made a narrow distinction between a reference to the defendant's silence and a reference to the failure of the defendant to rebut the state's case. The prosecutor in *Blackshare* had stated, "I want to know . . . if property can be stolen and no explanation be offered, and a man go scot free."<sup>19</sup> In holding the comment permissible, the court noted that the statement in question could not fairly be construed as a reference to the failure of the defendant to testify. Instead, it was merely a statement of opinion by the prosecutor that the defendant had not offered an explanation for the evidence presented against him.<sup>20</sup> One commentator has reasoned that *Blackshare* stands for the proposition that the court will not find a comment to be error if the comment is not a direct and unequivocal reference to the defendant or his failure to testify.<sup>21</sup> A comparison of

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neously admitted confession held harmless error); and *Harrington v. California*, 395 U.S. 250 (1969) (violation of confrontation clause in state criminal proceeding held harmless error).

15. *Id.*

16. 1885 Ark. Acts 82 (codified at ARK. STAT. ANN. § 43-2016 (1977)) provides:

On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the State of Arkansas, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him.

17. *Perry v. State*, 188 Ark. 133, 64 S.W.2d 328 (1933); *Bridgman v. State*, 170 Ark. 709, 280 S.W. 982 (1926); *Curtis v. State*, 89 Ark. 394, 117 S.W. 521 (1909). There is language in these decisions that an improper comment is merely "presumptively prejudicial." Although the concepts of "presumptive prejudice" and automatic reversal are not entirely consistent, the court did require automatic reversal in all three cases.

18. 94 Ark. 548, 128 S.W. 549 (1910).

19. *Id.* at 558, 128 S.W. at 554.

20. *Id.*

21. Hall, *The Bounds of Prosecutorial Summation in Arkansas*, 28 ARK. L. REV. 55, 72

various prosecutorial comments held permissible or impermissible in other Arkansas Supreme Court decisions apparently substantiates this conclusion.<sup>22</sup>

Following the United States Supreme Court's decision in *Chapman* in 1967, the Arkansas Supreme Court had the opportunity on several occasions to apply the new harmless constitutional error rule in cases involving alleged improper prosecutorial comments, but ruled on other grounds. In all of the cases, the court concluded that the comments were nothing more than fair comments on the evidence.<sup>23</sup> However, the court did recognize the doctrine in cases involving other errors of constitutional dimension soon after *Chapman* was decided.<sup>24</sup> The first application of a harmless error doctrine in a case involving an improper prosecutorial comment on the defendant's failure to testify occurred in *Powell v. State* in 1971.<sup>25</sup> There, the Arkansas Supreme Court relied upon the state statutory harmless error provision<sup>26</sup> and declined to reverse.

The Arkansas Supreme Court did not apply the *Chapman* harmless constitutional error rule to a comment on a defendant's silence until 1974. In *Clark v. State*<sup>27</sup> the court held that the error was harmless since none of the jurors had heard the statement. Since then, the applicability of the *Chapman* rule in all cases involving alleged violations of a defendant's constitutional rights has become well settled in

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(1974).

22. See, e.g., *Davis v. State*, 96 Ark. 7, 14, 130 S.W. 547, 549 (1910) ("[I]t is undisputed and denied in this case and he cannot deny it"); *Blackshare v. State*, 94 Ark. 548, 128 S.W. 549 (1910) ("I want to know . . . if property can be stolen and no explanation be offered, and a man go scot free."); Both comments were held permissible. Cf. *Miller v. State*, 240 Ark. 590, 591, 401 S.W.2d 15 (1966) ("The defendant has chosen not to take the stand and that is his privilege . . ."); *Perry v. State*, 188 Ark. 133, 134, 64 S.W.2d 328 (1933) ([T]he defendant has not denied a single, solitary iota of evidence that has been given against him from the stand here today."); Both comments were held reversible error. Post-*Chapman* decisions also seem to fit neatly into the test. See *Moore v. State*, 244 Ark. 1197, 429 S.W.2d 122 (1968) (comment that state's case was "uncontradicted and undenied"); *Shaddox v. State*, 244 Ark. 747, 749, 427 S.W.2d 198, 199 (1968) ("And nobody has attempted to explain that away, in fact, I guess they couldn't.") Both comments were held permissible.

23. *Moore v. State*, 244 Ark. 1197, 429 S.W.2d 122 (1968); *Hammond v. State*, 244 Ark. 1113, 428 S.W.2d 639 (1968); *Shaddox v. State*, 244 Ark. 747, 427 S.W.2d 198 (1968).

24. *Wilburn v. State*, 253 Ark. 608, 487 S.W.2d 600 (1972) (violation of defendant's right to counsel held harmless error); *Thom v. State*, 248 Ark. 180, 450 S.W.2d 550 (1970) (illegal search and seizure held harmless error).

25. 251 Ark. 46, 471 S.W.2d 333 (1971).

26. ARK. STAT. ANN. § 43-1012 (1977) provides: "No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merit."

27. 256 Ark. 658, 509 S.W.2d 812 (1974).

Arkansas.<sup>28</sup>

In *Bailey v. State*,<sup>29</sup> Justice Newbern spoke for the majority and primarily relied upon the state's statutory guarantee of protection of the defendant's fifth amendment rights. The court cited *Evans and Foust v. State*<sup>30</sup> and *Bridgman v. State*,<sup>31</sup> two cases decided prior to *Chapman*. Those cases stand for the proposition that a violation of the statute by the prosecutor requires automatic reversal.<sup>32</sup> While the court cited *Chapman* as the "principal contemporary case on protection of the U.S. constitutional right to remain silent,"<sup>33</sup> it disclaimed any reliance upon that decision. Nevertheless, the court concluded that its position is reinforced by that case.<sup>34</sup>

In addition to seemingly reintroducing a rule requiring automatic reversal, the court found that the particular comment made was a veiled reference to the failure of the defendant to testify and was no more permissible than a direct reference.<sup>35</sup> The court noted that veiled references have constituted grounds for reversal in prior cases.<sup>36</sup>

Finally, the court pointed out that prior cases have drawn a distinction between "remarks which seem meant to refer to the defendant's failure personally to dispute the state's case as opposed to the failure of the defense to present any witness or evidence to dispute the state's case." The former remarks are impermissible and the latter permissible, the court noted.<sup>37</sup> Thus, the reasoning of the court seems to be that the prosecutor's actual intent, as well as his choice of words, are important factors to consider in determining whether the comment is permissible.

Justice Hays, in a relatively lengthy dissent, noted several weaknesses in the court's reasoning. First, he stated that "finding the dividing line between 'veiled references' that are permissible as opposed to

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28. See *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), cert. denied, 105 S. Ct. 1847 (1985); *Hobbs v. State*, 277 Ark. 271, 641 S.W.2d 9 (1982); *Adams v. State*, 263 Ark. 536, 566 S.W.2d 387 (1978).

29. 287 Ark. 183, 184, 697 S.W.2d 110, 111 (1985).

30. 221 Ark. 793, 255 S.W.2d 967 (1953).

31. 170 Ark. 709, 280 S.W. 982 (1926).

32. 287 Ark. at 184, 697 S.W.2d at 111.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* The court cited *Adams v. State*, 263 Ark. 536, 538, 566 S.W.2d 387, 388 (1978), where the comment, "To convict him you don't have to disbelieve any part of their case, because what did the defense, how many witnesses did the defense put on for your consideration?" was held reversible error.

37. 287 Ark. at 185, 697 S.W.2d at 111.

those that are not is too subjective . . . .”<sup>38</sup> He suggested that when certain prosecutorial comments are “marginal and fall within what might be called ‘veiled references,’” the court should defer to the discretion of the trial court in determining their permissibility.<sup>39</sup> Second, Justice Hays pointed out that the prosecutor’s comment was nothing more than a fair comment on the evidence; it did not necessarily refer to the failure of Bailey to testify because there was another person (Bailey’s brother) in the room to which the prosecutor referred in his comment.<sup>40</sup> Finally, Justice Hays emphasized that “a mistrial is a drastic remedy”<sup>41</sup> and that the particular remarks in *Bailey* did not create prejudice sufficient to justify resorting to such a remedy.<sup>42</sup>

The court’s reasoning and decision in *Bailey* are flawed in two significant respects and represent a marked departure from its prior holdings. First, it is obvious that the court has reintroduced a rule requiring automatic reversal in a case in which an improper comment is made. Seemingly, the court has suspended its application of the *Chapman* harmless constitutional error rule. The court relied on cases decided prior to *Chapman* to support its holding—decisions which rested on a strict application of the state statute and which refused to recognize the existence of any discretion to consider a harmless error rule of any sort. The court cited *Chapman* in its decision but confused that rule with the rule of *Griffin*. Clearly, a reference to *Chapman* as the “principal contemporary case on protection of the U.S. constitutional right to remain silent”<sup>43</sup> is wrong. In fact, *Chapman* and its harmless constitutional error rule have significantly reduced the impact and severity of the *Griffin* rule that a comment by a prosecutor on the defendant’s silence violates the defendant’s federal fifth amendment rights. Interestingly, the state presented an extensive argument that the rule of *Chapman* was applicable to the facts of *Bailey* in light of the overwhelming evidence of guilt presented at trial.<sup>44</sup> The court’s failure to even acknowledge the possibility that the error could have been harmless lends support for the conclusion that the court has retreated from the *Chapman* rule to one requiring automatic reversal. If this was the court’s intent, the decision represents a major digression. In *United States v. Hasting*,<sup>45</sup> the United

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38. *Id.* at 186, 697 S.W.2d at 112. (Hays, J., dissenting).

39. *Id.*

40. *Id.*

41. *Id.* at 187, 697 S.W.2d at 112.

42. *Id.* at 187-88, 697 S.W.2d at 112-13.

43. 287 Ark. at 184, 697 S.W.2d at 111.

44. Brief for Appellee at 2-3, *Bailey v. State*, 287 Ark. 183, 697 S.W.2d 110 (1985).

45. 461 U.S. 499 (1983).

States Supreme Court made it clear that protecting a defendant's constitutional rights is not the only interest at stake in a criminal case; the prompt administration of justice and the victim's interest in not being subjected to the rigors of another trial are also important. The reviewing court has a duty to balance all of these interests.<sup>46</sup> Meaningless protection of a defendant's constitutional rights when such protection will have little, if any, influence on the outcome of a particular case prevents the court from performing its essential duty.

Second, the court's novel "veiled reference" test does little more than place a darker cloud over an already unclear area of Arkansas law. The rule which seemed to emerge from the cases prior to *Bailey* was that a comment was permissible if it did not constitute a direct and unequivocal reference to the defendant's silence. The court in *Bailey* effectively dissolved that rule. Arguably, under the majority's test almost all of the comments held permissible in prior cases could constitute "veiled references" to the defendant's failure to testify.<sup>47</sup>

A more workable test is needed. Under present Arkansas law, and especially in the wake of *Bailey*, prosecuting attorneys are clearly in a precarious position. Defense attorneys have been provided with a valuable appellate weapon, and prosecuting attorneys will have to choose their words with great care. The facts in *Bailey* presented the Arkansas Supreme Court with the opportunity to announce a more objective, workable test and reach a correct and fair result as well. If the particular comment in question could be construed as a reference to someone other than the defendant, the court should refrain from assuming that the comment is a reference to the defendant. The First, Fifth, and Tenth Circuits have adopted a similar rule.<sup>48</sup> While the test's applicability would be limited to factual situations similar to those of *Bailey*, it would at least begin to establish a more objective standard for evaluating prosecutorial comments and would dispose of some of the cases in a predictable manner.

The Arkansas Supreme Court should also defer more to the discretion of the trial court in evaluating the probable impact upon the

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46. *Id.* at 509.

47. See *Bailey*, 287 Ark. 183, 186, 697 S.W.2d 110, 112 (1985) (Hays, J., dissenting). Justice Hays pointed out that there is practically no difference between the comment made in *Bailey* and a comment such as "Doris Watson's testimony that she was raped, beaten, and kept prisoner is uncontradicted and undenied." A comment similar to the latter was allowed in *Moore v. State*, 244 Ark. 1197, 1210, 429 S.W.2d 122, 130 (1968).

48. See *Ruiz v. United States*, 365 F.2d 103 (10th Cir. 1966); *Desmond v. United States*, 345 F.2d 225 (1st Cir. 1965); *Garcia v. United States*, 315 F.2d 133 (5th Cir. 1963), *cert. denied*, 375 U.S. 855 (1963).

jury of an alleged improper comment. "The court is in a position to note the manner of delivery of such statements and the inflections or emphasis used and is therefore in the better position to understand how the jury perceived it."<sup>49</sup> Whether a particular comment is or is not a reference to the failure of the defendant to testify is a factual finding which should not be reversed unless clearly erroneous.

*Craig Lambert*

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49. *Pruett v. State*, 282 Ark. 304, 312, 669 S.W.2d 186, 191 (1984), *cert. denied*, 105 S. Ct. 362 (1984); *see also Perry v. State*, 277 Ark. 357, 642 S.W.2d 865 (1982).