CLOSING ARGUMENTS

Bench Book

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This "bench book" is intended to aid you, as a Florida Circuit and County Court Judge, in dealing with the growing number of improper comments advanced during closing arguments. As you are aware, this is a very hot topic with the appellate courts. The short summaries of the cases are intended to assist you in determining whether the full opinion will help you with regard to your particular fact pattern. The citations are current as of the date listed below.

It is impossible to convey the court's reasoning or entire ruling in such a limited space. In some of the cases, one sufficiently prejudicial error resulted in reversal. In other cases, the convictions or final judgments were reversed as a result of the cumulative effect of multiple minor errors. On some occasions cases were not reversed, despite significant error, because the error was deemed harmless under the particular circumstances of that case. I have attempted to provide this information whenever possible.

Finally, as an additional source, we should all remember that the Rules Regulating the Florida Bar address many of the improprieties which are too often seen in court. For example, Rule 4-3.4 provides, in part, that: "A lawyer shall not: * * * (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused."

If you have any questions, please do not hesitate to call.

Alex E. Ferrer

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State of Florida v. Revenel, 41 Fla. L. Weekly D330 (3rd DCA 2016) (State's multiple references during closing to the fact that the testimony of its witnesses went "uncontradicted" was neither a comment on def's right to remain silent nor burden shifting where def was not the only person who could have contradicted the witness testimony adduced by the State. For example, def could have (i) called a witness to examine further any inculpating security camera footage, (ii) examined other witnesses, or (iii) impeached the credibility of the State's witnesses and evidence through cross-examination. Testimony by def was not the only means to contradict the State's evidence. Reversed to correct sentencing issue.)

Fletcher v. State of Florida, 168 So.3d 186 (Fla. 2015) (*death penalty* - where def gave a statement to the police where he detailed what happened but denied involvement in murder and, when confronted with possibility he left DNA behind stated "I really don't even want to tell you everything that happened, to be honest with you." but then after some discussion gave another version of what transpired, prosecutor's statement: *"when the defendant was confronted with the possibility that he left DNA behind, all of a sudden, he went from I didn't touch her, I wasn't involved in her strangulation … [to] I don't really want to talk about it"* was not an improper comment on def's post-arrest silence. Although comments on post-Miranda silence are generally prohibited, no such prohibition exists where a defendant does not invoke his Fifth Amendment privilege against self-incrimination and refuses to answer "one question out of many." Here, def. not only waived his right against self-incrimination by engaging in a lengthy interview with police, but also continued to talk to the officers even after he made this statement as a direct part of that lengthy interview. [Note: although SCOFLA determined that there was no error under these circumstances, it went on to rule that even if there was error it was not fundamental. ??] Affirmed.)

Brown v. State of Florida, 40 Fla. L. Weekly D752 (3rd DCA 2015) (where def was arrested for trafficking in cocaine and at trial, 4 years later, testified as to the identity of the actual owner of the cocaine, it was improper for the state to question during closing argument why def waited 4 years to divulge that information. Comment shifted burden of proof to def. Def had asserted his *Miranda* rights and never waived his right to remain silent during the 4 years up until trial. Reversed.)

Sheppard v. State of Florida, 143 So.3d 1057 (4th DCA 2014) (prosecutor's argument during closing, which directed jurors to use their common sense and rhetorically asked "How else is his palm print and his thumbprint going to end up in [the victims'] house?" was no an improper comment on def's right to remain silent. Affirmed.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – Where def. who was accused of killing and sexually assaulting a child in his care took the stand and testified (for the first time) that his friend was alone with the child when she stopped breathing (contrary to his statement to police at the time that she had choked on a French fry while he and the child were

alone) it was not improper for prosecutor to question def. about his sudden change in the explanation of what occurred and to argue and point out in closing that his initial statements of what happened to the victim differed from his testimony 2 and half years later. Prosecutor did not misrepresent the facts or mislead the jury into believing that def. had an obligation or burden to raise any defense before trial. Instead, the prosecutor commented on the fact that def's testimony was not consistent with the statements he had made two-and-a-half years prior and that before def took the stand, the defense had not presented to the jury any evidence or argument supporting the theory that his friend had harmed the victim. By deciding to testify and changing the defense theory mid-trial, def put his credibility at issue and opened the door to the prosecutor's accurate observation that def had not previously raised the [friend] defense during trial. Once def testified on direct examination that his friend committed the charged offenses and about why def did not immediately implicate him, the prosecutor was entitled to cross-examine def about the timing of his allegations and to point out in closing the inconsistencies and weaknesses in his testimony. Denial of post-conviction motion affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (Death penalty – prosecutor's argument, that def told officer he was at Wal-Mart but when asked "Who are you with? I'm not going to say. I'm not going to tell you. When he says he sees something disturbing in the red van. What's in there? I'm not going to tell you, I'm not going to say. When he talks about aspects of the crime, he shuts down and will not talk about it" were not improper comments because prohibition against commenting on a defendant's silence does not apply when the defendant does not invoke his Fifth Amendment right. State may properly introduce evidence of his refusing to answer several questions and comment on it in closing. Affirmed.)

Rose v. State of Florida, 134 So.3d 996 (1st DCA 2012) (opening statement – it was error for prosecutor to disclose during opening statement that defendant had refused to allow officer to search his vehicle. "Comment on a defendant's denial of permission to search a vehicle, although not exactly the same thing as comment on a defendant's right to remain silent, since the Fourth Amendment is involved rather than the Fifth, constitutes constitutional error of the same magnitude." [citation omitted] Error not harmless where vehicle belonged to def's grandmother and defense argued that def. didn't know gun was in the glove compartment. Jury could infer knowing possession from his refusal to consent to search. Reversed.)

Yi v. State of Florida, 128 So.3d 186 (5th DCA 2013) (in a sexual battery trial, it was improper for state to argue: "This is a case in which you've heard testimony from the only person that was basically there. You only had one person who testified that was there[:] [the alleged victim]." Such argument is susceptible to being interpreted as a comment on the defendant's right to remain silent. [Note: dicta, already reversed on other grounds]).

Melehan v. State of Florida, 126 So.3d 1118 (4th DCA 2012) (opening statement - prosecutor's comment in opening, disclosing to jury that def. failed to follow through with arrangements to come speak to police [prior to arrest] was not improper as it was not portrayed in any context of def. avoiding custody or as evidence to support an inference of consciousness of

guilt. Reversed on other grounds.)

Parker v. State of Florida, 124 So.3d 1023 (2d DCA 2013) (in robbery trial where def and his friends were stopped and questioned about robbery, it was improper for prosecutor to argue in closing that def. answered officer's questions about picking up his friends but refused to answer questions about where he was at the time of the robbery (officer testified to this exchange). Although "an isolated comment on a def's failure to answer a single question during a voluntary, post-*Miranda* conversation with law enforcement does not violate the constitutional right to remain silent," the prosecutor in this case repeated the comment on multiple occasions. Reversed.)

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (in death penalty case, prosecutor's comment about def.'s failure to tell police where he had left murder victim was not an improper comment on def.'s exercise of his right to remain silent but rather a comment on def.'s constant refusal to answer the officers' questions truthfully while nonetheless carrying on conversation, as demonstrated by the State's reference to how def. "continue[d] to tell [officers] things that are simply not supported by the evidence, not supported by any of their investigation." Further, State's comment in reference to police testimony that def. had bonded with a detective while they were searching for victim, saying: "[t]here's absolutely nothing to contradict it," despite def.'s contention that statement is "fairly susceptible" of being interpreted as a comment on def.'s failure to testify because def. was the only person who could have contradicted it, was not improper because the State's comment merely summarized the evidence introduced at trial. Lastly, state's description of def.'s hesitation before signing consent-to-search form was not an improper comment on def.'s exercise of his 4th Amendment rights. Evidence shows def. did consent to search and comment was and state's comment merely recounted evidence relevant to the context of that consent. Conviction and sentence affirmed.)

Bell v. State of Florida, 108 So.3d 639 (Fla. 2013) (in trial for unlawful sex with a child under 12, prosecutor's comment regarding how proof of victim's age was uncontradicted was not an improper comment on def.'s right to remain silent: "The first element is that [the victim] was under the age of 12. … *[S]o without any evidence contradicting that[,]* the State has proven to you beyond a reasonable doubt the first element of the charge." The victim's age could have been contradicted by evidence other than the testimony of the def. "Where the evidence is uncontradicted on a point that witnesses other than the defendant can contradict, a comment on the failure to contradict the evidence is not an impermissible comment on the failure of the defendant to testify." In addition, state's comment that: "the defense attorney can't stand up here and tell you the reason [def] wasn't in court is because he was scared…. *Well, did you hear any testimony, any evidence that supports that statement*? Because if you didn't, that's not evidence and it should not be considered by you," although reasonably susceptible to being interpreted as a comment on def's right to remain silent as def. is the only one who could say he was scared, was not improper as it was invited and fair reply to def.'s attys argument that def had unintentionally missed the court hearing. However, state's additional comment: ""[i]n this particular case it is the word of [the victim] against the plea of not guilty that [def] entered" was improper because

by asserting that def's not guilty plea constituted the sum of the evidence in support of his innocence, the prosecutor impermissibly highlighted the fact that def did not testify on his own behalf. Also, statement that "[i]n cases like this, it is always a one-person's word against another" -- was also improper as it highlights the fact that while the victim testified, def did not. Errors not objected to and not fundamental. Affirmed.)

Whigham v. State of Florida, 97 So.3d 274 (1st DCA 2012) (prosecutor's comment: "Why are you here? … This is here because up until yesterday he says it was somebody else. … he told the police someone else did it" was not an improper comment on the def.'s right to remain silent. The prosecutor highlighted for the jury the inconsistency between what Appellant told police upon being arrested -- that a man named Leroy Thomas shot the victim -- and the defense he presented at trial. Appellant's statement was admitted into evidence, as was testimony about a letter he wrote to the victim while in jail telling her to stick to the story that Leroy Thomas shot the victim. The prosecutor argued to the jury that the Appellant's statement, together with the rest of the State's evidence, refuted the claim of self-defense. Affirmed.)

Bright v. State of Florida, 90 So.3d 249 (Fla. 2012) (in death penalty case, it was not an improper comment on def's right to remain silent for prosecutor to argue: "The defendant cannot admit to you that it was planned. He can't admit to his friends and family members that it's planned, and yet he could not escape the crime . . . . The defendant couldn't escape his actions, and yet he couldn't admit the truth. *** He told you a story through his friend and the inmate from the Duval County Jail, but that doesn't mean that that's what happened. That just means that's what he said happened." The prosecutor made the challenged comment in the context of detailing def's version of events to two individuals, in which he allegedly acted in self-defense. The prosecutor essentially informed the jury that, although def. intentionally planned the murders, he could never admit such a fact to his friends or family. Prosecutor mistakenly told the jury that def. "cannot admit *to you* that it was planned." However, it appears that the prosecutor recognized her questionable wording of that statement and immediately followed it with, "He can't admit *to his friends and family members*" that the murders were planned. Conviction and sentence affirmed.)

Strohm v. State of Florida, 84 So.3d 1181 (4th DCA 2012) (in trial for capital sexual battery on a minor, prosecutor's comment about what happened to victim in def's home: "The people who could tell you about that, the only two people who were there [are the victim] and the defendant," was not an improper comment on def's right to remain silent but, instead, a response to def counsel's suggestion that if def's mother were alive she could testify that daily life in def's home was normal. Affirmed.)

State of Florida v. Brown, 77 So.3d 693 (3rd DCA 2011) (it was error for court to order new trial based on prosecutor commenting on defendant's right to remain silent. The prosecutor's statement about the def. speaking to the officer but then refusing to have it taped or stenographed ("[y]ou don't have that record, you don't have that stenographic transcript, you don't have a tape, because at that point the defendant said, no, I'm done. That is basically the [S]tate's evidence.

You might want more, but that's the [S]tate's case,") was merely highlighting the refusal of the defendant to give a recorded statement to the police. Under Florida law, addressing a defendant's refusal to have his statements to the police recorded does not constitute an infringement on the defendant's right to silence. Because the accuracy and integrity of oral incriminating statements are often targeted by defense counsel, "[i]t is only reasonable that the State be permitted to elicit the fact that the accused was given the opportunity [to put his statement in writing] and declined." … "[T]he comment that the defendant declined to have his statement to the police recorded, after the defendant waived his Miranda rights and made a full statement, is not an impermissible comment on the defendant's silence." [citations omitted] Order granting new trial reversed.)

Massengale v. State of Florida, 69 So.3d 1095 (1st DCA 2011) (*opening statement* – although prosecutor improperly mentioned def.'s constitutional right not to testify in opening statement, error was harmless and denial of motion for mistrial was proper. Conviction affirmed.)

Henderson v. State of Florida, 69 So.3d 1022 (4th DCA 2011) (although prosecutor's comment that no one took the stand to contradict the state's case was an improper comment on the def's silence [citation implies that def. was only one who could have refuted it] and amounted to improper burden shifting, error was harmless. Affirmed.)

Serrano v. State of Florida, 64 So.3d 93 (Fla. 2011) (*opening statement*-trial court did not err in denying motion for mistrial on grounds that prosecutor commented on defendant's right to remain silent by 1) commenting in opening statement that def. "had to come up with a story to tell a jury about how his fingerprint got on that ticket" [prosecutor explained that fellow inmate would testify at trial that def told him that he needed to come up with a way to explain the fingerprint evidence inmate in fact testified that def claimed that FDLE planted the fingerprint evidence], and 2) commenting in opening that the day after the murders was "Mr. Serrano's opportunity to tell the police what happened at Erie Manufacturing" because, factually speaking, def's first opportunity to speak to the police was the day after the murders when he voluntarily went to the police station upon his return from Atlanta. Moreover, at the close of evidence, the trial judge instructed the jury that def had the absolute right to remain silent]. Affirmed as to conviction and death penalty.)

Carbonell v. State of Florida, 47 So.3d 944 (3rd DCA 2010) (although it was improper for prosecutor to argue "I wish I could give you, you know, a full confession. I wish I could give you a videotape of the robbery. I wish I could make it easy for you," as such comment can be interpreted as a comment on the def's right to remain silent, error was not fundamental because it was def's counsel who first argued to the jury "[t]here's not a single thing about [def] making a statement in this case. [thereby raising the issue of his silence first]. Note: Def HAD confessed but trial court suppressed def's confession because it was obtained after def was appointed counsel. Reversed on other grounds and prosecutor cautioned against making such argument on retrial.)

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (in guilt phase, prosecutor's comment that "[t]here is no evidence that def said a word to law enforcement about co-def," although when viewed in isolation could be construed as a referring to def's silence, when viewed in context it is clear that the prosecution was simply relying on the fact that def had not implicated co-def to demonstrate that co-def, who was def's friend, had no reason to lie about his best friend's involvement in the crimes at the time he confessed to the police. Even if comment were erroneous, it is not fundamental error. Affirmed.)

Fratcher v. State of Florida, 37 So.3d 365 (4th DCA 2010) (*opening statement*-It was improper for prosecutor to argue: "The police get there. …[Y]ou hear Detective McNally…say, can I search your truck. No, you can't search my truck. … Since [def] said she couldn't search, she couldn't go into the truck, which is his right, that's fine. She went and got a search warrant." "Comment on def's denial of permission to search a vehicle, although not exactly the same thing as comment on a def's right to remain silent, since [different constitutional amendments are involved], constitutes constitutional error of the same magnitude. …No comment on its exercise should be permitted to raise an inference of guilt, if the Fourth Amendment right against unreasonable search and seizure is to be given its full meaning." [Quoting Garcia v State, 572/952]. Error harmless as it occurred in opening in a non-argumentative fashion and was not raised again nor dwelled on. Affirmed.)

Green v. State of Florida, 27 So.3d 731 (2nd DCA 2010) (where testimony was that police told each co-def that the other had confessed, and in that fashion obtained a confession from all but the def, it was still improper for State to argue "When [def] was given an opportunity to talk to the police, he refused." Defense counsel did not "open the door" to such a response by raising the fact that the police had "set up" the suspects by lying to them about each other's confession. Although that may have initially raised the fact that all but def confessed, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to "qualify, explain or limit" testimony or evidence previously admitted. Prosecution's argument did not qualify, explain or limit prior evidence, but rather was a blatant appeal to the jury to convict def because he was the only one who did not confess. [Note: not an argument of facts not in evidence because the prosecution, over objection, was allowed to ask the officer whether def had given any post-arrest statements to law enforcement and the officer replied "refused."] Reversed.)

Evans v. State of Florida, 26 So.3d 85 (2nd DCA 2010) (in cocaine trafficking case where police found latex gloves around the stash of cocaine and def. was found wearing latex gloves during raid, it was improper for prosecutor to argue "But if [def] wasn't guilty, … wouldn't there be some reasonable explanation for him wearing these gloves under the totality of what we find in that house, the circumstances? … [T]here is no reasonable explanation for him having those gloves on except that he was in control of the east bedroom. … [T]here is no reasonable explanation for those gloves and the circumstances, especially when nobody else had them on." Comment was reasonably susceptible of being interpreted as an impermissible comment on def's right to remain silent or his failure to mount a defense. Reversed.)

Burford v. State of Florida, 8 So.3d 478 (4th DCA 2009) (in trial for manslaughter, vehicular homicide and fleeing a law enforcement officer, prosecutor's comment "Nowhere in here, ladies and gentlemen…does it say I have to prove why def decided to flee the law enforcement officer. The law does not require me to prove why he did that. *You heard no evidence from that stand as to why he decided to flee* [emphasis added]….I think you would agree that basically is irrelevant for those purposes," was not an improper comment on def's right to remain silent. Taken in context, it is clear that the prosecutor was explaining to the jury the elements that it needed to prove to establish the offense of fleeing law enforcement officer and clarified that the state did not need to prove why def. fled. Second comment as to the "two conflicting stories in this case, which recently came up—" no proper objection was lodged and motion for mistrial was untimely where it was made after jury retired to deliberate. Even if preserved, however, statement was not fairly susceptible of being interpreted as a comment on def's silence. Considering the context, the prosecutor was simply responding to the defense's alternative theory that the driver of the pickup truck was the one who ran the red light. Affirmed in part and reversed in part on other grounds.)

Cowan v. State of Florida, 3 So.3d 446 (4th DCA 2009) (It may have been proper to admit police car video of def. and co-def detained in the back of the car for the purpose of arguing that it appears (audio garbled) that the co-def asked def if he thought that the police had figured out that they had committed a home burglary and whether they had left anything in the home and the def. appeared to respond "they've got it, they've got it." It was improper, however, when def. denied that he had said anything in response to co-def. and claimed he remained silent, for prosecutor to question def and argue in closing that an innocent person would have responded with "what are you talking about?" or "I don't know what you're talking about." Even if tape was admissible for the limited purpose of showing an allegedly incriminating admission of the def, it did not permit inquiry into why the def would choose to remain silent. Comment on a def's post-arrest silence, even as here where Miranda warnings have not yet been given, is improper regardless of whether the silence is in response to comments or questions by a police officer, a family member, a stranger or a friend. Protection extends to evidence offered by state in case-in-chief as well as to impeachment evidence. Reversed.)

Poole v. State of Florida, 997 So.2d 382 (Fla. 2008) (Prosecutor argued: "Well, there is no evidence in this case that at any time, either in this trial or anywhere else, [def] ever acknowledged that he did anything" and "Mr. Dimmig is arguing all these things but there is absolutely no evidence that [def] ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that." Arguments were improper comment on def's right to remain silent. Comments were not objected to and do not constitute fundamental error because both comments were invited responses to the defenses closing arguments wherein def counsel argued that def acknowledged committing a sexual battery, robbery and burglary but denied he killed one victim and severely injured the other. Because the prosecutor's comments were invited responses attempting to show there was no evidence to either support the claim that def acknowledged he committed those crimes or to support the argument that someone else inflicted the injuries, the comments cannot be deemed improper.

Prosecutor also argued: "And if [def] wants to tell the state and [detective] that somebody helped him commit this crime, then let him come forward because …." Comment was also an improper reference to def's failure to testify and a shifting of the burden of proof. Nonetheless, trial court did not abuse its discretion in denying motion for mistrial because in light of the evidence linking def to the crimes, the error was not "so prejudicial as to vitiate the entire trial." Conviction affirmed. New penalty phase ordered on other grounds.)

Chamblin v. State of Florida, 994 So.2d 1165 (1st DCA 2008) (Although state argued that comments in closing were directed at statements made by def. at scene of accident months prior to arrest, two issues were raised. During questioning, prosecutor asked def. about his prior testimony in first trial, pointing out that it had been the first time def. had ever publicly claimed that deceased passenger had grabbed the wheel and caused the accident. The trial was a year after he had been arrested and therefore covered an extended period after receiving his Miranda warnings. Second, comment in closing, that conversation with paramedic at time of accident, months before arrest (where def. allegedly admitted causing fatal accident by "doing donuts"), was his opportunity to blame deceased passenger for causing the accident but, instead, def "waited a year to do that" also covered lengthy period following arrest and Miranda warnings. **Note**: Court points out that unlike Federal Constitution (which only prohibits prosecutorial comment on post-arrest, POST-Miranda silence, State Constitution prohibits comment on def.'s post-arrest silence, regardless of whether it is pre-Miranda or post-Miranda. [Note: It is unclear why this distinction is highlighted by the court since statement to EMT was months before arrest and Miranda warnings. If argument is that comment at trial covered time up to trial it covered post-Miranda period as well so reference to narrow window between arrest and warnings is unexplained. There is no indication that def. had an extended period or any period pre-Miranda following his arrest.] Reversed.)

Hudson v. State of Florida, 992 So.2d 96 (Fla. 2008) (death penalty - prosecutor's comment that def. refused to help police prosecute person who told him to kill the victim was not an improper comment on def's right to remain silent. Def. had waived his 5th amendment right and gave the police a statement but refused to disclose the identity of the person who ordered the hit. State's comment was appropriate response to defense that sought to portray police's ongoing investigation (to find other individual) as an indication that they were not sure def was the murderer. Affirmed.)

Williams v. State of Florida, 987 So.2d 1 (Fla. 2008) ("Where the evidence is uncontradicted on a point that only the defendant can contradict, a comment on the failure to contradict becomes an impermissible comment on the failure of the def. to testify." Here, prosecutor's comment that it was "uncontroverted" that def was the boss of a drug operation who had sent hit-men to recover his stolen drugs and money and statement as to the "uncontested" evidence relating to the crime scene were not improper where such statements were not the type that could only be contradicted by the testimony of the def. Reversed on other grounds.)

Munroe v. State of Florida, 983 So.2d 637 (4th DCA 2008) (It was improper for State to

comment on def's failure to make exculpatory statement to police about cocaine found in her bag as that amounts to comment on def's post-arrest silence, even though comment referred to time period before def was arrested. Florida constitution prevents comment on def's post-arrest silence, regardless of whether Miranda warnings have yet been given. [By contrast, US constitution allows comment on def's silence, even post-arrest, up to the time when Miranda warnings are given.] Under Florida caselaw, "post arrest silence" is interpreted broadly to encompass the period "at the time of arrest," which includes the period before the person is placed under arrest. Therefore, when def. claimed at trial that cocaine in her bag was not hers and must have been planted by her travel acquaintance, it was improper for prosecutor to comment that she didn't act surprised or otherwise respond when, prior to her arrest, police searched her bag with her consent and found two kilos of cocaine. Further, while def's own testimony that she was silent when police found the cocaine because she was too shocked to speak opened the door and invited a *limited* degree of inquiry, the prosecutor's comments exceeded the scope of invited response when he suggested that instead of being too shocked to speak, she should have been shocked enough to affirmatively proclaim her innocence. *Receded from on question of standard of review, 85 So.3d 532*.)

Hill v. State of Florida, 980 So.2d 1195 (3rd DCA 2008) (Although other members of drug surveillance team testified about apprehending def and other occupants of vehicle after being given the signal to do so, it was improper for prosecutor to refer to testimony of officer who was the only eyewitness to the drug deal as "uncontradicted and uncontroverted." Although other occupants of vehicle could have been called as witnesses to rebut officer's testimony, State did not call them and def. was not required to call them. Therefore, from the viewpoint of the jury, comment would suggest that def. could have disputed officer's testimony but did not do so. Comment could be interpreted as referring to def's silence or suggesting that def. had burden to present evidence to refute officer's version of transaction. Reversed. [CAUTION: prior opinions of this and other DCA's find "uncontroverted" to be improper comment when there are NO OTHER witnesses who could have been called to rebut state's witness, thereby suggesting that defendant could have testified. This may be departure from that rule.])

Lubin v. State of Florida, 963 So.2d 822 (4th DCA 2007) (acknowledging that this was a "close question," court held that prosecutor's comments about def's fingerprints on the outside of the victim's vehicle ('There is no way in the world his print got on that quality—and then try to tell you, "Well, maybe it got on some other time." … did you have one bit of evidence, did one person or one piece of evidence come in and tell you that he left his palm print on that van another day? …. Did you hear one bit of evidence? Not one.") were fair comment on uncontroverted evidence that def's fingerprints were impressed on van during murder altercation. Court notes that comment was not "invited" as def counsel did not address fingerprint evidence in his closing argument [yet quote from prosecutor's closing sounds like a reference to what def. argued]. Even if error, harmless. Affirmed [**Note**: court then goes on to caution prosecutors against making this comment. See other cases under Burden of Proof and Comment About Def's Right to Remain Silent concerning precisely these types of comments that are based on uncontroverted evidence that can only be refuted by defendant. Dangerous case.])

Belcher v. State of Florida, 961 So.2d 239 (Fla. 2007) (in murder/sex bat trial where def. counsel argued that def and victim had rough consensual sex, it was not improper for prosecutor to argue: "What evidence have you heard that it was consensual? All the evidence indicates quite to the contrary. … What consent are we talking about? *What evidence did you hear come out of that witness stand saying that she consented to this?*" It is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response. The State was merely commenting on the lack of evidence supporting the defense theory that the two engaged in consensual relations.)

Munoz-Perez v. State of Florida, 942 So.2d 1025 (4th DCA 2006) (prosecutor's question to def. during cross-examination: "We've never spoken before, have we?" and comment during closing that the reason for that question was to point out that at trial was the first time that anybody had ever heard the claim of insanity, were both improper comments on the def.'s right to remain silent. Prosecutions comment undercut insanity defense in a case where both victims testified that the def. appeared insane. Judge's curative instruction that: "All right, ladies and gentlemen, as you know, through the voir dire, the defendant has the right to remain silent, and he has, so, and probably upon advice of his attorney he did not and would not talk to the prosecutor. That's generally something that doesn't and wouldn't happen. …" made def.'s choice to follow his attorney's advice sound like the actions of a rational and sane man instead of someone who could be insane. [Not to mention court's own comment on def. remaining silent] Reversed. *Receded from on other grounds, Severance v. State, 972/931.*)

Glispy v. State of Florida, 940 So.2d 608 (4th DCA 2006) (prosecutor's comment: "And there's no evidence before you to contradict" which was cut off by defense counsel's objection was not clearly a comment on defendant's right to remain silent but, even if it was, the comment was harmless. Affirmed.)

Jackson v. State of Florida, 933 So.2d 1180 (4th DCA 2006) (It was improper of prosecutor to question def. and subsequently argue at closing that, prior to his testimony, def. had never disputed that the eyeglass case containing drugs was his and had never claimed that his eyeglass case, seized from him at the time of arrest, did not contain drugs. Both questioning and comment shifted burden of proof to def. to prove his innocence by suggesting to jury that def. had a duty to come forward with evidence. Error not harmless where case hinged on credibility contest between officer and defendant. Reversed. [Note: upon clarification, trial court instructed to reconsider revocation of probation, excluding improper comments from its consideration.])

State of Florida v. Fountain, 930 So.2d 865 (2nd DCA 2006) (Although prosecutor improperly commented on def.'s right to remain silent and shifted the burden of proof ("The evidence is uncontroverted, uncontradicted that this is what happened" … "No testimony at all ….[to support the defense theory that the children were making up allegations of molestation]" … "There's been no testimony to support a theory that [it] didn't happen."), there was no contemporaneous objection, request for a curative instruction or motion for mistrial. Further, trial court properly

instructed jury that def. was presumed innocent, was not required to present evidence or prove his innocence and was not required to testify. Error was not fundamental as it could not be said that absent the prosecutor's misstatements, the jury would have found him not guilty. Trial court's order granting defendant a new trial is reversed.) (**NOTE**: Comments about uncontroverted nature of evidence are improper where, as here, the only witness who could testify contrary to the state's evidence is the defendant.)

Watts v. State of Florida, 921 So.2d 722 (4th DCA 2006) (In Florida, any comment that is "fairly susceptible" of being interpreted as a comment on defendant's silence is improper. In a case where only def and officer were present during the crime and def chose not to testify, it was improper for prosecutor to argue: "Did you hear anybody else testify to dispute the officer's story?" Such comment could only refer to def's failure to testify. Reversed.)

Mitchell v. State of Florida, 911 So.2d 1278 (4th DCA 2005) (It was improper for prosecutor to argue: "If you're innocent, you stand there, you tell the cop why you're innocent, you don't take off running." The state may not make reference to a suspect's failure to make a statement to an arresting or investigating police officer. Reversed.)

Dendy v. State of Florida, 896 So.2d 800 (4th DCA 2005) (It was improper for prosecutor to argue that def.'s request to arresting officer for an attorney before his arrest was evidence of his "consciousness of guilt." Reversed on these and other grounds.)

Robbins v. State of Florida, 891 So.2d 1102 (Fla. 2005) (where def. claimed at trial that he shot the victim because he was attacked by the victim and his associate and, during the struggle, thought the assailants had cut him with his own knife, it was improper for prosecutor to inquire of officer and argue in closing that defendant never mentioned a knife when he went to the police after shooting the victim in the back, but only said he had been attacked with sticks and bottles. Unlike federal courts that permit the introduction of post-arrest, pre-Miranda statements for impeachment purposes, the Florida Constitution prevents a prosecutor from commenting upon or attempting to impeach a def. with his or her post-arrest, pre-Miranda or post-Miranda silence. This prohibition is premised on upon the generally accepted principle that a defendant does not waive his or her right to remain silent at the time of arrest by testifying in his or her own defense at trial. Curative instruction during questioning, which simply told the jury to "please disregard any question about the def. not mentioning a knife to the officer and the officer's response to that question" did not cure the prejudice and, even if it had, was rendered ineffective when prosecutor argued same point in closing. Reversed.)

Yok v. State of Florida, 891 So.2d 602 (1st DCA 2005) ("The prohibition against commenting on a def.'s silence does not apply when the def. does not invoke his Fifth Amendment right…." It was not improper for prosecutor to argue that when appellant spoke to police he could have avoided "the chaos, the calamity, and the conflict." Argument was not an improper comment on def's right to remain silent. Appellant gave a full statement to the police and testified at trial. Affirmed.)

Dessaure v. State of Florida, 891 So.2d 455 (Fla. 2004) (*voir* dire - it was not improper for prosecutor to comment in closing that defendant said there were only two people who knew what happened in the victim's apartment so she had to reconstruct what happened using scientific and other evidence. Comment was not "fairly susceptible of being interpreted by the jury as a comment on [def.'s] failure to testify." Evidence was presented that def. told a cell mate that nobody "but him and her" could say what happened in the apartment, therefore, comment was a fair characterization of the evidence. Moreover, jury was properly instructed that the burden of proof rested solely with the State and def. had an absolute right to remain silent. Additionally, comment at issue was a passing comment made only at opening and was not repeated during closing. [NOTE: It is unclear why the court added these observations, having found that the comment was an "appropriate characterization of the evidence" and, as even the dissent agreed, properly overruled. Additional observations would seem to go to harmless error analysis which, at that point, was irrelevant.] Affirmed.)

Williams v. State of Florida, 877 So.2d 884 (4th DCA 2004) (when defendant was arrested with stolen property, he gave two inconsistent statements concerning how he came to possess the property. Although the trial court properly denied a motion for mistrial based upon prosecutor's alleged improper comment on def.'s failure to testify: "Why else would [def] give two different versions of how he obtained the property, unless he can't get it together because he can't really *tell you* the truth because he hasn't got a complete story …--" [emphasis added], it became reversible error when, after judge denied motion for mistrial, prosecutor continued in an apparent well intentioned effort to clarify his earlier comment: "One thing I want to make perfectly clear, I refer to the two inconsistent statements. I am referring to the two statements that [the def] made at the day in question to [the witness]. Please, that's what I am suggesting to you when I talk about statements. *The defendant has no obligation whatsoever to ever, in court, come in and testify or give us a statement and I can in no way ever suggest to you, you should negatively infer something from his incorporating or exercising his constitutional right to remain silent.* I just wanted to make that clear if you could segregate those --." Prosecutor's clarification was fairly susceptible of being perceived as a comment on def.'s failure to testify. [**NOTE**: prosecutors in this situation, faced with a concern over whether an appellate court will agree with the trial court's assessment and wanting to minimize any damage, may want to ask defense counsel whether counsel wants the court to clarify for the jury that the def has no obligation to testify and that they should not use that against him (if the objection was overruled) or for such a curative instruction (if the objection was sustained). If rejected by the defense, it should be left alone.] Reversed.)

Mannarino v. State of Florida, 869 So.2d 650 (4th DCA 2004) (it was improper for prosecutor to argue that "the mere fact that the defendant had that [credit] card on him, the mere fact that he had it in his possession, presumption of guilt, and he stole those items, unless he can explain them away. And [def. witness] Ms. Bereda's explanation does not explain that away." Inference resulting from possession of recently stolen property attaches unless it can be satisfactorily explained. Nothing in the law requires that the def. be the one to explain it. State's argument:

"unless he can explain" obviously refers to def. and suggests that he was required to, but did not explain his possession of the stolen credit cards. Moreover, even if the prosecutor had used the correct language from the standard jury instruction and omitted the reference to "he," in the context in which it was made it was an inappropriate comment on the def.'s right to remain silent. Reversed.)

Russman v. State of Florida, 869 So.2d 635 (5th DCA 2004) (Where def. statement to police at time of arrest was that he was homeless and was living in the woods where he was found, and def. used this statement in its argument that the police had apprehended the wrong man and that he was not a burglar but was merely poor and unlucky, it was not improper for State to argue: "And the only person contradicting or conflicting with [the victim's testimony which identified def. as the burglar] was def. telling the police he was sleeping in the woods. Please use your common sense because the judge is going to instruct you on conflict of evidence. You can decide who to believe or who not to believe and what evidence supports the defendant's testimony." Taken in the context of the trial, the prosecutor was responding to the defense argument and his remarks were not "fairly susceptible" of being interpreted by the jury as a comment on def.'s failure to testify. Affirmed. *Reversed on other grounds: Grubb 922/1002*)

Jones v. State of Florida, 867 So.2d 398 (Fla. 2004) (It was not improper for State to argue: "... I ask you to go back in that jury room, apply your common sense to the true facts of this case and come back and tell the def. what he knows sitting there today, that he is guilty of indecent assault." Contrary to the holding of the DCA, the State did not suggest that the def. did not testify because he knew he was guilty. When read in context of the entire argument, it is clear that the prosecutor was simply referring to the def.s physical position in the courtroom and did not improperly comment on his right to remain silent at trial. DCA reversal of conviction quashed.)

Gordon v. State of Florida, 863 So.2d 1215 (Fla. 2003) (prosecutor's comment that def. "knows where that murder weapon was, and he knows what it is .... [Def.] came out from Dr. Davidson's apartment, but he was by himself" was a response to defense counsel's comment regarding the absence of the murder weapon and was neither objected to nor improper.)

Thornton v. State of Florida, 852 So.2d 911 (3rd DCA 2003)(it was improper for prosecutor to comment that evidence which could only be rebutted by the defendant was uncontradicted and uncontroverted. Under those circumstances, such statements amount to impermissible comments on the defendant's silence. Reversed on these and other grounds.)

Caballero v. State of Florida, 851 So.2d 655 (Fla. 2003)(prosecutor did not err in arguing: "You can tell ... what a man intends by what he does not by what he desires. What does he do? According to the [def.'s] statement, uncontradicted, what does he do?" Comment was not an improper comment on def.'s right to remain silent or a shifting of the burden of proof. It is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response. Here, the State

emphasized the evidence of def.'s actions for the purpose of countering the defense argument that the def. did not want to kill the victim. In this context, the State's argument directed the jury's attention to the evidence of the def.'s actions in contrast to his professed desire, rather than to his failure to testify. Moreover, even if it were improper, comment was harmless given overwhelming evidence of guilt. Affirmed.)

Sams v. State of Florida, 849 So.2d 1172 (3rd DCA 2003)(it was improper for prosecutor to comment on the uncontroverted nature of the evidence where the only witnesses to the alleged crimes were the defendant and the victims. In such a circumstance, only the def. could contradict the evidence and the comment will, therefore, be an impermissible reference to the def.'s failure to testify. However, the testimony of the two victims, along with the corroboration of four separate confessions, clearly make the comment harmless beyond a reasonable doubt. Affirmed.)

Chandler v. State of Florida, 848 So.2d 1031 (Fla. 2003)(where def. testified at trial, it was not improper for prosecutor to argue in closing: "Think about all the things he wouldn't talk about and didn't say." Taken in context, comment was not an unfair or improper comment on def.'s Fifth Amendment rights. "The settled rule is that if a defendant declines to become a witness in his own behalf, then the prosecuting attorney shall not comment on such course being taken by the defendant. In other words, the failure of the defendant to testify cannot be taken or considered as any admission against his interest; but, if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness, and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness." [citation omitted] Affirmed.)

Ramirez v. State of Florida, 847 So.2d 1147 (3rd DCA 2003)(where court initially allowed def. to show his tattoos to the jury without a proper predicate in the form of evidence that the def. had the tattoos on the date of the charged crime, but subsequently reconsidered and concluded that the State's objection had been well taken, it was not error for the court to allow the prosecution to argue to the jury the absence of any evidence that the def. had the tattoos on the day of the crime. Comment was not fairly susceptible of being a comment on the def.'s failure to testify or to call witnesses. Comment was phrased permissibly in terms of an absence of testimony from the witness stand. Moreover, comment was a permissible remedy under the circumstances and "a party may not make or invite error at trial and then take advantage of the error on appeal." [citation omitted] Affirmed.)

Miller v. State of Florida, 847 So.2d 1093 (4th DCA 2003)(it was improper for prosecutor to tell the jury, in closing, that the judge "also instructed you that the def. has the right to remain silent. And he does. He did not take the stand in this case. But there were two witnesses." Comment called undue attention to def.'s decision whether or not to testify and is certainly "fairly susceptible" of being interpreted by the jury as a comment on the def.'s failure to testify. Reversed.)

Kearney v. State of Florida, 846 So.2d 618 (4th DCA 2003)(It was improper for prosecutor to argue: "The Defense says, where's the tape? ... The Defense fully knows well that there's something called the Fifth Amendment, self-incrimination, and the Fourth Amendment, the right against illegal searches and seizures. ... and that the government can't just bust down somebody's door and say, we're taking everything out of your house. The government can't just grab somebody by the hand and say, get over here, sit down, you're going to tell us what we want to know. ... We don't have the tape because it's not in our possession. Who's possession is it in? Right there." Comment was fairly susceptible of being interpreted as referring to def.'s right to remain silent. Comment also highlighted def.'s Fourth and Fifth Amendment rights as impediments to the prosecution's ability to produce the tape, and pointed to def. for invoking the constitutional protections afforded to her. Even if it had been acceptable for the State to explain the Fourth and Fifth Amendments as a fair reply to defense argument questioning the whereabouts of the tape, the State's response went too far when it beleaguered the constitutional restraints and protections and then pointed a finger at the def. for invoking them. Reversed.)

Conahan v. State of Florida, 844 So.2d 629 (Fla. 2003)(prosecutor's penalty phase argument, that def. "wasn't abused. He wasn't mistreated. There was no evidence of mental difficulties or substance abuse or drug abuse" was not a comment on the def.'s right to remain silent. Instead, the prosecutor was commenting on the lack of certain mitigating evidence in light of the defense's presentation of certain mitigating factors. Affirmed.)

Smith v. State of Florida, 843 So.2d 1010 (1st DCA 2003)(where def. was identified by undercover officer as person who sold officer cocaine and defense offered no evidence, prosecutor's argument: "From that [sic] testimony from that witness stand there is no reasonable doubt that was put forward to you today from that witness stand that he didn't commit the crime. *Nobody testified he wasn't the guy*." improperly shifted the burden of proof and constituted an improper comment on defendant's failure to testify. Reversed)

Wilchcombe v. State of Florida, 842 So.2d 198 (3rd DCA 2003)(On the whole, prosecutor's references to "uncontroverted evidence" and alleged attacks on defense counsel were fair comments on the evidence and direct responses to defense arguments. No objections. Not fundamental. Affirmed.)

Durrant v. State of Florida, 839 So.2d 821(4th DCA 2003)(it was improper for prosecutor to argue "if he was going in for an employment application, of which there is no evidence by the way, [and] no sworn testimony by the way." Argument could be interpreted as a comment on def.'s right to remain silent because def. was the only person who could have provided that testimony. Defense counsel's comment in opening that def. had admitted to going into the restaurant to get a job application did not invite comment on def.'s failure to testify. Error harmless where objection was sustained and trial court instructed jury to disregard the statement. Affirmed.)

Evans v. State of Florida, 838 So.2d 1090 (Fla. 2002)(where def. testified that firearm discharged accidentally and he did not immediately go to the police because he was afraid, it was not improper for prosecutor to argue that if the shooting had really been an accident the def. would not have disposed of the weapon and would have immediately gone to the police and explained the circumstances. Comment did not improperly shift the burden of proof to def. to prove his innocence. By taking the stand def. put his credibility at issue. Accordingly, the prosecution was free to highlight inconsistencies between his testimony and other evidence, as well as to expose contradictions and improbabilities in def.'s version of events. Affirmed.)

Doorbal v. State of Florida, 837 So.2d 940 (Fla. 2003)(prosecutor's comment that "Never once was it anybody else but defendant Doorbal that was the hands-on killer. ... Never once did anybody else get up once to say anything different" [where no one but def.s could have testified different] did not warrant a new trial where def.'s counsel neither objected nor moved for a mistrial. Under fundamental error standard, prosecutor's statements did not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Affirmed)

Lawrence v. State of Florida, 831 So.2d 121 (Fla. 2002)(prosecutor's repeated use of the word "uncontroverted" in describing the nature of certain evidence presented at trial was not a comment on the def.'s right to remain silent. Affirmed)

Adams v. State of Florida, 830 So.2d 911 (3rd DCA 2002)(prosecutor's comment that another witness, unlike the defendant, "took the stand at least" was "fairly susceptible" of being interpreted by the jury as a comment on the def.'s failure to testify. When comment was juxtaposed with other personal attacks on defense counsel, effect was so prejudicial as to vitiate the entire trial. Reversed.)

Lawrence v. State of Florida, 829 So.2d 955 (3rd DCA 2002)(during *voir dire*, it was improper for prosecutor to comment on def.'s right to remain silent and decision to testify or not testify for the stated purpose of asking jurors whether they could treat him with the same rules and same critical eye as any other witness. Prosecutor's statement that the def. testifying is often the most critical or riveting moment in the trial, combined with the failure of the trial court to give a cautionary instruction that no adverse inference could be drawn from the def.'s failure to testify, left jurors free to infer or speculate that a def. who does not testify must surely be guilty. Error not harmless. Reversed.)

Morrison v. State of Florida, 818 So.2d 432 (Fla. 2002)(prosecutor's argument: "I haven't heard the defense in this case. I'm interested in hearing it, and I know you all are interested in hearing it. I'm eager to hear what [def. counsel] has to say when he gets up here, because I haven't heard the defense yet in this case. I haven't heard their response, yet, to this, other than he's not guilty. That's what they told you, he's not guilty. Well, I'm eager to hear it, because not only is there no reasonable doubt in this case, there is no doubt whatsoever that this man did it. None whatsoever" was not an improper shifting of the burden of proof nor a comment on def.'s

failure to testify. Comment was true as this argument occurred chronologically before def. counsel had argued. Given the context of the prosecutor's remarks, the prosecutor was merely referring to the fact that def. counsel had not yet presented his argument. Further, prosecutor's additional argument that the "defense or defendant would have us believe that this elderly disabled man attacked him, and that he was forced to defend himself. And that in defending himself, [victim] cut his own throat, twice. I guess that's what they want us to believe" was not a suggestion that the burden was on the def. to prove his innocence (nor a comment on def.'s failure to testify), but rather a direction for the jury to consider the evidence presented. Affirmed.)

Mann v. State of Florida, 787 So.2d 130 (3rd DCA 2001)(where def. in jail cell arson case took the stand and testified as to the presence of a trustee who he claimed may have started the fire, it was proper for the State to cross-examine and argue in closing about def.'s failure to tell the corrections officers or arson inspectors about the trustee's presence. The argument was not an improper comment on def.'s right to remain silent because the def. was not in custody on the arson charge and was not even charged with arson until much later, after the arson investigator completed his investigation. Affirmed.)

Delgado v. State of Florida, 776 So.2d 233 (Fla. 2000)(where def. claimed self-defense and the only evidence presented to jury by def. was his display of marks and scars on his shoulder, presumably from altercation with victim, it was appropriate for prosecutor to comment that def. was not found for approximately 2 ½ years following the crime and to ask: "Have you seen any evidence to suggest to you what was going on during that lapse of time?" Rhetorical question was not an improper comment on def.'s right to remain silent or an attempt to improperly shift burden of proof. Def. assumed burden of proving defense of self-defense and state properly commented on evidence presented in support of that def. (scars and marks) by pointing out that they could have been obtained before or after crime. [*NOTE: this case has no precedential value as it was withdrawn and superseded. The superseding opinion, however, did not address the closing arguments and was reversed on other grounds. Therefore, the case is included in the outline to give you an idea of the Court's possible view on this scenario.*])

Wolcott v. State of Florida, 774 So.2d 954 (5th DCA 2001)(although prosecutor's comments that although the defense has no obligation to present evidence "they have a right to if they choose to" and "[t]here has been no witnesses who came in and said that's not his fingerprint" could have been construed to suggest that the defendant had a burden to bring forward evidence, comment falls within the confines of "invited response" where defense counsel tried to discredit the fingerprint evidence by suggesting the police mishandled it. However, statement that there was no evidence that "the property that the defendant sold [to the pawnshop] came from anywhere else but the home of [the victim]" did not fit within any narrow exception and impermissibly refers to defendant's failure to testify, since he is the only one who would be able to show that they came from somewhere else. Reversed on these and other grounds.)

Brown v. State of Florida, 771 So.2d 603 (4th DCA 2000)(where the State's evidence

supported theory of homicide and only person who could have contradicted that theory was the defendant because he was the only witness to victim's death, prosecutor's argument that suicide argument advanced by defense counsel was "a nice argument, but [there was] no evidence to support that in any way, shape or form that you heard in this case. Nobody, nobody testified that [victim's] death was a suicide" impermissibly highlighted defendant's failure to testify. A comment on the failure to contradict the evidence becomes an impermissible comment on the defendant's failure to testify [i.e. is "fairly susceptible" to being interpreted that way] where the evidence is uncontradicted on a point that only the defendant can contradict. However, narrow exception allows such comment where prosecutor's statement is invited by the defense. Where def. counsel commented in opening that evidence would show death was a suicide and in opening and closing that M.E. could not definitively determine whether death was homicide or suicide, prosecutor was justified in commenting on lack of evidence of suicide. Affirmed)

Barnette v. State of Florida, 768 So.2d 1246 (5th DCA 2000) (prosecutor's question to venire during *voir dire* asking whether they could not convict without the testimony of an eyewitness other than the victim and stating that "it could come down to which witness is more credible" was not an improper comment on the defendant's right to remain silent in the context in which it was made. Affirmed)

Ruddock v. State of Florida, 763 So.2d 1103 (4th DCA 1999)(where def. testified at trial and in closing def. counsel argued that def. did not hit victim with a broom, it was not improper for prosecutor to point to long, skinny abrasions in photo of victim and ask "How can the def. explain that?" Comment related to defendant's defense, not his silence. Further, since def. testified in trial and did not exercise his right to remain silent, prosecutor's comments regarding appellant's testimony was not error. Affirmed)

Holmes v. State of Florida, 757 So.2d 620 (3rd DCA 2000)(where def. did not testify at trial, prosecutor's hypothetical in closing about a burglary of a car in which the hypothetical def. testified that he did not burglarize the car constituted an improper comment on def.'s right to remain silent. Reversed.)

White v. State of Florida, 757 So.2d 542 (4th DCA 2000)(In case where def. was found in possession of a package containing drugs and, prior to arrest, he voluntarily asserted that the package did not belong to him, it was proper for prosecutor to comment on def.'s failure to provide the detectives with the identity of the owner of the package or the names of persons who had knowledge of its true ownership. Comments were not directed at def.'s silence during or after arrest, but were used to impeach his trial testimony concerning his voluntary pre-arrest statement which denied ownership but omitted material significant facts that would naturally have been asserted. Reversed on other grounds.)

Rich v. State of Florida, 756 So.2d 1095 (4th DCA 2000) (it was not improper for prosecutor to argue that it was "uncontroverted" that the def. was not threatened or promised anything in exchange for his confession, and that certain testimony was also "uncontroverted." Although a

comment that evidence is "uncontroverted" may constitute a comment on the def.'s right to remain silent under certain circumstances, prosecutor may, as here, respond to suggestion by defense that some wrongdoing occurred in the taking of the statement by directing the jury to consider the evidence presented [see *Rodriguez*, below]. By arguing that the officer threatened the def. with the arrest of his girlfriend, the def. gave the state little choice but to argue that the evidence to the contrary was uncontroverted. Affirmed.)

Ricardo v. State of Florida, 756 So.2d 215 (4th DCA 2000) ("While the state is usually prohibited from commenting on the def.'s silence, if the defense raises the issue the state may respond.... However, The state's response may be objectionable if it's 'extent and content' goes beyond the scope of a fair comment." [Record inadequate to make determination and no facts provided])

Dormezil v. State of Florida, 754 So.2d 168 (5th DCA 2000) (prosecutor's comment: "why would not a person whose just been placed under arrest, placed in handcuffs, why doesn't that person ask, 'What are you handcuffing me for? What are you doing?'" was not properly preserved where def. counsel objected but declined the court's offer to make a curative instruction. Error not fundamental. Affirmed)

Rodriguez v. State of Florida, 753 So.2d 29 (Fla. 2000) (prosecutor's comment that: "somebody obviously was in that apartment with [co-def.]. And we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been," coupled with a reminder that def. counsel had asked during voir dire whether potential jurors would be willing to listen to two sides of the story and observation that "there was nothing in direct or cross examination ... that pointed to any other person being involved other than [co-def. and def.] There were no two sides" were susceptible to interpretation as comments on def.'s failure to testify or that impermissibly suggest a burden on the def. to prove his innocence. Comment in voir dire did not invite the state's response. Narrow exception exists when def. asserts defense of alibi, self-defense or defense of others, relying on facts that could be elicited only from a witness who is not equally available to the State. [NOTE: "A constitutional violation occurs ... if either the def. alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure to testify."] Error harmless. Affirmed)

Jones v. State of Florida, 727 So.2d 1120 (5th DCA 1999) (prosecutor's argument that: "The defendant has had time to think about his testimony, and you heard" was not a reference to the def.'s right to remain silent. Even if it were so construed, resulting error would be harmless. Affirmed).

Harris v. State of Florida, 726 So.2d 804 (4th DCA 1999) (improper for prosecutor to comment on def.s silence in pre-Miranda, custodial interrogation. Reversed)

State of Florida v. Dix, 723 So.2d 351 (5th DCA 1998) (Where witness testified that the def.

stated he shot the victim because he didn't like him, it was proper for prosecutor to comment: "There is no, it was an accident, he tried to shoot me, I had to grab the gun from him. No. What he said is, I have a beef with him." Comment was appropriate reference to the evidence and inferences therefrom, and was not fairly susceptible of being interpreted by the jury as a comment on def.s right to remain silent (i.e. that he did not give any of the above explanations.) The state has a right, and in fact a duty, to respond to the explanation of the charges given by the defense, because to ignore it is to give it credence.) Order granting new trial reversed.

State of Florida v. Hoggins, 718 So.2d 761 (Fla. 1998) (prosecutor improperly argued that def. had never, prior to trial, offered the exculpatory explanation he gave at trial and further that he did not offer his exculpatory account of the events after being advised of his rights. Referring to when the police found him hiding in a closet: "Remember, he doesn't tell them that story at that time." Referring to when he was brought downstairs and confronted by the victim: "[H]e never mentioned his story....[N]ever did at that point say anything like, 'Man, I didn't try to shoot you. I didn't rob your store. I just found that money and stuff....' " Error to comment on def.s silence *at time of arrest, whether pre or post Miranda.* [Note: "At time of arrest" is interpreted broadly to include some time before arrest.])

Charton v. State of Florida, 716 So.2d 803 (4th DCA 1998) (Although state may comment on def.'s flight or refusal to provide identification during *Terry stop*, it is improper to comment on def.'s failure to explain his presence to officer as such comment is fairly susceptible of being understood as a comment on a def.'s exercise of his right to remain silent, even though def. was not under arrest during the *Terry stop*. Reversed.)

Mackey v. State of Florida, 703 So.2d 1183 (3rd DCA 1997) (in discussing a defense expert's admission that bruises were consistent with having been caused by Astroturf carpet, the prosecutor continued: "Could they be consistent with something else? Maybe. I haven't seen anything else. They haven't shown me anything else in this case. There is no evidence -." Argument was not error because comments "in reference to the *defense* generally as opposed to the *defendant* cannot be 'fairly susceptible' to being interpreted as referring to the defendant's failure to testify." [No ref. to shifting of BOP] *[Subsequently reversed on other grounds - State v. Mackey, 719 So.2d 284]*)

Chandler v. State of Florida, 702 So.2d 186 (Fla. 1997) (it was not improper for prosecutor to argue that def. had never told his daughters or son-in-law that he was innocent as that was a fair characterization of the evidence. Affirmed)

Walker v. State of Florida, 701 So.2d 1258 (5th DCA 1997) (where def. raised affirmative defense of entrapment he had the burden of establishing that defense. When his lawyer argued for acquittal on the basis of entrapment despite the fact that def. neither took the stand nor presented any evidence, it was proper for the prosecutor to point out that the burden of proving the defense was on the defendant and that the def. had to say "if it wasn't for the action of the government, I would not have even thought or tried to do what I did." Although the def.

certainly does not have to take the stand in order to prove entrapment, and the prosecutor could have couched his argument directed at the defense, rather than the defendant (i.e. "the defense has to present evidence" instead of "the defendant has to say"), the prosecutor's choice of words were not error and was consistent with the wording of the jury instructions given without objection ("the def. must prove.) Even if erroneous, harmless. Affirmed.)

Austin v. State of Florida, 700 So.2d 1233 (4th DCA 1997) (Prosecutor stated: "The opening statement was: The defendant never threw a rock. Did you ever hear anything from this stand but the fact that the man threw a rock? You have no testimony from this stand that indicates otherwise." Comment was not impermissible ref. to def.'s failure to testify but a response to defense's assertion that def. did not throw the rock. It was proper for State to respond that the defense argument was not what the evidence showed by reminding the jury that all evidence was to the contrary.)

Smith v. State of Florida, 698 So.2d 632 (2nd DCA 1997) (improper for State to argue "And for him [def. counsel] to say my client didn't have to testify because he can't prove a negative, he could have certainly told us where he was on June 9, 1994." This argument consisted of a comment on def.'s right to remain silent and shifted the burden to def. to prove his innocence.)

Dean v. State of Florida, 690 So.2d 720 (4th DCA 1997) (where def. originally gave officer false name and claimed that he had no identification, and State was arguing that this was evidence of guilt - claiming that there was no other reasonable explanation, it was improper for State to argue: "If there is you haven't heard it in this trial." This statement was fairly susceptible to being interpreted as a comment on def.s failure to testify because the only person who could offer an explanation was the def.)

Batista v. State of Florida, 685 So.2d 20 (3rd DCA 1996) (in response to def. argument that it wasn't a burglary, that def. thought he was entering the leasing office, State pointed out that if def. had entered wrong apartment by mistake he would not have just run out, knocking down a victim as he fled, but would have apologized. And if he had run into person by mistake, he would have said "sorry" and not just gotten up and kept running. This was not a comment on def.'s silence but appropriate comment on the evidence.)

Kirkland v. State of Florida, 684 So.2d 732 (Fla. 1996) (improper for prosecutor to comment in closing on two taped statements that were not in evidence and then, when def. pointed out to the jury in it's closing that tapes were not in evidence, to comment in rebuttal that def. also had access to the tapes. Def. objected on grounds that comment was a reflection on def.s failure to testify. Although comment was improper, single remark did not warrant a mistrial. [no mention of why def. counsel did not object to comment on facts not in evidence])

Davis v. State of Florida, 683 So.2d 572 (4th DCA 1996) (comment directed to the customary defense of misidentification in which the prosecutor stated " I didn't hear that from either of these Def.'s. Neither one of them claimed to be a hitchhiker" was fairly susceptible of being

interpreted as a comment on the def.'s failure to testify. Reversed on other grounds)

Williams v. State of Florida, 682 So.2d 631 (3rd DCA 1996) (comment on def.'s right to remain silent is no longer fundamental error and an objection must be made.)

Varona v. State of Florida, 674 So.2d 823 (4th DCA 1996) (*voir dire* - it was improper during voir dire for State to tell the jury: "Now, you understand obviously that the defendant has a right to remain silent ... And you understand he doesn't have to do anything in a criminal case. He doesn't have to even say one word and that's his right, okay?.. You understand I can't comply [sic] the defendant to take the witness stand either. So I can't call him as a witness for any reason ..." Comment was "fairly susceptible" of being interpreted as a comment on a defendant's failure to testify and was an impermissible violation of the constitutional right to remain silent. Reversed.)

Knight v. State of Florida, 672 So.2d 590 (4th DCA 1996) (prosecutor's comment: "God forbid you should believe a police officer whose testimony went uncontradicted by these Defendants who told you specifically what happened in this case," together with numerous references to "uncontradicted testimony," was improper comment on appellant's right to remain silent.)

Barwick v. State of Florida, 660 So.2d 685 (Fla. 1995) (where def. counsel argued other officer's failure to testify in order to imply some wrongdoing in the obtaining of def.'s confession, it was fair reply for State to argue: "what in this courtroom, what evidence, what fact, what testimony, what anything have you heard as a result of him going down to that police station would create a reasonable doubt in your mind .... Nothing." --Not a comment on def.'s failure to testify, but merely directed the jury to consider the evidence presented. *Subsequently receded from on other grounds – Topps v. State, 865 So.2d 1253.*)

Shelton v. State of Florida, 654 So.2d 1295 (4th DCA 1995) (prosecutor's question to the jury: "[I]s there anything showing that he did not make that [drug] sale?" improperly shifted the burden of proof and could be interpreted as a comment on def.'s silence. [Disapproved of by Bell v. State, 108 So.3d 639, as to issue of comments on this point.])

Jones v. State of Florida, 653 So.2d 1110 (4th DCA 1995) (Except in limited situations where def. assumes burden of proving alibi, self-defense or defense of others, relying on facts that could be elicited only from witnesses who are not equally available to the state, it is improper for prosecutor to comment on def.'s failure to call a witness because it may mislead the jury into believing that the def. has the burden of introducing evidence or may violate def.'s right to remain silent.")

Heath v. State of Florida, 648 So.2d 660 (Fla. 1995) (in opening statement [reasoning is the same] it was improper for prosecutor to refer to def.'s brother as the only witness "who can tell you about what [def.] and [his brother] did." Comment impermissibly highlighted def.'s decision not to testify. Error harmless. Affirmed.)

Harrell v. State of Florida, 647 So.2d 1016 (4th DCA 1994) (it was improper for State to argue that: "The Defendant has a constitutional protection in the Florida Constitution and the United States Constitution not to testify if he does not want to or his attorney chooses for him not to." Def.'s testifying did not render error harmless because he may have felt coerced to testify. Reversed.)

Burgess v. State of Florida, 644 So.2d 589 (4th DCA 1994) (It is improper for state to make a comment that is fairly susceptible of being interpreted as a comment on def.'s right to silence under the Fifth Amendment. Likewise, showing that the def. did not make a statement until trial is improper. There is no requirement in a sexual battery case that a defendant file a pretrial notice that consent is the defense, as there is when a defendant wants to raise an alibi, a battered spouse, or an insanity defense. Prosecutor's comment in rape case: "So now he knows [before trial] that we have got a DNA match. We have got a live lineup ID, and we have got a photo ID. *And he comes in on the day of the trial and says she consented.* What else has he got left? I mean, he couldn't attack this. We saved you the pain of about four hours of testimony with the DNA specialist. We didn't get to show you all the pubic hair and dirt, and - -" was error. Reversed when combined with other errors.)

Wray v. State of Florida, 639 So.2d 621 (4th DCA 1994) (where def. had been given his Miranda warnings at the time he made his statement, it was proper for State to comment on what the def. did not say in his statement ["He never tells you on the statement about how he carried this weapon ..."] since by giving a statement he waived his right to remain silent as to that statement. Prosecutor's comment could not, therefore, have infringed on that right. Affirmed.)

Rigsby v. State of Florida, 639 So.2d 132 (2nd DCA 1994) (during summation, in a trial where the defendant did not testify, the prosecutor stated: "Now, we heard [defense counsel's] version as she stepped up to the podium about what happened that night, but we didn't hear that from the stand .... In her version of the facts, [defense counsel] stated they were arguing and while they were arguing that [defendant] put the baby in water. Frankly, ladies and gentlemen, you didn't hear from the stand from anyone who could testify as to exactly how it happened." Held: Reversed, improper comment).

Jean v. State of Florida, 638 So.2d 995 (4th DCA 1994) (def.'s complaint of an improper comment on his right to remain silent was waived when def. refused the court's offer of a curative instruction.")

Dorman v. State of Florida, 638 So.2d 589 (3rd DCA 1994) (prosecutors comment that he did not know why the defendant went to get the knife because "[w]e can't get into the head of the defendant" was not an improper comment on the defendants right to remain silent, but rather a permissible comment on the lack of testimony to support the defendant's contention that he acted in self-defense.)

Dixon v. State of Florida, 627 So.2d 19 (2nd DCA 1993) (in trial for aggravated child abuse where mother pled guilty and testified against def., it was improper for prosecutor to argue: "He was abused by both parents. But only one parent has come in here and admitted what she did was wrong. Only one parent has come in here and testified that she's going to prison. … The defendant has said he's not guilty. He's pled not guilty. He has not accepted his responsibility. He's not admitted his guilt." Reversed.)

Kirby v. State of Florida, 625 So.2d 51 (3rd DCA 1993) (in closing, the prosecutor said: "Now what did the defendant intend when he did what he did that night? Well, I can't take his head and crack it open and mark if for an exhibit, to show you what was in his head that night.:" The defendant objected and argued that this was a comment on his silence at trial. The court held that "the challenged portion of the prosecutor's closing argument was a permissible reference to the absence of testimony to support the defendant's contention that he did not intend to batter the victim, rather than an impermissible comment on the defendant's failure to testify." Worthy of note is the court's comment that it "refused to presume that jurors invariably draw the wrong conclusions from statement in which only lawyers or judges sensitized to possible error could even detect a sinister implication.")

Waterhouse v. State of Florida, 596 So.2d 1008 (Fla. 1992) (prosecutor's penalty phase argument: "Well, have you heard any testimony that Robert Waterhouse got beaten with a tire iron in his own vehicle? Absolutely not. There is absolutely no evidence that blood came from anywhere [except] Deborah Kammerer's skull" was not fairly susceptible of being interpreted as a comment on silence. Affirmed.)

Dailey v. State of Florida, 594 So.2d 254 (Fla. 1991) (it is improper for a prosecutor to make a statement that is "fairly susceptible" of being understood as a comment on a defendant's right to silence under the Fifth Amendment. It is also improper to show that the defendant did not make a statement until his testimony at trial.)

Jackson v. State of Florida, 575 So.2d 181 (Fla. 1991) (it is generally improper for State to comment on def.'s failure to produce evidence as that could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence and, in some cases, could be viewed as a comment on his right to remain silent. Exception to this rule applies where the def. voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state. (i.e. a witness who has a special relationship with the def.) [NOTE: Both elements to the exception must exist] Here, def. asserted no defense to which his mother could have related relevant testimony, therefore, State's comment as to def.'s failure to call her as a witness was improper.)

State of Florida v. Smith, 573 So.2d 306 (Fla. 1990) (where at the time of his arrest, but prior to Miranda warnings, def. spontaneously stated: "You've got the wrong person. I haven't done anything." but subsequently stated "I just shot someone. He was going for my daughter" it was

improper for state to question officer and then argue to jury about the fact that at that time the def. did not say anything about being frightened of the victim or that the victim was being sexually aggressive or assaulting his daughter. The prosecution is not permitted to comment upon a def.'s failure to offer an exculpatory statement prior to trial, since this would amount to a comment upon the def.'s right to remain silent. Order granting new trial affirmed.)

Holloman v. State of Florida, 573 So.2d 134 (2nd DCA 1991) (where C.I. allegedly made various drug purchases from def. while wearing a wire, only person who identified def.s voice on the tape was the C.I., it was improper for state to argue: "There was no other female in that house when it was searched... [A]nd there has been no rebuttal, no evidence from that stand to say other than it was the def. on that tape, or to establish that there was someone, some other female living in that house." Comment was fairly susceptible of being interpreted by the jury as referring to def.s failure to testify. Reversed)

Occhicone v. State of Florida, 570 So.2d 902 (Fla. 1990) (in case where def. claimed that his constant state of intoxication prevented him from knowing what he was doing, evidence by officer and comment by prosecutor in closing that, post-Miranda, def. pulled his hands away when officer attempted to swab his hands to perform atomic absorption test was proper, where argument was not made to show consciousness of guilt, but to refute def.'s allegation that his state of intoxication prevented him from knowing what he was doing. Affirmed.)

Bain v. State of Florida, 552 So.2d 283 (4th DCA 1989) (prosecutor's closing argument, containing a story about a hypothetical person with the def.'s same name who told the police: "You have no right stopping me, I am leaving ..." was improper as it highlighted def.'s exercise of his right to remain silent and was not based on any evidence, therefore improperly suggesting what might have been said. [Note: argument followed prosecutor's aborted attempt to ask the officer: "Did he ever say whether or not he was involved in a robbery?" Reversed.)

Wood v. State of Florida, 552 So.2d 235 (4th DCA 1989) (in case involving constructive possession of cocaine where def. attorney's elicited response from officer that when the cocaine was found the def. did not say anything [in order to show that there was no direct evidence of the def.'s knowledge of the cocaine], prosecutor went too far by arguing: "Common sense is your guide, the reactions of this def. to the finding of the cocaine, the things he didn't say, what does silence tell you? Sometimes more than anything anybody can say to you. ... He in this case, he is his own direct proof a thousand times more convincing than any police officer will ever be because when he didn't speak, he told you more than any police officer who takes the stand and testifies to you for hours ever will. ... Listen to what he says ... and you will know whether or not the def. is guilty." Although a prosecutor can fairly respond to defense counsel's "opening the door" with comment about the def.'s silence, the extent and content of the response in this case exceeded a fair reply. Reversed."

Eberhardt v. State of Florida, 550 So.2d 102 (1st DCA 1989) (In voluntary intoxication defense case, reference to defendant's claim of intoxication "through counsel" amounted to a comment

on the def.'s right to remain silent)

Stone v. State of Florida, 548 So.2d 307 (2nd DCA 1989) (in allegedly explaining to the jury the possible defenses available to the def., the prosecutor argued: "What does [def.] have to do here to have a defense? He's either got to say 'Folks, I was part of a conspiracy but I told Milton not to do it' or 'Folks, I wasn't part of the conspiracy.'" Comment was fairly susceptible of being interpreted as a comment on def.'s failure to testify as it suggested that he would not have a defense if he did not "say" those things. State could not rely on harmless error because it failed to even address the issue in its brief and therefore could not be found to have met it's burden of showing the error to be harmless beyond a reasonable doubt. Reversed. [Note: Trial court denied motion for mistrial or curative instruction and said it would be covered in jury instructions but failed to include an appropriate instruction])

Andrews v. State of Florida, 533 So.2d 841 (5th DCA 1988) (prosecutor's comment that no evidence had been presented which provided an innocent explanation for def.s fingerprint being found on the window screen was not improper where it was made in response to defendant's argument that there was an innocent explanation. Affirmed. *[subsequent abrogation on Frye issue recognized by Hadden, 690/573 and other cases.]*)

Erwin v. State of Florida, 532 So.2d 724 (5th DCA 1988) (Comment that the case pitted state's witness against def. not a comment on def.'s failure to testify)

Abreu v. State of Florida, 511 So.2d 1111 (2nd DCA 1987) (when referring to the testimony of his witness, it was improper for prosecutor to argue "And what did you hear to rebut that? Who took the stand and said that what he said wasn't true? ... Who rebutted what he said?" where only other persons who were present and could rebut what witness said were def. and co-def. Reversed.)

Murphy v. State of Florida, 511 So.2d 397 (4th DCA 1987) (it was improper for prosecutor to question witness and then comment to jury at closing about the fact that at the time of his arrest the def. failed to deny ownership of the drugs found in a pouch in the vehicle in which he was a passenger. Error compounded when judge overruled objection to question and refused to instruct the jury on the def.'s right to remain silent upon arrest. Reversed on these and other grounds.)

Lowry v. State of Florida, 510 So.2d 1196 (4th DCA 1987) (prosecutor's argument: "You heard [defense counsel] say that he has talked to the witnesses in this case many times and that is true. *Until Mr. Lowry testified in here the other day I had no idea whatsoever what he was going to say* but he knew exactly what all of the State witnesses were going to say before he got up and testified. *They had no idea what he was going to say. Keep that in mind.*" was fairly susceptible to being interpreted as a comment on def.'s right to remain silent and was not harmless. Reversed.)

Rosso v. State of Florida, 505 So.2d 611 (3rd DCA 1987) (Multiple and repetitive comments in

insanity defense case that def "comes before you and says "Yes, I shot [victim] ... but I will not be held responsible. And I shot [second victim] ...but I will not be held responsible...." made in opening and closing argument were reasonably susceptible to being interpreted as comment on def's silence.)

Minnis v. State of Florida, 505 So.2d 17 (3rd DCA 1987) (where def. did not testify but raised an alibi defense at trial, prosecutor's comment about the fact that def. never mentioned an alibi in his statement to police was permissible and was not a comment on the def.'s right to remain silent. Affirmed.)

Watson v. State of Florida, 504 So.2d 1267 (1st DCA 1986) (where def had provided other statement that failed to mention explanation he gave at trial, prosecutor's question "Where was that explanation before?" was not improper comment because def. had not invoked his right to remain silent. It was proper comment on the inconsistencies in def's exculpatory statements)

Barry v. State of Florida, 504 So.2d 524 (5th DCA 1987) (prosecutor's comment about the inconsistencies in the def.'s various statements to the police and his conclusion that: "If he told the truth in the first statement, then he lied in the second statement. ... So, he didn't tell the truth. He still hasn't told the truth." although arguably improper was harmless in light of the evidence. *[Note: in consolidated appeal, Sup. Ct. remanded because appellate court applied incorrect standard for harmless error. Long v. State, 494 So.2d 213. On remand, appellate court again affirmed as harmless error using correct standard. 504/524]*)

Dufour v. State of Florida, 495 So.2d 154 (Fla. 1986) (where witness, who was given immunity from prosecution on armed robbery charges, testified that def. was his cell mate, that def. had told him of the murder in detail and that def. had offered witness $5000 to kill another witness, prosecutor's comment that: "Nobody has come here and said, [witness'] testimony was wrong, or incorrect, or that that was not the deal he was offered," was not a comment on def.s failure to testify. Comment referred to witness' testimony on his negotiations with police and was appropriate comment on the evidence. Also, comment that "you haven't ... heard any evidence that [def.] had any legal papers in the cell with him" merely rebutted the def. argument that witness had access to and could have based his testimony on def.s "legal papers." Comment pointed out lack of evidence on that issue and was an "invited response."

State of Florida v. DiGuilio, 491 So.2d 1129 (Fla. 1986) (This is not a closing argument case. Prosecutor elicited comment from officer that def. asked for an attorney and refused to answer questions. Court held that a prosecutor's comment on a criminal defendant's silence was subject to a harmless error analysis stating that automatically reversing a conviction in order to punish a prosecutor is "draconian." [*NOTE: This case made harmless error rule applicable to comments on def.'s silence. Cases before DiGuilio were reversed per se but that is not longer the rule.*])

Kennedy v. State of Florida, 490 So.2d 195 (2nd DCA 1986) (Co-defendant counsel's argument that def's admission was not contradicted was not improper. Statement that shortly

after the admission the def and co-def parted company and "we didn't hear from him anymore" was not reasonably susceptible to interpretation as a comment on def's failure to testify. At most it referred to his silence upon and after leaving the car)

State of Florida v. Kinchen, 490 So.2d 21 (Fla. 1985) (Supreme Court declines to discard the "fairly susceptible" test for comment on def.'s right to remain silent. Comment by co-def.s counsel that alleged statements from def.s "own mouth" were "unrefuted" may have been "fairly susceptible" of being interpreted as a comment on def.'s failure to testify but such comment may be harmless. Supreme Court reversed DCA's reversal of trial court conviction and remanded case to appellate court for harmless error analysis.)

Whitfield v. State of Florida, 479 So.2d 208 (4th DCA 1985) (prosecutor's remark that he had proven the defendant guilty beyond a reasonable doubt and that the jury had not heard one word of testimony to contradict what the victims in the case had said was not reasonably susceptible to being interpreted as a comment on the defendant's silence. [**Note**: recent cases have warned against making statements about uncontradicted evidence that could only be contradicted by the defendant, i.e., claim that officer's testimony that def. confessed was uncontradicted, where it was allegedly only the officer and the def. present.])

State of Florida v. Sheperd, 479 So.2d 106 (Fla. 1985) (prosecutor's argument: "We've heard a lot of allegations with respect to a defense and I must confess to you, when I sat down to prepare my closing remarks, I had a lot of difficulty in trying to figure out exactly what the defense was going to be, because, frankly, for my purpose, I haven't heard any" was NOT improper comment on silence. It was merely a comment on the uncontradicted nature of the evidence. ** RULE: "[A] prosecutorial comment in reference to the *defense* generally as opposed to the *defendant* individually cannot be "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify. *[But see Rodriguez, supra, 753/29, which limited this case, urging a "narrow" interpretation of this rule]*)

State of Florida v. Marshall, 476 So.2d 150 (Fla. 1985) (case involved prosecutor's comment that jury only heard from [the state's witness] as to what happened on the day in question. Court held that harmless error analysis can be applied to cases where error is comment which is fairly susceptible of being interpreted as referring to def.'s failure to testify. [*NOTE: This case extended harmless error rule to comments on failure to testify. Prior cases were reversed per se but that is no longer the rule*.])

Marshall v. State of Florida, 473 So.2d 688 (4th DCA 1984) (where only two people witnessed crime -- victim who testified at trial and the def. who chose not to testify -- prosecutor's comment that "the only person you heard from in this courtroom with regard to the events ... was [the victim]" improperly highlighted def.'s decision not to testify and was "fairly susceptible" of being interpreted as referring to def.'s failure to testify, rather than as a comment "on the evidence." [NOTE: "A constitutional violation occurs ... if either the def. alone has the information to contradict the government evidence referred to or the jury 'naturally and

necessarily' would interpret the summation as a comment on the failure to testify."-- *At the time of this opinion, harmless error rule was inapplicable to comments on def's silence. This case was subsequently quashed on appeal as Supreme Court decided that harmless error rule would thereafter apply to comments on def.'s silence or failure to testify. See* Marshall *above 476/150*.])

Knox v. State of Florida, 471 So.2d 59 (4th DCA 1985) (it was not improper for prosecutor to argue, in case involving attempted sexual battery on a minor, "as to the statement that he placed his penis against her, as to that, too, you have not heard one word of contradictory evidence to differ." However, in addressing the testimony of detective who testified that he heard the def. apologize to his mother and sister for having committed the crime, prosecutor further argued: "... he [the deputy sheriff] remembered it word for word and as far as the persons who could have confirmed that, the other persons who heard the statement, they are not here. Who are they? The defendant's sister and the defendant's mother *and the defendant,* as you have been told and it is certainly true, has no obligation whatsoever to put on evidence for you whatsoever, but if there was evidence available, you can consider that there was nothing to contradict it. You can consider that no witness testified that that was not, in fact, the statement." [Emphasis added.] This last comment went beyond mere comment on the uncontradicted testimony of witnesses. *[**Note**: Initially, case was reversed. However, on remand from the Supreme Ct. to consider issue, 495 So.2d 166, error was deemed harmless and conviction affirmed. Knox, 521/322]*)

Long v. State of Florida, 469 So.2d 1 (5th DCA 1985) (prosecutor's comments: "[Defense counsel] asks you to allow his client to walk out of here a free man ... never having had to admit that he committed a crime" and "I haven't heard any evidence that he thought this car belonged to one of his friends" were improper. *[Appellate court originally concluded errors to be harmless but then decided otherwise when remanded by Supreme Ct., 494 So.2d 213, for reconsideration under proper DiGuilio standard "reasonable possibility that error affected the verdict" - 498 So.2d 570]*).

Moya v. State of Florida, 460 So.2d 446 (3rd DCA 1984) (where when def. was arrested he gave a statement in which he was asked if he understood he was being charged with kidnapping and sexual battery and he simply answered "yes," and that statement was introduced into evidence but def. did not testify at trial, it was improper for prosecutor to argue that the def. did not deny committing kidnapping -- that argument was an impermissible comment on def.'s silence. Reversed. [Note: Appellate court's ruling that trial court did not abuse its discretion in holding that statement referred to def.s silence at trial was based on the "abuse of discretion" standard. Appellate court might have just as easily affirmed trial court if trial court had found that comment was a reference to statement in confession rather than silence. Case was also decided before *DiGuilio* made "harmless error rule" applicable to comments on def.'s silence.)

Dunbar v. State of Florida, 458 So.2d 424 (2nd DCA 1984) (A prosecutor's reference to def.'s failure to call certain witnesses may be prejudicial if it refers to a def.'s exercise of his right to remain silent or if the comments indicate that the def. has the burden to come forward with

evidence and prove his innocence. However, it is not improper for a prosecutor to refer to a def.'s failure to call certain witnesses when def. counsel indicates in opening statements that those witnesses would be called to testify. Here, def.'s counsel referred to witnesses in opening and, when nobody called them, commented to jury on the state's failure to call them. Under those circumstances, it was proper for state to respond that def. could have called the witnesses as well. Affirmed.)

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) (Comments like: Def "is telling you that she's not guilty...," you must determine if "she's not guilty ...like she's claiming" and What would reasonable people say about that? They'd say... She's lying" are sure to be construed as an improper comment on her failure to testify).

Reynolds v. State of Florida, 452 So.2d 1018 (3rd DCA 1984) (trial court did not err in denying motion for mistrial for prosecutor's comment that evidence was "uncontradicted.")

Priestly v. State of Florida, 450 So.2d 289 (4th DCA 1984) (prosecutor's comment that def. would "have to show ... that [he was] entrapped" was a proper comment on the def.'s burden to prove an affirmative defense. It was not an improper comment on the def.'s right to remain silent.)

Samosky v. State of Florida, 448 So.2d 509 (3rd DCA 1983) (improper indirect comment on def.'s failure to testify for State to argue: "So normally at this point, I'd say, 'Well, what about the defense in this case?' I don't know what the defense is...." Reversed. [Note: This case predates *Marshall* (476/150) which made harmless error rule applicable to comments on failure to testify])

Brock v. State of Florida, 446 So.2d 1170 (5th DCA 1984) (where def. did not testify, it was improper for state to argue "Today is the day he has to stand up and , 'fess to what happened and pay for what the did." Comment was fairly susceptible of being interpreted by the jury as referring to def.'s failure to testify. Reversed. [Note: court said it was forced to reverse despite overwhelming evidence because the harmless error rule did not apply to comments on silence. Subsequently, *Marshall* (476/150) held that the harmless error rule does apply to comments on def.s' failure to testify])

Roberts v. State of Florida, 443 So.2d 192 (3rd DCA 1983) (*opening statement* - prosecutor's comment in opening statement: "...but there is one piece of evidence that will be presented that he will not be able to explain and that will be the evidence that links that def. to the crime as charged," was fairly susceptible of being interpreted by the jury as referring to the def.'s exercise of his right to remain silent. Reversed without regard to harmless error rule. [Subsequently, *Marshall* (476/150) held that the harmless error rule does apply to comments on def.s' failure to testify])

Kinnon v. State of Florida, 439 So.2d 958 (3rd DCA 1983) (in case where def. did not testify

after being arrested in a truck with many dresses stolen from a burglary, it was not improper for State to argue: "No explanation. If she wasn't in the truck all that period of time, is there any other explanation?" When taken in context of the complete argument, it is clear that State was not commenting on the def.'s Fifth Amendment rights. The references to the lack of an "explanation" by the defendant clearly relate to the inference of guilty knowledge which may be drawn from the def.'s unexplained possession of the recently stolen dresses. Comment was perfectly permissible. Affirmed.)

Garcia v. State of Florida, 439 So.2d 328 (3rd DCA 1983) ([dicta] prosecutor's statement to jury to "think back about the presentation of the defense and I think you will have some doubts" was not improper in case where def. neither testified nor presented witnesses because def.'s counsel asked questions during cross-examination which related to the possibility that the victim had committed suicide. Accordingly, the statement falls within the permissible range of comment on the nature of the evidence and it was proper for the prosecutor to ask the jury to think back to the defense-proffered evidence of suicide.

Harris v. State of Florida, 438 So.2d 787 (Fla. 1983) (prosecutor's comment: "I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial" was not a comment on the def.'s failure to testify at trial. As remainder of argument reflects, prosecutor was referring to the critical issue of whether the def.'s confession was voluntary and, in doing so, was commenting on appellant's demeanor at the time the confession was made and comparing it with his demeanor at trial. [Note: court does not address whether it was appropriate to comment on the demeanor of a def. who did not testify at trial.] Affirmed.)

Love v. State of Florida, 438 So.2d 142 (3rd DCA 1983) (prosecutor elicited from lead detective that although the defendant gave a verbal confession, he refused to give a "formal" statement thereafter. Held: *The refusal to reduce to writing an otherwise complete oral confession is not an exercise of the right to remain silent*).

Fussell v. State of Florida, 436 So.2d 434 (3rd DCA 1983) (*voir dire* - it was an improper comment on def.'s right to remain silent for prosecutor to ask during voir dire whether juror would be bothered that it was going to be 14 year old's word against def.'s word. Although question generally represented the projected evidence in the case (def.'s admissible confession was going to be pitted against victim's testimony) the question nonetheless constituted a comment upon the def.'s failure to testify. Reversed.)

Layton v. State of Florida, 435 So.2d 883 (3rd DCA 1983) (Where def. Parker testified at trial, prosecutor's argument: "[As] you know, it doesn't take a genius to figure out that Mr. Layton and Mr. Parker, as opposed to the other witnesses, have been sitting here in this courtroom with the advantage and ability to listen to how each witness testified ..." is "fairly susceptible" of being interpreted by the jury as referring to Layton's failure to testify. Reversed despite being harmless. [Subsequently, *Marshall* (476/150) held that harmless error rule does apply to

comments on def.'s failure to testify.])

Romero v. State of Florida, 435 So.2d 318 (4th DCA 1983) (prosecutor's reference to def's. failure to call a witness impinges upon def.s right to remain silent and presumption of innocence by shifting the burden of proof and will constitute reversible error. Comment permitted where def. comments on state's failure to call the witness and state replies by pointing out that the def. had the same ability to put on the witness [fair reply]), where defendant's own presentation [in opening statement, closing argument or otherwise] depends upon facts which could only be elicited from such witness whose testimony is consequently assumed to be relevant, material and favorable to the defense (i.e. alibi). Otherwise jury may be misled and a def.s position, unsupported by a scintilla of evidence, will not be put in the proper perspective. "Although a def. initially assumes no burden he is encumbered by one obligation: if he chooses to speak, he must speak the truth.." Here, def. identified an alibi witness who he claimed he still knew. Prosecutor's comment on his failure to call that witness was proper.)

Brown v. State of Florida, 427 So.2d 304 (3rd DCA 1983) ("Did you hear any testimony that Willie Brown told Lamar Cruse: 'Stop Lamar, we don't want to kill him, we just want to scare him'?" was susceptible of being interpreted by the jury as referring to the appellant's failure to testify. Reversed [Pre-*Marshall* (476/150)- court said reversal was "required."]

Fernandez v. State of Florida, 427 So.2d 265 (2nd DCA 1983) (commenting on the fact that defense attorney had said "the defense rests" in a case where def. did not testify or put on evidence, prosecutor stated "I would suggest to you during this entire trial the defense has rested. I haven't heard a defense yet." Held improper comment on right to remain silent. [Interestingly, no reference to shifting of burden of proof.]

Lee v. State of Florida, 422 So.2d 928 (3rd DCA 1982) (In case where def. and co-def. were handcuffed by witnesses and handed over to police, no Miranda warnings were ever given by the police and no statement was given by the def., it was error for State to argue: "Now don't you think that if the def. had just been beaten up by Mr. Undorfer [as def. claimed at trial], that he would have told somebody at the hospital that that's what happened. But you will [sic] see it on these medical records. *And, why didn't the def. report all this to the police?*" As a matter of *State* constitutional law, it is impermissible to comment on a def.'s post-arrest silence whether or not that silence is induced by Miranda warnings. Reversed)

Ramos v. State of Florida, 413 So.2d 1302 (3rd DCA 1982) (*voir dire* - it was improper for prosecutor to comment during voir dire: "You can take the Fifth any time you want to. You need not testify in any court of law if testifying might incriminate you.... [I]s it clear to everybody here that the decision as to whether or not to testify or to speak before you is a decision not made by the Office of the State Attorney ... but it is a decision totally up to the Def., who can, if she wants to, get up and speak, because she has a right to - -." Comment implying that def.'s testimony might have incriminated her, when considered with the fact that she did not testify, was reversible error. Reversed.)

Kindell v. State of Florida, 413 So.2d 1283 (3rd DCA 1982) (prosecutor's reference to def. failure to call as witnesses the persons who were with her when she was arrested, even if error [appellate court was unable to find any cases where such a comment was viewed as impermissible comment on def.s right to remain silent], was not preserved where def. counsel only requested a side-bar at the time of the comment, the court responded that it would give counsel a side-bar later, and the objection was not raised by the def. until after the jury was charged and retired to deliberate. While side-bar may be preferable method for resolving a dispute of this nature, neither the state nor the def. enjoys the right to side-bar conference. Objection and motion must be made sometime during closing but, at the latest, before jury retires. *[Subsequently disapproved of on other grounds - Reynolds v. State, 452 So.2d 1018]*)

Cooper v. State of Florida, 413 So.2d 1244 (1st DCA 1982) (comment that police could not determine def.s motive because his lawyer refused to permit further questioning - improper comment on silence)

Cunningham v. State of Florida, 404 So.2d 759 (3rd DCA 1981) (in referring to def.'s fingerprint being found on the middle of the inside of the door (inside the premises), prosecutor argued: "That is very important, how that left hand, little finger got in there. That has not been explained in this case and I think that counsel owes you an explanation for that." Comment was error as it was "clearly susceptible" of being interpreted as a comment on def.'s failure to testify. Since this case pre-dates *Marshall (476/150)*, harmless error rule did not apply. Reversed.)

Hufham v. State of Florida, 400 So.2d 133 (5th DCA 1981) (prosecutor's comment that def. waived his opening statement although "he could have told you every detail of what his story was going to be," so that he could sit back and wait until the evidence was all in and fabricate a story based solely on that evidence was improper because reserving opening statement is a recognized privilege of defense counsel [suggesting impropriety]. Since the comment was made at closing after def. had testified, however, it was not a comment on his right to remain silent.)

Smiley v. State of Florida, 395 So.2d 235 (1st DCA 1981) (It was not error for prosecutor to argue "... in none of that evidence have you heard any reason, any justification whatsoever for shooting a man in his sleep... none of the evidence and none of the doctor's testimony supports that kind of thing. ... Well, I repeat what I said to you in the beginning, if you have heard any testimony from any witness that would justify shooting that man in his sleep because he had a drinking problem then you need to acquit this woman." Arguments did not constitute improper comments on the defendant's failure to testify at trial. A prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence and may point out that there is an absence of evidence on a certain issue during closing argument to the jury. The State was not referring to defendant's failure to testify. Instead, the statements refer to the evidence as it existed before the jury and were directed to the lack of justification for the shooting of defendant's husband. Moreover, it was the duty of the State to point out to the jury the absence of evidence to justify the shooting. Affirmed.)

Holliday v. State of Florida, 389 So.2d 679 (3rd DCA 1980) (Prosecutor's statement that evidence came down to word of defendant against word of victim and victim "took the stand and told you what happened" was not improper because it was a comment on the evidence, but dangerously close to comment on silence. Prosecutor cautioned against treading "such dangerous ground".)

Smith v. State of Florida, 378 So.2d 313 (5th DCA 1980) (Prosecutor's statement that "there is no explanation" for defendant's fingerprints at the scene not improper comment on silence. Ok to point out that evidence is uncontroverted.)

Ruiz v. State of Florida, 378 So.2d 101 (3rd DCA 1979) (Where def. was apprehended as he fled from the scene of a break-in, and he testified at trial that he was trying to dissuade the actual perpetrator from committing the burglary but fled when police arrived because of his prior record, it was error for State to argue that when he saw an officer in uniform, the def. didn't stand there and say "Officer, I am just trying to help this man out. I am just trying to talk him out of this." Although state argued that comment was not directed to def.'s post-arrest silence but, rather, at the fact that he fled instead of remaining at the scene and telling the officer why he was there, court rejected this contention. Although prohibition applies only to references to custodial or post-apprehension silence, prosecutor's remark fairly suggested to the jury that if def.'s story were true, he would have told it to the policeman after being caught. Reversed.)

White v. State of Florida, 377 So.2d 1149 (Fla. 1979) (in one witness case, it was proper for prosecution to point out that jury had not "heard one word of testimony to contradict what she [they eyewitness] has said, other than the lawyer's argument." It is proper for a prosecutor to comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury. *[But see Rodriguez, supra, 753/29, limiting this case.]*)

Barnes v. State of Florida, 375 So.2d 40 (3rd DCA 1979) (*opening statement* - it was improper for prosecutor, in opening statement, to comment to jury that def. had exercised his right to remain silent after being informed of his Miranda rights. Reversed.)

Wilson v. State of Florida, 371 So.2d 126 (1st DCA 1978) (Prosecutor's comment that defendant could "shed some light" on what happened to certain evidence was improper comment on silence and not invited by defense counsel's reference to lack of evidence because it was not produced by state in trial.)

David v. State of Florida, 369 So.2d 943 (Fla. 1979) (In prosecution for Grand Larceny where defense related to claim that def. suffered a business failure, it was improper for prosecutor to ask in closing: "If he had a business failure, why didn't he say anything about the Jozefyks, about the Groves and about the Foxes?" Any comment "fairly susceptible" of being interpreted as referring to def.s failure to testify is reversible *[This case was quashed when the harmless error rule was expanded to include comments on def.'s silence. See Long (494/213), Diguilio*

(491/1129) and Marshall (476/150)]).

Brown v. State of Florida, 367 So.2d 616 (Fla. 1979) (Where defense counsel raised gap of silence in confession of defendant, right after he was confronted with incriminating evidence, as proof of coercion, it was fair response for prosecutor to suggest that silence of defendant at that moment was indicative of knowledge of guilt instead.--Although State's response then went too far, harmless,--affirmed)

Sublette v. State of Florida, 365 So.2d 775 (3rd DCA 1978) (comment by co-def.'s counsel on def.'s failure to testify is likewise a violation of def.s right to remain silent because "it is the fact of comment rather than the source of comment that effects denial of the right to remain silent." Where both prosecutor and co-def.s counsel commented on def.'s failure to testify, error was not curable. Reversed.)

Hall v. State of Florida, 364 So.2d 866 (1st DCA 1978) (Telling jurors how defense counsel was "getting on" the state's witnesses while the defendant was "sitting over here quietly" improper comment on defendant's right to remain silent. Reversed)

Wright v. State of Florida, 363 So.2d 617 (1st DCA 1978) (where def. counsel argued that his client had remained at the scene following the shooting and that if she had shot at the victim the police would have found her with the gun, it was improper for state to argue in response: "And I ask [def. counsel]: 'Where is the gun?" as that comment can only be interpreted as a demand for self-incriminating evidence or a testimonial explanation from the def. as to its whereabouts. The suggestion is that def. counsel knows where the gun is because his client knows and she could tell us. Reversed.)

Watkins v. State of Florida, 363 So.2d 575 (3rd DCA 1978) (prosecutor's playing of tape recording of incriminating telephone conversation admitted into evidence and then pointing at def. and arguing that he cannot deny such taped conversation constitutes an indirect comment on def.'s failure to testify. Arguing that certain evidence stands before the jury undenied by the def. himself is an indirect comment on def.'s failure to testify. Reversed per se. [Subsequently, *Marshall* (476/150) held that harmless error rule does apply to comments on def.'s failure to testify.])

Clark v. State of Florida, 363 So.2d 331 (Fla. 1978) (reversible error occurs where the prosecutor improperly comments on the def.'s right to remain silent. [*Note: this case was overruled on the issue of "per se" reversal when the harmless error rule was made applicable to these comments in State v. Diguilio, 491/1129.*])

Gilbert v. State of Florida, 362 So.2d 405 (1st DCA 1978) (Prosecutor's statement that if the defendant was not in Pensacola at the time of the crime there would be an alibi witness [where no such defense was presented] was reversible error despite a curative instruction that defendant does not have to testify or present any evidence.)

Smith v. State of Florida, 358 So.2d 1137 (3rd DCA 1978) (*opening statement* - prosecutor's comment in opening statement that "the basic issue in this whole trial is going to be one of credibility. Do you believe [the State's witness] or are you going to believe the Defendant" was an improper comment on the def.'s right to remain silent where def. did not take the stand and testify. Reversed. [Note: This case predates *Marshall* (476/150) which made harmless error rule applicable to comments on failure to testify])

Reaser v. State of Florida, 356 So.2d 891 (3rd DCA 1978) (There is a difference between pre-arrest silence and post-arrest silence. A def. may be impeached by pre-arrest silence when he has voluntarily taken the stand and asserted a position that is inconsistent with his prior silence. In this case, def. should have known he was going to be charged with a crime and it is reasonable to believe that one who fears that he is about to be charged with a crime committed by another would seek to exonerate himself as quickly as possible by volunteering exculpatory information to the police. The prosecutor's comment was legitimate impeachment based on pre-arrest silence, not a comment on post-arrest silence. Affirmed)

Manofsky v. State of Florida, 354 So.2d 1249 (4th DCA 1978) (*opening statement* - it was improper for State to refer to def.'s fifth amendment rights by telling jury: "Now the testimony may be different if the defendant testifies." Reversed on these and other grounds.)

Simpson v. State of Florida, 352 So.2d 125 (1st DCA 1977) (where def. counsel first raised the issue in closing argument, it was not improper - although it was perilous - for prosecutor to state: "He [defense counsel] told you that the def. is never required to take the witness stand and that any comment I or the Court might make about that is absolutely wrong for us to do that, and he's right in his stating the law to you in that way...." There was no "sinister influence" in these particular remarks. Affirmed.)

Gibson v. State of Florida, 351 So.2d 948 (Fla. 1977) (prosecutor's argument that the overwhelming testimony and the "uncontradicted testimony is that [def.]... shot one man in the head" had a basis in the record and was proper. Affirmed)

White v. State of Florida, 348 So.2d 368 (3rd DCA 1977) (prosecutor's statement to the jury: "You have not "heard one word of testimony to contradict what she [the eyewitness] has said, other than the lawyer's argument" was a fair comment on the evidence and not a reference to the defendant's failure to take the stand. Affirmed *[Subsequently quashed in part, on other grounds, by S. Ct., see White 377/1149 above]*)

Smith v. State of Florida, 344 So.2d 915 (1st DCA 1977) (improper for prosecutor to argue: "... and do you think if her story was not true they would not have called somebody in there to tell you it was not true? ... She is the one that was there, the only one living that was there to come before you and testify. And what of the fact that she participated in the cover-up? ... At whose direction? This man right here. Has there been any evidence to refute that? No, there has not.

There's not been a shred of evidence from the psychiatrist or anybody else that says that that is not the case." The combination of the argument that witness was the only living person to testify as to the homicide, coupled with the assertion that if it were untrue the def. would have produced someone to refute it, amounts to a comment on def.'s failure to testify. Reversed. *[This case predates Marshall (476/150) which made harmless error rule applicable to comments on failure to testify. Case was also subsequently overruled on other grounds - Ruffin v. State, 397 So.2d 277]*)

Jordan v. State of Florida, 334 So.2d 589 (Fla. 1976) (statement that defendant "doesn't have the courage to stand before the Bench and take that first step toward rehabilitation and say, okay, I am sorry..." not improper comment on right to jury trial or right to remain silent when defendant became a witness at trial and prosecutor has right to comment on his testimony, etc.)

Craft v. State of Florida, 300 So.2d 307 (2nd DCA 1974) (once def. takes the stand, the prosecutor may comment in closing about his failure to testify about any aspect of the case.)

State of Florida v. Mathis, 278 So.2d 280 (Fla. 1973) (where def. counsel argued to jury that they should consider the voluntariness of the def.'s confession, implying that it was not voluntary, prosecutor's response: "Now, did you hear one thing about him getting beaten up or somebody was pounding on his head, forcing him into this? Not a word about it" was not a comment on def.'s right to remain silent. The comment was an invited response which pointed out that there was no evidence that the statement was involuntary. DCA opinion quashed and case remanded for reinstatement of conviction and sentence.)

Childers v. State of Florida, 277 So.2d 594 (4th DCA 1973) (it is improper for state to comment, directly or indirectly on def.'s failure to testify. Prosecutor erred in arguing "if a man can offer you a reasonable hypothesis of innocence, then you should look to that reasonable hypothesis of innocence when you are dealing with circumstantial evidence. ... I submit to you, what reasonable hypothesis has been offered to you other than the one which indicates...." Comment is fairly susceptible of being interpreted by the jury as a statement to the effect that "an innocent man would attempt to explain the circumstances but the def. offered no such explanation. Reversed. [This case predates *Marshall* (476/150) which made harmless error rule applicable to comments on failure to testify])

Breniser v. State of Florida, 267 So.2d 23 (4th DCA 1972) (Improper to elicit from officer that def. declined to speak, post Miranda warnings. Matter brought up to jury 5 times was prejudicial.)

Woodside v. State of Florida, 206 So.2d 426 (3rd DCA 1968) (prosecutor's comments that if the def. attorneys thought they could show a mistake in identification, "they would have brought it out from the witness stand," and that the state "has the burden of proving their guilt by competent evidence" and "it is up to the defense, if they can, to rebut that" were not improper comments, directly or covertly, on def.s failure to testify. Instead, comments constituted an

observation of the fact that the state's witnesses were "unshaken by cross-examination." Affirmed.)

State of Florida v. Jones, 204 So.2d 515 (Fla. 1967) (it was not improper for prosecutor to argue: "Now how in the world have they shown to you gentleman by any witnesses ... that he did not know at the time ... what he was doing was wrong? Where is the testimony that came from that stand?" Def. raised defense of insanity and it was clear that argument was addressed to the "evidence as it existed before the jury" and not "to the failure of def. to explain or contradict what had been introduced." Affirmed)

Singleton v. State of Florida, 183 So.2d 245 (2nd DCA 1966) (Where only one of two def.'s testified at trial, it was an improper comment on the non-testifying def's right to remain silent for prosecutor to argue: "And I call your attention to the manner in which the defendants have testified in refuting their [the State's witnesses'] testimony." Further, it is error to refer to the State's evidence as being unexplained or uncontradicted, or undenied. Reversed.*[Subsequently, the DCA receded from dicta in this case without changing the holding.- Craft v. State, 300 So.2d 307.]*)

Sing v. State of Florida, 115 So.2d 771 (1st DCA 1959) (improper for prosecutor to note that defendants failed to take the stand)

McLendon v. State of Florida, 105 So.2d 513 (2nd DCA 1958) (Referring to def., prosecutor improperly stated: "What did he say-nothing." Whether intent is good or bad is immaterial)

Gordon v. State of Florida, 104 So.2d 524 (Fla. 1958) (Prosecutor's comment: "They [def.s] didn't testify to what happened out there." Fundamental error, even if no bad faith. This case predates *Marshall* (476/150) which made harmless error rule applicable to comments on failure to testify)

Trafficante v. State of Florida, 92 So.2d 811 (Fla. 1957) (Prosecutor's argument: "The testimony here is uncontradicted, uncontradicted by these two Trafficantes, ... They were both there, is there anyone, is there any statement here in evidence that either one of them contradicted, regardless of who said it?" improperly commented upon the failure of the def. to testify. Direct or indirect comment on def.'s failure to testify is prohibited regardless of the character of the comment, or the motive or intent with which it is made, or its susceptibility to a different construction. Reversed.[Note: This case predates *Marshall* (476/150) which made harmless error rule applicable to comments on failure to testify])

II. Appeal to the sympathy/emotions of jurors, safety of the community, or to send a message to criminals or community

A. Appeal to sympathy/emotions of jurors

Jordan v. State of Florida, 176 So.3d 920 (Fla. 2015) (although prosecutor's comment to jury, while discussing lesser-included offenses, urging them "don't let him get away with this" was improper, comment does not rise to the level of fundamental error. The prosecutor mentioned the comment only one time, and after saying, "Don't let him get away with this," the prosecutor still invited the jury to consider the lesser-included offenses. Also, the trial court read the standard jury instructions, which included an accurate statement of the law with regard to first-degree felony murder and the lesser-included offenses. Affirmed.)

Fletcher v. State of Florida, 168 So.3d 186 (Fla. 2015) (*death penalty* - prosecutor's argument: *"What is the appropriate sentence for someone who murders someone who was essentially his step-grandmother? What is the appropriate sentence for someone who, just three days after her murder, refers to her ... by terms such as bitch, ignorant, dumb-ass? ... What is the appropriate sentence for someone who, rather than recognizing the heinous crime that they have committed, instead blames the victim and says -- essentially says that it is her fault, that if she had not fight -- fought them, that she -- they would have left her alone,"* were not improper comments on def's lack of remorse as they made no mention of remorse or any other term that alludes to remorse. Prosecutor made no argument about def's lack of remorse and the comments, which simply related to what an appropriate sentence would be in the context of the facts of the case, were made at the beginning of the statement before the prosecutor had begun to discuss aggravation and mitigation. Further, comment was not was an improper request for the jury to consider non-statutory aggravating circumstances. Almost immediately following the challenged remarks, the prosecutor explained that the judge would instruct the jury on how to make a decision regarding the advisory sentence, and that the jury would weigh aggravating factors and mitigating factors. Further, the prosecutor later explained that there were only three aggravating circumstances for the jury to consider. Lastly, when addressing def's proffered mitigation, prosector's comments—that other people had drug addictions, were depressed, saw their mothers being abused and had artistic ability but that they didn't kill people—was not an improper denigration of his mitigating factors nor an attempt to convert them into aggravating factors. The prosecutor did not contend that the mitigating circumstances presented were invalid or excuses and did not characterize the mitigation evidence in a negative way. Rather, the statements by the prosecutor addressed the weight that the jury should assign to these mitigating circumstances. Prior cases from this court do not stand for the proposition that a prosecutor cannot make broad statements that other people in the community with the same background or characteristics as the defendant do not commit murder. Affirmed.)

Haspel v. State of Florida, 164 So.3d 6 (4th DCA 2014) (in trial for sexual battery of a child under the age of 12, prosecutor's multiple references to the victim as "damaged" was not an improper appeal for sympathy but rather supported by evidence that showed she had been abused

by her first stepfather as well as def and disbelieved by her grandmother when she tried to report the abuse by def. Comment was used to describe victim's psychological state caused by other harmful events in her life in order to explain why she didn't seek help when the abuse started. Moreover, even if they had been improper, no objection was raised and comments were not fundamental. Affirmed.)

Carr v. State of Florida, 156 So. 3d 1052 (Fla. 2015) (*death penalty* - prosecutor did not improperly invoke sympathy by arguing victim impact as an aggravating factor when he told the jury (as he addressed the mitigating factors of her difficult childhood and mothering abilities) that, as a result of the murder, the victim's children were being adopted by another family. While it is improper for a prosecutor to inform jurors that they can weigh victim impact evidence as aggravation, comments that are "a fair statement of the evidence produced during the trial" are not improper, prosecutor may comment on the impact victim's death had on victim's friends and family, and prosecutor may properly argue that a mitigator should be given less weight based on the facts of the case. Prosecutor properly argued that def's difficult childhood and mothering abilities constitute valid mitigation but that the jury should not give those mitigators much significance under the facts of the case. Affirmed.)

Brinson v. State of Florida, 153 So.3d 972 (5th DCA 2015) (in domestic violence prosecution it was improper for prosecutor to appeal for sympathy for the victim with the intent to arouse hostile emotions towards the def by calling him a "predatory exploiter" who took advantage of victim's mental vulnerabilities and stole money from her disability checks to fund his own crack addiction. Reversed due to these and other improper arguments.)

Poole v. State of Florida, 151 So.3d 402 (Fla. 2014) (in death penalty case, after having def's objection sustained and jury instructed to disregard prosecutor's improper statement, prosecutor's isolated "false apology," saying that he gets "wound up when [he] talk[s] about murders, especially heinous, atrocious, or cruel murders," did not rise to the level of fundamental error. Affirmed.)

Jackson v. State of Florida, 147 So.3d 469 (Fla. 2014) (although the State cannot create an imaginary first-person script depicting the victim's suffering or death or invite jurors to place themselves in the position of the victim, it is entitled to make comments recounting a victim's last hours alive if the comments are supported by the evidence. Prosecutors argument which recounted how victim originally didn't fight during the kidnapping, but later fought against being shoved into the truck of the car was not improper. The State was addressing the mental process experienced by the victim when she initially did not attempt to escape or plead for her life at the point that she was bound in the bathtub, but realized her impending death when she was carried from the apartment and shoved into the trunk of a car. Witnesses testified how at that point, she began to struggle and fight for her life, pleading with def not to put her in the trunk and apologizing to him. Affirmed.)

Stewart v. State of Florida, 147 So.3d 119 (1st DCA 2014) (in prosecution for unlawful sex

with a minor, where state introduced *William's Rule* evidence regarding two other step-daughters molested by def in the home, prosecutor's reference in flow chart of relatives to remaining 3 year old step-daughter: "And today you heard from [S.C.], [B.S.], and [A.S.], the only daughter left in that house is [D.S.], who is three. That's why that evidence is so important. To prove that intent, to prove that motive, to prove that opportunity, the absence of mistake. This is the family that's left" was not a "call to arms" to convict the def or the 3 year old would be molested next, but rather an accurate statement of the evidence that the 3 year old is the only non-testifying daughter living in the house. "[S]tatements are not so prejudicial so as to vitiate the entire trial and warrant reversal. The comments do not rise to the level of a character attack warranting a new trial." [Note: court does not explain why it evaluates prejudicial effect of statements it does not find to be improper.] Affirmed.)

Crew v. State of Florida, 146 So.3d 101 (5th DCA 2014) (improper for prosecutor to tell the jury: "we're talking about letting that man walk," "[d]on't let him get out of here and make this cheap," and "you all know what a misdemeanor means." The prosecutor further told the jury that by convicting Appellant of a lesser-included charge, it would be allowing a lower sentence, because the "client gets to walk out of here without facing any of the facts of what he's done" and by asking the jury to convict for the victim's family, repeatedly saying that convicting Appellant of a lesser-included charge "spits in his family's face." By using the imperative mood when he said, "Don't spit in his family's face," the prosecutor improperly implied that it would be the jury spitting in the victim's family's face.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – although it was improper in penalty phase for the murder of a 2 year old for prosecutor to argue, regarding child's siblings, "one day Ashley and Juan are going to grow up and they're going to want to know what happened to Caleasha, and they're going to know what justice was done," reference to victim's family was isolated comment and prosecutor did not dwell on topic. Moreover, reference to "what justice was done" could be read to mean that either life sentence or death sentence would be justice. Denial of post-conviction motion affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (Death penalty – although court has found improper the use of the word "exterminate" or any similar term which tends to dehumanize or demonize a capital defendant, prosecutor's statement that def. "executed" victim was proper as they were based on the fact that victim was shot execution-style in the back of the head. Further, repeated comments about "9 children scattered around" or "running around the house" was supported by testimony that victims had 9 special needs children and other testimony referring to at least some of the children being present. Evidence was not a non-statutory aggravator but was relevant to HAC aggravator as "fear, emotional strain, and terror of the victim during the events leading up to the murder" [such as fear for their children] "may make an otherwise quick death especially heinous, atrocious, or cruel." Likewise, brief comment that def. let victim wife "stand there and watch him shoot her husband down like a dog" was clearly intended to be considered as evidence of def's "utter indifference" to the "suffering of others" necessary to the HAC aggravator, and was also confined to inferences drawn from the evidence, as victim wife was in

the bedroom when her husband was murdered. 'Thus the 'shot him like a dog' comment, *while ill-advised*, was relevant to HAC and was proper. Even if improper, the comment was harmless error." Affirmed.)

Ayalavillamizar v. State of Florida, 134 So.3d 492 (4th DCA 2014) (it was error for prosecutor to loudly slam a four pound sledgehammer/murder weapon on a chair, podium and marble surface while urging the jury to consider the criminal nature of the act of repeatedly smashing a sledgehammer over a person's skull. Demonstration of the blows to the victim's head was intended to evoke an emotional response to the crimes or to the defendant and fell outside the realm of proper argument. Although def counsel objected and moved for mistrial, error was not so egregious as to warrant a new trial. Affirmed.)

Victorino v. State of Florida, 127 So.3d 478 (Fla. 2013) (*death penalty* - There is no indication that prosecutor's comment about a hit-man killing a husband for a wife was intended to or did inject fear into the minds of the jurors. Comment was made as a hypothetical example in the context of explaining the legal concepts of principals and independent acts, offered to help the jurors understand the legal concepts that they were to consider regarding the charges against def. Denial of post-conviction motion affirmed/habeas denied.)

Guerrero v. State of Florida, 125 So.3d 811 (4th DCA 2013) (it was improper for prosecutor to argue racial slurs allegedly used by def. against arresting officer ["You f-----g house n----r. F--- you. Get your hands off of me you dirty n----r"] where such slurs had no relevance to the charges of battery on a law enforcement officer or trespass—did not tend to prove or disprove elements of the charges. Although prosecutor contended that racial slurs by def were evidence of appellant's state of mind at the time of the incident, the use of the racial slur should be relevant to appellant's state of mind as an element of the crime charged [ie. to show premeditation or ill will, hatred, evil intent in murder case.] "Ordinarily, racial slurs and ethnic epithets are so prejudicial as to render them inadmissible, unless the probative value outweighs any prejudice that may result from having the jury hear them." Slurs became feature of the trial where prosecutor used them 23 times during opening, evidence and closing. [citation omitted]. Reversed.)

Petruschke v. State of Florida, 125 So.3d 274 (4th DCA 2013) (it was improper for prosecutor to repeatedly refer to def. as a "pedophile." Such inflammatory character attacks suggest that def. committed prior illegal sexual acts involving children and improperly suggested a profile-type argument that, if the defendant had certain traits which fit the offender profile, he must have abused the victim. Although defense counsel himself used the term "pedophile" in his closing argument and tried to suggest that appellant's conduct was inconsistent with what a pedophile would do, it is important to note that defense counsel made this argument only after the prosecutor, over defense objection, was permitted to characterize appellant as a pedophile. Reversed for this and other comment.)

Hildwin v. State of Florida, 84 So.3d 180 (Fla. 2011) (death penalty - while the prosecutor at length described the choices that def had made in his life and in particular the night of the murder

("*Paul Hildwin held Vronzettie Cox's life in his balance. And on this side of the balance was Vronzettie Cox's life. On this side of the balance was this cheap little radio, a pearl that she had gotten out of an oyster at Silver Springs and $75. And he weighed that against her life*"), the arguably improper comments were the ones the def refers to as being similar to an "eye for an eye" or "mercy" comments [show him the same mercy he showed the victim]. This Court has consistently held that it is improper during closing argument for the prosecutor to encourage the jury to show a defendant the same amount of mercy as he showed his victim because such argument tends to unnecessarily appeal to the sympathies of the jury. However, "a mercy argument standing alone does not constitute reversible error." Even assuming the state's comments were error ("*And for Vronzettie Cox, Paul Hildwin chose death and not life. And as we choose, our lives are formed. In choosing for Vronzettie Cox, Paul Hildwin chose for himself. He chose his own fate. And just as for Vronzettie Cox, he chose death and not life*"), they were relatively brief and not emphasized by the prosecutor. Denial of post-conviction motion affirmed.)

Gland v. State of Florida, 72 So.3d 216 (2nd DCA 2011) (In case where def obtained a jailhouse tattoo implying a reward against the officer who arrested him for murder, it was improper for court to admit photo of tattoo and for prosecutor to attack his character by arguing: "No prior contact with this detective. He gets arrested. Sometime while he's in jail, this appears on his arm. $100,000 reward for Detective Gibson. Consciousness of guilt. Arrogance about his guilt. Is that -- is that the kind of person that something like "I'm gonna kill one of them f__ n__," would be rolling out his lips?" Error harmless. Affirmed. [*Quashed on other grounds due to erroneous instruction-145 So.3d 824*])

Franqui v. State of Florida, 59 So.3d 82 (Fla. 2011) (in death penalty case appeal from post-conviction motion, prosecutor's arguments: "(a) "Yes it is much easier for Mr. Franqui to put a gun to somebody's head and demand their money, you don't have to work as hard to get the money, that's Franqui's way," (b) "It's a little easier to put a gun to somebody's head and pistol whip them and terrorize them and take their hard earned money," (c) "Why? Because to kill somebody for money is probably the most basic, the most vile of all motives," and (d) "There is no more vile motive than to kill somebody for money," while somewhat inflammatory, were relevant to the pecuniary gain aggravator. Additionally, as to the prosecutor's arguments: (a) "Now you know the shocking unbelievable nature of their criminal records," and (b) "You know now that this was not an isolated incident, you know now that this was the middle incident of an unbelievable crime spree that terrorized five separate human beings in a little over a month between November 29, 1991 and January 14, 1992," while def.'s prior violent felony convictions submitted by the State in aggravation were a legitimate subject of prosecutorial comment in the penalty phase, the words "shocking" and "terrorized" are unnecessarily inflammatory. Nonetheless, court has found similar arguments to be either not improper or harmeless ["terrorizing" found proper in the context of the burglarizing aggravating offense and "exterminate" found harmless]. Accordingly, comments above did not undermine the court's confidence in the outcome of the penalty phase despite counsel's failure to object. Affirmed.)

Mosley v. State of Florida, 46 So.3d 510 (Fla. 2009) (*guilt and penalty phase* – prosecutor's argument about what victim wondered and how "maybe she was excited" when def was looking for something in the trunk of his car right before he strangled her, although speculative in isolation, when taken in context were not golden rule violations but were permissible argument based on the facts of the case. Other comments ("She blacked out. Didn't take long. With the pressure around her throat she would have blacked out in darkness and then [the other victim] is crying and then darkness. He's in a bag and he's trying to breathe but the bag gets closer and closer to his face. … [Victim's] head was up at the back of that car and seeping blood. … [She] did not go unconscious right away. [She] was on the ground, looking up at that man, that face, someone she trusted, knowing that she wasn't leaving Armsdale [the killing site]) were appropriate as directly relevant to the HAC aggravator and had a factual basis in the testimony of both an eye witness and the medical examiner. "A prosecutor may make comments describing the murder where these comments are based on evidence introduced at trial and are relevant to the circumstances of the murder or relevant aggravators, so long as the prosecutor does not cross the line by inviting the jurors to place themselves in the position of the victim" or imaginary scripts where prosecutor speculates as to a victim's final moments. Affirmed.)

Wicklow v. State of Florida, 43 So.3d 85 (4th DCA 2010) (conviction of robbery with a firearm reversed for cumulative effect of improper closing arguments including: "As is usually the case, the victim is on trial for something" (invoking sympathy from jury and suggesting that accusing the victim of wrongdoing is simply an improper defense tactic that the prosecution has seen many times); "[State Witness/Def's boyfriend] could have been charged with this crime right next to def., they could have been sitting right next to each other. The detectives made a decision not to do so based on their interview with them. I interviewed [Witness]. … even had the detective reread [him] Miranda, so that if we decided after the interview that he needed to be charged, he would be charged. He is not charged and it is irrelevant to the crime that was committed by def" (Facts not in evidence, improper bolstering, suggesting that the government's vast investigatory network, outside of trial, knows that the def is guilty); "The only conflicts are between the defense attorney and the evidence. That's it. Don't be manipulated. Don't be gullible" (personal attack on defense counsel suggesting impropriety). Reversed and remanded).

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (*in penalty phase*, it was not improper for prosecutor to argue to jury: "How about being driven down that road, stopping for gas in a trunk not knowing what's going on, wondering where they are at, why have they stopped, are they going to be set free, what was in store for them? Was their horror over? No. It had just begun." Prosecutor then proceeded to describe how victims were buried alive. Although a prohibited golden rule argument invites jurors to put themselves in the victim's position and then imagine the victim's final pain, terror and defenselessness, here the State's recitation of the facts was accurate and did not invite the jury to place themselves in the victim's place. The prosecutor merely explained the evidence consistent with the application of the HAC aggravator. Further, prosecutor's argument "when you are done I ask you to walk out not into the darkness of greed, into the terror of the night drive in the back of a trunk but into the light of justice" was not an improper golden rule argument, as objected to by the defense—although it may have been subject

to challenge as an improper "blatant appeal to jurors emotions" in that it suggested that an acquittal would constitute walking "into the darkness of greed" rather than the light of justice." Affirmed.)

Stephenson v. State of Florida, 31 So.3d 847 (3rd DCA 2010) (In prosecution for aggravated manslaughter of def's own child, it was highly improper for prosecutor to raise during cross and again during closing argument the fact that in the course of her pregnancy the def had contemplated aborting the decedent child. "[A]bortion is one of the most inflammatory issues of our time…. Accordingly, numerous decisions reverse convictions after trials which improperly implicate that issue, including several, as in this case, which are necessarily based on a finding of fundamental error in the absence of proper preservation." Reversed.)

Ferrell v. State of Florida, 29 So.3d 959 (Fla. 2010) (*penalty phase* – where prosecutor argued that jury would be violating their lawful duty if they did not vote for death ("Some of you may be tempted to take the easy way out…you may be tempted not to weigh all of these aggravating circumstances and to consider the mitigating circumstances. That you may not want to carry out your full responsibility under the law and just decide to take the easy way out and to vote for death, I'm sorry, vote for life [emphasis added]. I ask you not to be tempted to do that. I ask you to follow the law, to carefully weigh the aggravating circumstances, to consider the mitigating circumstances, and you will see these aggravating circumstances clearly outweigh any mitigating circumstances. And then under the law and the facts death is a proper recommendation."); argued that the age mitigator could only apply to someone younger than def. ("No per se rule exists to pinpoint a particular age as an automatic factor in mitigation." Barnhill v. State, 834/836); argued that this was a bona fide death penalty case ("the State doesn't seek the death penalty in all first degree murders…But where the facts … demand the death penalty, the state has an obligation….This is one of those cases"); vouched for the credibility of several witnesses and urged the jury to "show this def the same sympathy, the same mercy he showed [victim] and that was none," trial court's order granting a new penalty phase is Affirmed.)

Hayward v. State of Florida, 24 So.3d 17 (Fla. 2009) (*penalty phase* – Although victim impact evidence itself was proper, prosecutor's use of it to compare and contrast the life choices made by the goal-oriented, hard-working victim with the choices made by the defendant that led him to where he is today was improper [especially where issue was addressed prior to closing and State agreed to refrain from using victim impact evidence to make characterizations and opinions about the defendant]. "In penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial" [quoting Bertolotti, 476/130]. Viewed in context with the entire closing, comments do not rise to the level of fundamental error. Prosecutors cautioned to use victim impact evidence only for limited, permitted purposes. [NOTE: case was re-affirmed on post-conviction appeal on same basis with court also pointing out that, while improper, prosecutor did not argue that victim's life was somehow more valuable than def's life. The comment appears to have been aimed more at pointing out that it was no one's fault but def's -- based on the choices he made in life -- that he was sitting in court convicted of

the crime of murder. *Hayward v. State of Florida,* 40 Fla. L. Weekly S381(Fla. 2015)] Affirmed.)

Paul v. State of Florida, 20 So.3d 1005 (4th DCA 2009) (where prosecutor displayed slide to jury that read "*No one can force you to abide by your oaths. *No one can force you to follow the law. *No one can force you to use your common sense. *Nothing we can say or do can stop you from elevating the burden of proof because you are not comfortable with your role" and defense objected that slide appealed to jury's emotion because it suggested some sort of possible religious undertone and was inflammatory, it was not error for trial court to sustain objection but deny mistrial. [Court gave no explanation as to why slide was improper—does not appear to be religious or inflammatory] Affirmed.)

Nowell v. State of Florida, 998 So.2d 597 (Fla. 2008) (It was improper for prosecutor to argue: "Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by [def], not by [co-def]. There was no mercy there, none whatsoever." Such argument is blatantly impermissible because it is an unnecessary appeal to the sympathies of the jurors. Reversed on various errors.)

Bailey v. State of Florida, 998 So.2d 545 (Fla. 2008) (*penalty phase opening and closing* – prosecutor's opening statement in penalty phase, commenting on witness' testimony: "A bullet has just gone through the glass. He's seen the fire. He saw the [defendant's] face, a face he described as mean, angry. I submit evil" and "Ladies and gentlemen, by the facts and the evidence that have been presented to you over the last two days you too have seen the face of the defendant" did not improperly vilify the defendant and, in any event, was not fundamental. Further, closing argument did not denigrate mitigation when prosecutor argued: "Ladies and gentlemen, the heart of the matter is that this is a cold, brutal, savage murder committed with aggravation that I have explained. The heart of this Defendant is one that is unworthy of the mitigation that has been presented. It has not been reasonably established. I ask that you apply the weight that is in your heart and that you render a verdict of justice, a verdict which rights the scales, a verdict where the sword goes unscabbard." The prosecutor explicitly argued that the jury should not accept Bailey's mitigation because it had "not been reasonably established." The statement, when viewed in its full context, does not amount to error, much less fundamental error.)

Salazar v. State of Florida, 991 So.2d 364 (Fla. 2008) (it was improper for prosecutor to attempt to explain deal with shooter to get def. who ordered the killing by stating that he feared for the victim who survived if def. was not convicted. "You may or may not like the deal, you may or may not like the concept that the State would give the shooter in this case some consideration, give him his life; not give him his freedom, give him his life. …[W]e have at the outset Ronze Cummings who has survived and who is alive today, six years later, and would the State in this circumstance have a reasonable concern that there could be another attempt on Ronze's life, attempt to finish him…." Although improper, comment was not so prejudicial as to deny def a fair trial. The defense objection interrupted the prosecutor in mid-sentence before the

argument was developed, and the trial court sustained the objection *at sidebar*. Following the sidebar conference, the prosecutor abandoned the argument. [**NOTE**: trial court refused to give a curative instruction out of fear that it would highlight the issue and appellate court found that to be within the discretion of the court.] Further, prosecutor's use of the word "terrorizing" was not an attempt to argue a non-statutory aggravating factor. The prosecutor's use of the word "terrorize" referred to the underlying assault supporting the burglary aggravator. "An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Similarly, "terror" is defined as "a state of intense fear," and to "terrorize" is "to coerce by threat or violence." Moreover, the State's argument alluded to both the HAC and CCP aggravators. "[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may be considered in determining whether [the HAC] aggravator is satisfied...." And the question of whether def's original purpose for entering victim's home was to "terrorize" her or to kill her related to the "heightened premeditation" element of CCP. Accordingly, the trial court did not abuse its discretion in allowing the prosecutor to use the word "terrorize" when referring to the assault underlying the burglary aggravator. Affirmed.)

Gonzalez v. State of Florida, 990 So.2d 1017 (Fla. 2008) (*in opening*, prosecutor's reference to victim police officer as a good guy who people liked, and statement that bullets "ripped" through his body were not improper and were supported by evidence presented during trial. In penalty phase closing, prosecutor displayed slain officer's badge and explained what it symbolized, discussed the significance of a police officer's duties and how killing a police officer is different from killing an ordinary citizen. This was not error. Several of the aggravators related directly to the victim's status as a police officer and the prosecutor was arguing why these aggravators should be given great weight. The prosecutor then quoted an author: "[i]t is long and hard and painful to create a life. It is short and easy to steal the life that others have made." The prosecutor then related this quotation to the life of the slain officer and explained that it took the officer many years to create a life for himself, but that that life was taken from him in a matter of seconds by def. When this quotation is read in context, it is not improper. Lastly, there was no error in prosecutor's telling the jury that their responsibility, "based upon all of the evidence in this case, is to return a recommendation for the death penalty." Tying the comment to the review of the evidence, the prosecutor was urging the jury that the death penalty was appropriate and warranted "based upon review of the evidence.")

Merck v. State of Florida, 975 So.2d 1054 (Fla. 2007) (*death penalty case*- it was improper for prosecutor to argue: "The Defense will be talking to you about what we call mitigation. Things about [Merck's] background they believe should warrant you affording him some mercy that he never afforded Mr. Newton. … What [Merck] did here, there should be no mercy for a merciless crime, ladies and gentlemen. On behalf of the People of [the] State of Florida and Jim Newton, I ask you all to recommend that he die." Mercy arguments that ask the jury to show the def. the same amount of mercy he showed to the victim are inappropriate. However, since mercy arguments were not dwelled upon or emphasized in entire context of closing reversal was not required. In addition, *a mercy argument standing alone does not constitute reversible error*.

[emphasis added] Further, prosecutor's argument about the number of books victim could have read since his death and denigration of def's ability to read books while in prison were improper but, taken together, arguments did not amount to reversible error. Affirmed.)

Wilson v. State of Florida, 964 So.2d 241 (4th DCA 2007) (prosecutor was improperly seeking sympathy for victim when he told the jury in closing that part of the defense was "that you cheapen the victim, you cheapen the crime" and that "if you don't care about [the victim], you don't think he deserves protection under the law, then you find them not guilty." In a case where the defense has denigrated the victim, particularly where the victim is poor and possibly has a criminal record, then the prosecutor can justifiably comment on the defense strategy of attacking the victim. Here, however, the defense argued that no one was saying the victim was a bad guy; he had simply been confused about who had robbed him. "[The victim] is not a bad person. And if you find not guilty, you're not saying he's a bad person, he's confused and it's not his fault." Affirmed where court sustained the objection and gave a curative instruction.

Boyd v. State of Florida, 963 So.2d 884 (3rd DCA 2007) (prosecutor's comment that def. "stole something much more valuable than a piece of food and a piece of property. He stole [the victim's] piece of mind" did not materially contribute to the conviction and was not so inflammatory as to have influenced the jury to reach a more severe verdict and warrant a new trial. Affirmed.)

Rogers v. State of Florida, 957 So.2d 538 (Fla. 2007) (prosecutor's arguments:

> *We know that she knew she was going to be killed, ... we know when she was stabbed the first time, she didn't become unconscious; she remained conscious and she could feel the pain of the knife going through her body and could feel the pain of the knife as it was twisted and pulled out of her body, and then he did it again.*
> ....
> *What weight do you give to the ten, twenty minutes where she was there in that bathroom reflecting back on her life, on the things that she hadn't done that she wished she could, the opportunities that had never been presented to her, on her children that she would never see again, on her mother who loved her so dearly....*

were not improper because they were based upon facts in evidence - the victim was stabbed twice, she struggled with her assailant, and she remained alive for at least a short period of time after being stabbed. Further, prosecutor was not violating the Golden Rule by attempting to place the jury in the position of the victim. Rather, the prosecutor was describing the heinousness of the crime for the purpose of establishing the HAC aggravator. For the purposes of the HAC aggravator, "a common-sense inference as to the victim's mental state may be inferred from the circumstances." [citation omitted]

Elisha v. State of Florida, 949 So.2d 271 (4th DCA 2007) (prosecutor's repeated references to

def. during closing as a "condom-carrying masturbator" and "a masturbator" [30 references] during prosecution for sexual battery on a child were designed to inflame the prejudices of the jury and constitute an impermissible general attack on his character. Comments were so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise reached. Concern was highlighted by the fact that the evidence against def. was far from overwhelming. Reversed.)

Capron v. State of Florida, 948 So.2d 954 (5th DCA 2007) (prosecutor's two brief references to O.J. Simpson case, although "ill-advised and unnecessary," did not characterize def as O.J. Simpson or "improperly appeal to juror sense of community by improperly appealing to their emotions, bias and fears in an attempt to improperly prejudice them against [def]." Not preserved and not fundamental error. Reversed on other grounds. [Cf. Defreitas below, 701/593]).

Dorsey v. State of Florida, 942 So.2d 983 (5th DCA 2006) (although prosecutor risked reversal of murder and aggravated child abuse conviction by demanding justice for the victim and referring to matters outside of the evidence in her closing argument, the trial court's sustaining of defense counsel's objection and curative instruction that the jury should disregard the prosecutor's comments cured the prejudice and saved the case from reversal. "But for the manner in which the trial court dealt with these improper comments by the prosecutor, our decision might have been different." Affirmed.)

Hannon v. State of Florida, 941 So.2d 1109 (Fla. 2006) (prosecutor's argument that def. turned victims home into a slaughterhouse was not improper where def, who actually worked at a slaughterhouse, had slit the victim's throat, told a trial witness that the police were trying to pin the murder on him because he slit throats for a living, and had testified at trial about his work at the slaughterhouse as well as the proper way to slaughter an animal. The state's analogy was supported by the testimony. Affirmed.)

Davis v. State of Florida, 928 So.2d 1089 (Fla. 2005) ("[P]rosecutor's comment may have crossed the line separating proper argumentation from an improper appeal to the jurors' emotions."

> [Victim] would have been conscious for approximately five minutes prior to his death. Folks, I ask you to do something. If any of you have a second hand on your watch, go back to the jury room and sit in silence, total silence for two minutes, not five, just two, and I suggest to you it is going to seem like an eternity to sit there and look at one another for two minutes. Contemplate [the victim] and the time he spent, not two minutes, but closer to five minutes with his throat cut, bleeding profusely, then with that man continuing the attack by repeatedly stabbing him in the chest with enough force to go through his body to the back five times breaking bones…. And that two to five minutes to [the victim], I suggest to you, was like an eternity of pain, suffering and hell. That is

> cruel punishment, that is cruel treatment to the victim. That's what this [HAC] aggravating factor is all about. I suggest to you that we have met that burden.

However, when read in context, the comment was made when the prosecutor was attempting to demonstrate to the jury that the murder was heinous, atrocious, or cruel, one of the "most serious aggravators set out in the statutory sentencing scheme. "Although a close question, we conclude that failing to object to the comments complained of clearly did not so affect the fairness and reliability of the proceeding that confidence in the outcome is undermined.")

Miller v. State of Florida, 926 So.2d 1243 (Fla. 2006) (in penalty phase argument, prosecutor's comment: "The defendant didn't care that Albert Floyd had a wife. He didn't care that Albert Floyd had children. He didn't care that he had family and friends that loved and cared for him. He didn't care. Now he wants you to care for him. He wants you to recommend a life sentence for him," although not identical to a "show him the same mercy" argument, was still objectionable. Nonetheless, def. counsel chose not to object and addressed the comment in his closing by pointing out that def. had a good side and a bad side, just like victim had a good side and a bad side. Decision to not object was not ineffective assistance of counsel. Affirmed.)

Walls v. State of Florida, 926 So.2d 1156 (Fla. 2006) (prosecutor's argument that the jury did not find out about how def. was at the time of the crime; "what kind of values [he] had, what was his idea of right and wrong, did he go to church, was he the kind of person to stand up for what's right … where did he go at night" was not improper. These comments did not constitute non-statutory aggravating circumstances as def. suggested. State cited these examples to make the point that the mitigating evidence presented by the defense left gaps in the picture of def.'s life and who he was at the time of the crime.)

Chambers v. State of Florida, 924 So.2d 975 (2nd DCA 2006) (where 20 year old's sexual relationship with 16 year old girlfriend may have been immoral but was not illegal and was not charged, and although some details of the relationship were admissible given that def. was accused of burglary and other crimes relating to the break up of the relationship, it was improper for prosecutor to attempt to inflame the minds of the jury with comments about how, instead of celebrating, the victim had to come to court to testify the day after her graduation and how the def. "is picking up high school kids and having sex with them. … What is this man doing with this kid? She is a child. She is a child." Further, there was no evidence, nor would such evidence have been relevant, that the def. had been involved in any other similar relationships with other high school girls. General attack on def.'s character was improper. Moreover, in responding to def. counsel's claim that the victim might have falsely accused def. of the crimes charged, prosecutor did not simply reply that it was unlikely that she would want to fabricate such a story and face exposure of her personal life, including her pregnancy, but he extended them inappropriately to invoke the sympathy or anger of the jury by focusing on the immorality of the relationship and the indignities associated with trial, without connecting it to the relevant issues. Reversed.)

Dial v. State of Florida, 922 So.2d 1018 (4th DCA 2006) (in murder prosecution, it was improper for prosecutor to tell the story of the case through the voice of the 8 year old victim. Although a prosecutor's closing argument is not limited to a "flat, robotic recitation[] of 'just the facts,'" argument was an improper appeal to the jury for sympathy for the victim, "the natural effect of which would be hostile emotions toward the accused." Error harmless. Affirmed.)

Snelgrove v. State of Florida, 921 So.2d 560 (Fla. 2005) (prosecutor's comment that no one ever takes responsibility for their actions, arguing def.'s alleged statement to other inmate that if victims had stayed asleep he would have never had to kill them, even if irrelevant and unduly inflammatory as objected to by def. counsel, was harmless. Conviction affirmed. Death penalty reversed on other grounds.)

Dufour v. State of Florida, 905 So.2d 42 (Fla. 2005) (*death penalty* - in trying to advocate the state's position that the death penalty was appropriate in robbery murder, prosecutor argued: "Do the aggravating factors outweigh any mitigating factors the defense can tell you? That is where you have to weigh the significance of a human life in our society versus a pretty piece of jewelry. It is custom made and unique. …I don't think too many people in the state of Florida think that having a piece of jewelry is worth taking a human life." Remarks did not rise to the level of being improper [no further explanation offered by court as to impropriety of such a comment other than referring to it as a "value of human life argument. See such arguments in Civil § VI below.] Affirmed.)

Gibbs v. State of Florida, 904 So.2d 432 (4th DCA 2005) (it was not improper for prosecutor to make multiple references in closing to def.'s statement that the victim was "bitching like a typical female" and to suggest that this was why def. shot victim, regardless of the fact that argument was made before an all-female jury. Evidence supported claim that def. made the statement and statement was relevant to show ill will towards victim [def. was charged with second degree murder of which one element includes ill will, hatred, spite, etc.]. Affirmed.)

Orme v. State of Florida, 896 So.2d 725 (Fla. 2005) (death penalty – prosecutor's description of the victim as *"a young nurse just finishing her studies, just completing her exam, trying to raise a son, trying to come help a friend who complained of being sick"* did not amount to nonstatutory aggravation as def complains. Rather, the statement shows the victim's uniqueness as an individual as permitted by law. Denial of post-conviction motion reversed on other grounds.)

Reed v. State of Florida, 875 So.2d 415 (Fla. 2004) (although it was improper for prosecutor to urge the jury to "show that defendant the same mercy and sympathy that he showed [victim] … and that was none," *"no mercy" arguments, standing alone, do not amount to reversible error*. [emphasis added] Affirmed.)

Perera v. State of Florida, 873 So.2d 389 (3rd DCA 2004) (where victims' brother testified that when he confronted def. with allegations that he had sexually abused the victims, def. apologized

and stated that he had been sexually abused by his uncle in Cuba, def. counsel was not ineffective for failing to object to prosecutor's closing argument, during which prosecutor stated that def.'s claim of having been sexually abused by his uncle was his excuse for sexually abusing the victims. Argument was fair comment on the evidence presented at trial and was certainly not fundamental error. Affirmed.)

Galiana v. State of Florida, 868 So.2d 1218 (3rd DCA 2004) (prosecutor's comment that "these two children are no longer with us, and will never be in the Keys with their parents, and will never spend the weekend playing with puppies," although bordering on inappropriate, did not deprive def. of a fair trial or materially contribute to his conviction, and were not so fundamentally tainted or inflammatory that a new trial was warranted. Affirmed in part and reversed in part on other grounds.)

Smith v. State of Florida, 866 So.2d 51 (Fla. 2004) (trial court did not err in denying defense motion for mistrial based upon prosecutor's act of slamming gun on defense table during closing argument. Trial court was in the best position to evaluate any prejudicial effect and properly admonished prosecutor not to repeat the action. Affirmed.)

Cronin v. State of Florida, 863 So.2d 412 (4th DCA 2004) (it was improper for prosecutor to refer to Mother's Day in closing argument of case that ended the Friday before Mother's Day where def. was on trial for attempting to murder his mother. Although trial court should have sustained the objection, error was harmless. Affirmed.)

Conde v. State of Florida, 860 So.2d 930 (Fla. 2003) (it was not improper for prosecutor to argue to jury: "You don't think he knew what was going to happen to Rhonda Dunn? You don't think when he put his arm around her neck that he knew he was going to suffocate her just like all the others[?]". Argument was permissible as *Williams Rule* evidence as it was intended to prove the existence of a premeditated plan, rather than suggesting that the jury should convict Def. because he was a serial killer. Comments referring to Def. as an adulterer and sociopath, which were not properly preserved and were not fundamental, were also remedied by a curative instruction. Lastly, trial court's overruling of defense objection to prosecutor's reference to "Tamiami strangler" was not improper where comment was made as part of a general reference to the perpetrator of the multiple crimes and concerned the police investigation of the six murders ["each and every one of the victims of the Tamiami strangler were found to have [certain identical] fibers on them, ..."]. Affirmed.)

Cooper v. State of Florida, 856 So.2d 969 (Fla. 2003) (prosecutor's isolated comments in penalty phase, that jury should place themselves in the victim's shoes and regarding the proper level of sympathy and mercy for def. in sentencing, do not rise to the level of fundamental error.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (it was improper for State to use an autopsy photo during closing to argue "the reason why he didn't testify here today is because he was killed by the defendant. Now, we're not here to have sympathy for anyone here today. But

you're going to take all this evidence back into the jury room, and I want you to avoid a third tragedy in this case." Closing arguments must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response rather than a logical analysis of the evidence and the applicable law. Photo was used in an inflammatory and prejudicial manner, especially when coupled with the State's comment that the jury should avoid a third tragedy in the case. Reversed on these and many other grounds. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Brazill v. State of Florida, 845 So.2d 282 (4th DCA 2003) (The most serious prosecutorial lapse in this case were comments designed to evoke sympathy for the victim. However, without more, such comments cannot amount to fundamental error. Unlike errors which cannot be cured by an instruction from the court, appeals to sympathy are easily correctable by a timely objection. Affirmed).

Lugo v. State of Florida, 845 So.2d 74 (Fla. 2003) (In closing argument, prosecutor's reference to "gratuitous violence," "the horrible things [that occur] in our world," and the "evil" of def.'s "hell on wheels" was not an impermissible character attack that warranted a new trial where the evidence had strong indications that the def. engaged in gratuitous violence and committed horrible acts. While the characterization of def. as "evil" and "hell on wheels" may have tested the bounds of permissible argument, remark did not warrant relief on fundamental error. Reference to victim having been "hog tied" and likening his captivity to an "Iranian hostage" did not so taint the jury's verdict as to warrant a new trial. In penalty phase, the trial judge did not abuse his discretion in allowing the prosecutor to argue: "What happens to her? She's just garbage. She's going into a packing box in another hour. ... And she's dead. She's cold and dead. And now, now he's really got garbage, huh? Human bodies that he treats like garbage." Prosecutor's argument was related to the "Cold, Calculated and Premeditated" aggravating factor. Given the evidence of the meticulous planning of the murders, the remarks were sufficiently related to the CCP aggravator. Comment that def. bought supplies to tape the victims up "like animals when they're people. Human beings" was not an attempt to argue an non-statutory aggravating factor but was appropriately related to the evidence. Argument that def. deserved "no mercy" was not fundamental error. Argument: "The diabolical nature of this crime, the planning, what it took to commit these crimes for financial gain makes this case different. Makes life in prison with the ability to see his family, to see his children, to read newspapers, to go to the yard to workout, to do whatever he wants to do. Same thing he's been doing for three years. He deserves a punishment that's different, that fits the crime" was harmless given the overwhelming evidence of guilt, number of aggravating circumstances and minimal mitigating circumstances. [NOTE: court did not state what error was in above argument.] In opening statement, prosecutor's assertion about the "awful," "evil," "horrible," and "gruesome" nature of the crimes; that def. and other def.'s were "preying on their victims; that def.'s offenses were worse than "any war crime"; that def.'s case resembled an "Iranian hostage" situation; and that def. and others participated in a "human barbecue" of the murder victims, viewed in the totality of the circumstances of this case in which the evidence showed that the murder victims were, in

fact, preyed upon, tortured, dismembered and burned, did not drift so far a field from the evidence as to constitute fundamental error. At most, selected comments were intemperate and may have walked the edge of emotion. Error, if any was harmless. Affirmed.)

Conahan v. State of Florida, 844 So.2d 629 (Fla. 2003)(in penalty phase closing, prosecutor's argument: "Mercy for a def. means nothing if we do not also honor justice for the victim. The statutory scheme in Florida attempts to strike a balance between the equally important values in our society of mercy to a def. and justice to a victim" was not improper. Comment did not ask jury to show def. the same mercy he showed victim and did not inflame or unnecessarily evoke the sympathies of the jury. Affirmed.)

Spencer v. State of Florida, 842 So.2d 52 (Fla. 2003) (despite defense attorney's claim that it was "designed to ignite the raw emotions of the jury," it was not improper during closing for prosecutor to put on latex gloves like the ones allegedly worn by def. at the time of the murder. Further, fact that prosecutor's voice quavered for a few seconds during closing was not "inflammatory histrionics" as claimed by the defense.)

Cole v. State of Florida, 841 So.2d 409 (Fla. 2003) (in penalty phase, prosecutor's argument that jury should show the same amount of mercy that the def. showed his victim, although improper, does not rise to the level of fundamental error.)

Doorbal v. State of Florida, 837 So.2d 940 (Fla. 2003)(it was improper for prosecutor to argue: "Does he deserve to spend the rest of his life in prison? See sisters and going to the library helping others? He deserves nothing. He deserves no mercy and he deserves no leniency. He deserves no respect...." No objection was made. Comments do not rise to the level of error such that the jury's recommendations of death could not have been made without reliance upon them." Affirmed.)

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) (Prosecutor's comment: "I'd ask that you not forget the victim as you sit in this courtroom and you see the def.'s mother and younger brother. ... I understand that sympathy is a normal very natural human response, I ask that you not forget the victim" was a request that the jury show sympathy for the victim. Reversed when combined with other improper arguments.)

Cherry v. Moore, 829 So.2d 873 (Fla. 2002) (Prosecutor's argument: "The criminal justice system in this country is a frustrating thing. People feel that they have no control over it. They have no voice in it. That it just happens, that all the rights are the Defendant's rights or whatever. It doesn't work well, it's slow, it's whatever. And they really have no voice in the criminal justice system, they're frustrated. And on the few occasions when they do have a voice, it seems like nobody cares, nobody listens, nobody pays attention. Today, ladies and gentlemen, each one of you individually and collectively have a unique opportunity in a situation. You have a voice in the criminal justice system. Not only do each of you have a voice, but that voice will be heard today" did not constitute fundamental error.)

Franklin v. State of Florida, 825 So.2d 487 (5th DCA 2002) (*opening statement* - isolated comment about def.'s child having been killed in a traffic accident did not warrant reversal because it was not focused upon. Affirmed.)

Rimmer v. State of Florida, 825 So.2d 304 (Fla. 2002) (while the use of the term "executed" or "executing" during closing argument may sometimes be improper, prosecutor's characterization of killing as being execution style did not jeopardize the validity of the trial or jury verdict. Affirmed.)

Cox v. State of Florida, 819 So.2d 705 (Fla. 2002) (prosecutor's comment in penalty phase: "I stand before you again today on behalf of the decent law-abiding people of this community and this state, whom I represent" was not an improper emotional appeal to send a message to the community. The prosecutor was only stating whom he represented, albeit in a somewhat grandiose manner. Affirmed.)

Carroll v. State of Florida, 815 So.2d 601 (Fla. 2002) (in death penalty case, prosecutor's reference to def. as a "boogie man" and "a creature that stalked the night" who "must die," although improper and ill advised, did not rise to the level of fundamental error. "When comments in closing are intended to and do inject elements of emotion and fear into jury deliberations, a prosecutor has ventured far outside the scope of proper argument." [citations omitted]. Affirmed.)

Pittman v. State of Florida, 814 So.2d 1257 (5th DCA 2002) (In post-conviction motion, reference to record evidence or evidentiary hearing required to determine if def. counsel was ineffective in failing to object to prosecutor arguing to jury that they should convict the def. for the sake of their grandchildren. Remanded for this and other error.)

Ford v. State of Florida, 802 So.2d 1121 (Fla. 2001) (In death penalty case, State's argument that "the punishment must fit the crime," when viewed in the totality of the closing argument, was a simple and fair representation of the law. Despite def. counsel's claim to the contrary, it did not bar the jury from considering the character and history of the def; the prosecutor said nothing about excluding those factors. Further, prosecutor's comment that def. had no excuse for committing the crime and that the fact that def. had not been abused during his childhood makes the crime worse was dealt with appropriately when the trial court instructed the prosecutor to refrain from using the term "excuse." There was no error in the state's argument that much of the def.'s mitigation evidence was intended to invoke sympathy. Likewise, where def. had presented evidence of his remorse, it was completely permissible for State to argue his lack of remorse, despite the fact that trial court sustained the objection to such argument. Conviction and sentence affirmed).

Nardone v. State of Florida, 798 So.2d 870 (4th DCA 2001) (where critical issue was whether aluminum strip was used by appellant in a way likely to cause death or great bodily harm and

victim testified that def was lying on his back on the floor holding onto aluminum strip which was part of a planter, and that as he was pulled away from the planter the strip, which def. held by the middle, snapped towards victim's face and the def. then attempted to strike the victim with the strip (still holding it by the middle), it was improper for State, in an effort to demonstrate that the strip could cause great bodily harm, to hold the aluminum strip by its end like a hammer and repeatedly strike it against a stack of books on his table with such force that they sent drywall that had been attached to the strip scattering around the courtroom. Such a demonstration was misleading to the jury because it was inconsistent with all of the evidence on how the def. used the alleged weapon. Reversed due to the cumulative effect of this error and improper opinion testimony by officer.)

Rose v. State of Florida, 787 So.2d 786 (Fla. 2001) (although it may have been improper for prosecutor to comment in closing on what he believed the child-victim might have said before she was killed by the defendant ["And he takes this little eight-year-old girl in his van to somewhere. And don't you know, drawing on your own human experience and common sense, she probably wanted to know where are we going? My mother's at the bowling alley"], any error was harmless. In addition, no motion for mistrial was made. Counsel's objection was sustained by court and comments were not so egregious or fundamental as to warrant reversal. Affirmed)

Muhammad v. State of Florida, 782 So.2d 343 (Fla. 2001) (describing why there were differences in the perception of the different eyewitnesses to a murder, the prosecutor commented that if the victim had survived and had come in to testify "against the backdrop of the fear and the anger and the terror of ...." Comment was erroneous because it invited the jury to imagine the pain and suffering of the victim. However, the jury had already heard testimony about the look of terror on the face of the victim. Accordingly, error by itself was harmless. Reversed when combined with other errors.)

Lewis v. State of Florida, 780 So.2d 125 (3rd DCA 2001) (improper for state to appeal to sympathy for the deceased victim: "[A] man has lost his life because of this caper someone is not going to be a father– ... Someone is not going to grow old and enjoy– ... the everyday things that you and I take for granted because of this caper. ... You can't be sympathetic to the victim, Bertram Williams, or his family, because he is dead. ... Bertram Williams died. And that person is going to be dead forever. We can't say don't worry, we understand, just don't let it happen again. That's not what human life means." Closing arguments must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Reversed on these and other grounds.)

Lukehart v. State of Florida, 776 So.2d 906 (Fla. 2001) (In death penalty case, prosecution may properly ask the jury to hold the def. responsible for his actions despite his deprived background, may argue that the defense has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy. [See *Valle* below] Affirmed)

Wilder v. State of Florida, 775 So.2d 430 (3rd DCA 2001) (In a trial for aggravated fleeing and eluding, it was not improper for prosecutor to comment: "we are all fortunate that nobody was killed." The evidence showed that the def. drove in a reckless manner at a high rate of speed through an intersection at lunch time, swerving around a dump truck and crashed into a parked van. Comment was entirely consistent with the evidence. Affirmed.)

Robinson v. Moore, 773 So.2d 1 (Fla. 2000) (in penalty phase, it was improper for prosecutor to argue: "She paid the ultimate penalty with her life. She didn't do anything wrong, ... She did everything by the textbook. Went along with the whole ball of wax, submitted herself to the ultimate humiliation. For what? To be given the ultimate punishment. ... I would suggest [the def.] deserves the ultimate punishment and nothing less...." However, error was not fundamental and did not warrant a new sentencing hearing. Petition for habeas corpus relief denied. *[Receded from on limited issue of post-conviction motion in death case - Mann v. Moore, 794 So.2d 595]*)

Kearse v. State of Florida, 770 So.2d 1119 (Fla. 2000) (Although it was improper for the prosecutor to argue that the def. "wants to live, even though he denied that right to Officer Parrish" and urged the jury to show "this Defendant the same mercy he showed Officer Parrish," errors were not so egregious as to require reversal. Death sentence affirmed.)

Peavy v. State of Florida, 766 So.2d 1120 (2nd DCA 2000) (In response to defense counsel's argument that the defendant's alleged actions were reasonable for someone premeditating a murder, the State argued: "You think about Danny Rolling, you think about Timothy McVey [sic] and you think about all the murders committed. None of that was reasonable." Although it was improper for prosecutor to analogize def.'s case to other convicted murderers, the court's response to the prosecutor, "you're treading in very dangerous territory and I would caution you not to do that," was the equivalent of sustaining the objection and the defense did not pursue the matter further or request a curative instruction or mistrial. Error was not so egregious as to deprive the def. of a fair trial. Affirmed.)

Eure v. State of Florida, 764 So.2d 798 (2nd DCA 2000) (in trial for sale and possession of cocaine, prosecutor argued: "this is the man; this is the cocaine. This is the bane of our existence . . . . and there's the man who caused it. I'm asking you for one thing and one thing only: A verdict of guilty. Convict this drug dealer and convict him on the testimony of that detective." Argument was improper "message to the community" argument aimed at the juror's most elemental fears of a lawless community that could endanger the jurors and their families. This type of argument has long been condemned by the courts because of its "obvious appeal to the emotions and fears of the jurors." Reversed on this and other errors.)

Brooks v. State of Florida, 762 So.2d 879 (Fla. 2000) (although somewhat emotional in it's descriptions, prosecutor's argument that the victim did nothing to deserve being shot down like a rabid dog, where his "blood flowed onto that cold concrete" as his "life flowed out of him" and he "died there on that cold slab of cement" was not improper. Unlike in *Urbin*, where the prosecutor created an imaginary script not supported by the evidence that portrayed the victim

pleading for his life, the argument here was properly confined to inferences based on record evidence and was therefore proper. However, much of the prosecutor's other arguments, almost identical to ones condemned in *Urbin*, improperly dehumanized the defs. as persons of "true deep-seated, violent character"; "vicious violence, brutal violence, ... violent to the core, violent in every atom of their body" and repeatedly used the inflammatory terms "executed" or "executing." Further, it was improper to urge jury to show the def.'s the same mercy they showed the victim - none. In addition, it was error for state to argue to the jury it's concern that they would "take the easy way out" and "just quickly vote for life," and to denigrate def.'s mitigating factors as "flimsy," "phantom" and "excuses." Reversed.)

Brown v State of Florida, 755 So.2d 616 (Fla. 2000) (prosecutor's argument in penalty phase: "What about life imprisonment? Now I am not saying that I would like to spend one day in jail,... but what about life imprisonment? ... You can laugh; you can cry; you can eat; you can sleep; ... you can participate in sports; .... In short, it is life," although improper, was not objected to by defense counsel and did not satisfy the Strickland standard for ineffective assistance of counsel. Moreover, defense counsel capitalized on the argument by replying that "[i]t's a world of reinforced concrete and steel, and steel doors, and coils of razor wire, and electric fences, and machine guns, and shotguns.... He will spend the rest of his life with men who society has found their presence so abhorred that they have to be locked away.... His life has been garbage. If he spends the rest of his life in prison, the rest of his life is going to be garbage, too, but it will be life." Affirmed.)

Otero v. State of Florida, 754 So.2d 765 (3rd DCA 2000) (improper for prosecutor to repeatedly refer to jury as "conscience of society" and claim that their verdict would "project a conscience upon someone who doesn't have it, and that's exactly what your verdict should do." Harmless error where argument did not permeate the closing but was made only at the very end of the state's rebuttal argument and evidence was overwhelming.)

Brown v. State of Florida, 754 So.2d 188 (5th DCA 2000) (it was improper for prosecutor to argue that cocaine is "white death," that the trial day was the most important day in everyone's life, that def. stood accountable to the jury for distributing cocaine and that it permeated the courtroom, that the jury verdict could send a message to def. that trafficking in cocaine was unacceptable and that although his witnesses were not "vestal virgins" and he wished that the offense had been committed in front of the pope, "people like that" don't traffic in cocaine. Prosecutor also improperly commented that he had properly granted immunity to certain witnesses because he was doing his duty to root out drug traffickers. Reversed)

Rivero v. State of Florida, 752 So.2d 1244 (3rd DCA 2000) (it was improper for prosecutor to make "conscience of community" argument, claim that witness avoided service of process [a fact not in evidence], make disparaging attack on defense counsel and defense, vouch for credibility of witness, suggest that someone had gotten to a witness to change his testimony [implying that def. had tampered with a witness] and suggest that the state had additional facts, not in evidence. Eight objections were sustained but motion for mistrial denied. Error not harmless. Reversed)

Birren v. State of Florida, 750 So.2d 168 (3rd DCA 2000) (in prosecution for possession of undersized lobster, harvesting lobster during the "soak" season, possession of lobster out of season, and having improperly marked traps, it was improper for prosecutor to argue that def. "was stealing from every other person who was trying to abide by the rules" and that jury should "say to [def.] that he is not allowed to violate these rules. That other people have to abide by these laws and he has to, too...." By accusing def. of uncharged crime of stealing, prosecutor "encroached on the jury's job by improperly weighing in with her own opinion of the credibility of the witness."[???] In addition, prosecutor's comments fashioning herself as a representative of the community, and suggesting to the jury that hey consider the unfairness to other "legal" crawfishermen, were out of line. Argument appealing to community sensibilities and civic conscience are improper. Reversed.)

Kennerdy v. State of Florida, 749 So.2d 507 (2nd DCA 1999) (improper for prosecutor to argue that defense witnesses had been "spoon-fed" their testimony and that jury knew that def. had profound disrespect for the legal system because he had "convinced two young men to come in here, and I would submit to you, commit perjury." Prosecutor also improperly argued that "the defendant thinks he's got six suckers sitting here" and accused def. of attempting to perpetrate a fraud on the jury and on the criminal justice system. Reversed.)

Thomas v. State of Florida, 748 So.2d 970 (Fla. 1999) (improper for prosecutor to urge jury, in penalty phase closing, to show the def. the same mercy he showed the victim. Not reversible on this ground because no objection and not fundamental. Reversed on other grounds.)

Johnson v. State of Florida, 747 So.2d 436 (4th DCA 1999) (in response to def.s counsel's comment that perhaps non-testifying witness failed to come to court and testify because she was not confident of what she had to say, it was improper for state to respond that perhaps she didn't testify because she was afraid, like other witness who testified. "It is error for a prosecutor to suggest that a witness did not appear due to fear of the def. where there is no evidentiary support for the proposition." Court sustained objection and instructed jury to disregard. Affirmed.)

McDonald v. State of Florida, 743 So.2d 501 (Fla. 1999) (improper for prosecutor to argue that the def. gagged victim because he "begged for mercy" or was "crying out" where there was no such evidence. "While it is a reasonable inference that victim was gagged to keep him quiet, the embellishment on what the victim may or may not have said, without a factual support in the record, was an appeal to the emotions of the jurors." Also, several references to victim's knowledge of impending death as he listened to the water fill the bath tub came very close to asking the jury to place themselves in the shoes of the victim and such arguments improperly appeal to the fear and emotion of the jurors. No objections. Affirmed)

Henry v. State of Florida, 743 So.2d 52 (5th DCA 1999) (improper for prosecutor to refer to def. as a killer who was out to establish his reputation with motorcycle gang and suggest that he was a member of Outlaws gang where there was no support, whatsoever, for that in the record.

Reversed.)

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) (prosecutor's comparison of jury's duty to that of his father who served his country in Operation Desert Storm was a blatant appeal to jurors' emotions. "A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; 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 [sic] evidence." Reversed due to many errors.)

Del Rio v. State of Florida, 732 So.2d 1100 (3rd DCA 1999) (Prosecutor's statement that the city is a place where "death is cheap," and comment upon his own, as well as the jury's personal stake in the matter by stating that "[t]he law protects all of us or the law protects none of us" and how "[i]n the south, we saw it when it happened to blacks. In Germany we saw it when it happened to the Jews" impermissibly appeal to the jury's "community conscience" or sense of "civic responsibility." Harmless in view of overwhelming evidence of guilt. Affirmed. [a corrected opinion adding a footnote referring the prosecutor to the Florida Bar for investigation was filed Feb. 3, 1999 - cite 1999 WL44171])

Fernandez v. State of Florida, 730 So.2d 277 (Fla. 1999) (*opening statement* - it was not improper for prosecutor to refer to def. as "a robber and a murderer" and to victim as singing a Christian song just before he was shot. Nor was it improper to describe the bullet's trajectory through the victim's body. A trial court has discretion in controlling opening statements, which are not evidence, and will not be overturned absent an abuse of discretion. Trial court did not abuse its discretion in allowing statements, which were later supported by evidence. Conviction affirmed.)

Grey v. State of Florida, 727 So.2d 1063 (4th DCA 1999) (prosecutor's comment ["Go back there for Margaret Bartlett and the people of the State of Florida and do your job. Render a verdict that's true."] was not of the "send a message" variety commonly condemned by the courts. Nonetheless, such a comment could be construed as an improper appeal to the jury for sympathy for the victim - and exhorting the jury to "do its job" may improperly exert pressure upon the jury and divert it from its responsibility to view the evidence independently and fairly. However, when viewed in context (comment did not urge a particular verdict, just one that is "true") and together with entire closing argument, comment did not exceed permissible bounds or rise to the level of reversible error.)

Izquierdo v. State of Florida, 724 So.2d 124 (3rd DCA 1998) (Improper for prosecutor to appeal to jury's sympathy and emotions by asking them to consider the effects "this crime has on the water we drink, on the air we breathe and on the ground where our children play. Based upon totality of many errors throughout trial by prosecution, error fundamental and not harmless. Trial court instructed that it may grant a new trial *or dismiss the case outright based on prosecutorial misconduct because the State Attorney's Office retained prosecutor after notice of his proclivities.* [improper argument and evidentiary violations common for particular

prosecutor] Reversed.)

Alston v. State of Florida, 723 So.2d 148 (Fla. 1998) (no error in allowing prosecution to display full-color 11" x 15" graduation photo of victim during penalty phase argument.)

Freeman v. State of Florida, 717 So.2d 105 (5th DCA 1998) (improper for prosecutor to argue that def. was asking jury to believe that there were "three Mark Furmans [sic] in this case, referring to "O.J. Simpson" case. Reversed based upon totality of the errors.)

Urbin v. State of Florida, 714 So.2d 411 (Fla. 1998) (by putting his own imaginary words in the victim's mouth (i.e. "Don't hurt me. Take my money, take my jewelry. Don't hurt me") prosecutor was trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused." [citation omitted] Also improper for prosecutor to criticize def.s mother because of her failure to show remorse for the victim's family and to urge the jury to show def. the same mercy or pity he showed the victim "and that was none." Death sentence reversed due to cumulative effect of all errors.)

Miller v. State of Florida, 712 So.2d 451 (2nd DCA 1998) (new trial required where prosecutor ridiculed defense of voluntary intoxication as "the defense of lack of responsibility" claiming "no one forced him to do it." Prosecutor's comments tended to arouse an emotional reaction to the appellant's defense and, by misstating the law, to discredit a valid and legal defense. There being ample evidence of voluntary intoxication and the lower court failing to sustain the objection, the court reversed.)

Cochran v. State of Florida, 711 So.2d 1159 (4th DCA 1998) (prosecutor's argument to jury that any verdict other than a conviction would be to establish a "one free murder rule" in the community improperly inferred to the jury that a conviction would serve some larger social good, beyond the confines of the trial. Prosecutor also attempted to appeal to jury's sympathy by reference to victim's "little child". Reversed on totality of these and other errors.)

Smith v. State of Florida, 710 So.2d 753 (4th DCA 1998) (prosecutor's appeal for sympathy from jury by referring to the victim's inability to kiss his son in the future was harmless, nonprejudicial error. Affirmed.)

Monlyn v. State of Florida, 705 So.2d 1 (Fla. 1997) (where victim was beaten to death and def. claimed he struck the victim during a struggle and introduced evidence of the presence of two shotguns, presumably for the purpose of showing that def. could have shot the victim if he intended to kill him, prosecutor's comment that: "I submit to you that he would have done [the victim] a big favor if he had shot him," was not inflammatory and was a proper comment on the evidence. It was not improper for the state to comment on def.'s choice of method in committing the murder.)

Kent v. State of Florida, 702 So.2d 265 (5th DCA 1997) (prosecutor's argument referring to

criticism that the "system doesn't work ... doesn't protect people," reminding the jury that whether the def. "faces justice for what he did is on [their] shoulders" and asking them to provide the answer: "does the system work?", even if improperly urging jurors to convict def. for the good of society, were not objected to and not fundamental. Affirmed.)

DeFreitas v. State of Florida, 701 So.2d 593 (4th DCA 1997) (Improper for prosecutor to compare def.'s case with "O.J. Simpson" case.)

Davis v. State of Florida, 698 So.2d 1182 (Fla. 1997) (reference to young witness' handicap was not improper because made once in passing. Reference to officer as "the guy that got upset thinking about this little girl" who had been found in a dumpster, where numerous officers testified, was an understandable short-hand method for prosecutor to refer to that particular officer. No undue emphasis was placed on officer's emotionalism. Reference to crime and its perpetrator as "vicious" and "brutal" was not improper in light of evidence in the case.)

Maldonado v. State of Florida, 697 So.2d 1284 (5th DCA 1997) (Improper for prosecutor to refer to def. as "coward" for trying to blame death of child on his girlfriend, the child's mother. Court admonished prosecutor about using disparaging names. Although it would have been preferable for court to give a formal curative instruction, any error was harmless.)

James v. State of Florida, 695 So.2d 1229 (Fla. 1997) (In response to def.'s claim that his crimes were mitigated by his impairment from the use of drugs and alcohol, the prosecutor commented: "What the def. is saying is give me the more lenient of the only two possible penalties for this ... because I've committed another felony, i.e., the use and thus possession of illegal drugs." Although the comment was not an improper way to rebut the def.'s claim that his intoxication was a mitigating factor, it was an isolated comment and the State did not characterize the def.'s drug use and possession as an aggravating factor. Further, the State's comment that the def.'s mental health experts had testified that he knew what he was doing, the consequences of his actions and that it was wrong, was not an improper suggestion that he was "legally sane" and therefore the mental mitigating circumstances should be disregarded. Rather, the State was simply reminding the jury that the experts had testified that the def. knew what he was doing when he committed the murders. The comments were proper rebuttal to def.'s claim that his ability to conform his conduct to the requirements of the law was substantially impaired. Affirmed.)

Jackson v. State of Florida, 690 So.2d 714 (4th DCA 1997) (where def. was charged with possession of cocaine, it was improper for State to suggest that def. might actually be a drug dealer because of the way the drugs were individually wrapped. Error was magnified by State's further statement that drugs were "root of all crime" and def. was the person "we have to thank for all that". Although counsel is allowed to argue the evidence and inferences that can be logically drawn from the evidence, the prosecutor may not argue that the evidence suggests that the defendant is guilty of a crime greater than the one for which he has been tried.)

Williams v. State of Florida, 689 So.2d 393 (3rd DCA 1997) (commenting that nothing could be more traumatic to a 6 year old than losing a parent, the prosecutor stated: "What's even worse than that is witnessing the loss of a parent. You're six years old." Not a "Golden Rule" violation because State was not asking jurors to place themselves in victim's position, imagine victim's pain and terror or imagine a relative was the victim. State was asking jury to understand child's viewing of crime was a possible reason for confusion as to the car's color. Also, even if it could be construed as an improper reference to child's suffering- isolated comment was harmless.)

Bonifay v. State of Florida, 680 So.2d 413 (Fla. 1996) (although prosecutor's singular use of the word "exterminate" was not harmful error, the court cautions against the use of any words that may tend to dehumanize a capital def.)

Jones v. State of Florida, 666 So.2d 995 (5th DCA 1996) (prosecutor's comment that "the only reason we're here on an aggravated battery and not a murder is because Officer Coffey jumped... and he went over the hood instead of under the car," was improper attempt to elicit sympathy. Not so inflammatory that it effected jury verdict.)

Allen v. State of Florida, 662 So.2d 323 (Fla. 1995) (def. counsel's objection that prosecution was attempting to evoke sympathy for the victim by commenting on her family relationships was without merit where def. had already argued to the jury that victim was a "nice old grandmother," "a lonely widow" and "a lady who has a large family" as part of his strategy to show that def., a drifter, was a convenient suspect because, unlike the victim, he had no family ties, and the police wanted to mollify the victim's family by arresting someone for the murder.)

Jones v. State of Florida, 652 So.2d 346 (Fla. 1995) (context of prosecutor's reference to victim's murder as "assassination" was not an improper attempt to instruct the jury on a CCP aggravator. Prosecutor was discussing possible mitigation: "What can explain what is in mitigation of an assassination of Dollie Nestor." "Assassination" was a reasonable characterization of the First Degree Murder and, even if it were not, it was not so prejudicial as to require a mistrial.)

Reaves v. State of Florida, 639 So.2d 1 (Fla. 1994) (prosecutor's portrayal of the slain officer "speaking from the grave" was not improper in the context it was made. Def. attorney had argued that officer had already started a records check on the def. and therefore killing him made no sense. The prosecutor was simply asserting that the officer was the only one who could say from a witness stand that def. was the person who shot him and therefore def. had a motive to kill him. Proper rebuttal. Affirmed. *Subsequently remanded on other grounds: 826/932.*)

Stein v. State of Florida, 632 So.2d 1361 (Fla. 1994) (prosecutor's isolated comment that murder victim was married and the father of a child, if improper, were harmless)

Hahn v. State of Florida, 626 So.2d 1056 (4th DCA 1993) (improper for prosecution to attack credibility of witness by attacking her character because she sleeps with men whose names she

doesn't know.)

King v. State of Florida, 623 So.2d 486 (Fla. 1993) (during final argument in the penalty phase of the trial, the prosecutor told the jury that "... they would be cooperating with evil, and would themselves be involved with evil just like [the defendant}," if they recommended life imprisonment. Held: Improper comment. Reversed).

Robinson v. State of Florida, 610 So.2d 1288 (Fla. 1992) (new trial not required where prosecutor placed two knives that had been entered into evidence on the bar of the jury box, def. objected and court asked the prosecutor to remove them. While closing argument must not be used to inflame the minds and passions of the jurors, here "the knives did not become a feature of closing argument" and def. has not shown he was denied a fair trial.)

Richardson v. State of Florida, 604 So.2d 1107 (Fla. 1992) (improper for state to urge the jury to show def. as much pity as he showed his victim. Harmless. Affirmed.)

Patten v. State of Florida, 598 So.2d 60 (Fla. 1992) (prosecutor's repeated reference to killing of police officer, during jury selection and trial, did not constitute the presentation of a non-statutory aggravating offense [legislature had not yet adopted this aggravating circumstance] because victim's status as an officer who was enforcing the laws was a necessary part of the factual scenario and a critical part of establishing the aggravator of "hindering the enforcement of laws." Affirmed.)

Brown v. State of Florida, 593 So.2d 1210 (2nd DCA 1992) (improper for State to argue that victim was victimized again by having to testify and have his character impugned, that it seemed wrong to him that the victim was put on trial and, that he wanted to be able to call the victim and tell him that the jury had the courage to see the truth and that he was not victimized a second time. These comments were an improper appeal to the jury for sympathy and an expression of the prosecutor's personal belief.)

Watts v. State of Florida, 593 So.2d 198 (Fla. 1992) (although it was improper for the prosecutor to comment that the life of the deceased victim's wife, who was sexually assaulted by def., "will never be the same" because such a statement was not relevant to def.'s guilt but only evoked sympathy from jury, error was harmless.)

Shaara v. State of Florida, 581 So.2d 1339 (1st DCA 1991) (Improper to argue to jury that the victim was asking the jury for justice.--No objection. Not fundamental)

Valle v. State of Florida, 581 So.2d 40 (Fla. 1991) (In death penalty case, State may properly argue that the def. has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy. In this case, the prosecutor did not argue that the law would not allow the jury to consider sympathy in their recommendation. Affirmed.)

Green v. State of Florida, 557 So.2d 894 (1st DCA 1990) (improper for prosecutor to attempt to appeal to juror's emotions by arguing that def. had taken from the hard working victim who had two jobs and was living the American Dream, and then point out the victim and his son in the courtroom so jurors could identify with them.)

Oropesa v. State of Florida, 555 So.2d 389 (3rd DCA 1989) (prosecutor's statement that he wished the victim had been armed so def.'s would have gotten what they deserved was unduly inflammatory but not objected to, not fundamental and otherwise harmless given overwhelming evidence)

Clark v. State of Florida, 553 So.2d 240 (3rd DCA 1989) (it was improper during murder prosecution for prosecutor to point the unloaded murder weapon at the jury and pull the trigger as it was theatrical and potentially dangerous. However, although the action tended to create the impression of involving the jurors in the display, the prosecutor did not employ any words in connection with the display so as to clearly cause it to constitute a Golden Rule violation. Affirmed as harmless.)

Eberhardt v. State of Florida, 550 So.2d 102 (1st DCA 1989) (In voluntary intoxication defense case, claim that "founding fathers never intended that to be the law in this country...." amounted to an overt appeal to the jury's sympathy.)

Rhodes v. State of Florida, 547 So.2d 1201 (Fla. 1989) (Improper for prosecutor to urge jury to show def. the same mercy shown to the victim on the day of her death as that was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentencing recommendation. Reversed due to cumulative effect of all errors and judge's failure to sustain any of the objections.)

Williams v. State of Florida, 544 So.2d 1114 (3rd DCA 1989) (Prosecutor's single reference to tears of victim's parents was improper appeal for sympathy but isolated comment does not rise to level of reversible error)

Garron v. State of Florida, 528 So.2d 353 (Fla. 1988) (improper for prosecutor to state: "I would hope at this point, that the jurors will listen to the screams and to her desires for punishment for the def. and ask that you bring back a recommendation that will tell the people of Florida, that will deter people from permitting...." When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. Reversed based upon cumulative errors. *Abrogation on other grounds recognized in 979/301*)

Jackson v. State of Florida, 522 So.2d 802 (Fla. 1988) (it was improper for prosecutor to comment in penalty phase closing that victims could no longer read books, visit their families, or see the sun rise in the morning as def. would be able to do if sentenced only to life in prison. Argument urged jurors to consider factors outside the scope of their deliberations. Also improper

to request the jury to show that the community cares. Purpose of closing is to review the evidence and explicate inferences which may reasonably be drawn from the evidence. It must not be used to inflame the passions of the jurors so verdict reflects an emotional response rather than logical analysis of evidence and applicable law. Neither error sufficient to taint the validity of jury's recommendation. Affirmed.)

Hill v. State of Florida, 515 So.2d 176 (Fla. 1987) (in capital sentencing hearing, improper for prosecutor to argue: "One hundred and fifty years ago if the def. left a town and stole a horse to come over to Pensacola ... with a companion, and they robbed a bank in the main street of the town ... and the deputy sheriff came up to arrest the def.'s buddy, and the def. shot the deputy in the back, they would have strung him up from the nearest tree that day. Now, the process has changed. He now has a jury trial. It's now taking years to do it, but things still remain the same. The crime calls for the sternest punishment for killing the deputy. He must hang from a tree. We're more merciful now. We'll shock him until he's dead. But that is the sentence that is appropriate in this case under the law." Comments did not deprive the def. of a fair sentencing hearing and constitute harmless error, although comments were "ill-advised" and in another context and factual situation, could result in harmful error. Affirmed)

Bush v. State of Florida, 461 So.2d 936 (Fla. 1984) (Prosecutor's penalty phase argument that jury "not" consider sympathy for victim's family who will have to look across dinner table in 3 days at Thanksgiving and see face of victim's twin sister, thereby continually reliving the entire incident, was NOT improper. *Holding modified on other issue: 770/1174*)

Parker v. State of Florida, 456 So.2d 436 (Fla. 1984) (in death penalty case, claim that prosecutor emotionally inflamed the jury by referring to his previous life sentence for a murder committed in 1967 and to the life sentence imposed for the D.C. murder following the commission of the present murder, and concluding that "if life meant life" both Chavez and the D.C. victim would be alive today was not properly preserved. At trial, defendant objected only on the ground that the prosecutor was arguing outside the evidence. The trial judge properly overruled the objection because both convictions were obtained prior to the sentencing in this case and were properly introduced as aggravating factors. Defendant's argument on appeal that the jury was emotionally inflamed was not presented at trial and, thus, was not properly preserved for appeal. Nonetheless, even had it been preserved, it would have no merit. The record shows that defendant was sentenced to life imprisonment for first-degree murder in 1967, and later murdered two additional persons. Under these circumstances, it is manifestly obvious that "if life meant life" the defendant would not have murdered these two additional victims. The prosecutor did not predict that the defendant would murder again if sentenced to life imprisonment and paroled after twenty-five years. Such argument would have been improper. Affirmed)

Jennings v. State of Florida, 453 So.2d 1109 (Fla. 1984) (although prosecutor's comparison of def.s right to use the phone to call an attorney during his interrogation with the victim's right to live was improper, [def. argued irrelevant and inflammatory] it was not so prejudicial as to

require a mistrial. *[Subsequently vacated by granting of writ of certiorari on other grounds - Jennings v. Florida, 105 S.Ct. 1351])*

Boatwright v. State of Florida, 452 So.2d 666 (4th DCA 1984) (urging jurors to "send a message to criminals" that this is our country, our nation and "we're not going to tolerate it anymore" is an improper argument calculated to inflame passions and prejudices of the jury)

Macias v. State of Florida, 447 So.2d 1020 (3rd DCA 1984) (improper for prosecutor to question [apparently rhetorically in closing] whether murder victim had ever seen his posthumously born child as that was an improper appeal to the sympathy of the jury. Trial court sustained objection and instructed jury to disregard the comment. Affirmed.)

Blackburn v. State of Florida, 447 So.2d 424 (5th DCA 1984) (prosecutors request for sympathy for victims, personal belief as to facts in issue and having met burden of proof, vouching for credibility of police officer and reference to other charges against defendant arising out of incident which were not pursued by state were improper BUT NOT FUNDAMENTAL. No objection. Affirmed [passing reference to fact that they were, in part, invited by defense counsel's questions and closing argument])

Hall v. State of Florida, 444 So.2d 1019 (3rd DCA 1984) (improper for prosecutor to attempt to elicit sympathy for victim with following argument: "Do not decide this case because you feel sorry for anybody, because if you really feel sorry for anybody, I would ask you to feel sorry for Mr. Manfready [victim]. You have heard so much about the defendant's right, ... but what about the rights of Mr. Manfready.... His rights are the ones that have been sacrificed. Feel sorry for him. Don't feel sorry for [the defendant] because he's the one that started this whole thing." No objection. Affirmed [Court stated that even if preserved error would not have been enough to warrant reversal].

Johnson v. State of Florida, 442 So.2d 185 (Fla. 1983) (improper for prosecutor to attempt to elicit sympathy during closing argument by reference to victim's family--Harmless in this case)

Teffeteller v. State of Florida, 439 So.2d 840 (Fla. 1983) (prosecutor's statement that if jury recommends life def. "will be eligible for parole in twenty-five years.... What do you think is going to happen? He's going to kill again.... He'll go after [witnesses].... Does he have to kill again before you think it's the proper case?...Don't give him that chance.... Don't let [def.] kill again." was an improper inflammatory argument. Trial court denied motion for mistrial and refused to give a cautionary instruction. Death sentence reversed and remanded for new penalty phase.)

Meade v. State of Florida, 431 So.2d 1031 (4th DCA 1983) (It was improper for prosecutor to argue in murder trial: "And [def.]... sits here today and I submit to you under the weight of all the evidence there, ladies and gentlemen, is a real live murderer. ... There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida

against murder: Thou shalt not kill. ... [H]ere's one person [victim] who did not get his day in court. [Def.] has." Comparison of Florida's murder statute with the Fifth Commandment could have conveyed to jury that all killing is against the law, when in fact under certain circumstances killing is excused. Further, comments preceding and following the reference to the Fifth Commandment seem intended to inflame the jury and to appeal to its sympathy for decedent and his kin. Reversed.)

Carr v. State of Florida, 430 So.2d 978 (3rd DCA 1983) (it was improper for prosecutor to argue: "Your job here, the reason why we have six people sitting here is because you are supposed to be the conscience of the community.... We want you to tell us if [def.'s] conduct ... is acceptable conduct in the community.... [T]hrough your verdict you tell that man this community is not going to tolerate this type of conduct under any circumstances." Error harmless in light of overwhelming evidence. Affirmed)

James v. State of Florida, 429 So.2d 1362 (1st DCA 1983) (Prosecutor argued to jury: "Now, these are Florida Statutes; they're the law in the State of Florida and we all live by them. And I submit to you that if you let that man walk free after what you have seen here and what you have heard here, you might as well throw those away because they will serve no purpose." Upon objection, court gave an admonishment stating "each of you are allowed to make your arguments as you deem best. I think the jury will take it in the sense in which it is intended. Lets move along," and prosecutor explained that what he said was that if the jury let a guilty man walk free they were throwing away the laws of the State of Florida, that he felt the def. had been proven guilty beyond a reasonable doubt and that the jury should apply the law as it exists and not throw away the laws on speculation. Any impropriety of the comment was cured by the court's admonishment and the follow-up explanations by the prosecutor. Further, since no motion for mistrial and comment was not fundamental error, point has not been properly preserved. Affirmed.)

Edwards v. State of Florida, 428 So.2d 357 (3rd DCA 1983) (prosecutor's request for justice on behalf of victim's wife and children improper appeal to sympathy, the natural effect of which would be hostile emotions toward the accused.) Objection overruled below. Reversed.)

Gomez v. State of Florida, 415 So.2d 822 (3rd DCA 1982) ("Don't let that gentleman [victim] with three children and a wife walk away without justice in this case, facing possible jail [for admitted perjury], an arm that's hideously changed the rest of his life and let these gentlemen [def. and co-def.] walk away into our community and commit further crimes of this nature. These assassins must be put away. It is your duty to do that. You told me you'll do that." Remarks were so egregious that reversal was compelled.)

Harris v. State of Florida, 414 So.2d 557 (3rd DCA 1982) (It was improper for prosecutor to thank the jury on behalf of the victim, refer to crime being on the rampage in the community, refer to the victim's tearful breakdown on the witness stand and imply that it was due to defense counsel's tactics and express his personal belief in the def.'s guilt. Reversed)

Harper v. State of Florida, 411 So.2d 235 (3rd DCA 1982) (prosecutor's comment that defendant is sorry and so are the victim's wife and children was improper request for sympathy for victim's family, the natural effect of which would be an adverse emotional feeling towards the defendant.)

Betsy v. State of Florida, 368 So.2d 436 (3rd DCA 1979) (Not error for prosecutor to request to jury to perform their public duty by returning a guilty verdict)

Darden v. State of Florida, 329 So.2d 287 (Fla. 1976) (prosecutor's comment that he wished victim had a gun and had "blown [def.'s] face off," and that "the only way that I know that he is not going to get out on the public" was for the jury to recommend death, although improper, were not grounds for reversal given the unique circumstances of case where DOC inexplicably released career criminal def., who was serving prison sentence, on furlough to visit his family and def. killed shop-owner, sexually battered his wife and shot 16 year old boy 3 times. [Comments would probably have led to reversal today] Also, prosecutor's reference to def. as an "animal," although generally improper, was not grounds for reversal where it was a response to defense counsel's argument that the person who committed the crime was a "vicious animal" [suggesting that someone other than def. committed the crimes]. Affirmed)

Thomas v. State of Florida, 326 So.2d 413 (Fla. 1975) ("[Prosecutors'] discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty.")

Knight v. State of Florida, 316 So.2d 576 (1st DCA 1975) (trial was conducted in "circus atmosphere" where, although def. was being tried for second degree murder, statements were made about his lack of support for his family, his morals were directly assaulted, appeals of sympathy were made for the plight of the widow and children of the deceased, and attempts were made to play on the juror's geographic prejudice. Reversed.)

Breniser v. State of Florida, 267 So.2d 23 (4th DCA 1972) (Improper to argue to jury that if they are going to feel sympathy, they should feel sympathy for the victim's family.)

Goddard v. State of Florida, 196 So. 596 (Fla. 1940) ("counsel should be restrained by the court of its own motion from indulging in appeals to sympathy, or passion or prejudice in cases where the feelings may be easily aroused." *This case is an anomaly*. Sup. Ct. found that improper closing argument, with so many errors it is too voluminous to detail in this outline, did not warrant a new trial because case was not close and jury requested read back of testimony, indicating that they were not influenced by improper comments. Case is amusing to read but do not expect similar results today.)

Grant v. State of Florida, 194 So.2d 612 (Fla. 1967) (prosecutor's argument during murder trial: "Do you want to give this man less than first degree murder and the electric chair and have

him get out and come back and kill somebody else, maybe you" was reversible error despite lack of objection.)

Pait v. State of Florida, 112 So.2d 380 (Fla. 1959) (improper for prosecutor to inform jury that the def. had the right to appeal a guilty verdict but that the State could not appeal a conviction. Also improper for State to inform jury that, before deciding whether to seek death penalty, a conference is held at the State Attorney's Office to determine whether the death penalty is an appropriate punishment for the case. While prosecutor may urge jury to prescribe the death penalty on the basis of the evidence it heard, he may not undertake to give the jury the benefit of the composite judgment of the State Attorney's staff allegedly reached on the basis of investigations and discussions taking place before the trial. Comments found to be calculated to forestall a mercy recommendation, rather than casual, innocuous observations. Reversed)

Stewart v. State of Florida, 51 So.2d 494 (Fla. 1951) (prosecutor's abusive and inflammatory argument {"The time to stop a sexual fiend and maniac is in the beginning and not to wait until after some poor little child or some little girl lost her life ... or mutilated."} warranted a reversal of the conviction.)

B. Appeal to safety of the community

Charriez v. State of Florida, 96 So.3d 1127 (5th DCA 2012) (prosecutor made an improper appeal to the jurors' community conscience by suggesting that they had a communal duty to convict def. in order to protect the community. Although no objection was made to this comment or multiple other errors which, individually, might not rise to level of fundamental error, together they deprived the def. of a fair trial. Reversed.)

DeHall v. State of Florida, 95 So.3d 134 (Fla. 2012) (in penalty phase, it was improper for prosecutor to comment on def's future dangerousness, arguing several times that def "is "violent," "dangerous," that he "can't be fixed," that "he acts with violence," and "[f]rom a school child he was violent." After court sustained objection and prosecutor continued arguing def's dangerousness, court chastised prosecutor saying "You keep saying that word. Don't do that, okay. Please." Undeterred, prosecutor continued: "His violence speaks for itself. You know what? Sometimes it's really sad a person can't be fixed." Error not harmless when combined with other improper comments. Conviction affirmed and remanded for new penalty phase.)

Fleurimond v. State of Florida, 10 So.3d 1140 (3rd DCA 2009) (where charge against def was reduced from "sale of cocaine within 1000 feet of a school" to "possession of cocaine with intent to sell" because there was no testimony as to the distance between the drug house and the nearby elementary school, and where no evidence whatsoever was presented that the police found the def flushing drugs down the toilet, it was improper for the State to argue to the jury in closing that the house was next to a school [there was no objection to this comment] and to disclose the alleged "flushing incident." Prosecution's other comment (in response to defense argument that

it was unfair that the police did not have a videotape to prove def's involvement) that " how fair is it to Miami-Dade County that there's people out there, these two individuals—" was interrupted by objection and was never finished. While a "call on the community's conscience would have been impermissible, it is unclear that either the interrupted comment, the "flushing comment" or the school comment alone would warrant a mistrial. But the combined effect of all three errors warrant the def receiving a new trial. Reversed. [NOTE: compare ruling in this case with ruling in Lelieve, the co-def, below by a different panel of same DCA])

Lelieve v. State of Florida, 7 So.3d 624 (3rd DCA 2009) (where charge against co-def was reduced from "sale of cocaine within 1000 feet of a school" to "possession of cocaine with intent to sell" [def was never charged with sale within 1000 feet, but instead with trafficking in cocaine] because there was no testimony as to the distance between the drug house and the nearby elementary school, it was improper for the State to tell the jury in closing that the house was next to a school [there was no objection to this comment]. Prosecution's other comment (in response to defense argument that it was unfair that the police did not have a videotape to prove def's involvement) that " how fair is it to Miami-Dade County that there's people out there, these two individuals—" was interrupted by objection and was never finished. While a "call on the community's conscience would have been impermissible, it is unclear that the interrupted comment, alone or in combination with school comment, vitiated the entire trial. Affirmed. [NOTE: compare ruling in this case with ruling in Fleurimond, the co-def, above by a different panel of same DCA])

Bailey v. State of Florida, 998 So.2d 545 (Fla. 2008) (*death penalty – voir dire* – it was not improper for prosecutor to introduce himself to the venire as follows: "Good morning, I'm Steve Meadows, I'm the State Attorney for the 14th Circuit and I'm here representing the community.")

Salazar v. State of Florida, 991 So.2d 364 (Fla. 2008) (it was improper for prosecutor to attempt to explain deal with shooter to get def. who ordered the killing by stating that he feared for the victim who survived if def. was not convicted. "You may or may not like the deal, you may or may not like the concept that the State would give the shooter in this case some consideration, give him his life; not give him his freedom, give him his life. …[W]e have at the outset Ronze Cummings who has survived and who is alive today, six years later, and would the State in this circumstance have a reasonable concern that there could be another attempt on Ronze's life, attempt to finish him…." Although improper, comment was not so prejudicial as to deny def a fair trial. The defense objection interrupted the prosecutor in mid-sentence before the argument was developed, and the trial court sustained the objection at sidebar. Following the sidebar conference, the prosecutor abandoned the argument. [**NOTE**: trial court refused to give a curative instruction out of fear that it would highlight the issue and appellate court found that to be within the discretion of the court.] Further, prosecutor's use of the word "terrorizing" was not an attempt to argue a non-statutory aggravating factor. The prosecutor's use of the word "terrorize" referred to the underlying assault supporting the burglary aggravator. "An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such

other person that such violence is imminent." Similarly, "terror" is defined as "a state of intense fear," and to "terrorize" is "to coerce by threat or violence." Moreover, the State's argument alluded to both the HAC and CCP aggravators. "[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may be considered in determining whether [the HAC] aggravator is satisfied...." And the question of whether def's original purpose for entering victim's home was to "terrorize" her or to kill her related to the "heightened premeditation" element of CCP. Accordingly, the trial court did not abuse its discretion in allowing the prosecutor to use the word "terrorize" when referring to the assault underlying the burglary aggravator. Affirmed.)

Rodriguez v. State of Florida, 919 So.2d 1252 (Fla. 2005) (*penalty phase* – prosecutor's argument that jurors should: "[a]s members of this community ... give to the Court, a recommendation of the community based on the facts of the case as to what the appropriate penalty should be" was not improper "because the prosecutor was simply advising the jury to follow the law.")

Orme v. State of Florida, 896 So.2d 725 (Fla. 2005) (death penalty - Although the prosecutor did tell jurors that they were there on behalf of the community, the argument stopped short of what was found to be objectionable in other cases and did not encourage jurors to "do their duty" for the community or "send a message" through their sentencing decision. Denial of post-conviction motion reversed on other grounds.)

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) (it was improper for prosecutor to comment that victim did not have any money on him because "Burger King knows enough to know that the def, people like the def. are out at night robbing people, especially managers of stores...." It is improper to cite witnesses or def.s as examples of a certain criminal type. Reversed due to multiple improper arguments.)

Pagan v. State of Florida, 830 So.2d 792 (Fla. 2002) (Prosecutor's argument that argued that def. had gone to great lengths to get away with crime and "[y]ou are the only force on earth that can prevent that from happening" did not suggest that def. would go out and commit other crimes if the jury did not convict him. Affirmed.)

Franqui v. State of Florida, 804 So.2d 1185 (Fla. 2001) (in penalty phase, it was not improper for state to suggest to jury that proceeds of robbery may have been used to repaint the car to avoid arrest and to purchase a gun used in the subsequent robbery where evidence indicated that def. was unemployed at the time of the offense and guns used in first robbery were disposed of, yet getaway vehicle was repainted and other guns were obtained for second robbery 11 days later. State's comment "did not constitute an improper attempt to ask the jury to draw a logical inference based upon the evidence." Merely arguing conclusions which can be drawn from the evidence is "permissible fair comment." It was improper, however, for State to imply that def.'s would have murdered victim of second robbery if the police had not stopped their van for a traffic infraction. Error does not warrant resentencing. Affirmed.)

Card v. State of Florida, 803 So.2d 613 (Fla. 2001) (in penalty phase, it was improper for state to tell the jury that they are the "conscience of the community" and to argue that jury should not recommend a life sentence because there was no guarantee that the def. would actually serve life. Trial court's curative instruction informing jury that "there is no parole. There is no early release from the sentence on a life sentence" and that it meant "life, natural life of a person, no parole" cured the "life sentence" error. Isolated "conscience of the community" comment did not warrant a mistrial despite the fact that the trial court overruled counsel's objection. It was also improper for state to suggest to jury that they could weigh victim impact evidence in evaluating aggravating and mitigating circumstances. Errors not sufficient for reversal. Affirmed.)

Wilder v. State of Florida, 775 So.2d 430 (3rd DCA 2001) (In a trial for aggravated fleeing and eluding, it was not improper for prosecutor to comment: "we are all fortunate that nobody was killed." The evidence showed that the def. drove in a reckless manner at a high rate of speed through an intersection at lunch time, swerving around a dump truck and crashed into a parked van. Comment was entirely consistent with the evidence. Affirmed.)

Pedroza v. State of Florida, 773 So.2d 639 (5th DCA 2000) (in Jimmy Rice Act prosecution, it was improper for State to argue: "What's really at issue here, though, what you're being asked to decide, is he likely to reoffend. If you decide that he's not, he walks out of this courtroom, and we all have to be comfortable that someone else is not at risk out there as a result of what we've done here today. [Objection was sustained]" Then , speaking about the various test results on his likelihood of reoffending: "The base rate of all offenders was 22%. All that sounds like 'likely to reoffend,' you know. The only -it's only about 12% chance here that you have cancer or are going to die. Whoa, whoa, whoa! That's pretty scary when we're talking about human lives and behavior. That's 'likely.'" Improper comments during closing argument, like other trial errors, must be properly preserved for appeal by making a contemporaneous objection and, if sustained by the trial court, a motion for mistrial. Moreover, under *Murphy* [766/1010] a civil litigant cannot seek review of improper arguments that were not objected to during trial unless, at the very least, the party moved for a new trial below. Def. did not move for a new trial so he is not entitled to reversal. Moreover, the statements do not rise to the level of fundamental error. Affirmed)

Eure v. State of Florida, 764 So.2d 798 (2nd DCA 2000) (in trial for sale and possession of cocaine, prosecutor argued: "this is the man; this is the cocaine. This is the bane of our existence . . . . and there's the man who caused it. I'm asking you for one thing and one thing only: A verdict of guilty. Convict this drug dealer and convict him on the testimony of that detective." Argument was improper "message to the community" argument aimed at the juror's most elemental fears of a lawless community that could endanger the jurors and their families. This type of argument has long been condemned by the courts because of its "obvious appeal to the emotions and fears of the jurors." Reversed on this and other errors.)

Johnson v. State of Florida, 747 So.2d 436 (4th DCA 1999) (in response to def. counsel's suggestion that a witness did not testify in court because she was not confident about what she

would have to say [state's objection was sustained], state improperly responded suggesting that witness may not have testified because of fear. It is error for prosecutor to suggest that a witness did not appear due to fear of the defendant where there is no evidentiary support for the proposition. Court sustained objection but denied motion for mistrial. Where "fear" may have been of entire judicial process and court was in best position to observe reactions of witnesses as well as impact of comment, denial of mistrial affirmed.)

Izquierdo v. State of Florida, 724 So.2d 124 (3rd DCA 1998) (Improper for prosecutor to appeal to jury's sympathy and emotions by asking them to consider the effects "this crime has on the water we drink, on the air we breathe and on the ground where our children play. Based upon totality of many errors throughout trial by prosecution, error fundamental and not harmless. Trial court instructed that it may grant a new trial *or dismiss the case outright based on prosecutorial misconduct because the State Attorney's Office retained prosecutor after notice of his proclivities.* [improper argument and evidentiary violations common for particular prosecutor] Reversed.)

Brown v. State of Florida, 718 So.2d 923 (5th DCA 1998) (Prosecutor's comment that "this man will kill somebody in a heartbeat" could be viewed as an argument that the attempted murder was coldly deliberate and intentional, given the testimony that the defendant ordered the victim out of his car, shot him in the chest when he refused, dragged his body out of the car and kicked him in the head. In closing, prosecutor is entitled to argue the evidence presented at trial and all reasonable inferences therefrom. Affd.)

Cochran v. State of Florida, 711 So.2d 1159 (4th DCA 1998) (prosecutor's argument to jury that any verdict other than a conviction would be to establish a "one free murder rule" in the community improperly inferred to the jury that a conviction would serve some larger social good, beyond the confines of the trial. Prosecutor also attempted to appeal to jury's sympathy by reference to victim's "little child". Reversed on totality of these and other errors.)

Kent v. State of Florida, 702 So.2d 265 (5th DCA 1997) (prosecutor's argument referring to criticism that the "system doesn't work ... doesn't protect people," reminding the jury that whether the def. "faces justice for what he did is on [their] shoulders" and asking them to provide the answer: "does the system work?", even if improperly urging jurors to convict def. for the good of society, were not objected to and not fundamental. Affirmed.)

DeFreitas v. State of Florida, 701 So.2d 593 (4th DCA 1997) (Improper for prosecutor to compare def.'s case with "O.J. Simpson" case.)

Jackson v. State of Florida, 690 So.2d 714 (4th DCA 1997) (where def. was charged with possession of cocaine, it was improper for State to suggest that def. might actually be a drug dealer because of the way the drugs were individually wrapped. Error was magnified by State's further statement that drugs were "root of all crime" and def. was the person "we have to thank for all that". Although counsel is allowed to argue the evidence and inferences that can be

logically drawn from the evidence, the prosecutor may not argue that the evidence suggests that the defendant is guilty of a crime greater than the one for which he has been tried.)

Sandoval v. State of Florida, 689 So.2d 1258 (3rd DCA 1997) (in case where def. was accused of possessing over 28 grams of cocaine, it was improper for prosecutor to argue that "[t]his substance makes crack cocaine that we find out on the streets of our cities day in and day out. Crack cocaine that destroys people and their families. This is not lemonade." This constituted an improper argument concerning the interest of the people of Florida to be safe in their environment, and a request that the jury "send the community a message." However, not reversible.)

Ramsaran v. State of Florida, 664 So.2d 1106 (4th DCA 1995) (where def. stated that he believed he had been charged in the case because he was known in the community as "a tough guy" and displayed to the jury an arm tattoo containing the words "original rude boy," it was not improper for state to comment on his reputation as well as the tattoo's wording and to offer a possible explanation concerning why certain witnesses had refused to speak to the police. The state's remarks concerned inferences that could be drawn from the evidence. Reversed on other grounds.)

Allen v. State of Florida, 662 So.2d 323 (Fla. 1995) (while arguing for the "committed by a person under a sentence of imprisonment" aggravator, prosecutor's comment that def. had escaped from a work release facility in Kansas in 1990, that "no form of control ... was adequate to take care of this def."... and "Had he served out his term of years in Kansas ... this crime might not have been committed" were not improper attempts to argue the non statutory aggravating factor of future dangerousness. Prosecutor did not predict that def. would murder again if he were sentenced to life imprisonment.)

Kirtsey v. State of Florida, 649 So.2d 946 (3rd DCA 1995) (Prosecutor's argument: "Though I don't have anybody sitting with me at my table, I do, behind my table, have everybody sort of looking over, peering over, wanting the State of Florida to be able to keep the streets safe, and that is my job. I just want you to keep that in mind" was improper but harmless. Affirmed.)

Pacifico v. State of Florida, 642 So.2d 1178 (1st DCA 1994) (improper for State to suggest to the jury that it was their duty to find the def. guilty. The prosecutor argued that if the def. walked out of court a free man, that would be the jury's decision --does he walk out laughing or do they make him take responsibility for his actions. When taking together, these comments infer to the jury that it is their duty to convict the accused for the good of society. Also improper for State to argue that people are raped all the time in their homes, shopping malls and cars where no such evidence was presented, therefore only serving to suggest to jurors that society generally is threatened by pervasive presence of rapists and prosecutor has special information on that subject.)

Esty v. State of Florida, 642 So.2d 1074 (Fla. 1994) (prosecutor's reference to def. as a

"dangerous, vicious, cold-blooded murderer" and comment that neither the police nor the judicial system can "protect us from people like that," although improper, was not so prejudicial as to vitiate the entire trial. Trial court sustained the objection and instructed the jury to "disregard the last comments of the State attorney." The control of the prosecutor's comments is within a trial court's discretion, and that court's ruling will not be overturned absent an abuse of discretion.)

Kelvin v. State of Florida, 610 So.2d 1359 (1st DCA 1992) (at murder trial, improper for state to argue that "defendant's spot" was at a certain location, that it was his "drug kingdom," that the young kids in the area were his "pawns," that he was the "king maker" that he was a convicted felon who could not legally possess a gun, and that he was on pretrial release and had been ordered deported.)

Hodges v. State of Florida, 595 So.2d 929 (Fla. 1992) (Prosecutor's argument, that if def. were not sentenced to death, he could laugh, cry, eat, read, watch TV and otherwise live in jail but that victim could never do any of those things because def. did not give her the choice but decided for himself that she should die, improperly urged jury to consider factors outside the scope of its deliberations. No proper objection and harmless under the circumstances. [NOTE: Prosecutor has made this same argument in several different cases and cases are reversed or affirmed depending on the circumstances of the case and existence or lack of proper objection.] [*Subsequently vacated by US Supreme Court and remanded to Fla. Supreme Ct. for review of aggravator's given to jury – Hodges v. Florida, 112 S.Ct 2926, Hodges v. State, 619 So.2d 272]*)

Taylor v. State of Florida, 583 So.2d 323 (Fla. 1991) (Prosecutor's argument, that if def. were not sentenced to death, he could laugh, cry, eat, read, watch TV and otherwise live in jail but that victim could never do any of those things because def. did not give her the choice but decided for himself that she should die, improperly urged jury to consider factors outside the scope of its deliberations. Proper objection and not harmless. Reversed. *[NOTE: Prosecutor has made this same argument in several different cases and cases are reversed or affirmed depending on the facts and circumstances of each case and existence or lack of proper objection.]*)

Arsis v. State of Florida, 581 So.2d 935 (3rd DCA 1991) (improper for prosecutor to argue that if def. were not made responsible for his actions, "[w]hat is to stop him from any future action" as this comment suggests that the def. will commit crimes in the future if not convicted in the case on trial.)

State of Florida v. Ramos, 579 So.2d 360 (4th DCA 1991) (improper for prosecutor to refer to ongoing narcotic investigation and suggest that prosecution of a "kingpin" over a "supplier" is warranted, as that implies that def. was caught up in an ongoing narcotics investigation and was a kingpin supplier of narcotics.")

Baker v. State of Florida, 578 So.2d 37 (4th DCA 1991) (improper for prosecutor to argue that "the interest of the people of the State of Florida in being safe in their environment" is at stake. Harmless error)

Alvarez v. State of Florida, 574 So.2d 1119 (3rd DCA 1991) (improper for prosecutor to argue that def. counsel wants jury to "walk him" and "turn him loose again".)

Jackson v. State of Florida, 522 So.2d 802 (Fla. 1988) (it was improper for prosecutor to comment in penalty phase closing that victims could no longer read books, visit their families, or see the sun rise in the morning as def. would be able to do if sentenced only to life in prison. Argument urged jurors to consider factors outside the scope of their deliberations. Also improper to request the jury to show that the community cares. Neither error sufficient to taint the validity of jury's recommendation. Affirmed. [NOTE: Prosecutor has made this same argument in several different cases and cases are reversed or affirmed depending on the circumstances of the case and existence or lack of proper objection.])

Teffeteller v. State of Florida, 439 So.2d 840 (Fla. 1983) (prosecutor's statement that if jury recommends life def. "will be eligible for parole in twenty-five years.... What do you think is going to happen? He's going to kill again.... He'll go after [witnesses].... Does he have to kill again before you think it's the proper case?...Don't give him that chance.... Don't let [def.] kill again." was an improper inflammatory argument. Trial court denied motion for mistrial and refused to give a cautionary instruction. Death sentence reversed and remanded for new penalty phase.)

Harris v. State of Florida, 438 So.2d 787 (Fla. 1983) (in penalty phase, prosecutor's comment: "The defense may tell you, Well, 25 years is a long time, 25 years without eligibility for parole, but I can tell you this: That in 25 years this 27 year old def. will be 52 years old. He will walk out of prison as he walked out of prison before" was not improper but was nothing more than what is in the statute itself and the instructions explaining to the jury the alternatives it has in advising the court of the appropriate sentence. The comment contained no assertion that def. would kill again and no lengthy lecture to the jury on the consequences of a life sentence for this def. Affirmed.)

Mason v. State of Florida, 438 So.2d 374 (Fla. 1983) (improper for prosecutor to argue that, if def. were turned loose, "he is going to do two days later ... just what he did two days after March the 18th" - [i.e. rob and rape] and that def. "has established a very, very clear pattern of criminality" and "absolutely cannot be rehabilitated." Errors were not sufficient to warrant new trial where def. counsel's objection to the first comment was sustained and the jury was instructed to disregard the comment. Affirmed.)

Salazar-Rodriguez v. State of Florida, 436 So.2d 269 (3rd DCA 1983) (it was neither proper nor harmless for prosecutor to argue: "... if you all condone what happened in Hialeah on September 22, 1981, well there is the front door. You can all walk them right through that door." Reversed.)

Rahmings v. State of Florida, 425 So.2d 1217 (2nd DCA 1983) (Although prosecutor in

aggravated assault case may have been referring to evidence of a previous altercation between the def. and the victim, it was improper to argue that a verdict of guilty would "prevent a murder" because "[o]ne day Rahmings is going to come out and pull that trigger." Comment created the impression that if the jury acquitted the def, she would subsequently commit a murder. Reversed.)

Williams v. State of Florida, 425 So.2d 591 (3rd DCA 1982) (improper for prosecutor to argue to jury: "[I]f you find ... the Defendant, not guilty, he can walk out of this courtroom. He can walk out, go to work again just like he did that night, nicely dressed.... [H]e walks out of the courtroom, gets dressed just as he did that night and goes to work." Error harmless.)

Gomez v. State of Florida, 415 So.2d 822 (3rd DCA 1982) ("Don't let that gentleman [victim] with three children and a wife walk away without justice in this case, facing possible jail [for admitted perjury], an arm that's hideously changed the rest of his life and let these gentlemen [def. and co-def.] walk away into our community and commit further crimes of this nature. These assassins must be put away. It is your duty to do that. You told me you'll do that." Remarks were so egregious that reversal was compelled.)

Harris v. State of Florida, 414 So.2d 557 (3rd DCA 1982) (It was improper for prosecutor to thank the jury on behalf of the victim, refer to crime being on the rampage in the community, refer to the victim's tearful breakdown on the witness stand and imply that it was due to defense counsel's tactics and express his personal belief in the def.'s guilt. Reversed)

Breedlove v. State of Florida, 413 So.2d 1 (Fla. 1982) (prosecutor's comments: "when we walk the streets we take our chances....One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home" were not improper. Comments reflect "common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place." Although other comments may have been improper, new trial was not required.)

McMillian v. State of Florida, 409 So.2d 197 (3rd DCA 1982) (Prosecutor's comment: "[I]f you want to let [defendant] walk out of here, if you want to let this kind of horrible crime go on in Dade County...." improper argument - Reversed because close case on evidence. Not harmless.)

Campbell v. State of Florida, 379 So.2d 1011 (4th DCA 1980) (Prosecutor's request to the jury not to find the defendant not guilty because of insanity, implying that he would be back on the street if they did was improper but could have been cured with instruction if proper objection had been made. Affirmed.)

Peterson v. State of Florida, 376 So.2d 1230 (4th DCA 1979) (Improper for State to argue to the jury the problems "America" has with drug "pushers" and the "slime" in which they dwell.)

Sims v. State of Florida, 371 So.2d 211 (3rd DCA 1979) (argument where prosecutor argued that jury was going to come back and shake def.'s hand saying "Go get another one" was an improper suggestion that def. would commit another murder if he was acquitted. Error exacerbated when, following court's sustaining objection, counsel repeated "go get another one." Reversed.)

Betsy v. State of Florida, 368 So.2d 436 (3rd DCA 1979) (Not error for prosecutor to request jury to perform their public duty by returning a guilty verdict)

Porter v. State of Florida, 347 So.2d 449 (3rd DCA 1977) (improper for prosecutor to argue: "what if you wanted to turn this pusher on the streets again?... If you want to put this man on the street to sell more heroin to people–." Reversed.)

Reed v. State of Florida, 333 So.2d 524 (1st DCA 1976) (in a marijuana prosecution where there was no evidence presented of def. having been previously engaged in the sale of drugs, improper for prosecutor to argue to the jury about drug use having skyrocketed, how it spread through schoolchildren and to state: "the welfare of the citizens of Florida and the people of Duval County, I'm contending, ask that you return a verdict of guilty ...." When taken together with other improper arguments, conviction was reversed despite the fact that the "trial judge valiantly tried to correct the inflammatory and prejudicial argument.")

Thomas v. State of Florida, 326 So.2d 413 (Fla. 1975) ("[Prosecutors'] discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty.")

Bullard v. State of Florida, 324 So.2d 652 (1st DCA 1975) ("If you turn this defendant loose, if you find him not guilty, ... when all of his friends and hoods come in here and make a mockery of our whole system of justice. How can anyone ever be convicted if he brings in all these convicted friends and thieves in here to testify and lie for him every time he's ever charged?" Improper but not reversible where curative given.)

Russell v. State of Florida, 233 So.2d 154 (4th DCA 1970) (improper for prosecutor to argue: "People are getting killed and I submit to you if we let this individual go in society, possibly something will happen ... that an innocent party, another innocent party could possibly get killed by this individual...." Prosecutor also argued that if the def. were not punished for his crime, "we are going to have a breakdown in society and we are going to have people getting stabbed all over Orange County." Reversed)

Wingate v. State of Florida, 232 So.2d 44 (3rd DCA 1970) (Improper for prosecutor to argue "I think there is at stake today the protection and safety of society....I am asking you not to allow this man to go back on the street and to redo those things that he has done."- Harmless.)

Chavez v. State of Florida, 215 So.2d 750 (2nd DCA 1968) (in drug prosecution, it was

improper for prosecutor to argue: "This is your community. If you believe that [the officer] is lying on that witness stand, if you think that he's mistaken then you come in with a verdict of an acquittal and let him go back out in your community and handle more morphine." Reversed)

Davis v. State of Florida, 214 So.2d 41 (3rd DCA 1968) (improper for prosecutor to argue: "if this man is sent out on the street to do the very same thing, the only question that can never be resolved, if you will,...'Am I to be next?'" Together with other improper comment. Reversed)

Grant v. State of Florida, 194 So.2d 612 (Fla. 1967) (prosecutor's argument during murder trial: "Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you" was reversible error despite lack of objection.)

Pait v. State of Florida, 112 So.2d 380 (Fla. 1959) (improper for prosecutor to inform jury that the def. had the right to appeal a guilty verdict but that the State could not appeal a conviction. Also improper for State to inform jury that, before deciding whether to seek death penalty, a conference is held at the State Attorney's Office to determine whether the death penalty is an appropriate punishment for the case. While prosecutor may urge jury to prescribe the death penalty on the basis of the evidence it heard, he may not undertake to give the jury the benefit of the composite judgment of the State Attorney's staff allegedly reached on the basis of investigations and discussions taking place before the trial. Comments found to be calculated to forestall a mercy recommendation, rather than casual, innocuous observations. Reversed)

Stewart v. State of Florida, 51 So.2d 494 (Fla. 1951) (prosecutor's abusive and inflammatory argument {"The time to stop a sexual fiend and maniac is in the beginning and not to wait until after some poor little child or some little girl lost her life ... or mutilated."} warranted a reversal of the conviction.)

C. Appeal to send a message to criminals or community

Fletcher v. State of Florida, 168 So.3d 186 (Fla. 2015) (although it was improper for prosecutor to tell the jury, on 3 occasions, to send a message to this def (*"and I ask you, ladies and gentlemen, send the message to this defendant that his behavior is not acceptable. ... Send the message to him and tell him, it's not okay to kill people. ... You send that message and you find him guilty as charged*), the phrase "send a message" was iterated only three times during the closing statements, all at roughly the same time. The prosecutor did not use this as a theme, and these were the only improper comments made during the closing statements. Since the evidence against the def was overwhelming, this error was not fundamental. Affirmed.)

Orme v. State of Florida, 896 So.2d 725 (Fla. 2005) (*death penalty* - Although the prosecutor did tell jurors that they were there on behalf of the community, the argument stopped short of what was found to be objectionable in other cases and did not encourage jurors to "do their duty"

for the community or "send a message" through their sentencing decision. Denial of post-conviction motion reversed on other grounds.)

Thornton v. State of Florida, 852 So.2d 911 (3rd DCA 2003)(it was improper for prosecutor to argue that "the only logical reasonable verdict which follows the law and the evidence *which speaks the truth in this community*, which the word verdict means." [emphasis added] Reversed on these and other grounds.)

Cherry v. Moore, 829 So.2d 873 (Fla. 2002) (Prosecutor's argument: "The criminal justice system in this country is a frustrating thing. People feel that they have no control over it. They have no voice in it. That it just happens, that all the rights are the Defendant's rights or whatever. It doesn't work well, it's slow, it's whatever. And they really have no voice in the criminal justice system, they're frustrated. And on the few occasions when they do have a voice, it seems like nobody cares, nobody listens, nobody pays attention. Today, ladies and gentlemen, each one of you individually and collectively have a unique opportunity in a situation. You have a voice in the criminal justice system. Not only do each of you have a voice, but that voice will be heard today" did not constitute fundamental error.)

Cox v. State of Florida, 819 So.2d 705 (Fla. 2002) (prosecutor's comment in penalty phase: "I stand before you again today on behalf of the decent law-abiding people of this community and this state, whom I represent" was not an improper emotional appeal to send a message to the community. The prosecutor was only stating whom he represented, albeit in a somewhat grandiose manner. Affirmed.)

Smith v. State of Florida, 818 So.2d 707 (5th DCA 2002) (Prosecutor's argument: "you are citizens that speak on behalf of your community in rendering a verdict in this case," approached the line of propriety and may have gone beyond. Courts have repeatedly condemned impassioned arguments which appeal to the jury's community sensibilities or civil conscience. Although the words "conscience of the community" where not used, the words evoke a sense of community responsibility. However, comment did not permeate closing argument. Isolated comment did not appear to be so prejudicial as to vitiate the entire trial. Affirmed.)

Card v. State of Florida, 803 So.2d 613 (Fla. 2001) (in penalty phase, it was improper for state to tell the jury that they are the "conscience of the community" and to argue that jury should not recommend a life sentence because there was no guarantee that the def. would actually serve life. Trial court's curative instruction informing jury that "there is no parole. There is no early release from the sentence on a life sentence" and that it meant "life, natural life of a person, no parole" cured the "life sentence" error. Isolated "conscience of the community" comment did not warrant a mistrial despite the fact that the trial court overruled counsel's objection. It was also improper for state to suggest to jury that they could weigh victim impact evidence in evaluating aggravating and mitigating circumstances. Errors not sufficient for reversal. Affirmed.)

Thornton v. State of Florida, 767 So.2d 1286 (5th DCA 2000) (Arguments which ask the jury

to convict a defendant for any reason except guilt are highly prejudicial and strongly discouraged. However, prosecutor's argument: "Show the defendant by your verdict that you're not going to ..." was not an attempt to send a message. Defendant claimed that although he was present at the scene, others committed the crime and he did not participate. Prosecutor was simply asking the jury to determine his guilt, and show him that if he commits a crime he must pay for it and cannot shift the burden or blame to others for his crime. Affirmed in part.)

Eure v. State of Florida, 764 So.2d 798 (2nd DCA 2000) (in trial for sale and possession of cocaine, prosecutor argued: "this is the man; this is the cocaine. This is the bane of our existence . . . . and there's the man who caused it. I'm asking you for one thing and one thing only: A verdict of guilty. Convict this drug dealer and convict him on the testimony of that detective." Argument was improper "message to the community" argument aimed at the juror's most elemental fears of a lawless community that could endanger the jurors and their families. This type of argument has long been condemned by the courts because of its "obvious appeal to the emotions and fears of the jurors." Reversed on this and other errors.)

Otero v. State of Florida, 754 So.2d 765 (3rd DCA 2000) (improper for prosecutor to repeatedly refer to jury as "conscience of society" and claim that their verdict would "project a conscience upon someone who doesn't have it, and that's exactly what your verdict should do." Harmless error where argument did not permeate the closing but was made only at the very end of the state's rebuttal argument and evidence was overwhelming.)

Brown v. State of Florida, 754 So.2d 188 (5th DCA 2000) (it was improper for prosecutor to argue that cocaine is "white death," that the trial day was the most important day in everyone's life, that def. stood accountable to the jury for distributing cocaine and that it permeated the courtroom, that the jury verdict could send a message to def. that trafficking in cocaine was unacceptable and that although his witnesses were not "vestal virgins" and he wished that the offense had been committed in front of the pope, "people like that" don't traffic in cocaine. Prosecutor also improperly commented that he had properly granted immunity to certain witnesses because he was doing his duty to root out drug traffickers. Reversed)

McDonald v. State of Florida, 743 So.2d 501 (Fla. 1999) (Defense objection to prosecutor's comment - that def.s circumvented the American way of life by killing for what they wanted, instead of working for it - on the grounds that it encouraged the jury to send a message to foreign citizens, is without merit. Several other arguments were improper but no objection was made. Affirmed.)

Grey v. State of Florida, 727 So.2d 1063 (4th DCA 1999) (prosecutor's comment ["Go back there for Margaret Bartlett and the people of the State of Florida and do your job. Render a verdict that's true."] was not of the "send a message" variety commonly condemned by the courts. Nonetheless, such a comment could be construed as an improper appeal to the jury for sympathy for the victim - and exhorting the jury to "do its job" may improperly exert pressure upon the jury and divert it from its responsibility to view the evidence independently and fairly.

However, when viewed in context (comment did not urge a particular verdict, just one that is "true") and together with entire closing argument, comment did not exceed permissible bounds or rise to the level of reversible error.)

Bell v. State of Florida, 723 So.2d 896 (2nd DCA 1998) (Although it was improper for prosecutor to vouch for the truthfulness of officers, urge the jury to send def. a message, argue matters not in evidence and comment on def.s exercise of his right to trial by jury, the errors were not fundamental and the only error objected to [def.s exercise of right to trial by jury] was harmless. Affirmed.)

Urbin v. State of Florida, 714 So.2d 411 (Fla. 1998) (improper for prosecutor to argue: "Now this def. wants a life sentence for robbing somebody and murdering them. What kind of message would that send - what kind of message would a life recommendation send to this def?" Death penalty reversed based upon cumulative effect of all errors.)

Sandoval v. State of Florida, 689 So.2d 1258 (3rd DCA 1997) (in case where def. was accused of possessing over 28 grams of cocaine, it was improper for prosecutor to argue that "[t]his substance makes crack cocaine that we find out on the streets of our cities day in and day out. Crack cocaine that destroys people and their families. This is not lemonade." This constituted an improper argument concerning the interest of the people of Florida to be safe in their environment, and a request that the jury "send the community a message." However, not reversible.)

Campbell v. State of Florida, 679 So.2d 720 (Fla. 1996) (prosecutor improperly commented to jury in closing in penalty phase of first-degree murder prosecution that death penalty was message sent to members of society who choose not to follow the law. Held: Reversed "'Message to the community' arguments are impermissible in penalty phase of death penalty cases because they are obvious appeals to emotions and fears of jurors, and these considerations are outside the scope of jury's deliberations. Their injection violates the prosecutor's duty to seek justice.")

Harris v. State of Florida, 619 So.2d 340 (1st DCA 1993) (improper for prosecutor to argue: "[T]his is a serious case. Not only serious in terms of the defendant but also serious in terms of the community. There is no question that there is a problem out there. And just as no one wants to see an innocent person convicted we certainly don't want to see another drug dealer let back out on the street." Argument asked the jury to convict the def. because it would send a message to drug dealers in the community. Error not preserved and not fundamental but case reversed on other grounds.)

Bass v. State of Florida, 547 So.2d 680 (1st DCA 1989) (in a case where only witnesses were def and victim, prosecutor's comment that one was lying and that if they want to tell the def. that he lied they should find him guilty could be and likely was interpreted by the jury as directing them to "send a message" about lying in the courtroom rather than focusing their attention on

whether reasonable doubt existed.)

Garron v. State of Florida, 528 So.2d 353 (Fla. 1988) (improper for prosecutor to state: "The people of the State of Florida ... have determined that in order to deter others from walking down the streets and gunning down....I would hope at this point, that the jurors will listen to the screams and to her desires for punishment for the def. and ask that you bring back a recommendation that will tell the people of Florida, that will deter people from permitting...." Reversed based upon cumulative errors. *Abrogation on other grounds recognized in 979/301*)

Bertolotti v. State of Florida, 476 So.2d 130 (Fla. 1985) (Prosecutor's comment that "anything less [than death] in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty" improperly urged the jury to consider the message its verdict would send to the community at large, an obvious appeal to the emotions and fears of jurors.)

Williard v. State of Florida, 462 So.2d 102 (2nd DCA 1985) (improper for prosecutor to urge jury to "tell the members of the community that the defendant's conduct...is unacceptable"–but affirmed as harmless. *Other holding on unrelated sentencing issue called into doubt in Sloan, 491/276.*)

Boatwright v. State of Florida, 452 So.2d 666 (4th DCA 1984) (improper for prosecutor to urge jurors to "send a message to criminals")

Perdomo v. State of Florida, 439 So.2d 314 (3rd DCA 1983) ("If you want to send a message out there 'Listen robbers you're picking on somebody by themself [sic], we are going to let you go because there is no corroborating evidence'...then set him free, that is fine with me. If that is what you want to happen in Dade County, you do that"--- improper "send a message" argument.)

Carr v. State of Florida, 430 So.2d 978 (3rd DCA 1983) (it was improper for prosecutor to argue: "Your job here, the reason why we have six people sitting here is because you are supposed to be the conscience of the community.... We want you to tell us if [def.'s] conduct ... is acceptable conduct in the community.... [T]hrough your verdict you tell that man this community is not going to tolerate this type of conduct under any circumstances." Error harmless in light of overwhelming evidence. Affirmed)

Hines v. State of Florida, 425 So.2d 589 (3rd DCA 1983) ("I am asking you, here to return a verdict in this case that you can be proud of. I am asking you to tell the community that you are not going to tolerate the violence that took place in Sewer Beach" was an improper "send a message" argument. Reversed.)

Gibson v. State of Florida, 351 So.2d 948 (Fla. 1977) (absent objection, prosecutors argument to jury that they should recommend death penalty because "it tells other people don't do it.... you just cannot do this and get away with it, you cannot gun down your fellow man and get away

with it" was not so prejudicial as to require a new trial. Affirmed)

Oliva v. State of Florida, 346 So.2d 1066 (3rd DCA 1977) (Prosecutor urging jurors to send a message to defendant that he can't go around peddling cocaine in Key West improper because not a comment on the evidence.)

Bullard v. State of Florida, 324 So.2d 652 (1st DCA 1975) ("If you turn this defendant loose, if you find him not guilty, ... when all of his friends and hoods come in here and make a mockery of our whole system of justice. How can anyone ever be convicted if he brings in all these convicted friends and thieves in here to testify and lie for him every time he's ever charged?" Improper but not reversible where curative given.)

III. Credibility issues

A. Attack on counsel's person, credibility or job

Evans v. State of Florida, 177 So.3d 1219 (Fla. 2015) (in responding to the defense argument that if he def had killed his estranged wife def would have picked up the shell casings left at the scene which matched his gun, it was improper for the prosecutor to attack def counsel by commenting: "And it's amazing that [defense counsel] suggests the reason def is not guilty is because there is evidence against him. Okay? Because the shell [casings] are there, he clearly didn't do it because he would have picked them up. I mean, only in a world populated by defense attorneys would that be true." Reversed for cumulative closing argument errors and other trial errors.)

Ramroop v. State of Florida, 174 So.3d 584 (5th DCA 2015) (after calling the defense "absolutely ludicrous," it was improper for prosecutor to attack def counsel by arguing: "You know, [Defense] Counsel has to argue what she has and that's what she has. … [D]efense counsel has to make the best argument she can based on what she's given. And she's done her job and that's what she's here to do." Argument improperly ridiculed def counsel. Not fundamental. Affirmed in part, reversed in part on other grounds.)

Howard v. State of Florida, 152 So.3d 825 (2nd DCA 2014) (it was improper for the state to refer to def counsel as a "magician" and imply that magicians are fraudulent and "dupe" people as it suggested she was relying on deceit to magically trick the jury into deciding in favor of the defendant. Notably, comments that "impugn the integrity or credibility of opposing counsel" are fundamental error. Reversed.)

Crew v. State of Florida, 146 So.3d 101 (5th DCA 2014) (improper for prosecutor to attack def counsel by arguing: *"[f]or three days, we've been in this courtroom and we've been listening to Mr. Zimmet's denials and nonsense about his client's involvement in a robbery."* The

prosecutor repeatedly referenced the defense attorney not minding Appellant's actions, *"throwing his client under the bus,"* disparaging the defense attorney's choice of the *"lowest offense the law will allow,"* and sarcastically saying *"Mr. Zimmet wants you to believe that his poor, misunderstood client . . . ."* Prosecutor's comments about the defense counsel's out-of-court questioning of a witness who suffered a stroke as *"[s]he gets questioned and questioned and questioned and questioned by three defense attorneys for an hour and a half off scene and here in the courtroom"* and referring to cross-examination as a "cheap shot" violates established case law. The prosecutor needlessly referred to the defense attorney's closing argument with sarcasm when he said, *"I'm going to invite Mr. Zimmet to step up" and "tell you what a good guy, what a moralistic guy that his client is."* Reversed for cumulative errors.)

Datilus v. State of Florida, 128 So.3d 122 (5th DCA 2013) (in case where DNA report originally excluded def. and was subsequently corrected to include def. as possible perpetrator, and defense counsel argued "[T]here are three types of lies; lies, damn lies and statistics. . . . I submit what the State's trying to do is pull a fast one on you," State's response: "Members of the jury, let's talk about the truth. Isn't that what we're here for? Not to obscure,"… and, after def. motion for mistrial was denied, "[Defense counsel] stated that the State's trying to pull a fast one, that we're trying to obscure the answer. Members of the jury, let's break it down and look for the answer, what the evidence actually shows…" was a proper argument. Affirmed.)

Fagins v. State of Florida, 116 So.3d 569 (3rd DCA 2013) ("[W]e note that comments on the credibility of counsel, such as those at issue in this case, are recurring in closing arguments at an alarming rate. We caution counsel for both the prosecution and defense to uphold their professional and ethical obligations and to be mindful of the line clearly established by the courts of this State. … *We also entreat the trial courts to be mindful of such misconduct and to respond accordingly with appropriate curative instructions and firm admonishment of counsel.*" [Emphasis added] No fundamental error. Affirmed.)

Braddy v State of Florida, 111 So.3d 810 (Fla. 2012) (in death penalty case, prosecutor's comment about def. refusing to give a sworn statement to police: "Why would he refuse? *I mean their whole thing is manipulation, misrepresentation*," comment that defense counsel must have been "in a different trial" because "[t]heir arguments make absolutely no sense," and statement that "[a]gain and again and again and again, from day one, this defendant has been trying to blame this victim," even if improper, were not properly preserved and do not rise to the level of fundamental error, even if combined with many other alleged errors. In penalty phase, characterizing defense counsel on two occasions as "screaming about" contested aggravating factors in order to draw attention away from those factors "written in stone," improperly denigrated the manner in which defense counsel conducted the defense. Likewise, the State improperly characterized defense counsel's cross-examination of the detective as an "attack" designed to undermine an aggravating factor. Defense counsel is entitled to question the evidence presented by the State to establish aggravating factors. Nonetheless, error not preserved and not fundamental.)

Toler v. State of Florida, 95 So.3d 913 (1st DCA 2012) (prosecutor's references to appellant as being a liar, to appellant's race ["This is a person who is willing to lie to get out of trouble. . . . [I]f there wasn't the physical evidence, you would be hearing a story about misidentification. You would be hearing a story about how all young black males look the same. *** Can't go with the story anymore of it wasn't me, you go into character assassination. Michael Brown is a bad person. He's gay. He likes young men. He basically uses prostitutes. He's some sort of sexual deviant. I'm honestly surprised that you didn't hear that he makes meth in his bathtub --"], and to matters for which there was absolutely no support in the record, in a manner both pejorative and sarcastic were so invasive and inflammatory, "it is questionable whether the jury could put aside the prosecutor's character attacks, and decide the case based strictly upon the evidence." [citation omitted] Reversed.)

Warmington v. State of Florida, 86 So.3d 1188 (3rd DCA 2012) (prosecutor's comment during closing: "Now, one of the tools used to confuse you . . .," even if properly preserved by the single word "objection," was not so egregious as to affect the fairness of the trial. Affirmed.)

Franqui v. State of Florida, 59 So.3d 82 (Fla. 2011) (in death penalty case appeal from post-conviction motion, prosecutor's comment: ""The lawyers that are arguing here before you this afternoon are the same lawyers in the other phase of the trial who told you that their clients confessed to a crime they didn't commit" was an improper attempt to impugn the integrity and credibility of defense counsel. Harmless when considered together with extensive evidence of aggravation presented to jury. Affirmed.)

Wicklow v. State of Florida, 43 So.3d 85 (4th DCA 2010) (conviction of robbery with a firearm reversed for cumulative effect of improper closing arguments including: "As is usually the case, the victim is on trial for something" (invoking sympathy from jury and suggesting that accusing the victim of wrongdoing is simply an improper defense tactic that the prosecution has seen many times); "[State Witness/Def's boyfriend] could have been charged with this crime right next to def., they could have been sitting right next to each other. The detectives made a decision not to do so based on their interview with them. I interviewed [Witness]. … even had the detective reread [him] Miranda, so that if we decided after the interview that he needed to be charged, he would be charged. He is not charged and it is irrelevant to the crime that was committed by def" (Facts not in evidence, improper bolstering, suggesting that the government's vast investigatory network, outside of trial, knows that the def is guilty); "The only conflicts are between the defense attorney and the evidence. That's it. Don't be manipulated. Don't be gullible" (personal attack on defense counsel suggesting impropriety). Reversed and remanded).

Caraballo v. State of Florida, 39 So.3d 1234 (Fla. 2010) (guilt phase - trial court did not err in denying a motion for mistrial when prosecutor argued that defense counsel asked certain irrelevant questions because he "has to distract you" and urged the jury to "keep your eye on the ball…." Trial court warned prosecutor who then moved on to discuss scientific evidence. Sentence of death vacated and remanded for new penalty phase on other grounds).

Boyd v. State of Florida, 963 So.2d 884 (3rd DCA 2007) (Prosecutor argued: "…I am confused. … [Y]esterday afternoon defense counsel ... told you that … he was the one who committed that burglary and that he was just looking for food … I don't know how [def counsel] on behalf of the defense can get up here with a straight face and tell you the exact opposite at 4:30 today." No abuse of discretion in denial of motion for a mistrial. Prosecutor's comment "regarding defense counsel bears no resemblance to the kinds of statements which Florida courts have found to require a new trial" Affirmed.)

Modha v. State of Florida, 962 So.2d 383 (5th DCA 2007) (*PCA-concurring opinion*-prosecutor's repeated suggestions that defense counsel had "continued" the alleged victim's embarrassment, discomfort and humiliation by challenging her credibility was particularly egregious and constituted a personal attack on opposing counsel. Counsel failed to object and error was not fundamental. Nonetheless, counsel are warned to refrain from inflammatory argument.)

Penalver v. State of Florida, 926 So.2d 1118 (Fla. 2006) (it was improper for prosecutor to suggest that witness had changed her identification of the def. after speaking with his counsel. It is impermissible for the state to suggest, without evidentiary support, that the defense has "gotten to" and changed a witness's testimony or that a witness has not testified out of fear. Such comment, in addition to being improper because it is not based on facts in evidence, is "highly irregular, impermissible, and prejudicial" because it improperly implies that def. engaged in witness tampering or suborning perjury, both criminal offenses. Reversed on cumulative error.)

Conde v. State of Florida, 860 So.2d 930 (Fla. 2003) (Prosecutor's suggestion that the defense's focus on certain issues was designed to lead the jury down the wrong road was not improper. Affirmed.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (it was improper for State to attack the defense by arguing: "And the second tragedy in this case is the defense doing all they can to throw whatever they can against the wall and see what sticks. ... The defense wants you to believe *** I mean, I don't know what trial that we're listening to here. ... The defense wants to make a big deal about when the defendant was arrested. ... The injustice here is that the defense wants you to rely on the facts that just aren't there. Woulda, coulda, shoulda, doesn't cut it here." A prosecutor may not ridicule a defendant or his theory of defense. Reversed on these and other grounds. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Kidd v. State of Florida, 855 So.2d 1165 (5th DCA 2003) (following defense counsel's argument which outlined the 13 year old victim's less than commendable behavior [i.e. sneaking out to meet her boyfriend [def.'s 14 year old son] and the def. and others, drinking large quantities of alcohol and smoking pot], prosecutor's argument which characterized defense counsel's argument as having suggested the victim should not be believed because she was acting "trashy so she got what she deserved" was not so egregious as to merit a new trial. [Objection

was sustained and the defense did not request a curative instruction or a mistrial. Therefore, only reversible error if fundamental.] Reversed in part on other grounds.)

Thornton v. State of Florida, 852 So.2d 911 (3rd DCA 2003)(it was improper for prosecutor to suggest that defense counsel had coached defense witnesses or suborned perjury: "[Defense counsel] says to you physical evidence can't lie, but witnesses, you can get them to say what you want. Is that what happened with Karen Wilson and Spider Bechum? They were going to say what the defense wanted them to –." Reversed on these and other grounds.)

Chandler v. State of Florida, 848 So.2d 1031 (Fla. 2003)(the prosecutor's use of the words and phrases "desperation, distortion and half-truths," charade," and "totally irrational" to characterize defense counsel's arguments as misleading was not improper. Although some of the descriptions may have been poorly chosen, more harsh than necessary or poorly expressed, the statements were made in reference to defense claims that the prosecutor felt were legally or factually inaccurate or logically inconsistent and, therefore, were not improper. Affirmed.)

Bell v. State of Florida, 841 So.2d 329 (Fla. 2002) (where def. counsel told jury in *death penalty* case that it should give def. the same sentence the co-def.'s received, prosecutor's argument that accused def. counsel of telling the jury not to follow the law was not improper but was an appropriate response.)

Sims v. State of Florida, 839 So.2d 807 (4th DCA 2003) (*dicta*-it was improper for State to argue to jury that they were told a "fish story" by the defense. Reversed on other grounds.)

Rudolph v. State of Florida, 832 So.2d 826 (3rd DCA 2002) (where, before summation, trial court distributed form order to counsel which, in part, prohibited counsel from using derogatory terms or making disparaging comments when referring to opposing counsel, and defense counsel disregarded the prohibition by arguing "Power is dangerous and maybe there should be a limit to the power that attorneys have and maybe there should be a limit to the deals attorneys can make and maybe power corrupts...,"[which the trial court found to be a derogatory comment on the prosecution and the lawyers in the case] it was proper for trial court to hold defense counsel in contempt of court for violating it's order. Counsel may point out perceived discrepancies in the evidence introduced at trial and opposing counsel's characterization of the same. However, it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury in the process. Affirmed.)

Adams v. State of Florida, 830 So.2d 911 (3rd DCA 2002)(it was improper for prosecutor to ignore court admonishments and personally attack defense counsel: "You know, the defense really tried to abuse Nathaniel by playing on his poor language – ... The defense tried to really push hard in cross-examination of this young boy.... The defense tried to get this young man of limited academics to change his testimony. ... Through their cross-examination of young Nathanial Pender, the defense tried in court to have Mr. Pender change his testimony. ... Despite whatever dances defense counsel might want to do with Nathaniel Pender." Given the three

sustained objections and the sidebar admonishment by the court, prosecutors continued attack on defense counsel irreparably impaired the jury's ability to render an impartial verdict. Reversed.)

Rimmer v. State of Florida, 825 So.2d 304 (Fla. 2002) (prosecutor's analogy to jury, asking them to think of themselves as baseball players, to keep their eyes on the ball (i.e. the facts and evidence in the case) and not be swayed by "sliders" or "outside fast balls" was not improper. Affirmed.)

Ford v. State of Florida, 802 So.2d 1121 (Fla. 2001) (trial court responded appropriately by: sustaining objection to state's "best defense is a good offense" argument and cautioning prosecutor about the burden of proof; sustaining the objection when the state argued that everyone, including the defense, had misidentified the exhibits; sustaining the objection when the state invited jurors to consider the prospect of defense counsel questioning Alexander Graham Bell on the workings of the telephone and sustaining the objection and cautioning jurors to disregard the prosecutor's comment that defense counsel had pulled a "bait and switch legal argument," instructing further that they should focus on the evidence in the case. Affirmed.)

Goodman v. State of Florida, 801 So.2d 1012 (4th DCA 2001) (where officer held fast to his testimony despite def. counsel's efforts to show inconsistencies with his depo testimony and officer accused def. counsel of "trying to put words in [his] mouth," it was not improper for state to argue: "And ask yourself where was the confusion in the testimony.... And rely on your own recollection. Don't take my word for it. Take the Detective's words. The words that were not clear, was what [def. counsel] was trying to put in his mouth." Affirmed. Remanded for correction of inconsistent conviction.)

Manning v. State of Florida, 801 So.2d 207 (4th DCA 2001) (although it was improper for State to tell the jury: "don't let the defense insult your intelligence," comment was isolated, objection was sustained and court instructed jury to disregard the comment. Affirmed.)

Lewis v. State of Florida, 780 So.2d 125 (3rd DCA 2001) (it was improper for State to attack defense counsel's integrity and suggest that he would suborn perjury: "If he could walk polka dotted pink elephants into this courtroom, he would do it... [defense counsel] is a highly skilled attorney with razor sharp skills.... Do you recall the abuse and ridicule piled on [the victim] by Defense counsel on cross-examination? ... I thought we were in a rape case and I had a woman up here who had been raped.... What you saw [when the def. testified] was an extremely well produced, and directed, and scripted story. And as sure as I am standing before you right now, you know that they went over, and over, and over, that story until they got it right. ... If I had a bridge, I would ask him to sell it for me. ... But [defense counsel] will tell you anything to get you to look away from the man who is sitting next to him, the Defendant. ...Everything around this circle are the pink elephants that the Defense counsel brings before you, and it's called reasonable doubt. That's B.S." Reversed)

Wolcott v. State of Florida, 774 So.2d 954 (5th DCA 2001)(improper for prosecutor to attack

defense counsel by pointing out to jury that defense counsel objected to evidence prosecutor wanted to present. "Now I tried to ask the deputy or officer if [the victim] had told him how she had found it, and [defense counsel] didn't want to let her say that because that was hearsay." Objections of counsel are also not part of the evidence. Reversed on these and other grounds.)

Brooks v. State of Florida, 762 So.2d 879 (Fla. 2000) (prosecutor's repeated reference to "those two criminal defense lawyers," in the context of what they had previously told the jury in opening statements and how the evidence showed otherwise, together with the suggestion that the prosecutor expected them "to get up here and argue to you that the law and the evidence that you've heard will support a recommendation of life" and that the evidence does not support what "those two criminal defense lawyers are going to argue to you" transcended the bounds of legitimate comment on the evidence and implied that the jury could not believe defense counsel or their arguments. Reversed due to many errors.)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (It was improper for State to attack defense counsel: "[Defense Counsel] has made this attack on the police officers here without giving you the benefit of reading what those reports really said in their entirety. He picked and chose.... He left stuff out.....I don't know why he thinks he can do that but he's done that.... [Defense counsel] asks you to take his word about what's in the police reports ... but he doesn't want you to have the whole police reports.... Why did he tell you half the story?... Does he create reasonable doubt in your minds with that kind of attack on the deputies?" Reversed on fundamental error when all other improper arguments are considered. [Note: In this case the appellate court lists a collection of errors like the ones above that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another panel of this DCA.])

Kellogg v. State of Florida, 761 So.2d 409 (2nd DCA 2000) (improper for state to comment during *voir dire*: "Obviously you know my name, and the fact that I'm an attorney and what type of law I practice. You know Mr. Howell is a public defender and the fact that he defends criminals." Reversed when combined with 13 incidents of badgering and expression of personal belief in def.'s guilt during def.'s cross-examination as well as closing comments on facts not in evidence and improper personal comments.)

Jones v. State of Florida, 760 So.2d 1057 (4th DCA 2000) (although it was grossly improper for prosecutor to argue that defense counsel was claiming that his client was in fear for his safety because "attorneys testify the way they're paid to testify," error was predicated in part on defense counsel's equally improper argument as to what he would have done under the circumstances and that he would have also been afraid of the victim. Moreover, defense counsel failed to properly object. Affirmed.)

Riggins v. State of Florida, 757 So.2d 567 (2nd DCA 2000) (in his response to def. counsel's argument that if the def. were going to commit a robbery, he would have put his bicycle closer to the door, it was improper for prosecutor to argue that the defense attorney would probably make an excellent armed robber and that he would probably handle being robbed better than the victim. Error harmless. Affirmed.)

Smith v. State of Florida, 754 So.2d 54 (3rd DCA 2000) (improper for prosecutor to comment on the motivations of def. counsel [opinion devoid of facts])

Rivero v. State of Florida, 752 So.2d 1244 (3rd DCA 2000) (it was improper for prosecutor to make "conscience of community" argument, claim that witness avoided service of process [a fact not in evidence], make disparaging attack on defense counsel and defense, vouch for credibility of witness, suggest that someone had gotten to a witness to change his testimony [implying that def. had tampered with a witness] and suggest that the state had additional facts, not in evidence. Eight objections were sustained but motion for mistrial denied. Error not harmless. Reversed)

Thomas v. State of Florida, 748 So.2d 970 (Fla. 1999) (Prosecutor's comments to the effect that the state's burden of proof is not higher because def. counsel "puts his arm around his client and parades around like some kind of martyr. It's not higher because [defense counsel] doesn't like police officers ... ," was an improper attack on def. counsel. However, the prejudice was minimized when trial court, in response to objection but no motion for mistrial, admonished prosecutor to avoid personalizing the closing argument and instructed jury to disregard. Also, prosecutor voluntarily apologized and told jury that def. counsel was a good attorney. Reversed on other grounds.)

Williams v. State of Florida, 744 So.2d 1103 (3rd DCA 1999) (not improper for prosecutor to urge jury that it should "not let the defense sell you a used car." Comment was not an attack on the character of counsel but a permissible comment on the quality of the defendant's case. [distinguishing *Jackson*]. Also, harmless. Affirmed)

Barnes v. State of Florida, 743 So.2d 1105 (4th DCA 1999) (improper for prosecutor to refer to the testimony of def. counsel, who was testifying on def.s behalf with regard to the suggestiveness of the lineup, as "the mercenary actions of ... a hired gun." Trial courts instruction that the jury should "ignore the last comment" was ambiguous in that it was unclear if it referred to the prosecutor's statement or def. counsel's request that it be stricken. "For a curative instruction conceivably to erase the palpable prejudice to the def. in this situation, the court should have condemned the comment in the clearest and most unmistakable terms. In these circumstances, it might even have been proper for the court to question the jurors to determine whether the effects ... could be set aside." Fundamental error. Prosecutor referred to Fla. Bar for repeated violations.)

D'Ambrosio v. State of Florida, 736 So.2d 44 (5th DCA 1999) (improper for prosecutor to argue that def. counsel is praying for jury to engage in "baseless speculation," "a sea of

confusion" and "unsupported innuendoes" and that def. counsel "did it with every witness, every witness" as those constitute derogatory comments about def. counsel. Reversed on many errors.)

Del Rio v. State of Florida, 732 So.2d 1100 (3rd DCA 1999) (prosecutor's unwarranted attack on defense counsel who "claims to be a lawyer in good standing" who will "get up when I sit down and try to tell you what the evidence showed" improperly attacked the integrity of opposing counsel. Harmless in view of overwhelming evidence of guilt. Affirmed. [this is a corrected opinion adding a footnote referring the prosecutor to the Florida Bar for investigation])

Young v. State of Florida, 720 So.2d 1101 (1st DCA 1998) (Following def.s questioning of victim about her history of mental illness, use of medication and knowledge of sexual acts, prosecutor stated in closing: "I'm going to come right out and say what nobody has said, '[victim] you are a piece of trash-you are brain dead, you have problems and you're on drugs.' "[indirectly attacking def. counsel for his cross] App Ct. cautioned against such "hyperbolic expression." In cases were a witnesses credibility is the pivotal issue, inappropriate prosecutorial comment which might be considered harmless in another context can become prejudicially harmful. Mistrial not warranted. Reversed on other grounds.)

Legette v. State of Florida, 718 So.2d 878 (4th DCA 1998) (improper for prosecutor to argue that def. attorney had requested lesser included offenses, since it concerned a matter both outside the evidence and inappropriate for the jury's consideration. A prosecutor's disclosure of a legal position taken by a defense lawyer can affect the lawyer's credibility before the jury, which may perceive that the lawyer is arguing for an acquittal, but will settle for a lesser included offense. Error not preserved and not fundamental. Affirmed.)

Palazon v. State of Florida, 711 So.2d 1176 (2nd DCA 1998) (improper for prosecutor to attack defense counsel for his cross examination of the victim, arguing that "the best he can do" is challenge her recollection of whether def. was sitting on the couch or in a chair and that maybe def. counsel would know what to do if he was raped; maybe he would fight or jump out a window, but "it's pretty easy sitting back in his cushy law office...playing Monday morning quarterback...." Combined with prosecutor's comment in response to defense counsel's objection: "I call them like I see them," argument deprived def. of a fair trial in what was a close case. Reversed)

Lewis v. State of Florida, 711 So.2d 205 (3rd DCA 1998) ("It's my job to present the evidence and it is their job to question the evidence. But you know, the manner with which they're questioning it, there's no other term for it, it's just lame" held impermissible attack on defense. Error harmless given facts of the case. Affirmed.)

Baker v. State of Florida, 705 So.2d 139 (3rd DCA 1998) (improper for prosecutor to imply to jury that defense counsel was fishing for gullible jurors. As comments were not invited response to defenses closing and no curative instruction or instruction to disregard the comments was given by the court, reversible error occurred. Reversed.)

Chandler v. State of Florida, 702 So.2d 186 (Fla. 1997) (improper for prosecutor to argue that def. counsel engaged in "cowardly" and "despicable" conduct and that def. was "malevolent ... a brutal rapist and conscienceless murderer," but although comments were petty they were not so prejudicial as to vitiate the entire trial. Affirmed)

De Jesus v. State of Florida, 684 So.2d 875 (3rd DCA 1996) (Prosecutor argued that def. counsel's claim that the evidence is insufficient was to be expected because "that's her job. She is defending the defendant.... When you have the law, you emphasize the law. When you have the facts you emphasize the facts. And when you don't have anything, you bang on the table and attack the credibility of the witnesses." These comments were within the range of appropriate advocacy and not erroneous.)

State of Florida v. Benton, 662 So.2d 1364 (3rd DCA 1995) (improper for prosecutor to comment that it is defense counsel's "job to cross things up, to muddy the water," however, single degrading comment insufficient to warrant a new trial.)

Williams v. State of Florida, 593 So.2d 1189 (3rd DCA 1992) (improper for prosecutor to suggest that defense wanted jury to feel sorry for def., disobey the law and find def. guilty of a lesser charge. It is improper for State to attack the person of the def. or his valid defense.)

Alvarez v. State of Florida, 574 So.2d 1119 (3rd DCA 1991) (improper for prosecutor to argue that def. counsel will only try to confuse the jury and that def.'s argument insults the jury's intelligence. Also improper to refer to def. as a "madman" on a "rampage", a burglar and a robber, and to ask the jury to "excise this cancer.")

Jenkins v. State of Florida, 563 So.2d 791 (1st DCA 1990) (error for prosecutor to personally attack def. counsel by accusing him of further victimizing the victim and of seeking an acquittal at all costs rather than searching for the truth)

State of Florida v. Lewis, 543 So.2d 760 (2nd DCA 1989) (Prosecutor's comment: "He [defense counsel] may want to pooh-pooh [the medical examiner], or put her down, as he's done all the rest of us in the trial, which is his job to do as a lawyer, I understand that,..." probably invited by defense counsel's claim that "[t]his is a case of a bungled crime scene, a pressured investigation, and a desperate prosecution." If there was error, it was sufficiently addressed by the judge's instruction to "disregard the prosecutor's comments on the job of the defense attorney")

Redish v. State of Florida, 525 So.2d 928 (1st DCA 1988) (improper to claim that defense counsel had engaged in "cheap tricks". Reversed because of combination of errors)

Waters v. State of Florida, 486 So.2d 614 (5th DCA 1986) (improper for prosecutor to refer to defense counsel's closing argument as misleading and a smoke screen. Reversed on these and

other grounds.)

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) (personal attacks on defense counsel's honesty and statement that he was playing "hide the ball" improper)

Briggs v. State of Florida, 455 So.2d 519 (1st DCA 1984) (Improper for prosecutor to suggest that defense counsel was not being truthful and deliberately misleading the jury. Should comment on the evidence, not try credibility of counsel--case has good citations to other improper argument cases).

Williams v. State of Florida, 441 So.2d 1157 (3rd DCA 1983) (Prosecutor's analogy of defense counsel's argument to that of a squid attempting to cloud the water not improper. "A prosecutor's jury argument need not rise to the level of the giants of our profession in order to be proper under the law")

Harris v. State of Florida, 414 So.2d 557 (3rd DCA 1982) (It was improper for prosecutor to thank the jury on behalf of the victim, refer to crime being on the rampage in the community, refer to the victim's tearful breakdown on the witness stand and imply that it was due to defense counsel's tactics and express his personal belief in the def.'s guilt. Reversed)

Cooper v. State of Florida, 413 So.2d 1244 (1st DCA 1982) (comment that "lessers" were "an old defense trick" to get less than what def. is really guilty of was improper)

Melton v. State of Florida, 402 So.2d 30 (1st DCA 1981) (comment about arguments defense counsel, in general, "will come up with just to try to thwart the jury using common sense" was a "gratuitous insult to the adversary system of justice" and highly improper).

Carter v. State of Florida, 356 So.2d 67 (1st DCA 1978) ("She's trying to mislead you, that's her job...It's almost criminal the extent these people go to...." --reversible error)

Simpson v. State of Florida, 352 So.2d 125 (1st DCA 1977) (prosecutor's comment about "one of the favorite tricks of a defense lawyer" was a gratuitous insult to the adversary system of justice which he serves and he was admonished by appellate court. Affirmed)

Johnson v. State of Florida, 351 So.2d 10 (Fla. 1977) (although it was improper for prosecutor to argue that def. counsel sought to make a mockery of Hamilton County, error was not so prejudicial as to warrant a mistrial. Reversed in part on other grounds.)

Cochran v. State of Florida, 280 So.2d 42 (1st DCA 1973) (improper for prosecutor to make comments during closing about "defense technique" and "... how defense lawyers operate ...." Such comments are not only improper but also unethical. Harmless. Affirmed.)

Adams v. State of Florida, 192 So.2d 762 (Fla. 1966) ("Let me just show you what perverted

and distorted things a lawyer can do when he wants to do it." *** "He has no business being a lawyer if ....") It is the duty of counsel to refrain from inflammatory and abusive argument.)

Akin v. State of Florida, 98 So. 609 (Fla. 1923) (Improper for prosecutor to comment on counsel's demeanor: "Just look at the def.'s counsel. See how nervous and uneasy he is, and well he may be uneasy and nervous with such a case made out against his client." Any attempt to ... influence the jury by the statement of facts or conditions not supported by the evidence should be rebuked by the trial court, and, if by such misconduct a verdict was influenced, a new trial should be granted. Prejudicial and unwarranted remarks and considerations deprived def. of a fair trial. Reversed.)

B. Improperly attacking or bolstering case or defense

Evans v. State of Florida, 177 So.3d 1219 (Fla. 2015) (where def. was accused of shooting to death his estranged wife and her new boyfriend, his holster and shell casings matching his gun were found at the scene and the victims were heard calling him by name on a 911 call, but def counsel argued that if def had actually killed them he wouldn't have left the casings behind for the police to find, it was improper for the state to denigrate the defense by arguing that the defense is so farfetched and unbelieveable that it would not even be written for a television series: "[T}he defense of this, I suggest, is that somebody else did that and intentionally left the stuff so the police would believe that def did it, that he's being framed . . . . What a clever frame these people had that they could -- this real murderer, that he could get Beth and Jerry to go along with this perfect script where they actually called him Rick and they could scream and do all this stuff. And they had it on the 911 tape. … And he could kill them and then he could leave the holster and leave the casings so they would think -- because they stole the gun from Rick earlier so that they would think that Rick did it. I mean, talk about bad TV. That wouldn't even make it on TV." A prosecutor is not permitted to denigrate the defense. Reversed for cumulative closing argument errors and other trial errors.)

Jordan v. State of Florida, 176 So.3d 920 (Fla. 2015) (although it is improper for attorney to refer to caselaw, citations or the facts or holdings of other cases in closing argument, prosecutor was cut off by objection after only saying "the way the caselaw interprets that…." He went on to explain to the jury how the law was applicable to the evidence presented at trial. Such an explanation is a permissible argument. "It is appropriate for an attorney who does not misstate the law to relate it to the facts of the case in closing argument." … However, [t]he correct practice does not permit counsel to read authorities to the jury, and while counsel may submit his [or her] theory of the law in written requested charges, it is the function of the trial court to charge the law applicable to the issues in the case." Affirmed.)

Ramroop v. State of Florida, 174 So.3d 584 (5th DCA 2015) (in case where def claimed he didn't attempt to shoot at officer during car chase and def counsel theorized that bullet from def's gun, found lodged in def's door frame, may have accidentally fired as weapon flew through def's

windshield as he struck another vehicle at the end of chase, it was improper for state to improperly ridicule def argument by analogizing bullet to the "magic loogie" of *Seinfeld* sitcom, calling it "incredible," "absolutely ludicrous," and eventually apologizing to the jury for his sarcasm by saying that the "story" is "so fictional" that it's hard for him to hold back his sarcasm. Not fundamental. Affirmed in part, reversed in part on other grounds.)

Carr v. State of Florida, 156 So. 3d 1052 (Fla. 2015) (*death penalty* - prosecutor did not improperly denigrate mitigating factor concerning def's history of sexual abuse by claiming it should be given less weight since it was not connected to the murder. While it is improper to denigrate mitigation by characterizing it as "flimsy," "phantom," and "excuses," it is not improper to attempt to rebut the mitigation and to ask the jury to put it in context. The prosecutor acknowledged that def's history of sexual abuse was a mitigating circumstance but asked the jury to put it in context (give it less weight) based on the mental health expert's testimony that def's abuse did not contribute to victim's murder. Similarly, prosecutor did not improperly invoke sympathy by arguing victim impact as an aggravating factor when he told the jury (as he addressed the mitigating factors of her difficult childhood and mothering abilities) that, as a result of the murder, the victim's children were being adopted by another family. While it is improper for a prosecutor to inform jurors that they can weigh victim impact evidence as aggravation, comments that are "a fair statement of the evidence produced during the trial" are not improper, prosecutor may comment on the impact victim's death had on victim's friends and family, and prosecutor may properly argue that a mitigator should be given less weight based on the facts of the case. Prosecutor properly argued that def's difficult childhood and mothering abilities constitute valid mitigation but that the jury should not give those mitigators much significance under the facts of the case. Affirmed. [NOTE: although def argument was "invoke sympathy," claim is included her because it can also be raised as "improper bolstering" for creating a non-statutory aggravator])

Brinson v. State of Florida, 153 So.3d 972 (5th DCA 2015) (in domestic violence prosecution it was improper for prosecutor to argue that the state evaluates cases in order to determine if charges should be filed, that it is state's obligation to bring this case to protect the victim, that the state feels this case is "worth our time," how domestic violence victims typically behave and that the victim had never been convicted of a felony. Such comments improperly bolstered the case by suggesting that the state only charges those who are guilty and by referring to facts not in evidence and expressed improper personal opinion. Reversed due to these and other improper arguments.)

Howard v. State of Florida, 152 So.3d 825 (2nd DCA 2014) (for the State to argue at closing that there were "documents with [the prosecutor's] name and [the prosecutor's] bar number . . . and his signature signed on them" that showed flip-def was not receiving a deal for his testimony was a grossly improper reference to information not in evidence that had the calculated effect of bolstering flip-def's testimony after the fact.)

Poole v. State of Florida, 151 So.3d 402 (Fla. 2014) (in this death penalty case, although it was

improper for prosecutor to refer to def's family's mitigation testimony about his head injury as "all that crap," error was not fundamental where trial court sustained objection, informed the jury that the comment was improper and instructed them to disregard it. Further, the prosecutor explained to the jury that he was not attempting to tell them not to consider the evidence presented by defs family, but was instead requesting that the jury give more weight to the doctors' evidence regarding defs head injuries. Affirmed.)

Jackson v. State of Florida, 147 So.3d 469 (Fla. 2014) ("improper vouching or bolstering occurs when the State 'places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony.'" [citation omitted] Prosecutor did not improperly bolster witnesses' testimony by asserting that they were courageous for testifying because they had been threatened where evidence was presented indicating that the def and co-def had both threatened witnesses. The State was discussing evidence before the jury and asking the jury to consider the evidence before it when weighing the credibility of the witnesses. Moreover, although prosecutor should take caution against making comments that ridicule a def for making a defense, statement that serial killer defense was "grasping at straws" was relatively minor and brief. Def. counsel was not ineffective for failing to object. Affirmed.)

Young v. State of Florida, 137 So.3d 532 (4th DCA 2014) (where def. attorney argued in closing that photo lineup was unduly suggestive, it was error for prosecutor to respond: "if it was unduly suggestive, you wouldn't have heard that because that would have been a matter of law for the Judge to decide. And remember we talked about that in jury selection, everyone has a role? Judge's role is a matter of law. So if there were anything to suppress because it was unduly suggestive, it would have been suppressed, but it wasn't." By arguing to the jury that if the lineup was inherently suggestive it would have been suppressed, the prosecutor suggested that the reliability of the lineup had already been decided by the trial court. Such a response was not "invited" by def counsel challenging the credibility of the photo lineup. Although curative instruction could have been given advising jury that it was empowered to form its own opinion about the credibility of the victim's testimony and the pretrial identification of the defendant, judge's curative instruction ["All right, once -- once again, ladies and gentlemen, you've heard it several times even from the attorneys and you'll hear it from me again at this moment, decisions of law, rulings on the law are the province of the Court. I will instruct you on the law. Nothing you hear from either one of these attorneys, *even if it happens to be correct*, is -- is your instruction on the law…"] did not cure the error and photo identification was a hotly contested issue. Reversed.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – prosecutor's comments that defense was "not true," "lies," or "silly," the prosecutor's suggestions that def's account of what happened to the victim should be thrown "out the window," "would not fly today," "makes no sense," and has "changed," and the prosecutor's statements that the jury was "supposed to believe" the defense, were permissible expressions of the inference that def's statements were inconsistent with the other evidence, not derisive comments offered merely to ridicule the

defense. However, prosecutor's statements that def "probably doesn't have the same wisdom as counsel does with respect to knowing that an unconscious child can't choke on a French fry (although based on the evidence presented at trial) and that def was "in la-la land," were arguably "needless sarcasm." In addition, "prosecutorial expertise" argument that *"the State of Florida does not seek the death penalty in every case, because it's not just proper in every case. But I submit to you, in this case, it most certainly is"* was improper. Nonetheless, errors not fundamental. Denial of post-conviction motion affirmed.)

Yi v. State of Florida, 128 So.3d 186 (5th DCA 2013) (it was improper for prosecutor to denigrate the defense by calling it absurd and saying that defense counsel was grasping at straws. [Note: Dicta, case already reversed on other grounds])

Victorino v. State of Florida, 127 So.3d 478 (Fla. 2013) (*death penalty* – Prosecutor's comment: *"You know, I guess some people say we really threw the book at these guys and did everything we could to charge them with everything we could, and let me say this. That's the decision[ ] that we make, but we're very careful what we do,"* was not improper bolstering. Prosecutor went on to explain how the particular charges are matched to the evidence in the case and why some charges differ between victims based on differing injuries. Argument was designed to explain why the "State filed so many charges," and how those charges were based on specific acts attributed to the various defendants. Denial of post-conviction motion affirmed/habeas denied.)

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (in death penalty case, prosecutor's reference to "the determination . . . that the State has to make in bringing a case like this to you as a death penalty case" raises concerns that the prosecutor is "vouching" to the jury for the case being a "death" case. Error, if any, was not fundamental where it was paired with a discussion about the state's obligation to "prove the aggravators beyond a reasonable doubt." Other comment that: "[t]he death penalty is not applied to every murder case. It just isn't because, of course, each case is taken on its own merits. *** In determining that, where the State is seeking the death penalty, what we have to look at are those murder cases that are so egregious, those defendants who commit acts that are so egregious, who have backgrounds that are so bad that they have earned the death penalty" is reasonably understood as a reference to the legal framework governing imposition of the death penalty, rather than to the State's determination whether to seek the death penalty. Finally, the court did not err [implied] in allowing the state to argue that def's "lovely, lovely, lovely family" actually "highlights…the fact that the aggravators outweigh the mitigators." Such argument did not denigrate def's mitigators or convert them to non-statutory aggravators and the court properly instructed the jury that closing arguments were not evidence and on the proper application of aggravation and mitigation. Conviction and sentence affirmed.)

Valentine v. State of Florida, 98 So.3d 44 (Fla. 2012) (death penalty - following def counsel's claim that victim was lying about def/ex-husband being the person who killed her new husband and tried to kill her, prosecutor's argument (*"[Defense counsel] wants you to believe that [the*

victim] is lying … he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe … as she was laying there, bound, bloodied, naked, wondering if she was going to live or die, not knowing if she would ever see her children again, she thought, "Hey, if I say [Valentine] did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half") was not improper. The prosecutor did not ridicule or otherwise improperly attack the defense's theory of the case; she merely described the defense's theory of the case and stated that the defense wanted the jury to "somehow" believe that theory. "Prosecutorial comments are not improper where, incident to evaluating a witness' credibility, jurors are told to ask themselves what motive the [witness] would have to deceive them." [citation omitted] Indicating to the jury that, based on the evidence of the case, they should question the plausibility of the defense's theory of the case is within a prosecutor's role of assisting the jury to consider and to evaluate the evidence presented. Further, prosecutor's additional argument: "What motive does anybody in the world have to do this to [her] except the man who so hated her and who thought that she was keeping him from his child and who thought that she had his belongings and that they were rightfully his? … Who else would do this commando raid into that house and really not take anything except the life of her husband? Who else was calling her and telling her to disappear? No one. No one in this world" was not improper bolstering. At no point did the prosecution make any comment that could be seen as placing the government's credibility or prestige behind a witness. Nor did the prosecutor indicate that there was additional, undisclosed evidence that was indicative of def's guilt. "Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment." Denial of post-conviction motion affirmed)

DeHall v. State of Florida, 95 So.3d 134 (Fla. 2012) (in death penalty case, it was improper for prosecutor to characterize def's mitigating circumstances as "excuses" and then, after objection was sustained, continue: "every single thing that was presented to you in mitigation, which I really think was one thing, stretched it out [to] make it more, but it's one, it's an excuse." Conviction affirmed and remanded for new penalty phase when combined with other improper comments.)

Mosley v. State of Florida, 46 So.3d 510 (Fla. 2009) (*penalty phase* – although prosecutors mention in voir dire and again during penalty closing that the death penalty is not sought "in every first degree murder case" came close to prohibition against first degree murder prescreening comments (arguments that are improper because they tend to cloak the case with legitimacy as a bona fide death penalty prosecution, much like an improper vouching argument), comments were relatively brief and were primarily made to inform the voir dire panel and the penalty phase jury of the process for weighing aggravators and mitigators. Affirmed.)

Ferrell v. State of Florida, 29 So.3d 959 (Fla. 2010) (penalty phase – where prosecutor argued that jury would be violating their lawful duty if they did not vote for death ("Some of you may be tempted to take the easy way out…you may be tempted not to weigh all of these aggravating circumstances and to consider the mitigating circumstances. *That you may not want to carry out*

your full responsibility under the law and just decide to take the easy way out and to vote for death, I'm sorry, vote for life [emphasis added]. I ask you not to be tempted to do that. I ask you to follow the law, to carefully weigh the aggravating circumstances, to consider the mitigating circumstances, and you will see these aggravating circumstances clearly outweigh any mitigating circumstances. And then under the law and the facts death is a proper recommendation."); argued that the age mitigator could only apply to someone younger than def. ("No per se rule exists to pinpoint a particular age as an automatic factor in mitigation." Barnhill v. State, 834/836); argued that this was a bona fide death penalty case ("the State doesn't seek the death penalty in all first degree murders…But where the facts … demand the death penalty, the state has an obligation….This is one of those cases"); vouched for the credibility of several witnesses and urged the jury to "show this def the same sympathy, the same mercy he showed [victim] and that was none," trial court's order granting a new penalty phase is Affirmed.)

White v. State of Florida, 17 So.3d 822 (5th DCA 2009) (*opening statement* – It was not improper for prosecutor to mention in opening statement and again during questioning that co-def was required to take a polygraph as part of her plea agreement and that she changed her story to implicate def when faced with having to take the examination. Although defense counsel claims that allowing the jury to hear that the witness took a polygraph suggests that her testimony was verified by the results, the mere mention of a polygraph is not prejudicial when no inference is raised as to the result or any inference that could be raised is not prejudicial. Neither witness's testimony nor prosecutor's comment indicated the results or raised an inference as to the results of the polygraph. Instead, they indicated that co-def finally told the truth and implicated def when confronted with the prospect of taking the polygraph examination. Affirmed.)

Poole v. State of Florida, 997 So.2d 382 (Fla. 2008) (*penalty phase*: "A picture of a church, isn't that nice. When did he go to this church? When he was like 12, 16, 19. He is 39 years old when he murdered this boy. 39. Does it matter what he looked like in this picture? Was Ted Bundy okay in the fourth grade? I don't care; and I think you shouldn't care what he was doing in the fourth grade. A nice little picture in the fourth grade." Def. claims comment belittled his mitigation evidence and commented on matters not in evidence. Comment was not improper because prosecutor was attempting to rebut mitigation evidence of his church-going childhood by pointing out that although he may have been a church-going boy at one point, he was not a child anymore. He was now a 39 year old man who had committed a crime. Further, prosecutor's comment as to def's brain damage mitigator: "you are free to reject it if you want and say I don't think brain damage mitigates against the death penalty," when taken in context, was not improper. Prosecutor acknowledged that it was uncontroverted that def had brain damage but was arguing it was not enough to recommend a life sentence. Conviction affirmed, new penalty phase ordered on other grounds.)

Wilson v. State of Florida, 964 So.2d 241 (4th DCA 2007) (prosecutor was improperly seeking sympathy for victim when he told the jury in closing that part of the defense was "that you cheapen the victim, you cheapen the crime" and that "if you don't care about [the victim], you don't think he deserves protection under the law, then you find them not guilty." In a case where

the defense has denigrated the victim, particularly where the victim is poor and possibly has a criminal record, then the prosecutor can justifiably comment on the defense strategy of attacking the victim. Here, however, the defense argued that no one was saying the victim was a bad guy; he had simply been confused about who had robbed him. "[The victim] is not a bad person. And if you find not guilty, you're not saying he's a bad person, he's confused and it's not his fault." Affirmed where court sustained the objection and gave a curative instruction.

Fonte v. State of Florida, 913 So.2d 670 (3rd DCA 2005) (It was improper for prosecutor to argue to jury that "if it was self-defense, I submit that they [the police] would not have arrested him." Objection, request for curative instruction and motion for mistrial were overruled. Error harmless because medical evidence and def.'s own account of incident were inconsistent with self-defense [def. claimed to have disarmed the intoxicated victim and then stabbed the unarmed victim 3 times in the back]. Affirmed in part, reversed as to downward departure.)

Romero v. State of Florida, 901 So.2d 260 (4th DCA 2005) (where def. was accused of shooting both victims but claimed that victim two had shot victim one and that def. had attacked and shot victim two in self-defense, and state elicited testimony from widow of victim one that victims were close friends, it was error for trial court to sustain State's "beyond the scope" objection when defense counsel attempted to ask widow if def. and victim one were also friends. Proffered testimony was that widow would confirm that they were also friends, dispelling the impression that def., not victim two, was more likely to have shot victim one. Error was compounded when, after precluding widow from answering the question, State argued in closing that although other witnesses had said that both victims were friends, the only witness to testify that victim one and defendant were friends was the defendant himself pointing out for the jury that the widow never corroborated that fact. "The state is prohibited from preventing the defense from introducing evidence to the jury and then using the absence of that evidence to strengthen its case for guilt." Reversed.)

Dendy v. State of Florida, 896 So.2d 800 (4th DCA 2005) (It was improper for prosecutor to argue that def.'s request to arresting officer for an attorney before his arrest was evidence of his "consciousness of guilt." Reversed on these and other grounds.)

Cartwright v. State of Florida, 885 So.2d 1010 (4th DCA 2004) (it was improper for State to suggest to the jury that the State charges only those who are guilty: "But before anything happened, before he was formally charged by the Office of the State's Attorney, sworn statements were taken to assure the police agency and the State Attorney's office that this prosecution is being put forth in good faith." Reversed on cumulative error.)

Anderson v. State of Florida, 863 So.2d 169 (Fla. 2003) (it was improper for prosecutor to denigrate the defense by arguing: "I've come to the conclusion that if I had to put this defense into a category that it doesn't fit in any of the standard categories, what I would call this defense is 'the National Enquire [sic] Defense." However, comment did not deprive the def. of a fair and impartial trial, materially contribute to the conviction, was not so harmful or fundamentally

tainted as to require a new trial or so inflammatory that they might have influenced the jury to reach a more sever verdict than it would have otherwise reached. Affirmed.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (it was improper for State to attack the defense by arguing: "And the second tragedy in this case is the defense doing all they can to throw whatever they can against the wall and see what sticks. ... The defense wants you to believe *** I mean, I don't know what trial that we're listening to here. ... The defense wants to make a big deal about when the defendant was arrested. ... The injustice here is that the defense wants you to rely on the facts that just aren't there. Woulda, coulda, shoulda, doesn't cut it here." A prosecutor may not ridicule a defendant or his theory of defense. Reversed on these and other grounds. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) (it was improper for prosecutor to argue that although victim felt a gun against his ribs, State did not charge def. with a gun "because we couldn't prove it. We didn't charge anything that we couldn't prove." As worded, comment suggests that State only charges persons who are guilty. Further, other comments that denigrated defense were also improper. Reversed because of multiple improper arguments.)

Cox v. State of Florida, 819 So.2d 705 (Fla. 2002) (prosecutor's comment in penalty phase as to def.'s mitigating factor of a traumatic childhood: "put that in it's proper context, it happened more than twenty-five years before the def. decided to kill [the victim]" did not improperly denigrate def.'s mitigating evidence. The comment was a valid argument designed to convey the concept that while the mitigator may be valid, perhaps its weight should be somewhat discounted because of the passage of time and the lack of an evidentiary nexus to the defendant. Affirmed.)

Sheridan v. State of Florida, 799 So.2d 223 (2nd DCA 2001) (it was improper for prosecutor to denigrate a defense theory by repeatedly referring to it as "desperate." [Note: Although court affirmed conviction because it was to a lesser included offense, it quoted arrogance of the prosecutor in responding to the court and stated that but for the fact that the evidence was overwhelming and def was convicted on a lesser, it may very well have reversed for prosecutorial misconduct—no mention of reference to the bar])

Mazile v. State of Florida, 798 So.2d 833 (3rd DCA 2001) (it was improper for prosecutor to argue: "They want you to think that these officer(s), everyone of these officers would put their careers at stake after they have been police officers so long on this case. ... [T]hat some officer would come up here to a Court of law and point him out. ... Why would he risk his career and all the other officers." This argument has repeatedly been held to be improper bolstering. However, court could not conclude that single comment in question "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Affirmed.)

Miller v. State of Florida, 782 So.2d 426 (2nd DCA 2001) (improper for prosecutor to

mischaracterize the testimony of a key witness. No objection. Although individually not significant, when combined with other errors in this close case errors were fundamental. Reversed.)

Brooks v. State of Florida, 762 So.2d 879 (Fla. 2000) (Improper for prosecutor to refer to mitigating factors as "flimsy," "phantom" and "excuses." Reversed due to many errors.)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (Improper for state to bolster case by arguing: "I'm the prosecutor here. If I do something wrong, then his conviction won't hold up." Reversed on fundamental error when all other improper arguments are considered. [Note: In this case the appellate court lists a collection of errors like the ones above that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another panel of this DCA.])

Martinez v. State of Florida, 761 So.2d 1074 (Fla. 2000) (where state improperly asked officer, over defense objection, if he had any doubt whether def. was guilty and officer answered "no," prosecutor's argument to jury that def. was arrested after police investigation because, between officers and an assistant state attorney, "nobody had a doubt that he was guilty" compounded the prejudice of the improper question. Comment was also an improper expression of personal opinion by the prosecutor [which usually suggests to the jury that the prosecutor has evidence not presented to the jury, but known to the prosecutor, which supports the charges] and was not even based on facts in evidence since the officer was the only one who gave his opinion of guilt [although improperly]. Reversed.)

Lavin v. State of Florida, 754 So.2d 784 (3rd DCA 2000) (During *voir dire* it was improper for prosecutor to comment that State Attorney's Office manual requires him to make sure that the innocent are not charged or prosecuted. Comment amounted to a personal opinion as to the guilt of the defendant. Reversed on other grounds)

Rivero v. State of Florida, 752 So.2d 1244 (3rd DCA 2000) (it was improper for prosecutor to make "conscience of community" argument, claim that witness avoided service of process [a fact not in evidence], make disparaging attack on defense counsel and defense, vouch for credibility of witness, suggest that someone had gotten to a witness to change his testimony [implying that def. had tampered with a witness] and suggest that the state had additional facts, not in evidence. Eight objections were sustained but motion for mistrial denied. Error not harmless. Reversed)

Gomez v. State of Florida, 751 So.2d 630 (3rd DCA 1999) (improper for prosecutor to refer to def., who had testified, as a "liar" and "a big zero" and to his version of events as "lies" and "a cockamamie story." Prosecutor improperly encroached on the jury's function by giving her opinion of the credibility of witnesses. Court printed name of prosecutor and admonished trial

judge saying she "retains the ultimate responsibility for the proper conduct of trial counsel and trial proceedings...." Considering all other improper comments, case reversed. [Note: Court failed to address how this case was distinguishable from Supreme Court case of *Craig v. State* on the issue of calling the def. a liar.])

Williams v. State of Florida, 744 So.2d 1103 (3rd DCA 1999) (not improper for prosecutor to urge jury that it should "not let the defense sell you a used car." Comment was not an attack on the character of counsel but a permissible comment on the quality of the defendant's case. [distinguishing *Jackson*]. Also, harmless. Affirmed)

Berkowitz v. State of Florida, 744 So.2d 1043 (4th DCA 1999) (improper for prosecutor to argue that def. and def. witness got together and "contrived and concocted" their story, where argument was not supported by the evidence. It is improper to suggest that def. suborned perjury or that a def. witness manufactured evidence, without a foundation in the record. Reversed.)

Henry v. State of Florida, 743 So.2d 52 (5th DCA 1999) (where def.s version of the facts was not contradicted by any state witnesses, it was improper for prosecutor to refer to defense's version of the facts as the "most ridiculous defense" he, the prosecutor, had ever heard. Reversed.)

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) (improper for prosecutor to argue that, as a representative of the state, he has no interest in convicting anyone other than the guilty. That comment, which essentially says: "If he wasn't guilty, he wouldn't be here" dispenses with the defendant's presumption of innocence and denigrates the function of the trial. Reversed due to many errors).

Brown v. State of Florida, 733 So.2d 1128 (4th DCA 1999) (*under facts of this case,* improper for prosecutor to denigrate defense as "a smokescreen" where legitimate issue existed as to officer's credibility due to a change in testimony. Under those circumstances, def.'s position "should not have been so ridiculed by the state." However, belittling a defense as a "smokescreen" may not always be error - *see Ham v. State*. Reversed.)

Izquierdo v. State of Florida, 724 So.2d 124 (3rd DCA 1998) (Improper for prosecutor to refer to the defense in final argument as a "pathetic fantasy." Based upon totality of errors throughout trial by prosecution, error fundamental and not harmless. Trial court instructed that it may grant a new trial *or dismiss the case outright based on prosecutorial misconduct because the State Attorney's Office retained prosecutor after notice of his proclivities*. [improper argument and evidentiary violations common for particular prosecutor] Reversed.)

Miller v. State of Florida, 712 So.2d 451 (2nd DCA 1998) (new trial required where prosecutor ridiculed defense of voluntary intoxication as "the defense of lack of responsibility" claiming "no one forced him to do it." Prosecutor's comments tended to arouse an emotional reaction to the appellant's defense and, by misstating the law, to discredit a valid and legal defense. There being

ample evidence of voluntary intoxication and the lower court failing to sustain the objection, the court reversed.)

Parker v. State of Florida, 641 So.2d 369 (Fla. 1994) (even if prosecutor's reference to defense as "fantasy" were improper, error was not properly preserved and, even if preserved, trial court did not abuse discretion in finding that error was invited by def.'s closing. The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury is to disregard the remarks.)

Jacobs v. State of Florida, 600 So.2d 1199 (5th DCA 1992) (Not improper for prosecutor to point out in closing that the state's case is uncontradicted; this constitutes comment on the credibility of the defense, not on the credibility of the defendant.)

Ham v. State of Florida, 580 So.2d 868 (3rd DCA 1991) (Prosecutor's argument that: "You are going to hear you're a lot about reasonable doubt. We have to prove our case beyond a reasonable doubt. But ladies and gentlemen, let's really get down to it. You are not here to find doubt. You are here to find the truth, and there has been a lot of smoke screens" did not denigrate the concept of reasonable doubt. Even if it had, error was harmless. Affirmed)

Jones v. State of Florida, 571 So.2d 1374 (1st DCA 1990) (improper for State to claim it could have brought in about 20 other witnesses but they did not want to get involved. No objection-affirmed)

Harris v. State of Florida, 570 So.2d 397 (3rd DCA 1990) (*dicta* - prosecutor exceeded bounds of proper argument when, in reply to def. counsel's claim of bad faith prosecution, prosecutor argued that the fact that an assistant state attorney signed the Information reflected that the prosecution was brought in good faith. The Information filed by the prosecutor was not evidence and, accordingly, should not have been argued to the jury. In effect, the prosecutor made herself a witness by arguing to the jury her personal opinion that the Information must be believed because it had been sworn to as being filed in good faith by the prosecution. Reversed on other grounds.)

Williams v. State of Florida, 548 So.2d 898 (4th DCA 1989) (When def. raises the State's failure to call other witnesses, the State may respond but may not suggest that there are other witnesses who would corroborate the State's case if called.)

Pope v. Wainwright, 496 So.2d 798 (Fla. 1986) ("I'm certainly familiar with the evidence over the last year and ... with [witness]. I have met her on more than one occasion .... I believed in the case I presented ..." constitute improper vouching for witness and case. Affirmed because harmless.)

Waters v. State of Florida, 486 So.2d 614 (5th DCA 1986) (improper for prosecutor to refer to defense counsel's closing argument as misleading and a smoke screen. Reversed on these and

other grounds.)

Williamson v. State of Florida, 459 So.2d 1125 (3rd DCA 1984) (in response to def. argument that State failed to call any neighbors to say that def. was at the scene and thereby contradict his alibi, it was improper for State to say it could have brought in the neighborhood and "have them tell you what they saw. The defense would have said these people are lying." State may not imply that there exist other witnesses who, if called, would have testified favorably for the State; and that they were not called because the def. would have called them liars. State may advise jury of def. subpoena power , or that evidence could not have been received over objection [see Wilder v. State] or that witness' testimony was not impeached.)

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) (Asking juror's whether police officer in courtroom would have wasted time and money on case if not worthy of consideration constitutes improper vouching for State's evidence)

Blackburn v. State of Florida, 447 So.2d 424 (5th DCA 1984) (prosecutor's request for sympathy for victims, personal belief as to facts in issue and having met burden of proof, vouching for credibility of police officer and reference to other charges against defendant arising out of incident which were not pursued by state, were improper BUT NOT FUNDAMENTAL. No objection. Affirmed [passing reference to fact that they were, in part, invited by defense counsel's questions and closing argument])

McGee v. State of Florida, 435 So.2d 854 (1st DCA 1983) (improper for prosecutor to make "smoke screen" argument. However, because of the absence of any factual controversy which possibly could have been influenced by the argument, error was harmless. Affirmed.)

Westley v. State of Florida, 416 So.2d 18 (1st DCA 1982) (trial court did not abuse it's discretion in determining that prosecutor's reference to "smoke screen" was directed at defense counsel's argument and was not intended to convey any impression of improper motives or tactics of def. counsel. Trial court was in better position to hear tone and manner in which remarks were uttered. Appellate court agreed that comment was not such as to "cast aspersions on the motives and tactics of defense counsel, or otherwise prejudice right to a fair trial. Affirmed.)

McGuire v. State of Florida, 411 So.2d 939 (4th DCA 1982) (Prosecutor's argument "It is not my job to prosecute innocent people" was improper)

Libertucci v. State of Florida, 395 So.2d 1223 (3rd DCA 1981) (Improper for prosecutor to state that if he could have called co-def. to testify he would have, as that suggests testimony would have supported state's case.)

Cumbie v. State of Florida, 378 So.2d 1 (1st DCA 1978) (prosecutor's argument: "The police officers had nothing against this man, they simply get paid to do a job. If he was innocent, they

would certainly have cleared him, and if he is guilty, then he has to pay for that, too," was improper. It was the jury's prerogative to determine the guilt or innocence of def., not the police officers'. [District court set aside conviction but was reversed by Supreme Ct. because error was not preserved and was not fundamental in *State v. Cumbie*, 380 So.2d 1031 (Fla. 1980)])

Wilder v. State of Florida, 355 So.2d 188 (1st DCA 1978) (Where def. argues insufficiency or lack of evidence because of the State's failure to call a corroborating witness, the State may properly respond that such evidence could not be received in the State's case over objection [if correct], that the witness was as available to the def. as to the State, and that the witness to be corroborated was not impeached. However, the State may not recite to the jury testimony the missing witness would have given if called.)

Thompson v. State of Florida, 235 So.2d 354 (3rd DCA 1970) (it was improper for prosecutor to argue: "If the evidence had substantiated [def.'s] version of accidental shooting, she would not be here today. The State went on and presented its evidence to a habeas corpus hearing and it presented its evidence in a Justice of the Peace hearing. This woman was advised of her rights." Implication of the statement is that the law enforcement officials responsible for the p/retrial proceedings all believed the appellant to be guilty. Together with other prejudicial comments, reversed.)

C. Comment relating to defendant's credibility

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – prosecutor's comments that defense was "not true," "lies," or "silly," the prosecutor's suggestions that def's account of what happened to the victim should be thrown "out the window," "would not fly today," "makes no sense," and has "changed," and the prosecutor's statements that the jury was "supposed to believe" the defense, were permissible expressions of the inference that def's statements were inconsistent with the other evidence, not derisive comments offered merely to ridicule the defense. However, prosecutor's statements that def "probably doesn't have the same wisdom as counsel does with respect to knowing that an unconscious child can't choke on a French fry (although based on the evidence presented at trial) and that def was "in la-la land," were arguably "needless sarcasm." Nonetheless, errors not fundamental. Denial of post-conviction motion affirmed.)

Toler v. State of Florida, 95 So.3d 913 (1st DCA 2012) (prosecutor's references to appellant as being a liar, to appellant's race ["This is a person who is willing to lie to get out of trouble. . . . [I]f there wasn't the physical evidence, you would be hearing a story about misidentification. You would be hearing a story about how all young black males look the same. *** Can't go with the story anymore of it wasn't me, you go into character assassination. Michael Brown is a bad person. He's gay. He likes young men. He basically uses prostitutes. He's some sort of sexual deviant. I'm honestly surprised that you didn't hear that he makes meth in his bathtub --"], and to matters for which there was absolutely no support in the record, in a manner both pejorative and

sarcastic were so invasive and inflammatory, "it is questionable whether the jury could put aside the prosecutor's character attacks, and decide the case based strictly upon the evidence." [citation omitted] Reversed.)

Floyd v. State of Florida, 93 So.3d 460 (4th DCA 2012) (it was not improper for prosecutor to refer to def. several times as having lied. Not only was it a permissible inference that defendant had lied in his testimony, but it could also be inferred that he had lied to his supervisors on the evening of the incident regarding his actions, all of which was corroborated by the testimony of other witnesses. Affirmed.)

Wilson v. State of Florida, 72 So.3d 331 (4th DCA 2011) (where def was on trial for child abuse and during recess yelled at witness in the parking lot calling her a liar and a bitch, it was improper for prosecutor to attack def's credibility by questioning def for the first time on cross-examination about this collateral matter, re-calling the witness to impeach def about the incident, and then compound the error by arguing in closing: "the defendant didn't remember losing her temper and cussing out Kristy White in the parking lot. But she did." If a party cross-examines a witness concerning a collateral matter, the cross-examiner must 'take' the answer, is bound by it, and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point. Whether or not def yelled obscenities at witness during a trial recess was not evidence tending to prove or disprove … that def. committed child abuse. Thus, the evidence was not relevant to the crime charged and did not serve to discredit def by establishing bias, corruption or lack of competency. Moreover, even if def's character for violence had been put at issue, such a trait is proven by reputation evidence, not specific acts. Reversed.)

Pham v. State of Florida, 70 So.3d 485 (Fla. 2011) (in case where evidence from victims indicated that def. bound and gagged his stepdaughter, killed his ex-wife by stabbing her at least 6 times and then attempted to kill her boyfriend, it was proper for prosecutor to comment in closing: "the way that you can describe the Defendant's testimony is a desperate man telling a desperate story. … I won't spend more than a few moments on the Defendant's testimony because that's all it deserves, if that much, … some of the things that he said are just nonsensical, that just don't make sense" (def. testified that he didn't know how his ex-wife was stabbed but he didn't stab her and that his teenage step-daughter consented to be bound and gagged). The prosecutor also argued: "Mr. Pham testified, the Defense chose to present a case … they chose to present evidence, and still they have not provided an explanation as --." Prosecutor's comments were a fair and accurate description of the evidence. Affirmed.)

Chavers v. State of Florida, 964 So.2d 790 (4th DCA 2007) (it was improper for prosecutor to suggest to jury that def and witness had agreed to align their testimony in court. "Is that the conversation that was had? Hey, Alan, you need to go to the jury, go to trial and tell them what happened. Or was it you need to go and tell the jury the same story I'm going to tell them…. Those two stories are very consistent. Because [Def] asked his friend to come in here and tell you that nothing happened and this was completely fabricated." After objection was overruled, prosecutor continued to argue that def and his witness "discussed their testimony and said this is

what we're going to say happened on this day." It is a well established rule that a "suggestion that the def. suborned perjury or that a defense witness manufactured evidence, without a foundation in the record, is completely improper." [citation omitted] Reversed.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (after arguing that State had shown def. in DUI manslaughter case was impaired by his actions, prosecutor commented that during his testimony, defendant denied being impaired: "Of course he's going to say that. What is he going to say? Oh yeah, I had a decrease in coordination." Court held that it was improper for prosecutor to not only insinuate that def. was lying but to explicitly express an opinion that def. was guilty by stating that it had shown he was impaired. **[??????]** Reversed on these and many other grounds. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Lugo v. State of Florida, 845 So.2d 74 (Fla. 2003) (defendant's claim that prosecutor persistently called him a "liar" or used variations on that term has little merit as the record contains a plethora of evidence that def. consistently engaged in deceitful practices. "In light of the substantial proof of [def.'s] deceitful actions, we determine that on the whole the prosecutor's remarks were nothing more than appropriate comment on the evidence. Any error that may have occurred is harmless. [**NOTE**: In this case the def. did not testify, therefore the State's ability to call him a "liar" was based on the other evidence in the case. State was not limited to challenging his credibility based upon his testimony.] Affirmed.)

Kelly v. State of Florida, 842 So.2d 223 (1st DCA 2003) (in case where mother on trial for murder of her husband accused her son of firing fatal shot, it was improper for state to argue: "She sat on the stand in this courtroom today, said she could look [her son] in the eye, but I will guarantee you she couldn't ...." Prosecutor's statement offering a guarantee that the def. could not look her son in the eye was the equivalent of guaranteeing the def. was lying. It is improper for a prosecutor to express a personal opinion concerning the credibility of a witness. Reversed on these and other grounds.)

Burst v. State of Florida, 836 So.2d 1107 (3rd DCA 2003) (where defense counsel improperly asked his client if he had "ever been convicted of a crime," def. counsel opened the door and the prosecutor was entitled to cross-examine the def. on the fact that the crimes identified by def. where only the felonies, that he had committed other crimes as well and the details of the felonies he committed. Thereafter, prosecutor's comment in closing that def.'s conviction for grand theft auto was not that he "just stole something from Burdines ... [that he] just stuffed a bunch of stuff in a bag, no. He went up to somebody's car and he broke in and he stole it" were aimed at attacking def.'s credibility and were not meant to show a propensity to commit crimes. Although the prosecutor may have gone too far in arguing that def. broke into a car, that isolated reference did not vitiate the entire trial so as to require a mistrial.)

Rodriguez v. State of Florida, 822 So.2d 587 (2nd DCA 2002) (it was improper for prosecutor to argue that the def. was a "liar" because he was using an interpreter without the need for one:

"... he cannot be honesty with you all about his ability to speak the English language what else is he going to lie about." Prosecutor's argument that the def.'s testimony was interrupted by the court reporter because he was answering questions before they were translated was factually incorrect and, in any event, both the State and defense pointed out to the jury in opening that the def. actually spoke and understood English but that an interpreter would be used to insure that he would understand the trial proceedings. It is improper to refer to a def. as a "liar" unless the record clearly supports such. The use of a translator in no way equates to factual support for the accusation that the def. is a liar. The incident is even more offensive in light of the fact that the prosecutor in voir dire told the jury that the def.'s use of a translator should not be used against him. Reversed.)

Fullmer v. State of Florida, 790 So.2d 480 (5th DCA 2001) (in trial for L&L in the presence of a child, where def. testified that he had not exposed himself but had exhibited a rubber penis while driving his vehicle, it was improper for the prosecutor to engage in pejorative and disparaging comments about def.: "Then [def.] has the nerve to come to court today and says, oh, gee, I didn't mean to make the girl cry. I'm so remorseful. Please don't find me guilty. ... He has no problems coming into this courtroom today, taking that oath, maybe to try to convince somebody so that he doesn't get convicted but it was not a rubber penis. That was for whatever that was supposed to be for today, to mix you up, confuse you. ... [Def.] is trying to say, gee, you know, the obvious didn't happen here, even to go so far as to pull out the rubber penis, ... Don't let it confuse you or mislead you. ... He represented that that was really a fake penis, which doesn't make a difference as far as the jury instructions go, but it does as far as the def.'s credibility." When combined with other errors, some of which were objected to, total errors where fundamental. Reversed.)

Pino v. State of Florida, 776 So.2d 1081 (3rd DCA 2001) (it was not improper for prosecutor to say def. was a "liar" and that he had "lied" and told "lies." If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence. Since the record reflects that the prosecutor's characterization of the def. were supported by the record, no error found. Affirmed *[NOTE: This case follows Craig v. State without citing it and does not explain the contrary opinion from the same DCA {different panel} in Gomez below.]*)

Portuondo v. Agard, 120 S.Ct 1119 (2000) ([*United States Supreme Court*] it was not improper for prosecutor to call to jury's attention the fact that the def. had the opportunity to hear other witnesses testify and to tailor his testimony accordingly: "You know, ladies and gentlemen, unlike all the other witnesses in this case the def. has a benefit and the benefit that he has ... is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. ... That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence." Such comment does not unlawfully burden def.'s right to be present at trial, to be confronted with witnesses, or to testify on his own behalf. "A witness's ability to hear prior testimony and to tailor his account

accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the def. doing the listening. Allowing comment upon the fact that a def.'s presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate– and indeed, given the inability to sequester the def., sometimes essential– to the central function of the trial, which is to discover the truth.")

Martinez v. State of Florida, 761 So.2d 1074 (Fla. 2000) (in attack on def.'s credibility, it was improper for state to argue: "you see, when you think about the defendant, you've got to realize who you're dealing with here. ... [A] man who doesn't tell the truth. He doesn't tell the truth to the women he's involved with; he cheats on them; he runs around on them, not just once, not just twice. That's who we're dealing with here." The state cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show the def.'s bad character or reputation, unless the accused, conceiving that his case will be strengthened by proof of good character, opens the door. Reversed based upon totality of errors.)

Gomez v. State of Florida, 751 So.2d 630 (3rd DCA 1999) (improper for prosecutor to refer to def., who had testified, as a "liar" and "a big zero" and to his version of events as "lies" and "a cockamamie story." Prosecutor improperly encroached on the jury's function by giving her opinion of the credibility of witnesses. Court printed name of prosecutor and admonished trial judge saying she "retains the ultimate responsibility for the proper conduct of trial counsel and trial proceedings...." Considering all other improper comments, case reversed. [Note: Court failed to address how this case was distinguishable from Supreme Court case of *Craig v. State* on the issue of calling the def. a liar.])

Connelly v. State of Florida, 744 So.2d 531 (2nd DCA 1999) (improper for prosecutor to state that the def. has lied. "Now he's gotten up here and told you today what it is you would expect him to say. 'I didn't intend ....' What do you think of his willingness to lie and lie and lie and lie, literally, by his calculations on cross-examination – hundreds of times." When combined with alleged errors in state's cross-examination of def. – Reversed) [**NOTE**: *There are more inconsistencies among DCA's and the Supreme Court in these types of cases {i.e. calling def. or witness a liar or saying they lied} than in almost any other area of closing arguments}*]

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) (although prosecutor may refer to def. as a "liar" where it is clear that he is submitting to the jury a conclusion that he is arguing can be drawn from the evidence, it was improper for the prosecutor to characterize def. as "Pinocchio," and then tell the jury that "truth equals justice" and "justice is that you convict him" as that invited the jury to convict def. because he was a liar. Reversed due to many errors).

Henderson v. State of Florida, 727 So.2d 284 (2nd DCA 1999) (prosecutor's comment that def. "would not know the truth if it hit him up side the head," that what he did was "Improvise. Modify. Comes up with this fairy tale" were improper comments on def.'s truthfulness. Not fundamental, even when considered with other improper closing arguments. *[Receded from on other grounds - Washington v. State, 752 So.2d 16]*)

Ross v. State of Florida, 726 So.2d 317 (2nd DCA 1998) (improper for prosecutor to refer to defendant's testimony as "preposterous," "nonsense" and "bologna." When combined with other errors, not harmless. Reversed. [court took unusual step of considering on appeal the ineffectiveness of counsel for failure to object])

Izquierdo v. State of Florida, 724 So.2d 124 (3rd DCA 1998) (Improper for prosecutor to insult defendant by asking the jury whether they would buy an umbrella if he told them it was raining inside the courthouse. Based upon totality of many errors throughout trial by prosecution, error fundamental and not harmless. Trial court instructed that it may grant a new trial *or dismiss the case outright based on prosecutorial misconduct because the State Attorney's Office retained prosecutor after notice of his proclivities*. [improper argument and evidentiary violations common for particular prosecutor] Reversed.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Henyard v. State of Florida, 689 So.2d 239 (Fla. 1996) (it was proper to argue to jury that because the State offered evidence at trial discrediting def.'s initial assertion to police that he did not rape first victim [he subsequently admitted the rape in a later statement to police that was not admitted at trail], the jury should not believe his further assertion that he did not kill the other two victims. Argument was proper comment on truthfulness, or lack thereof, of def.'s claim of innocence. Not a bad faith argument in context made.)

Washington v. State of Florida, 687 So.2d 279 (2nd DCA 1997) (it was improper for prosecutor to refer to defense as a "big lie" of the magnitude of Hitler's lie about Jews being the cause of all problems)

Pacifico v. State of Florida, 642 So.2d 1178 (1st DCA 1994) (improper for State to repeatedly refer to def. as a "liar". Exhorting the jury to convict the def. because he lied invites them to convict him for a reason other than his guilt for the offense charged. It is only permissible for a prosecutor to refer to a witness as a liar if the context of the statement indicates that "the charge is made with reference to testimony given by the person thus characterized, [and] the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.)

Parker v. State of Florida, 641 So.2d 483 (5th DCA 1994) (prosecutor's comment that, if def. were really innocent he would have been screaming it with a passion from the witness stand,

"screaming to the Heavens, I'm not guilty, this is not my cocaine..." was not improper because def. took the witness stand and therefore his on-stand demeanor was relevant.)

Jacobs v. State of Florida, 600 So.2d 1199 (5th DCA 1992) (Not improper for prosecutor to point out in closing that the state's case is uncontradicted; this constitutes comment on the credibility of the defense, not on the credibility of the defendant.)

Craig v. State of Florida, 510 So.2d 857 (Fla. 1987) (Not improper for prosecutor to refer to def's testimony as untruthful and defendant as a "liar". ESTABLISHED RULE: "When counsel refers to a witness or a def as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.")

Gale v. State of Florida, 483 So.2d 53 (1st DCA 1986) (prosecutor's argument that def. "knows the ropes" was not error as it could have been reasonably inferred from his admission on the stand to prior encounters with the criminal justice system. Affirmed).

Coley v. State of Florida, 449 So.2d 409 (2nd DCA 1984) (not error for prosecutor to comment on def.s credibility where def's testimony contradicted by reasonable inferences from overwhelming weight of other evidence.)

State of Florida v. Murray, 443 So.2d 955 (Fla. 1984) (comment that def. "thinks he can lie to you in court so that he is acquitted" improper and not fair reply to defense counsels claim that there was reasonable doubt as to the credibility of a witness. Error harmless, therefore DCA decision reversed and conviction reinstated.)

Wilkins v. State of Florida, 383 So.2d 742 (4th DCA 1980) (prosecutor's comment: "Here's a man, seven times prior been convicted of a crime, who takes the stand and tells you he's an innocent, law-abiding citizen, who doesn't know anything about this black man who approached him on two occasions [about drugs]," although susceptible to interpretation as a comment on def.'s propensity to commit crimes, is also consistent with an attack on def.'s credibility, which is entirely proper. Affirmed.)

Glassman v. State of Florida, 377 So.2d 208 (3rd DCA 1979) (in insurance fraud prosecution where doctor was alleged to be part of a conspiracy involving staged automobile accidents, feigned injuries and subsequent claims for insurance proceeds, it was improper for prosecutor to comment: "Well, he testified all right. Nothing to lose by testifying. His story was perfect. There was only one thing that was missing in that story, and that was at the very beginning it should have said, 'Once upon a time,' because the story is a fairy tale. Disney World is where it happened. ... This is the Disney World at Southwest 22nd and 6th under the name of Medical Arts and where he has his mill, Donald Duck, quack, quack. Pejorative language employed by the prosecutor can only be described as embarrassingly unprofessional. Given a variety of improper closing comments, case reversed.)

D. Attacking credibility of witness

Poole v. State of Florida, 151 So.3d 402 (Fla. 2014) (in this death penalty case, although it was improper for prosecutor to refer to def's family's mitigation testimony about his head injury as "all that crap," error was not fundamental where trial court sustained objection, informed the jury that the comment was improper and instructed them to disregard it. Further, the prosecutor explained to the jury that he was not attempting to tell them not to consider the evidence presented by defs family, but was instead requesting that the jury give more weight to the doctors' evidence regarding defs head injuries. Affirmed.)

Evans v. State of Florida, 62 So.3d 1203 (4th DCA 2011) (it was improper for prosecutor to suggest defendant tampered with a witness and suborned perjury without any supporting evidence. ["This is the sister of the defendant who hey sister-in-law, take the stand testify on my behalf. Go ahead say that. Hook me up. Help me out. I proffer to you that's what that was."] Prosecutor went on to say that Def and his brother had "three weeks to think of something" and that they "concocted" the story. No objection but fundamental error under facts of case. Reversed.)

Chavers v. State of Florida, 964 So.2d 790 (4th DCA 2007) (it was improper for prosecutor to suggest to jury that def and witness had agreed to align their testimony in court. "Is that the conversation that was had? Hey, Alan, you need to go to the jury, go to trail and tell them what happened. Or was it you need to go and tell the jury the same story I'm going to tell them…. Those two stories are very consistent. Because [Def] asked his friend to come in here and tell you that nothing happened and this was completely fabricated." After objection was overruled, prosecutor continued to argue that def and his witness "discussed their testimony and said this is what we're going to say happened on this day." It is a well established rule that a "suggestion that the def. suborned perjury or that a defense witness manufactured evidence, without a foundation in the record, is completely improper." [citation omitted] Reversed.)

Howard v. State of Florida, 869 So.2d 725 (2nd DCA 2004) (*dicta* - it was improper for prosecutor to ask def.'s mother on what date she was listed as a witness for trial [one month before trial] and, when witness insisted that she had told def.'s first attorney about def.'s alibi, to argue in closing that attorney must not have listed her because he felt she was lying. Witness was not competent to testify about the actions of prior counsel and even if counsel had been called as a witness, prosecutor would not have been allowed to ask him to comment on other witness's credibility. Prosecutor should not have been allowed to do indirectly what he could not do directly. Reversed on other grounds.)

Brown v. State of Florida, 787 So.2d 229 (2nd DCA 2001) (it was improper for prosecutor to attack the credibility of defense witness, who was a 14 time convicted felon, by arguing: "He looked like he was going to walk out of here and go rob somebody. He probably came here

between robberies. He looked like he was a convicted felon. He acted like one" and referring to other witness as a "drinker," implying he was drunk because he had two beers on the night of the offense. Also improper to argue that all convicted felons are liars: "Why didn't any of these witnesses file written complaints. Because they are all making it up. They don't like cops. They are convicted felons who don't like the cops." Combined with many other errors, reversed.)

Perry v. State of Florida, 787 So.2d 67 (2nd DCA 2001) (it is improper for prosecutor to refer to defense witnesses as a "pack of liars.")

Miller v. State of Florida, 782 So.2d 426 (2nd DCA 2001) (it was improper for prosecutor to refer to 3 defense witnesses by analogizing them to three dim-witted television characters and to accuse another defense witness of being a "glory hound" because "he sure was dressed up nice." No objection was made and not fundamental error. Reversed on totality of these and other more serious errors.)

Henderson v. State of Florida, 769 So.2d 477 (5th DCA 2000) (although it was improper for prosecutor to comment that he did not believe defense witness, witness was so inconsistent and thoroughly impeached that that error was harmless. Affirmed)

Kennerdy v. State of Florida, 749 So.2d 507 (2nd DCA 1999) (improper for prosecutor to argue that defense witnesses had been "spoon-fed" their testimony and that jury knew that def. had profound disrespect for the legal system because he had "convinced two young men to come in here, and I would submit to you, commit perjury." Prosecutor also improperly argued that "the defendant thinks he's got six suckers sitting here" and accused def. of attempting to perpetrate a fraud on the jury and on the criminal justice system. Reversed.)

Berkowitz v. State of Florida, 744 So.2d 1043 (4th DCA 1999) (improper for prosecutor to argue that def. and def. witness got together and "contrived and concocted" their story, where argument was not supported by the evidence. It is improper to suggest that def. suborned perjury or that a def. witness manufactured evidence, without a foundation in the record. Reversed.)

Arroyo-Munoz v. State of Florida, 744 So.2d 536 (2nd DCA 1999) (improper for prosecutor to urge jury that def. witness should not be believed because he withheld his real name [witness admitted on cross that the name he gave when he testified was not his real name] ???? Since the witness was the only person who corroborated the def.'s version, reversed)

Barnes v. State of Florida, 743 So.2d 1105 (4th DCA 1999) (improper for prosecutor to refer to the testimony of def. counsel, who was testifying on def.s behalf with regard to the suggestiveness of the lineup, as "the mercenary actions of ... a hired gun." Trial courts instruction that the jury should "ignore the last comment" was ambiguous in that it was unclear if it referred to the prosecutor's statement or def. counsel's request that it be stricken. "For a curative instruction conceivably to erase the palpable prejudice to the def. in this situation, the court should have condemned the comment in the clearest and most unmistakable terms. In these

circumstances, it might even have been proper for the court to question the jurors to determine whether the effects ... could be set aside." Fundamental error. Prosecutor referred to Fla. Bar for repeated violations.)

Parsonson v. State of Florida, 742 So.2d 858 (2nd DCA 1999) (prosecutor's comment about defs. propensity to lie was a proper comment on the evidence presented at trial where Appellant stated in her own tape-recorded statement that she had lied so many times before that no one could believe her.)

Ross v. State of Florida, 726 So.2d 317 (2nd DCA 1998) (improper for prosecutor to refer to defense witnesses as "pathetic," "ridiculous," "inappropriate," "insulting to the jury's intelligence," "totally incredible" and to say that they "just flat out" lied. When combined with other errors, not harmless. Reversed. [court took unusual step of considering on appeal the ineffectiveness of counsel for failure to object])

Cooper v. State of Florida, 712 So.2d 1216 (3rd DCA 1998) (While a prosecutor may certainly remind the jury of inconsistencies in the defense witnesses' testimony, the Prosecutor's suggestion that the defendant suborned perjury or that a defense witness manufactured evidence, without a foundation in the record, is improper. New trial not warranted because prosecutor's comments were not so inflammatory or egregious as to deprive defendant of a fair trial and because of overwhelming evidence (4 witnesses identified defendant minutes after the robbery occurred). Affirmed)

Martin v. State of Florida, 710 So.2d 58 (4th DCA 1998) (no error in allowing prosecutor to argue that juvenile witness, who came to police on his own, confessed to burglary and was convicted in juvenile court, was not involved in burglary where jury could have found from the evidence that def. committed the burglary and juvenile decided to take the blame in order to save def., an adult, from much more serious penalty. Claim that State should not be entitled to take inconsistent positions unsupported by any case law. Affirmed.)

Shellito v. State of Florida, 701 So.2d 837 (Fla. 1997) (it was not improper for prosecutor to argue that def.'s mother, who testified that another person confessed to her about having committed the crime and that she had given that information to a court employee, was either an extremely distraught and concerned mother or a blatant liar. It is not improper to call a witness a liar if it is in the context of what conclusion can be drawn from the evidence. Mother's testimony was contradicted and comment was made in the context of allowing the jury to determine her credibility. Affirmed)

First v. State of Florida, 696 So.2d 1357 (2nd DCA 1997) (*opening statement* - where state never impeached witness with any prior convictions or contradictory statement and witness' testimony was only contradicted by circumstantial evidence, prosecutor's comment in opening statement that "she is a liar" (with regard to witness' alibi testimony) was an improper expression of personal opinion. Error not harmless given weakness of case. Reversed.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses, or lack thereof, and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Willis v. State of Florida, 669 So.2d 1090 (3rd DCA 1996) (improper for prosecutor to attack credibility of wife testifying as alibi witness by telling the jury in closing that the wife was not listed as a witness until 4 months after crime. Witness does not control whether or when she will be listed.[no comment by court on the fact that prosecutor was arguing facts not in evidence]. Reversed - given other errors and "close" case.)

Hahn v. State of Florida, 626 So.2d 1056 (4th DCA 1993) (improper for prosecution to attack credibility of witness by attacking her character because she sleeps with men whose names she doesn't know.)

Duque v. State of Florida, 498 So.2d 1334 (2nd DCA 1986) (improper for prosecutor to attack credibility of witness by alleging that witness was motivated by revenge for having been identified as involved in a criminal solicitation to commit the subject murder when allegation is not supported by any evidence in the record, other than the questions of counsel on cross-examination, which were denied by witness)

Friddle v. State of Florida, 438 So.2d 940 (1st DCA 1983) (Error to allow prosecutor to comment on defense witness' pending charges because, although exception allows reference to charges pending against state witness to show bias in favor of state, that has not been extended to apply to defense witnesses. Error harmless where witness bias had already been shown and risk of guilt by association was not great [jury knew def. was a convicted felon in jail pending trial].)

Dukes v. State of Florida, 356 So.2d 873 (4th DCA 1978) (improper for state to ask witness if she was a prostitute and then argue that such persons are not worthy of belief)

E. Bolstering or vouching for the credibility of a witness

Johnson v. State of Florida, 177 So.3d 1005 (1st DCA 2015) (It was improper for prosecutor to argue that secret service agent would not lie because of his position ("[T]hey're suggesting that he basically came up here and perjured himself, that's what they're suggesting, that he came up here and perjured himself, a man who told you his qualifications, I won't get into it, it was that important to him that he came in here and perjured himself and he made that up. That's what

they're asking you to believe … I mean, if that were the case, why not take it one step further, why not go and just write a statement and just say, you know what, this is her handwriting, why not do that. Why not create some bank records, why not take it all the way to the hilt, if that were the case. If he really was out to get her.") The State may not bolster a witness's credibility by implying that he is less likely to lie because he is a government employee. These comments placed the prestige of the gov't behind the agent and constituted improper bolstering. Error was compounded because during cross examination of the def, the prosecutor asked her whether he defense was that a man entrusted to protect two presidents and a vice president had lied on the stand. Reversed due to the combination of the closing, cross and a venue issue.)

Ramey v. State of Florida, 177 So.3d 308 (3rd DCA 2015) (prosecutor's comment that "[the victim] got on the stand, he was honest with you. He told you the terms of his probation. He does not have a motive to lie" was no more than a direct counter to the defense's argument that the victim was dishonest. Taken in context, no improper bolstering occurred. Affirmed.)

Bailey v. State of Florida, 162 So.3d 344 (3rd DCA 2015) (prosecutor's argument, pointing out to jury that police detective "told you [victim's] reaction is unforgettable, that she literally screamed and hollered, and she tried to crawl out of the bed in the hospital" when she identified the def out of a photo lineup, was not improper bolstering, although prosecutor should not have ignored court's sustaining of objections to arguments. Affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (Death penalty – prosecutor's comment in opening statement, that flip co-def's had "confessed. They have *told the truth*. … [T]hey are going to testify in this trial…," they are "very credible and remorseful" and that another witness' only interest "is to tell the truth" did not improperly bolster the credibility of the witness. "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." Comments that co-def's confessed was based on facts the state intended to show and stating that a witness does not have any interest in the case follows the purpose of opening, which is to outline what the attorney expects will be established by the evidence. Moreover, state was giving anticipatory response to def case, which was that co-def's had confessed to their crime and would say anything the state wanted to get a lighter sentence. Further comments in closing that co-def's "testimony is not the kind of testimony that appears fabricated because in essence it could have gone a lot further down the way if they wanted to please us," was not improper vouching because the prosecutor did not "invoke his personal status as the government's attorney . . . as a basis for conviction of [the] criminal defendant … nor indicate that information not presented to the jury supported the witnesses' testimony." Attorneys can argue reasonable inferences from the evidence and credibility of witnesses. Further, statement was fair comment on def counsel's cross-examination of co-def's as to deal in their plea agreement. Affirmed.)

Bell v. State of Florida, 115 So.3d 1063 (4th DCA 2013) (it was improper for state to bolster the testimony of officers by arguing "Is it worth it for these two cops who have been with the

force for over twelve years to fabricate and falsify police reports, arrest someone that they felt like arresting, and then come in here after taking an oath, lie in a Court of law to the jury panel -- .” Argument basically claimed officers would not jeopardize their careers by lying in court, an improper argument. Reversed.)

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (in death penalty case, prosecutor’s argument that if the police had been lying, they could have done several things to make the lie more effective, including: (1) fabricating a sworn statement; (2) shooting def. in the back and claiming that he had tried to escape; (3) throwing def. into the canal for the alligators and claiming that he had fallen in; or (4) fabricating a total confession did not improperly bolster the State's witnesses by implying that the police were more truthful than other witnesses. Comments were proper because they were made in rebuttal to the defense's closing argument and were a legitimate inference based in the evidence produced at trial. Conviction and sentence affirmed.)

Becker v. State of Florida, 110 So.3d 473 (4th DCA 2013) (where def. attorney argued that although the testimony was that informant had not received any favorable treatment on his own criminal charges for testifying against def., he nonetheless either expected to get favorable treatment or was getting something “off the books,” it was improper for prosecutor to reply: “Defense says, well you know, [the informant] must be getting something. There must be something off the books. I can stand here today, ladies and gentlemen, as an officer of this Court, and tell you that [the informant] is not getting anything out of this.” While the prosecutor was free to point out to the jury that there was no evidence showing that a deal had been reached between the state and the informant in exchange for the informant's testimony, the prosecutor was not permitted to offer extra-testimonial knowledge that the informant was not receiving a deal or other special treatment from the state (an integral part of def.’s defense), and thus impermissibly vouch for or corroborate the informant's denial of such an arrangement. The prosecutor invoked his status as an “officer of [the] court” to assure the jury that the informant was being truthful. This undermined the integrity of the judicial process and irreparably contaminated the verdict and resulting sentence. Reversed. [NOTE: no mention of def. counsel suggesting state suborned perjury or otherwise did something improper by having an “off the books” arrangement with the witness and allowing him to testify otherwise despite there being no such evidence in the record].

Valentine v. State of Florida, 98 So.3d 44 (Fla. 2012) (death penalty - following def counsel’s claim that victim was lying about def/ex-husband being the person who killed her new husband and tried to kill her, prosecutor’s argument (*“[Defense counsel] wants you to believe that [the victim] is lying … he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe … as she was laying there, bound, bloodied, naked, wondering if she was going to live or die, not knowing if she would ever see her children again, she thought, “Hey, if I say [Valentine] did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half”*) was not improper. The prosecutor did not ridicule or otherwise improperly attack the defense's theory of the case; she merely described the defense's theory of

the case and stated that the defense wanted the jury to "somehow" believe that theory. "Prosecutorial comments are not improper where, incident to evaluating a witness' credibility, jurors are told to ask themselves what motive the [witness] would have to deceive them." [citation omitted] Indicating to the jury that, based on the evidence of the case, they should question the plausibility of the defense's theory of the case is within a prosecutor's role of assisting the jury to consider and to evaluate the evidence presented. Denial of post-conviction motion affirmed)

Whigham v. State of Florida, 97 So.3d 274 (1st DCA 2012) (it was not improper for prosecutor to say that witness was telling the truth: "Ms. Flowers was too proud to admit she was getting beat. … *But she came in here and she told you the truth about what happened to her*." "[A]n attorney is allowed to argue . . . credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." … "Improper prosecutorial 'vouching' for the credibility of a witness occurs 'where a prosecutor suggests that she has reasons to believe a witness that were not presented to the jury,' or, stated differently, where the prosecutor 'implicitly refers to information outside the record.' " Prosecutor appropriately explained witnesses demeanor on the stand after Appellant's counsel in closing argument attacked her credibility based on her demeanor and purported evasiveness on cross-examination. Affirmed.)

Jackson v. State of Florida, 89 So.3d 1011 (4th DCA 2012) (it was not improper for prosecutor to repeatedly argue that witness, whose credibility was hotly contested,was testifying openly, honestly and truthfully. Improper prosecutorial "vouching" for the credibility of a witness occurs "where a prosecutor suggests that she has reasons to believe a witness that were not presented to the jury," or, stated differently, where the prosecutor "implicitly refers to information outside the record." But "an attorney is allowed . . . to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." [citations omitted] In this case, prosecutor directly referred to evidence, corroboration and even points where witness admitted lying to police as reasons why jury could conclude witness was testifying truthfully . [Note: court distinguished cases where prosecutor used language like: "I *believe* she's telling the truth" as clear expressions of personal opinion.] Affirmed.)

Rodriguez v. State of Florida, 88 So.3d 405 (3rd DCA 2012) (it was improper for prosecutor to ask detective during cross-examination whether he would lie, put his career on the line or risk going to jail for perjury just to arrest the def., and then argue in closing: "He doesn't want to see this man in prison. … He has no reason to put his job on the line. He told you that. *** Yes, he wants you to trust him because he is trustworthy. There is no reason for him to lie to you. He told you that. You could judge his credibility." Court held that "ham-handed efforts at bolstering – 'would you lie under oath to send this defendant to jail?' and questions and arguments to similar effect -- are 'patently improper and violative of the rules of professional conduct.'" Reversed. [**NOTE**: Unlike other cases where state argued that officers would not jeopardize their careers to get this conviction and thereby were in effect arguing that all officers should be believed because they are officers, in this case the officer was questioned so there was evidence in the record for jury to evaluate his particular credibility. Would this "new" rule apply to def and other

witnesses? Should courts prevent them from being asked if they would lie under oath and risk going to jail?])

Jones v. State of Florida, 54 So.3d 1085 (Fla. 2011) (It was improper for prosecutor to argue in closing about police officer's testimony concerning location of def's fingerprints: "[H]e is my expert, and he is very credible." Such comment constitutes improper bolstering [Note: seems also like personal opinion but objection was for bolstering]. Error harmless however, court warned that this type of comment comes perilously close to being the basis for reversal, and it is only under the specific facts of this case that it found the error to be harmless. Court cautioned that these types of comments should be avoided. Affirmed.)

Wicklow v. State of Florida, 43 So.3d 85 (4th DCA 2010) (conviction of robbery with a firearm reversed for cumulative effect of improper closing arguments including: "As is usually the case, the victim is on trial for something" (invoking sympathy from jury and suggesting that accusing the victim of wrongdoing is simply an improper defense tactic that the prosecution has seen many times); "[State Witness/Def's boyfriend] could have been charged with this crime right next to def., they could have been sitting right next to each other. The detectives made a decision not to do so based on their interview with them. I interviewed [Witness]. … even had the detective reread [him] Miranda, so that if we decided after the interview that he needed to be charged, he would be charged. He is not charged and it is irrelevant to the crime that was committed by def" (Facts not in evidence, improper bolstering, suggesting that the government's vast investigatory network, outside of trial, knows that the def is guilty and corroborates witness's account); "The only conflicts are between the defense attorney and the evidence. That's it. Don't be manipulated. Don't be gullible" (personal attack on defense counsel suggesting impropriety). Reversed and remanded).

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (in guilt phase closing, it was not improper vouching for prosecutor to argue: (1) "So why would this guy lie, to get that deal? To get life? That's why he's lying?"; (2) "There's no way [co-def] is that bright;" and (3) "The only reason [co-def] was involved was because he wanted money and his best friend [def] gave him the opportunity and he [co-def] told the police the truth." Improper vouching or bolstering occurs when the State "places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." The first comment was rebuttal to def's argument that co-def was willing to lie for a lighter sentence. The other two comments were made as part of the prosecutions explanation of how all the evidence presented at trial by law enforcement officers, the medical examiner, and other witnesses corroborated co-def's testimony. All statements were therefore part of a "fair replay" to the defense argument that co-def was not credible. Affirmed.)

White v. State of Florida, 17 So.3d 822 (5th DCA 2009) (*opening statement* – It was not improper for prosecutor to mention in opening statement and again during questioning that co-def was required to take a polygraph as part of her plea agreement and that she changed her story to implicate def when faced with having to take the examination. Although defense counsel

claims that allowing the jury to hear that the witness took a polygraph suggests that her testimony was verified by the results, the mere mention of a polygraph is not prejudicial when no inference is raised as to the result or any inference that could be raised is not prejudicial. Neither witness's testimony nor prosecutor's comment indicated the results or raised an inference as to the results of the polygraph. Instead, they indicated that co-def finally told the truth and implicated def when confronted with the prospect of taking the polygraph examination. Affirmed.)

Simpson v. State of Florida, 3 So.3d 1135 (Fla. 2009) (prosecutor stated that witness was "honest and forthright" about why he delayed reporting def.'s confession, and that witness was "smart" in his knowledge of the criminal justice system and knew he had to provide "credible" information in order to get leniency for his own wrongdoings. While comments such as "smart" and "credible" may not have been improper in the context they were used—namely, the def's criminal history, desire for leniency and delay in reporting confession—taken together with other clearly improper comments vouching for witness's credibility, prosecutor's closing argument impermissibly bolstered the witness's testimony. Nonetheless, none of the comments individually or collectively rise to the level of fundamental error. No objection. Affirmed.)

Williamson v. State of Florida, 994 So.2d 1000 (Fla. 2008) (Prosecutor argued: "[Def. counsel] says to you, just on the faith of [witness's] testimony alone. Which I suggest to you is credible. You had an opportunity to review his demeanor and the way he answered your questions." Comment did not constitute improper vouching. "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness testimony" [facts not in evidence]. While the prosecutor suggested the witness's testimony was credible, this was a fair reply to the defense's closing argument that the witness was not believable. Immediately after this statement, the prosecutor asked the jury to think about the witness's demeanor and how he answered the questions, encouraging the jurors to rely on their own impressions as to the witness's credibility. Reversed in part, on other grounds.)

Spann v. State of Florida, 985 So.2d 1059 (Fla. 2008) (prosecutor was not improperly bolstering the credibility of witness, who had not seen def. at her house at the time of the crimes and who had been out on the porch all day, by comparing her to his grandmother who never forgot or missed anything that happened in the neighborhood because she was on her porch all day. Prosecutor was responding to def.'s alibi claim by pointing out it was unlikely that def could have come to witness's house without her knowing about it. Affirmed.)

Arrieta v. State of Florida, 947 So.2d 625 (3rd DCA 2007) ("[O]ne-time comment by prosecutor that detective and sergeant would not risk their careers to frame the def. did not rise to the level of fundamental error, which must 'reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' " Affirmed.)

Glispy v. State of Florida, 940 So.2d 608 (4th DCA 2006) (prosecutor's comment that trooper

was being truthful and reliable was not improper where it was in response to defense's attack on trooper's credibility and the prosecutor's comment did not place the prestige of the government behind the trooper or comment on matters outside the record. Affirmed.)

McCoy v. State of Florida, 928 So.2d 503 (4th DCA 2006) (by arguing that officer's "interest in the case is not great enough to make him lie, he's an officer" and he has an interest in the case … however "that interest is not great enough to lie, to get up here, take an oath and then perjure himself" prosecutor improperly bolstered the officer's credibility. Compare with Smith v. State 818/707)

Miller v. State of Florida, 926 So.2d 1243 (Fla. 2006) (concerning the testimony of a witness, it was not improper vouching or expression of personal opinion for prosecutor to argue: "He's a convicted felon, and he admitted that to you. But he's come here, *and he's told you the truth*. He told you he doesn't know anyone involved in this. He doesn't know either the victim or the defendant, but he had the courage to respond to [victim's] cries for help. [emphasis added] An attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence. The prosecutor was arguing, based on the facts surrounding the witness's testimony, that the witness was worthy of belief. Affirmed.)

Chambers v. State of Florida, 924 So.2d 975 (2nd DCA 2006) (where 20 year old's sexual relationship with 16 year old girlfriend may have been immoral but was not illegal and was not charged, and although some details of the relationship were admissible given that def. was accused of burglary and other crimes relating to the break up of the relationship, it was improper for prosecutor to attempt to inflame the minds of the jury with comments about how, instead of celebrating, the victim had to come to court to testify the day after her graduation and how the def. "is picking up high school kids and having sex with them. … What is this man doing with this kid? She is a child. She is a child." Further, there was no evidence, nor would such evidence have been relevant, that the def. had been involved in any other similar relationships with other high school girls. General attack on def.'s character was improper. Moreover, in responding to def. counsel's claim that the victim might have falsely accused def. of the crimes charged, prosecutor did not simply reply that it was unlikely that she would want to fabricate such a story and face exposure of her personal life, including her pregnancy, but he extended them inappropriately to invoke the sympathy or anger of the jury by focusing on the immorality of the relationship and the indignities associated with trial, without connecting it to the relevant issues. Reversed.)

Rodriguez v. State of Florida, 906 So.2d 1082 (3rd DCA 2004) (where def. counsel attacked the officer's credibility in closing, it was not improper bolstering for the State to argue that the officer had no motive to lie. Defense can not invite what it claims is error and seek to benefit from it. Further, where the court sustained the objection to the argument and gave a curative instruction, def. was not deprived of a fair trial. Reversed in part on other grounds.)

Yok v. State of Florida, 891 So.2d 602 (1st DCA 2005) (It was not improper bolstering for State to argue that victim was "honest and straightforward" while testifying. "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." When viewed in context, prosecutor's isolated comment simply urged the jury to find the victim honest and straightforward "on the state of the evidence" before it. Affirmed.)

Hutchinson v. State of Florida, 882 So.2d 943 (Fla. 2004) ("Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." It was not improper bolstering for prosecutor to argue that defendant's friends, who identified his voice on the 911 tape, had no reason to want to hurt defendant. "They came in here and told the truth even though they were so closely, closely in companionship with [def]. ... They were his best friends. The only thing that they've ever done to [def.] that hurt him in any way was come here and tell the truth." It was also not improper bolstering for prosecutor to argue that two officers who testified "didn't testify to anything that sounded prejudiced to me" where this statement was made in rebuttal to defense argument that the officers were already "prejudiced by the 911 calls" when they arrived at the def.'s home. Prosecutor did not refer to officers' honesty or credibility; he merely stated their testimony did not show they were prejudiced by the 911 call, as the defense had accused. Affirmed. *Abrogated on other grounds:995/351*)

Cole v. State of Florida, 866 So.2d 761 (1st DCA 2004) (it was improper for prosecutor to argue "It's all a question, ladies and gentlemen, of who you're going to believe. That's what this whole case is about. Are you going to believe the law enforcement officers that took the stand and told you what happened to them or are you going to believe that story he gave you? ... Who do you believe, the officers or the story?" Although it sustained the objection, trial court erred in ruling that motion for mistrial, made after State finished it's closing but before jury was instructed or retired, was untimely. Reversed.)

Johnson v. State of Florida, 858 So.2d 1274 (3rd DCA 2003) (it was not improper for prosecutor to argue that officers had no reason to lie about the circumstances surrounding the making of the def.'s statements because the statements contained so many exculpatory statements, denials and sympathetic excuses for the def.'s behavior that they logically could not have been planted in the def.'s mouth by the officers. Comment was a fair reply to def. assertion that officers had coerced the def. to say what they wanted him to say by "working him over psychologically." Prosecutor's assertion that retired officer had nothing to prove and that if detectives had wanted to lie the stories would have been better for the State did not amount to an argument that the jury had to take the officer's testimony as true because policemen don't lie. Instead, the comment simply pointed out that the defense's suggestion that the officers were lying was unlikely. Affirmed.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (it was improper for State to argue that jury should believe testimony of medical examiner and police officers because they were just

doing their job and they had "nothing to gain here." "Except to the extent that an attorney bases his or her opinion on the evidence of the case, an attorney may not express a personal opinion on the merits of the case or the credibility of witnesses." State improperly attempted to bolster the testimony of their witnesses by stating that they had no interest in the case and suggesting that officers should be believed simply because they are officers: "That's their job is to investigate an accident, and they came in here and told you what happened. They have no interest in how it's decided." Reversed on these and many other grounds. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Thornton v. State of Florida, 852 So.2d 911 (3rd DCA 2003)(it was improper for prosecutor to comment about a witness that: "Reverend Davis thought very carefully as a man of God." Comment improperly vouched for the credibility of the witness. Reversed on these and other grounds.)

Sims v. State of Florida, 839 So.2d 807 (4th DCA 2003) (*dicta*-it was improper for State to "embellish" officer's testimony by arguing that he was "not an officer who is trying to lie or embellish" and that he was not impeached [???]. Reversed on other grounds.)

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) (it is improper for State to vouch for the credibility of the law enforcement officers who testified [No facts in opinion]. Reversed due to multiple improper arguments.)

Pagan v. State of Florida, 830 So.2d 792 (Fla. 2002) (prosecutor did not improperly bolster credibility of witness by referring to the terror and horror she experienced and using that fact to excuse her inability to estimate the height of her attackers. Prosecutor's comments were in direct response to argument made by the defense which suggested that witnesses' descriptions of the murderers more closely matched other suspects in the case. Witness had testified that she was scared during the crime and did not get a really good look at the perpetrators. Comments by state were a fair statement of the evidence in the case and fair rebuttal to def. counsel's argument. Affirmed.)

Mese v. State of Florida, 824 So.2d 908 (3rd DCA 2002) (in relation to witness/co-def.'s plea agreement with State in which the witness agreed to testify truthfully in exchange for a reduced sentence, it was not improper bolstering for State to argue: "And you know that deal, I know defense is gonna say he made that deal before he gave that sworn statement. No, he didn't. ... The deal is when the judge accepts the deal. The judge accepted the deal on March 22nd. He gave his statement on March 20th. ... [i]t's the judge that imposes the sentence. ... The judge had to be assured that what we were doing was what [the witness] wanted to do and that he gave sworn testimony that was truthful. ... And why in a sworn statement? So [he] ... didn't decide to sit on this stand and help his friends. So that I had something to go back to the court with and say, uh-uh, judge, he lied, and he gets forty now. That's not gonna happen. [He] gets his fifteen years." When read in context, the prosecutor was not attempting to convince the jury that the

trial court was vouching for the credibility of the witness but was outlining the complete nature of the witness' plea agreement with the state, which was entirely proper. Reversed in part on other grounds.)

Smith v. State of Florida, 818 So.2d 707 (5th DCA 2002) (It was not improper for prosecutor to argue: "You can say the police have an interest in these cases. ... But is their interest of such a significant one that would cause them to either shade their testimony, embellish their testimony, or perjure themselves? Think about that. Then think about what the def. ... may have to gain or lose by the outcome of this case. ... Think about that in determining where the truth lies." Although prosecutor may not express a personal opinion as to the credibility of a witness, or vouch for the credibility of a police officer on the ground that he is a police officer, comments by the prosecutor asking the jurors to evaluate what motive a police officer would have to deceive them are not improper when made in connection with evaluating a witness' credibility. Affirmed.)

McArthur v. State of Florida, 801 So.2d 1037 (5th DCA 2001) (State's unobjected-to argument that could be interpreted as suggesting to jury that victim was being more truthful was distinguishable from cases where state vouched for or bolstered the credibility of an officer. Unlike cases involving officers, State expressed it's opinion on the credibility of the victim and was not suggesting that a witness should be believed simply because he was a law enforcement officer. Errors were not fundamental. Other arguments where state highlighted irreconcilable differences b/w testimony of State and Def. witnesses and stressed to jurors that it was up to them to resolve conflicts and determine credibility were entirely proper. Affirmed.)

Johnson v. State of Florida, 801 So.2d 141 (4th DCA 2001) (it was not improper for state to argue: "The best evidence is the testimony of the police officer who has absolutely no reason anyone has shown you to lie to you. ... Those officers have no reason to lie." The prosecutor neither stated his personal opinion nor suggested that the officer's opinion was more believable than that of another simply because he was a police officer. There is a difference between asking the jury to evaluate a witness' motive for deceit and asking the jury to believe a police officer's testimony simply because he is a police officer. "The prohibition against vouching does not forbid prosecutors from arguing credibility, which may be central to the case; rather, it forbids arguing credibility based on the reputation of the government officer or on evidence not before the jury."[quoting United States v. Hernandez, 921 F.2d 1569 (11th Cir. 1991)] Moreover, the state's comment was invited by the defense's closing argument attacking the credibility of the officer. Affirmed).

Brown v. State of Florida, 787 So.2d 229 (2nd DCA 2001) (it was improper for prosecutor to vouch for the credibility of the police officers by touting their occupation: "It's unfortunate that they put their lives on the line. They wear firearms to work. They choose to do this and God bless them, because I wouldn't do it. And yet, they come in here and they get attacked. They are in essence being accused of lying," and when comparing them to the defense witnesses, 3 of which had 21 felony convictions between them, asking the jury "who's got more motive to lie?"

Combined with many other errors, reversed.)

Echevarria v. State of Florida, 783 So.2d 1236 (5th DCA 2001) (it was not improper vouching for prosecutor to highlight for jury the fact that the testimony of the State's witnesses and the testimony of the def. were irreconcilable and, therefore, it would be up to the jury to resolve the conflict based upon their determination of the witnesses' credibility. Affirmed)

Lewis v. State of Florida, 780 So.2d 125 (3rd DCA 2001) ("But does that mean that [the detectives, officers and witnesses] all conspired to walk into this courtroom and raise their right hand and commit perjury and lie under oath, jeopardize their careers, their families, place their livelihood on the line? For what?" Argument was improper bolstering. Reversed for these and other errors.)

Jorlett v. State of Florida, 766 So.2d 1226 (5th DCA 2000) (prosecutor's comment that officer "is our public servant. She is sworn to protect us. And she comes in here and she has taken an oath...." improperly vouched for the credibility of the witness. Objection was overruled. Error not harmless in case that amounted to a swearing match between two witnesses. Reversed.)

Whiten v. State of Florida, 765 So.2d 309 (5th DCA 2000) (prosecutor's argument that the "police are not interested in arresting the wrong person" did not improperly bolster the credibility of the officers. If anything, the statement was a rebuttal to the defense's suggestion that it was not believable that the police officer would have shown the witnesses the photo lineup and not hinted to them which photo they were supposed to pick out. Affirmed. *[**Note**, S. Ct. opinion shows this case as vacated and remanded with no other explanation. 817/852]*)

Willard v. State of Florida, 764 So.2d 904 (5th DCA 2000) (although prosecutor made improper remarks which tended to bolster the testimony of psychiatric witness because he also had a law degree, thereby enabling expert to give a legal opinion beyond his qualifications, there was no objection and error was not fundamental. Affirmed.)

Eure v. State of Florida, 764 So.2d 798 (2nd DCA 2000) (in arguing that jury should release def. if they believed that officer had lied when making two police reports and when he swore to the arrest warrant but should convict if they believed he had not lied, prosecutor was improperly buttressing officer's testimony by referring to matters not in evidence. Reversed on these and other grounds.)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (It was improper for State to bolster officers' credibility: "This is not a credibility dispute between kids about who took the last cookie. This is a credibility question for you as to whether you can believe the testimony of the deputies who testified under oath.... Now if he saw nothing, would he want to be bothered by coming in here and spending the morning with us?... He testified and truthfully when there were things that he couldn't remember .... Now, if deputy Sherry were going to make something up, he would have done a better job of it.... Do they have an interest in seeing people who are

innocent convicted of crimes? There's no evidence that they do. I submit to you that the only interest they have in the outcome is seeing justice, seeing the guilty convicted and that's all." Reversed on fundamental error when all other improper arguments are considered. [Note: In this case the appellate court lists a collection of errors that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another panel of this DCA.])

Felton v. State of Florida, 753 So.2d 793 (5th DCA 2000) (in explaining to the jury that the victim's criminal record could only be used to impeach him and not to show that he was a bad person who deserved to be battered, it was proper for prosecutor to argue: "That doesn't mean he's a bad person. That doesn't mean it is open season on everyone who has a felony conviction;... Mr. Bellamy is entitled to the same protection that you and I would be entitled to." Affirmed)

Williams v. State of Florida, 747 So.2d 474 (5th DCA 1999) (it was improper for prosecutor to argue about police officer witness: "He is just doing his job and telling you all the truth. He has no reason to pick out this defendant from anyone else in the street and arrest him for burglary when this defendant wasn't even at that location." A prosecutor may argue any reasons, if supported by the evidence, why a given witness might or might not be biased in a case, but the prosecutor may not properly argue that a police officer must be believed simply because he is a police officer. Reversed.)

Milburn v. State of Florida, 742 So.2d 362 (2nd DCA 1999) ("Generally, 'the fact that [an] expert was originally retained by the adverse party is inadmissible to bolster the credibility of the expert.'" [quoting Ehrhardt])

Deluca v. State of Florida, 736 So.2d 1222 (4th DCA 1999) (improper for prosecutor to argue that officer would not lie because that would affect his off-duty job and "one does not bite the hand that feeds one" since that is the same as arguing that officer would not jeopardize his employment by lying - an argument that improperly vouches for the credibility of the officer. Trial court sustained objection, admonished the prosecutor and gave the jury an appropriate curative instruction. Therefore, affirmed.)

Bell v. State of Florida, 723 So.2d 896 (2nd DCA 1998) (Although it was improper for prosecutor to vouch for the truthfulness of officers, urge the jury to send def. a message, argue matters not in evidence and comment on def.s exercise of his right to trial by jury, the errors were not fundamental and the only error objected to [def.s exercise of right to trial by jury] was harmless. Affirmed.)

Freeman v. State of Florida, 717 So.2d 105 (5th DCA 1998) (improper for prosecutor to argue

that officer should be believed "[s]imply because they're police officers, because they're sworn to uphold the law, because they're trained observers, because they have no reason to lie.") Reversed based upon totality of errors.)

Sinclair v. State of Florida, 717 So.2d 99 (4th DCA 1998) (improper for prosecutor to argue that officer would not put his career on the line by committing perjury. Error harmless where judge sustained the objection and gave jury a curative instruction. Control of prosecutorial comments to the jury is within the trial court's discretion and will be upheld absent abuse of discretion. Affirmed.)

Lewis v. State of Florida, 711 So.2d 205 (3rd DCA 1998) (In referring to the victim's testimony, prosecutor stated: "And, he was honest. He didn't exaggerate. He didn't lie.... That's just they type of person he is. Don't let him walk simply because [the victim] is super honest or super accurate. Don't reward him because Peter is a super honest guy and would not come in here and exaggerate and would not come in here and lie." This type of vouching and bolstering is improper. Error harmless given facts of the case. Affirmed.)

Reyes v. State of Florida, 700 So.2d 458 (4th DCA 1997) (Prosecutor stated to the jury: "we have to rely on honesty, integrity and good memory of the officers that engage in these kinds of transactions. Ask yourself what kind of bad motive heard [sic] from Officer Aurigemma. Did he appear as though he was trying to deceive you? Was there any bad motive? Did it appear as though he was trying to lie?" Comment was not improper bolstering. Prosecutor was not expressing a personal opinion as to the credibility of the witness or stating that the officer would not risk his job by lying or that he should be believed simply because he is a police officer.)

McLellan v. State of Florida, 696 So.2d 928 (2nd DCA 1997) (Prosecutor's comment that doctor/witness "told you, and I would think common sense should also tell you, that when somebody goes to a doctor they're honest" was improper because: (a) it served to bolster the witness' testimony; (b) the doctor had not so testified, therefore, the prosecutor was commenting on facts outside of the evidence and (c) the prosecutor was expressed his opinion on the credibility of the witness.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses, or lack thereof, and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Buckner v. State of Florida, 689 So.2d 1202 (3rd DCA 1996) (State's repeated references to officer's credibility, that "[h]e puts his reputation on the line every time he makes an arrest...he's

under oath to sit her and testify truthfully, and that's what he did" constitute improper bolstering but, in their totality, do not warrant the granting of a new trial.)

Livingston v. State of Florida, 682 So.2d 591 (2nd DCA 1996) (improper for state to urge jury to believe "Officer of the Year" over def. who state repeatedly called a "liar.")

Baldez v. State of Florida, 679 So.2d 825 (4th DCA 1996) (it is improper to bolster a witness' testimony by reference to matters outside of the record. Improper bolstering occurred when prosecutor argued that child witnesses were telling the truth and def. was glaring at them while they were on the stand.)

Cisneros v. State of Florida, 678 So.2d 888 (4th DCA 1996) (improper for prosecutor to state: "He's not the type of man to come in here and violate that oath" and "To win a case he jeopardizes his career...?" with regard to officer's testimony. Former statement expresses personal opinion and latter suggests he should be believed simply because he's a police officer. Reversed because case came down to officer's credibility.)

Williams v. State of Florida, 673 So.2d 974 (1st DCA 1996) (prosecutor's argument: "I submit to you that it's not reasonable to consider that sworn police officers, doing their job, could come into court and perjure themselves" was improper bolstering of the officer's testimony. Reversed)

Knight v. State of Florida, 672 So.2d 590 (4th DCA 1996) (improper for prosecutor to state that a not guilty verdict means that officers were criminals and perjurers, and attempt to poll the jury by suggesting that if they believe the officers perjured themselves by swearing to tell the truth and then lying to convict two innocent people the jurors should raise their hand and he would sit down.)

Davis v. State of Florida, 663 So.2d 1379 (4th DCA 1995) (improper for State to argue that officers would not lie because that would jeopardize their career. Comment asks jurors to believe officers simply because they are police officers.)

State of Florida v. Fritz, 652 So.2d 1243 (5th DCA 1995) (in response to def.'s argument that a charge is not valid simply because the prosecution files it or a police officer says that it is, the prosecutor argued: "when the state puts a witness on the stand, in fact they are vouching for their credibility as a witness." Improper bolstering but not so outrageous as to taint jury's findings.)

Tillman v. State of Florida, 647 So.2d 1015 (4th DCA 1994) (in response to def.'s comment about State's failure to call other officers, it was improper for State to say that they were unnecessary because they would have just reiterated testimony of other witnesses.)

Robinson v. State of Florida, 637 So.2d 998 (1st DCA 1994) (A prosecutor may not properly argue that a police officer's testimony should be believed simply because he or she is a police

officer or that police officers would not testify falsely because they have too much at stake and would not risk their jobs. "These veterans of the Jacksonville Police Office, 20 years plus in Detective Lingenfelter's case I submit are not going to go up there, raise their hand and swear to tell the truth and lie. Why are they going to risk their lengthy careers with the Jacksonville Sheriff's Office on this one case?" Order denying Rule 3 for ineffective assistance of counsel reversed and remanded for evidentiary hearing on trial tactics issue)

Clark v. State of Florida, 632 So.2d 88 (4th DCA 1994) (prosecutor's remarks in closing were: "... someone is not telling you the truth. Could it be the cops, the law enforcement officials, the guys that are out there whose job is to protect and to serve, is it possible that these are the people lying to you? ... Would they [the police] actually put their credibility with this court, put their jobs on the line by coming in here and risking getting caught by not telling the truth in reference to one of their law enforcement cases? Does it mean that much that they would do that? Would they have taken it this far, what is their incentive to lie?" The case was reversed on other grounds. The court addressed the impropriety of the prosecutor's bolstering in light of the fact that the case would have to be re-tried.*[Subsequently overruled on other grounds by T.B. v. State, 669 So.2d 1085]*).

Landry v. State of Florida, 620 So.2d 1099 (4th DCA 1993) (Prosecutor's query as to why "They [the police officers] would risk all of their years, their unblemished records [to lie in this case]" was improper bolstering where there was no evidence as to officer's "unblemished records.")

Marshall v. State of Florida, 604 So.2d 799 (Fla. 1992) (*opening* statement - State's assertion that the State had overcome great obstacles in getting inmates to "truthfully tell what has occurred," and that inmates operate under a "code of silence" but that they have "a residual core of humanity did not warrant a new trial where counsel neither objected, nor requested a curative instruction, nor moved for a mistrial. Error not fundamental. Affirmed.)

May v. State of Florida, 600 So.2d 1266 (5th DCA 1992) (*Dicta*: "Improper vouching occurs when the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness' testimony." Prosecutor's argument to jury that if co-conspirators, testifying in order to obtain a reduced sentence in Federal Court, were not truthful in their testimony and he found out about it he would tell the Federal Government and the Marshalls who escorted them to court came perilously close to improper vouching for the credibility of the State's witnesses. [Note: Witness had testified that if he lied the prosecutor would tell the U.S. Attorney]. Reversed on other grounds.)

Jones v. State of Florida, 571 So.2d 1374 (1st DCA 1990) (improper for State to claim it could have brought in about 20 other witnesses but they did not want to get involved. No objection-affirmed)

Garrette v. State of Florida, 501 So.2d 1376 (1st DCA 1987) ("a prosecutor may argue any

reasons (if supported by evidence) why a given witness might or might not be biased in a case, but may not properly argue that a police officer must be believed simply because she is a police officer or that other witnesses called by the State should be believed because the prosecutor would not have called his witnesses to the stand if he could not vouch for their credibility.")

Pope v. Wainwright, 496 So.2d 798 (Fla. 1986) ("I'm certainly familiar with the evidence over the last year and ... with [witness]. I have met her on more than one occasion .... I believed in the case I presented ..." constitute improper vouching for witness and case. Affirmed because harmless.)

Walker v. State of Florida, 473 So.2d 694 (1st DCA 1985) (Stating that as a prosecutor he could not present witnesses "unless they have first hand knowledge, they know the things about which they testify" was improper bolstering of witness' credibility. Affirmed because harmless.)

Williamson v. State of Florida, 459 So.2d 1125 (3rd DCA 1984) (in response to def. argument that State failed to call any neighbors to say that def. was at the scene and thereby contradict his alibi, it was improper for State to say it could have brought in the neighborhood and "have them tell you what they saw. The defense would have said these people are lying." State may not imply that there exist other witnesses who, if called, would have testified favorably for the State; and that they were not called because the def. would have called them liars. State may advise jury of def. subpoena power , or that evidence could not have been received over objection [see Wilder v. State] or that witness' testimony was not impeached.)

Blackburn v. State of Florida, 447 So.2d 424 (5th DCA 1984) (prosecutor's request for sympathy for victims, personal belief as to facts in issue and having met burden of proof, vouching for credibility of police officer and reference to other charges against defendant arising out of incident which were not pursued by state, were improper BUT NOT FUNDAMENTAL. No objection. Affirmed [passing reference to fact that they were, in part, invited by defense counsel's questions and closing argument])

Cummings v. State of Florida, 412 So.2d 436 (4th DCA 1982) (It was improper for prosecutor to attempt to bolster the credibility of her witness by making statements about her office's policy regarding persons who commit violent crimes. Reversed on other grounds.)

Libertucci v. State of Florida, 395 So.2d 1223 (3rd DCA 1981) (Improper for prosecutor to state that if he could have called co-def. to testify he would have, as that suggests testimony would have supported state's case.)

Wilder v. State of Florida, 355 So.2d 188 (1st DCA 1978) (Where def. argues insufficiency or lack of evidence because of the State's failure to call a corroborating witness, the State may properly respond that such evidence could not be received in the State's case over objection [if correct], that the witness was as available to the def. as to the State, *and that the witness to be corroborated was not impeached*. However, the State may not recite to the jury testimony the

missing witness would have given if called.)

Richardson v. State of Florida, 335 So.2d 835 (4th DCA 1976) (prosecutor's assertion in closing that he "could have brought in a lot of police officers" improper and prejudicial in close case that hinged on defendant's credibility)

IV. Burden of proof

A. Comments that may shift the BOP

State of Florida v. Revenel, 41 Fla. L. Weekly D330 (3rd DCA 2016) (State's multiple references during closing to the fact that the testimony of its witnesses went "uncontradicted" was neither a comment on def's right to remain silent nor burden shifting where def was not the only person who could have contradicted the witness testimony adduced by the State. For example, def could have (i) called a witness to examine further any inculpating security camera footage, (ii) examined other witnesses, or (iii) impeached the credibility of the State's witnesses and evidence through cross-examination. Testimony by def was not the only means to contradict the State's evidence. Reversed to correct sentencing issue.)

Lucier v. State of Florida, 41 Fla. L. Weekly D258 (4th DCA 2016) (where def. who was arrested for possession, fleeing, tampering and resisting, testified he didn't know police were trying to pull him over and he was driving around the area looking for a friend who called him for a ride, it was error for prosecutor to argue: ""now it is absolutely critical that this defendant explain why he was behind Wilson's . . . . He has to explain that. … [H]e has to have an innocent explanation . . . . So how he explains that is, he's picking up this mysterious woman . . . [W]ouldn't you have expected her to be there to back up his story to corroborate?" These comments clearly shifted the burden of proof to the defendant. The state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. The exception to this rule occurs when the defendant voluntarily assumes some burden of proof by asserting the defense of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state. Appellant did not create an issue for which he carried the burden of proof [affirmative defense]; he simply asserted a defense to the state's theory of the case. Reversed.)

Brown v. State of Florida, 40 Fla. L. Weekly D752 (3rd DCA 2015) (where def was arrested for trafficking in cocaine and at trial, 4 years later, testified as to the identity of the actual owner of the cocaine, it was improper for the state to question during closing argument why def waited 4 years to divulge that information. Comment shifted burden of proof to def. Def had asserted his Miranda rights and never waived his right to remain silent during the 4 years up until trial. Reversed.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – Where def. who was accused of killing and sexually assaulting a child in his care took the stand and testified (for the first time) that his friend was alone with the child when she stopped breathing (contrary to his statement to police at the time that she had choked on a French fry while he and the child were alone) it was not improper for prosecutor to question def. about his sudden change in the explanation of what occurred and to argue and point out in closing that his initial statements of what happened to the victim differed from his testimony 2 and half years later. Prosecutor did not misrepresent the facts or mislead the jury into believing that def. had an obligation or burden to raise any defense before trial. Instead, the prosecutor commented on the fact that def's testimony was not consistent with the statements he had made two-and-a-half years prior and that before def took the stand, the defense had not presented to the jury any evidence or argument supporting the theory that his friend had harmed the victim. By deciding to testify and changing the defense theory mid-trial, def put his credibility at issue and opened the door to the prosecutor's accurate observation that def had not previously raised the [friend] defense during trial. Once def testified on direct examination that his friend committed the charged offenses and about why def did not immediately implicate him, the prosecutor was entitled to cross-examine def about the timing of his allegations and to point out in closing the inconsistencies and weaknesses in his testimony. Denial of post-conviction motion affirmed.)

Mitchell v. State of Florida, 118 So.3d 295 (3d DCA 2013) (prosecutor's argument that in order to find def. not guilty the jury would have to disbelieve all of the state's witnesses was an improper burden-shifting argument because it suggested the def. had to prove that the state's witnesses were lying. Such argument also misstates the burden of proof in that the test is not who's witnesses are more believable, it is whether the evidence convinces the jury of the def's guilt beyond a reasonable doubt. Reversed.)

Robards v. State of Florida, 112 So.3d 1256 (Fla. 2013) (in murder/arson trial where def's fingerprint was found on newspaper at victim's residence/crime scene used to spread the fire, prosecutor argued that there was no evidence that the newspaper had been planted as suggested by the defense and that the evidence was uncontradicted. Comment was not error as "it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response." In any event, judge reminded jury that burden was on State. Mistrial not warranted. [citation omitted] Conviction and sentence affirmed.)

Cribbs v. State of Florida, 111 So.3d 298 (1st DCA 2013) (in felony battery case where defendant's ID was only contested issue and def investigator testified that victim, contrary to testimony given at trial, stated to him that he didn't know who had hit him, it was error for prosecutor to argue (after questioning def. investigator on the matter) that investigator didn't know the date of the incident, didn't go to the scene and didn't interview other eye witness. Although the State has the right to comment on testimony produced by the defense, such commentary is improper if it implies an obligation on the part of the defense to refute the State's

evidence. It is error for a prosecutor to make comments that "shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." Error not cured by judge reminding the jury that state has the burden of proof where judge overruled objection and allowed state to continue with improper argument, which he did ["I'm going to overrule the objection to the extent that I'm going to allow the State of Florida to continue their argument. I just want to, once again, remind the jury -- and we'll go over this in a more further detailed jury instruction -- the burden is on the State of Florida to prove beyond a reasonable doubt the charges against Mr. Cribbs."]. Reversed.)

Bell v. State of Florida, 108 So.3d 639 (Fla. 2013) (in trial for unlawful sex with a child under 12, prosecutor's comment regarding how proof of victim's age was uncontradicted was not an improper shifting of burden of proof: "The first element is that [the victim] was under the age of 12. … [S]o without any evidence contradicting that the State has proven to you beyond a reasonable doubt the first element of the charge." The prosecutor went on to specifically state that the State carried the burden of proving the victim's age beyond a reasonable doubt. When considered in context, the prosecutor's comment is properly understood as a statement on the jury's duty to analyze the evidence presented at trial followed by the prosecutor's argument regarding what conclusion the jury should reach from the evidence. However, statement that "if you are looking for a reason to not believe [the victim] there isn't one. Because there is no evidence that she would have made this up at this particular time under these particular circumstances" was improper because by stating that "there is no evidence" to contradict the victim's testimony, the prosecutor highlighted def's failure to present any evidence impeaching the State's witness. The prosecutor's comment thereby implied that def had a burden of proof regarding the witness's credibility, and, unlike in prior comment, the prosecutor did not correct any false impression by reminding the jury that the State at all times retains the burden of proof. [NOTE: court or prosecutor's reference to correct BOP can cure potential error.] Errors not objected to and not fundamental. Affirmed.)

Haeussler v. State of Florida, 100 So.3d 732 (2nd DCA 2012) (prosecutor improperly shifted the burden of proof during closing argument by asserting that def. failed to present witnesses to support his testimony. No objection. Error not fundamental as this was a bench trial for contempt and trial court was well versed in the burden of proof and not likely to be swayed by prosecutor's improper argument. Affirmed.)

King v. State of Florida, 89 So.3d 209 (Fla. 2012) (in death penalty case where defense attorney in *opening statement* told jury that "the evidence will show that [def] did not fire the shot that ended [victim's] life," it was not improper for prosecutor to ask the jury in closing: "to "hold [the defense] to the statement that they said to you in opening and ask for the evidence that they said would show that someone other than [def.] committed this offense." The prosecution was not arguing that def. was required to show beyond a reasonable doubt that someone else shot the victim. Instead, the prosecutor only sought to demonstrate that the defense -- contrary to its assertion during opening statements -- had failed to provide any evidence that someone other than def. shot victim. Conviction and sentence affirmed.)

Covington v. State of Florida, 75 So.3d 371 (Fla. 4th DCA 2011) (Where defendant was charged with grand theft arising from shoplifting, and there was a surveillance video of the theft, but it was not introduced at trial because store had recorded over it; and defendant contended during closing argument that absence of video was a lack of evidence creating a reasonable doubt, it was error for prosecutor to respond that defendant had just as much of an opportunity to produce video as did state -- Prosecutor's argument was factually inaccurate where it does not appear that defendant was aware of the surveillance video during the 60-day period when it might have been obtained from store. Further, argument improperly shifted burden of proof to defendant. "[T]he state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe the defendant carried the burden of introducing evidence." Reversed.)

Pham v. State of Florida, 70 So.3d 485 (Fla. 2011) (in case where evidence from victims indicated that def. bound and gagged his stepdaughter, killed his ex-wife by stabbing her at least 6 times and then attempted to kill her boyfriend, it was proper for prosecutor to comment in closing: "the way that you can describe the Defendant's testimony is a desperate man telling a desperate story. … I won't spend more than a few moments on the Defendant's testimony because that's all it deserves, if that much, … some of the things that he said are just nonsensical, that just don't make sense" (def. testified that he didn't know how his ex-wife was stabbed but he didn't stab her and that his teenage step-daughter consented to be bound and gagged). The prosecutor also argued: "Mr. Pham testified, the Defense chose to present a case … they chose to present evidence, and still they have not provided an explanation as --." Prosecutor's comments were a fair and accurate description of the evidence. Affirmed.)

Henderson v. State of Florida, 69 So.3d 1022 (4th DCA 2011) (although prosecutor's comment that no one took the stand to contradict the state's case was an improper comment on the def's silence [citation implies that def. was only one who could have refuted it] and amounted to improper burden shifting, error was harmless. Affirmed.)

Scott v. State of Florida, 66 So.3d 923 (Fla. 2011) (in death penalty case where co-def wore a wire and at trial identified, along with officer, the voice of def. admitting to crime, prosecutor's closing argument which stated that def's alibi witnesses were never asked about whether the recorded voice was def's, did not impermissibly suggest to the jury that the burden was on def to disprove that it was his voice captured on the jailhouse recording. Comment was an invited response to def's claim that co-def set up a scripted conversation with another inmate in order to win favor with the authorities. Prosecutor's comment went no further than to point out the lack of evidence to support def.'s alternative theory and that the State's evidence on this matter was uncontradicted. Conviction affirmed. Death penalty reversed on proportionality).

Joseph v. State of Florida, 41 So.3d 307 (4th DCA 2010) (where trial court, upon def's counsel's objection, redacted portions of audio statement of def prior to trial, and then def attorney argued in closing "but if you heard more of that DVD, if you heard the whole thing,

wouldn't you see?", it was not reversible error for prosecutor to argue in response "It is an entire DVD. I moved the entire thing into evidence. Def counsel says, what's the State hiding? Why don't they show the whole thing? I said right there, I stipulate." Although comment may have been burden shifting [?], these comments were fair reply to defense counsel's questions about what the state was hiding. Affirmed.)

Perea v. State of Florida, 35 So.3d 58 (5th DCA 2010) (in trial for sexual abuse of a child, where def counsel attacked the child's credibility, it was not improper for prosecutor to argue "Well, if she was coming up with stories, first of all, why was she coming up with stories? There has been no evidence presented about any reasons why [the victim] made this up, none. There is no indication about family problems." Comment did not improperly shift any burden to the defense or imply that the def had to prove anything in order to establish his innocence. Prosecutor made a permissible argument that the evidence at trial (as submitted by the State) did not suggest that the victim had any reason to lie. Such comment was a reasonable response to defense counsel's comments indicating that the victim had lied. Affirmed in part, reversed in part as to sentencing and class of felony.)

Rodriguez v. State of Florida, 27 So.3d 753 (3rd DCA 2010) (in murder trial where victim's body was never located, it was improper for prosecutor to argue: "if any of you believe, *beyond a reasonable doubt* that she is not dead, well, you know that I invite you go ahead and acquit him." Statement misstates the law by shifting the burden of proof to the defendant. Correct argument would have been "if you do not believe beyond a reasonable doubt that the victim is dead, go ahead and acquit him." Misstatement could have been readily corrected with a curative instruction but no objection was raised. Error not fundamental where prosecution did not intentionally misstate the law, prosecution's closing repeatedly stated that the state had to "prove that she is dead," and the jury was properly instructed on the burden of proof. Error harmless. Affirmed.)

Evans v. State of Florida, 26 So.3d 85 (2nd DCA 2010) (in cocaine trafficking case where police found latex gloves around the stash of cocaine and def. was found wearing latex gloves during raid, it was improper for prosecutor to argue "But if [def] wasn't guilty, … wouldn't there be some reasonable explanation for him wearing these gloves under the totality of what we find in that house, the circumstances? … [T]here is no reasonable explanation for him having those gloves on except that he was in control of the east bedroom. … [T]here is no reasonable explanation for those gloves and the circumstances, especially when nobody else had them on." Comment was reasonably susceptible of being interpreted as an impermissible comment on def's right to remain silent or his failure to mount a defense. Reversed.)

Poole v. State of Florida, 997 So.2d 382 (Fla. 2008) (Prosecutor argued: "Well, there is no evidence in this case that at any time, either in this trial or anywhere else, [def] ever acknowledged that he did anything" and "Mr. Dimmig is arguing all these things but there is absolutely no evidence that [def] ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that." Arguments were improper

comment on def's right to remain silent. Comments were not objected to and do not constitute fundamental error because both comments were invited responses to the defenses closing arguments wherein def counsel argued that def acknowledged committing a sexual battery, robbery and burglary but denied he killed one victim and severely injured the other. Because the prosecutor's comments were invited responses attempting to show there was no evidence to either support the claim that def acknowledged he committed those crimes or to support the argument that someone else inflicted the injuries, the comments cannot be deemed improper. Prosecutor also argued: "And if [def] wants to tell the state and [detective] that somebody helped him commit this crime, then let him come forward because …." Comment was also an improper reference to def's failure to testify and a shifting of the burden of proof. Nonetheless, trial court did not abuse its discretion in denying motion for mistrial because in light of the evidence linking def to the crimes, the error was not "so prejudicial as to vitiate the entire trial." Conviction affirmed. New penalty phase ordered on other grounds.)

Paul v. State of Florida, 980 So.2d 1282 (4th DCA 2008) (it was improper for prosecutor to comment to jury that "[t]he State has the burden of proving all of these elements beyond a reasonable doubt. And if [the defense attorney] wants to present theories of how she believes this case should play out, there's got to be some level of proof from that [sic] Mr. Laboy was lying." Comment improperly shifted the BOP to the def by telling the jury that def needed to prove victim was lying in order to be found not guilty. Error was not cured and was exacerbated when trial court overruled the objection and explained to the jury "It's a comment on the evidence, or should I say, while the State always has the burden of proof, both lawyers have a right to comment on their perception of the evidence and, as I told you before, you're free to accept it or reject it." Instruction failed to specifically rebuff State's comment that def had to show victim was lying and appeared to consent to the accuracy of the comment when it overruled the objection and told the jury that the State is allowed to comment on the evidence. Reversed.)

Hill v. State of Florida, 980 So.2d 1195 (3rd DCA 2008) (Although other members of drug surveillance team testified about apprehending def and other occupants of vehicle after being given the signal to do so, it was improper for prosecutor to refer to testimony of officer who was the only eyewitness to the drug deal as "uncontradicted and uncontroverted." Although other occupants of vehicle could have been called as witnesses to rebut officer's testimony, State did not call them and def. was not required to call them. Therefore, from the viewpoint of the jury, comment would suggest that def. could have disputed officer's testimony but did not do so. Comment could be interpreted as referring to def's silence or suggesting that def. had burden to present evidence to refute officer's version of transaction. Reversed. **CAUTION:** prior opinions of this and other DCA's find "uncontroverted" to be improper comment when there are NO OTHER witnesses who could have been called to rebut state's witness, thereby suggesting that defendant could have testified. This may be departure from that rule.)

Montanye v. State of Florida, 976 So.2d 29 (5th DCA 2008) (in case where def.'s brother took the stand after statute of limitations had run and claimed that he, rather than his brother, was the one who committed the battery on the victim, prosecutor's argument that if brother was lying, def

was guilty was improper. ["If Josh Montanye is lying, Sean is guilty. … Josh Montanye is lying, and he's doing it to get all of you to buy it."] Comment not only expressed prosecutor's personal opinion about the credibility of a witness, but also attempted to improperly shift the burden of proof to the defense (since simply proving that def's brother was lying would not meet the State's burden of proving the case of def's guilt beyond a reasonable doubt. Def counsel only objected to one of the improper comments and court sustained objection and gave a curative instruction. Error not fundamental. Affirmed.)

Love v. State of Florida, 971 So.2d 280 (4th DCA 2008) (in prosecution for battery on an officer where def. witness testified she was part of a crowd of fellow church members who watched the officers assault the def., it was error for prosecutor to attack def. in closing for failing to produce additional witnesses from the crowd to corroborate defense witness' story. The general rule is that "the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence." The supreme court has "applied a narrow exception" to the general rule to "allow comment when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state." A witness is not "equally available" to the state if the witness has a special relationship with the defendant. In this case, def did not assert an affirmative defense for which he assumed any burden of proof (he simply denied that the crime happened) and there was no evidence of a special relationship between def. and the people who were at the scene of the crime. Reversed.)

Lubin v. State of Florida, 963 So.2d 822 (4th DCA 2007) (acknowledging that this was a "close question," court held that prosecutor's comments about def's fingerprints on the outside of the victim's vehicle ('There is no way in the world his print got on that quality—and then try to tell you, "Well, maybe it got on some other time." … did you have one bit of evidence, did one person or one piece of evidence come in and tell you that he left his palm print on that van another day? …. Did you hear one bit of evidence? Not one.") were fair comment on uncontroverted evidence that def's fingerprints were impressed on van during murder altercation. Court notes that comment was not "invited" as def counsel did not address fingerprint evidence in his closing argument [yet quote from prosecutor's closing sounds like a reference to what def. argued]. Even if error, harmless. Affirmed [**Note**: court then goes on to caution prosecutors against making this comment. See other cases under Burden of Proof and Comment About Def's Right to Remain Silent concerning precisely these types of comments that are based on uncontroverted evidence that can only be refuted by defendant. Dangerous case.])

Belcher v. State of Florida, 961 So.2d 239 (Fla. 2007) (in murder/sex bat trial where def. counsel argued that def and victim had rough consensual sex, it was not improper for prosecutor to argue: "What evidence have you heard that it was consensual? All the evidence indicates quite to the contrary. … What consent are we talking about? *What evidence did you hear come out of that witness stand saying that she consented to this?*" It is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the

defense has invited the response. The State was merely commenting on the lack of evidence supporting the defense theory that the two engaged in consensual relations.)

Delgado v. State of Florida, 948 So.2d 681 (Fla. 2006) (in murder prosecution, where defense counsel argued that murders were clearly pre-meditated and that the state had only shown the jury pictures of victim's body to evoke an emotional response, and state responded that it was all well and good for defense counsel to stand up at the end of a two and a half week trial and say that the murders were horrible and pre-meditated but that two and a half weeks earlier the prosecutors did not hear that concession, a mistrial was not warranted. Upon court's sustaining of objection to shifting the burden of proof (no ruling on objection that comment was reference to def.'s right to remain silent or generic "improper argument"), prosecutor went on to clearly remind the jury that only the state carries the burden of proving the charges in the case. Accordingly, in this context, "even if the comment was improper it was certainly not 'so prejudicial as to vitiate the entire trial." And def. failed to demonstrate that "a mistrial was an absolute necessity." [emphasis added by author as comment appears to fall under "fair reply"] Affirmed.)

Russ v. State of Florida, 934 So.2d 527 (3rd DCA 2006) (it was not reversible error, in case involving sexual battery on a child, for prosecutor to comment on def's failure to present evidence to support his theory that someone else may have molested the victim. Although objections were [improperly] overruled, prosecutor suggested, and defense accepted, the following curative instruction: "I need to advise the jurors that generally, as in any case, a defendant on trial for a criminal charge does not have to prove or disprove anything. It's up to the State through it's witnesses, if they can, to prove their case beyond and to the exclusion of every reasonable doubt and they have what we refer to as the burden of proof. Again, a defendant does got [sic] have [sic] prove or disprove anything." Further, where def. counsel argued to jury that the child's torn and healed hymen was an old injury because it did not make sense that it would heal within 7 days, it was not a shifting of the burden of proof for State to argue on rebuttal that def. counsel had failed to ask the examining physician what a tear would look like after 7 days. Comment was fair reply. Affirmed in part, reversed in part on other grounds.)

Jackson v. State of Florida, 933 So.2d 1180 (4th DCA 2006) (It was improper of prosecutor to question def. and subsequently argue at closing that, prior to his testimony, def. had never disputed that the eyeglass case containing drugs was his and had never claimed that his eyeglass case, seized from him at the time of arrest, did not contain drugs. Both questioning and comment shifted burden of proof to def. to prove his innocence by suggesting to jury that def. had a duty to come forward with evidence. Error not harmless where case hinged on credibility contest between officer and defendant. Reversed. [Note: upon clarification, trial court instructed to reconsider revocation of probation, excluding improper comments from its consideration])

State of Florida v. Fountain, 930 So.2d 865 (2nd DCA 2006) (Although prosecutor improperly commented on def.'s right to remain silent and shifted the burden of proof ("The evidence is

uncontroverted, uncontradicted that this is what happened" … "No testimony at all ….[to support the defense theory that the children were making up allegations of molestation]" … "There's been no testimony to support a theory that [it] didn't happen."), there was no contemporaneous objection, request for a curative instruction or motion for mistrial. Further, trial court properly instructed jury that def. was presumed innocent, was not required to present evidence or prove his innocence and was not required to testify. Error was not fundamental as it could not be said that absent the prosecutor's misstatements, the jury would have found him not guilty. Trial court's order granting defendant a new trial is reversed.) (**NOTE**: Comments about uncontroverted nature of evidence are improper where, as here, the only witness who could testify contrary to the state's evidence is the defendant.)

Ealy v. State of Florida, 915 So.2d 1288(2nd DCA 2005) (Comments that may shift the burden of proof invite the jury to convict the defendant for a specific reason other than the state's proof of the elements of the crime beyond a reasonable doubt. For example, because the defendant failed to mount a defense by not testifying, presenting evidence to prove his or her innocence or refuting an element of the crime. In bank robbery prosecution where def. was identified as robber by fingerprints because perpetrator wore a mask, and def. took the stand and denied robbing bank, it was improper for prosecutor to argue "you've not heard one thing from that witness stand that contradicts that those are his fingerprints * * * You've not heard one ounce of testimony, one word even spoken from anybody during this trial from that witness stand, that even placed [def.] there at the bank even on a different day." Prosecutor's comment impermissibly shifted the burden to def. to disprove that the fingerprints were his and suggested that his failure to do so was indicative of his guilt. Prosecutor's repetition of this suggestion three times makes the situation particularly egregious. Fact that def. elected to testify did not shift any burden of proof to the def. Reversed.)

Hamilton v. State of Florida, 907 So.2d 1228 (3rd DCA 2005) (Although it was improper for prosecutor to argue to jury that def. counsel's complaint about substitution of medical examiner was motivated by the fact that the state was able to present "a scenario that he can't rebut" court correctly denied motion for mistrial because it gave the jury an appropriate curative instruction: "Simply the State and only the State has the burden of proof in this case. The defense had no burden whatsoever." Affirmed.)

Williams v. State of Florida, 882 So.2d 1082 (4th DCA 2004) (in civil commitment action under Jimmy Rice Act, it was not improper for prosecutor to argue: "I submit to you the evidence is clear. The defense never put on an expert to counter [the State's expert witness]. You heard from one expert." Although in a criminal prosecution the State may not comment on the def's failure to produce evidence or refute an element of the crime charged, Jimmy Rice Act trials are civil proceedings. In civil cases, attorneys are afforded great latitude in presenting closing arguments, as long as their comments are confined to arguing the application of law to the evidence presented in the case, as well as logical deductions therefrom. Accordingly, "it is not per se improper for the State to argue the failure of the def. to adduce contrary expert evidence on the propensity issue." Counsel's remarks were properly confined to the evidence. Affirmed.)

Hutchinson v. State of Florida, 882 So.2d 943 (Fla. 2004) (where def. was accused of shooting and killing his girlfriend and her three children and evidence was presented that the def. had gunshot residue on his hands, it was not an improper shifting of the burden of proof for the State to argue "If there were no gunshot residue on his hands that would be valuable evidence of innocence." Prosecutor did not imply that def. had to prove anything in order to establish his innocence, but simply discussed the importance of certain evidence. Affirmed. *Abrogated on other grounds:995/351*)

Atkins v. State of Florida, 878 So.2d 460 (3rd DCA 2004) (where defense counsel argued that def. was not claiming that victim was lying, but only that she was mistaken, reiterating the discrepancy between the victim's description and the def.'s physical appearance, it was improper for prosecutor to suggest to jury that victim would have to be a liar for def. to be not guilty. Standard for a criminal conviction is not which side is more believable, but whether taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. Prosecutor's comment implied that the jury could ignore the def.'s argument that acquittal was proper if it believed the victim's identification was a mistake because the def. did not prove the victim was lying. Reversed.)

Rodriguez v. State of Florida, 875 So.2d 748 (2nd DCA 2004) (where def. witness testified that def. was only at the house repairing a car and not involved in the drug dealing, it was improper for prosecutor to ask def. witness whether his wife was present when def. was working on the car and could she come to court to testify about that, and then argue at closing that she was present and she's "sitting at home right now." Commenting on def.'s failure to call a witness, except in limited circumstances, improperly shifts the burden of proof from the State to the defendant. State also improperly commented on the def.'s failure to present receipts to document the auto repair. Reversed.)

Stancle v. State of Florida, 854 So.2d 228 (4th DCA 2003) (it was not improper for state to argue: "Use your common sense. What was that gun doing there if it wasn't dropped by [the def.]. Just laying out there for [the] next guy to come around, pick it up? What was it doing there? Is there any evidence to tell you anything other than it was there because [the def.] dropped it?" Comment was not an improper shifting of the burden of proof but a fair response to the defense argument that called the officer's testimony unreasonable, laughable and absurd, and suggested that the officer had lied and planted the gun. Affirmed.)

Caballero v. State of Florida, 851 So.2d 655 (Fla. 2003)(prosecutor did not err in arguing: "You can tell ... what a man intends by what he does not by what he desires. What does he do? According to the [def.'s] statement, uncontradicted, what does he do?" Comment was not an improper comment on def.'s right to remain silent or a shifting of the burden of proof. It is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response. Here, the State emphasized the evidence of def.'s actions for the purpose of countering the defense argument

that the def. did not want to kill the victim. In this context, the State's argument directed the jury's attention to the evidence of the def.'s actions in contrast to his professed desire, rather than to his failure to testify. Moreover, even if it were improper, comment was harmless given overwhelming evidence of guilt. Affirmed.)

Ramirez v. State of Florida, 847 So.2d 1147 (3rd DCA 2003)(where court initially allowed def. to show his tattoos to the jury without a proper predicate in the form of evidence that the def. had the tattoos on the date of the charged crime, but subsequently reconsidered and concluded that the State's objection had been well taken, it was not error for the court to allow the prosecution to argue to the jury the absence of any evidence that the def. had the tattoos on the day of the crime. Comment was not fairly susceptible of being a comment on the def.'s failure to testify or to call witnesses. Comment was phrased permissibly in terms of an absence of testimony from the witness stand. Moreover, comment was a permissible remedy under the circumstances and "a party may not make or invite error at trial and then take advantage of the error on appeal." [citation omitted] Affirmed.)

Smith v. State of Florida, 843 So.2d 1010 (1st DCA 2003)(where def. was identified by undercover officer as person who sold officer cocaine and defense offered no evidence, prosecutor's argument: "From that [sic] testimony from that witness stand there is no reasonable doubt that was put forward to you today from that witness stand that he didn't commit the crime. *Nobody testified he wasn't the guy.*" improperly shifted the burden of proof and constituted an improper comment on defendant's failure to testify. Reversed)

Rivera v. State of Florida, 840 So.2d 284 (5th DCA 2003) (Prosecutor's comment: "[i]n order for you to find him not guilty, which you have the prerogative to do, but you're going to have to essentially be saying that [the victim's] identification sucks," while inappropriate language, was not an improper shifting of the burden of proof as argued by def. counsel. Comment was not directed to def.'s failure to testify or mount a defense. In fact, the def. did present a defense and did testify. Moreover, the comment was invited by the defense's argument that the entire case turned on the identification of the victim and that the identification was unworthy of belief. "A defendant is not at liberty to complain about a prosecutor's comments in closing argument when the comment is [sic] an invited response." [citations omitted]. Affirmed.)

Evans v. State of Florida, 838 So.2d 1090 (Fla. 2002)(where def. testified that firearm discharged accidentally and he did not immediately go to the police because he was afraid, it was not improper for prosecutor to argue that if the shooting had really been an accident the def. would not have disposed of the weapon and would have immediately gone to the police and explained the circumstances. Comment did not improperly shift the burden of proof to def. to prove his innocence. By taking the stand def. put his credibility at issue. Accordingly, the prosecution was free to highlight inconsistencies between his testimony and other evidence, as well as to expose contradictions and improbabilities in def.'s version of events. Affirmed.)

Villella v. State of Florida, 833 So.2d 192 (5th DCA 2002) (in trial for first degree murder

where State successfully precluded def. from introducing corroborating evidence of victim/wife's extramarital affair, it was improper for prosecutor to argue in closing that the only evidence of an extramarital affair came from the def. and that there was "no other evidence that would indicate one way or the other what was going on in [victim's] life. ... [W]ere you given anything else?" The corroborating evidence should have been admitted because it supported defendant's claim that it was a crime of passion. The error of excluding such evidence was compounded when the State argued that the defense failed to provide any independent evidence of the affair. It is inappropriate for the State to argue the def.'s failure to mount a defense. Such evidence is even more egregious when, as here, the def. was precluded from introducing that evidence on the State's motion. Court's curative instruction to disregard prosecutor's last comment and that def. does not have to prove anything did not cure the error. Reversed.)

Jackson v. State of Florida, 832 So.2d 773 (4th DCA 2002) (where def. counsel was challenging under-cover detective's in-court identification of def, it was improper for state to argue: "... I ask you ladies and gentlemen to think about this question. What evidence was presented in this case that makes you believe Det. Brimm was incorrect, not what evidence is before you –." State cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the def. carried the burden of introducing evidence. Here, State's comment appears to shift the burden to appellant to present evidence to show Brimm was incorrect. Not harmless due to facts of case. Reversed.)

Stires v. State of Florida, 824 So.2d 943 (5th DCA 2002) (in prosecution for DUI with bodily injury, it was improper for prosecutor to argue to jury that since the law holds that if the def. assisted in the cause of the accident, he's guilty, "you would have to find him totally blameless ... [to acquit]." Comment improperly shifted the burden of proof because a jury does not have to "find" a def. innocent or "blameless" to acquit; he is presumed innocent. A jury may believe a def. is "blameworthy" but still acquit if they have a reasonable doubt as to one of the elements of the crime. Error harmless where judge, although not sustaining the objection, immediately instructed the jury that what the lawyers say is not the law and that the jury should follow the law on which he instructs them; and prosecutor immediately acknowledged his burden of proof, thereby removing any possibility that the jury might have misinterpreted the prior statement. Affirmed.)

Morrison v. State of Florida, 818 So.2d 432 (Fla. 2002)(prosecutor's argument: "I haven't heard the defense in this case. I'm interested in hearing it, and I know you all are interested in hearing it. I'm eager to hear what [def. counsel] has to say when he gets up here, because I haven't heard the defense yet in this case. I haven't heard their response, yet, to this, other than he's not guilty. That's what they told you, he's not guilty. Well, I'm eager to hear it, because not only is there no reasonable doubt in this case, there is no doubt whatsoever that this man did it. None whatsoever" was not an improper shifting of the burden of proof nor a comment on def.'s failure to testify. Comment was true as this argument occurred chronologically before def. counsel had argued. Given the context of the prosecutor's remarks, the prosecutor was merely

referring to the fact that def. counsel had not yet presented his argument. Further, prosecutor's additional argument that the "defense or defendant would have us believe that this elderly disabled man attacked him, and that he was forced to defend himself. And that in defending himself, [victim] cut his own throat, twice. I guess that's what they want us to believe" was not a suggestion that the burden was on the def. to prove his innocence (nor a comment on def.'s failure to testify), but rather a direction for the jury to consider the evidence presented. Affirmed.)

Keyes v. State of Florida, 804 So.2d 373 (4th DCA 2001) (although claim that injury of another was accidental usually bars claim of self-defense [which is an admission and avoidance], exception exists where there is evidence indicating that the accidental infliction of an injury and the defense of self- defense or defense of another are so intertwined that the jury could reasonably find that the accident resulted from the justifiable use of force. Since such evidence existed in this case, it was improper for State to argue to jury that def.'s claim of self-def. was an admission that he committed the battery. Although def.'s attempted objection ["I will object"] was insufficient to preserve any specific ground for appeal, comments which improperly shift the burden of proof to the def. present a deprivation of the fundamental right to a fair trial serious enough to require reversal without objection. Reversed.)

Reid v. State of Florida, 799 So.2d 394 (4th DCA 2001) (where def had claimed self-defense in his shooting of store security guard, it was permissible for state to comment on def.'s failure to call his wife, who was present during the incident, as a witness. The state is allowed to comment on a def's failure to call a witness to testify if the def. puts on evidence of a defense such as alibi, self-defense or defense of others which reflects the existence of a witness who could give relevant testimony and who is not equally available to the State. Although def. claimed that his wife was equally unavailable to him because she was in Jamaica, availability is determined by relationship not geographical proximity. The wife, girlfriend or long time acquaintance of a party will usually be considered to be available as a witness for that party. Conviction affirmed and remanded for resentencing on other grounds.)

Gutierrez v. State of Florida, 798 So.2d 893 (4th DCA 2001) (where police officer testified that after bumping into each other, def. drew a gun and pointed it at him, and def. testified that it was his friend Roman who drew a gun and handed it to him but that he never pointed it at the officer, it was improper for prosecutor to argue "where's Roman? Roman's his friend." To comment on def.'s failure to call a witness, the State must show that the def. asserted a defense of alibi, self-def. or def. of others relying of facts that could be elicited only from a witness who is not equally available to the state. A witness is not equally available when there is a special relationship b/w def. and the witness. Here, however, Def. did not assert an affirmative defense. Instead, his testimony was directed at refuting an element of the State's case. Def.'s testimony that he was scared that the officer was going to beat him up because the def. is much smaller did not amount to a self-def. claim which might allow comment on his failure to call a witness. His testimony was given in the context of an explanation as to why he took the gun from his friend. The record also fails to support the State's argument that a special relationship existed between appellant and

Roman and that because of that relationship Roman would have a reluctance to testify against appellant. Reversed.)

Sanders v. State of Florida, 779 So.2d 522 (2nd DCA 2000) (it was improper for prosecutor to argue to jury that defendant had failed to prove defense of alibi beyond a reasonable doubt. When a def. raises an alibi defense, the def. is not required to prove the alibi beyond a reasonable doubt. It is sufficient if the proof raises a reasonable doubt in the minds of the jury that the def. was present at the time and place of the commission of the crime charged. Where prosecutor improperly commented on four separate occasions that it was the def.'s burden to prove alibi beyond a reasonable doubt, the error in shifting the burden of proof deprived the def. of his fundamental right to due process, even absent objection. Reversed.)

Duncan v. State of Florida, 776 So.2d 287 (2nd DCA 2000) (although it would be proper for prosecutor to comment on defendant's failure to call friends and relatives who supposedly could substantiate his alibi defense, it would have been improper to argue that the alibi witnesses "didn't come in because they can't tell you that he was there on that day" without record evidence to support that allegation. Summary denial of post-conviction motion reversed and remanded for evidentiary hearing or attachment of record evidence.)

Delgado v. State of Florida, 776 So.2d 233 (Fla. 2000)(where def. claimed self-defense and the only evidence presented to jury by def. was his display of marks and scars on his shoulder, presumably from altercation with victim, it was appropriate for prosecutor to comment that def. was not found for approximately 2 ½ years following the crime and to ask: "Have you seen any evidence to suggest to you what was going on during that lapse of time?" Rhetorical question was not an improper comment on def.'s right to remain silent or an attempt to improperly shift burden of proof. Def. assumed burden of proving defense of self-defense and state properly commented on evidence presented in support of that def. (scars and marks) by pointing out that they could have been obtained before or after crime. [*NOTE: this case has no precedential value as it was withdrawn and superseded. The superseding opinion, however, did not address the closing arguments and reversed on other grounds. Therefore, the case is included in the outline to give you an idea of the Court's possible view on this scenario.*])

Wolcott v. State of Florida, 774 So.2d 954 (5th DCA 2001)(although prosecutor's comments that although the defense has no obligation to present evidence "they have a right to if they choose to" and "[t]here has been no witnesses who came in and said that's not his fingerprint" could have been construed to suggest that the defendant had a burden to bring forward evidence, comment falls within the confines of "invited response" where defense counsel tried to discredit the fingerprint evidence by suggesting the police mishandled it. However, statement that there was no evidence that "the property that the defendant sold [to the pawnshop] came from anywhere else but the home of [the victim]" was improper because it impermissibly refers to defendant's failure to testify, since he is the only one who would be able to show that they came from somewhere else. Reversed.)

Mitchell v. State of Florida, 771 So.2d 596 (3rd DCA 2000) (where defense counsel had argued misidentification, that the officers where lying to cover up that mistake, and had stated in opening and closing that inconsistencies in the officers' testimony establish the truth of the defendant's position, it was proper for State to argue "where is the evidence in this case of crooked cops?... The evidence in this case is uncontroverted. There is no material conflict in the evidence." State's argument was not a shifting of the burden of proof; it was fair comment on the testimony of the officers and a fair response to the defense position. Affirmed)

Whittaker v. State of Florida, 770 So.2d 737 (4th DCA 2000) (In trial for possession of a firearm by a convicted felon following a search of defendant's parent's home which revealed an arsenal of weapons, it was improper for prosecutor to argue: "[T]he defense has absolutely no burden in this case. They don't have to put on any witnesses. But they have the right if they want to, and they called Mrs. Whittaker. ... She says she knows where he [the defendant] lives? Why didn't she come in with a phone bill, utility bill where he lives? If you live someplace for five months, there is going to be something with that new address on it and there's not one bit of evidence. ... If it was somebody else and there's evidence of that, then why don't we have the evidence. Somebody is hiding the evidence." It is improper to comment on the defendant's failure to produce evidence to refute an element of the crime. To do so misleads the jury into thinking that the defendant bears the burden of proving his innocence. While jury may have questioned defendant's failure to call his father or other witnesses who could claim ownership of the weapons and exonerate him, it was not within the prosecutor's province to highlight the failure to call the witnesses and thereby suggest that defendant bore the burden of proof. Reversed)

Sackett v. State of Florida, 764 So.2d 719 (2nd DCA 2000) (in case where def. testified, it was improper for state to argue in closing that the def. did not tell the officers when they arrived at the scene that the victim was drunk and making up the allegations. Commenting that the def. should have proclaimed his innocence on the scene improperly shifts the burden of proof to the def. Considering this and other errors, reversed.)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (It was improper for State to argue that if officers had an interest in the outcome, "they would get a bonus for making an arrest or for that matter, for your verdict, or that they were going to get a gold star on the chart back at the station house, you would have heard about that.... Do they have an interest in seeing people who are innocent convicted of crimes? There's no evidence that they do. I submit to you that the only interest they have in the outcome is seeing justice, seeing the guilty convicted and that's all. If there was evidence to the contrary you would have heard it." Reversed on fundamental error when all other improper arguments are considered. [Note: In this case the appellate court lists a collection of errors that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another

panel of this DCA.])

Riggins v. State of Florida, 757 So.2d 567 (2nd DCA 2000) (it is improper for a prosecutor to suggest that the only way to believe the accused's version of events is to disbelieve a witness's testimony because that improperly distorts the state's burden of proof by shifting the burden to the accused. Harmless. Affirmed)

White v. State of Florida, 757 So.2d 542 (4th DCA 2000)(it was improper for prosecutor to comment on def.'s failure to call his cousin and another witness to testify in support of his version of the facts because doing so could erroneously lead the jury to believe that the def. carried the burden of introducing evidence. Narrow exception applies only if "the def. voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state." Comment outside of that narrow exception impinges upon the def.'s right to remain silent and the presumption of innocence (by placing an obligation on the def. to come forward with evidence). Here, defense amounted only to a general denial of knowledge that package contained drugs rather than an affirmative defense. Error was compounded when prosecutor commented further on the nature of the missing evidence and suggested that witnesses chose not to testify because it would have constituted perjury [facts not in evidence]. Reversed)

Rich v. State of Florida, 756 So.2d 1095 (4th DCA 2000) (it was not improper for prosecutor to argue that it was "uncontroverted" that the def. was not threatened or promised anything in exchange for his confession, and that certain testimony was also "uncontroverted." Although a comment that evidence is "uncontroverted" may constitute a comment on the def.'s right to remain silent under certain circumstances, prosecutor may, as here, respond to suggestion by defense that some wrongdoing occurred in the taking of the statement by directing the jury to consider the evidence presented [see *Rodriguez*, below]. By arguing that the officer threatened the def. with the arrest of his girlfriend, the def. gave the state little choice but to argue that the evidence to the contrary was uncontroverted. Affirmed.)

Otero v. State of Florida, 754 So.2d 765 (3rd DCA 2000) (where def. took the stand and testified in great detail about his whereabouts on the day following home-invasion robbery, State did not err in arguing that it was odd that def. remembered all those details yet could not recall what day of the week it was and, further: "More importantly, wouldn't you know where you were the day before during [sic] the home invasion? That would be something to account for." Generally speaking, the state may not comment upon a def.'s failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to conclude that the def. carried the burden of introducing evidence. Narrow exception exists where the def. voluntarily assumes some burden of proof as by asserting def. of alibi, self-def. and def. of others or by relying on facts that could be elicited only from a witness who is not equally available to the state. However, prosecutor's comment was a logical and fair inference from def.'s testimony rather than an improper shifting of the burden of proof. Affirmed)

Hogan v. State of Florida, 753 So.2d 570 (4th DCA 1999) (in prosecution for burglary of a dwelling where def. claimed that he had been invited to stay at unoccupied house by another homeless person who claimed to have the owner's permission, it was improper for prosecutor to refer to absent witness several times during closing. When the state points out that a def. has not produced a witness, it can mislead the jury into thinking that the def. has the burden of demonstrating his innocence. There is a narrow exception to this rule when the def. voluntarily assumes some burden of proof by asserting alibi, self-defense or defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state. A witness is not equally available when there is a special relationship between the def. and the witness. *[Note: this case concludes that a special relationship (i.e. wife, girlfriend, daughter) is a necessary requirement. All DCA's do not agree]*)

Rodriguez v. State of Florida, 753 So.2d 29 (Fla. 2000) (prosecutor's comment that: "somebody obviously was in that apartment with [co-def.]. And we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been," coupled with a reminder that def. counsel had asked during voir dire whether potential jurors would be willing to listen to two sides of the story and observation that "there was nothing in direct or cross examination ... that pointed to any other person being involved other than [co-def. and def.] There were no two sides" were susceptible to interpretation as comments on def.'s failure to testify or that impermissibly suggest a burden on the def. to prove his innocence. Comment in voir dire did not invite the state's response. Narrow exception exists when def. asserts defense of alibi, self-defense or defense of others, relying on facts that could be elicited only from a witness who is not equally available to the State. Error harmless. Affirmed)

Bradshaw v. State of Florida, 744 So.2d 1095 (5th DCA 1999) (improper for prosecutor to argue that def. had failed "to tell you where he was" as it suggests that def., who had not raised alibi defense, had the burden of proving his innocence. [Presumably, def. testified or we would expect that court would have discussed improper comment on his silence] Harmless. Affirmed.

Milburn v. State of Florida, 742 So.2d 362 (2nd DCA 1999) (prosecutor improperly argued to jury that def. expert had failed to prove beyond a reasonable doubt that def. was insane and then, upon sustaining of objection, that def. had failed to sustain its burden of showing insanity by a preponderance of the evidence. Although a def. is initially presumed sane, once the def. raises a reasonable doubt as to his sanity by showing any competent evidence of insanity the presumption of sanity vanishes and the state must prove sanity beyond a reasonable doubt. "Without quantifying the defense burden, it is far less than the preponderance of evidence argued to the jury." Reversed.)

Knowles v. State of Florida, 729 So.2d 473 (4th DCA 1999) (although prosecutor may comment on the def.s failure to call a witness where def. voluntarily assumes some burden of proof by asserting a defense that requires him to rely on facts that could be elicited only from a witness who is not available to the state, it was error for prosecutor to comment on def.s failure to call his best friend because, although he was present at the time of the altercation, the evidence

indicated that he was either asleep or involved in fighting with another individual. There was no testimony from any witness as to what def.s friend saw or what he was in a position to see with regard to def.s claim of self defense. Reversed.)

Henderson v. State of Florida, 727 So.2d 284 (2nd DCA 1999) (prosecutor's comment that "If you believe what [def.] said on that witness stand, check not guilty. Let him go. But that will mean that [the witnesses] are all a pack of liars. That they all made this up just to get poor old [def.].... If you believe [def.'s girlfriend], period. It's over. You have been convinced that he committed the crime" improperly shifted the burden of proof. [actually, this appears to fall under the "improper explanation of BOP category below rather than shifting of BOP]. Not fundamental error even when combined with other improper arguments. *[Receded from on other grounds - Washington v. State, 752 So.2d 16]*)

Thomas v. State of Florida, 726 So.2d 369 (4th DCA 1999) (Def.'s girlfriend testified that she and def. were in the area where arrest occurred because they were giving a ride home to a busboy with whom she worked but stated that she did not know busboy's name. Prosecutor commented: "They told you that she had gone there into this unknown neighborhood to drop off a busboy. Where is this busboy today? I don't know." Although comment on the def.s failure to call a witness is permitted where defense puts on evidence of a defense which reflects the existence of a witness who could give exculpatory testimony, *and* the witness is not equally available to the state or has a special relationship to the def., the busboy was not shown to have any special relationship to the def. Although comment was error, error was cured when court gave immediate instruction that def. had no burden to prove anything. Affirmed.)

State of Florida v. Dix, 723 So.2d 351 (5th DCA 1998) (Where witness testified that the def. stated he shot the victim because he didn't like him, it was proper for prosecutor to comment: "There is no, it was an accident, he tried to shoot me, I had to grab the gun from him. No. What he said is, I have a beef with him." Comment was appropriate reference to the evidence and inferences therefrom, and was not an improper shifting of the burden of proof. The state has a right, and in fact a duty, to respond to the explanation of the charges given by the defense, because to ignore it is to give it credence. Order granting new trial reversed.)

Janiga v. State of Florida, 713 So.2d 1102 (2nd DCA 1998) (Although the State may not normally comment on def.s failure to present evidence to refute element of crime charged, as that may shift burden of proof, exception exists where def. assumes burden of proof by advancing defense of alibi, self-defense or defense of another, relying on facts that could only be elicited from witness who is not equally available to the State. Improper for prosecutor to comment on def.s failure to call witness who was purportedly the true perpetrator of the crime where none of the applicable defenses were raised and witness was equally available to the State. Reversed.)

Jackson v. State of Florida, 707 So.2d 412 (5th DCA 1998) (prosecutor's comment that "there is no explanation and there is no other evidence anywhere else that Mr. Jackson was anywhere on March 6, 1996, but in that jewelry store" was not simply a comment on the uncontradicted nature

of the state's evidence. It improperly suggested that def. had failed to prove an alibi defense (e.g. he had failed to show that he was "anywhere else". Reversed based on this and other errors.)

Morgan v. State of Florida, 700 So.2d 29 (2nd DCA 1997) (where def.'s defense was misidentification, it was improper for State to ask him his whereabouts at time of crime and then argue to jury that: (a) the defense attorney never asked him his whereabouts although it was "a real obvious question to ask the guy" and (b) although he claimed to be at a party, he failed to produce his girlfriend to corroborate this alibi. The effect of setting up this "alibi" defense only to knock it down improperly shifted the burden of proof from the State to the defendant.)

Smith v. State of Florida, 698 So.2d 632 (2nd DCA 1997) (improper for State to argue "And for him [def. counsel] to say my client didn't have to testify because he can't prove a negative, he could have certainly told us where he was on June 9, 1994." This argument consisted of a comment on def.'s right to remain silent and shifted the burden to def. to prove his innocence.)

Consalvo v. State of Florida, 697 So.2d 805 (Fla. 1996) (Generally, it is improper for State to set up a "straw man" defense and then knock it down as this may lead the jury to believe that the def. had the burden to prove his innocence. Prosecutor did not manufacture suicide defense in order to knock it down where def. elicited testimony on cross-examination and requested certain evidence pre-trial which suggested a suicide defense. Since State could have reasonably believed that issue of suicide was raised by defense, response in closing was proper.)

D'Annunzio v. State of Florida, 683 So.2d 151 (5th DCA 1996) (where def. raised alibi def. by taking the stand and claiming to be at work at the time of the offense, it was proper for State to comment on def.'s failure to produce pay stubs the he had claimed would support his alibi. It was error, however, for State to comment on def.'s failure to produce witnesses when they were not shown to have knowledge of material facts or be otherwise competent)

Raupp v. State of Florida, 678 So.2d 1358 (5th DCA 1996) (error for prosecutor to comment on def.'s failure to call his brother-in-law and seven year old son as witnesses. Def. had not asserted defense of alibi, self-defense or defense of others and therefore carried no burden of proof. Argument had effect of shifting burden.)

Hayes v. State of Florida, 660 So.2d 257 (Fla. 1995) (improper for prosecutor to comment on def.s failure to test hairs found at the scene of the murder. Comments may have led jury to believe that def. had an obligation to test the evidence and prove that it did not match his own. Trial court failed to cure the problem when it instructed the jury that the def. had no obligation to test the evidence but it had the opportunity to have it tested. In this context, "opportunity" implies obligation. Reversed.)

Hazelwood v. State of Florida, 658 So.2d 1241 (4th DCA 1995) (Although prosecutor may not normally comment on the def.'s failure to produce evidence to refute an element of the crime

because doing so could shift the BOP, prosecutor's comment during closing argument that "defense counsel has the same subpoena power as the state of Florida," was an appropriate response to defendant's closing argument explicitly commenting on state's failure to call witnesses. However, prosecutor exceeded the scope of a "fair reply" when he then commented that if the witnesses had been called they would have simply corroborated what other witnesses had already said. A prosecutor cannot suggest during closing that there are other, uncalled witnesses who would corroborate the state's case, as this refers to matters outside of the evidence. Reversed)

Shelton v. State of Florida, 654 So.2d 1295 (4th DCA 1995) (prosecutor's question to the jury: "[I]s there anything showing that he did not make that [drug] sale?" improperly shifted the burden of proof and could be interpreted as a comment on def.'s silence. [Disapproved of by Bell v. State, 108 So.3d 639, on this point.])

Jones v. State of Florida, 653 So.2d 1110 (4th DCA 1995) (Except in limited situations where def. assumes burden of proving alibi, self-defense or defense of others, relying on facts that could be elicited only from witnesses who are not equally available to the state, it is improper for prosecutor to comment on def.'s failure to call a witness because it may mislead the jury into believing that the def. has the burden of introducing evidence or may violate def.'s right to remain silent.")

State of Florida v. Compo, 651 So.2d 127 (2nd DCA 1995) (state's comments on defense of entrapment were proper, despite fact that defense had been abandoned by the end of the trial, because the entrapment defense was the primary focus of the defendant's opening argument and it was a significant issue throughout the trial. By the time the defense was abandoned, the issue was firmly planted in the jury's mind. The state's comments fell into the category of "invited response." Fundamental notions of fairness required that the state be allowed to comment on the entrapment issues raised by the defendant. Order granting new trial reversed.)

Bates v. State of Florida, 649 So.2d 908 (4th DCA 1995) (where defense to aggravated assault on law enforcement officers was voluntary intoxication , it was error for State to raise def.'s failure to call his mother, with whom he lived, to testify about how much alcohol he had consumed. Although special relationship existed, def.'s defense did not rely on facts that could only be proved by his mother since officers could have testified to his level of intoxication.)

Rogowski v. State of Florida, 643 So.2d 1144 (3rd DCA 1994) (Although it was improper for State to comment on def.'s failure to call a witness by alleging that the witness had nothing positive to say about def., this comment was provoked by def. counsel's improper comment that the State had failed to call the same witness, namely, that this witness was the "real perpetrator," although there was no evidence to support this comment. Error harmless where court instructed jury that def. did not have to prove anything.)

Parker v. State of Florida, 641 So.2d 483 (5th DCA 1994) (where def. took the stand and

claimed that his nephew had driven his car earlier that day and drugs found inside must have been his, it was proper for the State to comment on his failure to produce his nephew as a witness.)

Richards v. State of Florida, 635 So.2d 983 (4th DCA 1994) (where def. counsel argued that the state failed to have a fingerprint technician testify at trial and that an identified fingerprint would have proven who was at the scene of the murder, it was improper for state to respond that the def. had an opportunity to present any evidence that proved somebody else committed the crime or raised a reasonable doubt. State did not simply respond that def. could have called the same fingerprint expert to testify that the def.'s prints were not identified. Rather, the prosecutor made a general remark about the def.'s failure to present "any evidence that proved that someone else committed the crime," thereby implying that the def. had the burden to bring forth evidence to prove innocence. The broad comment was not invited by the def.'s argument as it did more than reply to def.'s assertions. Although prosecutor reminded the jury that the "burden always remains with the state," the statement did not cure the error because he then repeated the words that led to the objection. Error harmless given the overwhelming evidence of guilt. Affirmed.)

Messec v. State of Florida, 635 So.2d 89 (4th DCA 1994) (error for prosecution to mention that def. failed to call a fingerprint expert to rebut State's expert - this may shift the burden of proof.)

Lawyer v. State of Florida, 627 So.2d 564 (4th DCA 1993) (improper for State to comment on def.'s failure to call work manager as a witness. In order for State to raise def.'s failure to call a witness, def. must have put on evidence of defenses such as alibi or self-defense which reflects the existence of a witness who could give relevant testimony AND that witness must have a special relationship with the defendant. "Special relationship" with the def. and "not equally available" to the state are synonymous for purpose of this rule.)

Heinz v. State of Florida, 615 So.2d 238 (3d DCA 1993) (even if alleged burden-shifting argument were improper [court does not identify argument], error would not be prejudicial because (1) the arguably improper argument was a fleeting, one-sentence comment, and was not a prolonged, inflammatory argument; (2) the trial court sustained, almost immediately, a defense objection to this argument and shortly thereafter gave the jury an appropriate cautionary instruction; and (3) the evidence that the defendant committed the crimes for which he was convicted was strong and pointed unerringly to the defendant. Affirmed.)

Jacobs v. State of Florida, 600 So.2d 1199 (5th DCA 1992) (Not improper for prosecutor to point out in closing that the state's case is uncontradicted; this constitutes comment on the credibility of the defense, not on the credibility of the defendant.)

Brown v. State of Florida, 593 So.2d 1210 (2nd DCA 1992) (improper for prosecutor to comment on def.'s failure to call a witness as that indicated that the def. had the burden to produce evidence and prove his innocence.)

Miller v. State of Florida, 582 So.2d 85 (3rd DCA 1991) (it was not improper for state to comment on def.'s failure to call companion (driver of car) as a witness at trial where defense counsel's opening argument alleged that defendant's companion was perpetrator of burglary for which defendant was charged, despite contention that it improperly led jury to believe that the defense carried the burden of producing evidence.)

Highsmith v. State of Florida, 580 So.2d 234 (1st DCA 1991) (In trial for possession of a firearm by a convicted felon, it was proper for State to comment on def.'s failure to call two friends as witnesses where def. took the stand, claimed to have been with those friends when police "harassed" him and denied knowing whether gun found under his seat belonged to one of them. General rule is that an accused puts his own credibility at issue by taking the stand. In doing so, if the def. makes it appear that a potential witnesses could exonerate him, then, to that extent, the prosecutor has the right to comment. This does not require that the def. explicitly state that witnesses would support his story, only that he "make it appear so." *[Reversed on other grounds, 617/825; Subsequently abrogated on issue of "flight" instruction - Fenelon v. State, 594 So.2d 292]*)

McDonald v. State of Florida, 578 So.2d 371 (1st DCA 1991) (Where defense counsel comments upon the state's failure to call a witness who is demonstrably competent and available, a reply by the prosecuting attorney that the defense has the same ability to put on the witness does not prejudice the def.s right to a fair trial [no explanation of why the child, who the evidence showed slept through the entire incident, would be considered "competent" in the context of having information to elucidate the transaction as that term is usually used]).

Jackson v. State of Florida, 575 So.2d 181 (Fla. 1991) (it is generally improper for State to comment on def.'s failure to produce evidence as that could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence and, in some cases, could be viewed as a comment on his right to remain silent. Exception to this rule applies where the def. voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state. (i.e. a witness who has a special relationship with the def.) [NOTE: Both elements to the exception must exist] Here, def. asserted no defense to which his mother could have related relevant testimony, therefore, State's comment as to def.'s failure to call her as a witness was improper.)

Alvarez v. State of Florida, 574 So.2d 1119 (3rd DCA 1991) ("If the defense wanted to see the earrings so bad, they have subpoena powers" - one of many improper arguments [although, if there had not been 14 enumerated errors in the prosecutions closing argument, this isolated comment would probably have been found to be an acceptable response to a def.'s question of "where are the earrings," assuming they were available to both sides. The opinion does not give us the context in which the statement was made.])

Jones v. State of Florida, 571 So.2d 1374 (1st DCA 1990) (Prosecutor's comment that def.

counsel also has subpoena power and could have brought in witnesses if she felt they would shed some light on the case was fair reply to def. counsel's argument to the jury about the absence of certain witnesses (including other officers and her question: "Ask yourself what would they have had to say that I didn't get to hear.")

Love v. State of Florida, 569 So.2d 807 (1st DCA 1990) (Not improper for State to argue to jury the "conspicuous absence" of doctor's who had previously adjudged him insane in a different case, pointing out that they were still in town "if they had anything relevant to say about this defendant's current insanity." Comments on a def.'s failure to call a witness is not reversible error where the def. raises in the jury's mind, in opening or through testimony, an implication that a witness will be called or will testify favorably to the def. Def. counsel's cross-exam might lead jurors to infer that other independent psychiatrists would disagree with the opinion of State's expert.)

Crowley v. State of Florida, 558 So.2d 529 (4th DCA 1990) (where def's closing argument did not raise the issue of the state's failure to call a witness, it was error for prosecutor to argue to jury that def. had subpoena powers and could have called witnesses who were present at the scene, including one who was his friend, to corroborate his claim that he was not selling drugs as the arresting officer claimed. After defense objection was overruled, prosecutor continued to argue that def had "testified these people were present at the scene, they saw what was going down, they are friends of Mr. Crowley's. But where are they?" The prosecutor also pointed out to the jury that if there were anybody out there that could vouch for Crowley's version of the facts, they would have been called to testify. Error was not invited and deprived def. of a fair trial. Reversed.)

Andrews v. State of Florida, 533 So.2d 841 (5th DCA 1988) (prosecutor's comment that no evidence had been presented which provided an innocent explanation for def.s fingerprint being found on the window screen was not improper where it was made in response to defendant's argument that there was an innocent explanation. Affirmed. *[subsequent abrogation on Frye issue recognized by Hadden, 690/573 and other cases.]*)

Erwin v. State of Florida, 532 So.2d 724 (5th DCA 1988) (Where prosecutor wonders to the jury whether the def., in final closing, may bring up the absence of certain witnesses and tells the jury that each side has subpoena power to bring in witnesses, argument was improper because it was not invited by the defense [implying that if actually raised by the def., disclosing subpoena power would be proper]. No objection and not fundamental. Affirmed)

Brown v. State of Florida, 524 So.2d 730 (4th DCA 1988) (Where def. did not claim that he was with other persons at the time of the offense but merely denied knowing where he was at the time of the offense [although he remembered where he was earlier that day], he did not raise alibi defense. It was error for prosecutor to imply that def. had an alibi defense and then comment on his failure to produce witnesses to corroborate it.)

Sastre v. State of Florida, 487 So.2d 1137 (3rd DCA 1986) (although it may have been improper for prosecutor to argue that def. did not produce any corroborating witness, [especially where def. tried to obtain C.I.'s address but unsworn motion was denied and did not call C.I. because he did not have address to reach him], no objection was made to comment and not fundamental. Affirmed in part.)

Henry v. State of Florida, 483 So.2d 860 (5th DCA 1986) (prosecutor's comment on def.'s failure to call witnesses for his own defense was not error where def. counsel invited the comment by his argument regarding the failure of the state to present certain evidence and call certain witnesses. The state's comment was fair rebuttal. Affirmed.)

Hall v. State of Florida, 470 So.2d 796 (4th DCA 1985) (Prosecutor may comment on def.'s failure to call an alibi witness if: 1) the witness knows material facts which will be helpful to the def. in making his defense and 2) the witness is competent and available. "Available" does not refer to geographic proximity or mental capacity but to one party's superior knowledge of the existence and identity and expected testimony of the witness. Def.'s wife, girlfriend or long-time acquaintance ordinarily will be considered to be available as a witness for that party. *[Subsequently reversed on other grounds- Hall v. State, 517 So.2d 678 (Fla. 1988]*)

Simmons v. State of Florida, 463 So.2d 423 (3rd DCA 1985) (Where def. claimed to have been on his way to meet a friend at the time he was arrested for robbery and the arrest occurred immediately after the robbery and in the immediate vicinity of the crime, it was proper for State to comment on def.'s failure to call his "friend" as a witness because (a) it was made in response to def.'s assertion of alibi; (b) the witness was within the peculiar power of the def. to produce as he was supposedly his friend and (c) the witness' testimony would have elucidated the transaction and was therefore potentially competent evidence.)

Dunbar v. State of Florida, 458 So.2d 424 (2nd DCA 1984) (A prosecutor's reference to def.'s failure to call certain witnesses may be prejudicial if it refers to a def.'s exercise of his right to remain silent or if the comments indicate that the def. has the burden to come forward with evidence and prove his innocence. However, it is not improper for a prosecutor to refer to a def.'s failure to call certain witnesses when def. counsel indicates in opening statements that those witnesses would be called to testify. Here, def.'s counsel referred to witnesses in opening and, when nobody called them, commented to jury on the state's failure to call them. Under those circumstances, it was proper for state to respond that def. could have called the witnesses as well. Affirmed.)

State of Florida v. Michaels, 454 So.2d 560 (Fla. 1984) (where def. claimed self defense or defense of others and daughter was an eyewitness to incident, it was appropriate for prosecutor to comment on def.'s failure to call daughter as a witness. She was not "equally available" to both sides because of her special relationship to the def. which would normally bias her toward supporting her father's defenses [reversing 429 So.2d 338] .)

Araujo v. State of Florida, 452 So.2d 54 (3rd DCA 1984) (where prosecutor challenged def.'s explanation of his presence at site of marijuana raid to meet a friend about a business deal as unreasonable, and def. attorney responded that, reasonable or not, he shouldn't be punished for his friend's [Frank DeCamilla's] choice of locale for a business discussion, it was improper for prosecutor to reply: "Where is Frank DeCamilla? We both called witnesses. I called everybody I wanted." Def. counsel's response did not "open the door" to "missing-witness inference." Although presumably competent, witness was not peculiarly within def.'s power to produce [being in the custody of the Dept. of Corrections. Trial court overruled objection. Reversed.)

Priestly v. State of Florida, 450 So.2d 289 (4th DCA 1984) (prosecutor's comment that def. would "have to show ... that [he was] entrapped" was a proper comment on the def.'s burden to prove an affirmative defense. It was not an improper comment on the def.'s right to remain silent.)

Trinca v. State of Florida, 446 So.2d 719 (4th DCA 1984) (in a case where def.'s stepdaughter, a drug user with many arrests, was apparently involved in the events leading up to def.'s arrest and gave the police a statement, and where prosecutor withdrew question about stepdaughter's statement following hearsay objection, it was improper for state to argue: "Then I would have loved to put the stepdaughter on *if I could* ... he has the same subpoena power that I do. How did he get the other witnesses in here?" Argument suggested that witness was unavailable to prosecutor and that def. had the burden of producing witnesses to show his innocence. Trial court overruled objection and denied request for curative instruction. Reversed.)

Kinnon v. State of Florida, 439 So.2d 958 (3rd DCA 1983) (in case where def. did not testify after being arrested in a truck with many dresses stolen from a burglary, it was not improper for State to argue: "No explanation. If she wasn't in the truck all that period of time, is there any other explanation?" When taken in context of the complete argument, it is clear that State was not commenting on the def.'s Fifth Amendment rights. The references to the lack of an "explanation" by the defendant clearly relate to the inference of guilty knowledge which may be drawn from the def.'s unexplained possession of the recently stolen dresses. Comment was perfectly permissible. Affirmed.)

Bayshore v. State of Florida, 437 So.2d 198 (3rd DCA 1983) (improper for State to present Officer's testimony that def. kept claiming he wasn't in the area of the crime but was home with his father, and then argue in closing that the def. did not call his father as a witness to corroborate that claim. Where the def. has not raised the alibi defense, it is inappropriate for the State to raise the "straw man" defense and then knock it down, as this may lead jury to believe that def. had the burden of proving his innocence.)

Romero v. State of Florida, 435 So.2d 318 (4th DCA 1983) (prosecutor's reference to defs. failure to call a witness impinges upon def.s right to remain silent and presumption of innocence by shifting the burden of proof and will constitute reversible error. Comment permitted where def. comments on state's failure to call the witness and state replies by pointing out that the def.

had the same ability to put on the witness [fair reply]), where defendant's own presentation [in opening statement, closing argument or otherwise] depends upon facts which could only be elicited from such witness whose testimony is consequently assumed to be relevant, material and favorable to the defense (i.e. alibi). Otherwise jury may be misled and a def.s position, unsupported by a scintilla of evidence, will not be put in the proper perspective. "Although a def. initially assumes no burden he is encumbered by one obligation: if he chooses to speak, he must speak the truth.." Here, def. identified an alibi witness who he claimed he still knew. Prosecutor's comment on his failure to call that witness was proper.)

Miller v. State of Florida, 435 So.2d 258 (3rd DCA 1983) (prosecutor's comment to the jury that "all we want is for police to do their job and to give aid to people" fell within bounds of "fair comment," in view of defense argument suggesting that police actions were inappropriate. Held: Affirmed).

Lynn v. State of Florida, 395 So.2d 621 (1st DCA 1981) (improper for prosecutor to comment on def.s failure to call a witness and matters outside the evidence: "He said, 'Where is Charles Williams?' Always got to have the mystery man. I ask you the question of where is James Atkins today? We presented you the available witnesses. Where is James Atkins today? Sometimes we know where they are and can't tell you." However, statements could be viewed as fair comment to refute statements made by def. in his closing. Even in conjunction with other errors, not sufficient to warrant a new trial.)

Cook v. State of Florida, 391 So.2d 362 (1st DCA 1980) (where def. commented on absence of other witnesses, it was not error for State to comment on the subpoena power of the defense.)

Brinson v. State of Florida, 364 So.2d 66 (4th DCA 1978) (Prosecutor's comment about the absence of witnesses who had obvious knowledge of the defense asserted by def. was not improper [no facts given]. Affirmed with modified sentence.)

Weeks v. State of Florida, 363 So.2d 176 (4th DCA 1978) (defendant and another defense witness testified than an absent witness was the real perpetrator. The prosecutor commented in closing that the absent witness had not testified and was conveniently out of town. Held: Proper comment. Affirmed).

Gilbert v. State of Florida, 362 So.2d 405 (1st DCA 1978) (Prosecutor's statement that if the defendant was not in Pensacola at the time of the crime there would be an alibi witness [where no such defense was presented] was reversible error despite a curative instruction that defendant does not have to testify or present any evidence.)

Allen v. State of Florida, 320 So.2d 828 (4th DCA 1975) (defense counsel's opening statement implied that a certain individual was the true perpetrator of the offense with which the defendant was charged. The court held that comment by the prosecuting attorney on defendant's failure to produce "the true perpetrator" to testify was not reversible error).

Jenkins v. State of Florida, 317 So.2d 90 (1st DCA 1975) (the defense attorney told the jury during opening statement that the defendant's common law wife would be called to testify and would provide an alibi for him. The common law wife was present in the courthouse throughout the trial. In closing argument, the prosecutor commented that the defendant failed to produce his wife as promised by his attorney. Held: Comment was proper. Affirmed).

Mabery v. State of Florida, 303 So.2d 369 (3rd DCA 1974) (although it was improper for prosecutor to argue that "when he [def.] is going to go get up on the stand and tell you something where it is questionable, he should bring witnesses to testify on his behalf" as that argument improperly shifts the BOP, error was not reversible because argument was proper in all other respects. Proper procedure is to ask for a "corrective instruction." Mistrial is only appropriate when the corrective instruction is denied or is inadequate or when the offense is repeated. Affirmed.)

Kirk v. State of Florida, 227 So.2d 40 (4th DCA 1969) (improper for prosecutor to ask: "where are Alfred Busser, Ralph Clark, the deputy sheriff that was announced as a witness, Grace Buher, where is Martin Lindsey" referring to the def. failure to call listed witnesses. Def. objected to shifting the BOP. "It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial.... The trial judge failed to uphold his duty to maintain order and decorum, and to exercise that general control over the trial needed to protect the accused from abuse or intimidation." Reversed).

Woodside v. State of Florida, 206 So.2d 426 (3rd DCA 1968) (prosecutor's comments that if the def. attorneys thought they could show a mistake in identification, "they would have brought it out from the witness stand," and that the state "has the burden of proving their guilt by competent evidence" and "it is up to the defense, if they can, to rebut that" were not improper comments, directly or covertly, on def.s failure to testify. Instead, comments constituted an observation of the fact that the state's witnesses were "unshaken by cross-examination." Affirmed.)

State of Florida v. Jones, 204 So.2d 515 (Fla. 1967) (it was not improper for prosecutor to argue: "Now how in the world have they shown to you gentleman by any witnesses ... that he did not know at the time ... what he was doing was wrong? Where is the testimony that came from that stand?" Def. raised defense of insanity and it was clear that argument was addressed to the "evidence as it existed before the jury" and not "to the failure of def. to explain or contradict what had been introduced." Affirmed)

B. Explanations of the BOP --Proper/Improper

Constant v. State of Florida, 139 So.3d 479 (3rd DCA 2014) (it was improper for prosecutor to "remind" jurors that they had "promised" in voir dire to convict based on the testimony of a

single witness if they found that witness credible [incorrect standard] and to tell jury: "I do believe he committed this crime." Errors were not harmless given the weakness of the case where def was identified by a single witness who got a brief look at his face when the rag covering it was momentarily moved and who picked him out of a lineup 11 days after the crime, where no forensic evidence existed and evidence of def.'s shoe size was, at best, equivocal. Reversed.)

Mullins v. State of Florida, 137 So.3d 558 (4th DCA 2014) (in manslaughter trial, it was improper for prosecutor to argue that for jury to find def. not guilty they would have to believe that the witnesses fabricated their testimony. Correct standard is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. [Note: this is sometimes referred to as "burden shifting" presumably because it imposes some burden on the def. to show the witnesses are lying or that def. witnesses are more believable, but it is really just a misstatement of the standard of proof.] Error not harmless. Reversed.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – prosecutor's argument that def didn't claim he was guilty of a lesser, only that he was not guilty of anything (*"He is telling you your choice is not guilty, if you believe his testimony from the witness stand"*), was not an invitation for the jury to find him guilty if they thought he was lying (rather than if he was proven guilty beyond every reasonable doubt). The prosecutor pointed out that the State and defense both sought an all-or-nothing verdict—that neither side asserted that def was guilty of a lesser included offense. The prosecutor did not argue that disbelief of def's account was sufficient for a conviction or that belief in def's account was necessary for an acquittal. Denial of post-conviction motion affirmed.)

Mitchell v. State of Florida, 118 So.3d 295 (3d DCA 2013) (prosecutor's argument that in order to find def. not guilty the jury would have to disbelieve all of the state's witnesses was an improper burden-shifting argument because it suggested the def. had to prove that the state's witnesses were lying. Such argument also misstates the burden of proof in that the test is not who's witnesses are more believable, it is whether the evidence convinces the jury of the def's guilt beyond a reasonable doubt. Reversed.)

Hendrix v. State of Florida, 82 So.3d 1040 (4th DCA 2011) (it was improper for prosecutor to argue that if the detective "is a liar, acquit. If he's not a liar, convict." The prosecutor may not argue that the jury can convict def. for any reason "other than his guilt of the crimes charged." Reversed on these and other grounds.)

Maharaj v. State of Florida, 78 So.3d 63 (4th DCA 2012) (in prosecution for sexual battery on a minor under 12, it was improper for prosecutor to argue: "in order to find the defendant not guilty you would have to discredit -- " where, after objection was lodged the prosecutor explained at sidebar that if allowed to finish she would have said "you would have to discredit what [the child] testified." However, although the trial court then overruled the objection, the

prosecutor did not finish the sentence in front of the jury. Instead, the state rephrased its argument: "[I]f you find that [the child's] testimony was credible, if you have an abiding conviction of guilt, you must find the defendant guilty." This rendered the error harmless. In rebuttal, the state summarized the child's testimony and told the jury "this boils down to, do you believe [the child]. … If you do, the State's proven its case." While the state could have more artfully argued that the child's testimony proved the elements of each charge, the state's comments, in the context of the entire closing argument and the entire trial, were not so "prejudicial and fundamental that it denie[d] the accused a fair trial." Affirmed.)

Lucas v. State of Florida, 67 So.3d 332 (4th DCA 2011) (prosecutor's *opening* that "[w]hat brought us all here is to find out about the truth of what that man, the defendant -- ." and closing about the "truth" that came out, were not improper as they did not insinuate that the def had to prove anything or suggest the jury convict the def. for any reason other than evidence that proved his guilt beyond every reasonable doubt. Affirmed.)

Dunlap v. State of Florida, 21 So.3d 873 (4th DCA 2009) (*opening statement*-prosecutor's single reference during opening statement to jury determining the truth when making their decision on a verdict did not suggest to the jury that they should decide the case solely based on witness credibility rather than whether the state proved its case beyond every reasonable doubt. Comment was made in the context of discussing the anticipated conflict in testimony between def and an informant. Defense immediately followed with its opening statement which addressed the State's burden of proof and the jury was also properly instructed at the end of the trial on that burden. Neither the word "truth" nor the topic of witness credibility is prohibited in a criminal trial in proper context.

Paul v. State of Florida, 980 So.2d 1282 (4th DCA 2008) (it was improper for prosecutor to comment to jury that "[t]he State has the burden of proving all of these elements beyond a reasonable doubt. And if [the defense attorney] wants to present theories of how she believes this case should play out, there's got to be some level of proof from that [sic] Mr. Laboy was lying." Comment improperly shifted the BOP to the def by telling the jury that def needed to prove victim was lying in order to be found not guilty. Error was not cured and was exacerbated when trial court overruled the objection and explained to the jury "It's a comment on the evidence, or should I say, while the State always has the burden of proof, both lawyers have a right to comment on their perception of the evidence and, as I told you before, you're free to accept it or reject it." Instruction failed to specifically rebuff State's comment that def had to show victim was lying and appeared to consent to the accuracy of the comment when it overruled the objection and told the jury that the State is allowed to comment on the evidence. Reversed.)

Montanye v. State of Florida, 976 So.2d 29 (5th DCA 2008) (in case where def.'s brother took the stand after statute of limitations had run and claimed that he, rather than his brother, was the one who committed the battery on the victim, prosecutor's argument that if brother was lying, def was guilty was improper. ["If Josh Montanye is lying, Sean is guilty. … Josh Montanye is lying, and he's doing it to get all of you to buy it."] Comment not only expressed prosecutor's

personal opinion about the credibility of a witness, but also attempted to improperly shift the burden of proof to the defense (since simply proving that def's brother was lying would not meet the State's burden of proving the case of def's guilt beyond a reasonable doubt. Def counsel only objected to one of the improper comments and court sustained objection and gave a curative instruction. Error not fundamental. Affirmed.)

Sempier v. State of Florida, 907 So.2d 1277 (5th DCA 2005) (it was improper for prosecutor to argue: "And just the fact that there's conflict in testimony between [the victim] and [the def.] does not mean that it's automatically not guilty. It's whether or not you truly believe everything the def. says," and "When you look at all of the testimony in this case there may be conflicts, but the bottom line is, if you believe her testimony, that's all you need." Argument improperly shifted burden of proof to def. Reversed.)

Atkins v. State of Florida, 878 So.2d 460 (3rd DCA 2004) (where defense counsel argued that def. was not claiming that victim was lying, but only that she was mistaken, reiterating the discrepancy between the victim's description and the def.'s physical appearance, it was improper for prosecutor to suggest to jury that victim would have to be a liar for def. to be not guilty. Standard for a criminal conviction is not which side is more believable, but whether taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. Prosecutor's comment implied that the jury could ignore the def.'s argument that acquittal was proper if it believed the victim's identification was a mistake because the def. did not prove the victim was lying. Reversed.)

Cole v. State of Florida, 866 So.2d 761 (1st DCA 2004) (it was improper for prosecutor to argue "It's all a question, ladies and gentlemen, of who you're going to believe. That's what this whole case is about. Are you going to believe the law enforcement officers that took the stand and told you what happened to them or are you going to believe that story he gave you? ... Who do you believe, the officers or the story?" Although it sustained the objection, trial court erred in ruling that motion for mistrial, made after State finished it's closing but before jury was instructed or retired, was untimely. Reversed.)

Kelly v. State of Florida, 842 So.2d 223 (1st DCA 2003) (in case where mother on trial for murder of her husband accused her son of firing fatal shot, it was improper for state to argue: "[you heard the defendant finally admit that she doesn't care about [her son] because with her words today, ladies and gentlemen, she put murder and responsibility for murder on her teenage son and, ladies and gentlemen, that all by itself ought to convince you that she deserves to be convicted of second degree murder." Argument suggested to the jury that they should convict the defendant because of her bad character and to base their verdict on ill will and passion, rather than on the evidence and the law. Inviting the jury to convict the defendant for a reason other than evidence that demonstrated defendant committed the crime is improper. Reversed)

Covington v. State of Florida, 842 So.2d 170 (3rd DCA 2003) (A closing argument is objectionable if it asks the jury to determine the issue of guilt on the basis of whether the def. (or

a witness) was lying. Prosecutor's asserted that there was only one issue in the case - whether the def. possessed a firearm - and that this boiled down to whether the jury believed the police officer or the defense witness. While in one sense the prosecutor was simply stating the obvious, it was nonetheless phrased in an objectionable way on burden-of-proof grounds and the objection should have been sustained. ["The question before you, now that you heard all the evidence in the case, is do you believe Officer Tellez or do you believe Articha Carter."] But error was harmless where prosecutor continued by explaining that this statement was addressed to the question of weighing the evidence, a permissible area of argument. Second comment that defense was arguing that officer should not be believed because he didn't do everything he should have and "That's up to you . That's why this comes down to [who] do you believe" was likewise an improper statement of the burden of proof but isolated comment was followed up by prosecutor's correct statement of the burden of proof and permissible argument that on the basis of the officer's testimony, the prosecution had met its burden. Error harmless. Affirmed.)

Rivera v. State of Florida, 840 So.2d 284 (5th DCA 2003) (Prosecutor's comment: "[i]n order for you to find him not guilty, which you have the prerogative to do, but you're going to have to essentially be saying that [the victim's] identification sucks," while inappropriate language, was not an improper *shifting* of the burden of proof as argued by def. counsel. Comment was not directed to def.'s failure to testify or mount a defense. In fact, the def. did present a defense and did testify. Moreover, the comment was invited by the defense's argument that the entire case turned on the identification of the victim and that the identification was unworthy of belief. "A defendant is not at liberty to complain about a prosecutor's comments in closing argument when the comment is [sic] an invited response." [citations omitted]. Affirmed.)

Sims v. State of Florida, 839 So.2d 807 (4th DCA 2003) (*dicta*-it was improper for State to argue to jury that they should base their verdict on which side they believed more, on whether the officer was telling the truth or lying and to choose the side that is more credible and believable. Reversed on other grounds.)

Owens v. State of Florida, 817 So.2d 1006 (5th DCA 2002) (It was not improper for State to argue to jury that either def. or officer was lying about who retrieved the gun. State was not suggesting that def. should be convicted for being a liar or that jury should convict def. if it believed the officer. Prosecutor merely pointed out that it was the jury's function to resolve the discrepancy in the testimony. Affirmed.)

Sanders v. State of Florida, 779 So.2d 522 (2nd DCA 2000) (it was improper for prosecutor to argue to jury that defendant had failed to prove defense of alibi beyond a reasonable doubt. When a def. raises an alibi defense, the def. is not required to prove the alibi beyond a reasonable doubt. It is sufficient if the proof raises a reasonable doubt in the minds of the jury that the def. was present at the time and place of the commission of the crime charged. Where prosecutor improperly commented on four separate occasions that it was the def.'s burden to prove alibi beyond a reasonable doubt, the error in shifting the burden of proof deprived the def. of his fundamental right to due process, even absent objection. Reversed.)

Eure v. State of Florida, 764 So.2d 798 (2nd DCA 2000) (improper for prosecutor to urge jury to acquit the defendant if they believed the officer was lying and to convict him if they believe he was not lying. Jury could believe officer was mistaken in his ID of the def. but not intentionally lying. Test is whether def. was proven guilty beyond a reasonable doubt, not whether witness was lying. Reversed on these and other grounds.)

Riggins v. State of Florida, 757 So.2d 567 (2nd DCA 2000) (it is improper for a prosecutor to suggest that the only way to believe the accused's version of events is to disbelieve a witness's testimony because that improperly distorts the state's burden of proof by shifting the burden to the accused. Harmless. Affirmed)

Connelly v. State of Florida, 744 So.2d 531 (2nd DCA 1999) (Gist of state's argument about how much def. lied during testimony was to urge jury to convict him for not being truthful. "Now he's gotten up here and told you today what it is you would expect him to say. 'I didn't intend ....' What do you think of his willingness to lie and lie and lie and lie, literally, by his calculations on cross-examination – hundreds of times." When combined with alleged errors in state's cross-examination of def. – Reversed) [**NOTE**: *There are more inconsistencies among DCA's and the Supreme Court in these types of cases {i.e. calling def. or witness a liar or saying they lied} than in almost any other area of closing arguments}*]

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) (improper for prosecutor to characterize def. as "Pinocchio," and then tell the jury that "truth equals justice" and "justice is that you convict him" as that invited the jury to convict def. because he was a liar. Reversed due to many errors).

Henderson v. State of Florida, 727 So.2d 284 (2nd DCA 1999) (prosecutor's comment that "If you believe what [def.] said on that witness stand, check not guilty. Let him go. But that will mean that [the witnesses] are all a pack of liars. That they all made this up just to get poor old [def.].... If you believe [def.'s girlfriend], period. It's over. You have been convinced that he committed the crime" improperly shifted the burden of proof. [actually, this appears to fall under the "improper explanation of BOP category rather than shifting of BOP]. Not fundamental error even when combined with other improper arguments. *[Receded from on other grounds - Washington v. State, 752 So.2d 16]*)

Gore v. State of Florida, 719 So.2d 1197 (Fla. 1998) (improper for prosecutor to argue to the jury: "If you believe he did not tell you the truth, that he made up a story, that's it, he's guilty of First Degree Murder." Argument improperly asked jury to determine whether def. was lying as the sole test for determining the issue of his guilt, rather than whether considering all the evidence he has been proven guilty beyond a reasonable doubt.) Reversed due to cumulative effect of all errors.)

Freeman v. State of Florida, 717 So.2d 105 (5th DCA 1998) (improper for prosecutor to argue to jury that they should convict the defendant if they believed the officer instead of him and that

"the question" was who they wanted to believe. Standard of proof is not whether the def. is lying or officer is telling the truth.) Reversed based upon totality of errors.)

Northard v. State of Florida, 675 So.2d 652 (4th DCA 1996) (improper for prosecutor to argue "in order to find him not guilty you're going to have to believe that the def. was telling the truth and the officer was lying ...." This misstatement urges the jury to convict the def. for a reason other than the guilt of the crimes charged [i.e. determine who was lying as the test for deciding guilt].)

Knight v. State of Florida, 672 So.2d 590 (4th DCA 1996) (prosecutor argued that a not guilty verdict meant the detectives were criminals and perjurers. Held: Improper argument. This prosecutor's summation was a veritable road map of prosecutorial misconduct, so this statement was not the only reason for reversing.)

Clewis v. State of Florida, 605 So.2d 974 (3rd DCA 1992) (Improper for prosecutor to argue that in order for jury to find a reasonable doubt, they must believe the defendant's testimony over the officers. Test for reasonable doubt is not which side is more believable, but whether, taking all of the evidence in the case into consideration, guilt as to every essential element has been proven beyond a reasonable doubt. Prosecutor's argument improperly shifted burden of proof to def.)

Bass v. State of Florida, 547 So.2d 680 (1st DCA 1989) (in a case where only witnesses were def and victim, prosecutor's comment that one was lying and that if they want to tell the def. that he lied they should find him guilty invited the jury to convict the def for a reason other than the crimes charged {i.e. simply because he lied})

Rodriguez v. State of Florida, 493 So.2d 1067 (3rd DCA 1986) (prosecutor's comment in closing was: "if you believe [the defendant's story] is not credible and if you believe he took the stand and didn't tell the truth, he is guilty of first degree murder." Held: Improper argument. Affirmed for failure to properly preserve the issue for appellate review).

V. Attorney's expression of personal opinions

A. Personal opinion as to the guilt or innocence of defendant

Constant v. State of Florida, 139 So.3d 479 (3rd DCA 2014) (it was improper for prosecutor to "remind" jurors that they had "promised" in voir dire to convict based on the testimony of a single witness if they found that witness credible and to tell jury: "I do believe he committed this crime." Errors were not harmless given the weakness of the case where def was identified by a single witness who got a brief look at his face when the rag covering it was momentarily moved

and who picked him out of a lineup 11 days after the crime, where no forensic evidence existed and evidence of def.'s shoe size was, at best, equivocal. Reversed.)

State of Florida v. Smith, 109 So.3d 1204 (5th DCA 2013) (prosecutor's comments: "This man committed an armed robbery on April 18, 2009. It's that simple. He's the person who did it" and "to believe that this is a case of mistaken identity, you have to ignore the facts of this case. . . ." were no more than comments on the evidence that the prosecutor was entitled to make. Order granting new trial on this and other alleged improper argument reversed.)

Lucas v. State of Florida, 67 So.3d 332 (4th DCA 2011) (prosecutor's comments to the jury in *opening* and closing urging them to "do the right thing," although improper, were harmless. Affirmed.)

Courtemanche v. State of Florida, 24 So.3d 770 (5th DCA 2009) (prosecutor's comment, (that no matter how overwhelming the evidence against an accused, he's entitled to a trial if he asks for one, and that just because there's a trial the jury doesn't have to sit there and say "well, there must be something. There isn't anything. The defendant is guilty and at this stage, after you've seen all the evidence, each and every element of each charge that's pending against [def] has been proven beyond … every reasonable doubt") does not rise to the level of fundamental error given the abundance of evidence of def's guilt. Court did not specifically address def's claim that closing "ridiculed the def's decision to take his case to trial and expressed his personal opinion " on def's guilt. [NOTE: 5th DCA takes a broad view of what constitutes expression of personal opinion; therefore it may have found prosecutor's statement to be improper while other DCA's would not.)

Sempier v. State of Florida, 907 So.2d 1277 (5th DCA 2005) (It was improper for prosecutor to argue "you have all the testimony that you need. He did it. He's guilty. You should convict him" as that constitutes a personal opinion as to the guilt or innocence of the accused. "Generally, where there is overwhelming evidence of a def.'s guilt, a prosecutor's assertion that the def. is guilty may be considered harmless. [citations omitted] However, when the jury is 'walking a thin line between a verdict of guilt and innocence, the prosecutor cannot be allowed to push the jury to the side of guilt with improper comments." Prosecutor's pronouncement that def. "is guilty" and that "he did it," improperly injected into the jury's consideration her personal beliefs as to def.'s guilt, and could have contributed to def.'s conviction. "Given that no physical evidence connected [def.] to the crime, and that important inconsistencies exist in the victim's identification of [def.], the jury could have attached considerable significance to the prosecutor's statement regarding [def.'s] guilt and been improperly influenced in rendering its verdict." Although no objection was made, error was fundamental. [**NOTE**: other DCA's have not gone as far as the 5th in closing argument restrictions] Reversed.)

Cartwright v. State of Florida, 885 So.2d 1010 (4th DCA 2004) (it was improper for State to suggest to the jury that the State charges only those who are guilty: "But before anything happened, before he was formally charged by the Office of the State's Attorney, sworn statements

were taken to assure the police agency and the State Attorney's office that this prosecution is being put forth in good faith." Reversed on cumulative error.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (after arguing that State had shown def. in DUI manslaughter case was impaired by his actions, prosecutor commented that during his testimony, defendant denied being impaired: "Of course he's going to say that. What is he going to say? Oh yeah, I had a decrease in coordination." Court held that it was improper for prosecutor to not only insinuate that def. was lying but to explicitly express an opinion that def. was guilty by stating that it had shown he was impaired. [??????] Reversed on these and many other grounds. [Note: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Matthews v. State of Florida, 834 So.2d 900 (4th DCA 2003) (prosecutor's comment, that if the jury believed def. and her sister's version of events they should find her not guilty but that the State was contending that def.'s version was not logical and that the evidence "begs for a guilty verdict" was completely proper. Prosecutor was merely submitting to the jury a conclusion that could arguably be drawn from the evidence. Prosecutor's claim that State's version was supported by evidence whereas def.'s version was not was a fair comment. Affirmed.)

Rimmer v. State of Florida, 825 So.2d 304 (Fla. 2002) (prosecutor's comment to jury to "do the right thing" and convict the defendants, although improper, was not *so* erroneous because it was coupled with references to the evidence in the record. Affirmed.)

Fullmer v. State of Florida, 790 So.2d 480 (5th DCA 2001) (in trial for L&L in the presence of a child, where def. testified that he had not exposed himself but had exhibited a rubber penis while driving his vehicle, it was improper for the prosecutor to express her personal opinion about the def.'s guilt: "Ladies and Gentlemen, this man is so guilty. He is very guilty. ... What we must prove and, believe me, has been proven, are the elements we talked about in opening statement. ... Don't let it confuse you or mislead you. The def. is guilty." When combined with other errors, some of which were objected to, total errors where fundamental. Reversed.)

Eure v. State of Florida, 764 So.2d 798 (2nd DCA 2000) (When prosecutor argued: "That's the drug dealer. That's what a drug dealer looks like" he improperly made himself a witness for the prosecution. Reversed based upon multiple errors.)

Martinez v. State of Florida, 761 So.2d 1074 (Fla. 2000) (where state improperly asked officer, over defense objection, if he had any doubt whether def. was guilty and officer answered "no," prosecutor's argument to jury that def. was arrested after police investigation because, between officers and an assistant state attorney, "nobody had a doubt that he was guilty" compounded the prejudice of the improper question. Comment was also an improper expression of personal opinion by the prosecutor [which usually suggests to the jury that the prosecutor has evidence not presented to the jury, but known to the prosecutor, which supports the charges] and was not even based on facts in evidence since the officer was the only one who gave his opinion of guilt

[although improperly]. Reversed.)

Lavin v. State of Florida, 754 So.2d 784 (3rd DCA 2000) (During *voir dire* it was improper for prosecutor to comment that State Attorney's Office manual requires him to make sure that the innocent are not charged or prosecuted. Comment amounted to a personal opinion as to the guilt of the defendant. Reversed on other grounds)

D'Ambrosio v. State of Florida, 736 So.2d 44 (5th DCA 1999) (improper for prosecutor to argue that his yelling about the case demonstrates "the vigor and the conviction I have about this case." Also improper, in urging the jury to reject the defense, to claim "This is just not going to happen ... And everybody in this courtroom knows that" since these arguments reflect a personal opinion on the justness of the cause or the guilt or innocence of the defendant. Reversed on many errors. [Note: The "vigor and conviction" comment was the only comment objected to by counsel. Following the sustaining of the objection, defense counsel asked the court to "strike and make curative" to which the trial court responded: "Strike the last comment by counsel." The appellate court pointed out that a stronger rebuke may have avoided a new trial.])

Kent v. State of Florida, 702 So.2d 265 (5th DCA 1997) (prosecutor's argument that: "make no question about it, if this man goes unanswered for what he did to that woman, it would be a miscarriage of justice," and "the State has conviction that, after you've heard these three days of testimony, that you don't have any doubt that this man did these crimes," even if improperly expressing personal opinion, were not objected to and not fundamental. Affirmed.)

Bauta v. State of Florida, 698 So.2d 860 (3rd DCA 1997) (Prosecutor's comment: "Don't you think that as a prosecutor in Dade County I have better things to do than to persecute this defendant?" is generally improper because it can be viewed as an assertion by the prosecutor of her personal view of the guilt of the defendant. However, where defense was that the child victim had made up the story against def. to gain attention or because she was coached by the State, comment by prosecutor was in the context of a fair reply. No objection was made and the comment, even if objectionable, was not fundamental error.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Washington v. State of Florida, 687 So.2d 279 (2nd DCA 1997) (it was improper for prosecutor to express personal opinion that defense was a "big lie" of the magnitude of Hitler's lie about Jews being the cause of all problems)

Conley v. State of Florida, 592 So.2d 723 (1st DCA 1992) (prosecutor's statement that he did not like def. because he doesn't like "people who rape, rob, burglarize"[the precise charges pending against def.] was improper expression of personal belief in guilt of def. ---Harmless [subsequently rev'd on other grounds, 620 So.2d 180 (Fla. 1993)].)

Jones v. State of Florida, 571 So.2d 1374 (1st DCA 1990) (improper for prosecutor to say "I wouldn't be here if I didn't believe that I could prove to you beyond a reasonable doubt that he shot him.")

Riley v. State of Florida, 560 So.2d 279 (3rd DCA 1990) (improper for prosecutor to comment to jury: "I don't prosecute people who have legitimate self-defense claims." Improper for prosecutor to express personal opinion on the guilt of the accused. Reversed based on this and other errors.)

Singletary v. State of Florida, 483 So.2d 8 (2nd DCA 1985) (improper for prosecutor to twice accuse def. of being a liar and tell jury: "You know as well as I that he [def.] certainly intended to harm ... [the victim] with that gun...." Not harmless given other errors. Reversed.)

Duque v. State of Florida, 460 So.2d 416 (2nd DCA 1984) (Prosecutor's suggestion that he would not prosecute defendant if he thought she was innocent was improper. "I don't come into a courtroom with the wrong persons. If that woman goes to jail that is on my conscience.... I stand before the bar of justice. And I take it seriously.... 'Cause I would cry at night if that girl is innocent behind bars. I wouldn't sleep." -- Already reversed on other grounds.)

McGuire v. State of Florida, 411 So.2d 939 (4th DCA 1982) (Prosecutor's argument "It is not my job to prosecute innocent people" was improper)

Wilson v. State of Florida, 371 So.2d 126 (1st DCA 1978) (Prosecutor's assertion that "I believe with all my heart, mind and soul, this defendant to be guilty of these offenses" improper personal opinion.)

Buckhann v. State of Florida, 356 So.2d 1327 (4th DCA 1978) (prosecutor's comment during closing argument was improper, where he stated, "... but don't you think for one second that the State of Florida does not believe that Terry Lee Buckhann is guilty, or we would not be here." Held: Reversed).

Reed v. State of Florida, 333 So.2d 524 (1st DCA 1976) (improper for prosecutor to argue that "the state doesn't prosecute someone because of their religion or their race or their nationality. We prosecute them because we believe they are guilty of crimes" – argument expressed personal belief in def.s guilty. When taken together with other improper arguments, conviction was reversed despite the fact that the "trial judge valiantly tried to correct the inflammatory and prejudicial argument.")

B. Personal opinion as to the credibility of a witness' testimony

Ramey v. State of Florida, 177 So.3d 308 (3rd DCA 2015) (prosecutor's comment that "[the victim] got on the stand, he was honest with you. He told you the terms of his probation. He does not have a motive to lie" was no more than a direct counter to the defense's argument that the victim was dishonest. Taken in context, no improper bolstering occurred. Affirmed.)

Poole v. State of Florida, 151 So.3d 402 (Fla. 2014) (in this death penalty case, although it was improper for prosecutor to refer to def's family's mitigation testimony about his head injury as "all that crap," error was not fundamental where trial court sustained objection, informed the jury that the comment was improper and instructed them to disregard it. Further, the prosecutor explained to the jury that he was not attempting to tell them not to consider the evidence presented by defs family, but was instead requesting that the jury give more weight to the doctors' evidence regarding defs head injuries. Affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (Death penalty – prosecutor's comment in opening statement, that flip co-def's had "confessed. They have *told the truth*. … [T]hey are going to testify in this trial…," they are "very credible and remorseful" and that another witness' only interest "is to tell the truth" did not improperly bolster the credibility of the witness. "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." Comments that co-def's confessed was based on facts the state intended to show and stating that a witness does not have any interest in the case follows the purpose of opening, which is to outline what the attorney expects will be established by the evidence. Moreover, state was giving anticipatory response to def case, which was that co-def's had confessed to their crime and would say anything the state wanted to get a lighter sentence. Further comments in closing that co-def's "testimony is not the kind of testimony that appears fabricated because in essence it could have gone a lot further down the way if they wanted to please us," was not improper vouching because the prosecutor did not "invoke his personal status as the government's attorney . . . as a basis for conviction of [the] criminal defendant … nor indicate that information not presented to the jury supported the witnesses' testimony." Attorneys can argue reasonable inferences from the evidence and credibility of witnesses. Further, statement was fair comment on def counsel's cross-examination of co-def's as to deal in their plea agreement. Affirmed.)

Valentine v. State of Florida, 98 So.3d 44 (Fla. 2012) (death penalty - following def counsel's claim that victim was lying about def/ex-husband being the person who killed her new husband and tried to kill her, prosecutor's argument (*"[Defense counsel] wants you to believe that [the victim] is lying … he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe … as she was laying there, bound, bloodied, naked, wondering if she was going to live or die, not knowing if she*

would ever see her children again, she thought, "Hey, if I say [Valentine] did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half") was not improper. The prosecutor did not ridicule or otherwise improperly attack the defense's theory of the case; she merely described the defense's theory of the case and stated that the defense wanted the jury to "somehow" believe that theory. "Prosecutorial comments are not improper where, incident to evaluating a witness' credibility, jurors are told to ask themselves what motive the [witness] would have to deceive them." [citation omitted] Indicating to the jury that, based on the evidence of the case, they should question the plausibility of the defense's theory of the case is within a prosecutor's role of assisting the jury to consider and to evaluate the evidence presented. The prosecutor's comments did not improperly express her personal belief as to def's guilt. Denial of post-conviction motion affirmed)

Whigham v. State of Florida, 97 So.3d 274 (1st DCA 2012) (it was not improper for prosecutor to say that witness was telling the truth: "Ms. Flowers was too proud to admit she was getting beat. … *But she came in here and she told you the truth about what happened to her*." "[A]n attorney is allowed to argue . . . credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." … "Improper prosecutorial 'vouching' for the credibility of a witness occurs 'where a prosecutor suggests that she has reasons to believe a witness that were not presented to the jury,' or, stated differently, where the prosecutor 'implicitly refers to information outside the record.' " Prosecutor appropriately explained witnesses demeanor on the stand after Appellant's counsel in closing argument attacked her credibility based on her demeanor and purported evasiveness on cross-examination. Affirmed.)

Jackson v. State of Florida, 89 So.3d 1011 (4th DCA 2012) (it was not improper for prosecutor to repeatedly argue that witness, whose credibility was hotly contested,was testifying openly, honestly and truthfully. Improper prosecutorial "vouching" for the credibility of a witness occurs "where a prosecutor suggests that she has reasons to believe a witness that were not presented to the jury," or, stated differently, where the prosecutor "implicitly refers to information outside the record." But "an attorney is allowed . . . to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." [citations omitted] In this case, prosecutor directly referred to evidence, corroboration and even points where witness admitted lying to police as reasons why jury could conclude witness was testifying truthfully . [Note: court distinguished cases where prosecutor used language like: "I believe she's telling the truth" as clear expressions of personal opinion.] Affirmed.)

Rodriguez v. State of Florida, 88 So.3d 405 (3rd DCA 2012) (it was improper for prosecutor to ask detective during cross-examination whether he would lie, put his career on the line or risk going to jail for perjury just to arrest the def., and then argue in closing: "He doesn't want to see this man in prison. … He has no reason to put his job on the line. He told you that. *** Yes, he wants you to trust him because he is trustworthy. There is no reason for him to lie to you. He told you that. You could judge his credibility." Court held that "ham-handed efforts at bolstering – 'would you lie under oath to send this defendant to jail?' and questions and arguments to similar

effect -- are 'patently improper and violative of the rules of professional conduct.'" Reversed. [NOTE: Unlike other cases where state argued that officers would not jeopardize their careers to get this conviction and thereby were in effect arguing that all officers should be believed because they are officers, in this case the officer was questioned so there was evidence in the record for jury to evaluate his particular credibility. That may be why it was not flagged for expression of personal opinion. Would this "new" rule prohibiting witnesses from saying they wouldn't lie apply to def and other witnesses? Should courts prevent them from being asked if they would lie under oath and risk going to jail?])

Pham v. State of Florida, 70 So.3d 485 (Fla. 2011) (in case where evidence from victims indicated that def. bound and gagged his stepdaughter, killed his ex-wife by stabbing her at least 6 times and then attempted to kill her boyfriend, it was proper for prosecutor to comment in closing: "the way that you can describe the Defendant's testimony is a desperate man telling a desperate story. … I won't spend more than a few moments on the Defendant's testimony because that's all it deserves, if that much, … some of the things that he said are just nonsensical, that just don't make sense" (def. testified that he didn't know how his ex-wife was stabbed but he didn't stab her and that his teenage step-daughter consented to be bound and gagged). The prosecutor also argued: "Mr. Pham testified, the Defense chose to present a case … they chose to present evidence, and still they have not provided an explanation as --." Prosecutor's comments were a fair and accurate description of the evidence. Affirmed.)

Jones v. State of Florida, 54 So.3d 1085 (Fla. 2011) (It was improper for prosecutor to argue in closing about police officer's testimony concerning location of def's fingerprints: "[H]e is my expert, and he is very credible." Such comment constitutes improper bolstering [Note: seems also like personal opinion but objection was for bolstering]. Error harmless however, court warned that this type of comment comes perilously close to being the basis for reversal, and it is only under the specific facts of this case that it found the error to be harmless. Court cautioned that these types of comments should be avoided. Affirmed.)

Montanye v. State of Florida, 976 So.2d 29 (5th DCA 2008) (in case where def.'s brother took the stand after statute of limitations had run and claimed that he, rather than his brother, was the one who committed the battery on the victim, prosecutor's argument that if brother was lying, def was guilty was improper. ["If Josh Montanye is lying, Sean is guilty. … Josh Montanye is lying, and he's doing it to get all of you to buy it."] Comment not only expressed prosecutor's personal opinion about the credibility of a witness, but also attempted to improperly shift the burden of proof to the defense (since simply proving that def's brother was lying would not meet the State's burden of proving the case of def's guilt beyond a reasonable doubt. Def counsel only objected to one of the improper comments and court sustained objection and gave a curative instruction. Error not fundamental. Affirmed.)

Arrieta v. State of Florida, 947 So.2d 625 (3rd DCA 2007) ("[O]ne-time comment by prosecutor that detective and sergeant would not risk their careers to frame the def. did not rise to the level of fundamental error, which must 'reach down into the validity of the trial itself to the

extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' " Affirmed.)

Glispy v. State of Florida, 940 So.2d 608 (4th DCA 2006) (prosecutor's comment that trooper was being truthful and reliable was not improper where it was in response to defense's attack on trooper's credibility and the prosecutor's comment did not place the prestige of the government behind the trooper or comment on matters outside the record. Affirmed.)

McCoy v. State of Florida, 928 So.2d 503 (4th DCA 2006) (by arguing that officer's "interest in the case is not great enough to make him lie, he's an officer" and he has an interest in the case … however "that interest is not great enough to lie, to get up here, take an oath and then perjure himself" prosecutor improperly bolstered the officer's credibility. Compare with Smith v. State 818/707)

Miller v. State of Florida, 926 So.2d 1243 (Fla. 2006) (concerning the testimony of a witness, it was not improper vouching or expression of personal opinion for prosecutor to argue: "He's a convicted felon, and he admitted that to you. But he's come here, and he's told you the truth. He told you he doesn't know anyone involved in this. He doesn't know either the victim or the defendant, but he had the courage to respond to [victim's] cries for help. [emphasis added] An attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence. The prosecutor was arguing, based on the facts surrounding the witness's testimony, that the witness was worthy of belief. Affirmed.)

Richardson v. State of Florida, 922 So.2d 331 (4th DCA 2006) (*Dicta*- It was improper for prosecutor to, among other things, assert his personal opinion on the credibility of a witness (saying that the witness "obviously isn't lying"), especially in a case where the witness's credibility "was everything." Although judge gave a curative instruction at the end of the State's rebuttal, telling the jury that credibility was a matter for their resolution, appellate court found that the instruction was insufficient in this case because of "the significance of [the witness's] testimony and credibility, and the cumulative effect of the improper comments made by the prosecutor…." Reversed on other grounds.)

Yok v. State of Florida, 891 So.2d 602 (1st DCA 2005) (It was not improper bolstering for State to argue that victim was "honest and straightforward" while testifying. "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." When viewed in context, prosecutor's isolated comment simply urged the jury to find the victim honest and straightforward "on the state of the evidence" before it. Affirmed.)

Hutchinson v. State of Florida, 882 So.2d 943 (Fla. 2004) (Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." It was not improper bolstering for

prosecutor to argue that two officers who testified "didn't testify to anything that sounded prejudiced *to me*" [emphasis added] where this statement was made in rebuttal to defense argument that the officers were already "prejudiced by the 911 calls" when they arrived at the def.'s home. Prosecutor did not refer to officers' honesty or credibility; he merely stated their testimony did not show they were prejudiced by the 911 call, as the defense had accused. [**Note**: no mention about possible interpretation as expression of personal opinion.] Affirmed. *Abrogated on other grounds:995/351*)

Cummings v. State of Florida, 874 So.2d 1203 (5th DCA 2004) (it was improper for prosecutor to make factual assertions that were not in evidence (including recounting things he had heard from bystanders during the jury view) and attempt to bolster the credibility of witnesses by expressing his own belief their testimony. "Sophomoric as the prosecutor's errors were and much as we are aware that some prosecutors are disinclined to improve their skills and curb their excesses in the absence of appellate rebuke, we have examined the entire closing argument with care, and we simply cannot say the trial court abused its discretion by failing to mistry the case." Error was not so frequent or egregious as to deprive def. of a fair trial where trial court sustained objection and instructed the jury to disregard. Affirmed.)

Cockett v. State of Florida, 873 So.2d 421 (3rd DCA 2004) (Although prosecutor was attempting to present a conclusion which the jury could reasonably draw from the evidence, prosecutor's comment about defense witness's testimony ["... I couldn't believe what she was saying."] may have stepped over the line and expressed personal opinion. However, the objection was sustained and no curative instruction was requested. Isolated comment did not vitiate the entire trial. Affirmed.)

Kelly v. State of Florida, 842 So.2d 223 (1st DCA 2003) (in case where mother on trial for murder of her husband accused her son of firing fatal shot, it was improper for state to argue: "She sat on the stand in this courtroom today, said she could look [her son] in the eye, but I will guarantee you she couldn't ...." Prosecutor's statement offering a guarantee that the def. could not look her son in the eye was the equivalent of guaranteeing the def. was lying. It is improper for a prosecutor to express a personal opinion concerning the credibility of a witness. Reversed on these and other grounds.)

Smith v. State of Florida, 818 So.2d 707 (5th DCA 2002) (It was not improper for prosecutor to argue: "You can say the police have an interest in these cases. ... But is their interest of such a significant one that would cause them to either shade their testimony, embellish their testimony, or perjure themselves? Think about that. Then think about what the def. ... may have to gain or lose by the outcome of this case. ... Think about that in determining where the truth lies." Although prosecutor may not express a personal opinion as to the credibility of a witness, or vouch for the credibility of a police officer on the ground that he is a police officer, comments by the prosecutor asking the jurors to evaluate what motive a police officer would have to deceive them are not improper when made in connection with evaluating a witness' credibility. Affirmed.)

McArthur v. State of Florida, 801 So.2d 1037 (5th DCA 2001) (State's unobjected-to argument that could be interpreted as suggesting to jury that victim was being more truthful was distinguishable from cases where state vouched for or bolstered the credibility of an officer. Unlike cases involving officers, State expressed it's opinion on the credibility of the victim and was not suggesting that a witness should be believed simply because he was a law enforcement officer. Errors were not fundamental. Other arguments where state highlighted irreconcilable differences b/w testimony of State and Def. witnesses and stressed to jurors that it was up to them to resolve conflicts and determine credibility were entirely proper. Affirmed.)

Johnson v. State of Florida, 801 So.2d 141 (4th DCA 2001) (it was not improper for state to argue: "The best evidence is the testimony of the police officer who has absolutely no reason anyone has shown you to lie to you. ... Those officers have no reason to lie." The prosecutor neither stated his personal opinion nor suggested that the officer's opinion was more believable than that of another simply because he was a police officer. There is a difference between asking the jury to evaluate a witness' motive for deceit and asking the jury to believe a police officer's testimony simply because he is a police officer. "The prohibition against vouching does not forbid prosecutors from arguing credibility, which may be central to the case; rather, it forbids arguing credibility based on the reputation of the government officer or on evidence not before the jury."[quoting United States v. Hernandez, 921 F.2d 1569 (11th Cir. 1991)] Moreover, the state's comment was invited by the defense's closing argument attacking the credibility of the officer. Affirmed).

Myers v. State of Florida, 788 So.2d 1112 (2nd DCA 2001) (in a close case were State witness was "the State's case" and his credibility was put in serious question by the testimony of defense witnesses as to his level of intoxication and prior comments of uncertainty, it was improper for prosecutor to characterize State witness as "very honest with you when he came in here today," "honest," "very candid" and "a credible witness." Error may have been harmless were it not for the last comment: "And having taken all of those things into consideration, do I think that what he said he saw was true? Was that truthful testimony? Yes." The law is well settled that expressions of personal belief by a prosecutor are improper. Reversed.)

Pino v. State of Florida, 776 So.2d 1081 (3rd DCA 2001) (it was not improper for prosecutor to say def. was a "liar" and that he had "lied" and told "lies." If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence. Since the record reflects that the prosecutor's characterization of the def. were supported by the record, no error found. Affirmed *[NOTE: This case follows Craig v. State without citing it and does not explain the contrary opinion from the same DCA {different panel} in Gomez below.]*)

Henderson v. State of Florida, 769 So.2d 477 (5th DCA 2000) (although it was improper for prosecutor to comment that he did not believe defense witness, witness was so inconsistent and

thoroughly impeached that that error was harmless. Affirmed)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (It was improper for State to argue: "He testified and truthfully when there were things that he couldn't remember .... Do they have an interest in seeing people who are innocent convicted of crimes? There's no evidence that they do. I submit to you that the only interest they have in the outcome is seeing justice, seeing the guilty convicted and that's all...." Reversed on fundamental error when all other improper arguments are considered. [Note: In this case the appellate court lists a collection of errors that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another panel of this DCA.])

Gomez v. State of Florida, 751 So.2d 630 (3rd DCA 1999) (improper for prosecutor to refer to def., who had testified, as a "liar" and "a big zero" and to his version of events as "lies" and "a cockamamie story." Prosecutor improperly encroached on the jury's function by giving her opinion of the credibility of witnesses. Court printed name of prosecutor and admonished trial judge saying she "retains the ultimate responsibility for the proper conduct of trial counsel and trial proceedings...." Considering all other improper comments, case reversed. [Note: Court failed to address how this case was distinguishable from Supreme Court case of *Craig v. State* on the issue of calling the def. a liar.])

Birren v. State of Florida, 750 So.2d 168 (3rd DCA 2000) (in prosecution for possession of undersized lobster, harvesting lobster during the "soak" season, possession of lobster out of season, and having improperly marked traps, it was improper for prosecutor to argue that def. "was stealing from every other person who was trying to abide by the rules" and that jury should "say to [def.] that he is not allowed to violate these rules. That other people have to abide by these laws and he has to, too ...." By accusing def. of uncharged crime of stealing, prosecutor "encroached on the jury's job by improperly weighing in with her own opinion of the credibility of the witness."[???] In addition, prosecutor's comments fashioning herself as a representative of the community, and suggesting to the jury that hey consider the unfairness to other "legal" crawfishermen, were out of line. Argument appealing to community sensibilities and civic conscience are improper. Reversed.)

Kennerdy v. State of Florida, 749 So.2d 507 (2nd DCA 1999) (improper for prosecutor to argue that defense witnesses had been "spoon-fed" their testimony and that jury knew that def. had profound disrespect for the legal system because he had "convinced two young men to come in here, and I would submit to you, commit perjury." Prosecutor also improperly argued that "the defendant thinks he's got six suckers sitting here" and accused def. of attempting to perpetrate a fraud on the jury and on the criminal justice system. Reversed.)

Williams v. State of Florida, 747 So.2d 474 (5th DCA 1999) (it was improper for prosecutor to

argue about police officer witness: "He is just doing his job and telling you all the truth. He has no reason to pick out this defendant from anyone else in the street and arrest him for burglary when this defendant wasn't even at that location." A prosecutor may argue any reasons, if supported by the evidence, why a given witness might or might not be biased in a case, but the prosecutor may not properly argue that a police officer must be believed simply because he is a police officer. Reversed.)

Connelly v. State of Florida, 744 So.2d 531 (2nd DCA 1999) (improper for prosecutor to state that the def. has lied. "Now he's gotten up here and told you today what it is you would expect him to say. 'I didn't intend ....' What do you think of his willingness to lie and lie and lie and lie, literally, by his calculations on cross-examination – hundreds of times." Comment expressed prosecutor's opinion as to both the def.'s credibility and the theory of defense. When combined with alleged errors in state's cross-examination of def. – Reversed) [**NOTE**: *There are more inconsistencies among DCA's and the Supreme Court in these types of cases {i.e. calling def. or witness a liar or saying they lied} than in almost any other area of closing arguments}*]

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) ("*Except to the extent [the prosecutor] bases any opinion on the evidence in the case,* he may not express his personal opinion on the merits of the case or the credibility of witnesses." [Emphasis added, citations omitted])

Sinclair v. State of Florida, 717 So.2d 99 (4th DCA 1998) (improper for prosecutor to argue that officer would not put his career on the line by committing perjury. Such an argument can, among other things, be interpreted as an affirmative statement of the prosecutor's personal belief in the veracity of the police officer. Error harmless where judge sustained the objection and gave jury a curative instruction. Control of prosecutorial comments to the jury is within the trial court's discretion and will be upheld absent abuse of discretion. Affirmed.)

First v. State of Florida, 696 So.2d 1357 (2nd DCA 1997) (*opening statement* - where state never impeached witness with any prior convictions or contradictory statement and witness' testimony was only contradicted by circumstantial evidence, prosecutor's comment in opening statement that "she is a liar" (with regard to witness' alibi testimony) was an improper expression of personal opinion. Error not harmless given weakness of case. Reversed.)

McLellan v. State of Florida, 696 So.2d 928 (2nd DCA 1997) (Prosecutor's comment that doctor/witness "told you, and I would think common sense should also tell you, that when somebody goes to a doctor they're honest" was improper because: (a) it served to bolster the witness' testimony; (b) the doctor had not so testified, therefore, the prosecutor was commenting on facts outside of the evidence and (c) the prosecutor was expressing his opinion on the credibility of the witness.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def.

counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Cisneros v. State of Florida, 678 So.2d 888 (4th DCA 1996) (improper expression of personal opinion for prosecutor to state: "He's not the type of man to come in here and violate that oath" with regard to officer's testimony. Reversed because case came down to officer's credibility.)

Pacifico v. State of Florida, 642 So.2d 1178 (1st DCA 1994) (improper for State to repeatedly refer to def. as a "liar". Exhorting the jury to convict the def. because he lied invites them to convict him for a reason other than his guilt for the offense charged. It also may express a personal opinion of the prosecutor as to the credibility of the witness. It is only permissible for a prosecutor to refer to a witness as a liar if the context of the statement indicates that "the charge is made with reference to testimony given by the person thus characterized, [and] the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.)

Luce v. State of Florida, 642 So.2d 4 (2nd DCA 1994) (although this was a PCA, the concurring opinion points out that it was improper for the prosecutor to express personal opinion as to credibility of a witness: "Lance Brown, he was probably as dumb as a stump and I respect him, but at least he was honest." The appellate court stated: "The courtroom is not an arena for testing the relative strengths of gladiators; it is the place where citizens of our state expect to settle disputes in a manner more civilized than hand-to-hand combat.... If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in it's use, they should not be members of the Florida Bar.")

Marshall v. State of Florida, 604 So.2d 799 (Fla. 1992) (*opening statement* - State's assertion that the State had overcome great obstacles in getting inmates to "truthfully tell what has occurred," and that inmates operate under a "code of silence" but that they have "a residual core of humanity did not warrant a new trial where counsel neither objected, nor requested a curative instruction, nor moved for a mistrial. Error not fundamental. Affirmed.)

Conley v. State of Florida, 592 So.2d 723 (1st DCA 1992) (prosecutor's statement that he did not like def. because he doesn't like "people who rape, rob, burglarize"[the precise charges pending against def.] was improper. Prosecutors are precluded from expressing personal beliefs about guilt or innocence, or the credibility of an accused. ---Harmless [subsequently rev'd on other grounds, 620 So.2d 180 (Fla. 1993)].)

State of Florida v. Ramos, 579 So.2d 360 (4th DCA 1991) ("I believe she testified truthfully to you." was improper expression of personal opinion on truthfulness of witness' testimony.)

Gutierrez v. State of Florida, 562 So.2d 433 (3rd DCA 1990) (error for defense counsel to state

"I think if you believe [the State's witness], you have got to be on drugs....")

George v. State of Florida, 539 So.2d 21 (5th DCA 1989) (it was improper for prosecutor to express personal confidence in the veracity of one of the State's witnesses. Reversed on these and other comments.)

Jones v. State of Florida, 449 So.2d 313 (5th DCA 1984) (prosecutor's statement that witness was "one of the most honest people" improper expression of personal opinion. Statement that defendant and defense witnesses had lied, improper)

State of Florida v. Murray, 443 So.2d 955 (Fla. 1984) (comment that def. "thinks he can lie to you in court so that he is acquitted" improper and not fair reply to defense counsels claim that there was reasonable doubt as to the credibility of a witness. Error harmless, therefore DCA decision reversed and conviction reinstated.)

Cummings v. State of Florida, 412 So.2d 436 (4th DCA 1982) (It is improper for counsel to express belief in the credibility of a witness where doing so implies the prosecutor has additional knowledge about the case which has not been disclosed to the jury. Likewise, it was improper to argue how prosecutor was sure that auto body man called by def. as a witness had been paid nicely for the body work on appellant's van when neither party had introduced evidence regarding the amount paid for the body work. Reversed on other grounds.)

Lynn v. State of Florida, 395 So.2d 621 (1st DCA 1981) (improper for prosecutor to express personal opinion on the evidence and credibility of witnesses: "Now I think - there's not much question in my mind about the check....When he testified here today, he told you that he was telling the truth; ... I think everything he said was true and we know it by independent evidence from the investigation that the officer did." Even in conjunction with other errors, not sufficient to warrant a new trial.)

Richmond v. State of Florida, 387 So.2d 493 (5th DCA 1980) (It was improper for prosecutor to argue that State's calling witness to testify means the State vouches for his honesty and truthfulness, and that prosecutor was personally vouching for him based upon prosecutor's investigation. Affirmed because no objection was raised. [Although not stated, error was apparently not fundamental.])

Francis v. State of Florida, 384 So.2d 967 (3rd DCA 1980) (improper for state to express personal opinion as to witness' credibility by saying "I think he was being very truthful to you.... [H]e testified as to the truth.... I think he is a moral fellow and I think he is truthful...." Error did not warrant reversal where curative instruction was given and where defense argument was that witness was not lying but mistaken.)

Dukes v. State of Florida, 356 So.2d 873 (4th DCA 1978) ("And I tell you, ladies and gentlemen, that she is an incredible witness, and she is not worthy of your belief. She is a liar,

clear and simple...who would think nothing of ...telling a lie for her buddy." Reversed.)

Lane v. State of Florida, 352 So.2d 1237 (1st DCA 1977) (prosecutor's comment about credibility of state witness: "I suggest to you that Mr. Ellison is quite credible, but then I have got [sic] to know him a little better than you have. You must base your decision on what you saw and the way he acted and what he had to say on the stand" was an improper expression of personal opinion on the credibility of a witness.)

Thompson v. State of Florida, 318 So.2d 549 (4th DCA 1975) (improper for prosecutor to comment that he could have called other officers to say "that this man said those statements" but "I saw no need.... I could have brought in other witnesses...." Also improper to argue, with regard to officer's testimony, "in my own mind, I was sure that he was telling me the truth that the def. made those statements." Court held that prosecutor's representation that he had additional evidence of def.s guilt which he simply saw no need to present was highly improper and fundamental error in view of the "close case." Prosecutor must confine his closing argument to evidence in the record and must not make comments which could not be reasonably inferred from that evidence [no mention made of expressing personal opinion of officer's credibility.] Reversed.)

Broge v. State of Florida, 288 So.2d 280 (4th DCA 1974) (prosecutor's comment: "If you consciously believe this case has been handled improperly by the State or by the Court, do it. Don't feel badly about it. My duty, as I told you, is to see that these defendants get a fair trial and that is your duty also. I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that," although seeming to relay prosecutor's personal belief in the believability of the evidence, was not improper as it was invited by def. counsel's argument that castigated the testimony of the policemen who testified, commenting on the 'false testimony' and 'bold lies' of these witnesses, and accused the prosecution of 'buying' evidence and knowing that the police officers had deliberately lied in this case. It would be improper to allow def. counsel "to deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong." [quoting Henderson v. State, 113 So. 689 (Fla. 1927)] Affirmed.)

C. Personal opinion as to merits of case or defense

Brinson v. State of Florida, 153 So.3d 972 (5th DCA 2015) (in domestic violence prosecution it was improper for prosecutor to argue that the state evaluates cases in order to determine if charges should be filed, that it is state's obligation to bring this case to protect the victim, that the state feels this case is "worth our time," how domestic violence victims typically behave and that the victim had never been convicted of a felony. Such comments improperly bolstered the case by suggesting that the state only charges those who are guilty and by referring to facts not in

evidence and expressed improper personal opinion. Reversed due to these and other improper arguments.)

Valentine v. State of Florida, 98 So.3d 44 (Fla. 2012) (death penalty - following def counsel's claim that victim was lying about def/ex-husband being the person who killed her new husband and tried to kill her, prosecutor's argument (*"[Defense counsel] wants you to believe that [the victim] is lying ... he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe ... as she was laying there, bound, bloodied, naked, wondering if she was going to live or die, not knowing if she would ever see her children again, she thought, "Hey, if I say [Valentine] did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half"*) was not improper. The prosecutor did not ridicule or otherwise improperly attack the defense's theory of the case; she merely described the defense's theory of the case and stated that the defense wanted the jury to "somehow" believe that theory. "Prosecutorial comments are not improper where, incident to evaluating a witness' credibility, jurors are told to ask themselves what motive the [witness] would have to deceive them." [citation omitted] Indicating to the jury that, based on the evidence of the case, they should question the plausibility of the defense's theory of the case is within a prosecutor's role of assisting the jury to consider and to evaluate the evidence presented. The prosecutor's comments did not improperly express her personal belief as to def's guilt. Denial of post-conviction motion affirmed)

Williamson v. State of Florida, 994 So.2d 1000 (Fla. 2008) (Prosecutor's comment: "You better believe we filed the charges, because it's warranted" was not an improper expression of personal opinion on the guilt of def. Comment was intended to explain that the state filed so many different charges because each charge was based on different conduct. Nonetheless, prosecutors cautioned that such comments should not be made. Reversed in part, on other grounds.)

Matthews v. State of Florida, 834 So.2d 900 (4th DCA 2003) (prosecutor's comment, that if the jury believed def. and her sister's version of events they should find her not guilty but that the State was contending that def.'s version was not logical and that the evidence "begs for a guilty verdict" was completely proper. Prosecutor was merely submitting to the jury a conclusion that could arguably be drawn from the evidence. Prosecutor's claim that State's version was supported by evidence whereas def.'s version was not was a fair comment. Affirmed.)

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) (it was improper for prosecutor to argue that although victim felt a gun against his ribs, State did not charge def. with a gun "because we couldn't prove it. We didn't charge anything that we couldn't prove." As worded, comment suggests that State only charges persons who are guilty. Further, other comments that denigrated defense were also improper. Reversed because of multiple improper arguments.)

Brooks v. State of Florida, 762 So.2d 879 (Fla. 2000) (although the prosecutor was correct in

his comment that the state does not seek the death penalty in every first degree murder case, it was improper to argue that to the jury since it cloaks the State's case with legitimacy as a bona-fide death penalty prosecution, much like an improper vouching argument. Further, State's example of a case involving a 16 year old getaway driver and 30 year old gunman where the driver may not warrant the death penalty was also misleading since Florida law prohibits imposing the death penalty on anyone under the age of 17. Reversed due to many errors.)

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) ("*Except to the extent [the prosecutor] bases any opinion on the evidence in the case,* he may not express his personal opinion on the merits of the case or the credibility of witnesses." [Emphasis added, citations omitted])

D'Ambrosio v. State of Florida, 736 So.2d 44 (5th DCA 1999) (improper for prosecutor to argue that his yelling about the case demonstrates "the vigor and the conviction I have about this case." Also improper, in urging the jury to reject the defense, to claim "This is just not going to happen ... And everybody in this courtroom knows that" since these arguments reflect a personal opinion on the justness of the cause or the guilt or innocence of the defendant. Reversed on many errors. [Note: The "vigor and conviction" comment was the only comment objected to by counsel. Following the sustaining of the objection, defense counsel asked the court to "strike and make curative" to which the trial court responded: "Strike the last comment by counsel." The appellate court pointed out that a stronger rebuke may have avoided a new trial.])

Kent v. State of Florida, 702 So.2d 265 (5th DCA 1997) (prosecutor's argument that: "make no question about it, if this man goes unanswered for what he did to that woman, it would be a miscarriage of justice," and "the State has conviction that, after you've heard these three days of testimony, that you don't have any doubt that this man did these crimes," even if improperly expressing personal opinion, were not objected to and not fundamental. Affirmed.)

Brown v. State of Florida, 593 So.2d 1210 (2nd DCA 1992) (improper for State to argue that victim was victimized again by having to testify and have his character impugned, that it seemed wrong to him that the victim was put on trial and, that he wanted to be able to call the victim and tell him that the jury had the courage to see the truth and that he was not victimized a second time. These comments were an improper appeal to the jury for sympathy and an expression of the prosecutor's personal belief.)

Alvarez v. State of Florida, 574 So.2d 1119 (3rd DCA 1991) (improper for prosecutor to state: "I would certainly be surprised if you don't believe force or violence was used to get them.")

Jones v. State of Florida, 571 So.2d 1374 (1st DCA 1990) (improper for prosecutor to say "I wouldn't be here if I didn't believe that I could prove to you beyond a reasonable doubt that he shot him.")

Harris v. State of Florida, 570 So.2d 397 (3rd DCA 1990) (*dicta* - prosecutor exceeded bounds of proper argument when, in reply to def. counsel's claim of bad faith prosecution,

prosecutor argued that the fact that an assistant state attorney signed the Information reflected that the prosecution was brought in good faith. The Information filed by the prosecutor was not evidence and, accordingly, should not have been argued to the jury. In effect, the prosecutor made herself a witness by arguing to the jury her personal opinion that the Information must be believed because it had been sworn to as being filed in good faith by the prosecution. Reversed on other grounds.)

Riley v. State of Florida, 560 So.2d 279 (3rd DCA 1990) (improper for prosecutor to comment to jury: "I don't prosecute people who have legitimate self-defense claims." Improper for prosecutor to express personal opinion on the guilt of the accused [merits of case]. Reversed based on this and other errors.)

Huff v. State of Florida, 544 So.2d 1143 (4th DCA 1989) (it was improper for prosecutor to make it clear that, in his opinion, the defense was a fabrication. Reversed based on this and other errors.)

Blackburn v. State of Florida, 447 So.2d 424 (5th DCA 1984) (prosecutor's request for sympathy for victims, personal belief as to facts in issue and having met burden of proof, vouching for credibility of police officer and reference to other charges against defendant arising out of incident which were not pursued by state, were improper BUT NOT FUNDAMENTAL. No objection. Affirmed [passing reference to fact that they were, in part, invited by defense counsel's questions and closing argument])

Lynn v. State of Florida, 395 So.2d 621 (1st DCA 1981) (improper for prosecutor to express personal opinion on the evidence and credibility of witnesses: "Now I think - there's not much question in my mind about the check....When he testified here today, he told you that he was telling the truth; ... I think everything he said was true and we know it by independent evidence from the investigation that the officer did." Even in conjunction with other errors, not sufficient to warrant a new trial.)

Thompson v. State of Florida, 235 So.2d 354 (3rd DCA 1970) (it was improper for prosecutor to argue: "If the evidence had substantiated [def.'s] version of accidental shooting, she would not be here today. The State went on and presented its evidence to a habeas corpus hearing and it presented its evidence in a Justice of the Peace hearing. This woman was advised of her rights." Implication of the statement is that the law enforcement officials responsible for the pretrial proceedings all believed the appellant to be guilty. Prosecutor also improperly expressed his opinion that he had not "heard anything in this courtroom which says to me that I can look at [the def.] ... in the eye and say 'You were justified in shooting that man down.'" Together with other prejudicial comments, reversed.)

VI. Reference to Biblical passages or religion

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (in death penalty case, prosecutor's argument: "What do we know about this defendant as far as his loving and giving heart when it comes to giving aid? He describes himself as a religious man to Detective Suco, does he not? He can talk the talk, but he can't walk the walk. Because if you're religious, if you believe in the Good Book, then you live by the Word. The word of charity, the lack of selfishness," was not an improper comment where it was made to counter the defense theory that def. had befriended and aided victim out of good Christian charity. The State asked the jury to consider why def. was "giving this aid to this woman and not telling his wife?" The State argued that the evidence contradicted the notion that def. had a loving and giving heart, pointing out that def.'s outward actions were contrary to the practice of Christian charity. The evidence established that def. had once touched the victim in a sexual manner, began choking her when he thought another man was coming to her home, and accused her of using him while choking her. The State argued that def. had become enraged at victim and ultimately attempted to murder her because of his failure to attain a sexual relationship with her and his belief that someone else had. The State's comments directly responded to the defense theory and fall within the wide latitude afforded to advance all legitimate arguments based in the evidence. Conviction and sentence affirmed.)

Farina v. State of Florida, 937 So.2d 612 (Fla. 2006) (prosecutor's comment in closing: "They have brought this judgment upon themselves by their choices, and your recommendation to this Court should be a recommendation that they pay the ultimate penalty for their crimes," although probably a biblical reference given that the prosecutor's choice of words mirrors biblical comments made from a witness while testifying, lack the force of other more obvious biblical references that the Supreme Court previously found did not constitute fundamental error and were not otherwise properly preserved. **Note:** In a split opinion, the majority states that there is no categorical rule prohibiting reference to religious authority in capital sentencing proceedings although the court has condemned its invocation. "Counsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law … *as may be appropriate to the case*. This is a matter within the discretion of the trial judge …." However, "trial judges and attorneys should refrain from discussing religious philosophy in court proceedings." [citations omitted] THIS REMAINS A DANGEROUS AREA.)

Lugo v. State of Florida, 845 So.2d 74 (Fla. 2003) (comment that "in any society, in any religion, def.'s case was the worst" was not fundamental error.)

Lawrence v. State of Florida, 691 So.2d 1068 (Fla. 1997) (prosecutor's comparison of jury's sentencing task to "God's judgment of the wicked" and use of a biblical story in describing the weighing process jurors must employ was not fundamental error and, even if preserved, was harmless in context of entire argument. Nonetheless, prosecutors cautioned to avoid divine reference because of risk of reversal.)

Ferrell v. State of Florida, 686 So.2d 1324 (Fla. 1996) ("Without question, trial judges and

attorneys should refrain from discussing religious philosophy in court proceedings." [Quoting other case: "The primary vice in referring to the Bible and other religious authority is that such argument may 'diminish the jury's sense of responsibility for its verdict and ... imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions.'" – Although case did not involve closing argument, it shows Supreme Court's displeasure with biblical references. Use caution.])

Bonifay v. State of Florida, 680 So.2d 413 (Fla. 1996) (although prosecutor's biblical references in closing were not fundamental error, or even harmful in the context of the entire argument, the court cautions against the use of references to divine law because they can easily cross the boundary of proper argument and become prejudicial.)

Street v. State of Florida, 636 So.2d 1297 (Fla. 1994) (It was not improper for prosecutor to ask during part of his closing: "Should we excuse the sinner? Should we thank the sinner? Is that our job; is that our obligation under the law?" The court held: "[c]ounsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law ..."[quoting Paramore, below]. This is a matter of judicial discretion that will not be overturned absent abuse of discretion. In this case, the comment was also in response to defense counsels argument that: "You will have a unique opportunity to condemn what has happened, to condemn the sin but not to condemn the sinner" [fair reply] and def. failed to object as well. *Holding modified on unrelated issue in Evans, 770/1174.*)

Meade v. State of Florida, 431 So.2d 1031 (4th DCA 1983) (It was improper for prosecutor to argue in murder trial: "And [def.]... sits here today and I submit to you under the weight of all the evidence there, ladies and gentlemen, is a real live murderer. ... There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill. ... [H]ere's one person [victim] who did not get his day in court. [Def.] has." Comparison of Florida's murder statute with the Fifth Commandment could have conveyed to jury that all killing is against the law, when in fact under certain circumstances killing is excused. Further, comments preceding and following the reference to the Fifth Commandment seem intended to inflame the jury and to appeal to its sympathy for decedent and his kin. Reversed.)

Paramore v. State of Florida, 229 So.2d 855 (Fla. 1969) (Reading of passages from the Bible is not ground for reversal. References by way of illustration to principles of divine law may be appropriate, within court's discretion. *[Subsequently modified as to death penalty - 92 S.Ct. 2857]*)

VII. Golden Rule

Orme v. State of Florida, 40 Fla. L. Weekly S695 (Fla. 2015) (prosecutor's request that the

jury consider the last minutes of the victim's life: "Was she feeling any endorphins, was she feeling a sense of calm, or was she feeling deep sadness, fear, pain, cruelty, what does our common sense tell us?" was an impermissible, "golden rule" argument -- one that asks jurors to place themselves in the victim's position, imagine the victim's pain or fear, or imagine how they would feel if the victim was their relative. Further, other statements where prosecutor argued that the victim could not breathe and therefore, could not tell def to "please take my car, go ahead, take the purse, you've already beaten me, you have already raped me, I have no dignity, don't take my life" and, later on, that the victim "didn't beg him, please, Mike, let me go, you are hurting me," placed imaginary words into the victim's mouth and were therefore improper as "imaginary script" arguments, a subtle form of a "golden rule " argument. Nonetheless, although counsel should have objected to these arguments, no prejudice has been shown. [NOTE: arguing what the victim didn't or couldn't say apparently satisfies the "imaginary script" prohibition] Denial of post-conviction motion affirmed.)

Jackson v. State of Florida, 147 So.3d 469 (Fla. 2014) (although the State cannot create an imaginary first-person script depicting the victim's suffering or death or invite jurors to place themselves in the position of the victim, it is entitled to make comments recounting a victim's last hours alive if the comments are supported by the evidence. Prosecutors argument which recounted how victim originally didn't fight during the kidnapping, but later fought against being shoved into the truck of the car was not improper. The State was addressing the mental process experienced by the victim when she initially did not attempt to escape or plead for her life at the point that she was bound in the bathtub, but realized her impending death when she was carried from the apartment and shoved into the trunk of a car. Witnesses testified how at that point, she began to struggle and fight for her life, pleading with def not to put her in the trunk and apologizing to him. Affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (*penalty phase* – it was improper for prosecutor to argue in closing that victim: "fearfully wondered, [w]hat will happen to my children, my precious children." While the evidence showed that the children were present in the house, the *imaginary script* speculated about the victim's final thoughts and invited the jurors to place themselves in the position of the victim "fearfully" wondering what would happen to her error is not fundamental. Affirmed.)

Victorino v. State of Florida, 127 So.3d 478 (Fla. 2013) (*death penalty* - Prosecutor did not make an improper "Golden Rule" argument by arguing: *"On…August the 5th and 6th, when these six young people went to sleep in their house on Telford in Deltona, they could not have imagined in their worst nightmares that two years later, 100 miles away, 12 strangers would go in to look at photographs of their broken, sometimes naked, bodies. And of the 16 people that looked at them, 12 would ultimately decide who the killers were and perhaps what to do with them."* Denial of post-conviction motion affirmed/habeas denied.)

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (in death penalty case involving murder of a child, prosecutor improperly argued during guilt phase: "You're five. You'd just seen what

he's done to your mother. You're falling out of a moving car, you're five and it's dark. That's terrifying." Although the state was entitled to make comments recounting victim's last hours alive as supported by the evidence, the form in which these last hours were presented arguably crossed the line because the use of the pronoun "you" instead of "she" invites the jury to place itself in the position of the victim. No objection. Not fundamental, even in conjunction with multiple alleged errors. In penalty phase, argument: "But the time between U.S. 27 and when she gets hit in the head, I want you to go back there and sit for five minutes and let yourselves think of that fear" was improper but did not warrant a mistrial given the court's admonishing the prosecutor and immediately instructing the jury to "disregard that last statement by the prosecutor, please." Prosecutor's additional comment "It's dark and they are driving. … Where's mommy? Where's mommy?" although an arguably improper first-person script, did not rise to the level of fundamental error. Conviction and sentence affirmed.)

Mosley v. State of Florida, 46 So.3d 510 (Fla. 2009) (*guilt and penalty phase* – prosecutor's argument about what victim wondered and how "maybe she was excited" when def was looking for something in the trunk of his car right before he strangled her, although speculative in isolation, when taken in context were not golden rule violations but were permissible argument based on the facts of the case. Other comments ("She blacked out. Didn't take long. With the pressure around her throat she would have blacked out in darkness and then [the other victim] is crying and then darkness. He's in a bag and he's trying to breathe but the bag gets closer and closer to his face. … [Victim's] head was up at the back of that car and seeping blood. … [She] did not go unconscious right away. [She] was on the ground, looking up at that man, that face, someone she trusted, knowing that she wasn't leaving Armsdale [the killing site]) were appropriate as directly relevant to the HAC aggravator and had a factual basis in the testimony of both an eye witness and the medical examiner. "A prosecutor may make comments describing the murder where these comments are based on evidence introduced at trial and are relevant to the circumstances of the murder or relevant aggravators, so long as the prosecutor does not cross the line by inviting the jurors to place themselves in the position of the victim" or imaginary scripts where prosecutor speculates as to a victim's final moments. Affirmed.)

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (in *penalty phase*, it was not improper for prosecutor to argue to jury: "How about being driven down that road, stopping for gas in a trunk not knowing what's going on, wondering where they are at, why have they stopped, are they going to be set free, what was in store for them? Was their horror over? No. It had just begun." Prosecutor then proceeded to describe how victims were buried alive. Although a prohibited golden rule argument invites jurors to put themselves in the victim's position and then imagine the victim's final pain, terror and defenselessness, here the State's recitation of the facts was accurate and did not invite the jury to place themselves in the victim's place. The prosecutor merely explained the evidence consistent with the application of the HAC aggravator. Further, prosecutor's argument "when you are done I ask you to walk out not into the darkness of greed, into the terror of the night drive in the back of a trunk but into the light of justice" was not an improper golden rule argument, as objected to by the defense—although it may have been subject to challenge as an improper "blatant appeal to jurors emotions" in that it suggested that an

acquittal would constitute walking "into the darkness of greed" rather than the light of justice." Affirmed.)

Bailey v. State of Florida, 998 So.2d 545 (Fla. 2008) (*penalty phase* – prosecutor's argument: "I ask that as you sit down in the jury room to deliberate you do two things before you reach time to take a vote. I want you all just to put your finger 18 to 24 inches away from each other's face and see how close you are when your eyes are meeting, as his met those eyes on an Easter night in our community and in 18 to 24 inches away firing once, twice, and three times" was not an improper golden rule argument. This comment did not encourage the jurors to place themselves in the victim's position but instead was designed to help the jury to visualize the distance between the gun and the victim and was in response to the defendant's theory that def. did not intend to kill the officer.)

Williamson v. State of Florida, 994 So.2d 1000 (Fla. 2008) (Prosecutor, in *voir dire*, asked jurors if they had ever been between a rock and a hard place and then during closing argument said "[Victim] is the person I was alluding to when I asked you if you had ever been between a rock and a hard place." Court held not a Golden Rule violation because jurors were not asked to place themselves in victim's position. Purpose of question was to determine whether a juror would make a fair and impartial decision without personal bias. Golden Rule arguments exist where attorney asks jurors to "place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." Court has also found a subtle Golden Rule violation where prosecutor asks the jurors to put the prosecutor's own imaginary words in the victim's mouth. Reversed in part, on other grounds.)

Merck v. State of Florida, 975 So.2d 1054 (Fla. 2007) (*death penalty case*- Prosecutor's argument:

> ["The Defendant was described to you today as a kind man, a man with positive values. One has to wonder on October 11, 1991, how kind Jim Newton felt when the Defendant jabbed this into his throat and twisted it. Twisted it until blood squirted out of his neck, as the Defendant described it, like a squirt gun....
>
> ... [I]sn't this among the worst ways to die that anyone can imagine? This is one of the worst most aggravated murders....
>
> ... How did that feel to have a knife penetrate his skull?....
>
> Now. That's one minute. How many thoughts went through your mind in that one minute? Did he live two minutes? Did he live three minutes? Four minutes? Enough time for his life to go, roll his eyes, to think about the people that he would never see again. Was that an unnecessarily torturous way for the

man to lose his life that night for no good reason?"]

Although on their face the prosecutor's above arguments appear to be Golden Rule violations, when taken in context the comments were actually made in support of the HAC aggravator and were appropriate responses to def. counsel's mitigation evidence and claim that the murder was "an awful crime, but it [was] not by any means the worst" because it was sudden and quick." [**NOTE**: See case for full statements in order to get feel of context of arguments.] Affirmed.)

Rogers v. State of Florida, 957 So.2d 538 (Fla. 2007) (prosecutor's arguments:

> We know that she knew she was going to be killed, ... we know when she was stabbed the first time, she didn't become unconscious; she remained conscious and she could feel the pain of the knife going through her body and could feel the pain of the knife as it was twisted and pulled out of her body, and then he did it again.
>
> ....
>
> What weight do you give to the ten, twenty minutes where she was there in that bathroom reflecting back on her life, on the things that she hadn't done that she wished she could, the opportunities that had never been presented to her, on her children that she would never see again, on her mother who loved her so dearly....

were not improper because they were based upon facts in evidence - the victim was stabbed twice, she struggled with her assailant, and she remained alive for at least a short period of time after being stabbed. Further, prosecutor was not violating the Golden Rule by attempting to place the jury in the position of the victim. Rather, the prosecutor was describing the heinousness of the crime for the purpose of establishing the HAC aggravator. For the purposes of the HAC aggravator, "a common-sense inference as to the victim's mental state may be inferred from the circumstances." [citation omitted])

Davis v. State of Florida, 928 So.2d 1089 (Fla. 2005) ("[P]rosecutor's comment *may have crossed the line* separating proper argumentation from an improper appeal to the jurors' emotions."

> [Victim] would have been conscious for approximately five minutes prior to his death. Folks, I ask you to do something. If any of you have a second hand on your watch, go back to the jury room and sit in silence, total silence for two minutes, not five, just two, and I suggest to you it is going to seem like an eternity to sit there and look at one another for two minutes. Contemplate [the victim] and the time he spent, not two minutes, but closer to five minutes with his throat cut, bleeding profusely, then with that man continuing the attack by repeatedly stabbing him in the chest with enough force to go through his body to the back five times breaking bones…. And that two to five minutes to [the victim], I suggest to you, was like an eternity of pain,

> suffering and hell. That is cruel punishment, that is cruel treatment to the victim. That's what this [HAC] aggravating factor is all about. I suggest to you that we have met that burden.

However, when read in context, the comment was made when the prosecutor was attempting to demonstrate to the jury that the murder was heinous, atrocious, or cruel, one of the "most serious aggravators set out in the statutory sentencing scheme. "*Although a close question*, we conclude that failing to object to the comments complained of clearly did not so affect the fairness and reliability of the proceeding that confidence in the outcome is undermined.")

Orme v. State of Florida, 896 So.2d 725 (Fla. 2005) (death penalty - prosecutor's request that when they retire to the jury room the jury take 5 minutes to reflect on [the victim] was not improper and was not a Golden Rule violation as alledged by the def. as it did not include an imaginary script of the victim pleading for her life or otherwise ask the jurors to place themselves in the place of the victim. Denial of post-conviction motion reversed on other grounds.)

Hutchinson v. State of Florida, 882 So.2d 943 (Fla. 2004) (A "golden rule" argument asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." Also, "an 'imaginary scenario' argument is a subtle form of "golden rule" argument that asks the jury to put his or her 'own imaginary words in the victim's mouth, i.e., 'Don't hurt me, Take my money, take my jewelry. Don't hurt me..' ' " An "imaginary scenario" argument is prohibited because it is an attempt to "unduly create, arouse and inflame sympathy, prejudice and passions of the jury to the detriment of the accused." In this case, the prosecutor told the jury that victim's 9 year old son saw the rest of his family dead and would have been shot along with them if he had been in the room at that time. Comment did not ask the jurors to put themselves in that victim's shoes or to consider how they would feel if he were their own son. Comment also did not ask the jury to imagine what child must have thought or felt and did not argue facts that were not in evidence, but simply asked the jurors to draw inferences from the testimony, based upon location of child's body, its position and location of blood. Affirmed. *Abrogated on other grounds:995/351*)

Cooper v. State of Florida, 856 So.2d 969 (Fla. 2003) (prosecutor's isolated comments in penalty phase, that jury should place themselves in the victim's shoes and regarding the proper level of sympathy and mercy for def. in sentencing, do not rise to the level of fundamental error.)

Fennie v. State of Florida, 855 So.2d 597 (Fla. 2003) (state's comment about victim pleading for her life was not improper Golden Rule violation because it was based upon the testimony of a witness rather than the prosecutor's speculation or conjecture. Affirmed.)

Lugo v. State of Florida, 845 So.2d 74 (Fla. 2003) (it was improper for State to argue: "Imagine with tape over your mouth and a hood over your head, imagine it on Krisztina. Not on yourselves, on Krisztina and what Krisztina is going through." An improper "Golden Rule"

argument typically occurs when counsel asks jurors to place themselves in the circumstances of the victim. However, because the error was isolated, and an overwhelming amount of unrebutted evidence exists against the def., error was harmless. **Note:** Lugo and Doorbal below were co-defendants in dual-jury trial with separate closings. Trial lasted over 4 months with over 2000 exhibits and 100 witnesses. That may be why the court said "*the error is, on this record, harmless in nature*." [emphasis in original] Affirmed.)

Doorbal v. State of Florida, 837 So.2d 940 (Fla. 2003)(it was improper for State to argue: "Remember [the police detective who] came in and showed you how that Omega taser works. Many of you jumped. Can you imagine how that would feel on your skin right up close? How it felt on Marc Schiller's sweating legs and ankles. But, again and again until he signed over everything." Comments improperly asked the jurors to place themselves in the position of the victim. No objection. Error harmless given "mountain of physical and testimonial evidence" as to def.'s guilt. Comment was isolated and did not affect the jury's verdict. Further, penalty phase argument that "to say that where I live, if I live in Trinidad or if you live in Trinidad or you live in the United States, you don't do the things this def. did" was not an improper comment on the evidence and, even if improper, was not a determining factor in the jury's ultimate recommendation of death. **Note:** Lugo above and Doorbal were co-defendants in dual-jury trial with separate closings. Trial lasted over 4 months with over 2000 exhibits and 100 witnesses. That may be why the court said "*the error is, on this record, harmless in nature*." [emphasis in original] Affirmed.)

Pagan v. State of Florida, 830 So.2d 792 (Fla. 2002) ("In general, a 'golden rule' argument encompasses requests that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." Prosecutor's argument that argued that def. had gone to great lengths to get away with crime and "[y]ou are the only force on earth that can prevent that from happening" was not an improper golden rule argument. Affirmed.)

Sehnal v. State of Florida, 826 So.2d 498 (4th DCA 2002) (Golden rule arguments are not per se reversible error. Issue is whether comment was highly prejudicial or inflammatory. Sentence reversed on other grounds.)

Geske v. State of Florida, 770 So.2d 252 (5th DCA 2000) (improper for prosecutor to argue: "I submit to you if you were a young woman, 12:30 at night, and you're in your car and you have a man with his penis hanging out ...." However, following proper objection, the trial court rebuked the prosecutor and told the jury that they were not to put themselves in the position of any of the parties in the case. As a result, comment was harmless. Affirmed)

Gomez v. State of Florida, 751 So.2d 630 (3rd DCA 1999) ("Golden Rule" violation for prosecutor to suggest to jury that if they placed themselves in the shoes of def., they would not have stabbed the victim and that they would have acted differently if it were a true self-defense case. Court printed name of prosecutor and admonished trial judge saying that judge "retains the

ultimate responsibility for the proper conduct of trial counsel and trial proceedings....” Considering all other improper comments, case reversed.)

McDonald v. State of Florida, 743 So.2d 501 (Fla. 1999) (improper for prosecutor to argue that the def. gagged victim because he “begged for mercy” or was “crying out” where there was no such evidence. “While it is a reasonable inference that victim was gagged to keep him quiet, the embellishment on what the victim may or may not have said, without a factual support in the record, was an appeal to the emotions of the jurors” and may constitute subtle “golden rule” argument. Also, several references to victim’s knowledge of impending death as he listened to the water fill the bath tub came very close to asking the jury to place themselves in the shoes of the victim. Although argument came during HAC discussion and appear to be more of an attempt to describe the heinousness of the crime than to ask the jury to consider what the victim felt, court admonishes prosecutors to refrain from making such arguments because they come perilously close to “golden rule” violations. No objections. Affirmed)

Parsonson v. State of Florida, 742 So.2d 858 (2nd DCA 1999) (prosecutor’s comment: “How are you going to get around that,” and others like it were rhetorical and this phraseology was not asking the jurors to place themselves in the shoes of anyone else. It was just a manner of speaking and not an improper “golden rule” argument.)

Walker v. State of Florida, 707 So.2d 300 (Fla. 1997) (Although it was improper for prosecutor to ask the jury to imagine the victim’s pain and suffering, prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. Harmless error.)

DeFreitas v. State of Florida, 701 So.2d 593 (4th DCA 1997) (Improper for prosecutor to comment to the jurors: “It’s a gun with a laser on it. Just imagine how terrifying this laser would be it was on our chest?” This violated the Golden Rule by asking the jurors to place themselves in the position of the victims and to think how they would feel if the crime happened to them.)

Williams v. State of Florida, 689 So.2d 393 (3rd DCA 1997) (commenting that nothing could be more traumatic to a 6 year old than losing a parent, the prosecutor stated: “What’s even worse than that is witnessing the loss of a parent. You’re six years old.” Not a “Golden Rule” violation because State was not asking jurors to place themselves in victim’s position, imagine victim’s pain and terror or imagine a relative was the victim. State was asking jury to understand child’s viewing of crime was a possible reason for confusion as to the car’s color. Also, even if it could be construed as an improper reference to child’s suffering- isolated comment was harmless.)

Reaves v. State of Florida, 639 So.2d 1 (Fla. 1994) (prosecutor’s argument: “Ladies and Gentlemen, I submit to you that if you had a gun in your face in a store after hours at 3:00 in the morning...” was a violation of the Golden Rule. Trial court immediately cured the error by interrupting the prosecutor, directing the jury to disregard the statement and directing the prosecutor not to put the jury “in any position.” *Subsequently remanded on other grounds:*

826/932.)

Davis v. State of Florida, 604 So.2d 794 (Fla. 1992) ("[I]t might not be a bad idea to look at [the knife] and think about what it would feel like if it went two inches into your neck" was a Golden Rule violation but harmless because it came at the end of an "otherwise unemotional" closing)

Sims v. State of Florida, 602 So.2d 1253 (Fla. 1992) (in death penalty case, prosecutor exceeded the bounds of proper argument when he suggested that jurors consider what the victim might have said had he been able to testify. This in effect constituted an improper "Golden Rule" argument because it asked jurors to place themselves in the victim's place. Remarks did not become feature of case. Affirmed.)

Shaara v. State of Florida, 581 So.2d 1339 (1st DCA 1991) (Prosecutor's request that jurors consider what victim had gone through and was now going through was not Golden Rule violation because it did not ask the jury to place themselves in the victim's position.)

Nixon v. State of Florida, 572 So.2d 1336 (Fla. 1990) (prosecutor's comment in closing that he did not enjoy "presenting this horrid thing" to jury but that he had an obligation to "make [jury] feel just a little bit ... of what [victim] felt" did not amount to a Golden Rule argument. Affirmed)

Jenkins v. State of Florida, 563 So.2d 791 (1st DCA 1990) (Golden Rule was violated when prosecutor pointed shotgun at one of juror while arguing to the others that this was the same circumstance that confronted the victim.)

Clark v. State of Florida, 553 So.2d 240 (3rd DCA 1989) (it was improper during murder prosecution for prosecutor to point the unloaded murder weapon at the jury and pull the trigger as it was theatrical and potentially dangerous. However, although the action tended to create the impression of involving the jurors in the display, the prosecutor did not employ any words in connection with the display so as to clearly cause it to constitute a Golden Rule violation. Affirmed as harmless.)

Rhodes v. State of Florida, 547 So.2d 1201 (Fla. 1989) (improper for prosecutor to ask the jury to try to place themselves in the hotel during the victim's murder. Golden Rule. Reversed due to cumulative effect of all errors and judge's failure to sustain any of the objections.)

Garron v. State of Florida, 528 So.2d 353 (Fla. 1988) (prosecutors statement: "you can just imagine the pain this young girl was going through as she was laying there on the ground dying.... Imagine the anguish and the pain that [she] felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired" was a Golden Rule violation as it placed the jury in the place of the victim and asked them to imagine her pain. Reversed based upon cumulative errors. *Abrogation on other grounds recognized in 979/301*)

Tuff v. State of Florida, 509 So.2d 953 (4th DCA 1987) (in a case where a woman was charged with shooting her son the prosecutor told jurors that a parent has a responsibility to keep his of her children safe. As he made this argument he apparently mentioned the name of every juror who had children. He further suggested that the defendant was a danger to the jurors' children. Held: Reversed).

Bertolotti v. State of Florida, 476 So.2d 130 (Fla. 1985) (inviting the jury to imagine the victim's final pain, terror and defenselessness is a variation of the Golden Rule argument and is prohibited.)

State of Florida v. Wheeler, 468 So.2d 978 (Fla. 1985) (Def is "supplying the drugs that eventually get to the school yards and into your own homes" violates Golden Rule. *[Subsequently overruled by statute on other grounds {entrapment issue.} See Gonzalez v. State, 571 So.2d 1346, Herrera 594 So.2d 275]*)

Morris v. State of Florida, 456 So.2d 471 (3rd DCA 1984) (any impropriety in prosecutor's argument: "and he says 'I'm sorry for the things I have done, I'm sorry for getting involved in drugs, I'm sorry,' but he did more than get involved in drugs and be a user. He was predisposed. He's been involved in deals before and sorry just isn't enough. When your -- when your son or your daughter takes some money out of your pocket or purse when you're not looking and you find out they did that ..." was cured when the prosecutor rephrased his remarks: "When somebody does something wrong, you say you're sorry, sometimes sorry just isn't enough." Affirmed. *[Quashed on other grounds - Morris v. State, 487 So.2d 291]*)

Bullard v. State of Florida, 436 So.2d 962 (3rd DCA 1983) (in closing the prosecutor told the jury, "imagine some individual coming up to you, pointing a gun in your face like this, tell me what you see, give me your money, give me watches, give me everything you got ... " Held: Reversed).

Cumbie v. State of Florida, 378 So.2d 1 (1st DCA 1978) (prosecutor's argument: "Now, we men often times can't appreciate the assault on a body that a woman has to undergo when she is being raped ... but I think we can think about it and kind of try to imagine, if you think of yourself in a similar situation when some –" was an improper Golden Rule argument. Trial court properly interrupted prosecutor and admonished jury to disregard the remarks. Reversed on other improper argument. [District court set aside conviction but was reversed by Supreme Ct. because error was not preserved and was not fundamental in *State v. Cumbie*, 380 So.2d 1031 (Fla. 1980)])

Lewis v. State of Florida, 377 So.2d 640 (Fla. 1980) (no error in prosecutor's comment: "Now, if you just shot a man in an alleged self defense, wouldn't you tell that to the deputy? Instead of, 'He's been bugging me a long time and I'm tired of it and I shot him.'" Comment was not a Golden Rule violation but was a clear reference to the inconsistency between appellant's defense

at trial (self-defense) and his statement to the arresting officer after the killing.)

Peterson v. State of Florida, 376 So.2d 1230 (4th DCA 1979) (Golden Rule violated when, in one witness case, Prosecutor suggested that he would take two jurors into the jury room, kill one, and then go to trial because the State would only have one witness against him [the other juror].)

Zamot v. State of Florida, 375 So.2d 881 (3rd DCA 1979) (it was improper for prosecutor to argue that he was glad he, and inferentially the jury, did not meet up with the def. in a dark alley. Argument suggested that if they had the def. would have assaulted or killed the prosecutor and the jury. ["He doesn't give a damn who he hurts.... That boy, well he kills like a man.... Give that boy a chance. That boy, who? I'm sure we all feel, my God, I'm lucky I didn't meet him in a dark alley. That boy, geez, I'm sorry, I'm glad I never met up with that boy."] Harmless due to overwhelming evidence. Affirmed.)

Lucas v. State of Florida, 335 So.2d 566 (1st DCA 1976) (In sexual battery case, prosecutor improperly commented to women on the jury "think how you ladies would feel if that happened to you.")

Adams v. State of Florida, 192 So.2d 762 (Fla. 1966) ("When you go home ... if your wife wasn't there because she had been murdered ....")

Collins v. State of Florida, 180 So.2d 340 (Fla. 1965) ("[I]f one of your daughters was violated...." Not reversed because statement was interrupted by objection.)

Barnes v. State of Florida, 58 So.2d 157 (Fla. 1951) ("What if it was your wife or your sister or your daughter this beast was after.")

VIII. Comment about defendant's other convictions or bad acts

Hall v. State of Florida, 107 So.3d 262 (Fla. 2012) (in death penalty case, where state was properly introducing evidence of def.'s prior violent felonies, it was improper for state to intertwine facts of def.'s prior crimes with facts of current case ["Donna Fitzgerald, ladies and gentlemen, had the afore knowledge of her own death, the fear, the anxiety. The fear and anxiety and suffering that goes along with knowing you are about to die. Didn't make a difference to [def]. He was completely indifferent to her suffering, exactly like he was indifferent to [G. S.], that 66-year-old lady, begging him, begging him for her heart pills. And how did he show his indifference? I don't give a damn about your heart. Shut up, bitch. Heinous, atrocious, cruel." And as to mitigation: "If you choose to believe that [Hall] was sexually battered in jail, I ask you, does that outweigh the fact that this defendant kidnapped, sexually battered and beat a 66-year-old lady? Kidnapped her in broad daylight."] However, comments were not so egregious as to reach the level of becoming a feature of the penalty phase so as to render the validity of the

penalty phase questionable or produce fundamental error. Conviction and sentence affirmed.)

Wilson v. State of Florida, 72 So.3d 331 (4th DCA 2011) (where def was on trial for child abuse and during recess yelled at witness in the parking lot calling her a liar and a bitch, it was improper for prosecutor to question def for the first time on cross-examination about this collateral matter, re-call the witness to impeach def about the incident, and then compound the error by arguing in closing: "the defendant didn't remember losing her temper and cussing out Kristy White in the parking lot. But she did." If a party cross-examines a witness concerning a collateral matter, the cross-examiner must 'take' the answer, is bound by it, and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point. Whether or not def yelled obscenities at witness during a trial recess was not evidence tending to prove or disprove … that def committed child abuse. Thus, the evidence was not relevant to the crime charged and did not serve to discredit def by establishing bias, corruption or lack of competency. Moreover, even if def's character for violence had been put at issue, such a trait is proven by reputation evidence, not specific acts. Reversed.)

Serrano v. State of Florida, 64 So.3d 93 (Fla. 2011) (*opening statement*-prosecutor's comment that murder def decided to "take some money owed to the two corporations and open up his own bank account" and that the banker at the new bank "knows something ain't right. You can't open corporate accounts by yourself" was not an improper attack on def's character where the State was making this argument, and later elicited testimony consistent with these statements, for the relevant purpose of establishing that def had a motive to kill his business partner because there were disagreements about the distribution of company assets and income. Conviction and death penalty affirmed.)

Ford v. State of Florida, 50 So.3d 799 (2nd DCA 2011) (in attempting to explain a six-month delay between the time of the controlled buy and the date def. was arrested, the prosecutor stated, "And the reason why he wasn't arrested for some time after, you heard [one of the law enforcement officers] say they were doing a federal investigation to try to get him on other things and they decided to make this a state case." Comment was improper as there was no evidence presented regarding any other crimes. "[A] prosecutor must confine closing argument to evidence in the record, and must refrain from comments that could not be reasonably inferred from the evidence." *** Further, implicating a defendant in other crimes not charged "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Error was not harmless as only evidence was testimony of CI who was 20 time convicted felon hoping to receive favorable treatment at his own sentencing and judge's curative instruction ("Ladies and gentlemen of the Jury, you will rely on your own memory about what testimony was present during trial") did not cure prejudice but left the jury with the impression that the argument may or may not have been accurate. Reversed.)

Mosley v. State of Florida, 46 So.3d 510 (Fla. 2009) (prosecutor's brief comment that def, who was married, had "girlfriends all over the place" was not an improper argument where it was

raised to dispute def's claim he was "leading a normal life at the time of the crime" and was made after defense counsel had raised the issue in opening statement saying, about his own client, "[Y]es he was having an affair, but not just one, more than one affair. He was having an affair with Lynda Wilkes. He was having an affair with Alesha Jackson and he was having an affair with Jamila Jones, unfortunately all while he was married, and that's why we talked about it because those things don't make him a murderer." Affirmed.)

Stephenson v. State of Florida, 31 So.3d 847 (3rd DCA 2010) (In prosecution for aggravated manslaughter of def's own child, it was highly improper for prosecutor to raise during cross and again during closing argument the fact that in the course of her pregnancy the def had contemplated aborting the decedent child. "[A]bortion is one of the most inflammatory issues of our time…. Accordingly, numerous decisions reverse convictions after trials which improperly implicate that issue, including several, as in this case, which are necessarily based on a finding of fundamental error in the absence of proper preservation." Reversed.)

Wright v. State of Florida, 19 So.3d 277 (Fla. 2009) (where collateral crime evidence was admitted to show that def. possessed the firearm throughout the crime spree and to refute def's testimony that co-def was in possession of the firearm when the murders occurred, prosecutions argument based on collateral crime evidence, that def. "doesn't have any problems shooting people" exceeded the proper use of that evidence by raising an impermissible propensity-toward-violence argument. "Admission of material evidence does not automatically mean that such evidence may be received for *any probative value* that it may have on *any issue* before the court" [emphasis supplied]. No objection was raised and not fundamental. Affirmed.)

Perez v. State of Florida, 919 So.2d 347 (Fla. 2005) (prosecutor's comment in *opening* that def. went to the scene of the crime with a knife "that he always carried" was neither misleading nor made in bad faith where state had a good faith expectation that such evidence would come in. Further, whether def. owned a knife or carried a knife was relevant given the charge that during a robbery the def. carried a weapon, "to wit: a knife." Moreover, even if such comment had been error, error was harmless. Conviction affirmed, death penalty reversed on other grounds.)

Cartwright v. State of Florida, 885 So.2d 1010 (4th DCA 2004) (where trial court allowed prosecutor to elicit from victim that he had changed his locks two weeks earlier as a result of a prior uncharged burglary, in order to rebut the def.'s claim that he had entered the victim's apartment under the mistaken assumption that it still belonged to his friend who had given him a key, it was improper for prosecutor to imply in closing that the def. had committed both burglaries ("-- the State is not implying that [def.] burglarized this home. But I ask you to take into consideration that it's not a coincidence that the fashion by which entry was gained into this condo was exactly the same manner.") Comment suggested that def. had a propensity to commit other burglaries and had, therefore, committed the one charged. Reversed based on cumulative error.)

Conde v. State of Florida, 860 So.2d 930 (Fla. 2003) (it was not improper for prosecutor to

argue to jury: "You don't think he knew what was going to happen to Rhonda Dunn? You don't think when he put his arm around her neck that he knew he was going to suffocate her just like all the others[?]". Argument was permissible as *Williams Rule* evidence as it was intended to prove the existence of a premeditated plan, rather than suggesting that the jury should convict Def. because he was a serial killer. Comments referring to Def. as an adulterer and sociopath, which were not properly preserved and were not fundamental, were also remedied by a curative instruction. Affirmed.)

Burst v. State of Florida, 836 So.2d 1107 (3rd DCA 2003) (where defense counsel improperly asked his client if he had "ever been convicted of a crime," def. counsel opened the door and the prosecutor was entitled to cross-examine the def. on the fact that the crimes identified by def. where only the felonies, that he had committed other crimes as well and the details of the felonies he committed. Thereafter, prosecutor's comment in closing that def.'s conviction for grand theft auto was not that he "just stole something from Burdines ... [that he] just stuffed a bunch of stuff in a bag, no. He went up to somebody's car and he broke in and he stole it" were aimed at attacking def.'s credibility and were not meant to show a propensity to commit crimes. Although the prosecutor may have gone too far in arguing that def. broke into a car, that isolated reference did not vitiate the entire trial so as to require a mistrial.)

King v. State of Florida, 765 So.2d 64 (4th DCA 2000) (although case involves opening statement rather than closing, principle is equally applicable. It was not error for prosecutor to refer to fact that officer knew def. or for officer to make brief, innocuous statement that he knew def. prior to day of sale of cocaine. Neither "improperly inferred that the [police] had contact with def. in an official capacity and suggested prior criminal activity on the part of [def.]" Concurring opinion points out that where comment innocuously refers to knowing def. prior to day of incident, officer may know def. from many "non-official" situations including: having been classmates in school, being a neighbor, or from "walking the beat" over an extended time. Affirmed)

Martinez v. State of Florida, 761 So.2d 1074 (Fla. 2000) (in attack on def.'s credibility, it was improper for state to argue: "you see, when you think about the defendant, you've got to realize who you're dealing with here. ... [A] man who doesn't tell the truth. He doesn't tell the truth to the women he's involved with; he cheats on them; he runs around on them, not just once, not just twice. That's who we're dealing with here." The state cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show the def.'s bad character or reputation, unless the accused, conceiving that his case will be strengthened by proof of good character, opens the door. Reversed based upon totality of errors.)

Shively v. State of Florida, 752 So.2d 84 (5th DCA 2000) (in prosecution for sexual battery upon a child, where evidence existed that on another occasion def. was seen naked in the presence of child victim, it was not error for State to comment on that testimony in closing. Incident was not being presented as "prior bad act evidence" but was relevant to show that the def. had set up circumstances where he and the victim would be alone in the family house.

Affirmed)

Wallace v. State of Florida, 742 So.2d 529 (1st DCA 1999) (although trial court properly allowed prosecutor to refer to earlier burglary of which def. had been acquitted because it was relevant to state's theory of manner in which def. obtained possession of stolen property that was subject of case on trial, prosecutor exceeded appropriate bounds by repeatedly referring to burglary, in violation of trial court's admonishments to refrain from further references, and thereby made burglary feature of trial. Reversed)

Perry v. State of Florida, 718 So.2d 1258 (1st DCA 1998) (limited reference to "Williams Rule" evidence that covered one page of a 22 page closing and pointed out the similarities of the charged and uncharged acts, asking why witnesses would come in and lie was proper and did not make such evidence "feature" of the trial. Affirmed)

Ford v. State of Florida, 702 So.2d 279 (4th DCA 1997) (prosecutor's remark: "how many times would a man get himself in a situation where four or five girls are going to call rape" improperly suggested other crimes unsupported by any record evidence. "The implication of a def. in other crimes is considered presumptively prejudicial." Reversed on these and other errors.)

Bozeman v. State of Florida, 698 So.2d 629 (4th DCA 1997) (where in a battery on a corrections officer case the def. and his witness claimed def. acted in self-defense and corrections officer was erroneously allowed to tell jury that def. was in the "special management unit" of jail which housed the "worst behaved" and most "violent" defendants, error was compounded when state argued: "Ask yourself who would be the aggressor.... Ask yourself who's in that unit.... Ask yourself how they got there.... These are not guys who are afraid of deputies." Comment was tantamount to a statement of def.'s prior bad acts and also attacked def.'s character when def. had not placed it at issue. Reversed.)

Williams v. State of Florida, 692 So.2d 1014 (4th DCA 1997) (prosecutor's comment that def. had "gotten himself in trouble in Miami" was improper especially when there was no evidence to that effect, other than prosecutor's explanation to the court that "He was in Miami. Some reason he left Miami to come up here to pull this robbery. I am saying we don't know." Trial court sustained objection and admonished jury to disregard the comment. Mistrial should have been granted when comment was combined with improper testimony about def. having been recently released from jail.)

Jones v. State of Florida, 666 So.2d 995 (5th DCA 1996) (where def. admitted being a convicted felon during her testimony, it was not error for State to argue "I would submit to you that she's not quite being truthful with us, and I guess what you would expect from someone who is a convicted felon." Comment called attention to her prior conviction as a factor to consider with regard to her credibility, not her propensity to commit crimes.)

Traina v. State of Florida, 657 So.2d 1227 (Fla. 4th DCA 1995) (*opening statement* - although it was improper for prosecutor to comment in opening that def. and co-def. "were no strangers to the drug scene," and objection should have been sustained as comment put def.'s character in issue, error did not warrant a mistrial as isolated comment was not so egregious as to vitiate def.'s entire trial. Affirmed.)

Pacifico v. State of Florida, 642 So.2d 1178 (1st DCA 1994) (while reference to def.'s prior conviction is permitted for impeachment (credibility), it may not be used for purpose of indicating that def. has a propensity to commit crime. Based upon the facts of this case, State's comment that def. "is a criminal and needs to be convicted," was not directed to credibility but to character.)

Henry v. State of Florida, 629 So.2d 1058 (5th DCA 1993) (improper for prosecutor to comment in closing, without any evidentiary support, that def.'s had previously been involved in drug trafficking. Reversed.)

Kelvin v. State of Florida, 610 So.2d 1359 (1st DCA 1992) (at murder trial, improper for state to argue that "defendant's spot" was at a certain location, that it was his "drug kingdom," that the young kids in the area were his "pawns," that he was the "king maker" that he was a convicted felon who could not legally possess a gun, and that he was on pretrial release and had been ordered deported.)

Brown v. State of Florida, 610 So.2d 579 (1st DCA 1992) (during defendant's testimony, the prosecutor elicited the fact that the defendant was a three-time convicted felon. During his summation, the prosecutor did not use the convictions to argue the credibility of the defendant, but rather said that the place where the homicide took place is the place where "people like the defendant hang out there, three times convicted felons ..." Held: Reversed).

Adams v. State of Florida, 585 So.2d 1092 (3rd DCA 1991) (prosecutor's suggestion to jury that identification of def. several days after drug deal with undercover officer should be believed because officer recognized def. because officer "is a narcotics officer ...." He's all over the place. He's made buys he's made sales. He sees lots of people –" was completely without an evidentiary basis and were inflammatory [presumably for suggesting def.s involvement in other drug deals]. Reversed.

Alvarez v. State of Florida, 574 So.2d 1119 (3rd DCA 1991) (improper for prosecutor to argue that def. counsel wants jury to "turn him loose again")

Cooper v. State of Florida, 413 So.2d 1244 (1st DCA 1982) (reference to def.s unrelated prior conviction - improper)

Davis v. State of Florida, 397 So.2d 1005 (1st DCA 1981) (Prosecutor's comment "This man has already been convicted of two crimes, already. He hasn't lived...by the rules of society and

the law of the State. ***[Y]ou well know he hadn't conformed twice in the past and he wasn't conforming that night" --improper reference to prior convictions to show propensity to commit crime rather than to attack credibility.)

Wilkins v. State of Florida, 383 So.2d 742 (4th DCA 1980) (prosecutor's comment: "Here's a man, seven times prior been convicted of a crime, who takes the stand and tells you he's an innocent, law-abiding citizen, who doesn't know anything about this black man who approached him on two occasions [about drugs]," although susceptible to interpretation as a comment on def.'s propensity to commit crimes, is also consistent with an attack on def.'s credibility, which is entirely proper. Affirmed.)

Glassman v. State of Florida, 377 So.2d 208 (3rd DCA 1979) (in insurance fraud prosecution where doctor was alleged to be part of a conspiracy involving staged automobile accidents, feigned injuries and subsequent claims for insurance proceeds, it was improper for prosecutor to comment that def. was an expert witness who often testified in court and "juries believe it and pay through the nose" as such allegations were unrelated to the crimes charged and were unsupported by any evidence. It is improper for a prosecutor to suggest to the jury that the def. has committed other crimes in the past, in addition to the crime for which he is on trial, when there is no evidence before the jury to support this assertion. Reversed.)

Lucas v. State of Florida, 335 So.2d 566 (1st DCA 1976) ("Although prior convictions, properly introduced into evidence, may be considered in weighing credibility, there is a point at which repeated references may be beyond the bounds of propriety." State's reference to def.'s four prior convictions on four occasions in closing was improper. Reversed on other grounds.)

Bullard v. State of Florida, 324 So.2d 652 (1st DCA 1975) ("If you turn this defendant loose, if you find him not guilty, ... when all of his friends and hoods come in here and make a mockery of our whole system of justice. How can anyone ever be convicted if he brings in all these convicted friends and thieves in here to testify and lie for him every time he's ever charged?" Improper but not reversible where curative given.)

Knight v. State of Florida, 316 So.2d 576 (1st DCA 1975) (trial was conducted in "circus atmosphere" where, although def. was being tried for second degree murder, statements were made about his lack of support for his family, his morals were directly assaulted, appeals of sympathy were made for the plight of the widow and children of the deceased, and attempts were made to play on the juror's geographic prejudice. Reversed.)

Wilson v. State of Florida, 294 So.2d 327 (Fla. 1974) (in perjury prosecution for allegedly providing false information in earlier murder trial at which def. was acquitted of murder, prosecutor's continual reference to the murder on 16 occasions, in 3 of which he directly accused def. of murder, together with repeated accusations that the def. was guilty of bigamy and adultery, both uncharged felonies completely unrelated to matter at issue, deprived def. of fair trial. Reversed.)

Fitzgerald v. State of Florida, 227 So.2d 45 (3rd DCA 1969) (def.'s testimony that he had just gotten out of jail on a "drunk charge," that he had been in that kind of trouble "quite a number of times" and that he had "consistently" been arrested for being drunk did not justify prosecutor's argument to jury that, in resolving conflicts in the testimony they should consider that the def. "by his own testimony, has spent the better part of his life in jail." The allegation that the def. had spent "the better part of his life in jail" was not reasonably inferred from his testimony concerning prior arrests for being drunk. The impropriety of the comment was heightened by the fact that it was used to discredit his testimony as to the events that occurred. Reversed.)

Davis v. State of Florida, 214 So.2d 41 (3rd DCA 1968) (where def. testified and admitted to having been previously convicted of 3 felonies and one misdemeanor without reference to the particular crimes, it was improper for prosecutor to argue on closing: "Less than 44 days after he got out of prison he is back robbing and doing the very same thing for which he was put in there the first time." Together with other improper argument, reversed.)

Ailer v. State of Florida, 114 So.2d 348 (2nd DCA 1959) ("Defendant's been performing abortions for years."--improper)

IX. Using derogatory terms

A. Derogatory terms to refer to the defendant or to defense counsel

Crew v. State of Florida, 146 So.3d 101 (5th DCA 2014) (State improperly degraded Appellant by repeatedly asserting "there isn't a moralistic thing" about Appellant and calling him a drug addict in various permutations like "nothing more than a hopeless old crack addict," a "crackhead," "our favorite crackhead," "little beady crackhead eyes," and "crackhead little brain." In summation, the prosecutor continued, "This is a guy who committed a crime because he's a crackhead and he was going to get free crack out of it." These are the vituperative or pejorative characterizations of a defendant that are clearly improper. Reversed for cumulative errors.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – prosecutor's comments that defense was "not true," "lies," or "silly," the prosecutor's suggestions that def's account of what happened to the victim should be thrown "out the window," "would not fly today," "makes no sense," and has "changed," and the prosecutor's statements that the jury was "supposed to believe" the defense, were permissible expressions of the inference that def's statements were inconsistent with the other evidence, not derisive comments offered merely to ridicule the defense. However, prosecutor's statements that def "probably doesn't have the same wisdom as counsel does with respect to knowing that an unconscious child can't choke on a French fry (although based on the evidence presented at trial) and that def was "in la-la land," were arguably

"needless sarcasm." Nonetheless, errors not fundamental. Denial of post-conviction motion affirmed.)

Petruschke v. State of Florida, 125 So.3d 274 (4th DCA 2013) (it was improper for prosecutor to repeatedly refer to def. as a "pedophile." Such inflammatory character attacks suggest that def. committed prior illegal sexual acts involving children and improperly suggested a profile-type argument that, if the defendant had certain traits which fit the offender profile, he must have abused the victim. Although defense counsel himself used the term "pedophile" in his closing argument and tried to suggest that appellant's conduct was inconsistent with what a pedophile would do, it is important to note that defense counsel made this argument only after the prosecutor, over defense objection, was permitted to characterize appellant as a pedophile. Reversed for this and other comment.)

Castro v. State of Florida, 122 So.3d 912 (4th DCA 2013) (state did not err in calling four co-defendants a "criminal gang" where defendants were being tried for RICO violations, prosecutor was responding to def. counsel's assertion that defendants were not an "enterprise," and Florida law states: "a criminal gang, as defined in s. 874.03, constitutes an enterprise." Affirmed.)

McPhee v. State of Florida, 117 So.3d 1137 (3rd DCA 2012) (in trial for sexual activity with a minor stemming from def's sexual contact with a 17 year old girl at a school for mentally challenged children, it was improper for prosecutor to refer to def. as a pedophile ["Today is the day that this defendant is held accountable for his pedophilia, . . ."]. No objection was made and isolated comment was not fundamental error. Affirmed.)

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (in *penalty phase*, prosecutor's reference to def. as "a guy who cannot live out in the community without hurting someone" and "you don't just wake up one morning and say I'm going to be violent today. I will submit to you that this has been since birth. He's been this way since birth. And no matter what he says or no matter what he does with his family, this is cruel, heinous" was not improper. Although court has previously criticized arguments that de-humanize the def. as a "cold-blooded killer, a ruthless killer," who exhibited "deepseeded [sic] violence," here the state properly introduced evidence at penalty phase establishing that def. had a violent character, in response to def.'s attempt to characterize himself as a nonviolent person. The state properly drew on the facts in evidence to argue that def had caused trouble as a child and had then gone on to an adult life full of violent crime. The State argued that these facts demonstrated that def had been violent "since birth" and "cannot live out in the community without hurting someone." State's characterization of def. as an unfaithful or bad husband was not improper where they were in direct response to def's attempt to characterize himself as a good husband. The evidence showed that def. had been in jail for several years while his wife was at home taking care of four children and pregnant with a fifth; that during this time his wife was the primary caregiver for her family; and that def had attempted to have at least one extramarital sexual relationship -- his relationship with the victim. Conviction and sentenced affirmed.)

Toler v. State of Florida, 95 So.3d 913 (1st DCA 2012) (prosecutor's references to appellant as being a liar, to appellant's race ["This is a person who is willing to lie to get out of trouble. . . . [I]f there wasn't the physical evidence, you would be hearing a story about misidentification. You would be hearing a story about how all young black males look the same. *** Can't go with the story anymore of it wasn't me, you go into character assassination. Michael Brown is a bad person. He's gay. He likes young men. He basically uses prostitutes. He's some sort of sexual deviant. I'm honestly surprised that you didn't hear that he makes meth in his bathtub --"], and to matters for which there was absolutely no support in the record, in a manner both pejorative and sarcastic were so invasive and inflammatory, "it is questionable whether the jury could put aside the prosecutor's character attacks, and decide the case based strictly upon the evidence." [citation omitted] Reversed.)

DeHall v. State of Florida, 95 So.3d 134 (Fla. 2012) (in penalty phase, it was improper for prosecutor to comment on def's future dangerousness, arguing several times that def "is "violent," "dangerous," that he "can't be fixed," that "he acts with violence," and "[f]rom a school child he was violent." After court sustained objection and prosecutor continued arguing def's dangerousness, court chastised prosecutor saying "You keep saying that word. Don't do that, okay. Please." Undeterred, prosecutor continued: "His violence speaks for itself. You know what? Sometimes it's really sad a person can't be fixed." Error not harmless when combined with other improper comments. Conviction affirmed and remanded for new penalty phase.)

Lot v. State of Florida, 13 So.3d 1121 (3rd DCA 2009) (prosecutor's comment that "People who are addicted to drugs steal from their families. People who are … alcoholics do some pretty evil things, too. … Gambling is just as bad. This def had a gambling problem and was in such hot water with his bookies that he had to go and steal money from somebody. … Well, the deepest well that he knows that he's got some power over belongs to his stepson." was not improperly referring to def as a drug addict or alcoholic. Taken in context, it is clear that the State was arguing that, like any other addiction such as drug or alcohol addiction, def's gambling addiction (of which there was substantial testimony) can lead people to steal, even from their own families. Further, comment was a fair reply and made in direct response to defense counsel's argument that the crime was so easily traceable that it indicated no criminal motive or intent. Affirmed.)

Bailey v. State of Florida, 998 So.2d 545 (Fla. 2008) (*penalty phase opening* – prosecutor's argument commenting on witness' prior testimony: "A bullet has just gone through the glass. He's seen the fire. He saw the [defendant's] face, a face he described as mean, angry. I submit evil" and "Ladies and gentlemen, by the facts and the evidence that have been presented to you over the last two days you too have seen the face of the defendant" did not improperly vilify the defendant and, in any event, was not fundamental.)

Hannon v. State of Florida, 941 So.2d 1109 (Fla. 2006) (prosecutor's comment in closing that they made a deal with the sinner (co-def.) to get the devil (def.), although ill advised, was not so prejudicial as to undermine confidence in the case. Affirmed.)

Davis v. State of Florida, 928 So.2d 1089 (Fla. 2005) ("[P]rosecutor's reference to def. as a "cagey little murderer. Little robber. Cagey little thief," although improper, was not so egregious as to constitute fundamental error when viewed in context. [Prosecutor was referring to testimony of a witness as follows: "Mr. White said that Beverly Castle referred to the Defendant as a little character of some kind. I specifically recall what she said. He was a cagey little character. I suggest to you at this point in the trial, you know that he was more than a little cagey little character. He was a cagey little murderer. Little robber, cagey little thief."] Counsel cautioned, however, to argue facts, not labels or characterizations of defendants. Affirmed.)

Conde v. State of Florida, 860 So.2d 930 (Fla. 2003) (Prosecutor's comments referring to Def. as an adulterer and sociopath, which were not properly preserved and were not fundamental, were also remedied by a curative instruction. Further, trial court's overruling of defense objection to prosecutor's reference to "Tamiami strangler" was not improper where comment was made as part of a general reference to the perpetrator of the multiple crimes and concerned the police investigation of the six murders ["each and every one of the victims of the Tamiami strangler were found to have [certain identical] fibers on them, ..."]. Affirmed.)

Kelly v. State of Florida, 842 So.2d 223 (1st DCA 2003) (in case where mother on trial for murder of her husband accused her son of firing fatal shot, it was improper for state to argue: "[you heard the defendant finally admit that she doesn't care about [her son] because with her words today, ladies and gentlemen, she put murder and responsibility for murder on her teenage son and, ladies and gentlemen, that all by itself ought to convince you that she deserves to be convicted of second degree murder." Argument suggested to the jury that they should convict the defendant because of her bad character. "It is improper for a prosecutor to refer to the accused in derogatory terms, in such a manner as to place the character of the accused in issue." [citations omitted] Argument was intended to encourage the jury to base its verdict on ill will and passion, rather than on the evidence and the law. Reversed)

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) (it was improper for prosecutor to comment that victim did not have any money on him because "Burger King knows enough to know that the def, people like the def. are out at night robbing people, especially managers of stores...." It is improper to cite witnesses or def.s as examples of a certain criminal type. Further, other comments that denigrated defense and defense counsel were also improper. Reversed due to multiple improper arguments.)

Moore v. State of Florida, 820 So.2d 199 (Fla. 2002) (Prosecutor argued the following: "Crime conceived in hell will not have any angels as witnesses. And, ladies and gentleman, as true as that statement is, Grand Park is hell. And that man right there is the devil.... Ladies and gentlemen, deals. Yes, ma'am, yes, ma'am, yes, sir, to all of you. I have dealt with [co-defendant 1] and I have dealt with [co-defendant 2]. I did that as an Assistant State Attorney. I did that the best I knew how. But, ladies and gentlemen, sometimes you have to deal with sinners to get the devil. And I would submit to you what the State did was we dealt with this sinner and we dealt with

this sinner to get this devil." Argument, although ill advised, was not so prejudicial as to vitiate the entire trial. Affirmed.)

Carroll v. State of Florida, 815 So.2d 601 (Fla. 2002) (in death penalty case, prosecutor's reference to def. as a "boogie man" and "a creature that stalked the night" who "must die," although improper and ill advised, did not rise to the level of fundamental error. "When comments in closing are intended to and do inject elements of emotion and fear into jury deliberations, a prosecutor has ventured far outside the scope of proper argument." [citations omitted]. Affirmed.)

Pino v. State of Florida, 776 So.2d 1081 (3rd DCA 2001) (it was not improper for prosecutor to say def. was a "liar" and that he had "lied" and told "lies." If the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence. Since the record reflects that the prosecutor's characterization of the def. were supported by the record, no error found. Affirmed *[NOTE: This case follows Craig v. State without citing it and does not explain the contrary opinion from the same DCA {different panel} in Gomez below.]*)

Gomez v. State of Florida, 751 So.2d 630 (3rd DCA 1999) (improper for prosecutor to refer to def., who had testified, as a "liar" and "a big zero" and to his version of events as "lies" and "a cockamamie story." Prosecutor improperly encroached on the jury's function by giving her opinion of the credibility of witnesses. Court printed name of prosecutor and admonished trial judge saying she "retains the ultimate responsibility for the proper conduct of trial counsel and trial proceedings...." Considering all other improper comments, case reversed. [Note: Court failed to address how this case was distinguishable from Supreme Court case of *Craig v. State* on the issue of calling the def. a liar.])

Barnes v. State of Florida, 743 So.2d 1105 (4th DCA 1999) (improper for prosecutor to refer to the testimony of def. counsel, who was testifying on def.s behalf with regard to the suggestiveness of the lineup, as "the mercenary actions of ... a hired gun." Trial courts instruction that the jury should "ignore the last comment" was ambiguous in that it was unclear if it referred to the prosecutor's statement or def. counsel's request that it be stricken. "For a curative instruction conceivably to erase the palpable prejudice to the def. in this situation, the court should have condemned the comment in the clearest and most unmistakable terms. In these circumstances, it might even have been proper for the court to question the jurors to determine whether the effects ... could be set aside." Fundamental error. Prosecutor referred to Fla. Bar for repeated violations.)

Henry v. State of Florida, 743 So.2d 52 (5th DCA 1999) (improper for prosecutor to refer to def. as a "cold-blooded killer" who was out to establish his reputation with motorcycle gang and suggest that he was a member of Outlaws gang where there was no support, whatsoever, for that in the record. Reversed.)

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) (although prosecutor may refer to def. as a "liar" where it is clear that he is submitting to the jury a conclusion that he is arguing can be drawn from the evidence, it was improper for the prosecutor to characterize def. as "Pinocchio," and then tell the jury that "truth equals justice" and "justice is that you convict him" as that invited the jury to convict def. because he was a liar. Reversed due to many errors).

Catis v. State of Florida, 741 So.2d 1140 (4th DCA 1998) (proper for prosecutor to state that def. was a "drug dealer," "trafficker" and "crack dealer" where he was on trial for cocaine trafficking and comment was based on what the evidence purportedly had shown.)

Fernandez v. State of Florida, 730 So.2d 277 (Fla. 1999) (*opening statement* - it was not improper for prosecutor to refer to def. as "a robber and a murderer" and to victim as singing a Christian song just before he was shot. Nor was it improper to describe the bullet's trajectory through the victim's body. A trial court has discretion in controlling opening statements, which are not evidence, and will not be overturned absent an abuse of discretion. Trial court did not abuse its discretion in allowing statements, which were later supported by evidence. Conviction affirmed.)

Copertino v. State of Florida, 726 So.2d 330 (4th DCA 1999) (improper for prosecutor to refer to def. as a "young Mr. Hitler." Judge instructed jury to disregard comment. Error harmless. Affirmed.)

Gore v. State of Florida, 719 So.2d 1197 (Fla. 1998) (improper for prosecutor to argue: "Ladies and Gentlemen, there's a lot of rules and procedures that I have to follow in court, and there's a lot of things I can say or can't say, but there's one thing the Judge can't ever make me say and that is he can never make me say that's a human being." Reversed based upon cumulative effect of all errors.)

Perry v. State of Florida, 718 So.2d 1258 (1st DCA 1998) (It was proper for the prosecutor to refer to the statement of def. as not being the words of an "innocent man" and to use the word "lie" when commenting on his testimony. It is understood from the context that the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. Affirmed.)

Hawk v. State of Florida, 718 So.2d 159 (Fla. 1998) (improper arguments that the def. "take[s] life for granted," and was a "savage killer," were not preserved by objection. Argument that a life recommendation for def. who is deaf, based upon his handicap, would be an "insult to all who have achieved greatness and lived law abiding and productive lives in spite of some handicap" was inappropriate but does not constitute reversible error. Following improper closing arguments, the issue is whether the trial court abused its discretion in responding to defense counsel's objections. Supreme Court urges trial courts to police with vigilance any hint of impropriety. *[Subsequently abrogated on other grounds - Connor v. State, 803 So.2d 598]*.)

Walker v. State of Florida, 710 So.2d 1029 (3rd DCA 1998) (prosecutor's reference to def. as "repulsive," having the "face of a liar" and treating his wife like a dog were entirely improper and offensive to any notion of a fair trial. Reversed.)

Walker v. State of Florida, 707 So.2d 300 (Fla. 1997) (Although it was improper for prosecutor to make derogatory remark about defense counsel and refer to defense expert as "hired gun," prosecutorial misconduct in penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. Harmless error.)

Baker v. State of Florida, 705 So.2d 139 (3rd DCA 1998) (improper for prosecutor to imply to jury that defense counsel was fishing for gullible jurors. As comments were not invited response to defenses closing and no curative instruction or instruction to disregard the comments was given by the court, reversible error occurred. Reversed.)

Chandler v. State of Florida, 702 So.2d 186 (Fla. 1997) (improper for prosecutor to argue that def. counsel engaged in "cowardly" and "despicable" conduct and that def. was "malevolent ... a brutal rapist and conscienceless murderer," but although comments were petty they were not so prejudicial as to vitiate the entire trial. Affirmed)

Davis v. State of Florida, 698 So.2d 1182 (Fla. 1997) (reference to statements made in def.'s confession as "bald-faced lies" was appropriate where it was clear from the context that the prosecutor was submitting to the jury a conclusion that he argued could be drawn from the evidence. Reference to crime and its perpetrator as "vicious" and "brutal" was not improper in light of evidence in the case.)

Maldonado v. State of Florida, 697 So.2d 1284 (5th DCA 1997) (Improper for prosecutor to refer to def. as "coward" for trying to blame death of child on his girlfriend, the child's mother. Court admonished prosecutor about using disparaging names. Although it would have been preferable for court to give a formal curative instruction, any error was harmless.)

Reese v. State of Florida, 694 So.2d 678 (Fla. 1997) (prosecutor's story about a "cute little puppy" who "grew into a vicious dog" was not improper because evidence of def.'s past character was presented to the jury, so it was appropriate for State to argue that past character is not determinant of present character. Story did not constitute name calling.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo

Sorondo])

Jackson v. State of Florida, 690 So.2d 714 (4th DCA 1997) (where def. was charged with possession of cocaine, it was improper for State to suggest that def. might actually be a drug dealer because of the way the drugs were individually wrapped. Error was magnified by State's further statement that drugs were "root of all crime" and def. was the person "we have to thank for all that". Although counsel is allowed to argue the evidence and inferences that can be logically drawn from the evidence, the prosecutor may not argue that the evidence suggests that the defendant is guilty of a crime greater than the one for which he has been tried.)

Perez v. State of Florida, 689 So.2d 306 (3rd DCA 1997) (it is "highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues, into any part of our judicial system." Prosecutor "not only labeled the witness a racist, but projected that characteristic onto the defendants.... [I]t is always wrong to call witnesses or defendants names by citing them as examples of a criminal 'type.'")

Bonifay v. State of Florida, 680 So.2d 413 (Fla. 1996) (although prosecutor's singular use of the word "exterminate" was not harmful error, the court cautions against the use of any words that may tend to dehumanize a capital def.)

Knight v. State of Florida, 672 So.2d 590 (4th DCA 1996) (error for prosecutor to personally attack def. counsel by suggesting that he presented "perjured testimony and planted evidence.")

State of Florida v. Benton, 662 So.2d 1364 (3rd DCA 1995) (improper for prosecutor to comment that it is defense counsel's "job to cross things up, to muddy the water," however, single degrading comment insufficient to warrant a new trial.)

Pacifico v. State of Florida, 642 So.2d 1178 (1st DCA 1994) (improper for State to refer to def. as "slick fraternity guy," "sadistic, selfish bully," "criminal" "convicted felon" "rapist" and "chronic liar." Although there was evidence that def. was a convicted felon and had lied, his record was minimal and the subject lies where not significant enough to warrant the State's "chronic" label. Argument amounted to character assassination and, since it became feature of trial, fundamental error.)

Esty v. State of Florida, 642 So.2d 1074 (Fla. 1994) (prosecutor's reference to def. as a "dangerous, vicious, cold-blooded murderer" and comment that neither the police nor the judicial system can "protect us from people like that," although improper, was not so prejudicial as to vitiate the entire trial. Trial court sustained the objection and instructed the jury to "disregard the last comments of the State attorney." The control of the prosecutor's comments is within a trial court's discretion, and that court's ruling will not be overturned absent an abuse of discretion.)

Reaves v. State of Florida, 639 So.2d 1 (Fla. 1994) (reference to def. as "cocaine seller," although improper in murder trial, was harmless. Affirmed. *Subsequently remanded on other*

grounds: 826/932.)

Shells v. State of Florida, 635 So.2d 140 (4th DCA 1994) (prosecutor's comment during voir dire that the role of both prosecutor and defense counsel on voir dire was to pick jurors favorable to their respective clients was improper).

Crump v. State of Florida, 622 So.2d 963 (Fla. 1993) (prosecutor's comment describing the defense as an "octopus" clouding the water in order to "slither away" was improper but not fundamental error. It should be noted that the evidence of Crump's guilt was overwhelming).

Hightower v. State of Florida, 592 So.2d 689 (3rd DCA 1991) (prosecutor made the following comment in closing: "... Karen Miller is an excellent attorney. She's appointed to represent Edward Hightower. She's the assistant public defender. She doesn't choose her clients and it's her job and she does a good one to confuse witnesses, to try to put words in witnesses' mouths as she did on her cross-examination." The comment was improper but there was no objection, no request for cautionary instruction or motion for mistrial. The court found that in light of the overwhelming quantum of evidence, the error was harmless.)

Gonzalez v. State of Florida, 588 So.2d 314 (3rd DCA 1991) (improper for prosecutor to attack def. character as a convicted felon and sexual pervert who desired to marry a sixteen year old girl)

Killings v. State of Florida, 583 So.2d 732 (1st DCA 1991) (prosecutor associated the defendant, charged with sale of cocaine, with Colombian drug lords. Held: Improper comment. Not properly preserved and not fundamental error.)

State of Florida v. Ramos, 579 So.2d 360 (4th DCA 1991) (improper for prosecutor to refer to ongoing narcotic investigation and suggest that prosecution of a "kingpin" over a "supplier" is warranted, as that implies that def. was caught up in an ongoing narcotics investigation and was a kingpin supplier of narcotics.")

McPherson v. State of Florida, 576 So.2d 1357 (3rd DCA 1991) (prosecutor referred to defendant as a madman and to his lawyer as manipulative. Held: Reversed).

Holton v. State of Florida, 573 So.2d 284 (Fla. 1990) (improper for prosecutor to comment that drawing by def. was product of "twisted mind." -Harmless error.)

Lopez v. State of Florida, 555 So.2d 1298 (3rd DCA 1990) (although repeated references to def. as a "drug dealer" who was lying on the stand were improper, they did not deprive the def. of a fair trial. In order to warrant a new trial, comments must be of such a nature so as to deprive the def. of a fair and impartial trial; materially contribute to his conviction; be so harmful or fundamentally tainted so as to require a new trial; or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that which they would have reached

otherwise. Conviction affirmed.)

Fuller v. State of Florida, 540 So.2d 182 (5th DCA 1989) (inappropriate to comment that the State should not be punished because its witnesses were not as shrewd, cunning and diabolical as the def.)

Biondo v. State of Florida, 533 So.2d 910 (2nd DCA 1988) (Improper to refer to def. as "slime" but not grounds for reversal)

Redish v. State of Florida, 525 So.2d 928 (1st DCA 1988) (improper to claim that defense counsel had engaged in "cheap tricks". Reversed because of combination of errors)

Craig v. State of Florida, 510 So.2d 857 (Fla. 1987) (Not improper for prosecutor to refer to def's testimony as untruthful and defendant as a "liar". ESTABLISHED RULE: "When counsel refers to a witness or a def as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.")

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) (prosecutor improperly attacked the defendant as being rich and manipulative, her lawyer as a "big city" lawyer who was not local and was less than honest. He further argued that law enforcement agencies would not have prosecuted the case if they did not have the evidence. Held: Reversed).

Gallon v. State of Florida, 455 So.2d 473 (5th DCA 1984) (prosecutor said in closing that if the defense attorney expected jurors to believe his defense, he also expected them to believe in the Easter Bunny. Held: Improper comment. Harmless error).

Williams v. State of Florida, 441 So.2d 1157 (3rd DCA 1983) (Prosecutor's analogy of defense counsel's argument to that of a squid attempting to cloud the water not improper. "A prosecutor's jury argument need not rise to the level of the giants of our profession in order to be proper under the law")

Bullard v. State of Florida, 436 So.2d 962 (3rd DCA 1983) (prosecutor stated in closing argument: "From that stand [those witnesses] identified this creature, this thing, this person who deprived those people of their rights ... " Held: Improper argument. Because there was no objection, this statement was not sufficient to reverse. The case was reversed due to an unrelated "Golden Rule" argument).

Green v. State of Florida, 427 So.2d 1036 (3rd DCA 1983) (prosecutor argued that the defendant was a "dragon lady, beautiful, cunning and evil." Although the defendant had been characterized this way by her own psychiatrist, the court found the comment to be improper. Because improper "Williams" rule evidence had also been introduced, the case was reversed.)

Jackson v. State of Florida, 421 So.2d 15 (3rd DCA 1982) (Prosecutor attacked defense counsel during summation and culminated his argument by asking the jury if they would buy a used car from the defense attorney. Held: Improper comment. Reversed).

Breedlove v. State of Florida, 413 So.2d 1 (Fla. 1982) (prosecutor's comment as to the "savage and brutal and vicious and animalistic attack" was a characterization of the killing and did not refer to def. as an animal. Although other comments may have been improper, new trial was not required.)

Blunt v. State of Florida, 397 So.2d 1047 (4th DCA 1981) (Prosecutor's statement "animals belong in cages" improper reference to defendant, however, no proper objection was made.)

Peterson v. State of Florida, 376 So.2d 1230 (4th DCA 1979) (Improper for State to argue, about undercover officers: "Not only do they have to get into these disguises and crawl down there and deal with people like this [the defendant], but they have to deal with people like his lawyer and be attacked and slandered throughout the whole thing...." Reversed.)

James v. State of Florida, 334 So.2d 83 (3rd DCA 1976) (although improper, prosecutor's comment "You all know that there are four letter words in the English language that are offensive, are dirty words, I submit to you, there is a dirtier word than that. It's a six letter word and it's P-U-S-H-E-R, pusher. A pusher infests other individuals with his disease of heroin," was not so inflammable and prejudicial as to require a mistrial. Affirmed. [Note: concurring opinion points out that term "pusher" suggests a person who repeatedly sells hard drugs and/or who entices non-users to develop new customers.])

Carter v. State of Florida, 332 So.2d 120 (2nd DCA 1976) (in rape trial prosecutor presented Williams Rule evidence concerning def.s advances to another woman. Witness testified that, upon her rejection of his advances, def. asked: "What if I just went ahead and kiss (sic) you and you didn't let me. It wouldn't be your fault, you wouldn't be letting me kiss you." Prosecutor's attempt to convey to jury that def. had threatened to force himself upon witness was unsupported by the evidence. In that light, prosecutor's reference to the def. as a "rapist" may have been interpreted by the jury as referring to his incident with the Williams Rule witness, rather than the evidence in the case at trial. Improper argument. Reversed.)

Darden v. State of Florida, 329 So.2d 287 (Fla. 1976) (prosecutor's reference to def. as an "animal," although generally improper, was not grounds for reversal where it was a response to defense counsel's argument that the person who committed the crime was a "vicious animal" [suggesting that someone other than def. committed the crimes]. Affirmed)

Stewart v. State of Florida, 51 So.2d 494 (Fla. 1951) (prosecutor's abusive and inflammatory argument {"The time to stop a sexual fiend and maniac is in the beginning and not to wait until after some poor little child or some little girl lost her life ... or mutilated."} warranted a reversal of the conviction.)

B. Derogatory terms to refer to a witness

Fabregas v. State of Florida, 829 So.2d 238 (3rd DCA 2002) (*dicta* - It was improper for prosecutor to refer to defense experts as a "wolving pack of wolves what attack cases as a team [sic]." Case reversed on other grounds.)

Brown v. State of Florida, 787 So.2d 229 (2nd DCA 2001) (it was improper for prosecutor to attack the credibility of defense witness, who was a 14 time convicted felon, by arguing: "He looked like he was going to walk out of here and go rob somebody. He probably came here between robberies. He looked like he was a convicted felon. He acted like one" and referring to other witness as a "drinker," implying he was drunk because he had two beers on the night of the offense. Combined with many other errors, reversed.)

Perry v. State of Florida, 787 So.2d 67 (2nd DCA 2001) (it is improper for prosecutor to refer to defense witnesses as a "pack of liars.")

Miller v. State of Florida, 782 So.2d 426 (2nd DCA 2001) (it was improper for prosecutor to refer to 3 defense witnesses by analogizing them to three dim-witted television characters and to accuse another defense witness of being a "glory hound" because "he sure was dressed up nice." No objection was made and not fundamental error. Reversed on totality of these and other more serious errors

Ross v. State of Florida, 726 So.2d 317 (2nd DCA 1998) (improper for prosecutor to refer to defense witnesses as "pathetic," "ridiculous," "inappropriate," "insulting to the jury's intelligence," "totally incredible" and to say that they "just flat out" lied. Error not harmless. Reversed. [court took unusual step of considering on appeal the ineffectiveness of counsel for failure to object])

Walker v. State of Florida, 707 So.2d 300 (Fla. 1997) (Although it was improper for prosecutor to make derogatory remark about defense counsel and refer to defense expert as "hired gun," prosecutorial misconduct in penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. Harmless error.)

Shellito v. State of Florida, 701 So.2d 837 (Fla. 1997) (it was not improper for prosecutor to argue that def.'s mother, who testified that another person confessed to her about having committed the crime and that she had given that information to a court employee, was either an extremely distraught and concerned mother or a blatant liar. It is not improper to call a witness a liar if it is in the context of what conclusion can be drawn from the evidence. Mother's testimony was contradicted and comment was made in the context of allowing the jury to determine her credibility. Affirmed)

First v. State of Florida, 696 So.2d 1357 (2nd DCA 1997) (*opening statement* - where state never impeached witness with any prior convictions or contradictory statement and witness' testimony was only contradicted by circumstantial evidence, prosecutor's comment in opening statement that "she is a liar" (with regard to witness' alibi testimony) was an improper expression of personal opinion. Error not harmless given weakness of case. Reversed.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence and referred to officer as "salesman". Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Perez v. State of Florida, 689 So.2d 306 (3rd DCA 1997) (it is "highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues, into any part of our judicial system." Prosecutor "not only labeled the witness a racist, but projected that characteristic onto the defendants.... [I]t is always wrong to call witnesses or defendants names by citing them as examples of a criminal 'type.'")

Brown v. State of Florida, 678 So.2d 910 (4th DCA 1996) (it is proper to refer to a witness as a "liar" so long as it is clear that he is referring to specific testimony given by the witnesses so characterized.)

Duque v. State of Florida, 498 So.2d 1334 (2nd DCA 1986) (reference to def witness as a "scumbag" improper argument.)

O'Callaghan v. State of Florida, 429 So.2d 691 (Fla. 1983) (improper for prosecutor to refer to def. expert as a "prostitute." No objection or motion. Error waived. Further, even if preserved, harmless)

Dukes v. State of Florida, 356 So.2d 873 (4th DCA 1978) ("You heard his witnesses, his prostitute, heroin pusher, convicted so many times she cannot count...." Reversed.)

Bullard v. State of Florida, 324 So.2d 652 (1st DCA 1975) ("If you turn this defendant loose, if you find him not guilty, ... when all of his friends and hoods come in here and make a mockery of our whole system of justice. How can anyone ever be convicted if he brings in all these convicted friends and thieves in here to testify and lie for him every time he's ever charged?" Improper but not reversible where curative given.)

X. Fair reply/Invited comment

Ramey v. State of Florida, 177 So.3d 308 (3rd DCA 2015) (prosecutor's comment that "[the victim] got on the stand, he was honest with you. He told you the terms of his probation. He does not have a motive to lie" was no more than a direct counter to the defense's argument that the victim was dishonest. Taken in context, no improper bolstering occurred. Affirmed.)

Jackson v. State of Florida, 147 So.3d 469 (Fla. 2014) (State rebuttal argument, implicitly rebuking the defense's closing argument, stating that challenges to the State's witnesses were "easy pickings" and agreeing with defense counsel that its own witnesses had significant credibility issues based on the fact that most of the witnesses were involved in illegal activities, was a fair reply made in rebuttal to def's closing arguments and were a fair response to defense counsel's attack on the credibility of the State's witnesses. Affirmed.)

Diaz v. State of Florida, 139 So.3d 431 (3rd DCA 2014) (where def. counsel argued that only evidence of assault state had presented was 911 tape and that state had failed to call witness who called 911, it was error for prosecutor to reply that witness would simply have told jury "exactly the same thing that's on the 911 call." Where defense counsel comments upon the state's failure to call a witness who is demonstrably competent and available, it opens the door to a fair reply by the prosecuting attorney that the defense has the same ability to put on the witness and such a response does not prejudice the defendant's right to a fair trial. The prosecution may not, however, ask the jury to accept the his or her assurance that there exists extra-record evidence to corroborate that which the jury heard during the trial.

Young v. State of Florida, 137 So.3d 532 (4th DCA 2014) (where def. attorney argued in closing that photo lineup was unduly suggestive, it was error for prosecutor to respond: "if it was unduly suggestive, you wouldn't have heard that because that would have been a matter of law for the Judge to decide. And remember we talked about that in jury selection, everyone has a role? Judge's role is a matter of law. So if there were anything to suppress because it was unduly suggestive, it would have been suppressed, but it wasn't." By arguing to the jury that if the lineup was inherently suggestive it would have been suppressed, the prosecutor suggested that the reliability of the lineup had already been decided by the trial court. Such a response was not "invited" by def counsel challenging the credibility of the photo lineup. Although curative instruction could have been given advising jury that it was empowered to form its own opinion about the credibility of the victim's testimony and the pretrial identification of the defendant, judge's curative instruction ["All right, once -- once again, ladies and gentlemen, you've heard it several times even from the attorneys and you'll hear it from me again at this moment, decisions of law, rulings on the law are the province of the Court. I will instruct you on the law. Nothing you hear from either one of these attorneys, *even if it happens to be correct*, is -- is your instruction on the law…"] did not cure the error and photo identification was a hotly contested issue. Reversed.)

Datilus v. State of Florida, 128 So.3d 122 (5th DCA 2013) (in case where DNA report

originally excluded def. and was subsequently corrected to include def. as possible perpetrator, and defense counsel argued "[T]here are three types of lies; lies, damn lies and statistics. . . . I submit what the State's trying to do is pull a fast one on you," State's response: "Members of the jury, let's talk about the truth. Isn't that what we're here for? Not to obscure,"… and, after def. motion for mistrial was denied, "[Defense counsel] stated that the State's trying to pull a fast one, that we're trying to obscure the answer. Members of the jury, let's break it down and look for the answer, what the evidence actually shows…" was a proper argument. Affirmed.)

Jennings v. State of Florida, 124 So.3d 257 (3d DCA 2013) (in case of constructive possession of a kilo of cocaine, def counsel properly argued that there were no DNA results and that, had there been, they might raise a reasonable doubt as to def's guilt. Def counsel improperly went further and insinuated that the State was lying in order to conceal DNA evidence that could exonerate def. and called police officer's testimony, that DNA tests had not been completed by the day of trial, "stupid," "poppycock" and "a lie." State appropriately responded by pointing out that no one knew the results of the DNA tests because the tests were not completed yet; by emphasizing the length of time it takes to obtain DNA test results; and by downplaying the probative value of the potential DNA evidence in the facts of the case. However, prosecutor exceeded "fair reply" by telling the jury the defendant had demanded a speedy trial to prevent incriminating evidence from coming forward in the DNA test. Nonetheless, court sustained the objection and curative instruction cured any prejudice (motion for mistrial properly denied).

Robards v. State of Florida, 112 So.3d 1256 (Fla. 2013) (in murder/arson trial where def's fingerprint was found on newspaper at victim's residence/crime scene used to spread the fire, prosecutor argued that there was no evidence that the newspaper had been planted as suggested by the defense and that the evidence was uncontradicted. Comment was not error as "it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response." In any event, judge reminded jury that burden was on State. Mistrial not warranted. [citation omitted] Conviction and sentence affirmed.)

Stepp v. State of Florida, 109 So.3d 839 (3rd DCA 2013) (in case where witness testified that trial court did not abuse its discretion in precluding defense from arguing that police detective failed to subpoena witness's phone records where (1) argument would have been based on facts not in evidence since def counsel did not ask officer if he had subpoenaed witness's phone records and (2) error, if any, was invited when def. objected to state questioning witness about phone calls from multiple numbers which could have led to disclosure that phone records were not subpoenaed or, if they were, to why law enforcement could not verify that witness received calls from def. Affirmed.)

Scott v. State of Florida, 66 So.3d 923 (Fla. 2011) (in death penalty case where co-def wore a wire and at trial identified, along with officer, the voice of def. admitting to crime, prosecutor's closing argument which stated that def's alibi witnesses were never asked about whether the recorded voice was def's, did not impermissibly suggest to the jury that the burden was on def to

disprove that it was his voice captured on the jailhouse recording. Comment was an invited response to def's claim that co-def set up a scripted conversation with another inmate in order to win favor with the authorities. Prosecutor's comment went no further than to point out the lack of evidence to support def.'s alternative theory and that the State's evidence on this matter was uncontradicted. Conviction affirmed. Death penalty reversed on proportionality).

Mackey v. State of Florida, 55 So.3d 606 (4th DCA 2011) (where during closing argument, def contended that the reason why his cousin refused to talk to the police was because his cousin shot the victim, it was not improper for the state to argue on rebuttal that the reason why the defendant's cousin refused to talk to the police was because the cousin did not want to "tattle" on the defendant. State's unsupported comment as to the alleged reason why the defendant's cousin refused to talk to the police was a fair reply to the defendant's prior unsupported comment that his cousin refused to talk to the police because his cousin committed the murder. Affirmed in part, reversed in part for evidentiary hearing on other grounds.)

Carbonell v. State of Florida, 47 So.3d 944 (3rd DCA 2010) (although it was improper for prosecutor to argue "I wish I could give you, you know, a full confession. I wish I could give you a videotape of the robbery. I wish I could make it easy for you," as such comment can be interpreted as a comment on the def's right to remain silent, error was not fundamental because it was def's counsel who first argued to the jury "[t]here's not a single thing about [def] making a statement in this case. [thereby raising the issue of his silence first]. Note: Def HAD confessed but trial court suppressed def's confession because it was obtained after def was appointed counsel. Reversed on other grounds and prosecutor cautioned against making such argument on retrial.)

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (in *guilt phase closing*, it was not improper vouching for prosecutor to argue: (1) "So why would this guy lie, to get that deal? To get life? That's why he's lying?"; (2) "There's no way [co-def] is that bright;" and (3) "The only reason [co-def] was involved was because he wanted money and his best friend [def] gave him the opportunity and he [co-def] told the police the truth." Improper vouching or bolstering occurs when the State "places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." The first comment was rebuttal to def's argument that co-def was willing to lie for a lighter sentence. The other two comments were made as part of the prosecutions explanation of how all the evidence presented at trial by law enforcement officers, the medical examiner, and other witnesses corroborated co-def's testimony. All statements were therefore part of a "fair replay" to the defense argument that co-def was not credible. Affirmed.)

Joseph v. State of Florida, 41 So.3d 307 (4th DCA 2010) (where trial court, upon def's counsel's objection, redacted portions of audio statement of def prior to trial, and then def attorney argued in closing "but if you heard more of that DVD, if you heard the whole thing, wouldn't you see?", it was not reversible error for prosecutor to argue in response "It is an entire DVD. I moved the entire thing into evidence. Def counsel says, what's the State hiding? Why

don't they show the whole thing? I said right there, I stipulate." Although comment may have been burden shifting [?], these comments were fair reply to defense counsel's questions about what the state was hiding. Affirmed.)

Perea v. State of Florida, 35 So.3d 58 (5th DCA 2010) (in trial for sexual abuse of a child, where def counsel attacked the child's credibility, it was not improper for prosecutor to argue "Well, if she was coming up with stories, first of all, why was she coming up with stories? There has been no evidence presented about any reasons why [the victim] made this up, none. There is no indication about family problems." Comment did not improperly shift any burden to the defense or imply that the def had to prove anything in order to establish his innocence. Prosecutor made a permissible argument that the evidence at trial (as submitted by the State) did not suggest that the victim had any reason to lie. Such comment was a reasonable response to defense counsel's comments indicating that the victim had lied. Affirmed in part, reversed in part as to sentencing and class of felony.)

Green v. State of Florida, 27 So.3d 731 (2nd DCA 2010) (where testimony was that police told each co-def that the other had confessed, and in that fashion obtained a confession from all but the def, it was still improper for State to argue "When [def] was given an opportunity to talk to the police, he refused." Defense counsel did not "open the door" to such a response by raising the fact that the police had "set up" the suspects by lying to them about each other's confession. Although that may have initially raised the fact that all but def confessed, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to "qualify, explain or limit" testimony or evidence previously admitted. Prosecution's argument did not qualify, explain or limit prior evidence, but rather was a blatant appeal to the jury to convict def because he was the only one who did not confess. [Note: not an argument of facts not in evidence because the prosecution, over objection, was allowed to ask the officer whether def had given any post-arrest statements to law enforcement and the officer replied "refused."] Reversed.)

Lot v. State of Florida, 13 So.3d 1121 (3rd DCA 2009) (prosecutor's comment that "People who are addicted to drugs steal from their families. People who are … alcoholics do some pretty evil things, too. … Gambling is just as bad. This def had a gambling problem and was in such hot water with his bookies that he had to go and steal money from somebody. … Well, the deepest well that he knows that he's got some power over belongs to his stepson." was not improperly referring to def as a drug addict or alcoholic. Taken in context, it is clear that the State was arguing that, like any other addiction such as drug or alcohol addiction, def's gambling addiction (of which there was substantial testimony) can lead people to steal, even from their own families. Further, comment was a fair reply and made in direct response to defense counsel's argument that the crime was so easily traceable that it indicated no criminal motive or intent. Affirmed.)

Poole v. State of Florida, 997 So.2d 382 (Fla. 2008) (Prosecutor argued: "Well, there is no evidence in this case that at any time, either in this trial or anywhere else, [def] ever acknowledged that he did anything" and "Mr. Dimmig is arguing all these things but there is

absolutely no evidence that [def] ever said, hey, somebody else was there before me and these people's heads were bashed in. There is no evidence of that." Arguments were improper comment on def's right to remain silent. Comments were not objected to and do not constitute fundamental error because both comments were invited responses to the defenses closing arguments wherein def counsel argued that def acknowledged committing a sexual battery, robbery and burglary but denied he killed one victim and severely injured the other. Because the prosecutor's comments were invited responses attempting to show there was no evidence to either support the claim that def acknowledged he committed those crimes or to support the argument that someone else inflicted the injuries, the comments cannot be deemed improper. Conviction affirmed. New penalty phase ordered on other grounds.)

Williamson v. State of Florida, 994 So.2d 1000 (Fla. 2008) (Prosecutor argued: "[Def. counsel] says to you, just on the faith of [witness's] testimony alone. Which I suggest to you is credible. You had an opportunity to review his demeanor and the way he answered your questions." Comment did not constitute improper vouching. "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness testimony" [facts not in evidence]. While the prosecutor suggested the witness's testimony was credible, this was a fair reply to the defense's closing argument that the witness was not believable. Immediately after this statement, the prosecutor asked the jury to think about the witness's demeanor and how he answered the questions, encouraging the jurors to rely on their own impressions as to the witness's credibility. Reversed in part, on other grounds.)

Munroe v. State of Florida, 983 So.2d 637 (4th DCA 2008) (It was improper for State to comment on def's failure to make exculpatory statement to police about cocaine found in her bag as that amounts to comment on def's post-arrest silence, even though comment referred to time period before def was arrested. Florida constitution prevents comment on def's post-arrest silence, regardless of whether Miranda warnings have yet been given. [By contrast, US constitution allows comment on def's silence, even post-arrest, up to the time when Miranda warnings are given.] Under Florida caselaw, "post arrest silence" is interpreted broadly to encompass the period "at the time of arrest," which includes the period before the person is placed under arrest. Therefore, when def. claimed at trial that cocaine in her bag was not hers and must have been planted by her travel acquaintance, it was improper for prosecutor to comment that she didn't act surprised or otherwise respond when, prior to her arrest, police searched her bag with her consent and found two kilos of cocaine. Further, while def's own testimony that she was silent when police found the cocaine because she was too shocked to speak opened the door and invited a *limited* degree of inquiry, the prosecutor's comments exceeded the scope of invited response when he suggested that instead of being too shocked to speak, she should have been shocked enough to affirmatively proclaim her innocence. Receded from on question of standard of review.)

McKenney v. State of Florida, 967 So.2d 951 (3rd DCA 2007) (where throughout trial def. counsel focused on the fact that a large number of people were at the site of the shooting and yet

only one eyewitness was brought forward by the state, and during closing repeatedly attacked the case on that same basis, it was fair reply or invited response for the state to say that "anyone with an ounce of sense, can figure out that when a person is capable of gunning down an unarmed man in front of a bunch of people … with an assault rifle, who the heck is going to get involved in that kind of mess? That is exactly what happened in this case." The defense essentially is asking that the state be prohibited from answering the question defense counsel posed—why haven't other eyewitnesses come forward? The prosecutor did not argue that witnesses in that part of town do not cooperate with police or are too scared to talk (which would have violated a pretrial ruling). Instead, the prosecutor responded fairly to the def's question by the common sense argument that the horrific crime scene with over 30 rounds of assault rifle fire would not encourage a bystander to get involved. She did not suggest that any eyewitness was intimidated by def, that any eyewitnesses had made reports to police but were not at trial because of fear, or that witnesses in that area behaved differently than any other area. Comment was invited by defense counsel and response was proper. Even if error, harmless. Affirmed.)

Delgado v. State of Florida, 948 So.2d 681 (Fla. 2006) (in murder prosecution, where defense counsel argued that murders were clearly pre-meditated and that the state had only shown the jury pictures of victim's body to evoke an emotional response, and state responded that it was all well and good for defense counsel to stand up at the end of a two and a half week trial and say that the murders were horrible and pre-meditated but that two and a half weeks earlier the prosecutors did not hear that concession, a mistrial was not warranted. Upon court's sustaining of objection to shifting the burden of proof (no ruling on objection that comment was reference to def.'s right to remain silent or generic "improper argument"), prosecutor went on to clearly remind the jury that only the state carries the burden of proving the charges in the case. Accordingly, in this context, "even if the comment was improper it was certainly not 'so prejudicial as to vitiate the entire trial." And def. failed to demonstrate that "a mistrial was an absolute necessity." [emphasis added by author as comment appears to fall under "fair reply"] Affirmed.)

Russ v. State of Florida, 934 So.2d 527 (3rd DCA 2006) (where, in case involving sexual battery on a child, def. counsel argued to jury that the child's torn and healed hymen was an old injury because it did not make sense that it would heal within 7 days, it was not a shifting of the burden of proof for State to argue on rebuttal that def. counsel had failed to ask the examining physician what a tear would look like after 7 days. Comment was fair reply. Affirmed in part, reversed in part on other grounds.)

Walls v. State of Florida, 926 So.2d 1156 (Fla. 2006) (It was not error for prosecutor to argue that def. only expressed concern for himself and how his life had been ruined, and never stated he was sorry for the victims. "Lack of remorse" comment in death penalty prosecution was invited by defense counsel who had argued that def.'s sobbing and tearful statements on the taped confession showed that he did not premeditate the murders and was sorry for what had happened.)

Johnson v. State of Florida, 917 So.2d 226 (3rd DCA 2005) ("It is well established that counsel is afforded wide latitude in making arguments to the jury, especially in response to opposing counsel's improper arguments." [citations omitted])

Rodriguez v. State of Florida, 906 So.2d 1082 (3rd DCA 2004) (where def. counsel attacked the officer's credibility in closing, it was not improper bolstering for the State to argue that the officer had no motive to lie. Defense can not invite what it claims is error and seek to benefit from it. Further, where the court sustained the objection to the argument and gave a curative instruction, def. was not deprived of a fair trial. Reversed in part on other grounds.)

Lewis v. State of Florida, 879 So.2d 101 (5th DCA 2004) (Although it is generally improper for a prosecutor to comment on the defendant exercising his right to a jury trial, it was not improper for prosecutor to state to jury that "The state would prefer that we were not here at all" and that it was the defendant "that chose to bring us here today and force you to listen to this testimony …." Comment was an invited response to defense argument that the reason "why we are here. … The state wants to execute, wants to kill [def]. Or they want him carried out of prison in a box after having served life without any possibility of parole." The state's response specifically identified the defenses assertions and then explained that the reason they were there was not because the state wanted to kill the defendant or see him carried out of prison in a box, as the defense argued, but rather because the def, not the state, "chose to bring us here and force you to listen to this testimony." Trial court properly found that comment was an invited response. [**Note**: trial court also felt, based on observations of demeanor and tone of the lawyers, that comment was not to be interpreted as directed at his right to trial by jury. Although it was not a focus of the appellate opinion, it may be that trial court felt that most likely interpretation was that def, through his actions of committing the crime, was the one who brought them there. Either way, appellate court focused on invited response, rather than interpretation of words.] Affirmed.)

Holley v. State of Florida, 877 So.2d 893 (1st DCA 2004) (alleged error of trial court in permitting and participating in the constant interruption of defense counsel during opening statement and closing argument, possibly suggesting to the jury that the judge did not care for the defense's arguments, were "invited" by defense counsel's repeated failure to heed the trial court's reasonable instructions to avoid digressions and simply set out what the evidence would show (or had shown). Trial court properly reminded counsel of its admonitions not to exceed the bounds of appropriate, relevant commentary. [NOTE: Defense counsel's repetitious remarks in opening statement prompted on juror to spontaneously (and inappropriately) comment out loud that the same point had been made three times.] Affirmed in part, reversed in part on other grounds.)

Perera v. State of Florida, 873 So.2d 389 (3rd DCA 2004) (where victims' brother testified that when he confronted def. with allegations that he had sexually abused the victims, def. apologized and stated that he had been sexually abused by his uncle in Cuba, def. counsel was not ineffective for failing to object to prosecutor's closing argument, during which prosecutor stated that def.'s

claim of having been sexually abused by his uncle was his excuse for sexually abusing the victims. Argument was fair comment on the evidence presented at trial and was certainly not fundamental error. Affirmed.)

Johnson v. State of Florida, 858 So.2d 1274 (3rd DCA 2003) (it was not improper for prosecutor to argue that officers had no reason to lie about the circumstances surrounding the making of the def.'s statements because the statements contained so many exculpatory statements, denials and sympathetic excuses for the def.'s behavior that they logically could not have been planted in the def.'s mouth by the officers. Comment was a fair reply to def. assertion that officers had coerced the def. to say what they wanted him to say by "working him over psychologically." Prosecutor's assertion that retired officer had nothing to prove and that if detectives had wanted to lie the stories would have been better for the State did not amount to an argument that the jury had to take the officer's testimony as true because policemen don't lie. Instead, the comment simply pointed out that the defense's suggestion that the officers were lying was unlikely. Affirmed.)

Stancle v. State of Florida, 854 So.2d 228 (4th DCA 2003) (it was not improper for state to argue: "Use your common sense. What was that gun doing there if it wasn't dropped by [the def.]. Just laying out there for [the] next guy to come around, pick it up? What was it doing there? Is there any evidence to tell you anything other than it was there because [the def.] dropped it?" Comment was not an improper shifting of the burden of proof but a fair response to the defense argument that called the officer's testimony unreasonable, laughable and absurd, and suggested that the officer had lied and planted the gun. Affirmed.)

Caballero v. State of Florida, 851 So.2d 655 (Fla. 2003)(prosecutor did not err in arguing: "You can tell ... what a man intends by what he does not by what he desires. What does he do? According to the [def.'s] statement, uncontradicted, what does he do?" Comment was not an improper comment on def.'s right to remain silent or a shifting of the burden of proof. It is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response. Here, the State emphasized the evidence of def.'s actions for the purpose of countering the defense argument that the def. did not want to kill the victim. In this context, the State's argument directed the jury's attention to the evidence of the def.'s actions in contrast to his professed desire, rather than to his failure to testify. Moreover, even if it were improper, comment was harmless given overwhelming evidence of guilt. Affirmed.)

Ramirez v. State of Florida, 847 So.2d 1147 (3rd DCA 2003)(where court initially allowed def. to show his tattoos to the jury without a proper predicate in the form of evidence that the def. had the tattoos on the date of the charged crime, but subsequently reconsidered and concluded that the State's objection had been well taken, it was not error for the court to allow the prosecution to argue to the jury the absence of any evidence that the def. had the tattoos on the day of the crime. Comment was not fairly susceptible of being a comment on the def.'s failure to testify or to call witnesses. Comment was phrased permissibly in terms of an absence of testimony from

the witness stand. Moreover, comment was a permissible remedy under the circumstances and "a party may not make or invite error at trial and then take advantage of the error on appeal." [citation omitted] Affirmed.)

Kearney v. State of Florida, 846 So.2d 618 (4th DCA 2003)(It was improper for prosecutor to argue: "The Defense says, where's the tape? ... The Defense fully knows well that there's something called the Fifth Amendment, self-incrimination, and the Fourth Amendment, the right against illegal searches and seizures. ... and that the government can't just bust down somebody's door and say, we're taking everything out of your house. The government can't just grab somebody by the hand and say, get over here, sit down, you're going to tell us what we want to know. ... We don't have the tape because it's not in our possession. Who's possession is it in? Right there." Comment was fairly susceptible of being interpreted as referring to def.'s right to remain silent. Comment also highlighted def.'s Fourth and Fifth Amendment rights as impediments to the prosecution's ability to produce the tape, and pointed to def. for invoking the constitutional protections afforded to her. Even if it had been acceptable for the State to explain the Fourth and Fifth Amendments as a fair reply to defense argument questioning the whereabouts of the tape, the State's response went too far when it beleaguered the constitutional restraints and protections and then pointed a finger at the def. for invoking them. Reversed.)

Wilchcombe v. State of Florida, 842 So.2d 198 (3rd DCA 2003)(On the whole, prosecutor's references to "uncontroverted evidence" and alleged attacks on defense counsel were fair comments on the evidence and direct responses to defense arguments. No objections. Not fundamental. Affirmed.)

Bell v. State of Florida, 841 So.2d 329 (Fla. 2002) (where def. counsel told jury in death penalty case that it should give def. the same sentence the co-def.'s received, prosecutor's argument that accused def. counsel of telling the jury not to follow the law was not improper but was an appropriate response.)

Rivera v. State of Florida, 840 So.2d 284 (5th DCA 2003) (Prosecutor's comment: "[i]n order for you to find him not guilty, which you have the prerogative to do, but you're going to have to essentially be saying that [the victim's] identification sucks," while inappropriate language, was not improper and, in any event, was invited by the defense's argument that the entire case turned on the identification of the victim and that the identification was unworthy of belief. "A defendant is not at liberty to complain about a prosecutor's comments in closing argument when the comment is an invited response." [citations omitted] Moreover, "a comment standing alone may be viewed as inappropriate, but when considered within the context of the entire closing argument and the record, it may be a fair comment." Affirmed.)

Burst v. State of Florida, 836 So.2d 1107 (3rd DCA 2003) (where defense counsel improperly asked his client if he had "ever been convicted of a crime," def. counsel opened the door and the prosecutor was entitled to cross-examine the def. on the fact that the crimes identified by def. where only the felonies, that he had committed other crimes as well and the details of the felonies

he committed. Thereafter, prosecutor's comment in closing that def.'s conviction for grand theft auto was not that he "just stole something from Burdines ... [that he] just stuffed a bunch of stuff in a bag, no. He went up to somebody's car and he broke in and he stole it" were aimed at attacking def.'s credibility and were not meant to show a propensity to commit crimes. Although the prosecutor may have gone too far in arguing that def. broke into a car, that isolated reference did not vitiate the entire trial so as to require a mistrial.)

Pagan v. State of Florida, 830 So.2d 792 (Fla. 2002) (prosecutor did not improperly bolster credibility of witness by referring to the terror and horror she experienced and using that fact to excuse her inability to estimate the height of her attackers. Prosecutor's comments were in direct response to argument made by the defense which suggested that witnesses' descriptions of the murderers more closely matched other suspects in the case. Witness had testified that she was scared during the crime and did not get a really good look at the perpetrators. Comments by state were a fair statement of the evidence in the case and fair rebuttal to def. counsel's argument. Affirmed.)

Pollard v. State of Florida, 807 So.2d 735 (3rd DCA 2002) (Comment that def's girlfriend had disposed of the murder weapon was a fair comment on the evidence, being based on def.'s own confession. Comment that the State intended to prosecute def.'s girlfriend if successful in locating her was irrelevant, but not unfairly prejudicial to the def. and certainly not fundamental error. Affirmed.)

Overton v. State of Florida, 801 So.2d 877 (Fla. 2001) (where def. submitted only one sample to expert for testing, attempted to prohibit expert from performing confirmatory testing and then argued to jury how the expert could not conclude one way or the other the significance of the test on def.'s sample because more testing was needed, it was proper for State to point out that it was the def. who asked for only one test and that the State sought confirmatory testing. Affirmed)

Johnson v. State of Florida, 801 So.2d 141 (4th DCA 2001) (it was not improper for state to argue: "The best evidence is the testimony of the police officer who has absolutely no reason anyone has shown you to lie to you. ... Those officers have no reason to lie." The prosecutor neither stated his personal opinion nor suggested that the officer's opinion was more believable than that of another simply because he was a police officer. There is a difference between asking the jury to evaluate a witness' motive for deceit and asking the jury to believe a police officer's testimony simply because he is a police officer. "The prohibition against vouching does not forbid prosecutors from arguing credibility, which may be central to the case; rather, it forbids arguing credibility based on the reputation of the government officer or on evidence not before the jury."[quoting United States v. Hernandez, 921 F.2d 1569 (11th Cir. 1991)] Moreover, the state's comment was invited by the defense's closing argument attacking the credibility of the officer. Affirmed).

Wolcott v. State of Florida, 774 So.2d 954 (5th DCA 2001)(although prosecutor's comments that although the defense has no obligation to present evidence "they have a right to if they

choose to" and "[t]here has been no witnesses who came in and said that's not his fingerprint" could have been construed to suggest that the defendant had a burden to bring forward evidence, comment falls within the confines of "invited response" where defense counsel tried to discredit the fingerprint evidence by suggesting the police mishandled it. However, statement that there was no evidence that "the property that the defendant sold [to the pawnshop] came from anywhere else but the home of [the victim]" did not fit within any narrow exception and impermissibly refers to defendant's failure to testify, since he is the only one who would be able to show that they came from somewhere else. Reversed on these and other grounds.)

Brown v. State of Florida, 771 So.2d 603 (4th DCA 2000)(where the State's evidence supported theory of homicide and only person who could have contradicted that theory was the defendant because he was the only witness to victim's death, prosecutor's argument that suicide argument advanced by defense counsel was "a nice argument, but [there was] no evidence to support that in any way, shape or form that you heard in this case. Nobody, nobody testified that [victim's] death was a suicide" impermissibly highlighted defendant's failure to testify. A comment on the failure to contradict the evidence becomes an impermissible comment on the defendant's failure to testify [i.e. is "fairly susceptible" to being interpreted that way] where the evidence is uncontradicted on a point that only the defendant can contradict. However, narrow exception allows such comment where prosecutor's statement is invited by the defense. Where def. counsel commented in opening that evidence would show death was a suicide and in opening and closing that M.E. could not definitively determine whether death was homicide or suicide, prosecutor was justified in commenting on lack of evidence of suicide. Affirmed)

Mitchell v. State of Florida, 771 So.2d 596 (3rd DCA 2000) (where defense counsel had argued misidentification, that the officers where lying to cover up that mistake, and had stated in opening and closing that inconsistencies in the officers' testimony establish the truth of the defendant's position, it was proper for State to argue "where is the evidence in this case of crooked cops?... The evidence in this case is uncontroverted. There is no material conflict in the evidence." State's argument was fair comment on the testimony of the officers and a fair response to the defense position. Affirmed)

Whiten v. State of Florida, 765 So.2d 309 (5th DCA 2000) (prosecutor's argument that the "police are not interested in arresting the wrong person" did not improperly bolster the credibility of the officers. If anything, the statement was a rebuttal to the defense's suggestion that it was not believable that the police officer would have shown the witnesses the photo lineup and not hinted to them which photo they were supposed to pick out. Affirmed. . *[**Note**, S. Ct. opinion shows this case as vacated and remanded with no other explanation. 817/852]*)

Jones v. State of Florida, 760 So.2d 1057 (4th DCA 2000) (although it was grossly improper for prosecutor to argue that defense counsel was claiming that his client was in fear for his safety because "attorneys testify the way they're paid to testify," error was predicated in part on defense counsel's equally improper argument as to what he would have done under the circumstances and that he would have also been afraid of the victim. Moreover, defense counsel failed to properly

object. Affirmed.)

Bell v. State of Florida, 758 So.2d 1266 (5th DCA 2000) ("A defendant is not at liberty to complain about a prosecutor's comments in closing argument when the comment is an invited response.")

Ricardo v. State of Florida, 756 So.2d 215 (4th DCA 2000) ("While the state is usually prohibited from commenting on the def.'s silence, if the defense raises the issue the state may respond.... However, The state's response may be objectionable if it's 'extent and content' goes beyond the scope of a fair comment." [Record inadequate to make determination and no facts provided])

Foxworth v. State of Florida, 754 So.2d 798 (2nd DCA 2000) (it was not improper for prosecutor to comment that, during street drug bust, officer safety was a matter of concern. Comment was a fair reply to defense counsel's attempts to portray the police work as shoddy and incomplete because the officers failed to videotape or photograph the scene. [No mention of whether any specific facts of particular danger were in evidence or whether comment was based on danger of street bust in general])

Rodriguez v. State of Florida, 753 So.2d 29 (Fla. 2000) (prosecutor's comment that: "somebody obviously was in that apartment with [co-def.]. And we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been," coupled with a reminder that def. counsel had asked during voir dire whether potential jurors would be willing to listen to two sides of the story and observation that "there was nothing in direct or cross examination ... that pointed to any other person being involved other than [co-def. and def.] There were no two sides" were susceptible to interpretation as comments on def.'s failure to testify or that impermissibly suggest a burden on the def. to prove his innocence. Comment in voir dire did not invite the state's response. Narrow exception exists when def. asserts defense of alibi, self-defense or defense of others, relying on facts that could be elicited only from a witness who is not equally available to the State. Harmless.)

Kent v. State of Florida, 702 So.2d 265 (5th DCA 1997) (following def. argument which criticized the victim's testimony, suggesting that she was suffering from some reaction to medication or dementia that caused her to wrongly identify the def., it was proper for prosecutor to characterize defense as an attempt to convince the jury that victim was "demented." Argument was "fair comment" in response to defense counsel's argument. Prosecutor's assertion that victim's testimony established that def. used or threatened to use a weapon was "fair comment" on evidence where victim stated that def. "had an object, a razor or knife of some sort, that it was sharp, and he said he would use it." Affirmed.)

Chandler v. State of Florida, 702 So.2d 186 (Fla. 1997) (it was not improper for prosecutor to argue that def. had never told his daughters or son-in-law that he was innocent as that was a fair characterization of the evidence. Affirmed)

Bauta v. State of Florida, 698 So.2d 860 (3rd DCA 1997) (Prosecutor's comment: "Don't you think that as a prosecutor in Dade County I have better things to do than to persecute this defendant?" is generally improper because it can be viewed as an assertion by the prosecutor of her personal view of the guilt of the defendant. However, where defense was that the child victim had made up the story against def. to gain attention or because she was coached by the State, comment by prosecutor was in the context of a fair reply. No objection was made and the comment, even if objectionable, was not fundamental error.)

Johnson v. State of Florida, 696 So.2d 326 (Fla. 1997) (where defendant attempted to discredit witness by demonstrating that he had no concern for the victim because he stood by and failed to help the victim during def.'s attack, it was not improper for prosecutor to respond: "Frankly I think [witness] is very fortunate that he did not because he may not have been here this week to testify." Although comment may imply that def. had the intention of committing another murder, State was providing a brief response once the def. "opened the door." Brief comment was minimal and appropriate. *Holding modified on other grounds: 770/1174*)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Ramsaran v. State of Florida, 664 So.2d 1106 (4th DCA 1995) (where def. stated that he believed he had been charged in the case because he was known in the community as "a tough guy" and displayed to the jury an arm tattoo containing the words "original rude boy," it was not improper for state to comment on his reputation as well as the tattoo's wording and to offer a possible explanation concerning why certain witnesses had refused to speak to the police. The state's remarks concerned inferences that could be drawn from the evidence. Reversed on other grounds.)

Barwick v. State of Florida, 660 So.2d 685 (Fla. 1995) (where def. counsel argued other officer's failure to testify in order to imply some wrongdoing in the obtaining of def.'s confession, it was fair reply for State to argue: "what in this courtroom, what evidence, what fact, what testimony, what anything have you heard as a result of him going down to that police station would create a reasonable doubt in your mind .... Nothing." --Not a comment on def.'s failure to testify, but merely directed the jury to consider the evidence presented. *Subsequently receded from on other grounds - Topps v. State, 865 So.2d 1253.*)

Hazelwood v. State of Florida, 658 So.2d 1241 (4th DCA 1995) (Although prosecutor may not

normally comment on the def.'s failure to produce evidence to refute an element of the crime because doing so could shift the BOP, prosecutor's comment during closing argument that "defense counsel has the same subpoena power as the state of Florida," was an appropriate response to defendant's closing argument explicitly commenting on state's failure to call witnesses. However, prosecutor exceeded the scope of a "fair reply" when he then commented that if the witnesses had been called they would have simply corroborated what other witnesses had already said. A prosecutor cannot suggest during closing that there are other, uncalled witnesses who would corroborate the state's case, as this refers to matters outside of the evidence. Reversed)

State of Florida v. Fritz, 652 So.2d 1243 (5th DCA 1995) (in response to def.'s argument that a charge is not valid simply because the prosecution files it or a police officer says that it is, the prosecutor argued: "when the state puts a witness on the stand, in fact they are vouching for their credibility as a witness." Improper bolstering but not so outrageous as to taint jury's findings.)

State of Florida v. Compo, 651 So.2d 127 (2nd DCA 1995) (state's comments on defense of entrapment were proper, despite fact that defense had been abandoned by the end of the trial, because the entrapment defense was the primary focus of the defendant's opening argument and it was a significant issue throughout the trial. By the time the defense was abandoned, the issue was firmly planted in the jury's mind. The state's comments fell into the category of "invited response." Fundamental notions of fairness required that the state be allowed to comment on the entrapment issues raised by the defendant. Order granting new trial reversed.)

Tillman v. State of Florida, 647 So.2d 1015 (4th DCA 1994) (in response to def.'s comment about State's failure to call other officers, it was improper for State to say that they were unnecessary because they would have just reiterated testimony of other witnesses.)

Stephenson v. State of Florida, 645 So.2d 161 (4th DCA 1994) (in response to def.'s argument that police had tricked def. into giving confession, it was improper for State to argue that if there was anything wrong with what the police did , the jury would not have gotten to hear the taped confession. Voluntariness of confession is mixed issue of law and fact. Improper for State to suggest to jury that its voluntariness has already been determined. Not reversible error.)

Rogowski v. State of Florida, 643 So.2d 1144 (3rd DCA 1994) (Although it was improper for State to comment on def.'s failure to call a witness by alleging that the witness had nothing positive to say about def., this comment was provoked by def. counsel's improper comment that the State had failed to call the same witness, namely, that this witness was the "real perpetrator," although there was no evidence to support this comment. Error harmless where court instructed jury that def. did not have to prove anything.)

Parker v. State of Florida, 641 So.2d 483 (5th DCA 1994) (where def. took the stand and claimed that his nephew had driven his car earlier that day and drugs found inside must have

been his, it was proper for the State to comment on his failure to produce his nephew as a witness.)

Street v. State of Florida, 636 So.2d 1297 (Fla. 1994) (It was not improper for prosecutor to ask during part of his closing: "Should we excuse the sinner? Should we thank the sinner? Is that our job; is that our obligation under the law?" [see §VI above]. This is a matter of judicial discretion that will not be overturned absent abuse of discretion. In this case, the comment was also in response to defense counsels argument that: "You will have a unique opportunity to condemn what has happened, to condemn the sin but not to condemn the sinner" [fair reply] and def. failed to object as well. *Holding modified on unrelated issue in Evans, 770/1174.*)

Richards v. State of Florida, 635 So.2d 983 (4th DCA 1994) (where def. counsel argued that the state failed to have a fingerprint technician testify at trial and that an identified fingerprint would have proven who was at the scene of the murder, it was improper for state to respond that the def. had an opportunity to present any evidence that proved somebody else committed the crime or raised a reasonable doubt. State did not simply respond that def. could have called the same fingerprint expert to testify that the def.'s prints were not identified. Rather, the prosecutor made a general remark about the def.'s failure to present "any evidence that proved that someone else committed the crime," thereby implying that the def. had the burden to bring forth evidence to prove innocence. The broad comment was not invited by the def.'s argument as it did more than reply to def.'s assertions. Although prosecutor reminded the jury that the "burden always remains with the state," the statement did not cure the error because he then repeated the words that led to the objection. Error harmless given the overwhelming evidence of guilt. Affirmed.)

Mann v. State of Florida, 603 So.2d 1141 (Fla. 1992) (prosecutor's argument that defense psychologist's testimony was suggesting that def.'s actions were somehow more excusable because he was "a child molester and a pervert" and that that was "the best she can do" was fair comment on the evidence. Prosecutor made the statements to negate the psychologist's conclusion that the statutory mental mitigators applied to def. rather than to convert def.s being a pedophile into a non-statutory aggravator. Arguing a conclusion that can be drawn from the evidence is fair comment. Affirmed)

Shaara v. State of Florida, 581 So.2d 1339 (1st DCA 1991) (not improper for State to point out that victim cried during cross-examination where comment was invited by def. counsel's argument that victim did not cry when she recalled certain matters.--Fair reply)

McDonald v. State of Florida, 578 So.2d 371 (1st DCA 1991) (Where defense counsel comments upon the state's failure to call a witness who is demonstrably competent and available, a reply by the prosecuting attorney that the defense has the same ability to put on the witness does not prejudice the def.s right to a fair trial [no explanation of why the child, who the evidence showed slept through the entire incident, would be considered "competent" in the context of having information to elucidate the transaction as that term is usually used]).

Jones v. State of Florida, 571 So.2d 1374 (1st DCA 1990) (Prosecutor's comment that def. counsel also has subpoena power and could have brought in witnesses if she felt they would shed some light on the case was fair reply to def. counsel's argument to the jury about the absence of certain witnesses (including other officers) and her question: "Ask yourself what would they have had to say that I didn't get to hear.")

Harris v. State of Florida, 570 So.2d 397 (3rd DCA 1990) (*dicta* - prosecutor exceeded bounds of proper argument when, in reply to def. counsel's claim of bad faith prosecution, prosecutor argued that the fact that an assistant state attorney signed the Information reflected that the prosecution was brought in good faith. The Information filed by the prosecutor was not evidence and, accordingly, should not have been argued to the jury. In effect, the prosecutor made herself a witness by arguing to the jury her personal opinion that the Information must be believed because it had been sworn to as being filed in good faith by the prosecution. Reversed on other grounds.)

Schwarck v. State of Florida, 568 So.2d 1326 (3rd DCA 1990) (Counsel are "accorded wide latitude in making arguments to the jury, particularly in retaliation to prior improper comments made by opposing counsel.")

Wood v. State of Florida, 552 So.2d 235 (4th DCA 1989) (in case involving constructive possession of cocaine where def. attorney's elicited response from officer that when the cocaine was found the def. did not say anything [in order to show that there was no direct evidence of the def.'s knowledge of the cocaine], prosecutor went too far by arguing: "Common sense is your guide, the reactions of this def. to the finding of the cocaine, the things he didn't say, what does silence tell you? Sometimes more than anything anybody can say to you. ... He in this case, he is his own direct proof a thousand times more convincing than any police officer will ever be because when he didn't speak, he told you more than any police officer who takes the stand and testifies to you for hours ever will. ... Listen to what he says ... and you will know whether or not the def. is guilty." Although a prosecutor can fairly respond to defense counsel's "opening the door" with comment about the def.'s silence, the extent and content of the response in this case exceeded a fair reply. Reversed."

Williams v. State of Florida, 548 So.2d 898 (4th DCA 1989) (When def. raises the State's failure to call other witnesses, the State may respond but may not suggest that there are other witnesses who would corroborate the State's case if called.)

Andrews v. State of Florida, 533 So.2d 841 (5th DCA 1988) (prosecutor's comment that no evidence had been presented which provided an innocent explanation for def.s fingerprint being found on the window screen was not improper where it was made in response to defendant's argument that there was an innocent explanation. Affirmed. *[subsequent abrogation on Frye issue recognized by Hadden, 690/573 and other cases.]*)

Dufour v. State of Florida, 495 So.2d 154 (Fla. 1986) (where witness, who was given

immunity from prosecution on armed robbery charges, testified that def. was his cell mate, that def. had told him of the murder in detail and that def. had offered witness $5000 to kill another witness, prosecutor's comment that "you haven't ... heard any evidence that [def.] had any legal papers in the cell with him" merely rebutted the def. argument that witness had access to and could have based his testimony on def.s "legal papers." Comment pointed out lack of evidence on that issue and was an "invited response.")

Henry v. State of Florida, 483 So.2d 860 (5th DCA 1986) (prosecutor's comment on def.'s failure to call witnesses for his own defense was not error where def. counsel invited the comment by his argument regarding the failure of the state to present certain evidence and call certain witnesses. The state's comment was fair rebuttal. Affirmed.)

Whitfield v. State of Florida, 479 So.2d 208 (4th DCA 1985) (prosecutor's remark that the interest of the victims was an interest in justice were not unduly calculated to influence the jury but were a fair reply to the defense arguments that the victims' testimony be weighed with their vindictive interest in mind, suggesting that the victims were looking for someone to be punished for the injuries they suffered. Comment was neither prejudicial nor inflammatory and, even if it had been, was overcome by the court's instruction to the jury upon objection that they take the testimony and regard it for what it is, and not the lawyers' arguments, which were not evidence. *Subsequently reversed in part on sentencing issue: 515/360.*)

Williamson v. State of Florida, 459 So.2d 1125 (3rd DCA 1984) (in response to def. argument that State failed to call any neighbors to say that def. was at the scene and thereby contradict his alibi, it was improper for State to say it could have brought in the neighborhood and "have them tell you what they saw. The defense would have said these people are lying." State may not imply that there exist other witnesses who, if called, would have testified favorably for the State; and that they were not called because the def. would have called them liars. State may advise jury of def. subpoena power, or that evidence could not have been received over objection [see *Wilder v. State*] or that witness' testimony was not impeached.)

State of Florida v. Murray, 443 So.2d 955 (Fla. 1984) (comment that def. "thinks he can lie to you in court so that he is acquitted" improper and not fair reply to defense counsels claim that there was reasonable doubt as to the credibility of a witness. Error harmless, therefore DCA decision reversed and conviction reinstated.)

Miller v. State of Florida, 435 So.2d 258 (3rd DCA 1983) (prosecutor's comment to the jury that "all we want is for police to do their job and to give aid to people" fell within bounds of "fair comment," in view of defense argument suggesting that police actions were inappropriate. Held: Affirmed).

Ferguson v. State of Florida, 417 So.2d 639 (Fla. 1982) (comment that defense counsel was asking jurors to find a "scapegoat" for def.s guilt by blaming co-def, "who has already been found guilty" was not improper comment on prior conviction of co-def. It was fair reply because

defense counsel had argued in closing that co-def had committed the crime and def was never in the house.)

Lynn v. State of Florida, 395 So.2d 621 (1st DCA 1981) (improper for prosecutor to comment on def.s failure to call a witness and matters outside the evidence: "He said, 'Where is Charles Williams?' Always got to have the mystery man. I ask you the question of where is James Atkins today? We presented you the available witnesses. Where is James Atkins today? Sometimes we know where they are and can't tell you." However, statements could be viewed as fair comment to refute statements made by def. in his closing. Even in conjunction with other errors, not sufficient to warrant a new trial.)

Spriggs v. State of Florida, 392 So.2d 9 (4th DCA 1981) (during closing arguments, the prosecutor picked up the knife admitted into evidence and said to the jury, "It's not funny ... this is a weapon," and proceeded to stick the knife into the jury rail. The Fourth District rebuked the prosecutor for the comment and his behavior but also stated that the defendant's bizarre conduct, together with the continuous laughter and interruptions, provoked the prosecutor and solicited the comments. Held: Conviction affirmed in view of overwhelming evidence).

Cook v. State of Florida, 391 So.2d 362 (1st DCA 1980) (where def. commented on absence of other witnesses, it was not error for State to comment on the subpoena power of the defense.)

Wilson v. State of Florida, 371 So.2d 126 (1st DCA 1978) (Prosecutor's comment that defendant could "shed some light" on what happened to certain evidence was improper comment on silence and not invited by defense counsel's reference to lack of evidence because it was not produced by state in trial.)

Brown v. State of Florida, 367 So.2d 616 (Fla. 1979) (Where defense counsel raised gap of silence in confession of defendant, right after he was confronted with incriminating evidence, as proof of coercion, it was fair response for prosecutor to suggest that silence of defendant at that moment was indicative of knowledge of guilt instead.--Although State's response went too far, harmless--affirmed.)

Wright v. State of Florida, 363 So.2d 617 (1st DCA 1978) (where def. counsel argued that his client had remained at the scene following the shooting and that if she had shot at the victim the police would have found her with the gun, it was not a fair reply for state to argue in response: "And I ask [def. counsel]: 'Where is the gun?" as that comment can only be interpreted as a demand for self-incriminating evidence or a testimonial explanation from the def. as to its whereabouts. The suggestion is that def. counsel knows where the gun is because his client knows and she could tell us. State could have simply referred to uncontroverted evidence that def. was the shooter and had been seen with gun. Reversed.)

Wilder v. State of Florida, 355 So.2d 188 (1st DCA 1978) (Where def. argues insufficiency or lack of evidence because of the State's failure to call a corroborating witness, the State may

properly respond that such evidence could not be received in the State's case over objection [if correct], that the witness was as available to the def. as to the State, and that the witness to be corroborated was not impeached. However, the State may not recite to the jury testimony the missing witness would have given if called.)

Reaves v. State of Florida, 324 So.2d 687 (3rd DCA 1976) (where def. testified that he did not enter store to steal TV but had just moved into an apartment and was looking to buy major appliances, it was fair comment for prosecutor to point out that the def. was being represented by a public defender - suggesting that if he was indigent his proffered reason for going to the store was not credible. Affirmed. [Note: this is not likely to have the same outcome today, with the much higher costs of retaining private counsel. Also, court made no mention of how issue of public defender came before the jury and prosecutor would be precluded from raising it at the first time in closing because it would be a comment on facts not in evidence.]

Pitts v. State of Florida, 307 So.2d 473 (1st DCA 1975) (Defense counsel may not make statements during summation which reasonably invite response and then complain when his opponent's response is such as would be reasonably expected to be elicited by defense counsel's own prior remarks. Affirmed.)

Broge v. State of Florida, 288 So.2d 280 (4th DCA 1974) (prosecutor's comment: "If you consciously believe this case has been handled improperly by the State or by the Court, do it. Don't feel badly about it. My duty, as I told you, is to see that these defendants get a fair trial and that is your duty also. I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that," although seeming to relay prosecutor's personal belief in the believability of the evidence, was not improper as it was invited by def. counsel's argument that castigated the testimony of the policemen who testified, commenting on the 'false testimony' and 'bold lies' of these witnesses, and accused the prosecution of 'buying' evidence and knowing that the police officers had deliberately lied in this case. It would be improper to allow def. counsel "to deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong." [quoting Henderson v. State, 113 So. 689 (Fla. 1927)] Affirmed.)

State of Florida v. Mathis, 278 So.2d 280 (Fla. 1973) (where def. counsel argued to jury that they should consider the voluntariness of the def.'s confession, implying that it was not voluntary, prosecutor's response: "Now, did you hear one thing about him getting beaten up or somebody was pounding on his head, forcing him into this? Not a word about it" was not a comment on def.'s right to remain silent. The comment was an invited response which pointed out that there was no evidence that the statement was involuntary. DCA opinion quashed and case remanded for reinstatement of conviction and sentence.)

Dixon v. State of Florida, 206 So.2d 55 (4th DCA 1968) (it was not improper for state to

comment that witness/manager "was available and the defense could have had him called as a defense witness if [defense counsel] had wanted to. ... The manager was here, sitting in the witness room and if his identification would have helped the def., you can be certain that [def. Counsel] would have called him to show that." Prosecutor's argument was invited by def. counsel's comment that manager was the person to whom the check was presented for the purpose of cashing it and "[w]e don't have the manager here." Affirmed.)

XI. Comments without supporting evidence

A. General arguments based on facts not in evidence

Mears v. State of Florida, 41 Fla. L. Weekly D217 (4th DCA 2016) (prosecutor's comment that def was selling Oxycodone well before the date for which he was charged was supported by evidence from the CI who stated she had 10 conversations with the def for the purpose of buying drugs. However, prosecutor's comment that def. was "doctor shopping," or going to several doctors to get prescriptions for the same drugs, was not supported by any evidence and therefore improper. Reversed.)

Evans v. State of Florida, 177 So.3d 1219 (Fla. 2015) (it was improper for the prosecutor, in explaining why police started investigating def, to tell the jury it was "because, as you all know, most homicides are committed by family members or friends" where there was no such evidence in the record. Reversed for cumulative closing argument errors and other trial errors.)

Wright v. State of Florida, 174 So.3d 558 (4th DCA 2015) (where def, who was charged with possession of a firearm by a convicted felon, raised argument that firearm was an antique firearm, it was improper for prosecutor, in arguing that def could be convicted of possession of ammunition as well, to claim without supporting evidence that ammunition was modern and could be bought anywhere and was readily available. Error not fundamental as jury had ammunition available for inspection. Affirmed.)

Narcisse v. State of Florida, 166 So.3d 954 (4th DCA 2015) (where victim picked def out of a photo lineup but then recanted his initial identification at trial, it was improper for prosecutor to explain away the victim's change of heart by claiming he was "scared" absent any evidence to support such claim. Comments regarding a victim's recantation of a previous identification on the grounds of fear of the defendant are improper unless there is evidence establishing that the "victim's recantation was motivated by fear or that the victim had been threatened with reprisal by Defendant or someone acting on Defendant's behalf." [quoting Pierre, 88 So.3d 354] Reversed.)

Brinson v. State of Florida, 153 So.3d 972 (5th DCA 2015) (in domestic violence prosecution it was improper for prosecutor to argue that the state evaluates cases in order to determine if

charges should be filed, that it is state's obligation to bring this case to protect the victim, that the state feels this case is "worth our time," how domestic violence victims typically behave and that the victim had never been convicted of a felony. Such comments improperly bolstered the case by suggesting that the state only charges those who are guilty and by referring to facts not in evidence and expressed improper personal opinion. Reversed due to these and other improper arguments.)

Poole v. State of Florida, 151 So.3d 402 (Fla. 2014) (in death penalty case, although def argues that prosecutor attempted to mislead the jury by suggesting to them that even if they found the defense had proved the impaired capacity mitigating factor, they could give it no weight simply because def voluntarily drank and did drugs, and that the prosecutor mischaracterized psychological testimony by stating that def's impaired capacity was only due to his voluntary intoxication, where the expert testified that it was also due to def's low intelligence, (*"I submit to you that when you think about that evidence, you need to really think about whether that is a mitigating circumstance, whether it mitigates the penalty that you should vote to impose, or whether that goes to sympathy that you're not allowed to consider. ... You don't have to accept it as mitigating the death penalty at all. And I'm going to tell you why you shouldn't. Because both of these doctors said that the only reason [def] hit this mitigator and the next one ... was because he voluntarily drank and did drugs. The only reason they told you."*), first comment was not improper. The prosecutor did not refute that the mental mitigators were proven, rather the prosecutor implied that perhaps the jury should give the mental mitigation a small amount of weight because the defendant may have been the cause of his own emotional distress and substantially impaired capacity. Additionally, any error that the prosecutor made in telling the jury that voluntary intoxication was the only reason that the experts gave to support def's impaired capacity was harmless, because the jurors were present for the experts' testimony and were able to draw their own individual conclusions regarding what the experts conveyed. Affirmed.)

Crew v. State of Florida, 146 So.3d 101 (5th DCA 2014) (it was improper for prosecutor to repeatedly argue that def. intended to "share in the proceeds" of victim's robbery where there was no such evidence and, at best, perpetrators of attempted robbery testified conflictingly that they didn't tell def of their intent to rob victim because he wouldn't have participated and, later, that he "knew" of their plan to rob victim. Reversed for cumulative effect of many errors).

Young v. State of Florida, 137 So.3d 532 (4th DCA 2014) (where def. attorney argued in closing that photo lineup was unduly suggestive, it was error for prosecutor to respond: "if it was unduly suggestive, you wouldn't have heard that because that would have been a matter of law for the Judge to decide. And remember we talked about that in jury selection, everyone has a role? Judge's role is a matter of law. So if there were anything to suppress because it was unduly suggestive, it would have been suppressed, but it wasn't." By arguing to the jury that if the lineup was inherently suggestive it would have been suppressed, the prosecutor suggested that the reliability of the lineup had already been decided by the trial court. Such a response was not "invited" by def counsel challenging the credibility of the photo lineup. Although curative

instruction could have been given advising jury that it was empowered to form its own opinion about the credibility of the victim's testimony and the pretrial identification of the defendant, judge's curative instruction ["All right, once -- once again, ladies and gentlemen, you've heard it several times even from the attorneys and you'll hear it from me again at this moment, decisions of law, rulings on the law are the province of the Court. I will instruct you on the law. Nothing you hear from either one of these attorneys, *even if it happens to be correct*, is -- is your instruction on the law…"] did not cure the error and photo identification was a hotly contested issue. Reversed.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – contrary to def's assertion that prosecutor implied police officers didn't believe def was being truthful, prosecutor's comments (that one detective kept asking def questions because his answers didn't make sense, and the other detective realized that def's statement was inconsistent with what doctors were finding), were were reasonable inferences from or summarizations of the evidence admitted at trial. Closing argument is an opportunity for the attorneys to "explicate those inferences which may reasonably be drawn from the evidence." Denial of post-conviction motion affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (Death penalty – prosecutor's comment that def. was a "karate person" trained in karate and "they use both hands" in response to suggestion that he was not the shooter because video caught the right hand of the shooter and def's wife stated he was left handed, was proper comment given that wife also testified they owned a karate studio and taught self-defense. State's comment was based on evidence and was fair reply to def counsel's suggestion that def. wasn't right handed. Prosecutor noted that def could have been proficient with both hands. Affirmed.)

King v. State of Florida, 130 So.3d 676 (Fla. 2013) (*Death penalty* - Where def. did not present jury with any evidence of def's lack of prior violent felonies and state was not arguing the "prior violent felony" aggravator, trial court correctly precluded def. counsel from arguing to jury that the aggravation the State used as grounds for the death penalty did not include evidence that def. had a long history of violent crimes. Judge subsequently found non-statutory mitigating factor of "no prior crimes of violence" because court was presented with PSI, which jury was not. On the other hand, where "avoid arrest" aggravator was not presented to the jury, state's comment that victim was killed to eliminate a witness to the burglary was nonetheless a fair comment on the evidence presented at trial and appropriately used to argue that the "committed during the course of a burglary" aggravator should be given great weight. Even assuming improper, not fundamental. Affirmed.)

Petruschke v. State of Florida, 125 So.3d 274 (4th DCA 2013) (it was improper for prosecutor to argue that 3 year old lacked the mental capacity or ability to fabricate allegations of sexual abuse where there was no such evidence in the record [allegations were not spontaneous but were in response to adult questioning]. While it might be permissible for a prosecutor to argue that a child of three would be unlikely to fabricate allegations of sexual abuse out of self-interest, there

was no evidence to support a blanket assertion that a three-year old lacks the ability to fabricate allegations of sexual abuse and it was not a reasonable inference that could be drawn from the evidence. Reversed for this and other comment.)

Ramirez v. State of Florida, 125 So.3d 171 (4th DCA 2013) (prosecutor suggested to jury that the testimony of the "15 SWAT guys" would have been cumulative to other testimony and that certain lost pictures would have corroborated "every single thing" that a detective said. Although improper, error not fundamental. Affirmed.)

Jennings v. State of Florida, 124 So.3d 257 (3d DCA 2013) (in case of constructive possession of a kilo of cocaine, def counsel properly argued that there were no DNA results and that, had there been, they might raise a reasonable doubt as to def's guilt. Def counsel improperly went further and insinuated that the State was lying in order to conceal DNA evidence that could exonerate def. and called police officer's testimony, that DNA tests had not been completed by the day of trial, "stupid," "poppycock" and "a lie." State appropriately responded by pointing out that no one knew the results of the DNA tests because the tests were not completed yet; by emphasizing the length of time it takes to obtain DNA test results; and by downplaying the probative value of the potential DNA evidence in the facts of the case. However, prosecutor exceeded "fair reply" by telling the jury the defendant had demanded a speedy trial to prevent incriminating evidence from coming forward in the DNA test. Nonetheless, court sustained the objection and curative instruction cured any prejudice (motion for mistrial properly denied).

Robards v. State of Florida, 112 So.3d 1256 (Fla. 2013) ("Although prosecutor's comment might be construed in isolation as a comment on evidence not properly admitted in court for proper consideration by the jury, when viewed in context, the prosecutor was emphasizing the scope of the homicide investigation and the volume of evidence of def's guilt. Because of the way the comment could be construed, however, it is ill-advised." ["Clearwater Police Department did one heck of a job. They truly, truly, truly did. Think about it, all the evidence, all the work that they did during this investigation. *And we didn't even show you all of it. We would have been here forever."*] Conviction and sentence affirmed.)

Becker v. State of Florida, 110 So.3d 473 (4th DCA 2013) (where def. attorney argued that although the testimony was that informant had not received any favorable treatment on his own criminal charges for testifying against def., he nonetheless either expected to get favorable treatment or was getting something "off the books," it was improper for prosecutor to reply: "Defense says, well you know, [the informant] must be getting something. There must be something off the books. *I can stand here today, ladies and gentlemen, as an officer of this Court, and tell you that [the informant] is not getting anything out of this.*" While the prosecutor was free to point out to the jury that there was no evidence showing that a deal had been reached between the state and the informant in exchange for the informant's testimony, the prosecutor was not permitted to offer extra-testimonial knowledge that the informant was not receiving a deal or other special treatment from the state (an integral part of def.'s defense), and thus impermissibly corroborate the informant's denial of such an arrangement. The prosecutor invoked

his status as an "officer of [the] court" to assure the jury that the informant was being truthful. This undermined the integrity of the judicial process and irreparably contaminated the verdict and resulting sentence. Reversed. [NOTE: no mention of def. counsel suggesting state suborned perjury or otherwise did something improper by having an "off the books" arrangement with the witness and allowing him to testify otherwise despite there being no such evidence in the record].

Stepp v. State of Florida, 109 So.3d 839 (3rd DCA 2013) (in case where witness testified that trial court did not abuse its discretion in precluding defense from arguing that police detective failed to subpoena witness's phone records where (1) argument would have been based on facts not in evidence since def counsel did not ask officer if he had subpoenaed witness's phone records and (2) error, if any, was invited when def. objected to state questioning witness about phone calls from multiple numbers which could have led to disclosure that phone records were not subpoenaed or, if they were, to why law enforcement could not verify that witness received calls from def. Affirmed.)

Charriez v. State of Florida, 96 So.3d 1127 (5th DCA 2012) (prosecutor improperly commented on facts not in evidence by arguing (1) the importance of enforcing the laws def. was charged with violating in order to protect fifteen-, sixteen-, and seventeen-year-old children who do not have the ability to understand the consequences of their actions; (2) suggesting the reason the victim had changed her story was that she was nineteen years old at the time of trial and she might have had a different perspective on things than when she was fifteen; and (3) speculating that the reason no forensic evidence was found in the victim's apartment was that victim and def. probably had more sex at his apartment. Error not harmless when combined with multiple other improper comments. [**NOTE**: J. Evander's dissent appears more consistent with law] Reversed.)

Swearingen v. State of Florida, 91 So.3d 885 (5th DCA 2012) (*dicta* – prosecutor misstated evidence and argued facts not in evidence: by informing jury that on 911 call witness had said that bullet "whizzed" by his head where there was no such comment on 911 call or testimony in court; by making outlandish claim that if gun had been fired in the air, as testified to by def, bullet would have landed right in front of def; and by impeaching def's testimony that there was another witness to the assault by informing the jury that the State had spoken to that witness and she denied that she saw anything. [Note: although case was reversed due to general ineffectiveness of counsel and issues regarding rule of completeness, court stated that it otherwise would have reversed for cumulative errors in state's closing argument)

Pierre v. State of Florida, 88 So.3d 354 (4th DCA 2012) (in shooting case where victim recanted prior identification claiming it was based upon police officer's assurance that the individuals identified were involved, it was improper for prosecutor to argue that the victim's story did not change until he was told that he would have to testify and look into the eyes of the guy who shot at him, and that this was a "clear cut case of a guy that is scared of what's going to happen." Comments were improper as there was no evidence that the victim recanted the prior identification out of fear [thus suggesting that prosecutor had "unique knowledge" not presented to jury] and the statements implied that Defendant may have engaged in witness tampering or

suborning perjury. Reversed.)

M.S. v. State of Florida, 88 So.3d 238 (3rd DCA 2011) (where supervisor at juveniles' shelter found juvenile crying, escorted her out of her dorm into the hallway, and def. followed, a verbal altercation ensued and def. reached around supervisor and slapped victim across the face, court did not err in precluding def from arguing self-defense in closing, a defense that was never raised prior to closing. "Closing arguments are improper where they cannot be reasonably inferred from the evidence presented at trial." Regardless of how altercation started, evidence did not support suggestion that def. needed to defend herself against imminent force from victim, who was being escorted away and separated from def by a supervisor. Affirmed.)

McGee v. State of Florida, 83 So.3d 837 (4th DCA 2011) (prosecutor's comparison of shoe print on victim's face to soles of bloody shoes found in def's trash was not improper expert "testimony" from prosecutor but rather an inference the State believed was supported by the evidence. Moreover, expert testimony was not necessary for such comparison. Affirmed.)

Louzon v. State of Florida, 78 So.3d 678 (5th DCA 2012) (where robbery victim picked def. out of photo array pre-trial but recanted ID during trial testimony, it was improper for prosecutor to argue: "I don't feel right about my ID, does he call the head detective in the case? No. Does he call the head prosecutor? No. He calls the defense attorney. How does he get the defense attorney's phone number in jail? There is a clear inference that he got the phone number the same time he got the threat that he says he never got. *** When confronted about a threat, he said, no, I had never been threatened. Using your common sense, again, if he had been threatened and he really was scared, he's not going to divulge the threat…. Of course, he's scared. He's testifying against the man who put a gun to his head." While a prosecutor is certainly entitled to point out the discrepancies and changes in a witness' testimony, it is impermissible to suggest, without evidentiary support, that a witness has changed his or her testimony due to contact with the defendant and/or defense counsel. Such comments are highly prejudicial because they imply that the defendant engaged in the separate criminal offenses of witness tampering and suborning perjury. Reversed.)

Evans v. State of Florida, 62 So.3d 1203 (4th DCA 2011) (it was improper for prosecutor to suggest defendant tampered with a witness and suborned perjury without any supporting evidence. ["This is the sister of the defendant who hey sister-in-law, take the stand testify on my behalf. Go ahead say that. Hook me up. Help me out. I proffer to you that's what that was."] Prosecutor went on to say that Def and his brother had "three weeks to think of something" and that they "concocted" the story. No objection but fundamental error under facts of case. Reversed.)

Moore v. State of Florida, 57 So.3d 240 (3rd DCA 2011) (in second degree murder trial, where although there was no evidence that def. was involved in sexual activity with victim, victim's body was found in a field with his shorts pulled down and def. had told a witness that he had "killed a faggot," prosecutor did not violate pretrial order prohibiting suggestion of sexual

activity between def and victim by arguing: "[W]hen you look at the exact circumstances surrounding the entire incident that happened to Keith, and everything that happened in the close quarters of that car, there Keith is in the front seat of this car with his pants down, and he died?" Comment did not suggest the defendant committed an uncharged crime or that some type of sexual activity occurred in the vehicle. Rather, the record reflects that the prosecutor's statement was made in support of the State's theory that the victim was killed because of his sexual orientation, and that the defendant acted with malice. The testimony clearly reflects that the defendant knew the victim was gay. The victim was found in a field with his shorts partially down, pebbles were found in the waistband of his boxer shorts, and the medical examiner testified that the evidence suggested the victim's shorts were down before he was dragged through the field. Affirmed. [*Quashed and remanded on other grounds 137 So.3d 1021*])

Mackey v. State of Florida, 55 So.3d 606 (4th DCA 2011) (where during closing argument, def contended that the reason why his cousin refused to talk to the police was because his cousin shot the victim, it was not improper for the state to argue on rebuttal that the reason why the defendant's cousin refused to talk to the police was because the cousin did not want to "tattle" on the defendant. State's unsupported comment as to the alleged reason why the defendant's cousin refused to talk to the police was a fair reply to the defendant's prior unsupported comment that his cousin refused to talk to the police because his cousin committed the murder. Affirmed in part, reversed in part for evidentiary hearing on other grounds.)

Ford v. State of Florida, 50 So.3d 799 (2nd DCA 2011) (in attempting to explain a six-month delay between the time of the controlled buy and the date def. was arrested, the prosecutor stated, "And the reason why he wasn't arrested for some time after, you heard [one of the law enforcement officers] say they were doing a federal investigation to try to get him on other things and they decided to make this a state case." Comment was improper as there was no evidence presented regarding any other crimes. "[A] prosecutor must confine closing argument to evidence in the record, and must refrain from comments that could not be reasonably inferred from the evidence." *** Further, implicating a defendant in other crimes not charged "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Error was not harmless as only evidence was testimony of CI who was 20 time convicted felon hoping to receive favorable treatment at his own sentencing and judge's curative instruction ("Ladies and gentlemen of the Jury, you will rely on your own memory about what testimony was present during trial") did not cure prejudice but left the jury with the impression that the argument may or may not have been accurate. Reversed.)

Watson v. State of Florida, 50 So.3d 685 (3rd DCA 2010) (where def was arrested for trafficking in cocaine based upon his driving another person's car with over 124 grams of cocaine under the driver's seat and where def. counsel argued in closing that there was no evidence that def placed the drugs under the seat, it was error for prosecutor to argue in rebuttal that it could be inferred from the bag's position that def was trying to conceal the cocaine before the police stopped him. There was no evidence from which the jury could infer def's knowledge

of or concealment of the drugs. Reversed.)

Green v. State of Florida, 43 So.3d 924 (1st DCA 2010) (where trial court had ruled transcripts of recorded telephone conversations inadmissible in evidence because their accuracy had neither been stipulated to nor independently determined by the court prior to trial, it was error for court to allow the State to display the transcripts to the jury during closing. Error harmless. Affirmed.)

Wicklow v. State of Florida, 43 So.3d 85 (4th DCA 2010) (conviction of robbery with a firearm reversed for cumulative effect of improper closing arguments including: "As is usually the case, the victim is on trial for something" (invoking sympathy from jury and suggesting that accusing the victim of wrongdoing is simply an improper defense tactic that the prosecution has seen many times); "[State Witness/Def's boyfriend] could have been charged with this crime right next to def., they could have been sitting right next to each other. The detectives made a decision not to do so based on their interview with them. I interviewed [Witness]. … even had the detective reread [him] Miranda, so that if we decided after the interview that he needed to be charged, he would be charged. He is not charged and it is irrelevant to the crime that was committed by def" (Facts not in evidence, improper bolstering, suggesting that the government's vast investigatory network, outside of trial, knows that the def is guilty); "The only conflicts are between the defense attorney and the evidence. That's it. Don't be manipulated. Don't be gullible" (personal attack on defense counsel suggesting impropriety). Reversed and remanded).

Wimberly v. State of Florida, 41 So.3d 298 (4th DCA 2010) (State's argument that community where shooting occurred was "the type of neighborhood where people attack each other … a close community where people want to protect each other, they certainly don't want to talk to police" and "like to handle them things themselves…you wake up, …you hear about people shooting people all over the place" was improper , not as an appeal to racial prejudice as defense counsel now argues, but as a comment on facts not in evidence because the comments were completely unsupported by any evidence at trial. Defense counsel failed to preserve objection (stating that he had no objection to State's comments other than to comment about "people shooting people") and error was not fundamental. Record was replete with witnesses' memories being vague and having to have their recollection refreshed with prior statements, and victim himself told his girlfriend to "tell no stories." It would have been clear to the jury that many of the witnesses were reluctant to testify so comment was not designed to imply that def was "guilty by association" as is sometimes prohibited in comments about a person being arrested in a "high-crime area." Affirmed.)

Brown v. State of Florida, 18 So.3d 1149 (4th DCA 2009) (it was improper for State to give a brief initial closing statement addressing only how the evidence did not support convictions for lesser included charges, followed by a more extensive, thirty –four-slide PowerPoint presentation on rebuttal [when def could not respond] summarizing in detailed fashion the testimony of each witness, the surveillance tape and the elements of each crime. The purpose of rebuttal is "a reply to what has been brought out in the def's [closing] argument." Further, rebuttal not only went beyond its function as a reply to def's closing argument, but PowerPoint

presentation included a photograph that was never introduced into evidence and a witness who never testified at trial. "A prosecutor must confine his or her closing argument to evidence in the record and must not make comments which could not be reasonably inferred from the evidence." Reversed.)

Fleurimond v. State of Florida, 10 So.3d 1140 (3rd DCA 2009) (where charge against def was reduced from "sale of cocaine within 1000 feet of a school" to "possession of cocaine with intent to sell" because there was no testimony as to the distance between the drug house and the nearby elementary school, and where no evidence whatsoever was presented that the police found the def flushing drugs down the toilet, it was improper for the State to argue to the jury in closing that the house was next to a school [there was no objection to this comment] and to disclose the alleged "flushing incident." Prosecution's other comment (in response to defense argument that it was unfair that the police did not have a videotape to prove def's involvement) that " how fair is it to Miami-Dade County that there's people out there, these two individuals—" was interrupted by objection and was never finished. While a "call on the community's conscience would have been impermissible, it is unclear that either the interrupted comment, the "flushing comment" or the school comment alone would warrant a mistrial. But the combined effect of all three errors warrant the def receiving a new trial. Reversed. [NOTE: compare ruling in this case with ruling in Lelieve, the co-def, below by a different panel of same DCA])

Williams v. State of Florida, 10 So.3d 218 (3rd DCA 2009) ([**NOTE**: content of improper argument gleaned from concurring opinion as majority opinion did not give specifics, therefor it is impossible to determine if the majority would have agreed with concurring judge's conclusions about the propriety of specific arguments]—It was improper for prosecutor to act out an imaginary statement of def to def's girlfriend during closing argument where there was no evidence or even a reason to believe such a statement ever existed: "Now this def was with [his girlfriend]. He wanted to take the law into his own hands….So what this def does is this, he tries to man up. He tells [his girlfriend] I'm going to be the bigger man. I don't want you going back to—with Norton Altidor. I'm going to take care of this for everybody." It was also improper for State to argue "This is street justice. It's not uncommon in that area. There were many people that were at the flea market that day. But they knew this def. They also knew Norton. They know that they are not nice guys. They didn't want to come forward. You only heard from—." Comments were unsupported by evidence, implied the existence of other witnesses who could corroborate the testimony presented and suggested that def had a prior criminal record because everyone was afraid to come forward because they knew he wasn't a "nice guy." Objections and motions were overruled but error harmless given strength of case. Affirmed.)

Lelieve v. State of Florida, 7 So.3d 624 (3rd DCA 2009) (where charge against co-def was reduced from "sale of cocaine within 1000 feet of a school" to "possession of cocaine with intent to sell" [def was never charged with sale within 1000 feet, but instead with trafficking in cocaine] because there was no testimony as to the distance between the drug house and the nearby elementary school, it was improper for the State to tell the jury in closing that the house was next to a school [there was no objection to this comment]. Prosecution's other comment (in response

to defense argument that it was unfair that the police did not have a videotape to prove def's involvement) that " how fair is it to Miami-Dade County that there's people out there, these two individuals—" was interrupted by objection and was never finished. While a "call on the community's conscience would have been impermissible, it is unclear that the interrupted comment, alone or in combination with school comment, vitiated the entire trial. Affirmed. [NOTE: compare ruling in this case with ruling in Fleurimond, the co-def, above by a different panel of same DCA])

Bigham v. State of Florida, 995 So.2d 207 (Fla. 2008) (where trial court dismissed count of sexual battery it was not improper for prosecutor to argue in closing that victim was dead at the time def. had sex with her because evidence supported argument that death by strangulation occurred during sex.)

Robinson v. State of Florida, 989 So.2d 747 (2nd DCA 2008) (It was improper for prosecutor to argue to jury statements that were never made by witnesses. Comment that homeowner said "get him out of here," referring to def., was unsupported by any testimony or evidence and went to the heart of the defense on issue of whether when def. returned and assaulted an occupant he was acting as an invited guest or uninvited burglar.

Spoor v. State of Florida, 975 So.2d 1233 (4th DCA 2008) (In L&L case, where def. counsel argued that victims who had identified def. did not remember the extensive tattoos on his arms because they were identifying the wrong person, it was improper for prosecution to argue that "over the last year, he's gone out and gotten that arm tattooed. … So he could stand up here in court and go like this and say, 'Look, I've got tattoos.' … He went out and got a tattoo in the meantime, because he knew what was going on. … [I]t looked fresh and sharp and clear." There was no evidence as to when def. obtained his tattoos, nor linking the sharpness and clarity to age. Therefore the prosecutor was commenting on facts not in evidence. Reversed.)

McKenney v. State of Florida, 967 So.2d 951 (3rd DCA 2007) (where throughout trial def. counsel focused on the fact that a large number of people were at the site of the shooting and yet only one eyewitness was brought forward by the state, and during closing repeatedly attacked the case on that same basis, it was fair reply or invited response for the state to say that "anyone with an ounce of sense, can figure out that when a person is capable of gunning down an unarmed man in front of a bunch of people … with an assault rifle, who the heck is going to get involved in that kind of mess? That is exactly what happened in this case." The defense essentially is asking that the state be prohibited from answering the question defense counsel posed—why haven't other eyewitnesses come forward? The prosecutor did not argue that witnesses in that part of town do not cooperate with police or are too scared to talk (which would have violated a pretrial ruling). Instead, the prosecutor responded fairly to the def's question by the common sense argument that the horrific crime scene with over 30 rounds of assault rifle fire would not encourage a bystander to get involved. She did not suggest that any eyewitness was intimidated by def, that any eyewitnesses had made reports to police but were not at trial because of fear, or that witnesses in that area behaved differently than any other area. Comment was invited by

defense counsel and response was proper. Even if error, harmless. Affirmed.)

Chavers v. State of Florida, 964 So.2d 790 (4th DCA 2007) (it was improper for prosecutor to suggest to jury that def and witness had agreed to align their testimony in court. "Is that the conversation that was had? Hey, Alan, you need to go to the jury, go to trail and tell them what happened. Or was it you need to go and tell the jury the same story I'm going to tell them…. Those two stories are very consistent. Because [Def] asked his friend to come in here and tell you that nothing happened and this was completely fabricated." After objection was overruled, prosecutor continued to argue that def and his witness "discussed their testimony and said this is what we're going to say happened on this day." It is a well established rule that a "suggestion that the def. suborned perjury or that a defense witness manufactured evidence, without a foundation in the record, is completely improper." [citation omitted] Reversed.)

Williams v. State of Florida, 947 So.2d 517 (3rd DCA 2006) (*opening statement*- prosecutor's opening statement reference to evidence prosecutor expected witness to testify to at trial was harmless, although witness failed to testify, where evidence was introduced through other witnesses or was irrelevant or tangential. Further, witness gave prosecutor her cell number and promised to appear then failed to appear. There was no suggestion that prosecutor acted in bad faith. "The prosecuting attorney may outline the facts which he, in good faith, expects to prove and which are competent for him to prove." [citation omitted] Affirmed.)

Dorsey v. State of Florida, 942 So.2d 983 (5th DCA 2006) (although prosecutor risked reversal of murder and aggravated child abuse conviction by demanding justice for the victim and referring to matters outside of the evidence in her closing argument, the trial court's sustaining of defense counsel's objection and curative instruction that the jury should disregard the prosecutor's comments cured the prejudice and saved the case from reversal. "But for the manner in which the trial court dealt with these improper comments by the prosecutor, our decision might have been different." Affirmed.)

Hayes v. State of Florida, 932 So.2d 381 (2nd DCA 2006) (*opening statement*-it was reversible error for prosecutor to tell jury in opening that it would present evidence that def. admitted his crime to a fellow inmate where such evidence was not presented. Even though failure of proof may have occurred through no fault of the State, statement created impression that def. had confessed his guilt. Despite curative instruction, error was not harmless where State had no physical evidence linking def. to the crime and case amounted to credibility contest between State witnesses and defense alibi witnesses. Reversed.)

Walls v. State of Florida, 926 So.2d 1156 (Fla. 2006) (although it was improper for prosecutor to speculate on what might have happened to witness had she walked over to where def. had murdered victims (based upon def's statement that he did not want any witnesses), def. cannot show any prejudice from that one improper comment.)

Penalver v. State of Florida, 926 So.2d 1118 (Fla. 2006) (it was improper for prosecutor to

suggest that witness had changed her identification of the def. after speaking with his counsel. It is impermissible for the state to suggest, without evidentiary support, that the defense has "gotten to" and changed a witness's testimony or that a witness has not testified out of fear. Such comment, in addition to being improper because it is not based on facts in evidence, is "highly irregular, impermissible, and prejudicial" because it improperly implies that def. engaged in witness tampering or suborning perjury, both criminal offenses. Reversed on cumulative error.)

Chambers v. State of Florida, 924 So.2d 975 (2nd DCA 2006) (where 20 year old's sexual relationship with 16 year old girlfriend may have been immoral but was not illegal and was not charged, and although some details of the relationship were admissible given that def. was accused of burglary and other crimes relating to the break up of the relationship, it was improper for prosecutor to attempt to inflame the minds of the jury with comments about how, instead of celebrating, the victim had to come to court to testify the day after her graduation and how the def. "is picking up high school kids and having sex with them. … What is this man doing with this kid? She is a child. She is a child." Further, there was no evidence, nor would such evidence have been relevant, that the def. had been involved in any other similar relationships with other high school girls. General attack on def.'s character was improper. Moreover, in responding to def. counsel's claim that the victim might have falsely accused def. of the crimes charged, prosecutor did not simply reply that it was unlikely that she would want to fabricate such a story and face exposure of her personal life, including her pregnancy, but he extended them inappropriately to invoke the sympathy or anger of the jury by focusing on the immorality of the relationship and the indignities associated with trial, without connecting it to the relevant issues. Reversed.)

Snelgrove v. State of Florida, 921 So.2d 560 (Fla. 2005) (prosecutor's comments to jury that "that man [witness] was telling the truth, that jury could tell that witness was telling the truth even better than prosecutor could, and that witness knew things that were not reported in the paper, even if improper based upon def. objection to facts not in evidence, were harmless. There was no reasonable probability that the statement contributed to the verdict. Conviction affirmed. Death sentence reversed on other grounds.)

Floyd v. State of Florida, 913 So.2d 564 (Fla. 2005) (Although prosecutor's comment in closing was based on facts not in evidence, the remark that def. had previously "hit" the victim, causing a bruise was insufficient to vitiate the fairness of the trial. Comment was isolated and court instructed jury to rely on their own recollection of the evidence. Affirmed.)

Hamilton v. State of Florida, 907 So.2d 1228 (3rd DCA 2005) (although the state improperly argued evidence that was not presented at trial as if it had actually been presented, error was harmless. Affirmed.)

Yok v. State of Florida, 891 So.2d 602 (1st DCA 2005) (It was not improper for prosecutor to argue that when appellant spoke to police he could have avoided "the chaos, the calamity, and the conflict." Argument was not a reference to matters outside the evidence. Defense counsel made

repeated references to "conflict, chaos and calamity" during closing argument. Therefore, the prosecutor's like reference during rebuttal represented nothing more than commentary on def.'s trial testimony and prior statements to police. Affirmed.)

Peterka v. State of Florida, 890 So.2d 219 (Fla. 2004) (Prosecutor's comment: "I've told you all of [the points]. I've done everything I can do. I've showed you all of the evidence that I can bring in here to you" did not imply that there was other evidence of def.'s guilt that was not presented to the jury. Prosecutor was merely stating that he had presented the jury with all of the State's evidence, which he believed proved first-degree premeditated murder. Affirmed.)

Mills v. State of Florida, 875 So.2d 823 (2nd DCA 2004) (*voir dire* - where, in opening statement of murder trial prosecutor detailed testimony he expected to receive from flip co-defendant concerning the careful planning and execution of robbery and defendant's involvement in crime, but flip failed to testify, asserting her 5th Amendment privilege and trial court refused to compel testimony and prohibited defense counsel from commenting on her failure to testify, new trial was required. Reversed.)

Cummings v. State of Florida, 874 So.2d 1203 (5th DCA 2004) (it was improper for prosecutor to make factual assertions that were not in evidence (including recounting things he had heard from bystanders during the jury view) and attempt to bolster the credibility of witnesses by expressing his own belief their testimony. "Sophomoric as the prosecutor's errors were and much as we are aware that some prosecutors are disinclined to improve their skills and curb their excesses in the absence of appellate rebuke, we have examined the entire closing argument with care, and we simply cannot say the trial court abused its discretion by failing to mistry the case." Error was not so frequent or egregious as to deprive def. of a fair trial where trial court sustained objection and instructed the jury to disregard. Affirmed.)

Parker v. State of Florida, 873 So.2d 270 (Fla. 2004) (prosecutor's comment that co-defendant told witness that def. had killed victim, although a misstatement of the testimony, was not reversible error where upon objection and motion, prosecutor agreed to, and did, correct the misstatement in front of the jury. Denial of motion for mistrial was proper. Affirmed)

Howard v. State of Florida, 869 So.2d 725 (2nd DCA 2004) (*dicta* - it was improper for prosecutor to ask def.'s mother on what date she was listed as a witness for trial [one month before trial] and, when witness insisted that she had told def.'s first attorney about def.'s alibi, to argue in closing that attorney must not have listed her because he felt she was lying. Witness was not competent to testify about the actions of prior counsel and even if counsel had been called as a witness, prosecutor would not have been allowed to ask him to comment on other witness's credibility. Prosecutor should not have been allowed to do indirectly what he could not do directly. Reversed on other grounds.)

Anderson v. State of Florida, 863 So.2d 169 (Fla. 2003) (it was improper for prosecutor to argue to jury: "Ladies and gentlemen, my job is not to satisfy the defendant's curiosity, or his

attorneys' curiosity, or the Judge's curiosity, or even your curiosity about these details. I've got one job, one job here today. If you folks have questions that you just have to know the answer to, after this trial is over, my office is up on the fourth floor, you are welcome to come up there and ask me about any of these little details –." Comment may have suggested to jury that there was evidence not presented at trial that provided additional grounds to find the def. guilty. However, comment did not deprive the def. of a fair and impartial trial, materially contribute to the conviction, was not so harmful or fundamentally tainted as to require a new trial or so inflammatory that it might have influenced the jury to reach a more sever verdict than it would have otherwise reached. Affirmed.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (it was improper for State to argue that victims in DUI manslaughter case were not impaired and were driving properly, and that def. was not arrested on the day of the incident because it takes time to receive blood results where such evidence was not presented to the jury. Reversed on these and many other grounds. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Brazill v. State of Florida, 845 So.2d 282 (4th DCA 2003) (prosecutor's comment that he had "spent hours with" the murder weapon and he was unable to "wipe the safety off" was minor error where the gun was in evidence, the jurors had the chance to manipulate it themselves and there had been much expert testimony directed to this issue. No objection, not fundamental. Affirmed.)

Conahan v. State of Florida, 844 So.2d 629 (Fla. 2003)(*opening statement* - in penalty phase opening statement, it was error for trial court to allow prosecutor to comment on *Williams* rule evidence (of def.'s seduction and attempted strangulation of prior victim) which court had taken under advisement and had not yet ruled admissible, where trial court later determined evidence to be inadmissible. Comments not "presumed harmful" regarding def.'s guilt or innocence because def. had already been found guilty of first degree premeditated murder in guilt phase of trial and trial court twice instructed jury that remarks of attys were not evidence. Further, circumstances support finding that prosecutor was acting in good faith. Affirmed.)

Anderson v. State of Florida, 841 So.2d 390 (Fla. 2003) (following the defense argument that def.'s decision to voluntarily speak to police and consent to a search of his vehicle shows that "he didn't do anything wrong; he had nothing to hide," prosecutor's response that drug traffickers often tell police to go ahead and search their car, even when they are carrying kilos of cocaine, in order to deflect suspicion did not warrant a mistrial. Court sustained objection and instructed the jury to disregard the comment. Comment did not vitiate the entire trial. Conviction and death penalty affirmed.)

McKenzie v. State of Florida, 830 So.2d 234 (4th DCA 2002) (it was improper for prosecutor to argue to jury that def. arrested for possession of drug paraphernalia told police "I don't smoke crack" where no one testified about such a statement at trial and there was otherwise no such

evidence in the record. Error fundamental where prosecutor used statement to show that def. knew of illicit nature of glass tube and substance inside of tube, a necessary element of the crime, by arguing that def. stated this to officer before officer told her what he thought the tube was used for or what he thought was in the tube. Reversed.)

Maddox v. State of Florida, 827 So.2d 380 (3rd DCA 2002) (in opening statement, it was improper for prosecutor to comment on statement def. allegedly gave to police officer and then fail to call the officer, thereby suggesting to the jury that there was additional evidence to support the State's case without subjecting it to cross-examination or evaluation by the jury. Reversed. [Note: Def. was allowed to read deposition of officer to jury to make clear the very limited nature of the statement. However, in doing so, def. waived right to final closing argument.)

Rodriguez v. State of Florida, 822 So.2d 587 (2nd DCA 2002) (it was improper for prosecutor to argue that the def. was a "liar" because he was using an interpreter without the need for one: "... he cannot be honesty with you all about his ability to speak the English language what else is he going to lie about." Prosecutor's argument that the def.'s testimony was interrupted by the court reporter because he was answering questions before they were translated was factually incorrect and, in any event, both the State and defense pointed out to the jury in opening that the def. actually spoke and understood English but that an interpreter would be used to insure that he would understand the trial proceedings. It is improper to refer to a def. as a "liar" unless the record clearly supports such. The use of a translator in no way equates to factual support for the accusation that the def. is a liar. The incident is even more offensive in light of the fact that the prosecutor in voir dire told the jury that the def.'s use of a translator should not be used against him. Reversed.)

Skanes v. State of Florida, 821 So.2d 1102 (5th DCA 2002) (while the prosecutor misstated the testimony when he told the jury that a witness had stated that the def. told her "You got my messages, and you know what will happen" but the witness had never said the def. stated "you know what will happen," error was not reversible where the misstatement was a logical inference that one could draw from def.'s otherwise innocuous statement under the circumstances of the case and the court, upon def. counsel's objection, instructed the jury that if their recollection of the evidence differed from that of counsel they should disregard counsel's recollection - thus reducing the impact of the misstatement. Affirmed.)

Jackson v. State of Florida, 818 So.2d 539 (2nd DCA 2002) (*Opening statement*- Reversal required where prosecutor confused case and mistakenly told the jury that co-def. had indicated to officer that def. was concealing contraband in his groin area. Error suggested to jury that there was non-record evidence, of which the prosecutor was aware, which corroborated officer's testimony. Error not harmless where case boiled down to credibility contest b/w def. and officers. Reversed.)

Owens v. State of Florida, 817 So.2d 1006 (5th DCA 2002) (it was improper for prosecutor to comment to jury that it had "a little tiny piece of what [witnesses] said to the police" as that

implied that there was evidence of guilt that the jury did not hear. Both were reluctant witnesses who had memory lapses on the stand and contradicted their prior statements. Immediately after the improper comment, prosecutor argued that nothing witnesses said should be believed. Error was harmless. Affirmed.)

Dennis v. State of Florida, 817 So.2d 741 (Fla. 2002) (It was improper for prosecutor to "testify" that witness had given her a prior statement and that no one had ever threatened witness with arrest if he "didn't come up with more evidence." Error not fundamental. Affirmed.)

Pittman v. State of Florida, 814 So.2d 1257 (5th DCA 2002) (In post-conviction motion, reference to record evidence or evidentiary hearing required to determine if def. counsel was ineffective in failing to object to prosecutor referring to assailants who perpetrated the robbery as "they" when the evidence that was presented during trial only alluded to a single perpetrator. Remanded for this and other error.)

Evans v. State of Florida, 808 So.2d 92 (Fla. 2001) (prosecutor's closing argument recounting how the shooting occurred, despite no witness testimony to that account, constituted reasonable inferences from the evidence presented at trial. Affirmed.)

Pollard v. State of Florida, 807 So.2d 735 (3rd DCA 2002) (comment that the State intended to prosecute def.'s girlfriend if successful in locating her was irrelevant, but not unfairly prejudicial to the def. and certainly not fundamental error. Affirmed.)

Franqui v. State of Florida, 804 So.2d 1185 (Fla. 2001) (in penalty phase, it was not improper for state to suggest to jury that proceeds of robbery may have been used to repaint the car to avoid arrest and to purchase a gun used in the subsequent robbery where evidence indicated that def. was unemployed at the time of the offense and guns used in first robbery were disposed of, yet getaway vehicle was repainted and other guns were obtained for second robbery 11 days later. State's comment did not constitute an improper attempt to ask the jury to draw a logical inference based upon the evidence. It was improper, however, for State to imply that def.'s would have murdered victim of second robbery if the police had not stopped their van for a traffic infraction. Error does not warrant resentencing. Affirmed.)

Tindal v. State of Florida, 803 So.2d 806 (4th DCA 2001) (in response to def.'s argument that a non-testifying eye-witness had identified someone named "Tony" as the shooter, it was error for state to argue: "[Y]ou don't know whether that person was intimidated or in fear when she said that, whether she had a gun pointed at her. *** You can't speculate if she told Detective Walley that a gun was pointed at her and she was in fear." Comment suggested that prosecutor had unique knowledge not presented to the jury and that the def. was engaged in witness tampering or suborning perjury. Curative instruction that simply reminded jurors that what lawyers say is not evidence was insufficient. Reversed.)

Snow v. State of Florida, 800 So.2d 307 (3rd DCA 2001) (prosecutor's comment that guns of

the same caliber cannot be distinguished by sound does not warrant a new trial. Affirmed.)

Nardone v. State of Florida, 798 So.2d 870 (4th DCA 2001) (where critical issue was whether aluminum strip was used by appellant in a way likely to cause death or great bodily harm and victim testified that def was lying on his back on the floor holding onto aluminum strip which was part of a planter, and that as he was pulled away from the planter the strip, which def. held by the middle, snapped towards victim's face and the def. then attempted to strike the victim with the strip (still holding it by the middle), it was improper for State, in an effort to demonstrate that the strip could cause great bodily harm, to hold the aluminum strip by its end like a hammer and repeatedly strike it against a stack of books on his table with such force that they sent drywall that had been attached to the strip scattering around the courtroom. Such a demonstration was misleading to the jury because it was inconsistent with all of the evidence on how the def. used the alleged weapon. Reversed due to the cumulative effect of this error and improper opinion testimony by officer.)

Farrell v. State of Florida, 791 So.2d 598 (3rd DCA 2001) (where the testimony of child's mother that child told her she played the "peter game" with the def. and then simulated oral sex with a sausage was permitted only for the limited purpose of explaining the mother's state of mind when she deliberately left her daughter with the def. in order to confirm her suspicions, and court instructed the jury that such testimony was not to be used as substantive evidence of guilt but only to explain the actions of the mother, it was improper for state in closing to argue the value of the testimony concerning the sexual game as substantive evidence of the def.'s guilt {i.e. "[He] is the only one who played the peter game, the only one with the sausage."} Error harmless where trial court sustained the objection and immediately instructed the jury on the correct use of the evidence, repeating the curative instruction again during the final instructions to the jury. Affirmed.)

Brown v. State of Florida, 787 So.2d 229 (2nd DCA 2001) (it was improper for prosecutor to attack the credibility of defense witness by arguing facts not in evidence: "A man who doesn't like me. Quite obviously because of what I do for a living.... Does that look like a man who likes law enforcement? I'm law enforcement. An officer of the court. A prosecutor. I'm law enforcement. I could arrest somebody if I wanted to. Does that look like somebody who likes law enforcement?" Combined with many other errors, reversed.)

State of Florida v. Cutler, 785 So.2d 1288 (5th DCA 2001) (in road-rage case where def. was accused of pulling alongside victims and pointing a firearm at them, prosecutor erred in arguing that def. had testified: "I was taking that gun out and I was going ..." and telling jury that he stopped at that point because he was going to say "I was going to scare them," where def. never said what prosecutor claimed but testified that he thought he was going to be robbed so he pulled his gun from his bag and in doing so it came up to the level of visibility. Prosecutors argument, telling the jury that the def. stopped just short of a virtual confession, was a figment of the prosecutor's imagination as the alleged statement was never made (nor was a similar statement made). Objection was overruled as a "fair characterization." Since there were no other witnesses

and credibility was crucial, prosecutor's interjection of "evidence" never adduced at trial required reversal.)

Miller v. State of Florida, 782 So.2d 426 (2nd DCA 2001) (where officer, who was not testifying as an expert, was allowed to testify that one could detect deception by watching the movement of the speaker's eyes [no objection], it was improper for State to imply to jury that officer's testimony amounted to expert testimony and advise the jury to apply the officer's "expertise" in evaluating the def.'s credibility. No objection, however, fundamental when combined with other unobjected to errors. Reversed)

Muhammad v. State of Florida, 782 So.2d 343 (Fla. 2001) (where trial court had ruled that officer could not testify about getting license plate number from BOLO and officer simply testified that he received "additional information," it was error for prosecutor to comment in closing that officer received information from BOLO. However, error not objected to and not fundamental. Affirmed.)

Lewis v. State of Florida, 777 So.2d 452 (4th DCA 2001) (prosecutor's argument that victim's identification at scene was more reliable because it was closer in time, that memory fades over time and that jury should ignore victim's inability to identify the subject in court were proper arguments. Logical inferences may be drawn from the evidence and counsel is allowed to advance all legitimate arguments. Affirmed.)

Duncan v. State of Florida, 776 So.2d 287 (2nd DCA 2000) (improper for prosecutor to argue what a third party said in a deposition where third party's testimony was only raised as a predicate question for impeachment of defendant's alibi witness and third party was never called to testify to those facts and complete the impeachment. Alibi witness denied the facts presented in question and facts were never introduced into evidence. Also, although it would be proper for prosecutor to comment on defendant's failure to call friends and relatives who supposedly could substantiate his alibi defense, it would have been improper to argue that the alibi witnesses "didn't come in because they can't tell you that he was there on that day" without record evidence to support that allegation. Summary denial of post-conviction motion reversed and remanded for evidentiary hearing or attachment of record evidence.)

Wilder v. State of Florida, 775 So.2d 430 (3rd DCA 2001) (In a trial for aggravated fleeing and eluding, it was not improper for prosecutor to comment: "we are all fortunate that nobody was killed." The evidence showed that the def. drove in a reckless manner at a high rate of speed through an intersection at lunch time, swerving around a dump truck and crashed into a parked van. Comment was entirely consistent with the evidence. Affirmed.)

Wolcott v. State of Florida, 774 So.2d 954 (5th DCA 2001)(improper for prosecutor to attack defense counsel by pointing out to jury that defense counsel objected to evidence prosecutor wanted to present. "Now I tried to ask the deputy or officer if [the victim] had told him how she had found it, and [defense counsel] didn't want to let her say that because that was hearsay."

Objections of counsel are also not part of the evidence. Reversed on these and other grounds.)

Peavy v. State of Florida, 766 So.2d 1120 (2nd DCA 2000) (In response to defense counsel's argument that the defendant's alleged actions were reasonable for someone premeditating a murder, the State argued: "You think about Danny Rolling, you think about Timothy McVey [sic] and you think about all the murders committed. None of that was reasonable." Although it was improper for prosecutor to analogize def.'s case to other convicted murderers, the court's response to the prosecutor, "you're treading in very dangerous territory and I would caution you not to do that," was the equivalent of sustaining the objection and the defense did not pursue the matter further or request a curative instruction or mistrial. Error was not so egregious as to deprive the def. of a fair trial. Affirmed.)

Eure v. State of Florida, 764 So.2d 798 (2nd DCA 2000) (in arguing that jury should release def. if they believed that officer had lied when making two police reports and when he swore to the arrest warrant but should convict if they believed he had not lied, prosecutor was improperly buttressing officer's testimony by referring to matters not in evidence. Reversed on these and other grounds.)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (Improper State argument: "In fact, [defense counsel] told you that there are some things in police reports that are not even in evidence. ... I wanted them in evidence. It's not my fault they're not. ... He didn't read you the whole sentence.... If you are annoyed with Deputy Cruz, we understand that, but your verdict is not to send a message to Deputy Cruz or to Deputy Sherry. Believe me, I already took care of that out in the hall after you folks were excused.... [H]e doesn't want you to have the whole police reports. They're not in evidence. ... Why did he only tell you half the story? Let's see if he explains that when he gets up here. ... He didn't read you the other report. I'm going to read it to you right now if he doesn't ...." [Note: In this case the appellate court lists a collection of errors that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another panel of this DCA.])

Martinez v. State of Florida, 761 So.2d 1074 (Fla. 2000) (where state improperly asked officer, over defense objection, if he had any doubt whether def. was guilty and officer answered "no," prosecutor's argument to jury that def. was arrested after police investigation because, between officers and an assistant state attorney, "nobody had a doubt that he was guilty" compounded the prejudice of the improper question. Comment was also an improper expression of personal opinion by the prosecutor [which usually suggests to the jury that the prosecutor has evidence not presented to the jury, but known to the prosecutor, which supports the charges] and was not even based on facts in evidence since the officer was the only one who gave his opinion of guilt [although improperly]. Reversed.)

Felton v. State of Florida, 753 So.2d 793 (5th DCA 2000) (prosecutor's comment: "I could have paraded fifty witnesses in here that saw this, eyewitnesses, but there's not one that testified as well as that physical evidence does through the pictures and through the diagrams, no one," although normally improper, was not error where State specifically advised jury that there were no witnesses it could have called to assist the jury more than the physical evidence and the defense responded to the argument: "He said he could have put on fifty witnesses. He probably could have, had anybody been interviewed or had any investigation taken place." The defense chose to use the state's possible exaggeration as to the number of eyewitnesses not called as proof of a shoddy investigation and cannot subsequently claim error because of it. Affirmed)

Rivero v. State of Florida, 752 So.2d 1244 (3rd DCA 2000) (it was improper for prosecutor to make "conscience of community" argument, claim that witness avoided service of process [a fact not in evidence], make disparaging attack on defense counsel and defense, vouch for credibility of witness, suggest that someone had gotten to a witness to change his testimony [implying that def. had tampered with a witness] and suggest that the state had additional facts, not in evidence. Eight objections were sustained but motion for mistrial denied. Error not harmless. Reversed)

Johnson v. State of Florida, 747 So.2d 436 (4th DCA 1999) (in response to def.s counsel's comment that perhaps non-testifying witness failed to come to court and testify because she was not confident of what she had to say, it was improper for state to respond that perhaps she didn't testify because she was afraid, like other witness who testified. "It is error for a prosecutor to suggest that a witness did not appear due to fear of the def. where there is no evidentiary support for the proposition." Court sustained objection and instructed jury to disregard. Affirmed.)

Dunsizer v. State of Florida, 746 So.2d 1093 (2nd DCA 1999) (although the main opinion was a PCA, the concurring opinion sets forth an improper prosecutorial argument where the prosecutor's description of the attempted murder (i.e. that the victim was on his knees begging for his life) was not only unsupported by the evidence but was belied by the victim's own testimony that he was walking away from the def., heard him call out, turned to face him and was shot. Prosecutor's "have no license to argue fiction.")

McDonald v. State of Florida, 743 So.2d 501 (Fla. 1999) (improper for prosecutor to argue that the def. gagged victim because he "begged for mercy" or was "crying out" where there was no such evidence. "While it is a reasonable inference that victim was gagged to keep him quiet, the embellishment on what the victim may or may not have said, without a factual support in the record, was an appeal to the emotions of the jurors." No objections. Affirmed)

Henry v. State of Florida, 743 So.2d 52 (5th DCA 1999) (improper for prosecutor to refer to def. as a killer who was out to establish his reputation with motorcycle gang and suggest that he was a member of Outlaws gang where there was no support, whatsoever, for that in the record. Reversed.)

Jones v. State of Florida, 730 So.2d 346 (4th DCA 1999) (where def. raised defense of

involuntary intoxication to charge of battery on a law enforcement officer, claiming that somebody had slipped a drug or substance into his non alcoholic drink, it was improper for prosecutor to argue, without any supporting evidence or testimony, that no drug or substance would make the def. behave in an angry manner ["They don't cause anger as far as I know. There is no controlled substance, no prescription drug out there that causes anger."]. Reversed)

Bell v. State of Florida, 723 So.2d 896 (2nd DCA 1998) (Although it was improper for prosecutor to vouch for the truthfulness of officers, urge the jury to send def. a message, argue matters not in evidence and comment on def.s exercise of his right to trial by jury, the errors were not fundamental and the only error objected to [def.s exercise of right to trial by jury] was harmless. Affirmed.)

Legette v. State of Florida, 718 So.2d 878 (4th DCA 1998) (improper for prosecutor to argue that def. attorney had requested lesser included offenses, since it concerned a matter both outside the evidence and inappropriate for the jury's consideration. A prosecutor's disclosure of a legal position taken by a defense lawyer can affect the lawyer's credibility before the jury, which may perceive that the lawyer is arguing for an acquittal, but will settle for a lesser included offense. Error not preserved and not fundamental. Affirmed.)

Freeman v. State of Florida, 717 So.2d 105 (5th DCA 1998) (in pointing out the concerns that officers have when searching for weapons, it was improper for prosecutor to refer to recent funeral of police officer killed in the line of duty [facts not in evidence]. Reversed based upon totality of errors.)

Sinclair v. State of Florida, 717 So.2d 99 (4th DCA 1998) (improper for prosecutor to argue that officer would not put his career on the line by committing perjury. Such an argument necessarily refers to matter outside the record. Error harmless where judge sustained the objection and gave jury a curative instruction. Control of prosecutorial comments to the jury is within the trial court's discretion and will be upheld absent abuse of discretion. Affirmed.)

Estopinan v State of Florida, 710 So.2d 994 (2nd DCA 1998) (improper for prosecutor to repeatedly refer to def.s absence from the courtroom at the end of trial as evidence of his knowledge of guilt where there was insufficient record evidence from which to conclude that def. fled to avoid prosecution on the instant charge. Error not harmless. Reversed)

Ford v. State of Florida, 702 So.2d 279 (4th DCA 1997) (prosecutor's characterization of def.s statement to witness that he had "a little fun" with the victim as "rapist talk" was improper as it was not supported by any basis in the evidence. Also, prosecutor's reference to ending of a movie that def. claimed he and the victim watched ("What did he leave out, he left out the ending of the movie.... Ask yourself why, why he wouldn't tell us the way the movie ends.") and imitated was improper as the movie was not in evidence. Prosecutor's argument was a blatant attempt to insinuate to the jury that the movie had a sinister ending that the def. had intentionally omitted from his testimony. This was not fair comment because there was no testimony about

how the movie ended. By making this argument, the prosecutor implied that she had additional knowledge of an ending to the movie that would be adverse to the def. An argument suggesting that there was evidence harmful to the def. that the jury did not hear is highly improper. *TEST*: *Whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt*. Reversed on these and other errors.)

Reyes v. State of Florida, 700 So.2d 458 (4th DCA 1997) (It is generally improper for the prosecutor to comment on what other drug dealers do because every def. has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminals in general. State's comment in this case, that the jury could use their common sense and conclude that def. did not carry other drugs or cash on him so that there would be no evidence on him if he was arrested was proper. Prosecutor was simply hypothesizing about reasons why a drug dealer may not have marked money or drugs on him at the time of arrest.)

Smith v. State of Florida, 698 So.2d 632 (2nd DCA 1997) (improper for State to argue that def. charged with burglary and battery intended to commit sexual battery on victim, where there was no such testimony from the victim and no evidence in the record to support that argument.)

McLellan v. State of Florida, 696 So.2d 928 (2nd DCA 1997) (Prosecutor's comment that doctor/witness "told you, and I would think common sense should also tell you, that when somebody goes to a doctor they're honest" was improper because: (a) it served to bolster the witness' testimony; (b) the doctor had not so testified, therefore, the prosecutor was commenting on facts outside of the evidence and (c) the prosecutor was expressing his opinion on the credibility of the witness.)

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

Williams v. State of Florida, 692 So.2d 1014 (4th DCA 1997) (prosecutor's comment that def. had "gotten himself in trouble in Miami" was improper especially when there was no evidence to that effect, other than prosecutor's explanation to the court that "He was in Miami. Some reason he left Miami to come up here to pull this robbery. I am saying we don't know." Trial court sustained objection and admonished jury to disregard the comment. Mistrial should have been granted when comment was combined with improper testimony about def. having been recently released from jail.)

Perez v. State of Florida, 689 So.2d 306 (3rd DCA 1997) (it is "highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues, into any part of our judicial system.")

De Jesus v. State of Florida, 684 So.2d 875 (3rd DCA 1996) (Prosecutor argued that def. counsel's claim that the evidence is insufficient was to be expected because "that's her job. She is defending the defendant.... When you have the law, you emphasize the law. When you have the facts you emphasize the facts. And when you don't have anything, you bang on the table and attack the credibility of the witnesses." These comments were within the range of appropriate advocacy and not erroneous.)

Aja v. State of Florida, 658 So.2d 1168 (5th DCA 1995) (it was improper for State to read to jury deposition testimony of witness who had testified live at trial. Although portions of the deposition had been used by def. counsel for impeachment, the testimony read to the jury had not been published during the course of the trial. Reversed in part.)

Henry v. State of Florida, 651 So.2d 1267 (4th DCA 1995) (prosecutor's comment about impeachment of witness: "I impeached her a little bit because I wanted to show you that somebody got to her. Somebody got to her" was improper. Impeachment may imply that witness is lying but suggesting that "somebody got to her" suggests that the defense was engaged in tampering with a witness and suborning perjury, both criminal offenses. Objection was overruled below. Error not harmless. Reversed.)

Spencer v. State of Florida, 645 So.2d 377 (Fla. 1994) (where no testimony existed that victim had opened the door carrying a rifle because court had granted def.'s motion in limine precluding such testimony on relevance grounds, it was error for prosecutor to tell jury those facts in closing as that was a comment on matters outside the evidence. Objection sustained. Single comment not grounds for a mistrial. *Limited on other grounds: 753/29*)

Pacifico v. State of Florida, 642 So.2d 1178 (1st DCA 1994) (improper for State to argue that people are raped all the time in their homes, shopping malls and cars where no such evidence was presented, therefore only serving to suggest to jurors that society generally is threatened by pervasive presence of rapists and prosecutor has special information on that subject.)

Henry v. State of Florida, 629 So.2d 1058 (5th DCA 1993) (improper for prosecutor to comment in closing, without any evidentiary support, that def.'s had previously been involved in drug trafficking. Reversed.)

Garcia v. State of Florida, 622 So.2d 1325 (Fla. 1993) (where def. gave a statement stating that shooter was "Joe Perez," there was evidence that co-def. used alias of "Joe Perez" and police arrested co-def. based on that alias, it was improper for prosecutor to argue that "Joe Perez" did not exist and that def. and "Joe Perez" are "one and the same." Argument was not supported by the evidence and in fact was contradicted by all of the evidence. "[W]hile the State is free to

argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Death sentence reversed and remanded for new penalty phase.)

Stewart v. State of Florida, 622 So.2d 51 (5th DCA 1993) (at closing of guilt phase, improper for prosecutor to comment: "Now, during the next phase we'll get into more of the proof, the discussion of why he actually did it, but all we have to prove-you can determine-." This comment suggested to the jury that the State had additional evidence and proof of the defendant's guilt that it had not provided to the jury. The court's curative instruction, which did not inform the jury that all of the evidence had been presented to them but simply told them to disregard the prosecutor's comments and decide the case on the evidence before them, did little to dispel the suggestion. *TEST: "Inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt"*[citing federal case]. Reversed based upon cumulative errors.)

Landry v. State of Florida, 620 So.2d 1099 (4th DCA 1993) (Prosecutor's query as to why "They [the police officers] would risk all of their years, their unblemished records [to lie in this case]" was improper bolstering where there was no evidence as to officer's "unblemished records.")

Cantero v. State of Florida, 612 So.2d 634 (2nd DCA 1993) (in response to def.'s testimony that he could not have been the person wearing dark glasses who robbed the victim because he had the tint bleached out of his sunglasses at the mall the week before the robbery, prosecutor's statement in closing that he had seen the def. in jail around the date that he supposedly went to mall was impermissible unsworn testimony and highly prejudicial. Reversed.)

Bogren v. State of Florida, 611 So.2d 547 (5th DCA 1992) (it was proper for prosecutor to argue that def. used money allegedly obtained by fraud to pay off gambling debts were the evidence showed that the def. was a gambler, that he wrote a check to a casino which overdrafted his personal account and was then reimbursed by the travel agency, owned by him and his wife, shortly after it collected advance payment from victims for travel arrangements. Inferences were supported by the evidence.)

Adams v. State of Florida, 585 So.2d 1092 (3rd DCA 1991) (prosecutor's suggestion to jury that identification of def. several days after drug deal with undercover officer should be believed because officer recognized def. because officer "is a narcotics officer ...." He's all over the place. He's made buys he's made sales. He sees lots of people –" was completely without an evidentiary basis and were inflammatory [presumably for suggesting def.s involvement in other drug deals]. Reversed.)

Stewart v. State of Florida, 558 So.2d 416 (Fla. 1990) (ct. erred when it precluded defense

counsel from arguing that when def. told witness about murdering the victim, def. was simply relating to witness what real murderer had told him. Although witness was asked whether def. had told him that he obtained that information from the murderer and witness denied that statement, def. counsel was hypothesizing from evidence that had been presented during the trial and should have been allowed to continue. Error harmless. Conviction affirmed.)

Bain v. State of Florida, 552 So.2d 283 (4th DCA 1989) (prosecutor's closing argument, containing a story about a hypothetical person with the def.'s same name who told the police: "You have no right stopping me, I am leaving ..." was improper as it highlighted def.'s exercise of his right to remain silent and was not based on any evidence, therefore improperly suggesting what might have been said. [Note: argument followed prosecutor's aborted attempt to ask the officer: "Did he ever say whether or not he was involved in a robbery?" Reversed.)

Rhodes v. State of Florida, 547 So.2d 1201 (Fla. 1989) (improper for prosecutor to insist that def. acted like a vampire when he committed crimes in Florida and Nevada where there was no evidence to support that assertion in the record. Reversed due to cumulative effect of all errors and judge's failure to sustain any of the objections.)

Shorter v. State of Florida, 532 So.2d 1110 (3rd DCA 1988) (error for prosecutor to state in closing that def.s sister had previously attacked victim with a knife when no such evidence was presented at trial.)

Starr v. State of Florida, 518 So.2d 1389 (4th DCA 1988) (it was proper for defense counsel to point out to the jury that the state failed to prove that baggie containing cocaine had any of def.'s fingerprints on it. A reasonable doubt is often created by the lack of evidence of guilt and, thus, comment on the absence of evidence on an issue pointing to guilt is fair and proper comment. Reversed.)

Travieso v. State of Florida, 480 So.2d 100 (4th DCA 1985) (*opening statement*- there was no error when prosecutor and co-defense counsel laid out their case in opening as if uncalled witness were going to testify, although nobody subsequently called the witness. Counsel were outlining the case as they expected it would unfold. There was no showing that they knew the witness would not testify. Affirmed.)

Breines v. State of Florida, 462 So.2d 831 (4th DCA 1985) ("[Y]ou don't need fingerprints when you have got eyewitnesses ... and I could have brought in 5 others" improper. Error harmless. [Note: error is in claiming that he could have brought in 5 other eyewitnesses, not in the comment that fingerprints are not necessary when you have eyewitnesses.] Affirmed.)

Duque v. State of Florida, 460 So.2d 416 (2nd DCA 1984) (prosecutor's statement about what defendant told doctor, when doctor was not allowed to testify because of discovery violation, went beyond evidence before the jury. Fundamental. Reversed although no objection at time of comment but only motion for mistrial at end of closing).

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) ("It is improper to refer to extra-testimonial facts during a final argument", especially when it intimates that the def. committed other crimes.)

Parker v. State of Florida, 456 So.2d 436 (Fla. 1984) (in death penalty case, claim that prosecutor emotionally inflamed the jury by referring to his previous life sentence for a murder committed in 1967 and to the life sentence imposed for the D.C. murder following the commission of the present murder, and concluding that "if life meant life" both Chavez and the D.C. victim would be alive today was not properly preserved. At trial, defendant objected only on the ground that the prosecutor was arguing outside the evidence. The trial judge properly overruled the objection because both convictions were obtained prior to the sentencing in this case and were properly introduced as aggravating factors. Defendant's argument on appeal that the jury was emotionally inflamed was not presented at trial and, thus, was not properly preserved for appeal. Nonetheless, even had it been preserved, it would have no merit. The record shows that defendant was sentenced to life imprisonment for first-degree murder in 1967, and later murdered two additional persons. Under these circumstances, it is manifestly obvious that "if life meant life" the defendant would not have murdered these two additional victims. The prosecutor did not predict that the defendant would murder again if sentenced to life imprisonment and paroled after twenty-five years. Such argument would have been improper. Affirmed)

Harris v. State of Florida, 438 So.2d 787 (Fla. 1983) (prosecutor's comment: "I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial" was not a comment on the def.'s failure to testify at trial. As remainder of argument reflects, prosecutor was referring to the critical issue of whether the def.'s confession was voluntary and, in doing so, was commenting on appellant's demeanor at the time the confession was made and comparing it with his demeanor at trial. [Note: court does not address whether it was appropriate to comment on the demeanor of a def. who did not testify at trial.] Affirmed.)

Huff v. State of Florida, 437 So.2d 1087 (Fla. 1983) (improper for prosecutor to imply that the def. had committed forgery on life insurance of decedent as motive for murder where there was no evidence to support that suggestion. Reversed.)

Mulford v. State of Florida, 416 So.2d 1199 (4th DCA 1982) (in a case where def. [rightfully] attempted to introduce a redacted letter but it was excluded upon objection from the state, it was improper for state to argue to jury that state would not have objected to introduction of entire letter but that def. counsel did not want jury to see entire letter, that def. only wanted jury to see letter with portions deleted and that they could draw their own inferences from that. Prosecutor also argued that he was not implying that def. counsel was doing anything wrong, stating that it's his job to defend his client and "[i]f he feels that it would not benefit his client to introduce those portions, then he has a right to try to keep those out of the case." Reversed.)

Breedlove v. State of Florida, 413 So.2d 1 (Fla. 1982) (prosecutor's comment that def. knew that there was a woman home was supported by the existence of a purse in the burglarized home. His conclusion that "He went prowling through the house to find that woman" however, was not supported by any evidence. New trial was not required.)

Cummings v. State of Florida, 412 So.2d 436 (4th DCA 1982) (It was improper for prosecutor to attempt to bolster the credibility of her witness by making statements about her office's policy regarding persons who commit violent crimes. Likewise, it was improper to argue how prosecutor was sure that auto body man called by def. as a witness had been paid nicely for the body work on appellant's van when neither party had introduced evidence regarding the amount paid for the body work. Reversed on other grounds.)

Carter v. State of Florida, 332 So.2d 120 (2nd DCA 1976) (in rape trial prosecutor presented Williams Rule evidence concerning def.s advances to another woman. Witness testified that, upon her rejection of his advances, def. asked: "What if I just went ahead and kiss (sic) you and you didn't let me. It wouldn't be your fault, you wouldn't be letting me kiss you." Prosecutor's attempt to convey to jury that def. had threatened to force himself upon witness was unsupported by the evidence. In that light, prosecutor's reference to the def. as a "rapist" may have been interpreted by the jury as referring to his incident with the Williams Rule witness, rather than the evidence in the case at trial. Improper argument. Reversed.)

Pait v. State of Florida, 112 So.2d 380 (Fla. 1959) (improper for prosecutor to inform jury that the def. had the right to appeal a guilty verdict but that the State could not appeal a conviction. Also improper for State to inform jury that, before deciding whether to seek death penalty, a conference is held at the State Attorney's Office to determine whether the death penalty is an appropriate punishment for the case. While prosecutor may urge jury to prescribe the death penalty on the basis of the evidence it heard, he may not undertake to give the jury the benefit of the composite judgment of the State Attorney's staff allegedly reached on the basis of investigations and discussions taking place before the trial. Comments found to be calculated to forestall a mercy recommendation, rather than casual, innocuous observations. Reversed)

Irvin v. State of Florida, 66 So.2d 288 (Fla. 1953) (where def. successfully prevented state from impeaching def. witness about prior contacts with police, it was improper for prosecutor to argue in closing that he had tried to prove that defense witness had a grudge against law enforcement but "he [def. counsel] stopped me from proving it –". Trial court denied motion for mistrial and refused to instruct jury to disregard. Error harmless. Affirmed.)

Akin v. State of Florida, 98 So. 609 (Fla. 1923) (Improper for prosecutor to argue that def. has other charges pending against him in connection with transactions at issue in trial and that prosecutor does not intend to try those cases so it is up to this jury whether it will "let this man go scot free and say that he has not committed any wrong." Any attempt to ... influence the jury by the statement of facts or conditions not supported by the evidence should be rebuked by the trial

court, and, if by such misconduct a verdict was influenced, a new trial should be granted. Reversed.)

B. Comment or reply regarding uncalled witnesses or failure to call a witness

McDowell v. State of Florida, 162 So.3d 124 (4th DCA 2014) (in response to defs argument that only one officer had testified about def's tossing away a key to the crack house upon being detained, it was improper for state to argue: "You didn't really expect the other police officer's testimony would have been any different than what you've already heard? … Do you expect that testimony to be any different? Of course not. I have too much respect for your time to waste your time to call ten people to tell you the exact thing over and over again." State may respond to "lack of evidence" argument but not by suggesting there are other witnesses who would have corroborated the state's case if called to testify. Error preserved. Reversed.)

Diaz v. State of Florida, 139 So.3d 431 (3rd DCA 2014) (where def. counsel argued that only evidence of assault state had presented was 911 tape and that state had failed to call witness who called 911, it was error for prosecutor to reply that witness would simply have told jury "exactly the same thing that's on the 911 call." Where defense counsel comments upon the state's failure to call a witness who is demonstrably competent and available, it opens the door to a fair reply by the prosecuting attorney that the defense has the same ability to put on the witness and such a response does not prejudice the defendant's right to a fair trial. The prosecution may not, however, ask the jury to accept the his or her assurance that there exists extra-record evidence to corroborate that which the jury heard during the trial.

Datilus v. State of Florida, 128 So.3d 122 (5th DCA 2013) (in sexual battery on a minor case, where initial DNA report mistakenly excluded def. and state's forensic expert subsequently realized mistake and corrected report so that it did not exclude def., it was error for defense attorney to argue about the State's failure to produce the lab supervisor who approved both the mistaken and corrected report: "[S]he had the results [that the defendant was not the father] verified. And she testified that some person who verified it, who didn't come in here and testify how they made that mistake also" … [and, after State's *Haliburton* objection was sustained] "for the first time [the expert witness] talked about who this person who verified it was. And this person wasn't brought here either." Supervisor was equally available to both parties and court was correct in sustaining *Haliburton* objection. Affirmed.)

Covington v. State of Florida, 75 So.3d 371 (Fla. 4th DCA 2011) (Where defendant was charged with grand theft arising from shoplifting, and there was a surveillance video of the theft, but it was not introduced at trial because store had recorded over it; and defendant contended during closing argument that absence of video was a lack of evidence creating a reasonable doubt, it was error for prosecutor to respond that defendant had just as much of an opportunity to produce video as did state -- Prosecutor's argument was factually inaccurate where it does not appear that defendant was aware of the surveillance video during the 60-day period when it might

have been obtained from store. Further, argument improperly shifted burden of proof to defendant. "[T]he state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe the defendant carried the burden of introducing evidence." Reversed.)

Jean-Marie v. State of Florida, 993 So.2d 1160 (4th DCA 2008) (it was not improper for trial court to prevent defense counsel from commenting on State's failure to call as a witness a police officer who took a statement from defendant, where court found officer was equally available to both sides. Although *dicta* exists suggesting that an officer who works closely with the prosecution in formulating the case shares a special relationship with the State such that the officer is not equally available to both sides [see *dicta* in Martinez, 478/871], court need not address whether it agrees with that comment since it was not shown that officer had information that would "elucidate the transaction," the second prong of *Halliburton*. Trial courts have discretion in regulating comments to be made in closing arguments. Affirmed.)

Love v. State of Florida, 971 So.2d 280 (4th DCA 2008) (in prosecution for battery on an officer where def. witness testified she was part of a crowd of fellow church members who watched the officers assault the def., it was error for prosecutor to attack def. in closing for failing to produce additional witnesses from the crowd to corroborate defense witness' story. The general rule is that "the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence." The supreme court has "applied a narrow exception" to the general rule to "allow comment when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state." A witness is not "equally available" to the state if the witness has a special relationship with the defendant. In this case, def did not assert an affirmative defense for which he assumed any burden of proof (he simply denied that the crime happened) and there was no evidence of a special relationship between def. and the people who were at the scene of the crime. Reversed.)

Hernandez v. State of Florida, 960 So.2d 816 (3d DCA 2007) (trial court did not err in precluding def. counsel from commenting on state's failure to call crime scene technician. The fact that a potential witness, even a police officer who worked on the case, is not called by the State does not give the defendant absolute right to insinuate on closing argument that the witness's testimony would be negative to the State. "When such witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness." Affirmed in part, reversed in part.)

Fenster v. State of Florida, 944 So.2d 477 (4th DCA 2006) (although individually the state's various arguments that lacked any support in the record would not have warranted a new trial, collectively they destroyed the fairness of the proceedings. Comments unsupported by the record included: that the fork allegedly used by the victim as a weapon was found in the sink, rather than by her body; that the def. should have known that the victim's head would probably hit a

stud in the wall when he pushed her because studs are generally 16 inches apart; that the victim's head was swelling as she lay on the floor waiting for police; that the def. was upset because the victim was moving out; and a comment about legislative intent with regard to reasonable doubt. Reversed.)

Conner v. State of Florida, 910 So.2d 313 (5th DCA 2005) ("To prevent the jury from being misled into believing that the def. has the burden of proof, the state is forbidden from commenting on the def.'s failure to produce evidence to refute an element of the crime he or she is charged with committing." [citations omitted] A narrow exception applies when the def. voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense and defense of others, relying on facts that could only be elicited from a witness who is not equally available to the state. In that situation, the state is permitted to comment on the def.'s failure to produce a witness when: 1) the evidence indicates the existence of a witness who could give relevant testimony, and 2) that witness has a special relationship with the def. that does not make him or her equally available to the state. Here, def. claimed that she was stopped and arrested inside the garden section of the store by security officers while pushing a cart for her friend Wendy (rather than outside the store as the state contends) and that the pants she was wearing (in which cocaine was found) belong to her other friend Penny. Since these claims do not constitute the defense of alibi, self-defense or defense of others, the state erroneously commented on def.'s failure to produce these "witnesses." Error harmless. Affirmed.)

Lena v. State of Florida, 901 So.2d 227 (3rd DCA 2005) (where defense counsel commented on the fact that the State was trying to "tailor the evidence" by not calling a particular witness which thereby forced the defense to call that witness [see Amos below, 618/157], trial court erred in sustaining state's objection to such argument. Error was harmless where on several occasions the defense was able to tell the jury that the state was tailoring the evidence by not calling the witness. The "Amos Rule" holds that where the defense calls a witness at trial who the state failed to call, the defense may argue that the state was attempting to tailor the evidence. The state may argue in rebuttal the reasons why it did not call the witness in its case in chief. [Note: this is a horrible rule because 1) this promotes name calling and finger pointing between the parties, instead of having the jury decide which evidence it believes to be true; 2) it puts the prosecutor in the role of witness, testifying as to the reasons why the witness was not called; 3) there may be many reasons why the state may not call a witness which the jury should not hear {for example, if the state gave the witness a polygraph test and the witness failed, would the state be able to explain that to the jury?} 4) the state does not always have a rebuttal.] Affirmed.)

Beard v. State of Florida, 884 So.2d 1008 (3rd DCA 2004) (issue of whether trial court erred in preventing defense counsel from arguing in closing that an adverse inference arose from the State's failure to call victim/police officer as a witness, where there was no adequate explanation for his absence, was moot where jury did not convict def. of crime against victim officer. [**Note:** original opinion, subsequently withdrawn by this opinion on Motion for Rehearing, found that trial court erred. Original opinion contained a dissent from Judge Green arguing that while officer had a "special relationship" with state under facts of this case, there was no evidence

presented that his testimony would "elucidate the transaction" because cumulative testimony does not give rise to such inference. Since the prior opinion has no precedentiary value and is now nonexistent, this dicta is provided for information only.])

Johnson v. State of Florida, 828 So.2d 460 (4th DCA 2002) (it was not error for trial court to grant State's motion in limine precluding def. from commenting on State's failure to call a certain witnesses where those witnesses were equally available to the State and the defense. Reversed on other grounds.)

Lasprilla v. State of Florida, 826 So.2d 396 (3rd DCA 2002) (it was improper for defense counsel to comment on State's failure to call a witness where witness was equally available to both sides. Witness, a friend of the victim who was present when the robbery occurred, had been flown in for trial and expected to testify for the State, but failed to appear in court. Trial court prohibited def. counsel from commenting on State's failure to call witness but allowed def. to comment that there was a lack of evidence in the case or lack of corroboration of the victim's testimony without reference to missing witness. "An inference adverse to a party based on the party's failure to call a witness is permissible WHEN IT IS SHOWN that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction." Here, the witness was equally available to both parties. The trial court was entirely correct in prohibiting any argument which stated, or implied, that an adverse inference should be drawn against the State for failure to call the witness. Affirmed.)

Reid v. State of Florida, 799 So.2d 394 (4th DCA 2001) (where def had claimed self-defense in his shooting of store security guard, it was permissible for state to comment on def.'s failure to call his wife, who was present during the incident, as a witness. The state is allowed to comment on a def's failure to call a witness to testify if the def. puts on evidence of a defense such as alibi, self-defense or defense of others which reflects the existence of a witness who could give relevant testimony and who is not equally available to the State. Although def. claimed that his wife was equally unavailable to him because she was in Jamaica, availability is determined by relationship not geographical proximity. The wife, girlfriend or long time acquaintance of a party will usually be considered to be available as a witness for that party. Conviction affirmed and remanded for resentencing on other grounds.)

Gutierrez v. State of Florida, 798 So.2d 893 (4th DCA 2001) (where police officer testified that after bumping into each other, def. drew a gun and pointed it at him, and def. testified that it was his friend Roman who drew a gun and handed it to him but that he never pointed it at the officer, it was improper for prosecutor to argue "where's Roman? Roman's his friend." To comment on def.'s failure to call a witness, the State must show that the def. asserted a defense of alibi, self-def. or def. of others relying of facts that could be elicited only from a witness who is not equally available to the state. A witness is not equally available when there is a special relationship b/w def. and the witness. Here, however, Def. did not assert an affirmative defense. Instead, his testimony was directed at refuting an element of the State's case. Def.'s testimony that he was scared that the officer was going to beat him up because the def. is much smaller did not amount

to a self-def. claim which might allow comment on his failure to call a witness. His testimony was given in the context of an explanation as to why he took the gun from his friend. The record also fails to support the State's argument that a special relationship existed between appellant and Roman and that because of that relationship Roman would have a reluctance to testify against appellant. Reversed.)

Duncan v. State of Florida, 776 So.2d 287 (2nd DCA 2000) (although it would be proper for prosecutor to comment on defendant's failure to call friends and relatives who supposedly could substantiate his alibi defense, it would have been improper to argue that the alibi witnesses "didn't come in because they can't tell you that he was there on that day" without record evidence to support that allegation. Summary denial of post-conviction motion reversed and remanded for evidentiary hearing or attachment of record evidence.)

White v. State of Florida, 757 So.2d 542 (4th DCA 2000)(it was improper for prosecutor to comment on def.'s failure to call his cousin and another witness to testify in support of his version of the facts because doing so could erroneously lead the jury to believe that the def. carried the burden of introducing evidence. Narrow exception applies only if "the def. voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state." Comment outside of that narrow exception impinges upon the def.'s right to remain silent and the presumption of innocence (by placing an obligation on the def. to come forward with evidence). Here, defense amounted only to a general denial of knowledge that package contained drugs rather than an affirmative defense. Error was compounded when prosecutor commented further on the nature of the missing evidence and suggested that witnesses chose not to testify because it would have constituted perjury [facts not in evidence]. Reversed)

Mackey v. State of Florida, 703 So.2d 1183 (3rd DCA 1997) (Prosecutor's comment to jury that they would have to decide who they believe as to cause of death because "Let's face it. You're a jury. You hear a lot of experts. We can parade experts in here for five, ten, fifteen days- ....Ultimately, you, as the jury, need to decide" although improperly implying the existence of other witnesses who did not testify, was cured by courts sustaining of the objection. The isolated comment, considered in context, addressed the jury's obligation as fact-finder to determine issues despite conflicting expert testimony. *[Subsequently reversed on other grounds - State v. Mackey, 719 So.2d 284]*)

Bauta v. State of Florida, 698 So.2d 860 (3rd DCA 1997) (where state wanted to call officer as a witness but def. counsel successfully objected to testimony of officer concerning child witness' statement and state, therefore, did not call officer, it was improper for def. counsel to then argue to jury the State's failure to call officer and suggest that it must be because he would not have testified favorably for the State. Def.s suggestion was misleading. Although trial court prevented def. from making that argument on the basis of Haliburton, the appellate court pointed out that Haliburton does not apply because the officer actually testified at trial [called by the def. as to other issues])

Knight v. State of Florida, 672 So.2d 590 (4th DCA 1996) (error for prosecutor to argue that uncalled witness was a "criminal" who would have lied if called to the stand.)

Terry v. State of Florida, 668 So.2d 954 (Fla. 1996) (where there was no indication that witness was "peculiarly within the [state's] power to produce" and that his testimony would have "elucidate[d] the transaction," it was proper for court to limit def.s' closing argument and prevent him from commenting on the State's failure to call the witness.)

Hazelwood v. State of Florida, 658 So.2d 1241 (4th DCA 1995) (Although prosecutor may not normally comment on the def.'s failure to produce evidence to refute an element of the crime because doing so could shift the BOP, prosecutor's comment during closing argument that "defense counsel has the same subpoena power as the state of Florida," was an appropriate response to defendant's closing argument explicitly commenting on state's failure to call witnesses. However, prosecutor exceeded the scope of a "fair reply" when he then commented that if the witnesses had been called they would have simply corroborated what other witnesses had already said. A prosecutor cannot suggest during closing that there are other, uncalled witnesses who would corroborate the state's case, as this refers to matters outside of the evidence. Reversed)

Tillman v. State of Florida, 647 So.2d 1015 (4th DCA 1994) (in response to def.'s comment about State's failure to call other officers, it was improper for State to say that they were unnecessary because they would have just reiterated testimony of other witnesses.)

Rogowski v. State of Florida, 643 So.2d 1144 (3rd DCA 1994) (Although it was improper for State to comment on def.'s failure to call a witness by alleging that the witness had nothing positive to say about def., this comment was provoked by def. counsel's improper comment that the State had failed to call the same witness, namely, that this witness was the "real perpetrator," although there was no evidence to support this comment. Error harmless where court instructed jury that def. did not have to prove anything.)

Parker v. State of Florida, 641 So.2d 483 (5th DCA 1994) (where def. took the stand and claimed that his nephew had driven his car earlier that day and drugs found inside must have been his, it was proper for the State to comment on his failure to produce his nephew as a witness.)

Harris v. State of Florida, 636 So.2d 137 (3rd DCA 1994) (it was proper for court to prevent def. from commenting in closing argument on state's failure to call confidential informant as a witness where the requirements of Haliburton were not satisfied [i.e. that the uncalled witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction]. The court stated: "While we do not agree with the state that the witness was not within its power to produce, we find that the CI had only a minimal relationship with the case at all and none whatsoever with the def. himself. Hence his testimony would not have "elucidate[d]

the transaction.")

Amos v. State of Florida, 618 So.2d 157 (Fla. 1993) (Where state called passenger in vehicle as a witness but did not call driver and def. called driver as a witness, it was proper for def. to comment on State's failure to call driver as a witness and to suggest to the jury that State was attempting to tailor the evidence. *Haliburton restriction does not apply where witness actually testified at trial*. Error in trial court, *sua sponte*, interrupting def.'s closing argument and instructing jury that, among other things, "the state has no obligation to call every single witness or produce every single item of evidence.... [I]t is up to them when to decide when they think they have produced enough evidence." While in another case this error might be harmless, this was a close circumstantial case.)

Miller v. State of Florida, 582 So.2d 85 (3rd DCA 1991) (it was not improper for state to comment on def.'s failure to call companion (driver of car) as a witness at trial where defense counsel's opening argument alleged that defendant's companion was perpetrator of burglary for which defendant was charged, despite contention that it improperly led jury to believe that the defense carried the burden of producing evidence.)

Haliburton v. State of Florida, 561 So.2d 248 (Fla. 1990) (trial court did not err in precluding the defense from commenting on the state's failure to call a witness where the witness was equally available to both parties. In order for there to exist an inference adverse to a party based on the party's failure to call a witness, it must be shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction. "The purpose of closing argument is to help the jury understand the issues by applying the evidence to the law. Thus, the purpose of closing argument is disserved when comment upon irrelevant matters is permitted.)

Crowley v. State of Florida, 558 So.2d 529 (4th DCA 1990) (where def's closing argument did not raise the issue of the state's failure to call a witness, it was error for prosecutor to argue to jury that def. had subpoena powers and could have called witnesses who were present at the scene, including one who was his friend, to corroborate his claim that he was not selling drugs as the arresting officer claimed. After defense objection was overruled, prosecutor continued to argue that def had "testified these people were present at the scene, they saw what was going down, they are friends of Mr. Crowley's. But where are they?" The prosecutor also pointed out to the jury that if there were anybody out there that could vouch for Crowley's version of the facts, they would have been called to testify. Error was not invited and deprived def. of a fair trial. Reversed.)

Restrepo v. State of Florida, 552 So.2d 1126 (3rd DCA 1989) (improper for prosecutor to say that a witness was absent "maybe because he is afraid to testify against this man" without support in the record.)

Williams v. State of Florida, 548 So.2d 898 (4th DCA 1989) (When def. raises the State's

failure to call other witnesses, the State may respond but may not suggest that there are other witnesses who would corroborate the State's case if called.)

Garron v. State of Florida, 528 So.2d 353 (Fla. 1988) (improper for prosecutor to state: "If [victim] were here, she would probably argue the def. should be punished for what he did." Reversed based upon cumulative effect of all errors. *Abrogation on other grounds recognized in 979/301*)

State of Florida v. Delafuente, 487 So.2d 1083 (4th DCA 1986) (trial court erred in granting a new trial based upon prosecutor's comment on defendant's failure to call confidential informant as a witness. No objection was made to comment and error, if any, was not fundamental where prosecutor's comment (that defense counsel knew who CI was and could have called him as a witness as well) was made after defense counsel first raised the issue by arguing that there were a lot of people the jury did not get to hear from and, specifically, that they did not get to hear the confidential informant rebut any claims made by the defense. Order granting new trial reversed.)

Martinez v. State of Florida, 478 So.2d 871 (3rd DCA 1985) (The general rule is that an inference adverse to a party based on the party's failure to call a witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction. "Availability" takes into account both practical and physical considerations. It may depend as much on the relationship to that party as on his physical availability. Special relationships have been found where the witness was the def.'s daughter; where there was a friendship between the party and the witness; where the witness was the employer of the def.(Federal Case); where the witness was a police officer closely associated with the government in developing its case and had an interest in seeing his police work vindicated by def.'s conviction (Federal Case); where the witnesses were state employees who were present at alleged suggestive pretrial line-up and were still in state's employ at time of trial; and where the witness was an informer associated with government in development of case against def. and there was no indication at trial of any break in the association. In this case, the co-def. plead guilty, was listed by the State as a witness, was brought from prison in case his testimony was needed and was deposed by the def. No special relationship existed to make co-def. less available to the def. than to the State. **Note:** beware of dicta as to other relationships that may qualify as this case involved the calling of a co-def. See *Jean-Marie*, 993/1160 above.)

Williamson v. State of Florida, 459 So.2d 1125 (3rd DCA 1984) (in response to def. argument that State failed to call any neighbors to say that def. was at the scene and thereby contradict his alibi, it was improper for State to say it could have brought in the neighborhood and "have them tell you what they saw. The defense would have said these people are lying." State may not imply that there exist other witnesses who, if called, would have testified favorably for the State; and that they were not called because the def. would have called them liars. State may advise jury of def. subpoena power, or that evidence could not have been received over objection [see Wilder v. State] or that witness' testimony was not impeached.)

Dunbar v. State of Florida, 458 So.2d 424 (2nd DCA 1984) (A prosecutor's reference to def.'s failure to call certain witnesses may be prejudicial if it refers to a def.'s exercise of his right to remain silent or if the comments indicate that the def. has the burden to come forward with evidence and prove his innocence. However, it is not improper for a prosecutor to refer to a def.'s failure to call certain witnesses when def. counsel indicates in opening statements that those witnesses would be called to testify. Here, def.'s counsel referred to witnesses in opening and, when nobody called them, commented to jury on the state's failure to call them. Under those circumstances, it was proper for state to respond that def. could have called the witnesses as well. Affirmed.)

State of Florida v. Michaels, 454 So.2d 560 (Fla. 1984) (where def. claimed self defense or defense of others and daughter was an eyewitness to incident, it was appropriate for prosecutor to comment on def.'s failure to call daughter as a witness. She was not "equally available" to both sides because of her special relationship to the def. which would normally bias her toward supporting her father's defenses [reversing 429 So.2d 338] .)

Araujo v. State of Florida, 452 So.2d 54 (3rd DCA 1984) (where prosecutor challenged def.'s explanation of his presence at site of marijuana raid to meet a friend about a business deal as unreasonable, and def. attorney responded that, reasonable or not, he shouldn't be punished for his friend's [Frank DeCamilla's] choice of locale for a business discussion, it was improper for prosecutor to reply: "Where is Frank DeCamilla? We both called witnesses. I called everybody I wanted." Def. counsel's response did not "open the door" to "missing-witness inference." Although presumably competent, witness was not peculiarly within def.'s power to produce [being in the custody of the Dept. of Corrections. Trial court overruled objection. Reversed.)

Jones v. State of Florida, 449 So.2d 313 (5th DCA 1984) (prosecutor's suggestion that witnesses had been intimidated into being absent from trial improper where no such evidence was presented.)

Trinca v. State of Florida, 446 So.2d 719 (4th DCA 1984) (in a case where def.'s stepdaughter, a drug user with many arrests, was apparently involved in the events leading up to def.'s arrest and gave the police a statement, and where prosecutor withdrew question about stepdaughter's statement following hearsay objection, it was improper for state to argue: "Then I would have loved to put the stepdaughter on *if I could* ... he has the same subpoena power that I do. How did he get the other witnesses in here?" Argument suggested that witness was unavailable to prosecutor and that def. had the burden of producing witnesses to show his innocence. Trial court overruled objection and denied request for curative instruction. Reversed.)

Kindell v. State of Florida, 413 So.2d 1283 (3rd DCA 1982) (Pearson, J. concurring: Even if the def. raises the defense of alibi, the law permits an inference adverse to the defendant [or state] for failing to call a witness only when it is shown that the witness is peculiarly within the def.'s power to produce and the testimony of the witness would elucidate the transaction, that is, that the witness is both available and competent [care should be taken that "available and competent"

not be too interpreted too broadly given later cases describing the "special relationship" or "not equally available" requirement] Error for state to argue such inference where def. did not raise an alibi defense [it was raised by the state as a "straw man"] and state did not show availability and competence as listed above. Error not preserved where def. counsel simply objected and requested a sidebar ["the functional equivalent of a child raising his hand in the classroom"], court stated he could have a sidebar later and def. counsel did not argue for mistrial or curative instruction until jury retired.*[Subsequently disapproved of on other grounds - Reynolds v. State, 452 So.2d 1018]*)

Libertucci v. State of Florida, 395 So.2d 1223 (3rd DCA 1981) (Improper for prosecutor to state that if he could have called co-def. to testify he would have, as that suggests testimony would have supported state's case.)

Lynn v. State of Florida, 395 So.2d 621 (1st DCA 1981) (improper for prosecutor to comment on def.s failure to call a witness and matters outside the evidence: "He said, 'Where is Charles Williams?' Always got to have the mystery man. I ask you the question of where is James Atkins today? We presented you the available witnesses. Where is James Atkins today? Sometimes we know where they are and can't tell you." However, statements could be viewed as fair comment to refute statements made by def. in his closing. Even in conjunction with other errors, not sufficient to warrant a new trial.)

Brinson v. State of Florida, 364 So.2d 66 (4th DCA 1978) (Prosecutor's comment about the absence of witnesses who had obvious knowledge of the defense asserted by def. was not improper [no facts given]. Affirmed with modified sentence.)

Wilder v. State of Florida, 355 So.2d 188 (1st DCA 1978) (Where def. argues insufficiency or lack of evidence because of the State's failure to call a corroborating witness, the State may properly respond that such evidence could not be received in the State's case over objection [if correct], that the witness was as available to the def. as to the State, and that the witness to be corroborated was not impeached. However, the State may not recite to the jury testimony the missing witness would have given if called.)

Buckrem v. State of Florida, 355 So.2d 111 (Fla. 1978) (it was proper for prosecutor to comment on def.s failure to call two witnesses [one of which was the def.'s wife] who could have testified relative to def.'s claim of alibi. Comment is appropriate if witness is "competent and available," especially if witness is def.'s wife. [See caution against interpreting "competent and available" too broadly in Kindell summary above].)

Lane v. State of Florida, 352 So.2d 1237 (1st DCA 1977) (improper for prosecutor to comment on def.'s failure to produce a witness as to his self-defense claim without laying appropriate predicate of "availability and competence" [see cautionary note in Kindell summary above]. Also improper for prosecutor to argue: "I suggest to you that Mr. Ellison is quite credible, but then I have got [sic] to know him a little better than you have." as that suggests reasons outside of

the record to support the witnesses credibility.)

Richardson v. State of Florida, 335 So.2d 835 (4th DCA 1976) (prosecutor's assertion in closing that he "could have brought in a lot of police officers" improper and prejudicial in close case that hinged on defendant's credibility)

Thompson v. State of Florida, 318 So.2d 549 (4th DCA 1975) (improper for prosecutor to comment that he could have called other officers to say "that this man said those statements" but "I saw no need.... I could have brought in other witnesses...." Also improper to argue, with regard to officer's testimony, "in my own mind, I was sure that he was telling me the truth that the def. made those statements." Court held that prosecutor's representation that he had additional evidence of def.s guilt which he simply saw no need to present was highly improper and fundamental error in view of the "close case." Prosecutor must confine his closing argument to evidence in the record and must not make comments which could not be reasonably inferred from that evidence [no mention made of expressing personal opinion of officer's credibility.] Reversed.)

Jenkins v. State of Florida, 317 So.2d 90 (1st DCA 1975) (the defense attorney told the jury during opening statement that the defendant's common law wife would be called to testify and would provide an alibi for him. The common law wife was present in the courthouse throughout the trial. In closing argument, the prosecutor commented that the defendant failed to produce his wife as promised by his attorney. Held: Comment was proper. Affirmed).

Deshler v. State of Florida, 298 So.2d 428 (1st DCA 1974) (in anticipation that def. counsel would comment on his failure to call the accomplice, a listed witness, prosecutor explained that defs. counsel knows who the State's witnesses will be and that witness was disclosed but "I happen to know that he was not served with a subpoena and he did not testify." Court sustained objection and instructed jury to disregard comment. Appellate court held that although it is improper "for either side to comment on failure to call an accomplice who could invoke his privilege against self incrimination," the remark was cured by the trial court's immediate instruction to disregard. [Opinion does not mention State's reference to other matters outside the evidence, such as his knowledge that witness was not served with subpoena.)

Dixon v. State of Florida, 206 So.2d 55 (4th DCA 1968) (it was not improper for state to comment that witness/manager "was available and the defense could have had him called as a defense witness if [defense counsel] had wanted to. ... The manager was here, sitting in the witness room and if his identification would have helped the def., you can be certain that [def. Counsel] would have called him to show that." Prosecutor's argument was invited by def. counsel's comment that manager was the person to whom the check was presented for the purpose of cashing it and "[w]e don't have the manager here." Affirmed.)

C. Attorney's disclosure that co-defendant was previously convicted

Ferguson v. State of Florida, 417 So.2d 639 (Fla. 1982) (comment that defense counsel was asking jurors to find a "scapegoat" for def's guilt by blaming co-def, "who has already been found guilty" was not improper comment on prior conviction of co-def. It was fair reply because defense counsel had argued in closing that co-def had committed the crime and that def. was never in the house.)

Thomas v. State of Florida, 202 So.2d 883 (3rd DCA 1967) (As a general rule, it is improper for a prosecuting attorney to disclose during trial that another def. had been convicted or has pleaded guilty because each person charged with a crime must be tried upon evidence legally tending to show his guilt or innocence and competent evidence against one person is not necessarily so against another.)

XII. Attorney's comment that may insinuate something improper or prejudicial

Brown v. State of Florida, 40 Fla. L. Weekly D629 (3rd DCA 2015) (comparing victim's .25 caliber bullets (with which he shot def in self defense) to def's .40 caliber bullets (with which he shot at victim in attempted robbery) it was improper for state to argue that victim's .25 caliber meant he wasn't out to kill anyone but the fact def carried .40 caliber bullets meant that "he means business" and that they were "bad guy bullets." Error not fundamental. Affirmed.)

Narcisse v. State of Florida, 166 So.3d 954 (4th DCA 2015) (where victim picked def out of a photo lineup but then recanted his initial identification at trial, it was improper for prosecutor to explain away the victim's change of heart by claiming he was "scared" absent any evidence to support such claim. Comments regarding a victim's recantation of a previous identification on the grounds of fear of the defendant are improper unless there is evidence establishing that the "victim's recantation was motivated by fear or that the victim had been threatened with reprisal by Defendant or someone acting on Defendant's behalf." [quoting Pierre, 88 So.3d 354] Reversed.)

Stewart v. State of Florida, 147 So.3d 119 (1st DCA 2014) (in prosecution for unlawful sex with a minor, where state introduced William's Rule evidence regarding two other step-daughters molested by def in the home, prosecutor's reference in flow chart of relatives to remaining 3 year old step-daughter: "And today you heard from [S.C.], [B.S.], and [A.S.], the only daughter left in that house is [D.S.], who is three. That's why that evidence is so important. To prove that intent, to prove that motive, to prove that opportunity, the absence of mistake. This is the family that's left" was not a "call to arms" to convict the def or the 3 year old would be molested next, but rather an accurate statement of the evidence that the 3 year old is the only non-testifying daughter living in the house. "[S]tatements are not so prejudicial so as to vitiate the entire trial and warrant reversal. The comments do not rise to the level of a character attack warranting a new

trial." [Note: court does not explain why it evaluates prejudicial effect of statements it does not find to be improper.] Affirmed.)

Datilus v. State of Florida, 128 So.3d 122 (5th DCA 2013) (in case where DNA report originally excluded def. and was subsequently corrected to include def. as possible perpetrator, and defense counsel argued "[T]here are three types of lies; lies, damn lies and statistics. . . . I submit what the State's trying to do is pull a fast one on you," State's response: "Members of the jury, let's talk about the truth. Isn't that what we're here for? Not to obscure,"… and, after def. motion for mistrial was denied, "[Defense counsel] stated that the State's trying to pull a fast one, that we're trying to obscure the answer. Members of the jury, let's break it down and look for the answer, what the evidence actually shows…" was a proper argument. Affirmed.)

Pierre v. State of Florida, 88 So.3d 354 (4th DCA 2012) (in shooting case where victim recanted prior identification claiming it was based upon police officer's assurance that the individuals identified were involved, it was improper for prosecutor to argue that the victim's story did not change until he was told that he would have to testify and look into the eyes of the guy who shot at him, and that this was a "clear cut case of a guy that is scared of what's going to happen." Comments were improper as there was no evidence that the victim recanted the prior identification out of fear [thus suggesting that prosecutor had "unique knowledge" not presented to jury] and the statements implied that Defendant may have engaged in witness tampering or suborning perjury. Reversed.)

Warmington v. State of Florida, 86 So.3d 1188 (3rd DCA 2012) (prosecutor's comment during closing: "Now, one of the tools used to confuse you . . .," even if properly preserved by the single word "objection," was not so egregious as to affect the fairness of the trial. Affirmed.)

Louzon v. State of Florida, 78 So.3d 678 (5th DCA 2012) (where robbery victim picked def. out of photo array pre-trial but recanted ID during trial testimony, it was improper for prosecutor to argue: "I don't feel right about my ID, does he call the head detective in the case? No. Does he call the head prosecutor? No. He calls the defense attorney. How does he get the defense attorney's phone number in jail? There is a clear inference that he got the phone number the same time he got the threat that he says he never got. *** When confronted about a threat, he said, no, I had never been threatened. Using your common sense, again, if he had been threatened and he really was scared, he's not going to divulge the threat…. Of course, he's scared. He's testifying against the man who put a gun to his head." While a prosecutor is certainly entitled to point out the discrepancies and changes in a witness' testimony, it is impermissible to suggest, without evidentiary support, that a witness has changed his or her testimony due to contact with the defendant and/or defense counsel. Such comments are highly prejudicial because they imply that the defendant engaged in the separate criminal offenses of witness tampering and suborning perjury. Reversed.)

Evans v. State of Florida, 62 So.3d 1203 (4th DCA 2011) (it was improper for prosecutor to suggest defendant tampered with a witness and suborned perjury without any supporting

evidence. ["This is the sister of the defendant who hey sister-in-law, take the stand testify on my behalf. Go ahead say that. Hook me up. Help me out. I proffer to you that's what that was."] Prosecutor went on to say that Def and his brother had "three weeks to think of something" and that they "concocted" the story. No objection but fundamental error under facts of case. Reversed.)

Watson v. State of Florida, 50 So.3d 685 (3rd DCA 2010) (where def was arrested for trafficking in cocaine based upon his driving another person's car with over 124 grams of cocaine under the driver's seat and where def. counsel argued in closing that there was no evidence that def placed the drugs under the seat, it was error for prosecutor to argue in rebuttal that it could be inferred from the bag's position that def was trying to conceal the cocaine before the police stopped him. There was no evidence from which the jury could infer def's knowledge of or concealment of the drugs. Reversed.)

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (prosecutor's comment that "[def] chose [co-def] as our witness" did not place the onus on def for forcing the state to use co-def as a witness. Jury was aware, and State made it clear, that co-def was involved in the murders and testified pursuant to a plea agreement. In context, the prosecutor made the remark to emphasize that it was def who invited co-def to join the robbery-murder scheme. Argument was fair comment on the evidence. Affirmed.)

Stephenson v. State of Florida, 31 So.3d 847 (3rd DCA 2010) (In prosecution for aggravated manslaughter of def's own child, it was highly improper for prosecutor to raise during cross and again during closing argument the fact that in the course of her pregnancy the def had contemplated aborting the decedent child. "[A]bortion is one of the most inflammatory issues of our time…. Accordingly, numerous decisions reverse convictions after trials which improperly implicate that issue, including several, as in this case, which are necessarily based on a finding of fundamental error in the absence of proper preservation." Reversed.)

Williams v. State of Florida, 10 So.3d 218 (3rd DCA 2009) ([NOTE: content of improper argument gleaned from concurring opinion as majority opinion did not give specifics, therefor it is impossible to determine if the majority would have agreed with concurring judge's conclusions about the propriety of specific arguments]—It was improper for prosecutor to act out an imaginary statement of def to def's girlfriend during closing argument where there was no evidence or even a reason to believe such a statement ever existed: "Now this def was with [his girlfriend]. He wanted to take the law into his own hands….So what this def does is this, he tries to man up. He tells [his girlfriend] I'm going to be the bigger man. I don't want you going back to—with Norton Altidor. I'm going to take care of this for everybody." It was also improper for State to argue "This is street justice. It's not uncommon in that area. There were many people that were at the flea market that day. But they knew this def. They also knew Norton. They know that they are not nice guys. They didn't want to come forward. You only heard from—." Comments were unsupported by evidence, implied the existence of other witnesses who could corroborate the testimony presented and suggested that def had a prior criminal record because

everyone was afraid to come forward because they knew he wasn't a "nice guy." Objections and motions were overruled but error harmless given strength of case. Affirmed.)

Chavers v. State of Florida, 964 So.2d 790 (4th DCA 2007) (it was improper for prosecutor to suggest to jury that def and witness had agreed to align their testimony in court. "Is that the conversation that was had? Hey, Alan, you need to go to the jury, go to trail and tell them what happened. Or was it you need to go and tell the jury the same story I'm going to tell them…. Those two stories are very consistent. Because [Def] asked his friend to come in here and tell you that nothing happened and this was completely fabricated." After objection was overruled, prosecutor continued to argue that def and his witness "discussed their testimony and said this is what we're going to say happened on this day." It is a well established rule that a "suggestion that the def. suborned perjury or that a defense witness manufactured evidence, without a foundation in the record, is completely improper." [citation omitted] Reversed.)

Penalver v. State of Florida, 926 So.2d 1118 (Fla. 2006) (it was improper for prosecutor to suggest that witness had changed her identification of the def. after speaking with his counsel. It is impermissible for the state to suggest, without evidentiary support, that the defense has "gotten to" and changed a witness's testimony or that a witness has not testified out of fear. Such comment, in addition to being improper because it is not based on facts in evidence, is "highly irregular, impermissible, and prejudicial" because it improperly implies that def. engaged in witness tampering or suborning perjury, both criminal offenses. Reversed on cumulative error.)

Chambers v. State of Florida, 924 So.2d 975 (2nd DCA 2006) (where 20 year old's sexual relationship with 16 year old girlfriend may have been immoral but was not illegal and was not charged, and although some details of the relationship were admissible given that def. was accused of burglary and other crimes relating to the break up of the relationship, it was improper for prosecutor to attempt to inflame the minds of the jury with comments about how, instead of celebrating, the victim had to come to court to testify the day after her graduation and how the def. "is picking up high school kids and having sex with them. … What is this man doing with this kid? She is a child. She is a child." Further, there was no evidence, nor would such evidence have been relevant, that the def. had been involved in any other similar relationships with other high school girls. General attack on def.'s character was improper. Moreover, in responding to def. counsel's claim that the victim might have falsely accused def. of the crimes charged, prosecutor did not simply reply that it was unlikely that she would want to fabricate such a story and face exposure of her personal life, including her pregnancy, but he extended them inappropriately to invoke the sympathy or anger of the jury by focusing on the immorality of the relationship and the indignities associated with trial, without connecting it to the relevant issues. Reversed.)

Dendy v. State of Florida, 896 So.2d 800 (4th DCA 2005) (It was improper for prosecutor to argue that def.'s request to arresting officer for an attorney before his arrest was evidence of his "consciousness of guilt." Reversed on these and other grounds.)

Howard v. State of Florida, 869 So.2d 725 (2nd DCA 2004) (*dicta* - it was improper for prosecutor to ask def.'s mother on what date she was listed as a witness for trial [one month before trial] and, when witness insisted that she had told def.'s first attorney about def.'s alibi, to argue in closing that attorney must not have listed her because he felt she was lying. Witness was not competent to testify about the actions of prior counsel and even if counsel had been called as a witness, prosecutor would not have been allowed to ask him to comment on other witness's credibility. Prosecutor should not have been allowed to do indirectly what he could not do directly. Reversed on other grounds.)

Thornton v. State of Florida, 852 So.2d 911 (3rd DCA 2003)(it was improper for prosecutor to suggest that defense counsel had coached defense witnesses or suborned perjury: "[Defense counsel] says to you physical evidence can't lie, but witnesses, you can get them to say what you want. Is that what happened with Karen Wilson and Spider Bechum? They were going to say what the defense wanted them to –." Reversed on these and other grounds.)

Kearney v. State of Florida, 846 So.2d 618 (4th DCA 2003)(It was improper for prosecutor to argue: "The Defense says, where's the tape? ... The Defense fully knows well that there's something called the Fifth Amendment, self-incrimination, and the Fourth Amendment, the right against illegal searches and seizures. ... and that the government can't just bust down somebody's door and say, we're taking everything out of your house. The government can't just grab somebody by the hand and say, get over here, sit down, you're going to tell us what we want to know. ... We don't have the tape because it's not in our possession. Who's possession is it in? Right there." Comment was fairly susceptible of being interpreted as referring to def.'s right to remain silent. Comment also highlighted def.'s Fourth and Fifth Amendment rights as impediments to the prosecution's ability to produce the tape, and pointed to def. for invoking the constitutional protections afforded to her. Even if it had been acceptable for the State to explain the Fourth and Fifth Amendments as a fair reply to defense argument questioning the whereabouts of the tape, the State's response went too far when it beleaguered the constitutional restraints and protections and then pointed a finger at the def. for invoking them. Reversed.)

Sims v. State of Florida, 839 So.2d 807 (4th DCA 2003) (*dicta*-it was improper for State to argue to jury that they were told a "fish story" by the defense. Reversed on other grounds.)

Rimmer v. State of Florida, 825 So.2d 304 (Fla. 2002) (prosecutor's analogy to jury, asking them to think of themselves as baseball players, to keep their eyes on the ball (i.e. the facts and evidence in the case) and not be swayed by "sliders" or "outside fast balls" was not improper. Affirmed.)

Hudson v. State of Florida, 820 So.2d 1070 (5th DCA 2002) (It was improper for prosecutor to refer to def. as a pedophile in closing. ["Pedophiles who snatch children generally are not stupid enough to do it in a location where they are likely to be caught. They wait until the opportunity – ."] Such a comment could be interpreted as suggesting that he had a history of criminal sexual activity with children and also suggested a profile-type argument, i.e. if def. had certain traits

which fit the offender profile, he must have abused the victim. Error harmless where prosecutor did not repeatedly refer to def. as a pedophile and evidence of guilt was overwhelming. Remanded for evidentiary hearing on other matters.)

Tindal v. State of Florida, 803 So.2d 806 (4th DCA 2001) (in response to def.'s argument that a non-testifying eye-witness had identified someone named "Tony" as the shooter, it was error for state to argue: "[Y]ou don't know whether that person was intimidated or in fear when she said that, whether she had a gun pointed at her. *** You can't speculate if she told Detective Walley that a gun was pointed at her and she was in fear." Comment suggested that prosecutor had unique knowledge not presented to the jury and that the def. was engaged in witness tampering or suborning perjury. Curative instruction that simply reminded jurors that what lawyers say is not evidence was insufficient. Reversed.)

Goodman v. State of Florida, 801 So.2d 1012 (4th DCA 2001) (where officer held fast to his testimony despite def. counsel's efforts to show inconsistencies with his depo testimony and officer accused def. counsel of "trying to put words in [his] mouth," it was not improper for state to argue: "And ask yourself where was the confusion in the testimony.... And rely on your own recollection. Don't take my word for it. Take the Detective's words. The words that were not clear, was what [def. counsel] was trying to put in his mouth." Affirmed. Remanded for correction of inconsistent conviction.)

Overton v. State of Florida, 801 So.2d 877 (Fla. 2001) (where def. submitted only one sample to expert for testing, attempted to prohibit expert from performing confirmatory testing and then argued to jury how the expert could not conclude one way or the other the significance of the test on def.'s sample because more testing was needed, it was proper for State to point out that it was the def. who asked for only one test and that the State sought confirmatory testing. Affirmed)

King v. State of Florida, 765 So.2d 64 (4th DCA 2000) (although case involves *opening statement* rather than closing, principle is equally applicable. It was not error for prosecutor to refer to fact that officer knew def. or for officer to make brief, innocuous statement that he knew def. prior to day of sale of cocaine. Neither "improperly inferred that the [police] had contact with def. in an official capacity and suggested prior criminal activity on the part of [def.]" Concurring opinion points out that where comment innocuously refers to knowing def. prior to day of incident, officer may know def. from many "non-official" situations including: having been classmates in school, being a neighbor, or from "walking the beat" over an extended time. Affirmed)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (It was improper for State to argue: "You are not going to get to go back and take [the police reports] in the back room.... I wanted them in evidence. It's not my fault they're not. [Defense Counsel] has made this attack on the police officers here without giving you the benefit of reading what those reports really said in their entirety. He picked and chose.... He left stuff out.....I don't know why he thinks he can do that but he's done that.... [Defense counsel] asks you to take his word about what's in the

police reports ... but he doesn't want you to have the whole police reports.... Why did he tell you half the story?... Does he create reasonable doubt in your minds with that kind of attack on the deputies?" Reversed on fundamental error when all other improper arguments are considered. [Note: In this case the appellate court lists a collection of errors like the ones above that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another panel of this DCA.])

Rivero v. State of Florida, 752 So.2d 1244 (3rd DCA 2000) (it was improper for prosecutor to make "conscience of community" argument, claim that witness avoided service of process [a fact not in evidence], make disparaging attack on defense counsel and defense, vouch for credibility of witness, suggest that someone had gotten to a witness to change his testimony [implying that def. had tampered with a witness] and suggest that the state had additional facts, not in evidence. Eight objections were sustained but motion for mistrial denied. Error not harmless. Reversed)

Kennerdy v. State of Florida, 749 So.2d 507 (2nd DCA 1999) (improper for prosecutor to argue that defense witnesses had been "spoon-fed" their testimony and that jury knew that def. had profound disrespect for the legal system because he had "convinced two young men to come in here, and I would submit to you, commit perjury." Prosecutor also improperly argued that "the defendant thinks he's got six suckers sitting here" and accused def. of attempting to perpetrate a fraud on the jury and on the criminal justice system. Reversed.)

Johnson v. State of Florida, 747 So.2d 436 (4th DCA 1999) (in response to def. counsel's suggestion that a witness did not testify in court because she was not confident about what she would have to say [state's objection was sustained], state improperly responded suggesting that witness may not have testified because of fear. It is error for prosecutor to suggest that a witness did not appear due to fear of the defendant where there is no evidentiary support for the proposition. Court sustained objection but denied motion for mistrial. Where "fear" may have been of entire judicial process and court was in best position to observe reactions of witnesses as well as impact of comment, denial of mistrial affirmed.)

Berkowitz v. State of Florida, 744 So.2d 1043 (4th DCA 1999) (improper for prosecutor to argue that def. and def. witness got together and "contrived and concocted" their story, where argument was not supported by the evidence. It is improper to suggest that def. suborned perjury or that a def. witness manufactured evidence, without a foundation in the record.) Reversed.

Fonticoba v. State of Florida, 725 So.2d 1244 (3rd DCA 1999) (improper for prosecutor to inform jury that def. had failed a polygraph test, in violation of pretrial order in limine and existing case law. [This case involved an *opening statement*. Obviously in closing it would also be commenting on facts not in evidence.] Reversed.)

Legette v. State of Florida, 718 So.2d 878 (4th DCA 1998) (improper for prosecutor to argue that def. attorney had requested lesser included offenses, since it concerned a matter both outside the evidence and inappropriate for the jury's consideration. A prosecutor's disclosure of a legal position taken by a defense lawyer can affect the lawyer's credibility before the jury, which may perceive that the lawyer is arguing for an acquittal, but will settle for a lesser included offense. Error not preserved and not fundamental. Affirmed.)

Bauta v. State of Florida, 698 So.2d 860 (3rd DCA 1997) (it was improper for def. attorney, having excluded the lead detectives child hearsay testimony by a motion in limine, to then comment in closing how "interesting" it was that the State did not call the lead detective as a witness, saying "Do you think that's because he had favorable evidence to present for the State?" Def. argument was clearly misleading where def. knew that detective had relevant evidence to produce and that the defense had successfully prevented the jury from hearing that evidence.)

Johnson v. State of Florida, 696 So.2d 326 (Fla. 1997) (where defendant attempted to discredit witness by demonstrating that he had no concern for the victim because he stood by and failed to help the victim during def.'s attack, it was not improper for prosecutor to respond: "Frankly I think [witness] is very fortunate that he did not because he may not have been here this week to testify." Although comment may imply that def. had the intention of committing another murder, State was providing a brief response once the def. "opened the door." Brief comment was minimal and appropriate. *Holding modified on other grounds: 770/1174*)

Washington v. State of Florida, 687 So.2d 279 (2nd DCA 1997) (it was improper for prosecutor to express personal opinion that defense was a "big lie" of the magnitude of Hitler's lie about Jews being the cause of all problems)

Knight v. State of Florida, 672 So.2d 590 (4th DCA 1996) (error for prosecutor to suggest that there was something improper about def.'s counsel's legal objections during state witness' testimony.)

Ramsaran v. State of Florida, 664 So.2d 1106 (4th DCA 1995) (where def. stated that he believed he had been charged in the case because he was known in the community as "a tough guy" and displayed to the jury an arm tattoo containing the words "original rude boy," it was not improper for state to comment on his reputation as well as the tattoo's wording and to offer a possible explanation concerning why certain witnesses had refused to speak to the police. The state's remarks concerned inferences that could be drawn from the evidence. Reversed on other grounds.)

Tran v. State of Florida, 655 So.2d 141 (4th DCA 1995) (prosecutor's argument was highly irregular and prejudicial where in opening statement prosecutor created theme that eyewitnesses would not testify out of fear of reprisal by def., elicited testimony from witness that other witness was scared to come to court and argued in closing that "nobody wanted to get involved," that the state could not make people get involved, and that "the bottom line is that nobody saw anything."

Reversed in part.)

Jones v. State of Florida, 652 So.2d 346 (Fla. 1995) (In response to defs. argument that because def. had been abandoned by his mother and raised by his aunt he suffered from extreme mental or emotional distress, prosecutor pointed out that Clarence Thomas had been raised in a foster home, and Gerald Ford had been adopted but both had been able to lead productive lives and that def.s argument was a ridiculous and insulting suggestion that everyone raised in a foster home is destined to be a killer. Although reference to "insult" was unfortunate [court sustained objection], it was not so inflammatory or prejudicial as to warrant a mistrial).

Henry v. State of Florida, 651 So.2d 1267 (4th DCA 1995) (prosecutor's comment about impeachment of witness: "I impeached her a little bit because I wanted to show you that somebody got to her. Somebody got to her" was improper. Impeachment may imply that witness is lying but suggesting that "somebody got to her" suggests that the defense was engaged in tampering with a witness and suborning perjury, both criminal offenses. Objection was overruled below. Error not harmless. Reversed.)

Landry v. State of Florida, 620 So.2d 1099 (4th DCA 1993) (improper for prosecutor to suggest that defense was "conjuring up" evidence as that implied they were presenting false testimony.)

Cantero v. State of Florida, 612 So.2d 634 (2nd DCA 1993) (in response to def.'s testimony that he could not have been the person wearing dark glasses who robbed the victim because he had the tint bleached out of his sunglasses at the mall the week before the robbery, prosecutor's statement in closing that he had seen the def. in jail around the date that he supposedly went to mall was impermissible unsworn testimony and highly prejudicial. Reversed.)

State of Florida v. Ramos, 579 So.2d 360 (4th DCA 1991) (improper for prosecutor to refer to ongoing narcotic investigation and suggest that prosecution of a "kingpin" over a "supplier" is warranted, as that implies that def. was caught up in an ongoing narcotics investigation and was a kingpin supplier of narcotics.")

Alvarez v. State of Florida, 574 So.2d 1119 (3rd DCA 1991) (improper for prosecutor to suggest that def. counsel acted improperly in deposition to elicit inconsistent statements presented at trial, that they would break up the elements of robbery and have the jury "just pick one" and give def. a slap on the wrist by convicting him of a lesser, and that they would try to confuse jury and insult jury's intelligence.)

Randolph v. State of Florida, 556 So.2d 808 (5th DCA 1990) (prosecutor's reference in closing to officer's statement that he knew the def. does not, in and of itself, imply that the def has been suspected of criminal activity or has a prior criminal record)

Restrepo v. State of Florida, 552 So.2d 1126 (3rd DCA 1989) (improper for prosecutor to say that a witness was absent "maybe because he is afraid to testify against this man" without support

in the record.)

Fuller v. State of Florida, 540 So.2d 182 (5th DCA 1989) (inappropriate to imply that there was something sinister about def.s counsel's decision to reserve opening statement until State had rested its case, or to personally attack def. counsel for his cross-examining the child victim.)

George v. State of Florida, 539 So.2d 21 (5th DCA 1989) (it was improper for prosecutor to make a remark susceptible of being understood to mean that the def. was involved in some prior drug deal. Reversed on these and other comments.)

Gale v. State of Florida, 483 So.2d 53 (1st DCA 1986) (prosecutor's argument that def. "knows the ropes" was not error as it could have been reasonably inferred from his admission on the stand to prior encounters with the criminal justice system. Affirmed).

Villavicencio v. State of Florida, 449 So.2d 966 (5th DCA 1984) (improper for prosecutor to argue to jury that def.'s answer to def. counsel's questions was "a rehearsed answer" as that suggested that def. and his counsel had concocted the story for trial. Reversal not necessary where trial court sustained objection advised the jury that it was an improper comment and instructed jury to disregard the comment, put it out of their mind and not allow it from affecting their decision, and prosecutor apologized to jury and def. counsel and explained the remark in the context of a comment on the evidence (i.e. that the witness felt the need to explain why he was sweating even though that wasn't asked. Affirmed)

Jones v. State of Florida, 449 So.2d 313 (5th DCA 1984) (prosecutor's suggestion that witnesses had been intimidated into being absent from trial improper where no such evidence was presented. Statement that defendant had manipulated judicial system and made "chumps" out of jury was improper)

State of Florida v. Murray, 443 So.2d 955 (Fla. 1984) (comment that def. "thinks he knows the law; thinks he can twist and bend the law to his own advantage and lie to you in court so that he is acquitted" improper. Error harmless, therefore DCA decision reversed and conviction reinstated.)

Williams v. State of Florida, 441 So.2d 1157 (3rd DCA 1983) (Prosecutor's analogy of defense counsel's argument to that of a squid attempting to cloud the water not improper. "A prosecutor's jury argument need not rise to the level of the giants of our profession in order to be proper under the law")

Jordan v. State of Florida, 441 So.2d 657 (3rd DCA 1983) (prosecutor's comment that defendant was "dispensing drugs" not improper where charged with trafficking, even though trafficking charged was based on *possession* of requisite amount).

Miller v. State of Florida, 438 So.2d 1043 (1st DCA 1983) (in aggravated battery case, where

defense counsel questioned the absence of victim from trial, it was improper for prosecutor to comment on murder prosecutions he had handled where victims were absent because they were dead in order to show that presence of victim is not necessary. Error not fair reply but also not fundamental. - No objection. Affirmed)

Salazar-Rodriguez v. State of Florida, 436 So.2d 269 (3rd DCA 1983) (it was improper for prosecutor to suggest to the jury that the def. was a Mariel boatlift refugee by tracking his moves from Key West in May of 1980 to Arkansas, to Atlanta and then back to Miami, especially where State sought a motion in limine to limit the def's questioning of State witnesses concerning the circumstances surrounding their arrival in Florida because it would be "highly prejudicial to them because of the unfortunate reputation that's come about throughout the community of all people from the Mariel boatlift." Reversed on these and other grounds.)

Tacoronte v. State of Florida, 419 So.2d 789 (3rd DCA 1982) (court held that it did not need to deal with the question of whether the inference prosecutor attempted to draw was supported by the evidence because it found that it could not have materially contributed to his conviction. Argument was "I would suggest to you the defense lawyer has been spending four months going over and preparing for this murder trial, ... He knows he has a guy who knew his client's last name standing in the middle triangle while this happened. He has to come up with something to counter it..... [S]o let us create this self-defense.... Let us play on the community's feeling about people that come from a Latin origin. Let us make this story up." [Def. had testified and it was his version that comments were directed to.] Affirmed)

Mulford v. State of Florida, 416 So.2d 1199 (4th DCA 1982) (in a case where def. [rightfully] attempted to introduce a redacted letter but it was excluded upon objection from the state, it was improper for state to argue to jury that state would not have objected to introduction of entire letter but that def. counsel did not want jury to see entire letter, that def. only wanted jury to see letter with portions deleted and that they could draw their own inferences from that. Prosecutor also argued that he was not implying that def. counsel was doing anything wrong, stating that it's his job to defend his client and "[i]f he feels that it would not benefit his client to introduce those portions, then he has a right to try to keep those out of the case." Reversed.)

Cooper v. State of Florida, 413 So.2d 1244 (1st DCA 1982) (comment that "lessers" were "an old defense trick" to get less than what def. is really guilty of - was improper)

Hufham v. State of Florida, 400 So.2d 133 (5th DCA 1981) (prosecutor's comment that def. waived his opening statement although "he could have told you every detail of what his story was going to be," so that he could sit back and wait until the evidence was all in and fabricate a story based solely on that evidence was an improper because reserving opening statement is a recognized privilege of defense counsel [suggesting impropriety]. Since the comment was made at closing after def. had testified, however, it was not a comment on his right to remain silent.)

Davis v. State of Florida, 397 So.2d 1005 (1st DCA 1981) (Prosecutor's comment "This man

has already been convicted of two crimes, already. He hasn't lived...by the rules of society and the law of the State. ***[Y]ou well know he hadn't conformed twice in the past and he wasn't conforming that night" improper reference to prior convictions to show propensity to commit crime rather than to attack credibility.)

Glassman v. State of Florida, 377 So.2d 208 (3rd DCA 1979) (in insurance fraud prosecution where doctor was alleged to be part of a conspiracy involving staged automobile accidents, feigned injuries and subsequent claims for insurance proceeds, it was improper for prosecutor to comment in voir dire that def. was running a "mill" and had submitted insurance claim forms containing "perjuries" where evidence, at best, established one incident of insurance fraud, not a series of such incidents, and claim forms were neither signed by def. nor sworn and, therefore, could not be considered "perjuries." Further, the prosecutor's comment that def. was an expert witness who often testified in court and "juries believe it and pay through the nose" was unsupported by any evidence and it is improper for a prosecutor to suggest to the jury that the def. has committed other crimes in the past, in addition to the crime for which he is on trial, when there is no evidence before the jury to support this assertion. Reversed.)

Peterson v. State of Florida, 376 So.2d 1230 (4th DCA 1979) (Improper for State to argue, about undercover officers: "Not only do they have to get into these disguises and crawl down there and deal with people like this [the defendant], but they have to deal with people like his lawyer and be attacked and slandered throughout the whole thing...." Reversed)

Irvin v. State of Florida, 66 So.2d 288 (Fla. 1953) (where def. successfully prevented state from impeaching def. witness about prior contacts with police, it was improper for prosecutor to argue in closing that he had tried to prove that defense witness had a grudge against law enforcement but "he [def. counsel] stopped me from proving it –". Trial court denied motion for mistrial and refused to instruct jury to disregard. Error harmless. Affirmed.)

XIII. Attorney's appeal to jurors' prejudice

A. Appeal to social class prejudice

Erwin v. State of Florida, 532 So.2d 724 (5th DCA 1988) (isolated comment that the case will be "a test of whether a man, whether he's rich or poor, black or white, educated or uneducated, is above the law" was "not so sinister as to vitiate the entire trial proceedings.")

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) (improper for prosecutor to argue fact that def's family has money and that rich get "preferential treatment" as means of appealing to jury's prejudice)

B. Appeal to racial or ethnic prejudice

Guerrero v. State of Florida, 125 So.3d 811 (4th DCA 2013) (it was improper for prosecutor to argue racial slurs allegedly used by def. against arresting officer ["You f-----g house n----r. F--- you. Get your hands off of me you dirty n----r"] where such slurs had no relevance to the charges of battery on a law enforcement officer or trespass—did not tend to prove or disprove elements of the charges. Although prosecutor contended that racial slurs by def were evidence of appellant's state of mind at the time of the incident, the use of the racial slur should be relevant to appellant's state of mind as an element of the crime charged [ie. to show premeditation or ill will, hatred, evil intent in murder case.] "Ordinarily, racial slurs and ethnic epithets are so prejudicial as to render them inadmissible, unless the probative value outweighs any prejudice that may result from having the jury hear them." Slurs became feature of the trial where prosecutor used them 23 times during opening, evidence and closing. [citation omitted]. Reversed.)

Castro v. State of Florida, 122 So.3d 912 (4th DCA 2013) (state did not err in commenting on nationality of four defendants where defendants were on trial for RICO violations. The prosecutor's reference to the fact that the co-defendants were all Honduran, knew each other, and each robbery was planned and committed in a similar fashion supported the state's contention that they were part of the same "enterprise" for RICO purposes. Affirmed.)

Wimberly v. State of Florida, 41 So.3d 298 (4th DCA 2010) (State's argument that community where shooting occurred was "the type of neighborhood where people attack each other … a close community where people want to protect each other, they certainly don't want to talk to police" and "like to handle them things themselves…you wake up, …you hear about people shooting people all over the place" was improper , not as an appeal to racial prejudice as defense counsel now argues, but as a comment on facts not in evidence because the comments were completely unsupported by any evidence at trial. Defense counsel failed to preserve objection (stating that he had no objection to State's comments other than to comment about "people shooting people") and error was not fundamental. Record was replete with witnesses' memories being vague and having to have their recollection refreshed with prior statements, and victim himself told his girlfriend to "tell no stories." It would have been clear to the jury that many of the witnesses were reluctant to testify so comment was not designed to imply that def was "guilty by association" as is sometimes prohibited in comments about a person being arrested in a "high-crime area." Affirmed.)

State of Florida v. Davis, 872 So.2d 250 (Fla. 2004) ([*Voir dire and Closing]* Counsel's attempt to elicit admissions of racial prejudice from the venire by commenting or acknowledging his own racial attitudes, and commenting on such at closing, was improper and constituted ineffective assistance of counsel, even though counsel testified that he had discussed the strategy with the def. who told him that sometimes blacks feel the same way about whites. The manner in which counsel approached the subject unnecessarily tended either to alienate jurors who did not share his animus against African Americans or to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open and getting

prospective jurors to "drop the mask." "Now, Henry Davis is my client and he's a black man, and he's charged with killing Joyce Ezell who was a white lady.... Now, ... myself and all of y'all, are all white. ... There is something about myself that I'd like to tell you, and then I'd like to ask you a question. Sometimes I just don't like black people. Sometimes black people make me mad just because they're black. ... I'm not proud of that and it embarrasses me to tell y'all that, to say it in public. ... Well, I'm a white southerner, and I've got those feelings in me that I – maybe I grew up with them. *** And I told you a little bit when we were questioning you as to potential jurors about some feelings that I have, and maybe very deep down y'all have them too." Reversed.)

Evans v. State of Florida, 838 So.2d 1235 (2nd DCA 2003) (it was improper for prosecutor to inject race issue into trial by insinuating that witnesses would not have been of any value because, like the def., they were African American and would have taken his side regardless of the truth. Reversed.)

Cherry v. Moore, 829 So.2d 873 (Fla. 2002) (prosecutor's comment that def. "lives with a black female, lives in a house with other black individuals, [and] circulates in a black community" where def. was black and victims were white was not improper. Comment was not made to improperly interject racial bias into the trial but to explain why a hair fragment of African-American origin which was not the def.'s was found in the victims bedroom.)

Terrazas v. State of Florida, 696 So.2d 1309 (2nd DCA 1997) (*opening statement*-in trial of def. who was of Mexican heritage, it was improper for prosecutor to comment that "vigilante style justice" was common to people with that ethnic background but was not how the law works [here]. Attempts to attribute criminal conduct to a def. based on racial or ethnic background have been uniformly condemned by the courts of this state. Reversed.)

Perez v. State of Florida, 689 So.2d 306 (3rd DCA 1997) (it is "highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues, into any part of our judicial system.")

Reynolds v. State of Florida, 580 So.2d 254 (1st DCA 1991) (in a case which charged a black defendant with raping a white woman, where the defense was consent, the prosecutor made the racial difference a feature of the trial. He questioned the jury on interracial dating and friendships during voir dire, commented on the respective races of the defendant and victim in opening, questioned the victim about interracial dating during her testimony, and commented in closing: "I want you to think about how embarrassing it is for an 18-year-year-old white girl from Crestview to admit she was raped by a black man. It is humiliating." Held: Reversed.)

George v. State of Florida, 539 So.2d 21 (5th DCA 1989) (it was improper for prosecutor to argue to jury, in effect, that the testimony of the def. should not be believed because he was from Haiti where if you told the authorities the truth you were dead. Reversed on these and other comments.)

C. Appeal to geographic prejudice

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) (prosecutor improperly attacked the defendant as being rich and manipulative, her lawyer as a "big city" lawyer who was not local and was less than honest. He further argued that law enforcement agencies would not have prosecuted the case if they did not have the evidence. Held: Reversed).

Knight v. State of Florida, 316 So.2d 576 (1st DCA 1975) (trial was conducted in "circus atmosphere" where, although def. was being tried for second degree murder, statements were made about his lack of support for his family, his morals were directly assaulted, appeals of sympathy were made for the plight of the widow and children of the deceased, and attempts were made to play on the juror's geographic prejudice. Reversed.)

XIV. Attorney's misstatement of the law or suggestion that jury disregard the law

Olenchak v. State of Florida, 41 Fla. L. Weekly D214 (4th DCA 2016) (in prosecution for sexual battery on a minor, where def counsel argued that the evidence failed to show that def acted intentionally, it was improper for prosecutor to argue: "The Judge read you the law, the elements of sexual battery and nowhere in that instruction did he tell you that the State had to prove intent. Intent is not an element of this crime. Don't hold me to that burden that the defense attorney had just laid out for me. He has increased my burden by requiring me to prove an element of a crime that I don't have to prove to prove my case." Although sexual battery is not a specific intent crime, it is a general intent crime. Court cannot discern from the record if counsel's decision not to object was strategic or ineffective therefore affirmed without prejudice to def raising again in post-conviction motion.)

Evans v. State of Florida, 177 So.3d 1219 (Fla. 2015) (it was error for the prosecutor to tell the jury that 2nd degree murder was "heat of passion" murder where, under Florida law, a heat of passion murder can be 2nd degree or manslaughter. [Note: court does not explain why this point is not harmless since the jury found the def guilty of first degree murder and recommended death, thereby clearly rejecting the "heat of passion" argument]. Reversed for cumulative closing argument errors and other trial errors.)

Jackson v. State of Florida, 179 So.3d 443 (5th DCA 2015) (it was error for prosecutor to argue that def used "deadly force" by pointing a firearm at victim where merely pointing a firearm, without firing, is "non-deadly force" as a matter of law. Reversed due to this error along with fundamental errors in jury instructions.)

Wright v. State of Florida, 174 So.3d 558 (4th DCA 2015) (where def, who was charged with

possession of a firearm by a convicted felon, raised argument that firearm was an antique firearm and prosecutor argued to jury that they could find him guilty by either possessing a firearm that wasn't antique or by possessing the modern ammunition, such argument was not fundamental error (error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error) because there was no danger of a non-unanimous verdict as all the evidence indicated that the ammunition was in the gun. Therefore, a finding that he possessed either indicates he possessed both. Affirmed.)

Carr v. State of Florida, 156 So. 3d 1052 (Fla. 2015) (*death penalty* - prosecutor did not improperly denigrate mitigating factor concerning def's history of sexual abuse by claiming it should be given less weight since it was not connected to the murder. While it is improper to denigrate mitigation by characterizing it as "flimsy," "phantom," and "excuses," it is not improper to attempt to rebut the mitigation and to ask the jury to put it in context. The prosecutor acknowledged that def's history of sexual abuse was a mitigating circumstance but asked the jury to put it in context (give it less weight) based on the mental health expert's testimony that def's abuse did not contribute to victim's murder. Similarly, prosecutor properly argued that def's difficult childhood and mothering abilities constitute valid mitigation but that the jury should not give those mitigators much significance under the facts of the case. Affirmed.)

Howard v. State of Florida, 152 So.3d 825 (2nd DCA 2014) (prosecutor made troubling assertions to the jury that "there is no benefit to be given to the [flip-def]" for his testimony and that only the trial court could decide whether he would receive leniency. This is belied by the State later waiving, at flip-def's sentencing, the ten-year mandatory minimum in exchange for his having testified against def. This also confirmed the hollowness in the State telling the jury that "the only person at the end of the day who has any decision making power as to what happens with Mr. Battle is the judge." Reversed.)

Poole v. State of Florida, 151 So.3d 402 (Fla. 2014) (in death penalty case, although def argues that prosecutor attempted to mislead the jury by suggesting to them that even if they found the defense had proved the impaired capacity mitigating factor, they could give it no weight simply because def voluntarily drank and did drugs, and that the prosecutor mischaracterized psychological testimony by stating that def's impaired capacity was only due to his voluntary intoxication, where the expert testified that it was also due to def's low intelligence, (*"I submit to you that when you think about that evidence, you need to really think about whether that is a mitigating circumstance, whether it mitigates the penalty that you should vote to impose, or whether that goes to sympathy that you're not allowed to consider. ... You don't have to accept it as mitigating the death penalty at all. And I'm going to tell you why you shouldn't. Because both of these doctors said that the only reason [def] hit this mitigator and the next one ... was because he voluntarily drank and did drugs. The only reason they told you."*), first comment was not improper. The prosecutor did not refute that the mental mitigators were proven, rather the prosecutor implied that perhaps the jury should give the mental mitigation a small amount of weight because the defendant may have been the cause of his own emotional distress and

substantially impaired capacity. Additionally, any error that the prosecutor made in telling the jury that voluntary intoxication was the only reason that the experts gave to support def's impaired capacity was harmless, because the jurors were present for the experts' testimony and were able to draw their own individual conclusions regarding what the experts conveyed. Affirmed.)

Moody v. State of Florida, 140 So.3d 700 (5th DCA 2014) (it was improper for prosecutor to tell the jury, in opening and in closing, that it would not be allowed read-back of any testimony. Error was compounded when trial judge overruled def. objection and re-iterated for the jury that read-backs were not permitted in her courtroom. Per se reversible error. Reversed.)

Young v. State of Florida, 137 So.3d 532 (4th DCA 2014) (where def. attorney argued in closing that photo lineup was unduly suggestive, it was error for prosecutor to respond: "if it was unduly suggestive, you wouldn't have heard that because that would have been a matter of law for the Judge to decide. And remember we talked about that in jury selection, everyone has a role? Judge's role is a matter of law. So if there were anything to suppress because it was unduly suggestive, it would have been suppressed, but it wasn't." By arguing to the jury that if the lineup was inherently suggestive it would have been suppressed, the prosecutor suggested that the reliability of the lineup had already been decided by the trial court. Such a response was not "invited" by def counsel challenging the credibility of the photo lineup. Although curative instruction could have been given advising jury that it was empowered to form its own opinion about the credibility of the victim's testimony and the pretrial identification of the defendant, judge's curative instruction ["All right, once -- once again, ladies and gentlemen, you've heard it several times even from the attorneys and you'll hear it from me again at this moment, decisions of law, rulings on the law are the province of the Court. I will instruct you on the law. Nothing you hear from either one of these attorneys, *even if it happens to be correct*, is -- is your instruction on the law…"] did not cure the error and photo identification was a hotly contested issue. Reversed.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – prosecutor's argument in penalty phase: *"If you find there are one or more aggravating circumstances in this case, Ladies and Gentlemen, then that justifies the imposition of a death penalty; unless, unless you find mitigating circumstances. And take it a step further, if those mitigating circumstances outweigh the aggravating circumstances"* was not improper. Although the state may not argue that the jury must recommend a death sentence unless the mitigating circumstances outweigh the aggravating circumstances, in the instant case, the prosecutor correctly informed the jury that a death sentence is legally permitted where the aggravating circumstances outweigh the mitigating circumstances without improperly diminishing the jury's discretion to recommend less than the legally allowable sentence. Further, state's argument that *"based on those categories of evidence,"* the jury will *"determine whether this defendant will be held fully accountable for the crime that he's committed"* and that *"[j]ustice demands that [the jury] hold this defendant fully accountable for this murder"* were not improper comments or statements of the law. Although the state cannot tell the jury that they have a legal duty, are required by law, or that the only

proper recommendation is a recommendation of death, it is not improper for the prosecutor to tell the jury that it has a "responsibility" to recommend the death penalty where the prosecutor informs the jury that its recommendation should be "based upon all the evidence in this case." Further, prosecutor's comment that this case *"simply cries out for the death penalty because of th[e] heavy, heavy aggravating circumstance"* that the murder was committed during the course of a sexual battery was not improper. Lastly, prosecutor's comment about how def. lied to first responders about cause of victim's asphyxiation even as they were trying to save her was not a non-statutory aggravator but, when read in context, were made to rebut the expected mitigating factor that the def was a good person. Denial of post-conviction motion affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (*penalty phase* – where prosecutor argued that def's proffered mitigating evidence of a good family life and being raised to respect others was actually "an aggravating circumstance" and where, upon objection, court overruled but reminded the jury that what the lawyers say is not evidence nor instruction on the law, that the court would instruct them on the law and on what can be considered as aggravating factors, thereby effectively giving a curative instruction, and prosecutor continued by clarifying that def's good upbringing is not mitigating and court properly instructed jury at the end, error, if any existed, did not warrant any relief to def. Further, state's repeated argument that "double murder" was an aggravator and that the fact that def killed "two people instead of one" makes it worse, although not artfully stated, was a proper statement of the "prior violent felony aggravator." "[W]here a defendant is convicted of multiple murders, arising from the same criminal episode, the contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim." Affirmed.)

Garcia v. State of Florida, 125 So.3d 260 (4th DCA 2013) (where def. challenged her taped confession by arguing that her statements were not freely and voluntarily made, it was improper for prosecutor to argue: "I assure you, you wouldn't be listening to that tape if they were not freely and voluntarily made." The law affords the defendant "two opportunities to attack a confession." [citation omitted] The defendant can first attack the confession before the trial court and then later again attack the confession by having the jury make a determination regarding the voluntariness of a confession. As in similar cases, the prosecutor's remark created the erroneous impression that the voluntariness of the confession had been resolved. Reversed.)

Miller v. State of Florida, 123 So.3d 595 (2d DCA 2013) (in aggravated battery case where State charged one count of aggravated battery under two possible theories, use of a deadly weapon and causing great bodily harm, it was error for prosecutor to argue to the jury that they didn't have to agree on whether it was aggravated by use of a deadly weapon or by causing great bodily harm; that some could convict for one reason and others for the other so long as all agreed it was aggravated battery. Jurors must unanimously agree that each essential element of an offense has been proven. Court "hesitatingly" found that error was not fundamental although it deemed the issue a "close question." "[G]iven the strength of the evidence, it is more likely that the jurors were unanimous on one or both theories. Especially as to the theory that the stool leg was a deadly weapon, the evidence seems compelling to this court. Because the jury could easily

have reached a lawful verdict in this context under either theory, and indeed under both theories, we conclude that we should not apply the doctrine of fundamental error." Affirmed. [But see *Chaffin* below])

Chaffin v. State of Florida, 121 So.3d 608 (4th DCA 2013) (where def. was charged with one count of tampering with evidence and information provided no factual basis for the tampering charge, state erred in arguing to jury that they could convict def. of single count of tampering based on either of two incidents (disposing of his father's grow house, or disposing of his father's body). Error was fundamental [no objection was made] as it compromised the jury's ability to render a unanimous verdict because some jurors could convict on one basis and other jurors on the other [citing a similar case]. Affirmed in part, reversed in part.)

Charriez v. State of Florida, 96 So.3d 1127 (5th DCA 2012) (prosecutor misstated the law as it relates to reasonable doubt when she suggested that if the jurors believed the victim, they would have to convict def. "The test for reasonable doubt is not which side is more believable, but whether, taking all the evidence in the case into consideration, guilt as to every essential element of the charge has been proven beyond reasonable doubt." [citation omitted] Error not harmless when combined with multiple other improper comments. Reversed.)

Dicks v. State of Florida, 75 So.3d 857 (1st DCA 2011) (Prosecutor's statement in closing argument and in rebuttal, that the definition of a dwelling included the unenclosed back yard, was a misstatement of the law [erroneously defining "dwelling" as "a building with a roof designed to be occupied by persons[,] *together with the yard* and the outbuildings immediately surrounding it." Moreover, the prosecutor described the "backyard" as part of the dwelling, and argued that by Dicks' having "merely" entered the backyard of the mobile home, he had entered into the dwelling. summarizing his point as follows: "A person in the backyard with the intent to commit a theft, *it doesn't matter if they're in the backyard or if they're in the back bedroom.*"] However, the comment was not objected to [def counsel choosing instead to correctly point out to the jury the enclosure requirement during his closing argument, which was re-iterated when the jury was properly instructed by the court] and the error was not fundamental where evidence showed that defendant was found underneath the mobile home removing the home's copper wiring and had thus breached the invisible vertical plane entering into the airspace of the dwelling. Affirmed.)

Lucas v. State of Florida, 67 So.3d 332 (4th DCA 2011) (prosecutor's comment in closing argument that the jury "no longer" has "to presume him innocent." That "[i]f you believe the evidence has shown that he is not presumed innocent does not mean he's actually innocent and the time for that is over."[sic] were not improper when viewed in context as they simply reflected the prosecutor's belief that the state satisfied it's burden of proof. [NOTE: In another DCA, a suggestion of the prosecutor's "belief" as to the evidence would be improper.] Affirmed.)

Taylor v. State of Florida, 62 So.3d 1101 (Fla. 2011) (it was not improper for prosecutor to argue: "there is… a presumption of innocence. And the presumption of innocence does not leave the defendant until evidence has been presented that wipes away that presumption. There is no

longer a presumption of innocence as evidence has been presented...." Prosecutor prefaced his allegedly improper statement with a reiteration that the presumption of innocence exists and stated that the presumption is not removed "until evidence has been presented that wipes away that presumption." Viewed in context, the comment in question was not improper. Affirmed.)

Franqui v. State of Florida, 59 So.3d 82 (Fla. 2011) (in death penalty case, prosecutor's argument that if the aggravators outweigh the mitigators, the jury had the "lawful legal duty" to recommend the death penalty was clearly improper because "[a] jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Claim procedurally barred, however prejudice cannot be shown in any event as the jury was properly instructed on this issue. Further, prosecutor's argument that "The lessers are a joke in this case ... but they have to be read to you by law," contrary to State's assertion that it was simply pointing out that the lesser included offenses were inconsistent with the facts of the case, could reasonably be understood to be an attempt, through sarcasm, to diminish the jury's obligation to follow the law. However, because the trial court properly and fully instructed the jury on the lesser included offenses def. cannot show prejudice. Affirmed.)

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (in penalty phase, it was not error for prosecutor to argue to jury that they might hear the defense suggest that a life sentence is enough because def would leave prison only when he dies, and to tell jury: "What I suggest to you is, that argument tells you that this def should not be held fully accountable for his actions. The argument in essence says "let's take the easy way out." … You have to …weigh this aggravation and you will find that it cries out for full accountability." Prosecutor did not tell the jury that it was their duty to return a recommendation of death—that the law required them to make that recommendation. Prosecutor told jurors that it was their duty actually to weigh the factors, but he in no way implied that the jury was required by law [emphasis in original] to return a recommendation of death. Accordingly, the prosecutor's comment was not error, much less fundamental error. Affirmed.)

Ferrell v. State of Florida, 29 So.3d 959 (Fla. 2010) (penalty phase – where prosecutor argued that jury would be violating their lawful duty if they did not vote for death ("Some of you may be tempted to take the easy way out…you may be tempted not to weigh all of these aggravating circumstances and to consider the mitigating circumstances. *That you may not want to carry out your full responsibility under the law and just decide to take the easy way out and to vote for death, I'm sorry, vote for life* [emphasis added]. I ask you not to be tempted to do that. I ask you to follow the law, to carefully weigh the aggravating circumstances, to consider the mitigating circumstances, and you will see these aggravating circumstances clearly outweigh any mitigating circumstances. And then under the law and the facts death is a proper recommendation."); argued that the age mitigator could only apply to someone younger than def. ("No per se rule exists to pinpoint a particular age as an automatic factor in mitigation." Barnhill v. State, 834/836); argued that this was a bona fide death penalty case ("the State doesn't seek the death penalty in all first degree murders…But where the facts … demand the death penalty, the state has an obligation….This is one of those cases"); vouched for the credibility of several witnesses

and urged the jury to "show this def the same sympathy, the same mercy he showed [victim] and that was none," trial court's order granting a new penalty phase is Affirmed.)

Rodriguez v. State of Florida, 27 So.3d 753 (3rd DCA 2010) (in murder trial where victim's body was never located, it was improper for prosecutor to argue: "if any of you believe, beyond a reasonable doubt that she is not dead, well, you know that I invite you go ahead and acquit him." Statement misstates the law by shifting the burden of proof to the defendant. Correct argument would have been "if you do not believe beyond a reasonable doubt that the victim is dead, go ahead and acquit him." Misstatement could have been readily corrected with a curative instruction but no objection was raised. Error not fundamental where prosecution did not intentionally misstate the law, prosecution's closing repeatedly stated that the state had to "prove that she is dead," and the jury was properly instructed on the burden of proof. Error harmless. Affirmed.)

Easterly v. State of Florida, 22 So.3d 807 (1st DCA 2009) (prosecutor's comment that "[t]he testimonial evidence in this case, the physical evidence in this case, has not only removed the presumption of innocence from this man, it has torn it away and shown him for what he did to [K.D.] on May of 2004 when he raped her," was not improper because prosecutor tied it to his belief that the evidence was strong, so it came across as an opinion about the evidence rather than a statement of law (i.e. a general statement that now that the evidence was in, def's presumption of innocence was gone would be a misstatement of law). In addition, the jury was subsequently properly instructed on the law concerning presumption of innocence. Moreover, error would not have been fundamental in any event since it could have been cured with a contemporaneous objection followed by a curative instruction (errors that can be cured by an objection and curative instruction are not fundamental error).

Paul v. State of Florida, 20 So.3d 1005 (4th DCA 2009) (where prosecutor argued to jury "I'm not asking you to take the hill. … You can steel yourselves and you can do this job. You can hold the State to the burden only required by law. Steel yourself for this duty…. *** Fear is not a reasonable doubt—fear of the consequences. Do not allow yourselves to be held hostage to that. That standard does not change. Be fearless in your duties. Doubt in the back of your mind is not a reasonable doubt is what His honor tells you. *** We are a nation of laws. … [w]e ask that you follow the laws—the rules, that's what you're doing today, that's what he must be held accountable for…. *** The bottom line is you cannot be 100% sure. … Unless you're a victim or a witness, you cannot be. If you were there. Okay, but that's not the standard," argument did not suggest jury had a duty to convict but, rather, urged jury to follow the law and follow the reasonable doubt standard. "Trial court properly sustained objections when made and correctly denied motions for mistrial." Unobjected to statements were not fundamental. (Court is unclear as to statements that were improper and grounds for sustaining objections). Affirmed.)

Anderson v. State of Florida, 18 So.3d 501 (Fla. 2009) (in death penalty case *voir dire*, it was improper for prosecutor to state: ""You weigh the aggravating evidence versus the mitigating evidence, and which ever [sic] way your personal scale tips, that, under the law, is supposed to be

the recommendation you make." In addition to the fact that a jury is never required to recommend death, the procedure for weighing aggravating factors and mitigating factors requires the jury to first determine that there are sufficient aggravating factors to warrant the death penalty before even proceeding to weigh mitigating factors. Error harmless where jury was properly instructed on procedure. Affirmed.)

Wheeler v. State of Florida, 4 So.3d 599 (Fla. 2009) (prosecutor's argument, quoting a writer: "we do choose how we will live. Either courageously or cowardly, or honorably or dishonorably … what we do or what we refuse to do. … We decide. We choose. … That's what I want you to look at as we walk through this case and these facts and these aggravating and mitigating circumstances," to the extent that it urged the jury to compare the worth of the life of the victim against that of the def. was erroneous. However, no contemporaneous objection was made (general pre-trial motion in limine does not constitute a contemporaneous objection) and def. was not shown to have been deprived of a fair penalty phase. Prosecutor's cautioned to be mindful of limited purpose of victim impact evidence (not to be used to compare, contrast or weigh the worth of the victim's life against that of def). NOTE: Section 90.104(1), which makes contemporaneous objection to admission or exclusion of evidence unnecessary to preserve appellate right where a prior "definitive ruling" has been obtained is inapplicable to claims of error in prosecutorial argument. Affirmed.)

Bailey v. State of Florida, 998 So.2d 545 (Fla. 2008) (*penalty phase closing* – prosecutor's closing argument did not denigrate mitigation when prosecutor argued: "Ladies and gentlemen, the heart of the matter is that this is a cold, brutal, savage murder committed with aggravation that I have explained. The heart of this Defendant is one that is unworthy of the mitigation that has been presented. It has not been reasonably established. I ask that you apply the weight that is in your heart and that you render a verdict of justice, a verdict which rights the scales, a verdict where the sword goes unscabbard." The prosecutor explicitly argued that the jury should not accept Bailey's mitigation because it had "not been reasonably established." The statement, when viewed in its full context, does not amount to error, much less fundamental error.)

Poole v. State of Florida, 997 So.2d 382 (Fla. 2008) (Prosecutor's *penalty phase* comment: "what sets this crime apart so much from other crimes that the death penalty is the only conclusion you can come to? … I submit to you that [HAC] is an overwhelming aggravating circumstance that can never be overcome in a case like this" was not improper. Prosecutor was attempting to argue that the HAC aggravator should be given significant weight and that it alone outweighed all other mitigation due to the overwhelming evidence that proved that aggravator. However, prosecutor's other comment: "the judge will tell you once you find that sufficient aggravating circumstances exist to warrant the death penalty, unless you find that the mitigating circumstances outweigh them … then your vote has got to be for the death penalty" was error. The jury is never required to recommend death. Although improper, there was no objection and error does not amount to fundamental error. Comment was not repeated and court properly instructed jurors on the law at the end of closing. Conviction affirmed, new penalty phase ordered on other grounds.)

Williamson v. State of Florida, 994 So.2d 1000 (Fla. 2008) (*opening statement*-Prosecutor's comment during opening statement in penalty phase, that crime's where "inexcusable" was not improper despite fact that court had instructed jury on excusable homicide. Jury had already rejected contention of excusable homicide in guilt phase verdict so comment made during penalty phase could not mislead them as to a decision they had already made. Further, prosecution's comment: "as you listen to these excuses, think about whether or not these excuses outweigh the inexcusable thing he did" was arguably improper since characterizing mitigating circumstances as "excuses" has been held to be an improper denigration of mitigation. Nonetheless, comment fails to warrant reversal where it was a brief mention of the word "excuses" and no prejudice was shown under *Strickland*. Reversed in part, on other grounds.)

Profitt v. State of Florida, 978 So.2d 228 (4th DCA 2008) (it was error for prosecutor to argue to jury that "under Florida law" an out of court identification is "considered to be a stronger" identification than a subsequent in-court identification. Comment was an incorrect statement of the law. While the "show-up" that occurred in this case has been recognized as admissible evidence, the strength of which can be argued to a jury, it is not inherently more reliable as a matter of law than an in-court identification or the inability to make an in-court identification as happened here. Trial court's overruling of def's objection gave "stamp of approval" to prosecutor's argument.)

Cox v. State of Florida, 966 So.2d 337 (Fla. 2007) ([opening statement] [death penalty]In prison stabbing trial, where def counsel told jury in opening that they should look at the medical care that was provided to victim and what role it played in his death, counsel was not ineffective for arguing a defense not recognized by law. Comment was a reasonable trial strategy to attack the element of premeditation in the State's case. Affirmed.)

State of Florida v. Mathis, 933 So.2d 29 (2nd DCA 2006) (Although prosecutor misstated the law by arguing to jury that def. had a duty to retreat when people at the scene jokingly informed def that victim intended to kill def, and also when victim approached def and said: "Well, there's going to be whatever, whatever when I see you," (no objection was made) error was not fundamental, therefore a new trial was not warranted. Victim was shot by someone else and, while on the floor and no longer a threat to the def, def approached and fired several shots into victim's body. Jury was properly instructed by judge on self-defense and prosecutorial misconduct does not constitute fundamental error unless, but for the misconduct, the jury could not have reached the verdict it did. It cannot be said that, absent the misconduct, the jury would have returned a verdict of not guilty. Therefore the prosecutor's statements were not so egregious as to warrant reversal. Affirmed.)

Nurse v. State of Florida, 932 So.2d 290 (2d DCA 2005) (*dicta* - it was improper for prosecutor to argue: "At the beginning of this trial in jury selection and when the judge read to you the law he explained to you that the defendant carries the presumption of innocence and that the State has the burden of proving this case beyond a reasonable doubt. [Mr. Nurse] no longer

has that presumption." A defendant is presumed innocent until his or her guilt is proved to the exclusion of a reasonable doubt. It was up to the jury to determine whether this burden had been met. Although the prosecutor could argue that the evidence was sufficient to meet the State's burden, it was improper for the prosecutor to specifically state that def no longer had the presumption simply because evidence had been presented. Reversed on other grounds.)

Schoenwetter v. State of Florida, 931 So.2d 857 (Fla. 2006) (*penalty phase*- although prosecutor improperly advised the jury that, when weighing aggravators and mitigators, they could consider the fact that the def. had been previously or contemporaneously convicted for other crimes charged in this case, court gave curative instruction and error was harmless. Affirmed)

Robinson v. State of Florida, 881 So.2d 29 (1st DCA 2004) (where information charged that sexual offenses occurred "on or between the 17th day of February, 2001 and the 5th day of May, 2001" but trial court instructed jury, without objection, that they could not convict unless the State "proved[d] that the crimes were committed on February 27th, [sic] 2001 and/or May 5th 2001," it was improper for prosecutor to argue to the jury: "You can find the def. guilty whether you believe it happened on February 17th or May 5th. Either one. And if some of you believe it happened on one day and the others believe on the May 5th date and some on the February 17th date, you can still have a unanimous verdict to convict." Under the circumstances of this case, argument encouraged jurors to convict even if they did not reach a unanimous verdict." Reversed.)

Smith v. State of Florida, 866 So.2d 51 (Fla. 2004) (prosecutor's argument that if the aggravating circumstances outweigh the mitigating circumstances the jury is obligated to return a death recommendation, although erroneous, did not warrant a new penalty phase where no objection was lodged, court properly instructed jury on the law, defense counsel advised jury that "the law never requires the death penalty under any circumstances," and the prosecutor himself told the jury that the judge's instructions override any statements by lawyers. Therefore, no prejudicial or fundamental error occurred.)

Griffin v. State of Florida, 866 So.2d 1 (Fla. 2003) (*revised opinion* - prosecutor's comment about def.'s mitigating evidence, that the def. should not be considered a "victim" of his environment and upbringing and should be held accountable for his actions did not rise to the level of comments that court has previously ruled to be egregious and prejudicial.)

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (In DUI manslaughter case, it was improper for prosecutor to argue that he was only required to prove that def. had a blood alcohol level of .08 or higher at some point, not necessarily while driving the motor vehicle. Statement was a misstatement of the law and was improperly overruled by court. Reversed on these and many other grounds. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Fennie v. State of Florida, 855 So.2d 597 (Fla. 2003) (state's comment in penalty phase closing concerning def.'s alleged rape of victim prior to murder, as testified by two witnesses in guilt phase, was not an improper reference to an uncharged rape as a non-statutory aggravator. Comment was made as part of the larger factual context of the criminal episode, and as a factual predicate for the "avoid arrest" aggravator as well as HAC and CCP. Prosecutor did, however, improperly argue that if the aggravators outweighed the mitigators the jury was *required* to recommend death. Error was harmless where jury was properly instructed by the trial court. Affirmed.)

Randolph v. State of Florida, 853 So.2d 1051 (Fla. 2003) (In penalty phase, it was not improper for prosecutor to argue to jury: "In this phase of the case, when you retire to deliberate, your sentence should be based upon the evidence, not upon emotion, pity, or sympathy, anger, or hatred. But only upon the evidence and the law as His Honor will give you." A prosecutor may properly argue that sympathy towards a defendant is an inappropriate consideration.. [citation omitted])

Belcher v. State of Florida, 851 So.2d 678 (Fla. 2003) (in penalty phase, prosecutor argued to the jury: "Don't those violent crimes show his true character? Doesn't it show that he is a person who refuses to learn from prior experience? You might restate that. You might say he actually learned from one of those experiences. What did he learn regarding Ms. White? She was able to identify him. Ms. Embry wasn't able to come into this court and identify him." Comment was arguably improper as a suggestion that the def. killed Embry to eliminate a witness where the state was not pursuing the "avoid arrest" aggravator. Nonetheless, comment was harmless because it was made in the context of the "prior violent felony" aggravator and the trial court properly instructed the jury that it could only consider the listed aggravating factors. Affirmed.)

Floyd v. State of Florida, 850 So.2d 383 (Fla. 2002) (Although prosecutor's penalty phase argument that "This man not only deserves but the law requires that he receive the death penalty" could be interpreted as misstating the law because a jury is never *required* to recommend death, any possible error was harmless because comment was isolated, jury was properly instructed by trial judge on its role in the sentencing process and aggravators greatly outweighed mitigators. Moreover, comment could have also been interpreted as an evaluation of the evidence and the conclusions to be drawn from such evidence. Affirmed.)

Lugo v. State of Florida, 845 So.2d 74 (Fla. 2003) (prosecutor's comment in penalty phase, that: "... these are horrible, horrible murders for which there is no other sentence" was not a misstatement of the law. The prosecutor was asserting that the horribleness of the conduct deserved the death penalty as a factual comment, not a legal analysis, therefore, the comment was not erroneous. Moreover, even if it were interpreted as a comment on the applicable law, which it was not, the trial judge fully and correctly instructed the jury on the subject and on their role in the sentencing scheme. Further, comment that def. bought supplies to tape the victims up "like animals when they're people. Human beings" was not an attempt to argue an non-statutory

aggravating factor but was appropriately related to the evidence. Affirmed.)

Holmes v. State of Florida, 842 So.2d 187 (2nd DCA 2003) (prosecutor's misstatement of the law, that def. could be found guilty of attempted sexual battery if the def.'s finger attempted to have union with the victim's vagina, when combined with a similarly erroneous instruction by the court, constitutes fundamental error. Reversed.)

Williams v. State of Florida, 824 So.2d 1050 (4th DCA 2002) (Although prosecutor made an unobjected to misstatement of law in closing argument, error was harmless "when viewed in the context of the entire closing argument; the considerable number of times during argument where the prosecutor made the correct statement of law; the court's instructions that what lawyers say is neither evidence nor argument [sic]; and the court's proper instructions of the law." Affirmed.)

Bennett v. State of Florida, 823 So.2d 849 (1st DCA 2002) (where def., on trial for sale of cocaine, was seen handing something to co-def. who then sold 2 crack rocks to undercover officer and, upon arrest, def. was found to have an empty baggie with traces of cocaine in his pocket, it was improper for prosecutor to tell jury that possession of the baggie was possession of cocaine, a lesser included offense of the charge of sale of cocaine. Def. was only charged with sale as it related to the 2 crack rocks sold to the undercover officer, therefore, the lesser of possession could only relate to those 2 crack rocks. The possession of the baggie was an uncharged offense and prosecutor erroneously implied that the jury could convict def. for his possession of a quantum of cocaine entirely separate from the cocaine on which the charge was based. Reversed.)

Cox v. State of Florida, 819 So.2d 705 (Fla. 2002) (it was improper for state to argue to jury that if "the evidence in aggravation outweighs the evidence in mitigation, the law says that you must recommend the [the def] die." A jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors. Although the state repeated this erroneous statement in four times during voir dire and once during closing argument, error was not fundamental. Affirmed.)

Pollock v. State of Florida, 818 So.2d 654 (3rd DCA 2002) (in trial where def. claimed he shot victim to prevent victim from committing a sexual battery on him, it was improper and misleading for prosecutor to argue to jury, on 5 different occasions, that in order to claim self-defense, def. had to be in imminent danger of death or great bodily harm from an attempted sexual battery by victim. Error was compounded by erroneous jury instruction that stated that def. had to have reasonably believed that such force was necessary to prevent imminent death or great bodily harm to himself or another, AND the attempt to commit sexual battery upon himself or another. Correct instruction should have read "or." Under these circumstances the error was fundamental. Reversed.)

Keyes v. State of Florida, 804 So.2d 373 (4th DCA 2001) (although claim that injury of another was accidental usually bars claim of self-defense [which is an admission and avoidance],

exception exists where there is evidence indicating that the accidental infliction of an injury and the defense of self- defense or defense of another are so intertwined that the jury could reasonably find that the accident resulted from the justifiable use of force. Since such evidence existed in this case, it was improper for State to argue to jury that def.'s claim of self-def. was an admission that he committed the battery. Although def.'s attempted objection ["I will object"] was insufficient to preserve any specific ground for appeal, comments which improperly shift the burden of proof to the def. present a deprivation of the fundamental right to a fair trial serious enough to require reversal without objection. Reversed.)

Waterhouse v. State of Florida, 792 So.2d 1176 (Fla. 2001) (in penalty phase, it was not error for prosecutor to argue to jury that sympathy towards a defendant is an inappropriate consideration. "Well, I point this out to everyone, sympathy is just a quality of human nature. And we all have sympathy in one form or another, either for or against the victim or for or against Mr. Waterhouse or not. And the judge will tell you that you just don't let sympathy play a part in your verdict, that you just have to take the coat of sympathy off and hang it outside based on what the evidence and law is; okay?" Affirmed.)

Farrell v. State of Florida, 791 So.2d 598 (3rd DCA 2001) (where the testimony of child's mother that child told her she played the "peter game" with the def. and then simulated oral sex with a sausage was permitted only for the limited purpose of explaining the mother's state of mind when she deliberately left her daughter with the def. in order to confirm her suspicions, and court instructed the jury that such testimony was not to be used as substantive evidence of guilt but only to explain the actions of the mother, it was improper for state in closing to argue the value of the testimony concerning the sexual game as substantive evidence of the def.'s guilt {i.e. "[He] is the only one who played the peter game, the only one with the sausage."} Error harmless where trial court sustained the objection and immediately instructed the jury on the correct use of the evidence, repeating the curative instruction again during the final instructions to the jury. Affirmed.)

Fullmer v. State of Florida, 790 So.2d 480 (5th DCA 2001) (in trial for L&L in the presence of a child, where def. testified that he had not exposed himself but had exhibited a rubber penis while driving his vehicle, it was improper for the prosecutor to misstate the law to the jury, to the effect that it did not matter whether it was his penis or a rubber penis because the act was still a lewd and lascivious act. Information charged the def. with exposing "his penis." While statute does not require a "real" penis, the language of the information does. Objection overruled. When combined with other errors, some of which were not objected to, total errors where fundamental. Reversed.)

Shaw v. State of Florida, 783 So.2d 1097 (5th DCA 2001) (it was improper for prosecutor to argue to jury that burden of proof was met if State proved that def.'s faculties were "weakened." Law requires a finding that def.'s faculties were "impaired" and terms are not synonymous; one's faculties can be weakened without being impaired. Fact that trial judge subsequently instructed jury as to proper burden did not cure error since by overruling def.'s objection trial court

indicated to jury that terms were synonymous. Reversed.)

Sanders v. State of Florida, 779 So.2d 522 (2nd DCA 2000) ("Counsel may not contravene the law and the jury instructions in arguing to the jury." Improper for prosecutor to argue to jury that def. had burden of proving alibi beyond a reasonable doubt. It is sufficient if proof raises a reasonable doubt as to whether def. was present at the time and place of commission of the crime. Reversed.)

Lukehart v. State of Florida, 776 So.2d 906 (Fla. 2001) (In death penalty case, prosecution may properly ask the jury to hold the def. responsible for his actions despite his deprived background, may argue that the defense has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy. [See *Valle* below] Affirmed)

Kearse v. State of Florida, 770 So.2d 1119 (Fla. 2000) (in penalty phase of death case following remand, it was a misstatement for State to argue to jury that the appellate court had affirmed defendant's conviction but had "said that there should be a proceeding to recommend death." Isolated comment did not vitiate the entire resentencing where trial court properly instructed the jury as to the nature of the resentencing proceeding. Death penalty affirmed. [Note: comment made during voir dire but objectionable in closing as well.])

Brooks v. State of Florida, 762 So.2d 879 (Fla. 2000) (Prosecutor misstated the law by telling the jury that "if sufficient aggravating factors are proved beyond a reasonable doubt, you must recommend a death sentence, unless those aggravating circumstances are outweighed ... by mitigating circumstances." A jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors. Further, the State's example of a case involving a 16 year old getaway driver and 30 year old gunman where the driver may not warrant the death penalty was misleading since Florida law prohibits imposing the death penalty on anyone under the age of 17. Also, State improperly argued that by virtue of merging the "robbery" and "pecuniary gain" aggravating circumstances, those factors become "even more weighty, even more demanding. Demanding that the defendants be held fully accountable, to the full extent of the law." Argument would give "more weighty" aggravating circumstance to persons who commit murder during robbery, as compared with those who murder during other enumerated felonies, and defeats the purpose of merging the aggravators. Reversed due to these and other errors.)

Hitchcock v. State of Florida, 755 So.2d 638 (Fla. 2000) (it was improper for the prosecutor in a child rape/murder case to argue that the def.'s poverty and living circumstances were not mitigating factors because "they don't give us any understanding of why he did what he did," but error was harmless. Although comment could have been viewed as a limiting statement as to the jury's consideration of the mitigating circumstance of the def.'s background, which is an appropriate factor for consideration, erroneous comment was followed by a correct explanation that mitigation "makes the def. less morally culpable for the crime in some way," record reflects that thirteen witnesses testified about the deprivation and abuse in his background and judge

found each mitigating factor to be established and gave them some weight. Affirmed)

Zack v. State of Florida, 753 So.2d 9 (Fla. 2000) (prosecutor's arguments in death phase that victim impact evidence "was designed to show you ... that this woman was unique, that she was loved and that her loss is a loss to this community....You'll give that weight whatever [sic] you feel is appropriate, but you are entitled to hear that" were not improper. There was no suggestion that this evidence, in and of itself, showed another aggravating factor. Further, prosecutor's argument that sympathy has no place in the jury room was a proper admonition for jurors to consider the mitigation evidence without resort to their emotions. Claim that such argument would lead the jury to erroneously disregard any mitigating evidence which evoked its sympathy is rejected. Affirmed)

Quaggin v. State of Florida, 752 So.2d 19 (5th DCA 2000) (In case where 14 year old boy was playing in 76 year old def.'s yard with 10 year old friend and eventually entered def.'s home through sliding glass door and was shot and killed by def. who claimed that he thought victim was a burglar, it was improper for prosecutor to argue that in order for use of deadly force to be proper, def. h ad to show beyond a reasonable doubt that victim was committing a burglary. Issue is whether state has shown beyond a reasonable doubt that def.'s claim that a burglary was being committed and that it was necessary to use deadly force was unreasonable. "A def. has a fundamental right to present a defense and to have the jury properly instructed on any legal defense supported by the evidence. These rights stand for naught if the prosecutor can ridicule a defense so presented, denigrate the accused for his temerity in raising the issue, and misstate the law in contradiction of the judge's instructions ...." Combined with improper instructions, reversed)

Almeida v. State of Florida, 748 So.2d 922 (Fla. 1999) (in death penalty case, although prosecutor misstated the law in telling the jury on 2 occasions that presumption of sanity vanishes if the jury believes *beyond a reasonable doubt* that the def. is not sane, and def.'s objection was overruled, error was harmless because comment was made in the context of closing by an advocate and not by the court; the error was an innocent one as the prosecutor was struggling with a concept that is difficult to articulate; the prosecutor corrected the error when a short time later he read the correct statement of the law; the court immediately instructed the jury that what the lawyers say is neither evidence nor law and that he would be instructing them on the law and they should follow his instructions; and the jury was provided with a copy of the standard jury instructions to take with them into the jury room. Affirmed.)

Harding v. State of Florida, 736 So.2d 1230 (Fla. 1999) (improper for defense counsel to ask jury to disregard the law -"[S]ometimes the law doesn't fit ... I'm standing up in front of you ... and asking you not to follow the law." Court held that Supreme Court's ruling in *Urbin*, that "ignore the law" argument has no place in a trial, applies equally to the defense despite the jury's pardon power. Counsel may not argue jury nullification during closing. [Note: Trial court interrupted counsel without objection, admonished him and told jury they would be in violation of their oath if they did as counsel requested.]) Affirmed.

Urbin v. State of Florida, 714 So.2d 411 (Fla. 1998) (prosecutor's comment to jury that if they recommended a life sentence the def. could still be released someday because "We all know in the past the laws have changed. And we all know that in the future laws can change" was improper suggestion to jury that they disregard the law. Court held that "ignore the law" argument has no place in a trial, especially when asserted by the State.)

Miller v. State of Florida, 712 So.2d 451 (2nd DCA 1998) (new trial required where prosecutor ridiculed defense of voluntary intoxication as "the defense of lack of responsibility" claiming "no one forced him to do it." Prosecutor's comments tended to arouse an emotional reaction to the appellant's defense and, by misstating the law, to discredit a valid and legal defense. There being ample evidence of voluntary intoxication and the lower court failing to sustain the objection, the court reversed.)

Moore v. State of Florida, 701 So.2d 545 (Fla. 1997) (prosecutor's comment that mitigation evidence of def.'s nurtured and loving youth and otherwise normal life as a child "may sound like mitigation, but to me it's the most ... aggravating factor of all" was not an improper attempt to use mitigation in aggravation. It is within the judge's discretion to control the comments made to a jury, and ruling will not be disturbed absent abuse of discretion. Court properly instructed jury that closing arguments are not evidence and that they were only allowed to consider the aggravating factors defined by him. Affirmed.)

Damren v. State of Florida, 696 So.2d 709 (Fla. 1997) (it was error for prosecutor to advise jury, on two occasions, that intoxication is not a defense unless it rises to the level of preventing the def. from knowing that he is killing or burglarizing or stealing. This placed a higher burden on the def. than is required by under intoxication defense. Error harmless where it was not emphasized and court properly instructed jury on the law.)

Kilgore v. State of Florida, 688 So.2d 895 (Fla. 1996) (Prosecutor's misstatement of the law relating to "heat of passion" (i.e. that it only applies on the issue of whether homicide was excusable rather than affecting premeditation) was not objected to and not fundamental. Affirmed.)

Northard v. State of Florida, 675 So.2d 652 (4th DCA 1996) (improper for prosecutor to argue "in order to find him not guilty you're going to have to believe that the def. was telling the truth and the officer was lying ...." This misstatement urges the jury to convict the def. for a reason other than the guilt of the crimes charged [i.e. determine who was lying as the test for deciding guilt].)

Stephenson v. State of Florida, 645 So.2d 161 (4th DCA 1994) (in response to def.'s argument that police had tricked def. into giving confession, it was improper for State to argue that if there was anything wrong with what the police did , the jury would not have gotten to hear the taped confession. Voluntariness of confession is mixed issue of law and fact. Improper for State to

suggest to jury that its voluntariness has already been determined. Not reversible error.)

Clewis v. State of Florida, 605 So.2d 974 (3rd DCA 1992) (Improper for prosecutor to argue that in order for jury to find a reasonable doubt, they must believe the defendant's testimony over the officers. Test for reasonable doubt is not which side is more believable, but whether, taking all of the evidence in the case into consideration, guilt as to every essential element has been proven beyond a reasonable doubt. Prosecutor's argument improperly shifted burden of proof to def.)

Valle v. State of Florida, 581 So.2d 40 (Fla. 1991) (In death penalty case, State may properly argue that the def. has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy. In this case, the prosecutor did not argue that the law would not allow the jury to consider sympathy in their recommendation. Affirmed.)

Ham v. State of Florida, 580 So.2d 868 (3rd DCA 1991) (Prosecutor's argument that: "You are going to hear you're a lot about reasonable doubt. We have to prove our case beyond a reasonable doubt. But ladies and gentlemen, let's really get down to it. You are not here to find doubt. You are here to find the truth, and there has been a lot of smoke screens" did not denigrate the concept of reasonable doubt. Even if it had, error was harmless. Affirmed)

Alvarez v. State of Florida, 574 So.2d 1119 (3rd DCA 1991) (improper for prosecutor to argue, as to reasonable doubt: "It goes to your heart, your gut. ...Nobody can describe what a reasonable doubt is, but you have to have it in your heart of hearts.")

Rhodes v. State of Florida, 547 So.2d 1201 (Fla. 1989) (it was a misstatement of the law for prosecutor to argue to the jury that the def. might be paroled before serving his 25 year min. man. if jury recommended life rather than death. Also misstatement to argue that the fact that the victim's body was transported to the dump by dump truck supported heinous, atrocious, and cruel aggravator. Actions after death cannot support this aggravator. Reversed due to cumulative effect of all errors and judge's failure to sustain any of the objections.)

Bass v. State of Florida, 547 So.2d 680 (1st DCA 1989) (in a case where only witnesses were def and victim, prosecutor's comment that one was lying and that if they want to tell the def. that he lied they should find him guilty invited the jury to convict the def for a reason other than the crimes charged (i.e. simply because he lied))

Garron v. State of Florida, 528 So.2d 353 (Fla. 1988) (prosecutor's statement: "The law is such that when the aggravating factors *outnumber* the mitigating factors then death is an appropriate penalty" was improper in that it was a misstatement of the law. Reversed based upon cumulative errors. *Abrogation on other grounds recognized in 979/301*)

Craig v. State of Florida, 510 So.2d 857 (Fla. 1987) (To the extent that the prosecutor misstated the law, it was adequately remedied by judge's cautioning the jury that he would

instruct them on the law and that they should follow his instructions)

Cave v. State of Florida, 476 So.2d 180 (Fla. 1985) (it was improper for def. counsel to argue to jury that they could not find def. guilty of first-degree murder unless he personally killed the victim. Under the circumstances [after several objections to this argument were sustained], it was appropriate for trial court to remove the jury and require def. counsel to proffer the remainder of his closing argument. Counsel may not contravene the law and the jury instructions in arguing to the jury.)

Meade v. State of Florida, 431 So.2d 1031 (4th DCA 1983) (It was improper for prosecutor to argue in murder trial: "And [def.]... sits here today and I submit to you under the weight of all the evidence there, ladies and gentlemen, is a real live murderer. ... There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill. ... [H]ere's one person [victim] who did not get his day in court. [Def.] has." Comparison of Florida's murder statute with the Fifth Commandment could have conveyed to jury that all killing is against the law, when in fact under certain circumstances killing is excused. Further, comments preceding and following the reference to the Fifth Commandment seem intended to inflame the jury and to appeal to its sympathy for decedent and his kin. Reversed.)

XV. Miscellaneous comments

A. Comment about validity of defense

Yi v. State of Florida, 128 So.3d 186 (5th DCA 2013) (it was improper for prosecutor to denigrate the defense by calling it absurd and saying that defense counsel was grasping at straws. [Note: Dicta, case already reversed on other grounds])

State of Florida v. Smith, 109 So.3d 1204 (5th DCA 2013) (it was error for trial court to grant new trial for prosecutorial error during closing argument where only comment that drew objection, prosecutor's reference to claimed defense as "insane," was cured when following objection prosecutor rephrased comment and def.'s counsel did not request a curative instruction or move for a mistrial. Objectionable statement received the appropriate treatment it warranted and would not have supported a mistrial had one been requested. Other errors did not rise to the level of fundamental error. Order granting new trial reversed. [NOTE: trial judge granted new trial 2 months later without hearing, transcribing closing, giving state opportunity to be heard on motion for new trial or otherwise explaining it's ruling.])

Toler v. State of Florida, 95 So.3d 913 (1st DCA 2012) (prosecutor's references to appellant as being a liar, to appellant's race ["This is a person who is willing to lie to get out of trouble. . . . [I]f there wasn't the physical evidence, you would be hearing a story about misidentification. You

would be hearing a story about how all young black males look the same. *** Can't go with the story anymore of it wasn't me, you go into character assassination. Michael Brown is a bad person. He's gay. He likes young men. He basically uses prostitutes. He's some sort of sexual deviant. I'm honestly surprised that you didn't hear that he makes meth in his bathtub --"], and to matters for which there was absolutely no support in the record, in a manner both pejorative and sarcastic were so invasive and inflammatory, "it is questionable whether the jury could put aside the prosecutor's character attacks, and decide the case based strictly upon the evidence." [citation omitted] Reversed.)

DeHall v. State of Florida, 95 So.3d 134 (Fla. 2012) (in death penalty case, it was improper for prosecutor to characterize def's mitigating circumstances as "excuses" and then, after objection was sustained, continue: "every single thing that was presented to you in mitigation, which I really think was one thing, stretched it out [to] make it more, but it's one, it's an excuse." Conviction affirmed and remanded for new penalty phase when combined with other improper comments.)

Ruiz v. State of Florida, 80 So.3d 420 (4th DCA 2012) (prosecutor did not belittle def's insanity defense but rather pointed out substantial evidence that contradicted his defense. Affirmed.)

Franqui v. State of Florida, 59 So.3d 82 (Fla. 2011) (in death penalty case appeal from post-conviction motion, prosecutor's comment: ""That's the world of Dr. Toomer [Franqui's mental mitigation expert], folks. Through the looking glass at Disney World. Make believe. Use your common sense" was improper as it suggested that the mental mitigation was make-believe or a fantasy. Error harmless where extensive aggravation was presented. Affirmed.)

Clowers v. State of Florida, 31 So.3d 962 (1st DCA 2010) (in murder trial, prosecutor's questioning of defense claim that def was guilty only of manslaughter did not ridicule defendant or denigrate def's theory of defense. State hewed closely to the facts in evidence, asking the jury to draw its own inferences from the circumstances surrounding victim's murder and amounted to a logical analysis of the evidence in light of the applicable law. Affirmed.)

Courtemanche v. State of Florida, 24 So.3d 770 (5th DCA 2009) (prosecutor's comment, (that no matter how overwhelming the evidence against an accused, he's entitled to a trial if he asks for one, and that just because there's a trial the jury doesn't have to sit there and say "well, there must be something. There isn't anything. The defendant is guilty and at this stage, after you've seen all the evidence, each and every element of each charge that's pending against [def] has been proven beyond … every reasonable doubt") does not rise to the level of fundamental error given the abundance of evidence of def's guilt. Court did not specifically address def's claim that closing "ridiculed the def's decision to take his case to trial and expressed his personal opinion " on def's guilt. [NOTE: 5th DCA takes a broad view of what constitutes expression of personal opinion; therefore it may have found prosecutor's statement to be improper while other DCA's would not.)

Rogers v. State of Florida, 957 So.2d 538 (Fla. 2007) (prosecutor did not improperly denigrate the statutory mitigator concerning def's capacity to appreciate the criminality of his conduct by stating: "Mr. Rogers is a violent, aggressive person and brain damage has nothing to do with it." Although denigrating a statutory mitigator would be improper, the prosecutor was not doing so but was merely responding to defense counsel's argument that Rogers' aggressive behavior was due to a history of head trauma, a brain contusion, and damage to the frontal and temporal lobes of his brain. Affirmed.)

Delgado v. State of Florida, 776 So.2d 233 (Fla. 2000)(prosecutor's comment suggesting that mitigation evidence was an attempt to excuse or justify the murder was not of such a nature as to taint the jury's recommendation of death. Wide latitude is permitted in arguing to the jury and it is within the trial court's discretion to control the arguments of counsel. [*NOTE: this case has no precedential value as it was withdrawn and superseded. The superseding opinion, however, did not address the closing arguments and reversed on other grounds. Therefore, the case is included in the outline to give you an idea of the Court's possible view on this scenario.*])

Brooks v. State of Florida, 762 So.2d 879 (Fla. 2000) (It was error for state to denigrate def.'s mitigating factors as "flimsy," "phantom" and "excuses." Reversed.)

Jones v. State of Florida, 652 So.2d 346 (Fla. 1995) (In response to defs. argument that because def. had been abandoned by his mother and raised by his aunt he suffered from extreme mental or emotional distress, prosecutor pointed out that Clarence Thomas had been raised in a foster home, and Gerald Ford had been adopted but both had been able to lead productive lives and that def.s argument was a ridiculous and insulting suggestion that everyone raised in a foster home is destined to be a killer. Although reference to "insult" was unfortunate [court sustained objection], it was not so inflammatory or prejudicial as to warrant a mistrial).

Taylor v. State of Florida, 640 So.2d 1127 (1st DCA 1994) (during his opening statement, the prosecutor told the jury that they would have to decide whether the insanity defense was a "cop out." Although the opinion is unclear about the specifics, it appears that during voir dire the prosecutor had also denigrated the defense of insanity. Held: Reversed. The court felt that because the issue of insanity was the only issue for the jury's consideration, the state's comments could not be deemed harmless).

Williams v. State of Florida, 593 So.2d 1189 (3rd DCA 1992) (improper for prosecutor to suggest that defense wanted jury to feel sorry for def., disobey the law and find def. guilty of a lesser charge. It is improper for State to attack the person of the def. or his valid defense.)

Blaylock v. State of Florida, 537 So.2d 1103 (3rd DCA 1988) (it was not improper for state to argue to the jury that based on all the facts, Blaylock's reliance on an insanity defense was incredible. The remarks were made within the context of asking the jury to consider all the evidence rather than an impermissible argument which denigrates the insanity defense in general.

Affirmed.)

Rosso v. State of Florida, 505 So.2d 611 (3rd DCA 1987) (Prosecutor's denigration of insanity defense, which is a valid defense, was improper and, combined with comment on def's silence constitutes fundamental error. Reversed)

Gilbert v. State of Florida, 362 So.2d 405 (1st DCA 1978) (Prosecutor's statement that if the defendant was not in Pensacola at the time of the crime there would be an alibi witness [where no such defense was presented] was reversible error despite a curative instruction that defendant does not have to testify or present any evidence.)

B. Comment about defendant's demeanor while not on witness stand

Jenkins v. State of Florida, 96 So.3d 1110 (1st DCA 2012) (it was improper for prosecutor to comment on def.'s demeanor while not on the witness stand: "The defense has asked you to evaluate the demeanor [of the] different witnesses that testified before you today. I also encourage you to review the demeanor of the defendant himself. While [the assistant prosecutor] was making his opening statement, and he sat there smiling at you, he thinks this is funny, this is all a joke." Comment was isolated and there was ample evidence of guilt. Affirmed.)

Wellons v. State of Florida, 87 So.3d 1223 (3rd DCA 2012) (prosecutor's comment about the demeanor of the def. while evidence was being presented against him in his murder trial: "And during that time, that was when [def.] was so bored that he took a nice long yawn. See, it didn't bother him" was improper. However, isolated comment was harmless error. Affirmed.)

Baldez v. State of Florida, 679 So.2d 825 (4th DCA 1996) (improper for prosecutor to argue that def. was glaring at child witnesses while they were on the stand.)

Rodriguez v. State of Florida, 609 So.2d 493 (Fla. 1992) (it was improper comment on def.'s demeanor off the witness stand when the prosecutor argued that the person who committed the crime was "[t]his man with his eyes closed sleeping over here." - Harmless.)

Holton v. State of Florida, 573 So.2d 284 (Fla. 1990) (improper for prosecutor to comment on def.'s demeanor in court while not on the witness stand. -Harmless error)

Williams v. State of Florida, 550 So.2d 28 (Fla. 1989) (prosecutor's comment during closing argument about the defendant's laughing and snickering were improper. Held: Harmless error).

Pope v. Wainwright, 496 So.2d 798 (Fla. 1986) (Improper to comment that def, who claims he was wrongfully accused, was "grinning from ear to ear" while not on the witness stand. Demeanor of def while not on the stand is not evidence subject to comment by prosecutor)

Harris v. State of Florida, 438 So.2d 787 (Fla. 1983) (prosecutor's comment: "I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial" was not a comment on the def.'s failure to testify at trial. As remainder of argument reflects, prosecutor was referring to the critical issue of whether the def.'s confession was voluntary and, in doing so, was commenting on appellant's demeanor at the time the confession was made and comparing it with his demeanor at trial. [Note: court does not address whether it was appropriate to comment on the demeanor of a def. who did not testify at trial.] Affirmed.)

Spriggs v. State of Florida, 392 So.2d 9 (4th DCA 1981) (during closing arguments, the prosecutor picked up the knife admitted into evidence and said to the jury, "It's not funny ... this is a weapon," and proceeded to stick the knife into the jury rail. The Fourth District rebuked the prosecutor for the comment and his behavior but also stated that the defendant's bizarre conduct, together with the continuous laughter and interruptions, provoked the prosecutor and solicited the comments. Held: Conviction affirmed in view of overwhelming evidence).

Thompson v. State of Florida, 235 So.2d 354 (3rd DCA 1970) (it was improper for prosecutor to argue his opinion that he had not "heard anything in this courtroom which says to me that I can look at [the def.] ... in the eye and say 'You were justified in shooting that man down.' and she won't look me in the eye when I say that to her." Together with other prejudicial comments, reversed.)

C. Comment about objection counsel made during trial

Wolcott v. State of Florida, 774 So.2d 954 (5th DCA 2001)(improper for prosecutor to attack defense counsel by pointing out to jury that defense counsel objected to evidence prosecutor wanted to present. "Now I tried to ask the deputy or officer if [the victim] had told him how she had found it, and [defense counsel] didn't want to let her say that because that was hearsay." Objections of counsel are also not part of the evidence. Reversed on these and other grounds.)

Caraballo v. State of Florida, 762 So.2d 542 (5th DCA 2000) (It was improper for State to argue: "You are not going to get to go back and take [the police reports] in the back room.... I wanted them in evidence. It's not my fault they're not." [Note: In this case the appellate court lists a collection of errors like the ones above that were made by the prosecutor but, unfortunately, also lists arguments as error where no citation or explanation is provided as to why it is erroneous. In addition, the footnotes attempting to identify the particular error sometimes appear to be wrong. There are certainly sufficient errors for their conclusion of fundamental error but some of the claimed improprieties may, in my opinion, be acceptable in other jurisdictions or even before another panel of this DCA.])

Knight v. State of Florida, 672 So.2d 590 (4th DCA 1996) (error for prosecutor to suggest that there was something improper about def.'s counsel's legal objections during state witness'

testimony.)

Ryan v. State of Florida, 457 So.2d 1084 (4th DCA 1984) (Prosecutor's statement in closing that every piece of evidence was objected to by defense counsel and: "If our case was so weak...what was [defense counsel] afraid of ?" was improper.)

Mulford v. State of Florida, 416 So.2d 1199 (4th DCA 1982) (in a case where def. [rightfully] attempted to introduce a redacted letter but it was excluded upon objection from the state, it was improper for state to argue to jury that state would not have objected to introduction of entire letter but that def. counsel did not want jury to see entire letter, that def. only wanted jury to see letter with portions deleted and that they could draw their own inferences from that. Prosecutor also argued that he was not implying that def. counsel was doing anything wrong, stating that it's his job to defend his client and "[i]f he feels that it would not benefit his client to introduce those portions, then he has a right to try to keep those out of the case." Reversed.)

D. Improper mention of criminal penalties during closing argument

Brandon v. State of Florida, 727 So.2d 1010 (5th DCA 1999) (improper for prosecutor to comment that "if [the accomplices] are facing life sentences, certainly [the def.] is in the same boat," because it is improper to inform the jury of possible penalties for the def.'s crime except in death cases. Error was harmless where def. counsel had already informed the jury of the possible penalties when he cross examined the accomplices and reminded the jury in his closing that the accomplices were charged with the same crimes as def.)

Legette v. State of Florida, 718 So.2d 878 (4th DCA 1998) (Except in cases where the jury is faced with the choice of recommending either the death penalty or life in prison, it is improper for counsel to refer to penalties during closing, other than by using the phrase "lesser included offenses." To do so is to suggest an improper basis for the jury's decision. Nonetheless, prosecutor's reference to lesser of battery being a misdemeanor was not prejudicial. Affirmed)

Smith v. State of Florida, 648 So.2d 1259 (4th DCA 1995) (it is improper for the State to comment on possible penalties in closing argument)

Valdez v. State of Florida, 613 So.2d 916 (4th DCA 1993) (prosecutor's comment in closing that the "police stand between us and anarchy" was improper. Additionally, the prosecutor argued that the defendant was "trying to cut his losses" by admitting to the less serious charge in the information and in so doing told the jury the relative penalties for the difference counts in the charging document admitted to).

E. Improper comment that charges were based on a grand jury indictment

Reichmann v. State of Florida, 581 So.2d 133 (Fla. 1991) (improper for prosecutor to argue to jury that def. had been indicted by "23 grand jurors" as that left improper implication of guilt in the minds of jurors. Objection was properly sustained. No motion to strike, for curative instruction or for mistrial was made. In any event, court found def. was not deprived of a fair trial by collective errors.)

Riley v. State of Florida, 560 So.2d 279 (3rd DCA 1990) (improper for prosecutor to comment to jury "why would the grand jury return the indictment against him, the grand jury of this county? ... Because he's guilty of first-degree murder." Reversed based on this and other errors.)

Giamo v. State of Florida, 245 So.2d 116 (3rd DCA 1971) (Improper for state to impute probative value to grand jury indictment. Curative instruction sufficient.)

F. Comment as to character of neighborhood where Defendant was arrested

Wimberly v. State of Florida, 41 So.3d 298 (4th DCA 2010) (State's argument that community where shooting occurred was "the type of neighborhood where people attack each other … a close community where people want to protect each other, they certainly don't want to talk to police" and "like to handle them things themselves…you wake up, …you hear about people shooting people all over the place" was improper , not as an appeal to racial prejudice as defense counsel now argues, but as a comment on facts not in evidence because the comments were completely unsupported by any evidence at trial. Defense counsel failed to preserve objection (stating that he had no objection to State's comments other than to comment about "people shooting people") and error was not fundamental. Record was replete with witnesses' memories being vague and having to have their recollection refreshed with prior statements, and victim himself told his girlfriend to "tell no stories." It would have been clear to the jury that many of the witnesses were reluctant to testify so comment was not designed to imply that def was "guilty by association" as is sometimes prohibited in comments about a person being arrested in a "high-crime area." Affirmed.)

Lucier v. State of Florida, 41 Fla. L. Weekly D258 (4th DCA 2016) (Although def counsel's suggestion that def's actions were totally innocent and detective acted unreasonably in following def's vehicle may have opened the door to evidence and argument about police observing def conduct a hand to hand transaction, it did not open the door wide enough for state to elicit and argue that the transaction occurred by a drug house. It is error to allow references to the character of the location of a suspect's arrest. Testimony [and argument] about def's proximity to a drug house was irrelevant and unduly prejudicial by implying guilt through association. Reversed.)

Williams v. State of Florida, 10 So.3d 218 (3rd DCA 2009) ([NOTE: content of improper

argument gleaned from concurring opinion as majority opinion did not give specifics, therefor it is impossible to determine if the majority would have agreed with concurring judge's conclusions about the propriety of specific arguments]— It was improper for State to argue "This is street justice. It's not uncommon in that area. There were many people that were at the flea market that day. But they knew this def. They also knew Norton. They know that they are not nice guys. They didn't want to come forward. You only heard from—." Comments were unsupported by evidence, implied the existence of other witnesses who could corroborate the testimony presented and suggested that def had a prior criminal record because everyone was afraid to come forward because they knew he wasn't a "nice guy." Objections and motions were overruled but error harmless given strength of case. Affirmed.)

Latimore v. State of Florida, 819 So.2d 956 (4th DCA 2002) (it was improper for prosecutor to repeatedly characterize the area of def.'s arrest as a place of many auto burglaries which motivated the decoy operation that resulted in def.'s arrest. Officer's testimony on the subject did not relate to auto burglaries observed by officers at or around the time of def.'s arrest and, therefore, was not "relevant context testimony" as the State suggests. Instead, the testimony related to general data and crime statistics which showed the area's high incidence of burglaries. The prosecutor's highlighting of this improper evidence in both opening and closing may have contributed to the verdict. Reversed.)

Wheeler v. State of Florida, 690 So.2d 1369 (4th DCA 1997) (it was improper for witness to identify location of def's arrest on drug charges as being a known drug area. Error was compounded when prosecutor argued: "And I submit to you that your common sense tells you that if an undercover officer is going to go into a known drug area and attempt to successfully buy drugs from someone who is selling drugs, that in order to be successful, he has to look act, walk, talk and behave like someone who is there to buy drugs. … This is an area known for drug transactions. … And I would suggest to you that your common sense would tell you that the Defendant, who is obviously a user, and knows, you know, that he's in an area where drugs are bought and sold, I mean he's there trying to make the money to buy more for himself." Reversed.)

Johnson v. State of Florida, 670 So.2d 1121 (5th DCA 1996) (*opening statement*-it is improper in a drug prosecution case for the prosecution to characterize the area in which a def. was arrested as a high crime area or a known drug location. Evidence of this nature is generally considered irrelevant to the issue of guilt and can be unduly prejudicial to the def. because it tends to establish bad character or propensity. However, passing reference in opening was harmless as it did not become a feature of the trial and was not highlighted in closing. [Note that comment can also be less harmful in cases where def. denies being present during the transaction, since he is less likely to be convicted through "guilt by association."] Affirmed.)

Sherrod v. State of Florida, 582 So.2d 814 (4th DCA 1991) (prosecutor's comment alluding to the criminal character of the neighborhood where def. was arrested, following on the heels of officer's testimony that it was a high crime area, unduly prejudiced def.--Reversed)

G. Prosecutor's comment about defendant's lack of remorse

Fletcher v. State of Florida, 168 So.3d 186 (Fla. 2015) (prosecutor's argument: *"What is the appropriate sentence for someone who murders someone who was essentially his step-grandmother? What is the appropriate sentence for someone who, just three days after her murder, refers to her ... by terms such as bitch, ignorant, dumb-ass? ... What is the appropriate sentence for someone who, rather than recognizing the heinous crime that they have committed, instead blames the victim and says -- essentially says that it is her fault, that if she had not fight -- fought them, that she -- they would have left her alone,"* were not improper comments on def's lack of remorse as they made no mention of remorse or any other term that alludes to remorse. Prosecutor made no argument about def's lack of remorse and the comments, which simply related to what an appropriate sentence would be in the context of the facts of the case, were made at the beginning of the statement before the prosecutor had begun to discuss aggravation and mitigation. Affirmed.)

Walls v. State of Florida, 926 So.2d 1156 (Fla. 2006) (It was not error for prosecutor to argue that def. only expressed concern for himself and how his life had been ruined, and never stated he was sorry for the victims. "Lack of remorse" comment in death penalty prosecution was invited by defense counsel who had argued that def.'s sobbing and tearful statements on the taped confession showed that he did not premeditate the murders and was sorry for what had happened.)

Ford v. State of Florida, 802 So.2d 1121 (Fla. 2001) (In death penalty case, State's argument that "the punishment must fit the crime," when viewed in the totality of the closing argument, was a simple and fair representation of the law. Despite def. counsel's claim to the contrary, it did not bar the jury from considering the character and history of the def; the prosecutor said nothing about excluding those factors. Further, prosecutor's comment that def. had no excuse for committing the crime and that the fact that def. had not been abused during his childhood makes the crime worse was dealt with appropriately when the trial court instructed the prosecutor to refrain from using the term "excuse." There was no error in the state's argument that much of the def.'s mitigation evidence was intended to invoke sympathy. Likewise, where def. had presented evidence of his remorse, it was completely permissible for State to argue his lack of remorse, despite the fact that trial court sustained the objection to such argument. Conviction and sentence affirmed).

Shellito v. State of Florida, 701 So.2d 837 (Fla. 1997) (it was improper for prosecutor to raise the def.'s lack of remorse in capital sentencing as that is a non-statutory aggravating factor. Error harmless. Affirmed)

Gorby v. State of Florida, 630 So.2d 544 (Fla. 1993) (In first degree murder trial [guilt phase], it was not error to deny motion for mistrial when, among other errors, prosecutor argued to jury

that def. had shown no remorse. Trial court sustained the objection and instructed the jury to disregard the objectionable statement. Mistrials should be granted only when necessary to insure that a def. receives a fair trial. Affirmed)

Jones v. State of Florida, 569 So.2d 1234 (Fla. 1990) (improper for prosecutor to comment on def.'s lack of remorse in guilt phase or penalty phase.)

H. Comment relating to defendant's right to trial by jury

Evans v. State of Florida, 177 So.3d 1219 (Fla. 2015) (it was improper for the prosecutor to comment on the def's right to trial by jury by pointing out the strong case against the def and stating: "This is what America is about. Everybody has a right to a jury trial. … So in America everybody has a right to a jury trial regardless of the evidence against you. It could be on videotape. It could be in front of a hundred priests. You have a right to a jury trial." Comments were specifically directed at def's decision to seek a jury trial despite the significant incriminating evidence against him. Such a comment negatively reflected upon def's exercise of his constitutional right because it suggested that he wasted the time of the court and the jury by seeking a jury trial. Reversed for cumulative closing argument errors and other trial errors.)

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (in death penalty case, prosecutor's comment that during search for victim's body def. "was in charge of the situation . . . [and] was the center of attention, just like he is right now" did not constitute an impermissible comment on his decision to exercise his right to trial. The evidence showed that def. manipulated police over the span of three counties for multiple days during the search for victim's body. It is logical to infer that def. was both in charge of and the center of attention of a search conducted at his direction. It is equally logical to infer that the defendant at a capital murder trial is the center of attention. This was fair comment on the evidence. Conviction and sentence affirmed.)

Courtemanche v. State of Florida, 24 So.3d 770 (5th DCA 2009) (prosecutor's comment, (that no matter how overwhelming the evidence against an accused, he's entitled to a trial if he asks for one, and that just because there's a trial the jury doesn't have to sit there and say "well, there must be something. There isn't anything. The defendant is guilty and at this stage, after you've seen all the evidence, each and every element of each charge that's pending against [def] has been proven beyond … every reasonable doubt") does not rise to the level of fundamental error given the abundance of evidence of def's guilt. Court did not specifically address def's claim that closing "ridiculed the def's decision to take his case to trial and expressed his personal opinion " on def's guilt. [NOTE: 5th DCA takes a broad view of what constitutes expression of personal opinion; therefore it may have found prosecutor's statement to be improper while other DCA's would not.)

Lingebach v. State of Florida, 990 So.2d 1213 (1st DCA 2008) (Prosecutor's argument: "The reason we're here is because this defendant doesn't want to take responsibility or be accountable

for his actions" was an improper comment on the def's right to a jury trial. Affirmed because of overwhelming evidence.)

Lewis v. State of Florida, 879 So.2d 101 (5th DCA 2004) (Although it is generally improper for a prosecutor to comment on the defendant exercising his right to a jury trial, it was not improper for prosecutor to state to jury that "The state would prefer that we were not here at all" and that it was the defendant "that chose to bring us here today and force you to listen to this testimony …." Comment was an invited response to defense argument that the reason "why we are here. … The state wants to execute, wants to kill [def]. Or they want him carried out of prison in a box after having served life without any possibility of parole." The state's response specifically identified the defenses assertions and then explained that the reason they were there was not because the state wanted to kill the defendant or see him carried out of prison in a box, as the defense argued, but rather because the def, not the state, "chose to bring us here and force you to listen to this testimony." Trial court properly found that comment was an invited response. [**Note**: trial court also felt, based on observations of demeanor and tone of the lawyers, that comment was not to be interpreted as directed at his right to trial by jury. Although it was not a focus of the appellate opinion, it may be that trial court felt that most likely interpretation was that def, through his actions of committing the crime, was the one who brought them there. Either way, appellate court focused on invited response, rather than interpretation of words.] Affirmed.)

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) (it is improper for prosecutor to disparage def. for having exercised his right to trial. [No facts in opinion] Reversed due to multiple improper arguments)

Bell v. State of Florida, 723 So.2d 896 (2nd DCA 1998) (Although it was improper for prosecutor to vouch for the truthfulness of officers, urge the jury to send def. a message, argue matters not in evidence and comment on def.s exercise of his right to trial by jury, the errors were not fundamental and the only error objected to [def.s exercise of right to trial by jury] was harmless. Affirmed.)

Conley v. State of Florida, 592 So.2d 723 (1st DCA 1992) (prosecutors argument that few people report rape because they have to recount it to officers, attorneys, jurors and then "sit idly by as [the defense] parades witness after witness to say what a terrible person she is" was improper but harmless.) [subsequently rev'd on other grounds, 620 So.2d 180 (Fla. 1993)].)

Jordan v. State of Florida, 334 So.2d 589 (Fla. 1976) (statement that defendant "doesn't have the courage to stand before the Bench and take that first step toward rehabilitation and say, okay, I am sorry..." not improper comment on right to jury trial or right to remain silent when defendant became a witness at trial and prosecutor has right to comment on his testimony, etc.)

I. Prosecutor's remarks about defense counsel's belief in the guilt of defendant

Fryer v. State of Florida, 693 So.2d 1046 (3rd DCA 1997) (improper for state and defense to express personal opinions on credibility of witnesses and guilt or innocence of accused. State also improperly attacked defense counsel and asserted that he knew his client was guilty. Def. counsel improperly argued facts not supported by evidence. Invited Reply doctrine requires that the comments of the replying party be viewed in light of the improper argument to which they reply. On the facts of this case, the State's reply far exceeded what was necessary to "right the scale." [This case includes a priceless concurring opinion on all matters by Judge Rodolfo Sorondo])

J. Bad faith comments or reference to something that was ordered or agreed would not be discussed in closing

Herring v. State of Florida, 132 So.3d 342 (4th DCA 2014) (where state successfully precluded defense from eliciting from police officer that he thought def was "crazy" and def counsel subsequently introduced the officer's opinion through testimony of psychologist, it was not error for state to tell jury in closing that they had not heard the police officer say def was crazy. Comment was factually correct and was not made in bad faith as it was a fair reply to def counsel's closing that incorrectly stated to jury that officer had told them def. was crazy. Further, state continued, following def. objection, by pointing out that he never challenged doctor about whether he was making up allegation of officer's statement and that doctor said it was in officer's report so prosecutor was "sure" that statement was in officer's report. Affirmed.)

Moore v. State of Florida, 57 So.3d 240 (3rd DCA 2011) (in second degree murder trial, where although there was no evidence that def. was involved in sexual activity with victim, victim's body was found in a field with his shorts pulled down and def. had told a witness that he had "killed a faggot," prosecutor did not violate pretrial order prohibiting suggestion of sexual activity between def and victim by arguing: "[W]hen you look at the exact circumstances surrounding the entire incident that happened to Keith, and everything that happened in the close quarters of that car, there Keith is in the front seat of this car with his pants down, and he died?" Comment did not suggest the defendant committed an uncharged crime or that some type of sexual activity occurred in the vehicle. Rather, the record reflects that the prosecutor's statement was made in support of the State's theory that the victim was killed because of his sexual orientation, and that the defendant acted with malice. The testimony clearly reflects that the defendant knew the victim was gay. The victim was found in a field with his shorts partially down, pebbles were found in the waistband of his boxer shorts, and the medical examiner testified that the evidence suggested the victim's shorts were down before he was dragged through the field. Affirmed. [*Quashed and remanded on other grounds 137 So.3d 1021*])

Barnett v. State of Florida, 45 So.3d 963 (3rd DCA 2010) (where state objected to mother's statement that victim/daughter had recanted her testimony on grounds of "hearsay" and

statement was excluded, trial court did not err in denying a motion for mistrial when state subsequently argued in closing (in response to defense counsel's comment about inconsistencies in victim's testimony) that victim's recounting of the crime, on the 5 prior times it was discussed, was consistent. "Decision on whether to grant or deny a motion for mistrial is committed to the sound discretion of the trial court…." Affirmed.)

Hayward v. State of Florida, 24 So.3d 17 (Fla. 2009) (penalty phase – Although victim impact evidence itself was proper, prosecutor's use of it to compare and contrast the life choices made by the goal-oriented, hard-working victim with the choices made by the defendant that led him to where he is today was improper [especially where issue was addressed prior to closing and State agreed to refrain from using victim impact evidence to make characterizations and opinions about the defendant]. "In penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial" [quoting Bertolotti, 476/130]. Viewed in context with the entire closing, comments do not rise to the level of fundamental error. Prosecutors cautioned to use victim impact evidence only for limited, permitted purposes. [NOTE: case was re-affirmed on post-conviction appeal on same basis with court also pointing out that, while improper, prosecutor did not argue that victim's life was somehow more valuable than def's life. The comment appears to have been aimed more at pointing out that it was no one's fault but def's -- based on the choices he made in life -- that he was sitting in court convicted of the crime of murder. *Hayward v. State of Florida*, 40 Fla. L. Weekly S381(Fla. 2015)] Affirmed.)

Edwards v. State of Florida, 19 So.3d 1043 (3rd DCA 2009) (where defense counsel had previously sought to introduce def's prior statement to police which was arguably consistent to his trial testimony but statement was excluded upon prosecutor's objection that it was self-serving, prosecutor's closing argument referring to possibility that def, having sat through the entire trial and having heard all the evidence, had tailored his testimony to the other testimony he heard in the case, "may have been questionable" under the "gotcha" theory. Argument not properly preserved and "comment was not so serious as to require granting a new trial." Affirmed.)

Fleurimond v. State of Florida, 10 So.3d 1140 (3rd DCA 2009) (where charge against def was reduced from "sale of cocaine within 1000 feet of a school" to "possession of cocaine with intent to sell" because there was no testimony as to the distance between the drug house and the nearby elementary school, and where no evidence whatsoever was presented that the police found the def flushing drugs down the toilet, it was improper for the State to argue to the jury in closing that the house was next to a school [there was no objection to this comment] and to disclose the alleged "flushing incident." Prosecution's other comment (in response to defense argument that it was unfair that the police did not have a videotape to prove def's involvement) that " how fair is it to Miami-Dade County that there's people out there, these two individuals—" was interrupted by objection and was never finished. While a "call on the community's conscience would have been impermissible, it is unclear that either the interrupted comment, the "flushing

comment" or the school comment alone would warrant a mistrial. But the combined effect of all three errors warrant the def receiving a new trial. Reversed. [NOTE: compare ruling in this case with ruling in Lelieve, the co-def, below by a different panel of same DCA])

Lelieve v. State of Florida, 7 So.3d 624 (3rd DCA 2009) (where charge against co-def was reduced from "sale of cocaine within 1000 feet of a school" to "possession of cocaine with intent to sell" [def was never charged with sale within 1000 feet, but instead with trafficking in cocaine] because there was no testimony as to the distance between the drug house and the nearby elementary school, it was improper for the State to tell the jury in closing that the house was next to a school [there was no objection to this comment]. Prosecution's other comment (in response to defense argument that it was unfair that the police did not have a videotape to prove def's involvement) that " how fair is it to Miami-Dade County that there's people out there, these two individuals—" was interrupted by objection and was never finished. While a "call on the community's conscience would have been impermissible, it is unclear that the interrupted comment, alone or in combination with school comment, vitiated the entire trial. Affirmed. [NOTE: compare ruling in this case with ruling in Fleurimond, the co-def, above by a different panel of same DCA])

Tillman v. State of Florida, 964 So.2d 785 (4th DCA 2007) (it was error for trial court to allow prosecutor to introduce contents of armed kidnapping BOLO into evidence for the limited purpose of explaining why officers were so aggressive with defendant when they confronted him. Error was compounded when prosecutor exceeded that limitation and referred to mention of gun in BOLO to explain why def may have run from officers. Reversed)

Romero v. State of Florida, 901 So.2d 260 (4th DCA 2005) (where def. was accused of shooting both victims but claimed that victim two had shot victim one and that def. had attacked and shot victim two in self-defense, and state elicited testimony from widow of victim one that victims were close friends, it was error for trial court to sustain State's "beyond the scope" objection when defense counsel attempted to ask widow if def. and victim one were also friends. Proffered testimony was that widow would confirm that they were also friends, dispelling the impression that def., not victim two, was more likely to have shot victim one. Error was compounded when, after precluding widow from answering the question, State argued in closing that although other witnesses had said that both victims were friends, the only witness to testify that victim one and defendant were friends was the defendant himself pointing out for the jury that the widow never corroborated that fact. "The state is prohibited from preventing the defense from introducing evidence to the jury and then using the absence of that evidence to strengthen its case for guilt." Reversed.)

Villella v. State of Florida, 833 So.2d 192 (5th DCA 2002) (in trial for first degree murder where State successfully precluded def. from introducing corroborating evidence of victim/wife's extramarital affair, it was improper for prosecutor to argue in closing that the only evidence of an extramarital affair came from the def. and that there was "no other evidence that would indicate one way or the other what was going on in [victim's] life. ... [W]ere you given anything else?"

The corroborating evidence should have been admitted because it supported defendant's claim that it was a crime of passion. The error of excluding such evidence was compounded when the State argued that the defense failed to provide any independent evidence of the affair. It is inappropriate for the State to argue the def.'s failure to mount a defense. Such evidence is even more egregious when, as here, the def. was precluded from introducing that evidence on the State's motion. Court's curative instruction to disregard prosecutor's last comment and that def. does not have to prove anything did not cure the error. Reversed.)

Gonzalez v. State of Florida, 829 So.2d 323 (2nd DCA 2002) (where State successfully obtained an order on Motion in Limine prohibiting the defense from mentioning the fact that child victims of alleged sexual battery had previously been sexually abused, it was improper for State to argue in closing that the young witnesses (ages 8 and 9) should be believed because they knew things that no one that age should know and their ability to provide explicit details proved their credibility. Reversed for evidentiary hearing on Rule 3.850 to determine if def. counsel's failure to object was prejudicial.)

Farrell v. State of Florida, 791 So.2d 598 (3rd DCA 2001) (where the testimony of child's mother that child told her she played the "peter game" with the def. and then simulated oral sex with a sausage was permitted only for the limited purpose of explaining the mother's state of mind when she deliberately left her daughter with the def. in order to confirm her suspicions, and court instructed the jury that such testimony was not to be used as substantive evidence of guilt but only to explain the actions of the mother, it was improper for state in closing to argue the value of the testimony concerning the sexual game as substantive evidence of the def.'s guilt {i.e. "[He] is the only one who played the peter game, the only one with the sausage."} Error harmless where trial court sustained the objection and immediately instructed the jury on the correct use of the evidence, repeating the curative instruction again during the final instructions to the jury. Affirmed.)

Reid v. State of Florida, 784 So.2d 605 (5th DCA 2001) (it was improper for prosecutor to argue: "Probably the most important thing that came out of the [witness's] testimony was something they didn't say. They said the defendant came over and turned himself in and that he had been the one who had fired off these shots. But I want you to remember, did they ever say that the defendant told them -- ... Did they ever say that the defendant told them that these guys tried to run me over? No, they did not. That's because that was a convenient-one of the convenient statements that the defendant had made earlier that he chose to go with today" where state succeeded in preventing the admission of that part of the def.'s prior statement as "self-serving" hearsay. "The prosecutor's use of the privilege of nondisclosure, first as a shield, then as a sword, unfairly prejudiced the defendant. While the State is free to argue to the jury any theory of a crime that is reasonably supported by evidence, it may not subvert the truth-seeking function of a trial by obtaining a conviction or sentence based on the obfuscation of relevant facts." Reversed.)

Muhammad v. State of Florida, 782 So.2d 343 (Fla. 2001) (where trial court had ruled that

officer could not testify about getting license plate number from BOLO and officer simply testified that he received "additional information," it was error for prosecutor to comment in closing that officer received information from BOLO. However, error not objected to and not fundamental. Affirmed.)

Gonzalez v. State of Florida, 774 So.2d 796 (3rd DCA 2000) (where state sought and obtained ruling in limine precluding comment on the reason why charges against certain individual [Alexander Ramillo] were dropped, and precluded disclosure of the confidential informant, and def. suggested in closing that def.'s acquaintance [Peter Cabrera] was the confidential informant who had "set up" the def. for his own personal gain, it was improper for state to argue that there was no evidence of the identity of the C.I. and then suggest to jury that C.I. could just as easily have been Ramillo since he had his charges dropped. Prosecutor's use of the privilege of nondisclosure, first as a shield, then as a sword, unfairly prejudiced the defendant. While the State is re to argue to the jury any theory of a crime that is reasonably supported by evidence, it may not subvert the truth-seeking function of a trial by obtaining a conviction or sentence based on the obfuscation of relevant facts. Reversed.)

Martinez v. State of Florida, 761 So.2d 1074 (Fla. 2000) (although it was improper for state to refer to "injunction" twice in violation of pretrial ruling that the term not be used, denial of motion for mistrial on that basis was not an abuse of discretion. Reversed on other grounds.)

Fonticoba v. State of Florida, 725 So.2d 1244 (3rd DCA 1999) (improper for prosecutor to inform jury that def. had failed a polygraph test, in violation of pretrial order in limine and existing case law. [This case involved an opening statement. Obviously in closing it would also be commenting on facts not in evidence.] Reversed.)

Bauta v. State of Florida, 698 So.2d 860 (3rd DCA 1997) (where def. counsel successfully objected to testimony of officer concerning child witness' statement, it was improper for def. counsel to then argue to jury the State's failure to call officer and suggest that it must be because he would not have testified favorably for the State.)

Hampton v. State of Florida, 680 So.2d 581 (3rd DCA 1996) (where prosecutor agreed not to mention a 911 tape in closing argument in exchange for def. not calling another witness, it was error for prosecutor to violate the agreement by discussing the tape in closing. Error not objected to and not fundamental.)

Landry v. State of Florida, 620 So.2d 1099 (4th DCA 1993) (where court excluded certain evidence from being mentioned in closing, it was error for prosecutor to tell jurors that def. had "her own motives and reasons, some evidence I can't comment upon....")

Garcia v. State of Florida, 564 So.2d 124 (Fla. 1990) (where def. proffered payroll records under his claimed alias to show he was not working at company when co-worker claimed he made incriminating statement, and state succeeded, albeit erroneously, in having records

excluded on the grounds that they had not been properly authenticated and were unreliable, it was error for State to falsely argue to jury: "you can't get the records. I wouldn't say we didn't look for them. You better believe we looked for them. The police looked for them but they simply didn't exist, and that's why you didn't hear any records in this courtroom, even though you heard testimony from a woman who alleged to have some. Error was reversible when combined with the improper exclusion of the evidence. Reversed.)

Duque v. State of Florida, 460 So.2d 416 (2nd DCA 1984) (where def.'s statements to doctor were excluded from trial for a discovery violation, error for prosecutor to refer to def.'s statements to doctor in closing. Reversed.)

K. Comment relating to charges not pursued by the State

Ford v. State of Florida, 50 So.3d 799 (2nd DCA 2011) (in attempting to explain a six-month delay between the time of the controlled buy and the date def. was arrested, the prosecutor stated, "And the reason why he wasn't arrested for some time after, you heard [one of the law enforcement officers] say they were doing a federal investigation to try to get him on other things and they decided to make this a state case." Comment was improper as there was no evidence presented regarding any other crimes. "[A] prosecutor must confine closing argument to evidence in the record, and must refrain from comments that could not be reasonably inferred from the evidence." *** Further, implicating a defendant in other crimes not charged "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Error was not harmless as only evidence was testimony of CI who was 20 time convicted felon hoping to receive favorable treatment at his own sentencing and judge's curative instruction ("Ladies and gentlemen of the Jury, you will rely on your own memory about what testimony was present during trial") did not cure prejudice but left the jury with the impression that the argument may or may not have been accurate. Reversed.)

Hudson v. State of Florida, 820 So.2d 1070 (5th DCA 2002) (It was improper for prosecutor to refer to def. as a pedophile in closing. ["Pedophiles who snatch children generally are not stupid enough to do it in a location where they are likely to be caught. They wait until the opportunity – ."] Such a comment could be interpreted as suggesting that he had a history of criminal sexual activity with children and also suggested a profile-type argument, i.e. if def. had certain traits which fit the offender profile, he must have abused the victim. Error harmless where prosecutor did not repeatedly refer to def. as a pedophile and evidence of guilt was overwhelming. Remanded for evidentiary hearing on other matters.)

Owens v. State of Florida, 817 So.2d 1006 (5th DCA 2002) (it was not improper for prosecutor to argue that police had been investigating an aggravated assault in prosecution for possession of a firearm by a convicted felon. Prosecutor was not suggesting that def. should be convicted based upon an uncharged crime but was pointing out to the jury that def. confessed, not to save

his wife from arrest as def. claimed, but to save himself from a greater charge. In this context, it was a fair comment. Affirmed. *[Note: There was no mention in the opinion about whether the officers testified that they were responding to a call about an aggravated assault.]*)

Shively v. State of Florida, 752 So.2d 84 (5th DCA 2000) (in prosecution for sexual battery upon a child, where evidence existed that on another occasion def. was seen naked in the presence of child victim, it was not error for State to comment on that testimony in closing. Incident was not being presented as "prior bad act evidence" but was relevant to show that the def. had set up circumstances where he and the victim would be alone in the family house. Affirmed)

Robinson v. State of Florida, 704 So.2d 688 (3rd DCA 1997) (prosecutor's reference to def.s "scheme to defraud" in closing argument was proper to argue the intent element of theft crime. Use of word "scheme" was not an improper reference to an uncharged crime. Affirmed.)

Cruse v. State of Florida, 522 So.2d 90 (1st DCA 1988) (Although prosecutor's comment about other battery charges that could have been brought was improper, it was not fundamental error and not objected to.)

Blackburn v. State of Florida, 447 So.2d 424 (5th DCA 1984) (prosecutor's request for sympathy for victims, personal belief as to facts in issue and having met burden of proof, vouching for credibility of police officer and reference to other charges against defendant arising out of incident which were not pursued by state, were improper BUT NOT FUNDAMENTAL. No objection. Affirmed [passing reference to fact that they were, in part, invited by defense counsel's questions and closing argument])

Wilson v. State of Florida, 294 So.2d 327 (Fla. 1974) (in perjury prosecution for allegedly providing false information in earlier murder trial at which def. was acquitted of murder, prosecutor's continual reference to the murder on 16 occasions, in 3 of which he directly accused def. of murder, together with repeated accusations that the def. was guilty of bigamy and adultery, both uncharged felonies completely unrelated to matter at issue, deprived def. of fair trial. Reversed.)

Oglesby v. State of Florida, 23 So.2d 558 (Fla. 1945) (reversible error for prosecutor to comment that: "law enforcement officers ...would not have brought this Def. into this Court on this charge if it were not for the fact that there were other matters of this kind that could be tacked on him.")

Akin v. State of Florida, 98 So. 609 (Fla. 1923) (Improper for prosecutor to argue that def. has other charges pending against him in connection with transactions at issue in trial and that prosecutor does not intend to try those cases so it is up to this jury whether it will "let this man go scot free and say that he has not committed any wrong." Any attempt to ... influence the jury by the statement of facts or conditions not supported by the evidence should be rebuked by the trial

court, and, if by such misconduct a verdict was influenced, a new trial should be granted. Reversed.)

L. Claim that trial court improperly restricted defendant's closing argument or objections

Selman v. State of Florida, 160 So.3d 102 (4th DCA 2015) (court committed reversible error by refusing to allow def counsel to make a closing argument during probation revocation hearing. Although court sentenced def to time served and reinstated probation, error was not harmless as conviction of violation of probation may effect defendant on subsequent scoresheets. Reversed and remanded.)

Fain v. State of Florida, 134 So.3d 1039 (1st DCA 2013) (it was reversible error for trial court to deny def. the opportunity to make a closing argument in probation violation hearing. Reversed.)

Stepp v. State of Florida, 109 So.3d 839 (3rd DCA 2013) (in case where witness testified that trial court did not abuse its discretion in precluding defense from arguing that police detective failed to subpoena witness's phone records where (1) argument would have been based on facts not in evidence since def counsel did not ask officer if he had subpoenaed witness's phone records and (2) error, if any, was invited when def. objected to state questioning witness about phone calls from multiple numbers which could have led to disclosure that phone records were not subpoenaed or, if they were, to why law enforcement could not verify that witness received calls from def. Affirmed.)

Kaczmar v. State of Florida, 104 So.3d 990 (Fla. 2012) (in death penalty case, court did not err in precluding def counsel from reading other court opinions to jury during closing argument. "[T]he correct practice does not permit counsel to read authorities to the jury, and while counsel may submit his [or her] theory of the law in written requested charges, it is the function of the trial court to charge the law applicable to the issues in the case." [citation omitted] Conviction affirmed, remanded for new penalty phase on other grounds.)

M.S. v. State of Florida, 88 So.3d 238 (3rd DCA 2011) (where supervisor at juveniles' shelter found juvenile crying, escorted her out of her dorm into the hallway, and def. followed, a verbal altercation ensued and def. reached around supervisor and slapped victim across the face, court did not err in precluding def from arguing self-defense in closing, a defense that was never raised prior to closing. "Closing arguments are improper where they cannot be reasonably inferred from the evidence presented at trial." Regardless of how altercation started, evidence did not support suggestion that def. needed to defend herself against imminent force from victim, who was being escorted away and separated from def by a supervisor. Affirmed.)

Pearson v. State of Florida, 51 So.3d 1286 (4th DCA 2011) (in violation of probation hearing,

it was improper for court to preclude closing argument on issue of violation. [When defense counsel requested that she be allowed to make a closing argument, the trial judge refused, stating that he could not "imagine anything that [defense counsel] would say that would change [the] ruling."] Although the court later heard argument on the sentence which was to be imposed, the failure to allow argument on the threshold issue of whether defendant violated his probation was error. Reversed and remanded.)

Emory v. State of Florida, 46 So.3d 89 (4th DCA 2010) (in bifurcated trial, where court initially tried defendant on robbery and resisting arrest without violence and subsequently on possession of a firearm by a convicted felon, and jury found defendant guilty of resisting arrest without violence but not guilty of robbery, but jury also answered special interrogatory finding that def DID possess a gun, trial court was correct in precluding defense counsel from arguing, during second phase of trial for possession of a firearm by a convicted felon, that the state failed to prove that def's fingerprints were on the gun. Defense counsel argued that trial court's ruling was error because a jury must not let its verdict on one crime affect its verdict on other crimes charged (in other words, the jury's factual finding on the special interrogatory in the first phase of the trial should have no effect on the State's burden of proof in the second phase of the bifurcated trial). "The appropriate procedure in a bifurcated trial is to have the jury reconvene in the second phase for the trial of the charge of possession of a firearm by a convicted felon. In the second phase, the jury would be instructed that the fact that the def possessed a firearm had already been established by the verdict in the first phase. The State must then introduce evidence that the def. is a convicted felon." Affirmed.)

Jean v. State of Florida, 27 So.3d 784 (3rd DCA 2010) (in trial for charge of escape, court erred in precluding defense counsel from arguing that def was not in lawful custody when he was alleged to have escaped as that is an essential element of the crime of escape. When judge precluded counsel from arguing that issue, jury may have concluded that it was not an issue for the jury to decide and that the trial court had already deemed def's custody to be lawful. Reversed.)

Bigham v. State of Florida, 995 So.2d 207 (Fla. 2008) (after trial court's dismissal of charges of sexual battery and kidnapping, the counts were no longer germane to the jury's consideration and court properly restricted defense counsel from arguing to the jury that the prosecution had failed to prove those counts.)

Jean-Marie v. State of Florida, 993 So.2d 1160 (4th DCA 2008) (it was not improper for trial court to prevent defense counsel from commenting on State's failure to call as a witness a police officer who took a statement from defendant, where court found officer was equally available to both sides. Although *dicta* exists suggesting that an officer who works closely with the prosecution in formulating the case shares a special relationship with the State such that the officer is not equally available to both sides [see *dicta* in Martinez, 478/871], court need not address whether it agrees with that comment since it was not shown that officer had information that would "elucidate the transaction," the second prong of *Halliburton*. Trial courts have

discretion in regulating comments to be made in closing arguments. Affirmed.)

Perry v. State of Florida, 973 So.2d 1289 (4th DCA 2008) (even if it was error for trial court to restrict defense counsel's closing argument as to whether co-def could have been tried as an adult, counsel still made it clear to jury during closing that co-def was not prosecuted the same way as his client. Even if there was error, no prejudice resulted. Affirmed in part and reversed as to sentencing error. NOTE: opinion does not say whether trial court action was error.)

Ibar v. State of Florida, 938 So.2d 451 (Fla. 2006) (despite Ring v. Arizona, trial court was correct in prohibiting defense counsel from arguing lingering or residual doubt to jury as a mitigating factor in death penalty prosecution. Cf., Trepal, 846/405, below)

Fencher v. State of Florida, 931 So.2d 184 (5th DCA 2006) (trial court did not err in precluding defense counsel from arguing in closing that detective's felony conviction affected his trial testimony concerning chain of evidence or evidence tampering. Trial court had allowed defense counsel to question detective about conviction for impeachment purposes, but there was no suggestion that detective had tampered with evidence or that the evidence had been tampered with at all. Although counsel are allowed wide latitude to argue to the jury during closing arguments, controlling comments to the jury rests within the trial court's discretion and a reviewing court may not interfere unless an abuse of discretion is shown. Affirmed.)

Curry v. State of Florida, 930 So.2d 849 (2nd DCA 2006) (trial court erred in limiting defense counsel to twenty minutes for closing arguments on a case involving four counts of sexual battery on children, three of which were under 12. The case involved nine witnesses, four for the state and five for the defense, and the defendant received 3 concurrent life sentences and one concurrent sentence of 30 years. Further, the appellate court noted that the discussion regarding the time allowed for closing was held in the presence of the jury and defense counsel was denied the opportunity to approach the bench to present his argument, thereby hindering the appellate court's review on the issue of prejudice. Reversed.)

J.M.S v. State of Florida, 921 So.2d 813 (5th DCA 2006) (in delinquency hearing, it was a violation of def's 6th Amendment right to counsel for judge to deny defense counsel the opportunity to present a closing argument before finding the def. guilty. Trial court's offer to allow def counsel to later submit a written closing argument and to voice argument at the disposition hearing after the court had already determined guilt does not cure the prejudice. Reversed.)

Williams v. State of Florida, 912 So.2d 66 (4th DCA 2005) (in a case where def. was accused of burglary with a battery and victim had pending criminal charges, trial court erred in precluding defense from arguing in closing that victim was the aggressor and had fabricated his story to avoid getting in further trouble with the law on top of his already pending criminal charges. There was evidence in the record to support claim that victim was the aggressor where officers saw the victim with a shock absorber in his hand, standing over def. and holding him down.

Reversed.)

Beard v. State of Florida, 884 So.2d 1008 (3rd DCA 2004) (issue of whether trial court erred in preventing defense counsel from arguing in closing that an adverse inference arose from the State's failure to call victim/police officer as a witness, where there was no adequate explanation for his absence, was moot where jury did not convict def. of crime against victim officer. [**Note:** original opinion, subsequently withdrawn by this opinion on Motion for Rehearing, found that trial court erred. Original opinion contained a dissent from Judge Green arguing that while officer had a "special relationship" with state under facts of this case, there was no evidence presented that his testimony would "elucidate the transaction" because cumulative testimony does not give rise to such inference. Since the prior opinion has no precedentiary value and is now nonexistent, this dicta is provided for information only.])

Kirkland-El v. State of Florida, 883 So.2d 383 (4th DCA 2004) (where trial court indicated to defense counsel that it would not read "duty to retreat" portion of self-defense instruction in case involving co-occupants of home and, relying on that decision, defense counsel argued to jury that def. had no duty to retreat, def. was denied a fair trial when judge changed his mind during State's closing argument and advised counsel outside the presence of the jury that it intended to give instruction on defense of home against co-occupant, rather than defense of home instruction. State was able to argue consistent with what the jury would hear from the jury instructions. Under those circumstances, the jury would have to conclude that defense counsel was either trying to purposely mislead it or was ignorant of the law. Reversed.)

Holley v. State of Florida, 877 So.2d 893 (1st DCA 2004) (alleged error of trial court in permitting and participating in the constant interruption of defense counsel during opening statement and closing argument, possibly suggesting to the jury that the judge did not care for the defense's arguments, were "invited" by defense counsel's repeated failure to heed the trial court's reasonable instructions to avoid digressions and simply set out what the evidence would show (or had shown). Trial court properly reminded counsel of its admonitions not to exceed the bounds of appropriate, relevant commentary. [NOTE: Defense counsel's repetitious remarks in opening statement prompted on juror to spontaneously (and inappropriately) comment out loud that the same point had been made three times.] Affirmed in part, reversed in part on other grounds.)

Barnes v. State of Florida, 875 So.2d 789 (3rd DCA 2004) (reversible error for trial court to interrupt defense counsel with instructions such as "move on," "next question," "let's go," or "counsel sit down" during closing argument and cross-examination. Reversed.)

Theard v. State of Florida, 861 So.2d 103 (3rd DCA 2003) (after a two-day, three-witness jury trial, it was grossly abusive for trial court to limit counsel to five minutes for closing argument. Reversed.)

Goodrich v. State of Florida, 854 So.2d 663 (3rd DCA 2003) (it was improper for trial court to

tell defense counsel to "move on," "move along," "let's move," or "let's go" on 14 separate occasions during a 25 minute closing argument. Although the control of comments made to the jury by counsel is within the discretion of the trial court, here the trial court abused it's discretion through repeatedly telling defense counsel to "move on" thereby preventing counsel from arguing his theory of the case. Also, because of the number of times that the trial court told defense counsel to "move on" in the jury's presence, the jury may have been given the impression that the trial court did not care for counsel's argument. Reversed.)

Hendrickson v. State of Florida, 851 So.2d 808 (2nd DCA 2003) (it was improper for trial court to prohibit defense from arguing to jury that drugs belonged to confidential informant rather than to def. and that CI was trying to set up def. so that the police would help resolve a pending charge against his friend, where such argument was an inference that jury could draw from the evidence presented at trial. It was the jury's province, not that of the trial judge, to determine the strengths or weaknesses of def. counsel's theory of defense. Reversed.)

Freeman v. State of Florida, 846 So.2d 552 (4th DCA 2003) (where defense counsel requested copies of witness' employment records and obtained a court order for their production but the records were not received by the day of trial and witness, during cross-examination, could not recall if she was working at the time of the incident, it was error for trial court to refuse to allow the defense to re-open cross-examination when the records arrived after the state rested. The records would have refreshed the witness' recollection about whether she was working at the time of the incident, a significant issue in the case, and was a proper area for cross-examination but for the unavailability of the records at that time. Although the trial court has discretion to allow the reopening of cross-examination, it is an abuse of discretion to refuse the request when its purpose is the weakening of the testimony given by the witness, it was an abuse of discretion under these circumstances. By refusing to allow the defendant to re-open cross-examination, the defendant was forced to re-call the witness as his own witness to address matters that were proper for cross-examination and thereby waive final closing argument. Reversed.)

Trepal v. State of Florida, 846 So.2d 405 (Fla. 2003) (although not directly addressing the issue of the propriety of defense counsel arguing residual or lingering doubt, in this case the judge stated that such argument was improper but the state attorney stated that he disagreed and felt that def. had a right to make such argument. Although case does not state that trial judge allowed def. counsel to make such argument, def.'s Rule 3.850 motion stated that trial counsel was ineffective for failing to argue lingering doubt after being given permission to do so. No deficient performance was found. Since this case, the court has stated clearly in Ibar, supra, that trial court is correct in prohibiting such arguments. Prior cases on the subject were phrased in terms of lingering doubt not being an appropriate mitigating circumstance, therefore implying that such argument would be improper. *Receded from on other grounds: Guzman, 868/498*)

Rogers v. State of Florida, 844 So.2d 728 (5th DCA 2003) (It was improper for trial court to allow state to re-open case and introduce confession which was previously excluded for *Miranda* violation in order to prevent jury from being misled by defense counsel's closing argument that

no "hard evidence" existed pointing to defendant's guilt. Trial judge has power to prevent improper argument by granting timely objections and rules of ethics exist to prohibit attorneys from making improper arguments. Further, argument was not improper as defense counsel was simply challenging sufficiency and credibility of state's case. Reversed.)

Marman v. State of Florida, 814 So.2d 1158 (2nd DCA 2002) (It is error to deny the defense the opportunity to argue to the jury for a decision based on the law *as instructed*, no matter how far-fetched the argument might be. Regardless of whether or not a self-defense instruction *should* have been given, once given it was error to not allow def. counsel to argue it to the jury. If an instruction is given to the jury, counsel must be given an opportunity to address the jury on the matter. Reversed.)

Feltner v. Colum. Pic. T.V., Inc., 789 So.2d 453 (4th DCA 2001) (in criminal contempt proceeding, it was improper for court to deny def. the opportunity to make a closing argument saying: "Look, in view of the hour, I'm going to dispense with closing argument. I understand he's entitled to a full panel of his rights, but I don't know that there's any right to make a closing argument and if I'm wrong, I'm wrong." Because criminal contempt is "a crime in the ordinary sense," a contemnor must be afforded the same constitutional due process protections afforded to criminal defendants. Reversed.)

Gonzalez v. State of Florida, 777 So.2d 1068 (3rd DCA 2001) (improper for trial court to prevent defense counsel from articulating objections until after jury retired to consider verdict as that is tantamount to refusing to hear the objection. A trial judge is not required to sit supinely by and see the argument of counsel for either side needlessly mutilated or destroyed by repeated captious and unfounded objections of opposing counsel. However, regardless of whether the objection is entertained during argument or thereafter, it *must* be considered and ruled upon before the jury is instructed. Reversed)

Byers v. State of Florida, 776 So.2d 1012 (5th DCA 2001) (following 4 days of trial involving 16 witnesses, trial court limited defense counsel's closing to 30 minutes and cut off defense counsel before he concluded his summation. Defense, however, failed to object when the trial court announced its time limits for closing argument nor when he was cut off. Setting a 30 minute time limit is not fundamental error, therefore alleged error was not properly preserved. Moreover, the determination that a time limit on closing argument was unreasonable turns on the facts of the case. Here although there were a number of witnesses, their testimony was not contradictory and evidence overwhelmingly indicated that def. was the person who shot victim and robbed others. Affirmed.)

Rodriguez v. State of Florida, 770 So.2d 740 (4th DCA 2000) (improper for court to deny *pro se* defendant a closing argument despite the fact that defendant testified in a narrative fashion. A defendant has the right to present a closing argument, regardless of the length of the proceedings or apparent simplicity of the issues presented [even though this was a bench trial]. Reversed)

Simmons v. State of Florida, 753 So.2d 700 (5th DCA 2000) (trial court did not err in limiting def. counsel's closing to 15 minutes where case was brief [trial lasted only 1 hour and 50 minutes from beginning of voir dire to conclusion of evidence], and when prosecutor stated he only needed 10 to 15 minutes, def. counsel responded: "I don't think it will be much longer than that," only asking for [and receiving] additional time after the state had limited itself to time stated. Record reflects that court considered the simplicity of the case, brevity of testimony, nature of defense, time requested by counsel and time required to submit a meaningful argument to the jury, and was not arbitrary. Affirmed)

Medina v. State of Florida, 748 So.2d 360 (4th DCA 2000) (trial court erred in refusing to allow def. counsel to refer during closing argument to a diagram drawn by victim because it was not admitted into evidence. [Def. counsel did not want to give up concluding argument] Demonstrative aids may be used during trial as an aid to the jury understanding a material fact or issue. They are not usually introduced into evidence. Harmless. Affirmed)

Harding v. State of Florida, 736 So.2d 1230 (Fla. 1999) (Despite defense counsel's objection that his closing argument was improperly limited, trial court properly interrupted defense counsel's closing argument, without objection from the state, to prevent defense counsel from continuing with an improper "ignore the law" argument. Trial court admonished defense counsel and told jury they would be in violation of their oath if they did as counsel requested. Affirmed.)

Estevez v. State of Florida, 705 So.2d 972 (3rd DCA 1998) (it was improper for court to refuse to allow def. to make closing argument in probation violation hearing. Def. has a right to be heard on whether there was a probation violation and on what sentence should be imposed. Reversed in part.)

S.G. v. State of Florida, 678 So.2d 495 (5th DCA 1996) (reversible error for trial court to refuse to permit closing argument in juvenile delinquency proceeding. Reversed.)

T.W. v. State of Florida, 677 So.2d 111 (4th DCA 1996) (improper to deny the def. the right to make a closing argument during a delinquency hearing. Reversed.)

Munez v. State of Florida, 643 So.2d 82 (3rd DCA 2003) (it was improper for trial court to limit defense counsel's closing argument in aggravated battery case to 45 minutes following 2 day trial in which 5 witnesses testified to conflicting versions of the circumstances surrounding the confrontation and defendant was claiming self-defense. Reversed.)

King v. State of Florida, 642 So.2d 649 (2nd DCA 1994) (it was error for trial court to refuse to give instruction on an appropriate lesser that was supported by the evidence. Error was not corrected by trial court giving appropriate instruction after defense counsel had given his closing argument where he was deprived of the opportunity of arguing to the jury that they could find the def. guilty of the lesser offense. "Closing arguments are the last and best opportunity trial counsel have to directly address the jury on what they should or should not decide within the

parameters of the proper instructions the jury is about to receive from the trial judge. The tardy correction the trial judge made here did not cure the error that had occurred." Reversed. [*Disapproved of on issue of appropriate lesser in Welsh 850/467]*)

T. McD. v. State of Florida, 607 So.2d 513 (2nd DCA 1992) (it was a violation of the def.'s 6th Amendment rights for trial court to adjudicate child guilty without allowing def. counsel to make a closing argument and terminate the trial during the State's cross-examination of def. Reversed.)

M.E.F. v State of Florida, 595 So.2d 86 (2nd DCA 1992) ("In a bench trial or a jury trial, it is an absolute violation of the Sixth Amendment for the court to deny the def. the right to make a closing argument. Allowing counsel to submit the closing argument in writing did not cure the error and counsel's possible acquiescence to that procedure did not waive def.'s constitutional rights. Reversed.)

E.C. v. State of Florida, 588 So.2d 698 (3rd DCA 1991) (trial court reversibly erred in denying juvenile defendant an opportunity to present a closing argument. Reversed.)

Adams v. State of Florida, 585 So.2d 1092 (3rd DCA 1991) (error for court to limit closing argument to 15 minutes per def. in two defendant case that took two days to try. Although there is no "bright shining rule" to reveal the precise number of minutes to be allotted for closing, less than thirty minutes are suspect. Trial court abuses discretion by imposing arbitrary time limits. Reversed on several grounds).

Floyd v. State of Florida, 569 So.2d 1225 (Fla. 1990) (trial court was correct in limiting defense counsel to addressing the two aggravating circumstances that the state was presenting to the jury, and prohibiting defense counsel from arguing to jury that there were a total of nine possible aggravating circumstances).

Dobson v. State of Florida, 566 So.2d 560 (5th DCA 1990) (court did not improperly restrict defense's closing argument where objections sustained related either to facts not in evidence, counsel opinions or improper statement of the law)

Williams v. State of Florida, 565 So.2d 838 (1st DCA 1990) (while trial judge acted within his discretion in refusing to give the circumstantial evidence instruction to the jury, he improperly restricted def. counsel's closing argument by prohibiting her from arguing to the jury the law on circumstantial evidence. Error harmless where def. was able to make strong reasonable doubt argument which is a corollary to circumstantial evidence rule and where evidence of guilt was overwhelming. [*Superseded by rule as to other grounds, see Kio, 624/744]*)

Stewart v. State of Florida, 558 So.2d 416 (Fla. 1990) (ct. erred when it precluded defense counsel from arguing that when def. told witness about murdering the victim, def. was simply relating to witness what real murderer had told him. Although witness was asked whether def.

had told him that he obtained that information from the murderer and witness denied that statement, def. counsel was hypothesizing from evidence that had been presented during the trial and should have been allowed to continue. Error harmless. Conviction affirmed.)

Stewart v. State of Florida, 549 So.2d 171 (Fla. 1989) (In death penalty prosecution, the trial court properly rejected def.'s request that the jury be instructed on all possible aggravating factors so that he could argue in closing that the absence of many of these factors was a reason for imposing a lesser sentence.)

Stockton v. State of Florida, 544 So.2d 1006 (Fla. 1989) (Time limit for closing argument must be reasonable based upon facts and circumstances of each case. Court abused discretion in setting 30 minute limit where case took 2 full days to try and went into the night, fifteen witnesses testified with conflicting testimony as to who started fight, who participated and who fired fatal shot and every eyewitness was confronted with inconsistent deposition testimony. Limit was set for jury's convenience to allow them to finish before the weekend. Reversed)

Hickey v. State of Florida, 484 So.2d 1271 (5th DCA 1986) (error to limit closing argument to 30 minutes in this second degree murder case that required four days for trial.)

Cain v. State of Florida, 481 So.2d 546 (5th DCA 1986) (error for trial court to arbitrarily limit closing from requested 30 minutes to 15 minutes each. Appellate court ruled that it would have affirmed if the trial court had given counsel the 30 minutes requested. Reversed. [Two day trial with twelve witnesses])

Joseph v. State of Florida, 479 So.2d 870 (5th DCA 1985) (error to limit def. closing to ten minutes and state to and additional two minutes in burglary/grand theft case.)

Cave v. State of Florida, 476 So.2d 180 (Fla. 1985) (it was improper for def. counsel to argue to jury that they could not find def. guilty of first-degree murder unless he personally killed the victim. Under the circumstances [after several objections to this argument were sustained], it was appropriate for trial court to remove the jury and require def. counsel to proffer the remainder of his closing argument. Counsel may not contravene the law and the jury instructions in arguing to the jury.)

Rodriguez v. State of Florida, 472 So.2d 1294 (5th DCA 1985) (where in burglary case that took two days including jury selection the state presented 5 witnesses, def. testified and there were many inconsistencies between the def. and the victim, it was error for court to limit attorneys, both of which requested 30 minutes, to 15 minutes each. Reversed.[Def. counsel did not finish closing argument and was cut off by court.)

Foster v. State of Florida, 464 So.2d 1214 (3rd DCA 1984) ("def. counsel is not entitled to filibuster the case or engage in unreasonably long arguments, but nonetheless wide latitude must be given counsel in arguing his case ... and ordinarily arguments restricted to thirty minutes or

less are considered suspect." Error to limit def. to 15 minutes for closing despite the strength of the state's case. Reversed.)

Stanley v. State of Florida, 453 So.2d 530 (5th DCA 1984) (it was improper for court to limit def. and co-def. to 10 minutes each and state to 12 minutes for closing in case where each def. allegedly testified with inconsistent statements. Reversed)

Neal v. State of Florida, 451 So.2d 1058 (5th DCA 1984) (error to limit closing argument to 30 minutes in this second degree murder and robbery case where jury selection and trial took 2 days each and case involved sharp disagreement over premeditation as well as complex defense of spousal abuse.)

Chalk v. State of Florida, 443 So.2d 421 (2nd DCA 1984) (where the def. was facing commitment to a mental institution in an involuntary commitment hearing, it was error for the trial court to deny him the opportunity to present a closing argument, despite the fact that the hearing lasted only 20 minutes. "[A] defendant has a right to a closing argument regardless of the length of the hearing or the apparent simplicity of the issues presented." Reversed)

Pittman v. State of Florida, 440 So.2d 657 (1st DCA 1983) (error to limit closing to 30 minutes in resisting arrest case that involved 7 defendants, 33 witnesses and took four days to try).

Seckington v. State of Florida, 424 So.2d 194 (5th DCA 1983) (trial court erred in preventing def. counsel from arguing to jury that an accidental or unintentional touching did not constitute battery. Even though it is not the prerogative of an attorney in his closing arguments to instruct the jury on the law, it is entirely appropriate for an attorney to relate the applicable law to the facts of the case and to tie them together so that the jury can give proper weight to the evidence in reaching its verdict. Counsel had every right to point out to the jury that an accidental touching was not the same as an intentional one. Harmless where def. counsel did, in fact, argue that touching was accidental and not intentional.)

E.V.R. v. State of Florida, 342 So.2d 93 (3rd DCA 1977) (trial court erred in denying def. counsel the opportunity to present a closing argument in child delinquency proceeding. "If counsel is to render effective assistance to his juvenile client at every step in the proceedings and to prepare and submit a defense upon ascertaining that a defense exists, then he must be permitted the opportunity to render a closing statement in a final attempt to persuade the court of the juvenile's innocence." Such argument is an integral part of a juvenile's right to effective assistance of counsel and the denial of that right is a denial of due process. Reversed.)

Taylor v. State of Florida, 330 So.2d 91 (Fla. 1976) (it was improper for trial court to prevent def. counsel from telling the jury what law the court would instruct them on. It is entirely appropriate for counsel to relate the applicable law to the facts of the case, so long as he does not misstate the law. Reversed on other grounds.)

M. Comment about criminal charges pending against a defense witness

Friddle v. State of Florida, 438 So.2d 940 (1st DCA 1983) (Error to allow prosecutor to comment on defense witness' pending charges because, although exception allows reference to charges pending against state witness to show bias in favor of state, that has not been extended to apply to defense witnesses. Error harmless where witness bias had already been shown and risk of guilt by association was not great [jury knew def. was a convicted felon in jail pending trial]. **NOTE**: See Dessaure v. State, 891 So.2d 455 (Fla. 2004), where Supreme Court allowed state to impeach defense witnesses by telling the jury that they were serving mandatory life sentences as a result of being prosecuted by the same State Attorney's office. The Court reasoned that the clear potential for bias against the state created an arguable motive for perjury and the life sentences and resulting immunity from penalty for perjury were relevant issues for jury. It is unclear why bias, which is always admissible under 90.608(2), would not allow evidence of a defense witness' pending criminal charges.)

N. Comment on defendant's prior trial

Duque v. State of Florida, 498 So.2d 1334 (2nd DCA 1986) (Even though erroneously mentioned by witness, where comment was not elicited from witness by def. counsel, improper for prosecutor to exploit improper prejudicial testimony at closing by mentioning def's prior trial)

O. Improper comment on jury's duty

Constant v. State of Florida, 139 So.3d 479 (3rd DCA 2014) (it was improper for prosecutor to "remind" jurors that they had "promised" in voir dire to convict based on the testimony of a single witness if they found that witness credible and to tell jury: "I do believe he committed this crime." Errors were not harmless given the weakness of the case where def was identified by a single witness who got a brief look at his face when the rag covering it was momentarily moved and who picked him out of a lineup 11 days after the crime, where no forensic evidence existed and evidence of def.'s shoe size was, at best, equivocal. Reversed.)

Davis v. State of Florida, 136 So.3d 1169 (Fla. 2014) (Death penalty – prosecutor's argument in penalty phase: *"If you find there are one or more aggravating circumstances in this case, Ladies and Gentlemen, then that justifies the imposition of a death penalty; unless, unless you find mitigating circumstances. And take it a step further, if those mitigating circumstances outweigh the aggravating circumstances"* was not improper. Although the state may not argue that the jury must recommend a death sentence unless the mitigating circumstances outweigh the aggravating circumstances, in the instant case, the prosecutor correctly informed the jury that a death sentence is legally permitted where the aggravating circumstances outweigh the mitigating

circumstances without improperly diminishing the jury's discretion to recommend less than the legally allowable sentence. Further, state's argument that *"based on those categories of evidence,"* the jury will *"determine whether this defendant will be held fully accountable for the crime that he's committed"* and that *"[j]ustice demands that [the jury] hold this defendant fully accountable for this murder"* were not improper comments or statements of the law. Although the state cannot tell the jury that they have a legal duty, are required by law, or that the only proper recommendation is a recommendation of death, it is not improper for the prosecutor to tell the jury that it has a "responsibility" to recommend the death penalty where the prosecutor informs the jury that its recommendation should be "based upon all the evidence in this case." Further, prosecutor's comment that this case *"simply cries out for the death penalty because of th[e] heavy, heavy aggravating circumstance"* that the murder was committed during the course of a sexual battery was not improper. Lastly, prosecutor's comment about how def. lied to first responders about cause of victim's asphyxiation even as they were trying to save her was not a non-statutory aggravator but, when read in context, were made to rebut the expected mitigating factor that the def was a good person. Denial of post-conviction motion affirmed.)

Gonzalez v. State of Florida, 136 So.3d 1125 (Fla. 2014) (*penalty phase* – prosecutor's argument that jury's role was advisory and that it would make a sentencing recommendation to the judge did not improperly denigrate the role of the jury but fully and accurately advised the jury of its role and therefore was not improper. [Note: without a quote it is difficult to ascertain whether the court is saying it is ok to state this to the jury or whether it read the prosecutor's entire statement and is paraphrasing.]

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (prosecutor's comment to jury that conviction of a lesser included offense as opposed to the charged offense, would be a "miscarriage of justice," although similar to arguments that "exhort the jury to 'do its job'" and thereby put improper pressure on the jury, was not so egregious as to warrant reversal, even when combined with other alleged errors. Improper pressure on the jury was diminished by the context. The State was recounting the evidence that supported a guilty verdict for each charge and advising the jury to follow the law as spelled out in each jury instruction. "[I]t is your duty when you're deliberating to review the evidence, make a determination that the State has proved the case beyond a reasonable doubt, prove each and every element of the crimes that are charged . . . . [Y]ou should find the defendant guilty of the highest crimes that the State has proved." Thus, even if it was error, error was not fundamental. In penalty phase, state's argument "That's your job. Not to do what's good enough. Not to do what's easy. Your job is to do the hard one. Your job is to give him the consideration he's entitled to and the State the consideration that it's entitled to" was not improper. State did not suggest that jury was obligated to return a recommendation of death but instead correctly told jurors to give both State and def. the consideration each was entitled to by following the law as it was set out in the instructions [ie. weigh the factors]. Conviction and sentence affirmed.)

Bell v. State of Florida, 108 So.3d 639 (Fla. 2013) (prosecutor's arguments: "[I]f you feel the evidence has proved the charges beyond and to exclusion of a reasonable doubt[, then] follow the

law and . . . hold the defendant responsible for the crimes he committed and . . . reflect so in your verdict of guilty as charged," and "I know you have been very attentive in listening to me now and I have every confidence that you will listen to the Court and will follow the law" – were not improper. A prosecutor's comment "is not erroneous because the prosecutor was simply advising the jury to follow the law." [NOTE: original quote in opinion was highlighted as follows: "This is a very important day for the defendant no doubt. *This is also a very important day for [the victim], her family and the people of the State of Florida who I represent*. And we are asking you if you feel the evidence has proved the charges beyond and to exclusion of a reasonable doubt that you follow the law and you hold the defendant responsible for the crimes he committed and you reflect so in your verdict of guilty as charged." It is not clear why the court highlighted this particular language but did not refer to it as acceptable or unacceptable in its opinion.] Affirmed.)

Lucas v. State of Florida, 67 So.3d 332 (4th DCA 2011) (prosecutor's comments to the jury in opening and closing urging them to "do the right thing," although improper, were harmless. Affirmed.)

Wade v. State of Florida, 41 So.3d 857 (Fla. 2010) (in penalty phase, it was not error for prosecutor to argue to jury that they might hear the defense suggest that a life sentence is enough because def would leave prison only when he dies, and to tell jury: "What I suggest to you is, that argument tells you that this def should not be held fully accountable for his actions. The argument in essence says "let's take the easy way out." … You have to …weigh this aggravation and you will find that it cries out for full accountability." Prosecutor did not tell the jury that it was their duty to return a recommendation of death—that the law required them to make that recommendation. Prosecutor told jurors that it was their duty actually to weigh the factors, but he in no way implied that the jury was *required by law* [emphasis in original] to return a recommendation of death. Accordingly, the prosecutor's comment was not error, much less fundamental error. Affirmed. [NOTE: if you hear "tempted to take the easy way out you may want to stop the argument in its track and avoid a retrial. See Ferrell case below for completely different result with very similar language.)

Ferrell v. State of Florida, 29 So.3d 959 (Fla. 2010) (penalty phase – where prosecutor argued that jury would be violating their lawful duty if they did not vote for death ("Some of you may be tempted to take the easy way out…you may be tempted not to weigh all of these aggravating circumstances and to consider the mitigating circumstances. *That you may not want to carry out your full responsibility under the law and just decide to take the easy way out and to vote for death, I'm sorry, vote for life* [emphasis added]. I ask you not to be tempted to do that. I ask you to follow the law, to carefully weigh the aggravating circumstances, to consider the mitigating circumstances, and you will see these aggravating circumstances clearly outweigh any mitigating circumstances. And then under the law and the facts death is a proper recommendation."); argued that the age mitigator could only apply to someone younger than def. ("No per se rule exists to pinpoint a particular age as an automatic factor in mitigation." Barnhill v. State, 834/836); argued that this was a bona fide death penalty case ("the State doesn't seek the death

penalty in all first degree murders…But where the facts … demand the death penalty, the state has an obligation….This is one of those cases"); vouched for the credibility of several witnesses and urged the jury to "show this def the same sympathy, the same mercy he showed [victim] and that was none," trial court's order granting a new penalty phase is Affirmed.)

Paul v. State of Florida, 20 So.3d 1005 (4th DCA 2009) (where prosecutor argued to jury "I'm not asking you to take the hill. … You can steel yourselves and you can do this job. You can hold the State to the burden only required by law. Steel yourself for this duty…. *** Fear is not a reasonable doubt—fear of the consequences. Do not allow yourselves to be held hostage to that. That standard does not change. Be fearless in your duties. Doubt in the back of your mind is not a reasonable doubt is what His honor tells you. *** We are a nation of laws. … [w]e ask that you follow the laws—the rules, that's what you're doing today, that's what he must be held accountable for…. *** The bottom line is you cannot be 100% sure. … Unless you're a victim or a witness, you cannot be. If you were there. Okay, but that's not the standard," argument did not suggest jury had a duty to convict but, rather, urged jury to follow the law and follow the reasonable doubt standard. "Trial court properly sustained objections when made and correctly denied motions for mistrial." Unobjected to statements were not fundamental. (Court is unclear as to statements that were improper and grounds for sustaining objections). Affirmed.)

Poole v. State of Florida, 997 So.2d 382 (Fla. 2008) (Prosecutor's penalty phase argument to jury: "[w]hen you go back into that room and make that vote and you head for your car this afternoon, you're not going to find yourself feeling the same way. You're just going to find that you did your job just like you promised to do when you raised your right hand and swore to that oath" was not a suggestion to jury that they had promised to recommend death. Clearly, as an advocate for the State, prosecutor was attempting to persuade jurors to recommend death, but comment, which followed prosecutor's discussion of weighing the aggravators and mitigators, simply informed the jurors that they should do their job as they promised to do and weigh the mitigators and aggravators. Conviction affirmed. New penalty phase ordered on other grounds.)

Gonzalez v. State of Florida, 990 So.2d 1017 (Fla. 2008) There was no error in prosecutor's telling the jury that their responsibility, "based upon all of the evidence in this case, is to return a recommendation for the death penalty." Tying the comment to the review of the evidence, the prosecutor was urging the jury that the death penalty was appropriate and warranted "based upon review of the evidence.")

Frazier v. State of Florida, 970 So.2d 929 (4th DCA 2008) (Prosecutor's argument that if jury did not follow the law regarding the definition of a "dwelling" it would not be following the law, "just as" def had done was not nullifying jury's inherent pardon power by suggesting jurors would be committing a crime. There was nothing improper in prosecutor's urging the jury to follow the law. Affirmed. Remanded for resentencing.)

Melton v. State of Florida, 949 So.2d 994 (Fla. 2006) (prosecutor's argument (that the jurors must *"fulfill [their] duties by recommending to this Court the appropriate punishment for this*

murder, that [def] be sentenced to die;" and that *"the only proper recommendation to this court is a recommendation of death"*) telling the jurors that it is their duty to recommend the death penalty, were improper. However, error not fundamental.)

Orme v. State of Florida, 896 So.2d 725 (Fla. 2005) (death penalty - Although the prosecutor did tell jurors that they were there on behalf of the community, the argument stopped short of what was found to be objectionable in other cases and did not encourage jurors to "do their duty" for the community or "send a message" through their sentencing decision. Denial of post-conviction motion reversed on other grounds.)

Randolph v. State of Florida, 853 So.2d 1051 (Fla. 2003) (Prosecutor's comment in penalty phase comparing jury's decision to other difficult decisions in life: "When you take that old pet that can't get up anymore, and if you can afford to go to the vet you take him to the vet. If you can't, I think my father-in-law put the dog in the trunk of the car and gave him gas, carbon monoxide," even if improper, was not as egregious as to constitute fundamental error. Affirmed.)

Rimmer v. State of Florida, 825 So.2d 304 (Fla. 2002) (prosecutor's comment to jury to "do the right thing" and convict the defendants, although improper, was not *so* erroneous because it was coupled with references to the evidence in the record. Affirmed.)

Kearse v. State of Florida, 770 So.2d 1119 (Fla. 2000) (in penalty phase of death case following remand, it was improper for State to argue to jury that the appellate court had affirmed defendant's conviction but had "said that there should be a proceeding to recommend death." Isolated comment did not vitiate the entire resentencing where trial court properly instructed the jury as to the nature of the resentencing proceeding. Death penalty affirmed. [Note: comment made during voir dire but objectionable in closing as well.])

Brooks v. State of Florida, 762 So.2d 879 (Fla. 2000) (it was improper for state to argue to the jury it's concern that they would "take the easy way out" and "just quickly vote for life." Reversed due to many other errors.)

Culpepper v. State of Florida, 757 So.2d 1260 (3rd DCA 2000) (prosecutor's comment: "The only thing for you to do now is return your verdict of guilty. And you'll feel good when you do it" was not reversible error. There was no contemporaneous or specific objection and, because of the overwhelming evidence of guilt, any error was harmless. Affirmed)

Otero v. State of Florida, 754 So.2d 765 (3rd DCA 2000) (improper for prosecutor to repeatedly refer to jury as "conscience of society" and claim that their verdict would "project a conscience upon someone who doesn't have it, and that's exactly what your verdict should do." Harmless error where argument did not permeate the closing but was made only at the very end of the state's rebuttal argument and evidence was overwhelming.)

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) (improper for prosecutor to equate his father's duty in serving his country in Operation Desert Storm with the jury's moral duty to recommend the def. be sentenced to death. Reversed due to all errors).

Grey v. State of Florida, 727 So.2d 1063 (4th DCA 1999) (prosecutor's comment ["Go back there for Margaret Bartlett and the people of the State of Florida and do your job. Render a verdict that's true."] was not of the "send a message" variety commonly condemned by the courts. Nonetheless, such a comment could be construed as an improper appeal to the jury for sympathy for the victim - and exhorting the jury to "do its job" may improperly exert pressure upon the jury and divert it from its responsibility to view the evidence independently and fairly. However, when viewed in context (comment did not urge a particular verdict, just one that is "true") and together with entire closing argument, comment did not exceed permissible bounds or rise to the level of reversible error.)

Izquierdo v. State of Florida, 724 So.2d 124 (3rd DCA 1998) (Improper for prosecutor to tell jury that it was their province to "go bankrupt" and acquit the def. if they so chose. Based upon totality of many errors throughout trial by prosecution, error fundamental and not harmless. Trial court instructed that it may grant a new trial *or dismiss the case outright based on prosecutorial misconduct because the State Attorney's Office retained prosecutor after notice of his proclivities*. [improper argument and evidentiary violations common for particular prosecutor] Reversed.)

Urbin v. State of Florida, 714 So.2d 411 (Fla. 1998) (improper for prosecutor to tell jury that any juror's vote for a life sentence would be irresponsible and a violation of the juror's lawful duty. Death sentence reversed due to cumulative errors.)

Kent v. State of Florida, 702 So.2d 265 (5th DCA 1997) (prosecutor's argument referring to criticism that the "system doesn't work ... doesn't protect people," reminding the jury that whether the def. "faces justice for what he did is on [their] shoulders" and asking them to provide the answer: "does the system work?", even if improperly urging jurors that it is their duty to convict def. for the good of society, were not objected to and not fundamental. Affirmed.)

King v. State of Florida, 623 So.2d 486 (Fla. 1993) (during final argument in the penalty phase of the trial, the prosecutor told the jury that "... they would be cooperating with evil, and would themselves be involved with evil just like (the defendant), " if they recommend life imprisonment. Held: Improper comment. Reversed).

Garron v. State of Florida, 528 So.2d 353 (Fla. 1988) (improper for prosecutor to state to the jury: "It is your sworn duty as you came in and became jurors to come back with a determination that the def. should die for his actions." Reversed based upon cumulative errors. *Abrogation on other grounds recognized in 979/301*)

Redish v. State of Florida, 525 So.2d 928 (1st DCA 1988) (Improper for prosecutor to tell the

jury that it would be a violation of their oath as jurors if they "succumb[ed] to the defense argument." This comment is an impermissible attempt to instruct the jury as to its duties and functions. "Ultimate deductions from the evidence are for the jury to draw.")

James v. State of Florida, 429 So.2d 1362 (1st DCA 1983) (Prosecutor argued to jury: "Now, these are Florida Statutes; they're the law in the State of Florida and we all live by them. And I submit to you that if you let that man walk free after what you have seen here and what you have heard here, you might as well throw those away because they will serve no purpose." Upon objection, court gave an admonishment stating "each of you are allowed to make your arguments as you deem best. I think the jury will take it in the sense in which it is intended. Lets move along," and prosecutor explained that what he said was that if the jury let a guilty man walk free they were throwing away the laws of the State of Florida, that he felt the def. had been proven guilty beyond a reasonable doubt and that the jury should apply the law as it exists and not throw away the laws on speculation. Any impropriety of the comment was cured by the court's admonishment and the follow-up explanations by the prosecutor. Further, since no motion for mistrial and comment was not fundamental error, point has not been properly preserved. Affirmed.)

Betsy v. State of Florida, 368 So.2d 436 (3rd DCA 1979) (Not error for prosecutor to request to jury to perform their public duty by returning a guilty verdict)

Thomas v. State of Florida, 326 So.2d 413 (Fla. 1975) ("[Prosecutors'] discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty.")

Spencer v. State of Florida, 133 So.2d 729 (Fla. 1961) (prosecutor's discussion of the evidence, and all logical inferences that can be drawn from the evidence, is not to be condemned merely because it appeals to the jury to "perform their public duty" by bringing in a verdict of guilty. Affirmed.)

Carlile v. State of Florida, 176 So. 862 (Fla. 1937) (improper for prosecutor to argue: "These men [referring to def. and two others] had been stealing yearling after yearling together. … We can only look to the jury to stop this stealing of the oranges, grapefruit, and cattle." Reversed.)

Akin v. State of Florida, 98 So. 609 (Fla. 1923) (Improper for prosecutor to argue to the jury that "The grand jury has brought in this indictment. I am not afraid to discharge my duty, and you must do yours. If you do not convict this def., I had just as well throw up my job and go home." Comment told jury that everybody connected with the case has done his full duty, now it's up to you to do yours by bringing in a conviction. [Note: court did not comment on reference to grand jury indictment] Reversed.)

Blackwell v. State of Florida, 79 So.731 (Fla. 1918) (it was improper for the prosecutor to argue to the jury "If there is any error committed in this case, the Supreme Court, over in the

capital of our state, is there to correct it, if any error should be done." The purpose and effect of this remark was to suggest to the jury that they need not be too greatly concerned about the result of their deliberation, because, if they committed an error in forfeiting the lives of the prisoners, the Supreme Court could correct it. This tended to lessen their estimate of the weight of their responsibility, and caused them to shift it from their consciences to the Supreme Court. Such arguments that denigrate the role of the jury are improper. Reversed on these and other grounds.)

P. Waiver of/Order of closing argument or contents of reply

Kirkbride v. State of Florida, 60 So.3d 1136 (4th DCA 2011) (def's claim that it was improper for prosecutor to waive closing argument and then reply to def's closing by going beyond the scope of what the def addressed was not properly preserved as it was not raised below and did not constitute fundamental error because it did not "[reach] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." However, prosecutors are cautioned that "[t]he proper limit of a rebuttal is 'a reply to what has been brought out in the defendant's [closing] argument.' " Affirmed.)

Brown v. State of Florida, 18 So.3d 1149 (4th DCA 2009) (it was improper for State to give a brief initial closing statement addressing only how the evidence did not support convictions for lesser included charges, followed by a more extensive, thirty –four-slide PowerPoint presentation on rebuttal [when def could not respond] summarizing in detailed fashion the testimony of each witness, the surveillance tape and the elements of each crime. The purpose of rebuttal is "a reply to what has been brought out in the def's [closing] argument." Further, rebuttal not only went beyond its function as a reply to def's closing argument, but PowerPoint presentation included a photograph that was never introduced into evidence and a witness who never testified at trial. Reversed.)

D.B. v. State of Florida, 979 So.2d 1119 (3rd DCA 2008) (although in *adult* criminal prosecutions, [pursuant to §918.19, Fla. Stat. (2007) and Fla. R. Crim. P. 3.381] the state is entitled to give first and rebuttal argument even where the accused has offered no evidence other than his own testimony, such procedure does not apply to juvenile prosecutions [which are outside the referenced statute and are governed by rules of juvenile procedure]. Therefore it was error to give state first and rebuttal argument where juvenile did not present any evidence nor offer testimony on his own behalf. Right of *rebuttal* argument, rather than right to make a closing argument, is a procedural error, not a constitutional due process error and can be remedied by limited remand for a new closing argument and reconsideration by the trial judge. If the same judge is not available, def must be given a new adjudicatory hearing.)

Brown v. State of Florida, 976 So.2d 1201 (2nd DCA 2008) (on issue of order of closing arguments where trial occurred during period between legislature's repeal of old rule of court and adoption of new rule allowing state first and rebuttal argument, this panel of 2nd DCA aligns itself with Sullivan panel below and holds that repeal of rule of court revived common law rule

that state is entitled to first and rebuttal argument, even in absence of replacement rule. See Sullivan, Grice and Taylor below. Affirmed.)

Sullivan v. State of Florida, 972 So.2d 918 (2nd DCA 2007) (on issue of order of closing arguments and challenge to constitutionality of statute allowing state to have first and rebuttal argument, court adopts the reasoning below in Grice. Affirmed.)

Taylor v. State of Florida, 969 So.2d 583 (4th DCA 2007) (At common law, the state was entitled to present first and last closing argument. This procedure was modified by the statutory precursor to Rule 3.250 to allow the defendant first and last closing argument when the defendant offered no testimony at trial other than his or her own. In 2006, the legislature enacted statute §918.19, providing the state with first and last closing in criminal prosecutions. In so doing, Rule 3.250 providing otherwise was repealed. The Supreme Court subsequently adopted the procedure supplied in §918.19 in May, 2007 when it amended Rule 3.250 and created Rule 3.381. The Supreme Court has exclusive authority to enact rules of practice but the legislature has the authority to repeal them by 2/3's vote. As a result, §918.19 effectively repealed the prior rule of court regarding order of closing arguments but could not legally create a substitute, leaving no express rule until the Supreme Court acted in 2007 to adopt the procedure set forth in the statute. During this period, the defendant was denied first and last closing argument pursuant to §918.19 and claims that since the statute changing the procedure for closing unconstitutionally violated the separation of powers he should have been giving first and last closing and his conviction should be reversed. As a matter of law, when a rule of court that modified the common law is repealed, the common law operates to reinstate the common law rule, absent contrary legislative intent. The statute in question effectively repealed Rule 3.250. Accordingly, although §918.19 is constitutionally infirm in trying to enact a rule of court, the repeal of Rule 3.250 revived the common law rule that allows the state to have the first and last argument, reaching the same effect. Affirmed.)

Grice v. State of Florida, 967 So.2d 957 (1st DCA 2007) (Under the common law, the state was entitled to present first and last argument during closing. This procedure was modified by the statutory precursor to Rule 3.250 to allow the defendant first and last argument when the defendant offered no testimony at trial other than the def's own. In 2006, the legislature enacted statute §918.19, providing the state with first and last closing in criminal prosecutions. Def. argues that since the crime he was convicted of occurred before the enactment of §918.19 he should have been afforded first and last close. The question of who will have the opportunity to address the jury in first and last argument is clearly procedural, rather than substantive. As such, there is no impediment to retroactive application. Moreover, although the legislature exceeded its authority in creating a new rule of court, it was within its power to *repeal*, by 2/3's vote, an existing rule, as it did in the enactment of §918.19. As a result, the repeal of Rule 3.250 revived the common law rule which was identical to what the statute improperly attempted to achieve. Thus while the procedure set forth in the statute does not apply because the legislature does not have rule-making authority, the common law rule was the same so the outcome is the same. Affirmed.)

Zackery v. State of Florida, 849 So.2d 343 (4th DCA 2003) (Defendant did not waive right to final closing argument by introducing still photos extracted from video introduced by the State where video consisted only of a collection of still photos and not a videotape of continuous action or motion picture. Introduction of pictures from this type of video is analogous to introduction of transcript in *Gari* below. [Note: In initial opinion, court thought that State's video was a true video from which the def. had extracted the still pictures that he introduced and, on that basis, initially found the def. had waived closing argument.] Reversed.)

Darling v. State of Florida, 808 So.2d 145 (Fla. 2002) (Where state responded to def.'s closing argument by telling jury: "I don't feel it's necessary to do a closing argument. We will ask the jury to rely upon the evidence they've heard, the court's instruction on the law. We'd ask the court to proceed to jury instruction," def. was not entitled to a rebuttal argument as there was nothing to rebut. Affirmed.)

Wright v. State of Florida, 718 So.2d 934 (1st DCA 1998) (Def. who waived initial closing argument with intent to rebut state's closing was properly precluded from making a closing argument when state declined to make a closing argument since there was nothing to rebut).

Dean v. State of Florida, 478 So.2d 38 (Fla. 1985) (Where, following the closing arguments of defendant's counsel and co-defendant's counsel, prosecutor stood up and announced: "I think I can save the court some time. The evidence speaks for itself. We rest," prosecutor's comments did not constitute a closing argument and def. was not entitled to further argument before the jury. Remanded on other grounds.)

Dean v. State of Florida, 430 So.2d 491 (3rd DCA 1983) (where def. made a full and complete argument to the jury and the State then waived it's closing argument by saying: "I think I can save the court some time. The evidence speaks for itself. We rest," the court properly denied the def. an opportunity to make a concluding argument. The states comment did not constitute an indirect jury argument requiring rebuttal and, even if it did, the error in failing to allow a response to such a fleeting comment can hardly be considered reversible. *[Modified on other grounds - Dean v. State, 478 So.2d 38*].)

Menard v. State of Florida, 427 So.2d 399 (4th DCA 1983) (where after def. made initial closing argument, State waived it's closing argument, def. was not entitled to rebuttal. Despite def.s argument to the contrary, State's comment that: "The State of Florida is going to rely on the evidence and testimony before the Court and the jury's common sense, and we will waive our argument" was an effective waiver not necessitating rebuttal. The statement did not address the evidence in particular or any of the testimony.)

Gari v. State of Florida, 364 So.2d 766 (2nd DCA 1978) (Although Rule 3.250 of the Florida Rules of Criminal Procedure provides, in part, that "a defendant offering no *testimony* in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before

the jury," [emphasis added] the introduction of documentary evidence by the defendant will likewise waive the right to concluding argument. Nonetheless, where state introduced Spanish document into evidence and had it read to jury in English, defendant's introduction of English translation did not waive his right to concluding argument.)

Lyttle v. State of Florida, 320 So.2d 424 (Fla. 1975) (where state witness testified about note written by defendant's mother to defendant and read note verbatim to jury but did not introduce it into evidence, defendant's introduction of note during cross examination did not waive right to concluding argument. Under these circumstances, note was part of the state's evidence.)

State of Florida v. Pettibone, 164 So.2d 801 (Fla. 1964) (held: The State may waive the opening argument to the jury and, after argument by the defense, make a closing statement if such closing statement consists of nothing more than strict reply to argument advanced by defense counsel. If the statement consists of more than strict [reply] there is no prejudicial error if defense counsel is allowed appropriate reply. It is error to allow the state to comment on evidence or theory not discussed by the defense in its summation if the defense is denied the right of rebuttal upon request. [Note: judges should require trial counsel to object to argument as being outside the scope of reply in order to give the court the opportunity to prevent the improper argument before it requires the unusual act of an extra reply by opposing counsel. Also, this case is from the period when many errors were per se reversible. Today, this matter would probably be deemed waived if opposing counsel did not raise a contemporaneous objection to the argument but, instead, waited to the end to ask for a reply.]

Tindall v. State of Florida, 128 So. 494 (Fla. 1930) ("where the attorney, having the opening argument, feigns or only makes a short statement, the opposing attorney may thereupon waive his right to argument and thus deprive his adversary of a reply." Further, "[w]hile an attorney may not be required to make the opening argument (or if he makes a pretended one), yet the trial court, exercising its discretion, may permit opposing attorney to reply to any new material matter brought out on the former's second or closing argument.")

Q. Inconsistent positions

Martin v. State of Florida, 710 So.2d 58 (4th DCA 1998) (no error in allowing prosecutor to argue that juvenile witness, who came to police on his own, confessed to burglary and was convicted in juvenile court, was not involved in burglary where jury could have found from the evidence that def. committed the burglary and juvenile decided to take the blame in order to save def., an adult, from much more serious penalty. Claim that State should not be entitled to take inconsistent positions unsupported by any case law. Affirmed.)

R. Court admonishments

Goodrich v. State of Florida, 854 So.2d 663 (3rd DCA 2003) (it was improper for trial court to tell defense counsel to "move on," "move along," "let's move," or "let's go" on 14 separate occasions during a 25 minute closing argument. Although the control of comments made to the jury by counsel is within the discretion of the trial court, here the trial court abused it's discretion through repeatedly telling defense counsel to "move on" thereby preventing counsel from arguing his theory of the case. Also, because of the number of times that the trial court told defense counsel to "move on" in the jury's presence, the jury may have been given the impression that the trial court did not care for counsel's argument. Reversed.)

Rudolph v. State of Florida, 832 So.2d 826 (3rd DCA 2002) (where, before summation, trial court distributed form order to counsel which, in part, prohibited counsel from using derogatory terms or making disparaging comments when referring to opposing counsel, and defense counsel disregarded the prohibition by arguing "Power is dangerous and maybe there should be a limit to the power that attorneys have and maybe there should be a limit to the deals attorneys can make and maybe power corrupts...," [which the trial court found to be a derogatory comment on the prosecution and the lawyers in the case] it was proper for trial court to hold defense counsel in contempt of court for violating it's order. Counsel may point out perceived discrepancies in the evidence introduced at trial and opposing counsel's characterization of the same. However, it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury in the process. Affirmed.)

Thomas v. State of Florida, 752 So.2d 679 (1st DCA 2000) (although trial court placed on each counsel's table a packet of information prior to trial which included a reminder of the pertinent rules of ethics, a checklist of "NO-NOs" for closing argument and a copy of Judge Sorondo's concurring opinion in *Fryer v. State*, 693 So.2d 1046 (3rd DCA 1997), urging that counsel comply with the guidelines therein, improper for trial court to hold def. counsel in contempt for improper closing arguments that violated instructions from court. A finding of direct criminal contempt can be made despite the absence of a specific written or verbal court order, however, the placement of a list of guidelines on counsel's table, without more, is an insufficient basis for a finding of contempt. Reversed. [NOTE: Use Order in Limine or state in the memorandum that violating the list of "NO-NOs" will result in imposition of direct criminal contempt])

Gomez v. State of Florida, 751 So.2d 630 (3rd DCA 1999) ("When objections are sustained and the trial court considers it proper to admonish counsel, it should be done outside the jury's presence. However, if counsel continues to engage in improper comments and arguments, the trial judge should admonish counsel and advise them that future improper tactics will cause counsel to be rebuked before the jury. This has a magical effect! Trial counsel realize that for the impartial judge to rebuke him or her in the jury's presence can seriously undermine their rapport with a jury.")

McDonald v. State of Florida, 578 So.2d 371 (1st DCA 1991) ("With regard to a trial judge's

rebuke of defense counsel, a trial judge abuses his discretion when his rebukes so severely call into question an attorney's level of advocacy and sense of fairness that the attorney's client is unjustly prejudiced." Where def. counsel argued that the def. would not have committed the rape knowing that a black man charged with rape of a white woman could not get a fair jury in Jacksonville and, upon objection, the court warned counsel at sidebar not to continue with such argument because it was improper and impugned the integrity of the court and the jury, but counsel continued with such racially-based statements in his closing argument, it was appropriate for court to admonish def. counsel in front of the jury, i.e.: "Ladies and Gentlemen of the jury, the remarks of counsel are entirely inappropriate. This court is color blind. This court believes that we have a fair jury. ...The court believes that this attorney, and I have already admonished him at the bench, is simply trying to prejudice your thinking. ..." Court's admonishment referred to as "mild.")

Paramore v. State of Florida, 229 So.2d 855 (Fla. 1969) ("When an improper statement is made by counsel before it is practicable for the Court to prevent its utterance, the Court should visit upon such counsel prompt and fitting rebuke so as to impress on the jury the gross impropriety of being influenced thereby." *** " A better practice is to require the retirement of the jury before rebuking defense counsel. *[Subsequently modified as to death penalty - 92 S.Ct. 2857]*).

S. Concession of guilt

Mohanlal v. State of Florida, 162 So.3d 1043 (4th DCA 2015) (*post conviction motion for ineffective assistance of counsel* - def counsel may concede a defendant's guilt to lesser offenses, even without the defendant's consent, if the record shows this was a reasonable tactical decision of counsel in the face of overwhelming inculpatory evidence. In prosecution of teacher for sexual relations with a student, it was proper for def counsel to concede that def posted flyers defaming student as that was a reasonable tactical decision considering there were several witnesses to that fact. In fact, the defense argued, had he engaged in the alleged sex acts with the student, that would have furnished a strong reason for him not to be involved in the flyers, which could bring the sexual activity to light. However, no argument was provided at summary post-conviction hearing as to why def counsel would concede that def and student may have had a phone sex relationship. Remanded for full hearing on that issue.)

Victorino v. State of Florida, 127 So.3d 478 (Fla. 2013) (*death penalty - Def* counsel's act of complimenting the State ("The prosecution has done a wonderful job here") did not amount to a concession of guilt or failure to advocate on his behalf. He merely paid a professional courtesy to the prosecution before challenging the State's case by attacking the credibility of witnesses and arguing that the evidence was inconsistent with the theory that def committed the offenses. Def counsel testified that he always makes a remark about the prosecution doing a good job before challenging the State's case because he and co-counsel "want to make sure that we can try to make [the jurors] comfortable and not to dislike us." The comment was particularly appropriate

in light of the fact that the prosecution complimented the defense during its closing. Denial of post-conviction motion affirmed/habeas denied.)

Williams v. State of Florida, 987 So.2d 1 (Fla. 2008) (In murder prosecution, def. counsel's argument to jury that def. belonged in jail was not reversible error where comment related to jail sentence that def. was serving for being a drug dealer, a fact that the jury had already learned. Counsel was making a strategic decision to disclose to the jury that def. was already being punished for being a drug dealer, thereby diffusing the jury's desire to punish def. for the drug crime in the murder trial and using his known status to argue that he would not have risked income of $90,000 a week to collect on an $8,000 debt by murdering victims. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Def. did not concede a crime that was at issue, but rather a crime that was known to the jury, for which def. could not be punished again, and turned that conviction into the cornerstone of his defense. Affirmed in part, reversed on other grounds as to sentence.)

Cox v. State of Florida, 966 So.2d 337 (Fla. 2007) (Counsel did not concede def's guilt by conceding that he was involved in a prison fight with the victim. Many other inmates witnessed the fight and def counsel would have lost credibility with the jury by arguing otherwise. Nonetheless, counsel maintained that victim was stabbed by another inmate who jumped into the altercation and was attempting to stab def. Unlike in *Nixon*, counsel did not state that def was responsible for victim's death. Accordingly, def counsel did not concede guilt and to the extent he conceded an altercation had occurred, it was a reasoned strategic decision. Affirmed.)

Harvey v. State of Florida, 946 So.2d 937 (Fla. 2006) (*opening* statement-Def. counsel's opening statement conceded that def. was guilty of murder. Although such a strategy might be useful if def. counsel were going to claim that it was second degree murder or some other lesser included offense, counsel went on to claim that, after robbing the victims, def. and co-def. went outside and talked about whether to kill them, thus also conceding premeditation and felony murder, the charged offenses. Conceding the charged offense requires an affirmative, explicit acceptance of counsel's strategy by def., which was not done. However, pursuant to Florida v. Nixon, 543 US 175 (2004), a defendant's claim of ineffective assistance of counsel based on counsel's concession of guilt to the crime charged, even without the defendant's consent, must be evaluated under the standard set forth in Strickland. [*See Nixon III below]*. Although counsel conceded the charged offense, his statements to the jury merely repeated what def. said in his confession which was presented to the jury during trial. The evidence against the def. was overwhelming even without counsel's concession. Accordingly, def. cannot establish prejudice and the deficiency prong of Strickland need not be addressed. Affirmed.)

Nixon v. State of Florida, 932 So.2d 1009 (Fla. 2005) ([*Nixon III- See Nixon I and II below*] Upon remand from the US Supreme Court in Florida v. Nixon, 543 US 175 (2004), issues of ineffective assistance of counsel for concession of guilt are subject to Strickland analysis, even if counsel concedes the charged offense. Where def. remained silent and did not respond to

counsels suggestion that guilt be conceded in order to focus on saving def's life in penalty phase, counsel's decision to proceed with plan and concede guilt was not deficient performance. Accordingly, the second prong of Strickland need not be addressed. Affirmed.)

Walls v. State of Florida, 926 So.2d 1156 (Fla. 2006) (Even if, unlike his attorneys, def. testified that he did not consent to the strategy of having his attorneys concede his guilt to felony murder and the existence of an aggravator, appellate court would still recognize the trail court's superior vantage point in assessing credibility of witnesses.)

Windom v. State of Florida, 886 So.2d 915 (Fla. 2004) (it was not improper for trial counsel to concede at penalty phase closing that he was unsuccessful at the guilt phase, that the defendant does not deserve pity for what he did and that the def.'s actions were cold. Record supports trial court's conclusion that it was a reasonable trial strategy undertaken to try to restore some credibility to the defense so they could argue that the def. was not acting like himself that day. The record reflects that def. counsel argued vigorously against the death penalty. Affirmed.)

Dillbeck v. State of Florida, 882 So.2d 969 (Fla. 2004) (Where def. was charged with first degree murder and def. counsel conceded def.'s guilt to felony murder in voir dire and again in closing argument, but argued against the existence of premeditation and in favor of a life rather than death sentence, defendant was not entitled to seek a new trial on the grounds that he did not consent affirmatively and explicitly to counsel's strategy, as required by Nixon below. When the trial court attempted to question def. about whether he consented to counsel's trial strategy in an effort to obtain that affirmative and explicit consent, def. counsel objected, arguing that the matter was confidential and subject to the attorney-client privilege. Def. counsel assured the court that he had discussed the strategy with the def. and the court found that the def. was present throughout the inquiry of the jurors (where the concession was made), was totally aware of the proceedings, was alert and intelligent, the court gave the def. an opportunity to respond to the court's concern about whether he consented to the trial strategy of conceding felony murder and the def. remained silent with just a smile on his face; all of which indicated to the court that he understood that he could make known to the court if he disagreed with his counsel's strategy and he had chosen not to do so. Moreover, def. took the stand and testified that he had committed felony murder, consistent with his counsel's concession. Affirmed.)

Gamble v. State of Florida, 877 So.2d 706 (Fla. 2004) (in guilt phase, it was not error for defense counsel to tell the jury, during closing argument, that they "would conclude that Mr. Gamble [was] guilty of second or third degree murder but not first degree murder." Counsel did not concede the charged offense, concession of the lesser offenses was a reasonable strategy taken after considering and rejecting alternative courses and, in any event, defendant consented to the strategy. In penalty phase, concession of aggravator that was proven as part of guilt phase (pecuniary gain - where def. was found guilty of armed robbery, robbery and first degree murder) was not error. "[I]t would have been preposterous for penalty phase counsel to argue that no facts in the record established pecuniary gain when the jury found, beyond a reasonable doubt that it did. Because the aggravator did not require the proof of additional facts that were not

proven in the guilt phase, *Nixon* case does not apply. Affirmed.)

Reed v. State of Florida, 875 So.2d 415 (Fla. 2004) (where def. counsel suggested to jury that evidence could just as easily support a conclusion that def. entered house to ask for or take money and, having found victim dead, took purse and fled, and defendant claims that counsel's concession to theft was tantamount to a concession of murder because by all appearances person who committed theft also committed the murder, comment by def. counsel was not ineffective assistance because counsel felt that def.'s cap, found on the scene, was strong evidence of his presence in house and, therefore, counsel's objective was to make some halfway concession to the truth in order to give the appearance of reasonableness and candor, thereby gaining some credibility with the jury for more important issues. Further, counsel's comment about heinous nature of crime during guilt phase was not concession of HAC aggravator. Instead, comment was part of defense counsel's argument that jury should not just act on emotions and convict def. although guilt was not proven beyond every reasonable doubt simply because it was a "heinous event." Affirmed.)

Davis v. State of Florida, 866 So.2d 1251 (4th DCA 2004) (def. counsel's strategy of arguing that although the def. had alcohol in her system and was guilty of DUI she was not guilty of DUI manslaughter because she did not cause the accident was not ineffective assistance of counsel. Def. was facing charge of DUI manslaughter and had admitted having several drinks prior to accident and giving false name after accident. Counsel did not "fail to subject the prosecution's case to meaningful adversarial testing." His admission was more analogous to the concession of guilt on a lesser included offense, rather than the charged offense. Affirmed.)

Nixon v. Singletary, 857 So.2d 172 (Fla. 2003) ([*Nixon II- See earlier ruling before remand, Nixon I below and subsequent ruling in Nixon III above.*] Improper for atty to comment in opening statement that case was not about victim's death but about whether def. would die of electrocution or of natural causes after a lifetime of confinement. As a result of def. counsel's statement in opening, State's case was not subjected to meaningful adversarial testing. Before attorney can admit his client's guilt *to charged offense* as a trial strategy he must obtain def.'s consent. Conceding guilt to the charged offense is tantamount to a plea of guilty and the decision to plead guilty or not guilty is a matter left to the defendant. Def. should be questioned on the record outside the presence of the jury in order to avoid a post-conviction issue. Silent acquiescence is not enough. Trial court erred in concluding, upon remand, that def. consented to strategy. Only evidence was, at best, of silent acquiescence. Reversed. [NOTE: *Subsequently reversed on issue of ineffective assistance of counsel by US Supreme Court, leading to Nixon III above. While it could still be reversible error and is a dangerous area, it is not per se reversible.*])

Jones v. State of Florida, 845 So.2d 55 (Fla. 2003) (after subjecting the state's case to meaningful adversarial testing as part of a trial strategy to save the def.'s life, it was not error for trial counsel to tell jury in closing argument: "the evidence prove[d] beyond a reasonable doubt that [def.] killed [the victims]." Trial counsel then proceeded to argue that the def. was guilty of

the lesser included offense of second degree murder, rather than the charged offense of first degree murder. Def.'s argument would require counsel to present arguments with no credibility and contrary to fact to satisfy his theory of representation. "To be effectual, trial counsel should be able to do this [concede def.'s guilt to lesser offense] without the express approval of his client and without risk of being branded as being professionally ineffective because others may have different judgments or less experience." Affirmed.)

Spencer v. State of Florida, 842 So.2d 52 (Fla. 2003) (it was not improper for def. counsel to concede that the incident occurred and that the def. committed the acts but to argue against premeditation. Counsel made this strategic decision because the victim's son was an eyewitness to the crime. Trial court properly found that concession did not constitute deficient performance by counsel and there was no reasonable probability that the outcome of the trial would have been different had counsel not made this argument. Affirmed)

Thompson v. State of Florida, 839 So.2d 847 (4th DCA 2003) (although def. counsel conceded that def. committed the acts of which he was accused in the charged offense in opening and closing argument, counsel argued to the jury that after they heard all the evidence they would not find him guilty, suggesting to the jury that it was not the type of offense the legislature intended to punish (sexual intercourse between 18 year old boy and his 13 year old girlfriend). Counsel was merely conceding the acts that def. had confessed to and, in fact, testified to during trial. Nonetheless, counsel urged the jury to consider whether it was a crime and whether it was "wicked, lustful." Unlike in *Nixon v. Singletary*, below, this argument specifically challenged the State's proof, did not concede that the State had proven all the elements of the crime beyond a reasonable doubt, and requested a verdict of not guilty. Affirmed.)

Cooper v. State of Florida, 835 So.2d 1250 (4th DCA 2003) (when trial counsel concedes defendant's guilt *to the charged offense* in opening statement, thereby failing to subject the state's case to meaningful adversarial testing, a presumption of ineffectiveness arises unless the def. consented to counsel's strategy. Remanded to trial court for evidentiary hearing or attachment of portions of record conclusively refuting def.'s claim that he did not consent.)

Lawrence v. State of Florida, 831 So.2d 121 (Fla. 2002)(it was not improper for def. counsel to concede def.'s guilt to lesser included offense without def.'s on-the-record consent. [Def. counsel told jury in opening that they would find the def. guilty of something but not premeditated murder and, in closing, stated: "Lawrence is guilty; he's got to pay the price. He has to answer to you, and he's got to answer to the judge for what he did. He committed a crime. ... And we told you that you will find Mr. Lawrence guilty of something, and we never disputed that. But that something should not be first-degree premeditated murder. That something should either be second-degree murder or manslaughter."] Although counsel testified that def. consented but was apathetic and def. testified that "not to his knowledge" did he consent to his atty's trial strategy to concede guilt, the record supports a finding that it was a reasonable and informed tactical decision by defense counsel that does not constitute ineffective assistance of counsel given the strength of the State's case. [Note also that "defense counsel's strategic choices do not constitute

deficient conduct if alternative courses of action have been considered and rejected."] There was no due process requirement that the trial court conduct an on-the-record inquiry as to whether the def. agreed with def. counsel's trial strategy to concede guilt to a lesser included offense. Counsel was not conceding guilt to the charged offense. Further, counsel's comment in penalty phase: "We have never at any time in this case disputed Gary Lawrence's guilt...." was made in the context of arguing that def. should not be sentenced to death rather than as a concession of premeditated murder. Affirmed.)

State of Florida v. Williams, 797 So.2d 1235 (Fla. 2001) (def. counsel argued that if the jury chose to believe def.'s claim that he was not in the room when the shooting occurred they should find him not guilty, but if they believe he was lying, they still had to decide whether the State proved him guilty. Counsel then went on to offer a plausible scenario for how the def. could have shot the victim that would constitute a lesser included offense if the jury rejected his testimony. Given the evidence in the case, counsel's argument was not ineffective as it did not concede the charged offense, but rather gave the jury two options, acquit the def. or find him guilty of a lesser included offense. Affirmed.)

Atwater v. State of Florida, 788 So.2d 223 (Fla. 2001) (in trial for first degree murder where death penalty was an issue, it was proper during closing argument for trial counsel to argue in favor of a conviction for second degree murder, even absent consent of the defendant, where evidence of guilt of first degree murder was overwhelming. Case can be distinguished from situation where def. counsel concedes guilt to *charged offense* in opening, thereby failing to submit State's evidence to any adversarial testing whatsoever. Denial of 3.850 motion affirmed.)

Harris v. State of Florida, 780 So.2d 980 (4th DCA 2001) (evidentiary hearing not absolutely necessary in Rule 3.850 motion alleging ineffectiveness of counsel in conceding def.'s guilt. Unlike case where counsel conceded def.'s guilt to the charged offense and then argued for a life sentence rather than death [i.e. *see Nixon*, below], counsel here argued that lesser included offenses were appropriate rather than charged offense. Therefore, argument did not constitute a failure to subject the state's case to meaningful adversarial testing. Under these circumstances, Strickland test applies and def. must show that counsel's performance was deficient and that deficiency prejudiced defendant. Even if counsel were deficient, def. cannot show prejudice where record reflects that his attorney's concessions constituted a reasonable tactical decision made in consideration of the overwhelmingly inculpatory evidence of def.'s statements to police and other trial testimony. Even without the alleged deficiency, it is not reasonably likely that the result of def.'s trial would have been any different. Thus, def. was not entitled to an evidentiary hearing. [NOTE: Court points out, however, that most post-conviction motions will require an evidentiary hearing and that *counsel should obtain on-the-record consent from their clients to strategic decisions, such as admissions to lesser crimes, to avoid these issues*] Affirmed)

Harris v. State of Florida, 768 So.2d 1179 (4th DCA 2000) (counsel's concession of lesser included offenses was not ineffective, despite lack of def.'s consent. Trial record reflects that concessions were reasonable tactical decisions made in consideration of the overwhelming

inculpatory evidence of def.'s statements to the police and other trial testimony. Affirmed.)

Nixon v. Singletary, 758 So.2d 618 (Fla. 2000) ([*Nixon I-See appeal after remand, in Nixon II and Nixon III above.*] Improper for atty to comment in opening statement that case was not about victim's death but about whether def. would die of electrocution or of natural causes after a lifetime of confinement. As a result of def. counsel's statement in opening, State's case was not subjected to meaningful adversarial testing. Before attorney can admit his client's guilt *to charged offense* as a trial strategy he must obtain def.'s consent. Conceding guilt to the charged offense is tantamount to a plea of guilty and the decision to plead guilty or not guilty is a matter left to the defendant. Def. should be questioned on the record outside the presence of the jury in order to avoid a post-conviction issue. Silent acquiescence is not enough. Def.'s consent must be *affirmative and explicit*. "[I]f a trial judge ever suspects that a similar strategy [of conceding the def.'s guilt] is being attempted by counsel for the defense, the judge should stop the proceedings and question the def. on the record as to whether or not he or she consents to counsel's strategy." Remanded for evidentiary hearing as to whether def. consented to strategy.)

Brown v State of Florida, 755 So.2d 616 (Fla. 2000) (it was not improper for def. counsel to concede guilt to lesser included offense of second degree murder and armed trespass to avoid a conviction of first degree murder and armed burglary (which would support felony murder) where evidence against def. was strong, including confession that was not suppressed, and counsel repeatedly advised def. of his strategy, believed he understood it and concluded that he agreed with the strategic approach. Affirmed.)

Geddis v. State of Florida, 715 So.2d 991 (4th DCA 1998) (where def. was facing a possible death sentence for first degree murder and had admitted stabbing and robbing victim, it was not necessary for trial court to have inquired as to whether counsel obtained def.'s consent before attempting to persuade jury that he was actually guilty of a lesser degree of murder, thereby saving his life. ["Then if there are those of you that believe that way, like I do, then I'm going to ask you to render a proper verdict, either it would be third degree murder or second degree murder. ... We're not asking you to find him not guilty."] However, it is better practice to obtain consent, even where the case law does not require it, in order to reduce unnecessary appeals and post-conviction motions. Affirmed. [Note: No mention of def. counsel expressing personal opinion as that issue was probably not appealed.])

McNeal v. State of Florida, 409 So.2d 528 (5th DCA 2002) (it was not improper for def. atty. to argue that def. who was charged with first degree murder was "at best" guilty of manslaughter. "When faced with the duty of attempting to avoid the consequences of overwhelming evidence of the commission of an atrocious crime, such as a deliberate, considered killing without the remotest legal justification or excuse, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position. To be effectual, trial counsel should be able to do this without express approval of his client [footnote omit.] and without risk of being branded as being professionally

ineffective because others may have different judgment or less experience." Affirmed.)

T. Improper personalizing with jury

Ruiz v. State of Florida, 80 So.3d 420 (4th DCA 2012) (prosecutor's comment, thanking the jury "on behalf of the state attorney, the victim's behalf, and on [sic] the people of the State of Florida" "did not warrant a new trial." [NOTE: no clear statement that this is error or explanation of why] Affirmed.)

Rimmer v. State of Florida, 825 So.2d 304 (Fla. 2002) (prosecutor's reference to military maneuver was not an attempt to personalize with the jury but, rather, an effort to explain the actions of the "lookout." Affirmed.)

Brown v. State of Florida, 787 So.2d 229 (2nd DCA 2001) (it was improper for prosecutor to attempt to personalize herself with the jury: "This happened on March 8th. I turned 29 on March 7th. It was a Sunday. I couldn't go out and party because it was a Sunday. March 8th would have been Monday. He's drinking at midnight, Sunday night into Monday." Combined with many other errors, reversed.)

Ruiz v. State of Florida, 743 So.2d 1 (Fla. 1999) (improper for prosecutor to equate his father's duty in serving his country in Operation Desert Storm with the jury's moral duty to recommend the def. be sentenced to death. Reversed due to all errors).

U. Allowing represented defendant to address jury in closing

McCray v. State of Florida, 71 So.3d 848 (Fla. 2011) (in *death penalty* case, although def. had previously been declared incompetent and had made several equivocal requests during trial to represent himself—all of which had been rejected by the court which found him incompetent to be co-counsel—it was not improper for trial court to allow def. to address jury in closing argument during penalty phase. Although court's Faretta inquiry was brief, it is enough for the def. "to be alerted generally to the difficulties of navigating the legal system." The courts prior, limited comment regarding def's inability to represent himself during an earlier request did not foreclose def.'s continuing ability to make a clear and unequivocal declaration of a desire for self-representation in the future. Lastly, as to def.'s claim that his inappropriate argument on lingering doubt reflects his inability to adequately represent himself, the trial court did not abuse its discretion in allowing def. to conduct his closing argument, even if it ultimately was to his own detriment. Affirmed.)

Mora v. State of Florida, 814 So.2d 322 (Fla. 2002) (A trial court's decision whether to allow a def. who is represented by counsel to address the jury is subject to the abuse of discretion standard, even when def. is allowed, again at court's discretion, to act as co-counsel. Standard of

review is abuse of discretion. Trial court engaged def. in an extensive colloquy concerning what issues he was going to talk about, limited def. to new issues not raised by his counsel in closing and suggested to def. that he follow his atty's advise and not give a closing statement. Under the circumstances, trial court did not abuse its discretion in allowing def. to give a closing statement.)

State of Florida v. Tait, 387 So.2d 338 (Fla. 1980) (The sixth amendment does not guarantee that the accused can make his own defense personally and have the assistance of counsel. When the accused is represented by counsel, affording him the privilege of addressing the court or the jury in person is a matter for the sound discretion of the court.)

V. Improper comments by court

Paul v. State of Florida, 980 So.2d 1282 (4th DCA 2008) (it was improper for prosecutor to comment to jury that "[t]he State has the burden of proving all of these elements beyond a reasonable doubt. And if [the defense attorney] wants to present theories of how she believes this case should play out, there's got to be some level of proof from that [sic] Mr. Laboy was lying." Comment improperly shifted the BOP to the def by telling the jury that def needed to prove victim was lying in order to be found not guilty. Error was not cured and was exacerbated when trial court overruled the objection and explained to the jury "It's a comment on the evidence, or should I say, while the State always has the burden of proof, both lawyers have a right to comment on their perception of the evidence and, as I told you before, you're free to accept it or reject it." Instruction failed to specifically rebuff State's comment that def had to show victim was lying and appeared to consent to the accuracy of the comment when it overruled the objection and told the jury that the State is allowed to comment on the evidence. Reversed.)

Munoz-Perez v. State of Florida, 942 So.2d 1025 (4th DCA 2006) (prosecutor's question to def. during cross-examination: "We've never spoken before, have we?" and comment during closing that the reason for that question was to point out that at trial was the first time that anybody had ever heard the claim of insanity, were both improper comments on the def.'s right to remain silent. Prosecutions comment undercut insanity defense in a case where both victims testified that the def. appeared insane. Judge's curative instruction that: "All right, ladies and gentlemen, as you know, through the voir dire, the defendant has the right to remain silent, and he has, so, and probably upon advice of his attorney he did not and would not talk to the prosecutor. That's generally something that doesn't and wouldn't happen. …" made def.'s choice to follow his attorney's advice sound like the actions of a rational and sane man instead of someone who could be insane. [Not to mention court's own comment on def. remaining silent] Reversed. *Receded from on other grounds, Severance v. State, 972/931.*)

Jacques v. State of Florida, 883 So.2d 902 (4th DCA 2004) (it was improper for court to interrupt defense counsel's closing and state "That's not what she [witness] said and that's not what the record shows." Statement was a comment on the weight of the evidence and the

credibility of the witness. While a judge may take some initiative to clear up uncertainties in the issues in a case, it is error for the judge to make any remark in front of the jury that might be interpreted as conveying the judge's view of the case or an opinion on the weight, character, or credibility of the evidence. Although no objection was made, error was fundamental where sole issue in case was witness credibility. Reversed.)

Goodrich v. State of Florida, 854 So.2d 663 (3rd DCA 2003) (it was improper for trial court to tell defense counsel to "move on," "move along," "let's move," or "let's go" on 14 separate occasions during a 25 minute closing argument. Although the control of comments made to the jury by counsel is within the discretion of the trial court, here the trial court abused it's discretion through repeatedly telling defense counsel to "move on" thereby preventing counsel from arguing his theory of the case. Also, because of the number of times that the trial court told defense counsel to "move on" in the jury's presence, the jury may have been given the impression that the trial court did not care for counsel's argument. Reversed.)

Simmons v. State of Florida, 803 So.2d 787 (1st DCA 2001) (where State argued that "according to the defense, no crime occurred here because [the victim] said it was a butcher knife and [the eyewitness] said it was a steak knife" and trial court overruled defense counsel's mischaracterization of evidence objection by saying, "[i]t is accurate and dead on point. Sit down, Mr. Boothe," comment deprived def. of a fair trial. While a judge may take the initiative to clear up uncertainties in the issues of a case, Florida law is clear that it is error for the judge to make a remark within the hearing of the jury that might convey his view of the case or his opinion of the weight, character, or credibility of the evidence. Not only did the judge's comment reflect approval of the State's argument, it also demonstrated disapproval of the defense argument. This type of error is particularly harmful, as the judge's position of neutrality is essential to the proper functioning of the justice system. Reversed.)

Brown v. State of Florida, 678 So.2d 910 (4th DCA 1996) (where testimony from two witnesses differed in several respects and ones testimony was internally inconsistent and def. counsel argued in closing "they are liars, I submit to you," it was improper for court to admonish def. counsel for calling witnesses liars and state: "*There is no evidence that anybody is a liar.* If you will point that out to me. There is all kind of evidence, conflicting testimony, but because somebody isn't consistent doesn't mean they are necessarily a liar. It's not up to you in this court to call anybody a liar." Calling a witness a liar is permitted where it relates to the evidence in the record and testimony of the witness. For the trial judge to say in open court during final argument that there is no evidence that either witness had lied amounted to the trial judge's assessment of the very issue reposed in the jury, the credibility of the witnesses. Reversed despite lack of objection.)

Andrews v. State of Florida, 443 So.2d 78 (Fla. 1983) (*voir dire* - it was error for trial court to instruct the jury at the outset of case that "The Defense may or may not call witnesses. The Defense is not required to call any witnesses nor is the defendant required to take the stand" without any cautionary instruction to the jury not to draw any inference of guilt from the

defendant's failure to take the stand in his own defense." Court's comment may have "forced" def. to take the stand. Reversed.)

Provence v. State of Florida, 337 So.2d 783 (Fla. 1976) ("The dominant position occupied by a judge in the trial of the cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers." [citation omitted] In death penalty case, judge's 'You've got me' response to the juror's question asking why an innocent person would not take the stand was unfortunate and ill-considered. However, his entire response, including the clarifying explanation that no inference of guilt could be drawn from appellant's failure to testify, was neither misleading nor erroneous. Further, def. was not "forced" to testify by the court's comment because, faced with a situation in which the deceased's body exhibited eight stab wounds and in which where were no witnesses to the homicide, it is inconceivable how he could expect to present a credible self-defense argument except through his own testimony from the witness stand.)

W. Comparative Sentences

Hess v. State of Florida, 794 So.2d 1249 (Fla. 2001) (in death penalty case, it was improper for defense counsel to make reference to the sentences of unrelated capital defendants such as Ted Bundy, Jeffrey Dahmer, and Charles Manson. While proportionality is an appropriate consideration for the trial court, it is not relevant to the jury's determination of an appropriate sentence for the defendant's involvement in the murder on trial.)

XVI. Generally

Fagins v. State of Florida, 116 So.3d 569 (3rd DCA 2013) ("[W]e note that comments on the credibility of counsel, such as those at issue in this case, are recurring in closing arguments at an alarming rate. We caution counsel for both the prosecution and defense to uphold their professional and ethical obligations and to be mindful of the line clearly established by the courts of this State. … We also entreat the trial courts to be mindful of such misconduct and to respond accordingly with appropriate curative instructions and firm admonishment of counsel." [Emphasis added] No fundamental error. Affirmed.)

De Jesus v. State of Florida, 115 So.3d 1029 (4th DCA 2013) ("Attorneys have wide latitude in arguing to a jury." … However, they "must 'confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence.' " Affirmed)

Braddy v. State of Florida, 111 So.3d 810 (Fla. 2012) (If the trial court erred in allowing the prosecutor to engage in improper argument but there is no reasonable probability that the improper comments affected the verdict, such error is harmless and does not require reversal.)

Bright v. State of Florida, 90 So.3d 249 (Fla. 2012) (alleged error in closing argument was not preserved when defense counsel failed to lodge a contemporaneous objection but, instead, waited until State finished its closing argument before objecting and moving for mistrial.)

Pierre v. State of Florida, 88 So.3d 354 (4th DCA 2012) (In order for the necessity of a new trial to arise, the improper prosecutorial comments must either: "deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.")

M.S. v. State of Florida, 88 So.3d 238 (3rd DCA 2011) (where supervisor at juveniles' shelter found juvenile crying, escorted her out of her dorm into the hallway, and def. followed, a verbal altercation ensued and def. reached around supervisor and slapped victim across the face, court did not err in precluding def from arguing self-defense in closing, a defense that was never raised prior to closing. "Closing arguments are improper where they cannot be reasonably inferred from the evidence presented at trial." Regardless of how altercation started, evidence did not support suggestion that def. needed to defend herself against imminent force from victim, who was being escorted away and separated from def by a supervisor. Affirmed.)

Fenster v. State of Florida, 944 So.2d 477 (4th DCA 2006) (The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.)

Dessaure v. State of Florida, 891 So.2d 455 (Fla. 2004) ("Closing argument presents an opportunity for both the State and the defendant to argue all reasonable inferences that might be drawn from the evidence. Indeed, '[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.'" [citation omitted])

Cartwright v. State of Florida, 885 So.2d 1010 (4th DCA 2004) ("In order to require a new trial, a prosecutor's comments must either deprive the def. of a fair trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise.")

Lewis v. State of Florida, 879 So.2d 101 (5th DCA 2004) ("In order to determine whether improper remarks constitute reversible error, they should be reviewed within the context of the closing argument as a whole and considered cumulatively within the context of the entire record." [citation omitted])

Griffin v. State of Florida, 866 So.2d 1 (Fla. 2003) (r*evised opinion* - "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may

reasonably be drawn from the evidence. [citations omitted] Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment.")

Servis v. State of Florida, 855 So.2d 1190 (5th DCA 2003) (Closing arguments must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response rather than a logical analysis of the evidence and the applicable law. [**Note**: the court cites as error several comments that have been approved by other DCA's, read entire opinion carefully and rely on at your own peril.])

Rivera v. State of Florida, 840 So.2d 284 (5th DCA 2003) ("Closing argument is the part of the trial proceedings wherein each party is given the opportunity to summarize the evidence that has been presented to the jury regarding the issues in the case." [citation omitted] "Wide latitude is given the parties so that they may "advance all legitimate arguments and draw logical inferences from the evidence.")

Johns v. State of Florida, 832 So.2d 959 (2nd DCA 2003) ("A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; 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." Reversed due to multiple improper arguments.)

McArthur v. State of Florida, 801 So.2d 1037 (5th DCA 2001) (Primary purpose of closing argument is to give the parties an opportunity to summarize the evidence and explain how the facts derived therefrom should be applied to the law as instructed by the trial court.)

Diaz v. State of Florida, 797 So.2d 1286 (4th DCA 2001) ("A prosecutor's obligation is to secure justice, not victory at any cost." However, this duty does not limit prosecutors' closing arguments to flat, robotic recitations of "just the facts." Closing argument "is a time for robust, vigorous, challenging ... of an opponents ideas.")

Thomas v. State of Florida, 787 So.2d 27 (2nd DCA 2002) ("Closing argument 'must not be used to inflame the minds and passions of the jurors.'")

Delgado v. State of Florida, 776 So.2d 233 (Fla. 2000)(Wide latitude is permitted in arguing to the jury and it is within the trial court's discretion to control the arguments of counsel. [*NOTE: this case has no precedential value as it was withdrawn and superseded. The superseding opinion, however, did not address the closing arguments and reversed on other grounds. Therefore, the case is included in the outline to give you an idea of the Court's possible view on this scenario.*])

Smith v. State of Florida, 754 So.2d 54 (3rd DCA 2000) ("The purpose of closing argument is to present a review of the evidence and suggestions for drawing reasonable inferences from the evidence.")

Hawk v. State of Florida, 718 So.2d 159 (Fla. 1998) (Following improper closing arguments, the issue is whether the trial court abused its discretion in responding to defense counsel's objections to those arguments. Supreme Court urges trial courts to police with vigilance any hint of impropriety. *[Subsequently abrogated on other grounds - Connor v. State, 803 So.2d 598]*.)

Joseph v. State of Florida, 704 So.2d 1149 (3rd DCA 1998) (although opinion does not tell us the nature of the improper argument or the details of the curative instruction, court holds that "the strong curative instruction promptly given by the trial court alleviated any possible prejudice, thus the court correctly denied the mistrial motion." Suggestion is that a strong and quick curative instruction may save you from having to retry the case.)

Robinson v. State of Florida, 704 So.2d 688 (3rd DCA 1997) ("Wide latitude is permitted in arguing to a jury." Control of comments "is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown." Affirmed.)

Reyes v. State of Florida, 700 So.2d 458 (4th DCA 1997) (In order for a prosecutor's comment to merit a new trial, the comments must be of such a nature as to: (1) deprive the appellant of a fair and impartial 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 they might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise.)

Buckner v. State of Florida, 689 So.2d 1202 (3rd DCA 1996) (In order for a prosecutor's comment to merit a new trial, the comments must be of such a nature as to: (1) deprive the appellant of a fair and impartial 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 they might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise.)

Wike v. State of Florida, 648 So.2d 683 (Fla. 1994) (Although closing arguments in the guilt phase of a criminal trial are governed by Rule 3.250 which provides that a def. is only entitled to the concluding argument before the jury if he offered no testimony in his or her own behalf, except the def.'s own, closing arguments in penalty phase proceedings are governed by Rule 3.780 which provides that the defendant always gets the concluding argument [close/close] regardless of whether he presented evidence beyond his own testimony. The erroneous denial of defendant's right to concluding argument, in guilt or penalty phase, cannot be deemed harmless error. Reversed.)

Luce v. State of Florida, 642 So.2d 4 (2nd DCA 1994) (although this was a PCA, the concurring opinion points out that it was improper for the prosecutor to express personal opinion as to credibility of a witness: "Lance Brown, he was probably as dumb as a stump and I respect him, but at least he was honest." The appellate court stated: "The courtroom is not an arena for

testing the relative strengths of gladiators; it is the place where citizens of our state expect to settle disputes in a manner more civilized than hand-to-hand combat.... If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in it's use, they should not be members of the Florida Bar.")

Rodriguez v. State of Florida, 609 So.2d 493 (Fla. 1992) (The proper procedure when the prosecution makes an improper comment during closing argument is to request an instruction to the jury to disregard the comment.)

Mann v. State of Florida, 603 So.2d 1141 (Fla. 1992) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence.")

Lopez v. State of Florida, 555 So.2d 1298 (3rd DCA 1990) (although repeated references to def. as a "drug dealer" who was lying on the stand were improper, they did not deprive the def. of a fair trial. In order to warrant a new trial, comments must be of such a nature so as to deprive the def. of a fair and impartial trial; materially contribute to his conviction; be so harmful or fundamentally tainted so as to require a new trial; or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise. Conviction affirmed.)

Jackson v. State of Florida, 522 So.2d 802 (Fla. 1988) (Purpose of closing is to review the evidence and explicate inferences which may reasonably be drawn from the evidence. It must not be used to inflame the passions of the jurors so verdict reflects an emotional response rather than logical analysis of evidence and applicable law. Neither error sufficient to taint the validity of jury's recommendation. Affirmed.)

Jackson v. State of Florida, 498 So.2d 406 (Fla. 1986) ("The control of comments in closing arguments is within a trial court's discretion, and a court's ruling will not be overturned unless a clear abuse is shown." [quoting Davis, 461 So.2d 67][Note: subsequently remanded numerous times on other grounds, 547/1197, 648/85, 704/500, 767/1156])

Bertolotti v. State of Florida, 476 So.2d 130 (Fla. 1985) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence.")

State of Florida v. Murray, 443 So.2d 955 (Fla. 1984) ("[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" NOTE: This case extended harmless error analysis to prosecutorial misconduct. Although the case involved closing argument, it appears the court spoke of "prosecutorial error" in general)

Seckington v. State of Florida, 424 So.2d 194 (5th DCA 1983) ("One of the purposes of

closing arguments is to give the attorneys the opportunity to tie together for the jury the law and the facts so that the jury can give the proper legal weight to the evidence in reaching its verdict.")

Thomas v. State of Florida, 326 So.2d 413 (Fla. 1975) (good general discussion about lack of objection, wide latitude in closing and how every improper comment, even if objected to, does not warrant a new trial)

Paramore v. State of Florida, 229 So.2d 855 (Fla. 1969) (Comments by counsel before a jury are controllable in the judicial discretion of the trial court. *[Subsequently modified as to death penalty - 92 S.Ct. 2857]*)

Frenette v. State of Florida, 29 So.2d 869 (Fla. 1947) ("A prosecuting attorney should always confine his argument to facts which are established by the record or which may be reasonably inferred from the facts established, and when he goes beyond that range he takes the chance that he may thereby cause the necessity of the reversal of a favorable judgment."

Akin v. State of Florida, 98 So. 609 (Fla. 1923) (It is the duty of the trial judge, whether requested or not, to check improper remarks of counsel to the jury, and to seek by proper instructions to the jury to remove any prejudicial effect they may be calculated to have against the opposing party. Any attempt to pervert or misstate the evidence or to influence the jury by the statement of facts or conditions not supported by the evidence should be rebuked by the trial court, and, if by such misconduct a verdict was influenced, a new trial should be granted. Reversed.)

Washington v. State of Florida, 98 So. 605 (Fla. 1923) ("[E]xcessive vituperation or ridiculous epithets are out of place and should not be indulged in criminal prosecutions. The prosecuting attorney occupies a semi-judicial position.... His primary considerations should be to develop the facts and the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state, struggling for a verdict.")

XVII. Power of court to intercede without objection

Harding v. State of Florida, 736 So.2d 1230 (Fla. 1999) (Trial court affirmed when it interrupted defense counsel's closing argument, without objection from the state, to prevent defense counsel from continuing with an improper "ignore the law" argument. Trial court admonished defense counsel and told jury they would be in violation of their oath if they did as counsel requested.) Affirmed.

Paramore v. State of Florida, 229 So.2d 855 (Fla. 1969) ("When an improper statement is made by counsel before it is practicable for the Court to prevent its utterance, the Court should visit upon such counsel prompt and fitting rebuke so as to impress on the jury the gross

impropriety of being influenced thereby." *** " A better practice is to require the retirement of the jury before rebuking defense counsel. *[Subsequently modified as to death penalty - 92 S.Ct. 2857]*).

Ailer v. State of Florida, 114 So.2d 348 (2nd DCA 1959) ("Judge must halt improper remarks...whether objection is made or not" and should rebuke attorney in front of jury for any of several listed comments)

Oglesby v. State of Florida, 23 So.2d 558 (Fla. 1945) ("It is the rule in this state that the trial judge shall halt improper remarks of counsel made during an address to the jury even though he is not requested to do so." [emphasis added])

Carlile v. State of Florida, 176 So. 862 (Fla. 1937) ("[w]hether requested to or not, it is the duty of the trial judge to check improper remarks of counsel to the jury, and by proper instructions to remove any prejudicial effect such remarks may have created. A judgment will not be set aside because of the omission of the judge to perform his duty in the matter unless objected to at the proper time. This rule is, however, subject to the exception that if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in such event, a new trial should be awarded, regardless of the want of objection or exception.")

XVIII. Objection v. fundamental error

Haspel v. State of Florida, 164 So.3d 6 (4th DCA 2014) (in trial for sexual battery of a child under the age of 12, prosecutor's multiple references to the victim as "damaged" was not an improper appeal for sympathy but rather supported by evidence that showed she had been abused by her first stepfather as well as def and disbelieved by her grandmother when she tried to report the abuse by def. Comment was used to describe victim's psychological state caused by other harmful events in her life in order to explain why she didn't seek help when the abuse started. Moreover, even if they had been improper, no objection was raised and comments were not fundamental as they do not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Affirmed.)

Howard v. State of Florida, 152 So.3d 825 (2nd DCA 2014) (it was improper for the state to refer to def counsel as a "magician" and imply that magicians are fraudulent and "dupe" people as it suggested she was relying on deceit to magically trick the jury into deciding in favor of the defendant. Notably, comments that "impugn the integrity or credibility of opposing counsel" are fundamental error. Reversed.)

Augustine v. State of Florida, 143 So.3d 940 (4th DCA 2014) (although appeals court found

that state's closing argument read like a primer for prosecutors entitled "What NOT to Say During Closing Arguments" [prosecutor urged jury to convict based on sympathy for the victim, gave a personal opinion on the justness of the cause, invited the jury to reach a verdict based upon determining what the "truth" was rather than because the state had proven the case beyond a reasonable doubt, and gave an incorrect interpretation of the law], errors were not preserved and do not rise to the level of fundamental error because, although the state's case was based entirely on circumstantial evidence, appeals court could not say that a conviction "could not have been obtained absent the prosecutor's improper arguments." [**NOTE**: although counsel objected to one lone comment, counsel failed to secure a ruling on the objection and it is therefore not preserved either]. Affirmed.)

Ayalavillamizar v. State of Florida, 134 So.3d 492 (4th DCA 2014) (def. attorney properly preserved error by objecting and moving for mistrial, although counsel declined trial court's offer of a curative instruction. Where counsel believes a curative instruction would be insufficient and requests a mistrial instead, error should be deemed preserved. Nonetheless, error of prosecutor repeatedly pounding sledgehammer/murder weapon while urging jurors to consider the criminality of the act was designed to elicit improper emotional response but was not so egregious, standing alone, as to warrant a new trial. Affirmed.)

Richemond v. State of Florida, 126 So.3d 281 (3rd DCA 2011) (in order for contemporaneous objection to preserve issue for appeal, objection need not use "magic words," as long as counsel articulates the objection with sufficient specificity as "to inform the trial judge of the alleged error." Counsel failed to do so by saying "objection, judge" and "objection, improper argument." Affirmed.)

De Jesus v. State of Florida, 115 So.3d 1029 (4th DCA 2013) (def's "general" objection [implicitly "improper argument"] did not state specific grounds [i.e. "improper comment on character of neighborhood"] and was therefore insufficient to preserve issue for appeal. Affirmed)

Scott v. State of Florida, 66 So.3d 923 (Fla. 2011) (where def. moved for mistrial at end of closing argument but failed to make a contemporaneous objection at time of improper argument, alleged error was not preserved for appellate review and will only serve as grounds for reversal if fundamental).

Kirkbride v. State of Florida, 60 So.3d 1136 (4th DCA 2011) (def's claim that it was improper for prosecutor to waive closing argument and then reply to def's closing by going beyond the scope of what the def addressed was not properly preserved as it was not raised below and did not constitute fundamental error because it did not "[reach] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." However, prosecutors are cautioned that "[t]he proper limit of a rebuttal is 'a reply to what has been brought out in the defendant's [closing] argument.' " Affirmed.)

Carbonell v. State of Florida, 47 So.3d 944 (3rd DCA 2010) (although it was improper for prosecutor to argue "I wish I could give you, you know, a full confession. I wish I could give you a videotape of the robbery. I wish I could make it easy for you," as such comment can be interpreted as a comment on the def's right to remain silent, error was not fundamental because it was def's counsel who first argued to the jury "[t]here's not a single thing about [def] making a statement in this case. [thereby raising the issue of his silence first]. Note: Def HAD confessed but trial court suppressed def's confession because it was obtained after def was appointed counsel. Reversed on other grounds and prosecutor cautioned against making such argument on retrial.)

Fratcher v. State of Florida, 37 So.3d 365 (4th DCA 2010) (requirement that a contemporaneous objection be made does not mean it must be made immediately after the state makes an impermissible argument. "[A]n objection may be considered timely if it is made soon enough to allow the trial court to provide a remedy." [Quoting Padovano, *Appellate Practice*])

Courtemanche v. State of Florida, 24 So.3d 770 (5th DCA 2009) (prosecutor's comment, (that no matter how overwhelming the evidence against an accused, he's entitled to a trial if he asks for one, and that just because there's a trial the jury doesn't have to sit there and say "well, there must be something. There isn't anything. The defendant is guilty and at this stage, after you've seen all the evidence, each and every element of each charge that's pending against [def] has been proven beyond … every reasonable doubt") does not rise to the level of fundamental error given the abundance of evidence of def's guilt. Court did not specifically address def's claim that closing "ridiculed the def's decision to take his case to trial and expressed his personal opinion " on def's guilt. [NOTE: 5th DCA takes a broad view of what constitutes expression of personal opinion; therefore it may have found prosecutor's statement to be improper while other DCA's would not.)

Hayward v. State of Florida, 24 So.3d 17 (Fla. 2009) (*penalty phase* – Although victim impact evidence itself was proper, prosecutor's use of it to compare and contrast the life choices made by the goal-oriented, hard-working victim with the choices made by the defendant that led him to where he is today was improper [especially where issue was addressed prior to closing and State agreed to refrain from using victim impact evidence to make characterizations and opinions about the defendant]. "In penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial" [quoting Bertolotti, 476/130]. Viewed in context with the entire closing, comments do not rise to the level of fundamental error. Prosecutors cautioned to use victim impact evidence only for limited, permitted purposes. [NOTE: case was re-affirmed on post-conviction appeal on same basis with court also pointing out that, while improper, prosecutor did not argue that victim's life was somehow more valuable than def's life. The comment appears to have been aimed more at pointing out that it was no one's fault but def's -- based on the choices he made in life -- that he was sitting in court convicted of the crime of murder. *Hayward v. State of Florida*, 40 Fla. L. Weekly S381(Fla. 2015)] Affirmed.)

Easterly v. State of Florida, 22 So.3d 807 (1st DCA 2009) (prosecutor's comment that "[t]he testimonial evidence in this case, the physical evidence in this case, has not only removed the presumption of innocence from this man, it has torn it away and shown him for what he did to [K.D.] on May of 2004 when he raped her," was not improper because prosecutor tied it to his belief that the evidence was strong, so it came across as an opinion about the evidence rather than a statement of law (i.e. a general statement that now that the evidence was in, def's presumption of innocence was gone would be a misstatement of law). In addition, the jury was subsequently properly instructed on the law concerning presumption of innocence. Moreover, error would not have been fundamental in any event since it could have been cured with a contemporaneous objection followed by a curative instruction (errors that can be cured by an objection and curative instruction are not fundamental error).

Wheeler v. State of Florida, 4 So.3d 599 (Fla. 2009) (General pre-trial motion in limine does not constitute a contemporaneous objection. Affirmed.)

Poole v. State of Florida, 997 So.2d 382 (Fla. 2008) (In order to preserve an improper argument for appellate review, counsel must lodge a contemporaneous objection or, failing that, the error must rise to the level of fundamental error—that is, an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty of jury recommendation of death could not have been obtained without the assistance of the alleged error." Where prosecutor's argument was invited response to def's argument, errors were not fundamental.)

Arrieta v. State of Florida, 947 So.2d 625 (3rd DCA 2007) ("[O]ne-time comment by prosecutor that detective and sergeant would not risk their careers to frame the def. did not rise to the level of fundamental error, which must 'reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' " Affirmed.)

Washington v. State of Florida, 935 So.2d 1256 (5th DCA 2006) (prosecutor's argument, even if improper, was not properly preserved and did not rise to the level of fundamental error. Error is fundamental when it "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." "When the prejudicial conduct in [its] collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and merits [by] the jury, fundamental error can override the failure of defense counsel to make timely objections." The error here was not fundamental.)

State of Florida v. Mathis, 933 So.2d 29 (2nd DCA 2006) (Although prosecutor misstated the law by arguing to jury that def. had a duty to retreat when people at the scene jokingly informed def that victim intended to kill def, and also when victim approached def and said: "Well, there's going to be whatever, whatever when I see you," (no objection was made) error was not fundamental, therefore a new trial was not warranted. Victim was shot by someone else and,

while on the floor and no longer a threat to the def, def approached and fired several shots into victim's body. Jury was properly instructed by judge on self-defense and prosecutorial misconduct does not constitute fundamental error unless, but for the misconduct, the jury could not have reached the verdict it did. It cannot be said that, absent the misconduct, the jury would have returned a verdict of not guilty. Therefore the prosecutor's statements were not so egregious as to warrant reversal.)

State of Florida v. Fountain, 930 So.2d 865 (2nd DCA 2006) (Although prosecutor improperly commented on def.'s right to remain silent and shifted the burden of proof ("The evidence is uncontroverted, uncontradicted that this is what happened" … "No testimony at all ….[to support the defense theory that the children were making up allegations of molestation]" … "There's been no testimony to support a theory that [it] didn't happen."), there was no contemporaneous objection, request for a curative instruction or motion for mistrial. Further, trial court properly instructed jury that def. was presumed innocent, was not required to present evidence or prove his innocence and was not required to testify. "The test for fundamental error is whether the error 'goes to the foundation of the case or goes to the merits of the cause of action.' *Specifically, prosecutorial misconduct constitutes fundamental error when, but for the misconduct, the jury could not have reached the verdict it did.*" Error was not fundamental as it could not be said that absent the prosecutor's misstatements, the jury would have found him not guilty. Trial court's order granting defendant a new trial is reversed.) (**NOTE**: Comments about uncontroverted nature of evidence are improper where, as here, the only witness who could testify contrary to the state's evidence is the defendant.)

Snelgrove v. State of Florida, 921 So.2d 560 (Fla. 2005) (prosecutor's interruption of defense counsel's hypothetical to jury during closing with a suggestion that he would "be glad to offer a scenario if you would like," and argument of facts not in evidence concerning presence or absence of blood on knife were not fundamental error as they were not so "fundamentally improper that their utterance 'reache[d] down into the validity of the trial itself to the extent that a verdict of guilty … could not have been obtained without the assistance of the alleged error.'" [citation omitted])

Galiana v. State of Florida, 868 So.2d 1218 (3rd DCA 2004) (prosecutor's comment that "these two children are no longer with us, and will never be in the Keys with their parents, and will never spend the weekend playing with puppies," although bordering on inappropriate, did not deprive def. of a fair trial or materially contribute to his conviction, and were not so fundamentally tainted or inflammatory that a new trial was warranted. Affirmed in part and reversed in part on other grounds.)

Cooper v. State of Florida, 856 So.2d 969 (Fla. 2003) (prosecutor's isolated comments in *penalty phase*, that jury should place themselves in the victim's shoes and regarding the proper level of sympathy and mercy for def. in sentencing, do not rise to the level of fundamental error.

Randolph v. State of Florida, 853 So.2d 1051 (Fla. 2003) (In order for an error to be

fundamental and justify reversal in the absence of a timely objection, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." [citation omitted] "Moreover, in order for improper comments made in closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence.")

Brazill v. State of Florida, 845 So.2d 282 (4th DCA 2003) (The general rule is "that failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review." The requirement of an objection at trial avoids "the creation of 'gotchas' whereby the defense is allowed to sit on its rights, saying nothing until after it sees whether the jury returns an adverse verdict." [citation omitted] The sole exception to this rule is where the comment constitutes fundamental error; that is, error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Comments designed to evoke sympathy for the victim, without more, cannot amount to fundamental error. Unlike errors which cannot be cured by an instruction from the court, appeals to sympathy are easily correctable by a timely objection. Affirmed).

Cole v. State of Florida, 841 So.2d 409 (Fla. 2003) (in penalty phase, prosecutor's argument that jury should show the same amount of mercy that the def. showed his victim, although improper, does not rise to the level of fundamental error.)

Doorbal v. State of Florida, 837 So.2d 940 (Fla. 2003)(Under fundamental error standard, prosecutor's statements did not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Affirmed)

McKenzie v. State of Florida, 830 So.2d 234 (4th DCA 2002) (Fundamental error in closing argument occurs when the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury.)

Woodel v. State of Florida, 804 So.2d 316 (Fla. 2001) (*opening statement* - Although in opening statement State erroneously disclosed a communication b/w def. and wife which was protected under spousal privilege, no objection was made for two days until State disclosed that it had just learned that woman was not the def.'s ex-wife but that they were in fact still married. Privilege was waived when def. failed to timely object; even if not waived, alleged error was not preserved when def. failed to object and error was not fundamental. Conviction affirmed, remanded for resentencing on other grounds.)

Card v. State of Florida, 803 So.2d 613 (Fla. 2001) (Fundamental error in closing argument is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.")

McArthur v. State of Florida, 801 So.2d 1037 (5th DCA 2001) (Fundamental error in closing argument is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.")

Morton v. State of Florida, 789 So.2d 324 (Fla. 2001) (Failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. Exception exists where the comments rise to the level of fundamental error, which is "error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error.'")

Brown v. State of Florida, 787 So.2d 229 (2nd DCA 2001) ("When the prosecutorial argument taken as a whole is of such a character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted, regardless of the lack of objection or exception." The prosecutor's argument, which improperly vouched for the credibility of police officers, made improper attacks on individual witnesses, commented on facts not in evidence, improperly personalized the prosecutor, improperly appealed to the jurors' emotions, improperly attacked defense counsel and violated the Golden Rule, reached that level. Reversed.)

Echevarria v. State of Florida, 783 So.2d 1236 (5th DCA 2001) ("Fundamental error in closing argument occurs only when the prejudicial conduct is so extensive that its influence pervaded the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury.")

Delgado v. State of Florida, 776 So.2d 233 (Fla. 2000)(Fundamental error has been defined as the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." [*NOTE: this case has no precedential value as it was withdrawn and superseded. The superseding opinion, however, did not address the closing arguments and reversed on other grounds. Therefore, the case is included in the outline to give you an idea of the Court's possible view on this scenario.*])

Pedroza v. State of Florida, 773 So.2d 639 (5th DCA 2000) (in Jimmy Rice Act prosecution, it was improper for State to argue: "What's really at issue here, though, what you're being asked to decide, is he likely to reoffend. If you decide that he's not, he walks out of this courtroom, and we all have to be comfortable that someone else is not at risk out there as a result of what we've done her today. [Objection was sustained]" Then , speaking about the various test results on his likelihood of reoffending: "The base rate of all offenders was 22%. All that sounds like 'likely to reoffend,' you know. The only -it's only about 12% chance here that you have cancer or are going to die. Whoa, whoa, whoa! That's pretty scary when we're talking about human lives and behavior. That's 'likely.'" Improper comments during closing argument, like other trial errors, must be properly preserved for appeal by making a contemporaneous objection and, if sustained

by the trial court, a motion for mistrial. Moreover, under *Murphy* [766/1010] a civil litigant cannot seek review of improper arguments that were not objected to during trial unless, at the very least, the party moved for a new trial below. Def. did not move for a new trial so he is not entitled to reversal. Furthermore, the statements do not rise to the level of fundamental error. Affirmed)

Hendrix v. State of Florida, 767 So.2d 493 (2nd DCA 2000) ("Ordinarily, to preserve a claim based on improper comment, counsel has the obligation to object and request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver." [quoting *Nixon*, 572/1336] Fundamental error is an exception but here error was not fundamental. Affirmed.)

Dormezil v. State of Florida, 754 So.2d 168 (5th DCA 2000) (prosecutor's comment: "why would not a person whose just been placed under arrest, placed in handcuffs, why doesn't that person ask, 'What are you handcuffing me for? What are you doing?'" was not properly preserved where def. counsel objected but declined the court's offer to make a curative instruction. Error not fundamental. Affirmed)

James v. State of Florida, 741 So.2d 546 (4th DCA 1999) (standing objection or request to defer objections until conclusion of closing argument is insufficient to preserve improper closing argument for review. While motion for mistrial may be reserved, objectionable material must be excised from the juror's consideration immediately.) Affirmed

D'Ambrosio v. State of Florida, 736 So.2d 44 (5th DCA 1999) (trial judge's comments prior to closing argument that "I don't like it when lawyers object during closing arguments" may have had a limiting effect on counsel and caused them to avoid objecting. Reversed for many improper arguments, most of which were without objection.)

Gutierrez v. State of Florida, 731 So.2d 94 (4th DCA 1999) (Although prosecutor's remarks were "fairly susceptible" of being interpreted as a comment on def.s right to remain silent, the remarks were not preserved by a contemporaneous objection or, at the latest, an objection at the end of the closing argument. Such a comment may be constitutional error but it is not fundamental error. Affirmed.)

Izquierdo v. State of Florida, 724 So.2d 124 (3rd DCA 1998) (Improper for prosecutor to refer to the defense in final argument as a "pathetic fantasy," and to appeal to jury's sympathy by asking them to consider effect crime had "on the water we drink, on the air that we breathe and on the ground where our children play." Based upon totality of many errors throughout trial by prosecution, error fundamental and not harmless. Trial court instructed that it may grant a new trial *or dismiss the case outright based on prosecutorial misconduct because the State Attorney's Office retained prosecutor after notice of his proclivities*. [improper argument and evidentiary violations common for particular prosecutor] Reversed.)

Bell v. State of Florida, 723 So.2d 896 (2nd DCA 1998) (Although it was improper for prosecutor to vouch for the truthfulness of officers, urge the jury to send def. a message, argue matters not in evidence and comment on def.s exercise of his right to trial by jury, the errors were not fundamental and the only error objected to [def.s exercise of right to trial by jury] was harmless. Affirmed.)

Freeman v. State of Florida, 717 So.2d 105 (5th DCA 1998) (despite lack of objection, prosecutor's argument that they should convict the defendant if they believed the officer instead of him and that "the question" was who they wanted to believe, that officers should be believed because they are officers who have sworn to uphold the law, that the defense was asking them to believe that there were "three Mark Furmans" in this case [referring to the "O.J. Simpson" case] and reference to recent funeral of police officer in explaining why officers are cautious in searching for weapons had a cumulative effect of being "so prejudicial as to vitiate the entire trial." Error fundamental.)

Cochran v. State of Florida, 711 So.2d 1159 (4th DCA 1998) (prosecutor's argument to jury that any verdict other than a conviction would be to establish a "one free murder rule" in the community improperly inferred to the jury that a conviction would serve some larger social good, beyond the confines of the trial. Prosecutor also attempted to appeal to jury's sympathy by reference to victim's "little child". These errors, combined with prosecutor's personal attacks on def. counsel and def., expression of personal belief at to witness' credibility and def.s guilt, and comments on matters outside of the evidence reached level of fundamental error. Reversed)

Hill v State of Florida, 700 So.2d 449 (3rd DCA 1997) (Fundamental error in closing argument occurs when the "prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury.")

Lawrence v. State of Florida, 691 So.2d 1068 (Fla. 1997) (prosecutor's comparison of jury's sentencing task to "God's judgment of the wicked" and use of a biblical story in describing the weighing process jurors must employ was not fundamental error and, even if preserved, was harmless in context of entire argument.)

Kilgore v. State of Florida, 688 So.2d 895 (Fla. 1996) (Prosecutor's misstatement of the law relating to "heat of passion" (i.e. that it only applies on the issue of whether homicide was excusable rather than affecting premeditation) was not objected to and not fundamental. Affirmed.)

Williams v. State of Florida, 682 So.2d 631 (3rd DCA 1996) (comment on def.'s right to remain silent is no longer fundamental error and an objection must be made.)

Parker v. State of Florida, 641 So.2d 369 (Fla. 1994) (The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the

jury is to disregard the remarks.)

Nixon v. State of Florida, 572 So.2d 1336 (Fla. 1990) (Where def. counsel waited until end of State's closing argument to make motion for mistrial but did not make a contemporaneous objection at the time of the offending comment, objection was waived. Motion for mistrial may be made later [up to the time when State finishes it's closing argument] but objection must be contemporaneous. Affirmed)

Jones v. State of Florida, 571 So.2d 1374 (1st DCA 1990) ("The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application....[footnote omitted] We do not want to encourage the creation of "gotchas" whereby the defense is allowed to sit on its rights, saying nothing until after it sees whether the jury returns an adverse verdict.")

Erwin v. State of Florida, 532 So.2d 724 (5th DCA 1988) (Where prosecutor wonders to the jury whether the def., in final closing, may bring up the absence of certain witnesses and tells the jury that each side has subpoena power to bring in witnesses, argument was improper because it was not invited by the defense [implying that if actually raised by the def., disclosing subpoena power would be proper]. No objection and not fundamental. Affirmed)

Cruse v. State of Florida, 522 So.2d 90 (1st DCA 1988) (Although prosecutor's comment about other battery charges that could have been brought was improper, it was not fundamental error and not objected to.)

Rosso v. State of Florida, 505 So.2d 611 (3rd DCA 1987) (improper attack) (Prosecutor's denigration of insanity defense, which is a valid defense, was improper and, combined with comment on def's silence constitutes fundamental error. Reversed)

State of Florida v. Marshall, 476 So.2d 150 (Fla. 1985) (comments on def.'s failure to testify are no longer considered fundamental error.)

Duest v. State of Florida, 462 So.2d 446 (Fla. 1985) (The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks.[not a closing argument case but procedure is the same])

Jones v. State of Florida, 449 So.2d 313 (5th DCA 1984) (prosecutor's suggestion that witnesses had been intimidated into being absent from trial improper where no such evidence was presented. Combined with statement that defendant had manipulated the judicial system, made "chumps" of the jury and the prosecutor's personal expression as to the honesty of a state witness' and that def. and defense witnesses lied, fundamental error in this "close case".)

Blackburn v. State of Florida, 447 So.2d 424 (5th DCA 1984) (prosecutor's request for sympathy for victims, personal belief as to facts in issue and having met burden of proof,

vouching for credibility of police officer and reference to other charges against defendant arising out of incident which were not pursued by state, were improper BUT NOT FUNDAMENTAL. No objection. Affirmed [passing reference to fact that they were, in part, invited by defense counsel's questions and closing argument])

Richmond v. State of Florida, 387 So.2d 493 (5th DCA 1980) (It was improper for prosecutor to argue that State's calling witness to testify means the State vouches for his honesty and truthfulness, and that prosecutor was personally vouching for him based upon prosecutor's investigation. Affirmed because no objection was raised. [Although not stated, error was apparently not fundamental.])

State of Florida v. Cumbie, 380 So.2d 1031 (Fla. 1980) (where def. objects and objection is sustained, unless error is fundamental he must move for a mistrial at the time the improper comment is made, at some point during the closing argument or, at the latest, at the end of the State's closing argument, in order to preserve his objection for appeal. [RULE: Motion for mistrial based upon improper closing argument must be made no later than the end of the prosecutor's closing argument.] Motion made after instructions were given and jury retired to deliberate was too late.)

Peterson v. State of Florida, 376 So.2d 1230 (4th DCA 1979) (despite absence of objection, State's closing arguments "were such as utterly to destroy the defendant's most important right under our system, the right to the "essential fairness of [his] criminal trial." Fundamental error--Reversed.)

Clark v. State of Florida, 363 So.2d 331 (Fla. 1978) (When there is an improper comment, the def., if he is offended, has the obligation to object and to request a mistrial... If the def. fails to object or if, after having objected, he does not ask for a mistrial, his silence will be considered an implied waiver. *[subsequently overruled on other grounds -491 So.2d 1129]*)

Thomas v. State of Florida, 326 So.2d 413 (Fla. 1975) (good general discussion about lack of objection, wide latitude in closing and how every improper comment, even if objected to, does not warrant a new trial)

Kruglak v. State of Florida, 300 So.2d 315 (3rd DCA 1974) (absent fundamental error, an objection is necessary to preserve improper argument for appeal)

Gordon v. State of Florida, 104 So.2d 524 (Fla. 1958) ("They didn't testify to what happened out there." Fundamental error, even if no bad faith)

Carlile v. State of Florida, 176 So. 862 (Fla. 1937) ("[w]hether requested to or not, it is the duty of the trial judge to check improper remarks of counsel to the jury, and by proper instructions to remove any prejudicial effect such remarks may have created. A judgment will not be set aside because of the omission of the judge to perform his duty in the matter unless

objected to at the proper time. This rule is, however, subject to the exception that if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in such event, a new trial should be awarded, regardless of the want of objection or exception.")

XIX. Motion for mistrial/new trial

Pierre v. State of Florida, 88 So.3d 354 (4th DCA 2012) (In order for the necessity of a new trial to arise, the improper prosecutorial comments must either: "deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.")

Fenster v. State of Florida, 61 So.3d 465 (Fla. 2011) (although def only objected to two out of 15 alleged improper arguments, appellate court considered all arguments in determining harmlessness because "it is appropriate to consider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt." See, Martinez below, 761/1074 [*Quashed on other grounds 135 So.3d 283*])

Simon v. State of Florida, 38 So.3d 793 (4th DCA 2010) (Where defense counsel objected to plaintiff's argument as an improper comment on def's right to remain silent and trial court told the jury to disregard the improper statement, defendant waived any right to appeal on that ground when he failed to request a mistrial. "When there is an improper comment, the defendant, if he is offended, has the obligation to object and to request a mistrial…. If the def fails to object or if, after having objected, he does not ask for a mistrial, his silence will be considered an implied waiver." [*Quashed on other grounds relating to jury instructions 160 So.3d 898*].)

Burford v. State of Florida, 8 So.3d 478 (4th DCA 2009) (comment as to the "two conflicting stories in this case, which recently came up—" was not preserved where no proper objection was lodged and the motion for mistrial was untimely where it was made after jury retired to deliberate. "In order to preserve an allegedly improper prosecutorial comment for review, a def must object to the comment and move for a mistrial. *While a motion for mistrial may be made as late as the end of closing argument* [emphasis added], a timely objection must be made in order to allow a curative instruction or admonishment to counsel." Affirmed in part and reversed in part on other grounds.)

Brooks v. State of Florida, 918 So.2d 181 (Fla. 2005) (In order to warrant a new trial, a prosecutor's improper comments "must either deprive the def. of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that [sic] it would have otherwise." Subsequently receded from on other grounds.)

Rodriguez v. State of Florida, 906 So.2d 1082 (3rd DCA 2004) (where trial court sustained the defense's objection to closing argument and gave the jury a curative instruction, and where there was overwhelming evidence of guilt, appellate court cannot say def. was deprived of a fair trial.)

Cole v. State of Florida, 866 So.2d 761 (1st DCA 2004) (Although it sustained defense counsel's contemporaneous objection, trial court erred in ruling that motion for mistrial, made after State finished it's closing but before jury was instructed or retired, was untimely. Reversed.)

Anderson v. State of Florida, 863 So.2d 169 (Fla. 2003) (In order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must either deprive the def. of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial or be so inflammatory that it might have influenced the jury to reach a more sever verdict than it would have otherwise reached.[Note: def. counsel objected but did not request a curative instruction or mistrial])

Anderson v. State of Florida, 841 So.2d 390 (Fla. 2003) (following the defense argument that def.'s decision to voluntarily speak to police and consent to a search of his vehicle shows that "he didn't do anything wrong; he had nothing to hide," prosecutor's response that drug traffickers often tell police to go ahead and search their car, even when they are carrying kilos of cocaine, in order to deflect suspicion did not warrant a mistrial. Court sustained objection and instructed the jury to disregard the comment. Harmless error analysis is not necessary where the trial court recognizes the error, sustains the objection, and gives a curative instruction. Under those circumstances, correct standard for review is whether trial court abused its discretion in denying a mistrial. Mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial. Comment did not vitiate the entire trial. Conviction and death penalty affirmed.)

Bush v. State of Florida, 809 So.2d 107 (4th DCA 2002) (A mistrial should be granted only when an error during trial is "so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile." [quoting *Ferguson* 417/639 below].

Pedroza v. State of Florida, 773 So.2d 639 (5th DCA 2000) (in Jimmy Rice Act prosecution, it was improper for State to argue: "What's really at issue here, though, what you're being asked to decide, is he likely to reoffend. If you decide that he's not, he walks out of this courtroom, and we all have to be comfortable that someone else is not at risk out there as a result of what we've done here today. [Objection was sustained]" Then , speaking about the various test results on his likelihood of reoffending: "The base rate of all offenders was 22%. All that sounds like 'likely to reoffend,' you know. The only -it's only about 12% chance here that you have cancer or are going to die. Whoa, whoa, whoa! That's pretty scary when we're talking about human lives and behavior. That's 'likely.'" Improper comments during closing argument, like other trial errors, must be properly preserved for appeal by making a contemporaneous objection and, if sustained by the trial court, a motion for mistrial. Moreover, under *Murphy* [766/1010] a civil litigant

cannot seek review of improper arguments that were not objected to during trial unless, at the very least, the party moved for a new trial below. Def. did not move for a new trial so he is not entitled to reversal. Moreover, the statements do not rise to the level of fundamental error. Affirmed)

Kearse v. State of Florida, 770 So.2d 1119 (Fla. 2000) (although def. counsel failed to object to improper argument or request a curative instruction, but merely moved for a mistrial, issue was preserved since counsel may have concluded that curative instruction would not cure error and contemporaneous motion for mistrial at the time of the comment was sufficient to preserve issue for appellate review.)

Hendrix v. State of Florida, 767 So.2d 493 (2nd DCA 2000) ("Ordinarily, to preserve a claim based on improper comment, counsel has the obligation to object and request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver." [quoting *Nixon*, 572/1336] Fundamental error is an exception but here error was not fundamental. Affirmed.)

Martinez v. State of Florida, 761 So.2d 1074 (Fla. 2000) ("it is appropriate to consider both the preserved and unpreserved errors in determining whether the preserved error was harmless beyond a reasonable doubt.")

Johnson v. State of Florida, 747 So.2d 436 (4th DCA 1999) ("[A] ruling on a motion for a mistrial is within the sound discretion of the trial court.... A motion for a mistrial should be granted only when it is necessary to ensure that the def. receives a fair trial." Affirmed.)

Harris v. State of Florida, 742 So.2d 835 (2nd DCA 1999) (Although prosecutor's comments in closing were improper, mistrial not warranted where comments "did not vitiate the trial or so poison the minds of the jurors that [def.] did not receive a fair trial - trial court sustained three objections and gave curative instructions. Affirmed.

James v. State of Florida, 741 So.2d 546 (4th DCA 1999) (standing objection or request to defer objections until conclusion of closing argument is insufficient to preserve improper closing argument for review. While motion for mistrial may be reserved, objectionable material must be excised from the juror's consideration immediately.) Affirmed

Hamilton v. State of Florida, 703 So.2d 1038 (Fla. 1998) ("A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial.... A ruling on a motion for mistrial is within the trial court's discretion.")

Ford v. State of Florida, 702 So.2d 279 (4th DCA 1997) (in order to require a new trial based upon improper closing argument by a prosecutor, "the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have

influenced the jury to reach a more severe verdict than it would have otherwise." [Quoting Spencer v. State, 645 So.2d 377 (Fla. 1994)])

Voorhees v. State of Florida, 699 So.2d 602 (Fla. 1997) (In order to warrant a new trial, the prosecutor's comments must either deprive the def. of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise. Even if argument that def. tortured victim by slicing his arm in order to obtain his ATM card were improper, comment fails to meet any of the aforementioned criteria. Conviction affirmed, death penalty reversed on other grounds.)

James v. State of Florida, 695 So.2d 1229 (Fla. 1997) (Prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. Affirmed.)

Hunter v. State of Florida, 660 So.2d 244 (Fla. 1995) ("A mistrial should be granted only where it is apparent that the defendant cannot receive a fair trial.")

Puentes v. State of Florida, 658 So.2d 171 (3rd DCA 1995) ("Assuming arguendo that the prosecutor made improper remarks during his closing argument, the defendant's objection was sustained and defense counsel did not thereafter make a request for a curative instruction or a motion for a mistrial." Error was not preserved.)

Gorby v. State of Florida, 630 So.2d 544 (Fla. 1993) (In first degree murder trial [guilt phase], it was not error to deny motion for mistrial when, among other errors, prosecutor argued to jury that def. had shown no remorse. Trial court sustained the objection and instructed the jury to disregard the objectionable statement. Mistrials should be granted only when necessary to insure that a def. receives a fair trial. Affirmed)

Power v. State of Florida, 605 So.2d 856 (Fla. 1992) ("Ruling on a motion for a mistrial is within the sound discretion of the trial court.... A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial.")

Nixon v. State of Florida, 572 So.2d 1336 (Fla. 1990) (Where def. counsel waited until end of State's closing argument to make motion for mistrial but did not make a contemporaneous objection at the time of the offending comment, objection was waived. Motion for mistrial may be made later [up to the time when State finishes it's closing argument] but objection must be contemporaneous. Affirmed)

Randolph v. State of Florida, 556 So.2d 808 (5th DCA 1990) (objection to improper closing argument must be made at the time it occurs and motion for mistrial no later than end of State's closing argument)

DuBoise v. State of Florida, 520 So.2d 260 (Fla. 1988) (motion for mistrial based upon improper closing argument, made after jury was instructed and had retired to deliberate, was untimely.)

Jones v. State of Florida, 466 So.2d 293 (3rd DCA 1985) (motion for mistrial based upon improper closing argument was untimely because it was not made until after the jury retired to deliberate.)

Duest v. State of Florida, 462 So.2d 446 (Fla. 1985) (A mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. [not a closing argument case but standard is the same])

Wilson v. State of Florida, 436 So.2d 908 (Fla. 1983) ("Ruling on a motion for a mistrial is within the sound discretion of the trial court.... A motion for mistrial should only be granted in cases of absolute legal necessity." *[Habeas Writ granted on other grounds: 474/1162 and, on new direct appeal, reversed in part and affirmed in part on unrelated issues: 493/1019]*)

Ferguson v. State of Florida, 417 So.2d 639 (Fla. 1982) (A mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. The objection and grounds for mistrial must be made with sufficient specificity to apprise the trial court of the potential error and to preserve the point for appellate review. Even if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury disregard the remarks. A motion for mistrial is addressed to the sound discretion of the trial judge and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity."

Kindell v. State of Florida, 413 So.2d 1283 (3rd DCA 1982) (prosecutor's reference to def. failure to call as witnesses the persons who were with her when she was arrested, even if error [appellate court was unable to find any cases where such a comment was viewed as impermissible comment on def.s right to remain silent], was not preserved where def. counsel only requested a side-bar at the time of the comment, the court responded that it would give counsel a side-bar later, and the objection was not raised by the def. until after the jury was charged and retired to deliberate. While side-bar may be preferable method for resolving a dispute of this nature, neither the state nor the def. enjoys the right to side-bar conference. Objection and motion must be made sometime during closing but, at the latest, before jury retires. *[Subsequently disapproved of on other grounds - Reynolds v. State, 452 So.2d 1018]*)

Calloway v. State of Florida, 409 So.2d 1142 (1st DCA 1982) (motion for mistrial, directed at allegedly improper closing argument by the State, was untimely where it was not made until after the jury had retired.)

State of Florida v. Cumbie, 380 So.2d 1031 (Fla. 1980) (where def. objects and objection is

sustained, unless error is fundamental he must move for a mistrial at the time the improper comment is made, at some point during the closing argument or, at the latest, at the end of the State's closing argument, in order to preserve his objection for appeal. [**Rule**: Motion for mistrial based upon improper comment in closing argument must be made no later than the end of the prosecutor's closing argument.] Motion made after instructions were given and jury retired to deliberate was too late.)

Salvatore v. State of Florida, 366 So.2d 745 (Fla. 1978) ("[T]he power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity.")

Smith v. State of Florida, 365 So.2d 405 (3rd DCA 1978) ("[A] mistrial should be declared in the midst of a criminal trial only where there is an absolute legal necessity to stop the trial because of prejudice to the defendant.")

James v. State of Florida, 334 So.2d 83 (3rd DCA 1976) ("The law requires a new trial only in those cases in which it is reasonably evident that the statements made by prosecutors in closing argument were so inflammatory and abusive as to have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done, thereby depriving the accused of a fair trial. [citations omitted] The law also requires that juries be composed of persons of sound judgment and intelligence, and it will not be presumed that they are led astray to wrongful verdicts by the impassioned eloquence and illogical pathos of counsel. [citations omitted] When the prosecutor makes a statement to which defense counsel objects, the trial judge, who is in a position of experience and intimacy with the case which cannot be duplicated by any other tribunal, determines whether the jury would be so prejudiced by the comment as to render a verdict different from one properly supported by the evidence and presentation of counsel.")

Mabery v. State of Florida, 303 So.2d 369 (3rd DCA 1974) (although it was improper for prosecutor to argue that "when he [def.] is going to go get up on the stand and tell you something where it is questionable, he should bring witnesses to testify on his behalf" as that argument improperly shifts the BOP, error was not reversible because argument was proper in all other respects. Proper procedure is to ask for a "corrective instruction." Mistrial is only appropriate when the corrective instruction is denied or is inadequate or when the offense is repeated. Affirmed.)

Civil Cases

I. Attacks on opposing party/counsel/witnesses

State Farm Mut. Auto. Ins. Co. v. Gold, 41 Fla. L. Weekly D257 (4th DCA 2016) (in uninsured motorist case, it was improper for plaintiff's counsel to comment on how plaintiff purchased an uninsured motorist policy "so this wouldn't happen" and that *"State Farm has denied his claim and now he's facing down a stack of medical bills. And he's been carrying this burden with him until today and State Farm to this day, to this minute has never taken responsibility for the damages in the crash and for the injuries that are covered under this policy, and they're not going to do it until you force them to do it with your verdict."* Error was exacerbated by powerpoint which displayed, among other things, *"Michael Gold has been carrying a debt. State Farm promised to pay stacks of medical bills. Paying the price for someone else's mistake State Farm refuses to take responsibility for the debt it owes to Mr. Gold, forcing us to bring them to trial,"* and *"Gold has done the right thing all along. Has the Defendant?"* Comment, powerpoint and questionable judge's instruction improperly focused the jury's attention on def's liability and culpability rather than on the issue of damages, and painted a clear picture in the jury's minds of a company breaking an obligation rather than a company simply attempting to determine actual damages attributable to the accident. [NOTE: this DCA has also interpreted similar comments as a suggestion that jury "punish" def.—See *Marotta*] Reversed.)

Allstate Ins. Co. v. Marotta, 125 So.3d 956 (4th DCA 2013) (it was improper for plaintiff's counsel to argue that Allstate "made up issues" and "manufacture[d]" a defense. Statements improperly denigrated Allstate's defense and counsel. It is improper for counsel to suggest in closing argument that a "defendant should be punished for contesting damages at trial," that defending a "claim in court" is improper or to suggest that a party should be punished for contesting a claim. Plaintiff's comments included: *"[T]hey denied accepting responsibility. I ask you, is that what it means to be in good hands? ... [C]onsistently, in this case, didn't want to accept the responsibility at all for causing the accident ... and they still don't want to accept the responsibility to ... make up all of the losses and harms caused by this automobile crash. ... Allstate could have come to this trial saying, I'm sorry, I want to fairly pay you for the injuries ... but they didn't. ... Make Allstate repent."* Further, Plaintiff's counsel, referring to def witness/doctors, argued that Allstate can pay doctors who know what Allstate "really wants," called Allstate's experts "paid opinion courtroom doctors" and, over objection, stated that Allstate "made up issues." These and other improper comments "shifted the focus of the case from compensating the plaintiff to punishing the defendant." Reversed.)

Carnival Corporation v. Jimenez, 112 So.3d 513 (2nd DCA 2013) ("If the issue of an opponent's improper argument [or conduct] has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the [objecting] party its right to a fair trial.' " [See Engle, infra]. If, however, the improper argument is NOT properly preserved, a motion for new trial can only be granted if the improper argument amounts to fundamental error according to the 4-prong test announced by the Supreme Court in Murphy v. International Robotic Systems, 766/1010. Although defense counsel suggested, without supporting evidence, that plaintiff's treating

physician who was friends with Plaintiff's counsel had his testimony "scripted," implying it was by defense counsel, error was not properly preserved and does not satisfy Murphy's 4-prong test for fundamental error. Order granting new trial reversed.)

State Farm, et. al v. Thorne, et. al, 110 So.3d 66 (2nd DCA 2013) (Plaintiff's counsel's contention in closing that the defendants' evidence and argument were an attempt "to avoid responsibility" and that, as a result, the defendants exhibited shameful conduct was improper. Such argument suggested that defendant should be punished for contesting damages and that defending the claim in court was improper. Reversed on these and other grounds.)

Reffaie v. Wal-Mart Stores, 96 So.3d 1073 (4th DCA 2012) (It was error for defense counsel to argue that law firms transported their clients to plaintiff's medical expert, en masse, for procedures and that he would bus them "right back up for the purposes of litigation," or that the expert had any "business relationships" with personal injury law firms, where he had asked such questions on cross examination and the expert had answered in the negative or denied knowledge of any "bussing" of people to his office. Such improper comments were intended to, and did, impugn the doctor's credibility and objectivity in the eyes of the jurors. Defense counsel did not obtain the desired answers during questioning but continued in closing argument as though he had. Comments were objected to and were not harmless. Reversed for retrial on damages.)

Health First v. Cataldo, 92 So.3d 859 (5th DCA 2012) (Plaintiff's counsel's closing was replete with improper comment, including: 1) religious references and appeals to a higher power which improperly suggested to the jury that God favored a verdict in favor of Plaintiff, coupled with a request that the jury "punish" Defendants, who had not "repented" for their sins. ["And call it fate or call it whatever you want to call it, but I believe that there was a reason why you were selected. … And as I've watched you carefully for the last two weeks … it dawned on me that whoever it is that decides what's right and wrong in this world, had some say in you all being the one's [sic] selected to decide this case. … I was reading about the concept of repentance. And it applies here, folks, because part of what you're going to be doing in this case, through your verdict, is to make sure that the Defendants who caused the wrong we're here on, really have repented for what they've done."], 2) claiming that Defendants were trying to sidetrack the jury and make them take their eye off the ball, that Defendants had to be dragged "kicking and screaming" into the courtroom, that the jury had to force Defendants to take care of Plaintiff, and that it would be a victory for the defense if they got an "unfair" verdict, all of which improperly disparaged the defense and implied that Defendants had done something improper by defending the case, and 3) grossly misstating the compensation that had been paid to Defendants' only medical witness by arguing, incorrectly, that he had been paid almost $1,000,000 over three years for cases on which he had worked with defense counsel, and implying that no one knew how much the doctor received from defense counsel's firm after considering he had worked with three or four other lawyers at the firm, which comments were factually inaccurate. However, no objection to the improper arguments was made and, even cumulatively, they fail to reach the standard of fundamental error pronounced in Murphy v. International Robotics. Affirmed.)

Fasani, et al. v. Kowalski, 43 So.3d 805 (3rd DCA 2010) (in a premises liability action for injuries from a piece of granite that struck plaintiff when it fell from the wall of an elevator, where liability was admitted before trial, it was improper for plaintiff's counsel to suggest to jury that defendants should be punished for contesting the claim ("Why didn't they send him to a doctor instead of kicking him out on the street like a dog and telling him we're giving you nothing….They told him we're wrong, we shouldn't have done it, it's our fault, we did the right thing, we're giving you nothing. Well that isn't really doing the right thing." Counsel continued arguing that def's "drug [plaintiff] through all of this" and attributed this behavior and the condition of the elevator to "corporate greed and arrogance." Plaintiff's counsel also urged jury to punish defendants and "make them do the right thing because they haven't done it on their own and they have no intentions of doing it on their own" (although there was no claim for punitive damages). Arguments served no purpose other than to inflame and prejudice the jury. Further, plaintiff's counsel contrasted def's "corporate greed and arrogance" in "wanting to put beauty over safety" (despite there being no evidence that defendant's installed the granite in a way to sacrifice safety in favor of aesthetics) with plaintiff who was "just a simple man trying to get by. Not trying to get anything from anybody." This argument of the economic disparity between the parties was "not relevant in determining the issues before the jury, and could only have served to prejudice the members of the jury." Plaintiff's counsel then implied that the appellants tried to hide evidence at the scene based only on speculation as there was no evidence of tampering presented at trial (and notably, the condition of the elevator was not at issue as the defendants had admitted liability). Given the cumulative effect of numerous improper arguments, case reversed and remanded.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including statements attacking the character of every person involved with the defense, including defense counsel; painting the defense as "frivolous"—designed to "add insult to injury"; and suggesting the defense was suborning perjury and was involved in other improper actions by arguing: "We all make mistakes. But you make a bigger one when you don't admit it; and you make a bigger one to try to avoid responsibility. And you make a bigger one when you call in witnesses that don't tell the truth. Anything to win. Anything to save the day." On appeal, plaintiff's counsel attempted to shift the focus away from these improprieties by arguing that defense counsel's opening was improper (defense commented in opening about how plaintiff was making remarkable improvement but that once those uplifting medical reports came in, plaintiff's counsel referred him to another doctor and all of a sudden plaintiff started limping and claiming new injuries as well as a decline in his recovery. At that point, defense counsel claimed, the case went from being a medical case to a legal case—suggesting that def's referral to a doctor was for financial profit). In addressing plaintiff's claim, the court responded "the legal profession has as much right as anyone else to make an appropriate referral to other professionals. However, if there is evidence that such activity is occurring solely for personal financial profit, then the jury also is entitled to have those facts brought before them for consideration." Reversed and remanded for new trial.)

Philippon, M.D., et al. v. Shreffler & Smith, et al., 33 So.3d 704 (4th DCA 2010) (in medical

malpractice action, it was improper for patient's counsel to argue: "Where is the chronology? Why isn't it in evidence if it's so important?" because the chronology was a document that patient's own witness/doctor used to testify but patient's counsel objected to turning over to the defense (claiming work product) when requested to do so during trial. Also, referring to the delineation of privileges that demonstrated that the surgeon had authorization to perform a hip arthroscopy at the hospital, counsel argued: "We've been asking for it for years. And we get nothing. We get a stiff arm and a cocksure attorney who thinks that you've made up your mind." In addition to the personal attack on opposing counsel, counsel's argument was improper in that "delineation of privileges" had been a privileged document until a Supreme Court decision was issued during trial. Although these arguments could be considered close to running afoul the "permissible bounds of advocacy," they were not so prejudicial as to deny appellant a fair trial, either individually or collectively. Affirmed.)

Gold v. West Flagler Associates, Ltd., 997 So.2d 1129 (3rd DCA 2008) (in slip and fall case, it was improper for defense counsel to argue: "I've been doing this almost 30 years now, and it invariably happens somebody falls down somewhere. They don't know why they fell. They don't know for sure where they fell. The investigator and the photographer go back to the scene of the accident. They go around and take pictures of everything they can find that looks bad. … [S]o you can parade all these pictures of allegedly dangerous conditions in front of the jury in the hopes you'll find that, well, even though it didn't happen here, it must have been the same thing here." [Court did not specify errors, i.e.-attacking opposing party and counsel suggesting they were suborning perjury or manufacturing a claim, arguing facts not in evidence, expressing personal opinion, etc.] Error harmless after reviewing entire record. Affirmed)

SDG Dadeland Assoc. v. Anthony, 979 So.2d 997 (3rd DCA 2008) (it was improper for Plaintiff's counsel to repeatedly attack defendant and defense counsel, during opening and closing, by arguing that they had committed discovery violations and hidden and manufactured evidence (i.e., among others, "[T]o come in here and know there is a spill and walk over after an accident and put the cone down because you know you can't win the case if she falls on a spill that you didn't clean up that you didn't find … let's put the cone there and she tripped over there. … Their defense is in the toilet, and they're trying to save the day by trying to change his testimony"). Such arguments accused the defendant and it's counsel of perpetrating a fraud on the court and the jury. Moreover, the existence of alleged discovery violations was unsupported by any evidence, had been ordered excluded from closing argument by the court and, in any event, would have been a matter for the court, not the jury. [*NOTE: beware of dicta about whether objection would have been necessary in light of Murphy case-766/1010*]. Reversed.)

Rosario-Paredes v. J.C.Wrecker Service, 975 So.2d 1205 (5th DCA 2008) (It was improper for Def. counsel to argue: "[T]hey do an amazing job of trying to convince people of these injuries, but that's why they keep on hiring these doctors over and over; that's why Dr. Hoffman has testified 15 times for this Plaintiff's firm, they're good. … I mean there's a network of lawyers and doctors and all working together, everybody is making money. … [T]hey're professional witnesses." While counsel may certainly comment on an expert's income derived from a case as

well as from litigation related matters, may point out the percentage of work performed for plaintiffs and defendants and the financial incentive to testify favorably for a party in order to continue a financially advantageous relationship with a particular attorney, arguments that attack opposing counsel or suggest fraud or collusion are unacceptable. Nonetheless, arguments were isolated and did not deprive plaintiff of a fair trial. Affirmed.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (It was improper for plaintiff's counsel to denigrate Carnival's defense and attack def. and def. counsel for raising the issue of plaintiff's 28 years of smoking, as well as his failure to stop after being advised to do so by def's doctor, as grounds for comparative negligence, and to suggest that they were raising the issue of his smoking simply to divert attention away from the real issue. "[O]h, now that we know that he smokes some cigarettes, therefore, we want to blame his stroke on that ..., but now we want this jury to focus on just the fact that he's a smoker, he's a criminal because he smokes. … They want you to hold it against him just because he smokes." Argument suggested that def and counsel were doing something wrong by asking jury to consider effect of plaintiff's extensive smoking on his comparative damages. Further, plaintiff's counsel suggested def. should be punished for defending against plaintiff's claim at all. "They won't accept the harm that they have caused him. They are fighting on both. It is time to hold them responsible." Reversed.)

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel to malign insurer def. in UM action for not living up to its contractual obligation to insured and leaving him "out hanging." Pre-trial order limited such comment to establishing the existence of the business relationship and prohibited counsel from such emotional argument. Also improper for plaintiff's counsel to argue to jury that this was def's alleged claims handling practice and usual litigation tactics. Such facts were not in evidence and defs alleged practices in other cases were irrelevant to case at hand. Improper to claim def was breaching it's contract with insured since UM action is based on existing contract but is a tort action in which def stands in the shoes of the uninsured driver. Moreover, attacking defs for aggressively defending the lawsuit was further improper since def had the right to raise any and all defenses that other driver could have raised. Lastly, it was improper of plaintiff's counsel to tell the jury what his 14 year old son would have thought about insurer's defense. In addition to such facts not being in evidence as son had not testified, son's opinion would be completely irrelevant and such argument was simply a transparent attempt to curry favor with the jury. *NONETHELESS*, despite numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] **Note**: Generally, improper references to insurance matters in closing argument can be cured by an appropriate curative instruction. Affirmed.)

Sanchez v. Nerys, 954 So.2d 630 (3rd DCA 2007) (where there was no evidence in the record that doctor had destroyed any computer lists of attorneys who had retained him or that such documents ever existed on his computer, it was improper for plaintiff's counsel to argue to jury that doctor had deliberately destroyed documents and that his testimony should be disregarded as a result. In fact, although not required to do so, doctor had kept a list of court appearances and produced that list for plaintiff's counsel prior to trial. An expert may not be compelled to

compile non-existent documents. Therefore, Plaintiff's argument that he had destroyed documents that had never been created and that he was under no duty to compile was a prohibited attack on his character. Moreover, inflammatory comments and personal attacks claiming that defense counsel was "pulling a fast one," "hiding something" and "trying to pull something," was tantamount to calling defense counsel liars and accusing them of perpetrating a fraud upon the court and jury. Reversed.)

Engle v. Liggett Group, et al., 945 So.2d 1246 (Fla. 2006) (although attorney's comments in closing argument were improper and attempts to incite racial passions were "conduct unbecoming an attorney practicing in our state courts," reversal based upon improper closing argument and comment was not warranted when viewed under the totality of the circumstances in this two year trial. Many of the comments were not objected to, were the subject of a curative instruction or were taken out of context by the District Court. A review of the verdicts reveals that the jury carefully analyzed the issues of comparative fault and individual damages, contrary to the image of a runaway and inflamed jury portrayed by the District Court. District Court's ruling affirmed in part and reversed in part. **NOTE: SEE DISTRICT COURT OPINION BELOW (Ligget Group, et al. v. Engle) FOR REFERENCE TO ARGUMENTS NOT INCLUDED IN SUPREME COURT OPINION**)

Wall v. Costco Wholesale Corp., 857 So.2d 975 (3rd DCA 2003) (it was improper for defense counsel in personal injury action to argue that plaintiff/husband was hiding the fact that he was a lawyer for devious reasons, make repeated comments about plaintiff/wife being a "lawyer's wife" and further argue that plaintiff's were committing a fraud upon the court. Reversed.)

Liggett Group, et. al v. Engle, 853 So.2d 434 (3rd DCA 2003) (it was improper for plaintiff's counsel to interject racism into the trial of the tobacco company defendants without basis in the evidence or relevance to the case. Counsel argued to the jury how tobacco companies would "divide the American consumer up into groups," including "white" and "black," then proceeded to tie this racial argument into an appeal for jury nullification arguing that "before we get all teary-eyed about the law ... [h]istorically, the law has been used as an instrument of oppression and exploitation." Counsel then juxtaposed the def.'s conduct with the genocide of the Holocaust and slavery and urged the jury to fight "unjust laws" with reference to Martin Luther King and Rosa Parks. [Note: four of the six jurors were African American and, even more egregiously, counsel had previously published a book where he identified this strategy almost verbatim and acknowledged that it is tremendously effective because it is incurably prejudicial.] Further, counsel maligned opposing counsel, calling his argument to the jury "a fraud," stated that one witness "hasn't been prepped on the subject [by counsel], so maybe I'll get an honest answer, and said another witness "wouldn't know science if he fell on science." Reversed. **NOTE: THIS CASE WAS SUBSEQUENTLY REVERSED IN PART AS TO CLOSING ARGUMENTS BY THE SUPREME COURT [see Engle v. Ligget above] but is included here for reference to arguments not included in the Supreme Court opinion.**)

Johnnides v. Amoco Oil Co., 778 So.2d 443 (3rd DCA 2000) (highly improper for defense

counsel to accuse opposing counsel of conspiring with the plaintiff's expert to commit a fraud on the jury: "He [plaintiff's counsel] goes out and finds Dr. Pavda and says, Dr. Pavda, what are we going to do, we are going to try to get a naive jury. And then what we are going to do is, I need you to look at all of these tests and somehow come up with some scientific gobble-dee-cock that confuses the jury...." Baseless attacks on the integrity of counsel, or any other player in the case, are both contemptible and condemnable. [Footnote 1 in the opinion lists a collection of improper arguments, too numerous to list here, made by the same attorney during the same trial]. Reversed)

Wilbur, et. al v. Hightower, 778 So.2d 381 (4th DCA 2001) (Plaintiff's unobjected to argument: "Don't let these people go back to their offices and [laugh] in the hall room and say, we put one over on them," although not an improper "send a message" or "conscience of the community" argument, could reasonably be understood as accusing defense counsel of attempting to mislead the jury. However, error does not seem to have been prejudicial given the compelling evidence of medical negligence and devastating loss to the surviving spouse, the fact that the jury more than halved the plaintiff's requested damages and the fact that the statement was a single excess at the end of a five week trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [citing *Murphy* 766/1010] Error harmless. Order granting a new trial reversed.)

Lingle v. Dion, et. al, 776 So.2d 1073 (4th DCA 2001) (it was improper for plaintiff's counsel to attack def. counsel's analogy in closing as "about the dumbest story I've ever heard in a courthouse in front of a jury of intelligent people" and to refer to def.'s testimony as follows: "...I'm going to show you what real B.S. is from the defendant. Real B.S." It is improper for an attorney to express personal opinion as to the credibility of a witness, the arguments presented by his opposition or his personal knowledge of facts. Moreover, use of the term "B.S." was not only improper but highly unprofessional." Dicta because already reversed on other grounds.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) ("It is not improper for counsel to state during closing argument that a witness "lied" or is a "liar," provided such characterizations are supported by the record." However, in the case at bar, def. counsel's repeated use of term "B.S. detector, comment that if jury found for the plaintiff they would be "accessories, after the fact, to tax fraud, and characterization of plaintiff's case as cashing in on a "lottery ticket" were all improper. Nonetheless, it was not an abuse of discretion to conclude that the improper arguments were not harmful, incurable or requiring of a new trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [NOTE: Subsequently, *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014) held that the a party benefitting from an error has the burden of proving that the error was harmless, ie. that there is no reasonable possibility that the error complained of contributed to the verdict—the same standard as used in criminal cases. Going forward, this may affect prong 2 of the *Murphy* 4-part test.] Affirmed)

Owens-Corning v. McKenna, 726 So.2d 361 (3rd DCA 1999) ([opening statement case] where def. counsel's opening statement repeatedly denigrated asbestos litigation and lawyers who tried asbestos cases, claimed that there was an entire industry of lawyers and doctors who became dependant on such litigation, and stated that in plaintiff's case "litigation generated the disease," and plaintiff's counsel's objections to those statements were overruled, it was not reversible error for plaintiff's counsel to comment, at one point during his objections: "Just for the record, I think this is the most unethical opening statement I have ever heard." Even if comment had been properly preserved for appellate review, plaintiff's lawyer was simply defending himself and his client's case against a barrage of blatant improprieties by his opponent and his comment was an accurate description of defense counsel's tirade. Affirmed.)

King v. Byrd, 716 So.2d 831 (4th DCA 1998) (While it was improper for plaintiff's counsel to refer to defense expert as "hired gun", among other improper arguments, none of the arguments were objected to and they do not rise to the level of fundamental error. Affirmed.)

Sawczak v. Goldenberg, 710 So.2d 996 (4th DCA 1998) and on remand *Sawczak v. Goldenberg*, 781 So.2d 450 (4th DCA 2001) (While it was improper for defense counsel to make arguments that appealed to the community conscience of the jury, expressed counsel's personal beliefs, referred to facts not in evidence and personally attacked the plaintiff's expert as "a hired gun who was asked to put the biggest numbers he could conceivably think of up on the board," plaintiff's counsel improperly objected and moved for mistrial on incorrect grounds of "Golden Rule". Having failed to assert the appropriate grounds in her objection, counsel failed to properly preserve the issue for appeal. Affirmed. [Subsequently, the Supreme Court ordered reconsideration in light of the opinion in *Murphy v. Int'l Robotics*, 766 So.2d 1010 (Fla. 2000), on remand, court held that plaintiff failed to demonstrate that the challenged arguments were "improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."] Affirmed)

Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (4th DCA 1997) (improper for plaintiff to argue: "that's the kind of defense and evidence and forthrightness that you get from this side of the room [indicating def.],""the last thing that the defense wants in this case is for you to be fair and reasonable. That is why they come in here with this bogus counterclaim to try and make it look like they have something to argue about . . . ." Plaintiff's judgment reversed on these and other comments)

Hernandez v. State Farm Fire & Cas. Co., 700 So.2d 451 (4th DCA 1997) (it was not improper for counsel to attack experts credibility by addressing the fees he received for testifying at trial. Record indicates that comments were fair and jury was free to accept or reject them.)

Owens-Corning Fiberglas Corp. v. Crane, 683 So.2d 552 (3rd DCA 1996) (When defense counsel was making its closing argument, it was inappropriate for plaintiff's counsel to continuously interrupt with a speaking objection in which he stated that defense counsel was

fabricating evidence. While it is perfectively permissible for trial attorneys to point out perceived discrepancies in the evidence introduced at trial and opposing counsel's characterization of the same, it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury in the process. Even in the absence of a contemporaneous objection, such comments about opposing counsel made during closing arguments are fundamental error and require no preservation below. [Note: case predates Murphy 766/1010 below.)

Donahue v. FPA Corp., 677 So.2d 882 (4th DCA 1996) (**PCA**. *Concurring opinion* was written to chastise defense counsel for unethical argument. It was improper for defense counsel to compare a video introduced into evidence by plaintiff to a staged film, prepared by a television station, which showed a GMC truck blowing up [implying something prejudicial and personal attack on plaintiff and counsel]. It was also improper for defense counsel to compare def. expert dentist who holds free seminars for lawyers on TMJ problems to lawyers who advertise on benches "call 1-800, you know, sue you, whatever. If you are a lawyer that's embarrassing"[personal attack on witness]. Concurring judge suggests that PCA was entered because errors were not objected to and were not fundamental.)

Segarra v. Mellerson, 675 So.2d 980 (3rd DCA 1996) (In order to impeach co-defendant as to her version of the accident, defense counsel called her English professor as a witness to testify that she was absent from class on the day of the accident, although she claimed to be returning from class at the time the accident occurred. Following that testimony, defense counsel argued to the jury "I personally have always been of the belief that if you stretch things a bit about A, you might stretch things about B. . . . [W]e don't think (co-defendant) has been completely candid with you about the accident. . . . What we wanted to show you is we didn't think she was straight forward about something as simple as where she was that day." Because the professor's testimony about co-defendant's absence from class was proper impeachment testimony, there was no error in allowing co-defendant's attorney to comment on that evidence, and on his view of that evidence, in his closing argument. [Court cites Craig v. State, 510 So.2d 857 (Fla. 1987) ("When counsel refers to a witness or a defendant as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.) Note that in this context the court is not bothered by counsel's expression of personal opinion])

Donaldson v. Cenac, 675 So.2d 228 (1st DCA 1996) (improper for def. counsel to argue to jury that "It's not uncommon for plaintiff's attorneys to put up some ridiculous number 50 times what they really do expect to get. . . ." [Case already reversed on other grounds so effect of argument was not discussed further])

Cohen v. Pollack, 674 So.2d 805 (3rd DCA 1996) (in auto accident case, improper for plaintiff's counsel to argue: "[Defense counsel] and his witnesses will say anything. He had to create a defense, . . . He can't even tell the truth about a picture staring at him. . . . How can he

continue to misrepresent things to the jury?" Combined with other errors in closing argument, judgment for plaintiffs reversed.)

Baptist Hosp. v. Rawson, 674 So.2d 777 (1st DCA 1996) (Improper for plaintiff's counsel, in referring to defendant's emergency room doctors, to argue that "these idiots" made "the most ridiculous decision that anybody has ever made in history. . . . everything these people did while he is sitting there is ridiculous." And that their testimony was "the company line". When considered together with other improper arguments, errors were so pervasive as to affect the fairness of the proceeding and will not be condoned. Reversed. [Note: pre-Murphy v. Intl. Robotics])

D'Auria ex rel. Mendoza v. Allstate Ins. Co., 673 So.2d 147 (5th DCA 1996) (PCA - concurring opinion is written solely to remind trial judges of their "long-standing responsibility to protect jurors from improper closing arguments, even in the absence of a proper objection." Judge pointed out that defense counsel engaged in character assassination of the 16 year old plaintiff, her counsel and witnesses; injected his personal opinions on the credibility of the witnesses, belittled the plaintiff, urged jury to "send a message" and apologized for plaintiff's case. According to concurring judge, reversal would have been mandated if a proper objection and motion for mistrial had been made. Affirmed)

Forman v. Wallshein, 671 So.2d 872 (3rd DCA 1996) (it is not proper to attack the credibility of a party to a suit who testifies in his own behalf, unless such comment is based on facts appearing in the evidence, or unless it can be deduced from the witness' appearance and conduct while giving his testimony. Absent a factual basis, it would be inappropriate to characterize the witness as a "liar." Where there was ample evidentiary evidence in the record to dispute the credibility of the plaintiff, it was appropriate for def. counsel to refer to the plaintiff as a "liar.")

Norman v. Gloria Farms, 668 So.2d 1016 (4th DCA 1996) (counsel played on jurors general fears and prejudices by evoking images of runaway verdicts and frivolous lawsuits ["What is happening to our American system of justice if that is what is supposed to be justice?"] and attacked plaintiffs counsel in general with impermissible comments concerning how plaintiff's lawyers always ask for as much money as they can and hope they "don't turn people off." Reversed without objection)

Muhammad v. Toys "R" Us, Inc., 668 So.2d 254 (1st DCA 1996) (def. counsel's anecdotal commentary comparing his family's shopping incident at a store where they never returned because of a negative experience to plaintiff's buying another bicycle from def. 6 weeks after alleged defect injured their child, as a means of impeaching plaintiff was improper. Such irrelevant familial rhetoric must not be condoned. Moreover, counsel also implicitly accused plaintiff of perpetrating a fraud upon the court and jury. Reversed.)

Hammond v. Mulligan, 667 So.2d 854 (5th DCA 1996) (CONCURRING OPINION: Def. counsel improperly argued that opposing counsel was attempting to "fool" them by hiding

relevant evidence from them, and that he and the plaintiff "should not be rewarded for not telling the truth." Comments were improper, inflammatory, highly prejudicial, and constitute fundamental error. [NOTE: case was reversed on other grounds so concurring opinion is dicta.])

King v. Nat'l Security F & C, 656 So.2d 1335 (4th DCA 1995) ("it is improper to impugn the integrity of a witness by calling him or her a liar." *[NOTE: Disapproved of by Murphy 766/1010 which finds that a witness may be called a liar under certain circumstances. See also, Craig v. State, 510/857]*)

Martino v. Metropolitan Dade County, 655 So.2d 151 (3rd DCA 1995) (It was improper for defense counsel to argue "I don't like Mr. Martino [plaintiff]. . . . We went back years before when he was bringing in $5,000, $6,000, $20,000.00 and then one shipment $336,000.00." It was also improper for defense counsel to personally attack plaintiff's only expert witness, Kenneth Harms, arguing: "Harms needs one of those tall hats that they wear down in the Banana Republic. The guy that has got all the braids. He is the guy who is a dictator because it is Harm's Law." Reversed.)

Owens-Corning Fiberglas Corp. v. Morse, 653 So.2d 409 (3rd DCA 1995) (Derogatory comments accusing plaintiff's counsel of "trickery" and "hiding the ball," together with allegations that other trial counsel "prodded" plaintiff into giving answers and that his responses "had been told to him by his attorneys" constitute fundamental error **[Pre Murphy!]** which deprived plaintiff of a fair trial. Def. counsel attacked the integrity of counsel, accusing them of perpetrating a fraud upon the court and jury. [Note: although co-def. OCF did not make any improper closing argument, appellate court concluded that def.'s argument prejudiced jury to such extent that retrial as to both def.'s was warranted.] Order granting new trial affirmed)

Al-Site Corp. v. Della Croce, 647 So.2d 296 (3rd DCA 1994) (Improper for plaintiff's counsel to engage in character attacks and name calling during closing and rebuttal: "character wise he is a small man . . . he is a bully . . . he wanted to become a big shot . . . some jerk . . .." Even absent a timely objection, court will not permit the result to stand because it resulted in less than a fair trail. Reversed [Note: pre-Murphy v. Intl. Robotics])

Bellsouth Human Resources Admin., Inc. v. Colatarci, 641 So.2d 427 (4th DCA 1994) (improper for defense counsel to argue that it's alarming that "trial lawyers" will come before a jury and try to get 1 ½ million dollars for a broken leg, how that says a lot about "the deterioration of our society" and that our system of justice has "created a situation that every time we do something if it doesn't turn out the way we thought we sue." Defense counsel's argument attacked trial lawyers in general and suggested that their bringing of frivolous lawsuits was one of the major ills of our society. [Upon objection, court's response that def. counsel is a "seasoned attorney" and that he hoped he would "do what is right" and def. counsel's reply: "I would do nothing but what is right" did not help the situation] It was also improper for plaintiff's counsel to suggest in his rebuttal that def. counsel's arguments were "designed to make you feel prejudice or sympathy" and to refer to def. as corporate America, "You know, the folks that brought you

the gas tank that explodes, and agent orange, and silicone breast implants. Court was unwilling to say that judgment would stand because both sides participated in improper arguments. Plaintiff judgment reversed)

Walt Disney World Co. v. Blalock, 640 So.2d 1156 (5th DCA 1994) (improper for plaintiff's counsel to derogate def. witnesses by referring sarcastically to them as "a good soldier" and "this joker," and to attack def. as "some nickel and dime carnival" throwing "pixie dust" to delude the jurors. Reversed)

Kaas v. Atlas Chemical Co., 623 So.2d 525 (3rd DCA 1993) (def. counsel's argument ["It's so ridiculous and I can prove that that guy is a liar on this issue because, ladies and gentlemen of the jury, take a look at this. . . . Now , here's how I am going to prove to you that he was a liar. . . . That's a lie. Dr. Mackler showed you an anatomy book. . . . The only defense witness on Andre Kass' impotency was Dr. Suarez who does hate me and who I did call a liar and who I will take some more time with you to show that he really is a liar because I mean, the guy flip flops in a deposition . . . . I feel the two to three nights thing was phony. I think he is a liar"] falls squarely within that category of fundamental error – requiring no preservation – in which the basic right to a fair and legitimate trial has been fatally compromised. Counsel improperly expressed his feelings or beliefs concerning the credibility of a witness and impugned the integrity of a witness by calling him a liar. Counsel may "demonstrate inconsistencies between witnesses' testimony and within a witness's own testimony. But lines have been drawn as to what constitutes proper comment and what is egregious. The statements in the instant case were egregious." **[PRE MURPHY]** Order granting new trial affirmed.)

Emerson Electric Co. v. Garcia, 623 So.2d 523 (3rd DCA 1993) (at several points during the trial, def. counsel was accused of "fraud, hiding evidence, putting up roadblocks to the discovery of relevant evidence, and picking and choosing the evidence it would produce in response to discovery demands. No pretrial discovery violation was ever established and, even if there had been evidence of a violation, an appropriate sanction was a matter for the court and not for the jury. Reversed. [Note: case is not clear about whether comments occurred during closing or questioning but same rule would apply.])

George v. Mann, 622 So.2d 151 (3rd DCA 1993) (defense counsel's repeated reference to plaintiff's "lawsuit pain" and suggestion that she "set up" the entire lawsuit, implying that she was a liar, was perpetrating a fraud upon the court, had concealed evidence and violated discovery orders "fatally compromised" plaintiff's right to a fair and legitimate trial. Defense judgment reversed.)

Venning v. Roe, 616 So.2d 604 (2nd DCA 1993) (it was improper for def. counsel to indicate that plaintiff's medical expert was "nothing more than an unqualified doctor who prostitutes himself . . . for the benefit of lawyers," who is paid to perform a service by giving "magic testimony" for plaintiff's lawyer; that there was a "special relationship" between plaintiff's medical expert and plaintiff's lawyer, that plaintiff's counsel had presented "a work of fiction"

which he "created and orchestrated" with the assistance of the medical expert and that he had personally been involved in seven cases where the two of them worked together. Comments essentially accused the expert of perjury and opposing counsel of unethically committing fraud upon the court. Reversed)

Schubert v. Allstate Ins. Co., 603 So.2d 554 (5th DCA 1992) (It was improper for defense counsel, among numerous other improper arguments, to argue that plaintiff's doctor "as he usually does, has found a permanency"; argue that the treating healthcare providers had ulterior, self-interested, motives in testifying and admonish the jury not to be deceived by them; and attack appellant's lawyer by saying he would do "anything to advance the cause." While some of the remarks alone may not have required reversal, [they were not objected to by plaintiff's counsel] the cumulative effect of the improper comments warrants reversal and the award of a new trial. **[PRE MURPHY]** Reversed.)

Riley v. Willis, 585 So.2d 1024 (5th DCA 1991) (improper for plaintiff's counsel to suggest to jury about def.: "here's a good man that has been trying to do the best he can to protect his side but also trying to stick to the truth as best he can and would really like to say up there, folks, I really wasn't paying attention to what I should have. I'm sorry. It's my fault. . . . Did you get that idea he'd really like to be doing that but his lawyers are keeping him from it? I would suggest to you that's a possibility." Reversed)

Sun Supermarket v. Fields, 568 So.2d 480 (3rd DCA 1990) (it was improper for plaintiff's counsel to repeatedly remark to jury that def. counsel had lied to the jury and committed a fraud upon the court and the jury. The conduct of plaintiff's counsel devastated any chance the def. might have had to secure a fair trial in front of a jury who had been told not to trust def.'s counsel. Reversed)

Carnival Cruise Line v. Rosania, 546 So.2d 736 (3rd DCA 1989) (improper for counsel to attack opposing party, suggest opposing expert was bought and urge jury to consider in verdict how defendant defended the case: "They want to hide the truth. . . . There are certain companies and organizations that look for a way to taint. . . . I think the evidence shows that they have taken the position that they're going to put roadblock after roadblock and say she wasn't fit to make this trip. . . . They have a doctor, the best money could buy. . . . In putting up roadblocks such as we've seen here through this entire trial, keep in mind when you make a verdict when you render a verdict, your verdict has to be unanimous. And think about how Carnival Cruise Lines defended this particular case." Reversed)

Pier 66 v. Poulos, 542 So.2d 377 (4th DCA 1989) (it was improper for plaintiff's counsel to make inflammatory remarks in opening and closing [i.e. that the def.s had destroyed the plaintiff's brain, which, like Humpty Dumpty, could not be put back together; that the plaintiff thought she was going insane; that her heart could bleed only tears], repeatedly express his opinion that the def.s were liars and that they engaged in a cover up and a conspiracy to lie and falsify, and urge the jury to send a message to others. Such comments were completely improper

and, among other things, went far beyond simply asking the jury to consider whether they believed the witnesses' testimony. Due to the added risk of prejudice affecting the verdict and based upon extensive emotionalism of trial, inadmissible evidence and improper argument, judgment reversed.)

LaBerge v. Vancleave, 534 So.2d 1176 (5th DCA 1988) (Defense attorney's comment that plaintiffs' attorneys routinely ask 8 to 10 times "what a case is worth" were improper. It was also improper for defense counsel to comment on plaintiff's first treating physician (who did not testify). However, comments with regard to first treating physician were not so outrageous and improper as to merit a new trial and jury's determination that there was no permanent injury obviates any necessity to retry the damage issue in the case, since it is determinative of the lawsuit).

Mein, Joest & Hayes v. Weiss, 516 So.2d 299 (1st DCA 1987) (In a lawsuit against a physician claiming that the negligent use of forceps during a delivery resulted in a severe urethrovaginal laceration in the mother, it was error for defense counsel, on two occasions to comment that had the obstetrician not intervened with the forceps' rotations and the baby had suffered brain damage, plaintiffs would be in court with a healthy mother and a brain damaged baby where there was no evidence supporting counsel's "brain damaged baby" and "litigious plaintiffs" arguments. Although the trial court gave a curative instruction on each occasion, advising the jury that there was no evidence of the baby ever being in danger of suffering brain damage had the forceps rotation not been performed, it was not an abuse of discretion for the trial court to conclude that the two defense arguments improperly influenced the jury. Order granting new trial affirmed.)

27th Ave.Gulf Srv.Ctr. v. Smellie, 510 So.2d 996 (3rd DCA 1987) (Improper for counsel to characterize settlement agreement or Mary Carter agreement between plaintiff and co-defendant as, among other things, a conspiracy with implications that go beyond what occurs in this courtroom. Even though agreement was not a true Mary Carter agreement, improper characterization required reversal.)

Miller v. Court, 510 So.2d 926 (4th DCA 1987) (in med. mal. case for alleged negligent treatment of wife, it was improper to allow def. counsel to repeatedly comment on husband's abuse of alcohol and drugs. Comment was not relevant to the issues presented and was highly prejudicial. Reversed.)

Borden, Inc. v. Young, 479 So.2d 850 (3rd DCA 1985) ("They have done things that you can't possibly imagine and Eddie [plaintiff] is supposed to be able to go in and counteract this type of resources. It's absolutely and totally impossible. . . . They say but don't hold it against us. Don't hold it against Elsie. Well, I got to tell you something. Elsie isn't the sweet little cow you see on the milk can. Obviously, Elsie is a big corporation and they are there to do one thing, lay it off on somebody else . . . ." Plaintiff's argument alleged personal knowledge of nefarious activities supposedly engaged in by the corporate defendant, on top of which allegations were untrue.

Arguments of both plaintiff and defense were entirely improper and both counsel were referred to the Fla. Bar for disciplinary action. Error fundamental. Reversed despite absence of objection or motion for mistrial. **[Note: pre-Murphy v. Intl. Robotics]**)

Kendall Skating Ctrs., Inc. v. Martin, 448 So.2d 1137 (3rd DCA 1984) (trial court improperly asserted that there are "no bounds" during closing argument. Plaintiff's characterization of def.s as "despicable" and his assertion that both they and their lawyers were liars grossly exceeded the bounds of closing argument and warrant reversal. Reversed.)

Erie Ins. Co. v. Bushy, 394 So.2d 228 (5th DCA 1981) (it was improper for plaintiff's counsel to criticize insurance company def. for not having a corporate representative at defense table, rather than just its insured, to state that he had never seen such "subtle, hidden deception of any defendant," and to suggest bad faith on the part of the insurer where there was no basis for such an allegation. Together with other closing errors, plaintiff judgment reversed.)

Thundereal Corp. v. Sterling, 368 So.2d 923 (1st DCA 1979) (where def.'s counsel had discussed in his argument the benevolence of his client and the ease with which plaintiff could apply for and receive workman's compensation benefits, plaintiff counsel's comment that def. had been pushing plaintiff around for 2 or 3 years and that it was the "day of reckoning, and it's time that this lady got what she is entitled to and not all these inconsistent positions" from the defendant were in the context of fair reply. Affirmed)

Clay v. Thomas, 363 So.2d 588 (4th DCA 1978) (plaintiff's counsel improperly ridiculed def. hospital's Cuban physicians by mimicking Spanish accents, suggested that the hospital was a "zoo" which ". . . didn't care about anything except [its] bill, . . . to heck with the patient," and the physician as having "needed money more than [the patient] needed her uterus." Def. counsel improperly attacked plaintiff's counsel by referring to the art of contingent fee representation of injured plaintiffs as ". . . the personal injury industry . . . . A whole trade group . . . of lawyers, doctors, economists [created] to come into court and sue people." Def. counsel also chastised plaintiffs and their attorneys as "just hunting anyone with some kind of assets to pay off these people and these lawyers, . . . " and referred to plaintiff's medical witnesses as "hired mercenaries." Although there were numerous improper comments by both sides, appellate court distinguished this case from cases holding that comments that "neither rebuke or retraction" can cure are subject to reversal without objection because this case involved "intemperate remarks" rather than misstatements of evidence, and comments were "invited" by counsel's own "gross conduct." Affirmed)

Caughey v. Beller, 322 So.2d 83 (2nd DCA 1975) (following a default entered in an action by law enforcement officers for compensatory and punitive damages suffered at the hands of the def., a trial on damages was held where the plaintiffs and their counsel characterized def. as one of the largest illegal drug traders in Florida, ostensibly as part of the proof of def.'s financial worth. Court found since comments may have been ruled inadmissible upon appropriate objection but no objection was made [def. and counsel also failed to appear for trial on damages]

and comments were not fundamental error, verdict would not be reversed. Court declined to hold that a party may Never be granted relief because of what occurs in a trial subsequent to a default being entered against him. Affirmed)

Metro. Dade Cty. v. Dillon, 305 So.2d 36 (3rd DCA 1974) (while plaintiff's counsel used "strong and zealous" language in characterizing def. counsel as the "insurance company's lawyer" who was seeking to "soft-soap" the jury and who wanted to be the "hero" of the insurance company by "getting out as cheap as he can," defense counsel was not timid and also referred to plaintiff's counsel as "a great salesman" attempting to turn tragedy into a "commercial enterprise" because "somebody wants the Cadillacs and the big houses." Affirmed)

Dixie-Bell Oil Co. v. Gold, 275 So.2d 19 (3rd DCA 1973) (although it was improper for plaintiff's counsel to personally attack def. counsel in his closing, error was not reversible where trial court instructed jury that only testimony that comes from the witness stand shall be considered evidence. Improper statements in arguments before a jury will not be considered grounds for mistrial, reversal, or new trial unless they are highly prejudicial and inflammatory. Affirmed.)

Carlton v. Johns, 194 So.2d 670 (4th DCA 1967) (unclear whether it was improper for counsel to argue that witness had motive to lie because of fear of going to "State Penitentiary" for manslaughter in automobile accident case where entire transcript was not provided to court on appeal and it is therefore possible that such argument was a fair inference to be drawn from the evidence. Court also noted that def. counsel did not object to the statement until it was raised a second time. Reversed on other grounds.)

Griffith v. Shamrock Village, 94 So.2d 854 (Fla. 1957) (where no attempt was made to impeach plaintiff or his witnesses and their testimony was neither contradictory nor contradicted by defendant's evidence, it was improper for defense counsel to argue to the jury: "I don't believe this boy is telling the truth, I don't believe you believe that he made a telephone call. What this Plaintiff wants is money." In this context, comments suggested perjury and collusion on the part of plaintiff and his witnesses.[no ref. made to counsel's expression of personal opinion] Reversed)

Conner v. State Road Dep't of Fla., 66 So.2d 257 (Fla. 1953) (in condemnation proceeding, it was improper for counsel for the State to argue, inter alia, that "The testimony of the oil companies . . . is nothing but trickery to get money, . . ." and "These Jacksonville attorneys have come over here and tried to put something over on the Court." Comments were unwarranted and inexcusable. Reversed.)

Tampa Transit Lines v. Corbin, 62 So.2d 10 (Fla. 1953) (comment by plaintiff's counsel that def. employed "high price attorneys on retainer," to "fight all claims made against them, regardless of how just they may be, and that was what the average man, or average woman, was up against," and other similar comments were highly prejudicial. Reversed on these and other

improper comments.)

Blackwood v. Jones, 149 So. 600 (Fla. 1933) (In case of auto/pedestrian accident, it was improper for attorney for the plaintiff to tell the jury that the defendant was trying to have them believe that the decedent "deliberately committed suicide" where defense counsel gave no such impression. Statement was intended and calculated to prejudice defendant in the minds of the jury by making it appear that defendant was trying to escape legal liability by casting aspersions on decedents character. Statement extremely prejudicial. Reversed.)

II. Comments that suggest something prejudicial or improper

State Farm Mut. Auto. Ins. Co. v. Gold, 41 Fla. L. Weekly D257 (4th DCA 2016) (in uninsured motorist case, it was improper for plaintiff's counsel to comment on how plaintiff purchased an uninsured motorist policy "so this wouldn't happen" and that *"State Farm has denied his claim and now he's facing down a stack of medical bills. And he's been carrying this burden with him until today and State Farm to this day, to this minute has never taken responsibility for the damages in the crash and for the injuries that are covered under this policy, and they're not going to do it until you force them to do it with your verdict."* Error was exacerbated by powerpoint which displayed, among other things, *"Michael Gold has been carrying a debt. State Farm promised to pay stacks of medical bills. Paying the price for someone else's mistake State Farm refuses to take responsibility for the debt it owes to Mr. Gold, forcing us to bring them to trial,"* and *"Gold has done the right thing all along. Has the Defendant?"* Comment, powerpoint and questionable judge's instruction improperly focused the jury's attention on def's liability and culpability rather than on the issue of damages, and painted a clear picture in the jury's minds of a company breaking an obligation rather than a company simply attempting to determine actual damages attributable to the accident. [NOTE: this DCA has also interpreted similar comments as a suggestion that jury "punish" def.—See *Marotta*] Reversed.)

Allstate Ins. Co. v. Marotta, 125 So.3d 956 (4th DCA 2013) (it was improper for plaintiff's counsel to argue that Allstate "made up issues" and "manufacture[d]" a defense. Statements improperly denigrated Allstate's defense and counsel. It is improper for counsel to suggest in closing argument that a "defendant should be punished for contesting damages at trial," that defending a "claim in court" is improper or to suggest that a party should be punished for contesting a claim. Plaintiff's comments included: *"[T]hey denied accepting responsibility. I ask you, is that what it means to be in good hands? ... [C]onsistently, in this case, didn't want to accept the responsibility at all for causing the accident ... and they still don't want to accept the responsibility to ... make up all of the losses and harms caused by this automobile crash. ... Allstate could have come to this trial saying, I'm sorry, I want to fairly pay you for the injuries ... but they didn't. ... Make Allstate repent."* Further, Plaintiff's counsel, referring to def witness/doctors, argued that Allstate can pay doctors who know what Allstate "really wants,"

called Allstate's experts "paid opinion courtroom doctors" and, over objection, stated that Allstate "made up issues." These and other improper comments "shifted the focus of the case from compensating the plaintiff to punishing the defendant." Reversed.)

Carnival Corporation v. Jimenez, 112 So.3d 513 (2nd DCA 2013) (Although defense counsel suggested, without supporting evidence, that plaintiff's treating physician who was friends with Plaintiff's counsel had his testimony "scripted," implying it was by defense counsel, error was not properly preserved and does not satisfy Murphy's 4-prong test for fundamental error. Order granting new trial reversed.)

State Farm, et. al v. Thorne, et. al, 110 So.3d 66 (2nd DCA 2013) (Plaintiff's counsel's contention in closing that the defendants' evidence and argument were an attempt "to avoid responsibility" and that, as a result, the defendants exhibited shameful conduct was improper. Such argument suggested that defendant should be punished for contesting damages and that defending the claim in court was improper. Reversed on these and other grounds.)

Reffaie v. Wal-Mart Stores, 96 So.3d 1073 (4th DCA 2012) (It was error for defense counsel to argue that law firms transported their clients to plaintiff's medical expert, en masse, for procedures and that he would bus them "right back up for the purposes of litigation," or that the expert had any "business relationships" with personal injury law firms, where he had asked such questions on cross examination and the expert had answered in the negative or denied knowledge of any "bussing" of people to his office. Such improper comments were intended to, and did, impugn the doctor's credibility and objectivity in the eyes of the jurors. Defense counsel did not obtain the desired answers during questioning but continued in closing argument as though he had. Comments were objected to and were not harmless. Reversed for retrial on damages.)

Health First v. Cataldo, 92 So.3d 859 (5th DCA 2012) (Plaintiff's counsel's closing was replete with improper comment, including claiming that Defendants were trying to sidetrack the jury and make them take their eye off the ball, that Defendants had to be dragged "kicking and screaming" into the courtroom, that the jury had to force Defendants to take care of Plaintiff, and that it would be a victory for the defense if they got an "unfair" verdict, all of which improperly disparaged the defense and implied that Defendants had done something improper by defending the case, and grossly misstating the compensation that had been paid to Defendants' only medical witness by arguing, incorrectly, that he had been paid almost $1,000,000 over three years for cases on which he had worked with defense counsel, and implying that no one knew how much the doctor received from defense counsel's firm after considering he had worked with three or four other lawyers at the firm, which comments were factually inaccurate. However, no objection to the improper arguments was made and, even cumulatively, they fail to reach the standard of fundamental error pronounced in Murphy v. International Robotics. Affirmed.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including statements attacking the character of every person involved with the defense, including defense counsel; painting the defense as

"frivolous"—designed to "add insult to injury"; and suggesting the defense was suborning perjury and was involved in other improper actions by arguing: "We all make mistakes. But you make a bigger one when you don't admit it; and you make a bigger one to try to avoid responsibility. And you make a bigger one when you call in witnesses that don't tell the truth. Anything to win. Anything to save the day." On appeal, plaintiff's counsel attempted to shift the focus away from these improprieties by arguing that defense counsel's opening was improper. [Defense commented in opening about how plaintiff was making remarkable improvement but that once those uplifting medical reports came in, plaintiff's counsel referred him to another doctor and all of a sudden plaintiff started limping and claiming new injuries as well as a decline in his recovery. At that point, defense counsel claimed, the case went from being a medical case to a legal case—suggesting that def's referral to a doctor was for financial profit. In addressing plaintiff's claim, the court responded "the legal profession has as much right as anyone else to make an appropriate referral to other professionals. However, if there is evidence that such activity is occurring solely for personal financial profit, then the jury also is entitled to have those facts brought before them for consideration."] Reversed and remanded for new trial.)

Philippon, M.D., et al. v. Shreffler & Smith, et al., 33 So.3d 704 (4th DCA 2010) (in medical malpractice action, it was improper for patient's counsel to argue: "Where is the chronology? Why isn't it in evidence if it's so important?" because the chronology was a document that patient's own witness/doctor used to testify but patient's counsel objected to turning over to the defense (claiming work product) when requested to do so during trial. Also, referring to the delineation of privileges that demonstrated that the surgeon had authorization to perform a hip arthroscopy at the hospital, counsel argued: "We've been asking for it for years. And we get nothing. We get a stiff arm and a cocksure attorney who thinks that you've made up your mind." In addition to the personal attack on opposing counsel, counsel's argument was improper in that "delineation of privileges" had been a privileged document until a Supreme Court decision was issued during trial. Although these arguments could be considered close to running afoul the "permissible bounds of advocacy," they were not so prejudicial as to deny appellant a fair trial, either individually or collectively. Affirmed.)

Gold v. West Flagler Associates, Ltd., 997 So.2d 1129 (3rd DCA 2008) (in slip and fall case, it was improper for defense counsel to argue: "I've been doing this almost 30 years now, and it invariably happens somebody falls down somewhere. They don't know why they fell. They don't know for sure where they fell. The investigator and the photographer go back to the scene of the accident. They go around and take pictures of everything they can find that looks bad. … [S]o you can parade all these pictures of allegedly dangerous conditions in front of the jury in the hopes you'll find that, well, even though it didn't happen here, it must have been the same thing here." [Court did not specify errors, i.e.-attacking opposing party and counsel suggesting they were suborning perjury or manufacturing a claim, arguing facts not in evidence, expressing personal opinion, etc.] Error harmless after reviewing entire record. Affirmed)

SDG Dadeland Assoc. v. Anthony, 979 So.2d 997 (3rd DCA 2008) (it was improper for Plaintiff's counsel to repeatedly attack defendant and defense counsel, during opening and

closing, by arguing that they had committed discovery violations and hidden and manufactured evidence (i.e., among others, "[T]o come in here and know there is a spill and walk over after an accident and put the cone down because you know you can't win the case if she falls on a spill that you didn't clean up that you didn't find … let's put the cone there and she tripped over there. … Their defense is in the toilet, and they're trying to save the day by trying to change his testimony"). Such arguments accused the defendant and it's counsel of perpetrating a fraud on the court and the jury. Moreover, the existence of alleged discovery violations was unsupported by any evidence, had been ordered excluded from closing argument by the court and, in any event, would have been a matter for the court, not the jury. [*NOTE: beware of dicta about whether objection would have been necessary in light of Murphy case-766/1010*]. Reversed.)

Rosario-Paredes v. J.C.Wrecker Service, 975 So.2d 1205 (5th DCA 2008) (It was improper for Def. counsel to argue: "[T]hey do an amazing job of trying to convince people of these injuries, but that's why they keep on hiring these doctors over and over; that's why Dr. Hoffman has testified 15 times for this Plaintiff's firm, they're good. … I mean there's a network of lawyers and doctors and all working together, everybody is making money. … [T]hey're professional witnesses." While counsel may certainly comment on an expert's income derived from a case as well as from litigation related matters, may point out the percentage of work performed for plaintiffs and defendants and the financial incentive to testify favorably for a party in order to continue a financially advantageous relationship with a particular attorney, arguments that attack opposing counsel or suggest fraud or collusion are unacceptable. Nonetheless, arguments were isolated and did not deprive plaintiff of a fair trial. Affirmed.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (It was improper for plaintiff's counsel to denigrate Carnival's defense and attack def. and def. counsel for raising the issue of plaintiff's 28 years of smoking, as well as his failure to stop after being advised to do so by def's doctor, as grounds for comparative negligence, and to suggest that they were raising the issue of his smoking simply to divert attention away from the real issue. "[O]h, now that we know that he smokes some cigarettes, therefore, we want to blame his stroke on that ..., but now we want this jury to focus on just the fact that he's a smoker, he's a criminal because he smokes. … They want you to hold it against him just because he smokes." Argument suggested that def and counsel were doing something wrong by asking jury to consider effect of plaintiff's extensive smoking on his comparative damages. Further, plaintiff's counsel suggested def. should be punished for defending against plaintiff's claim at all. "They won't accept the harm that they have caused him. They are fighting on both. It is time to hold them responsible." Reversed.)

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel to malign insurer def. in UM action for not living up to its contractual obligation to insured and leaving him "out hanging." Pre-trial order limited such comment to establishing the existence of the business relationship and prohibited counsel from such emotional argument. Also improper for plaintiff's counsel to argue to jury that this was def's alleged claims handling practice and usual litigation tactics. Such facts were not in evidence and defs alleged practices in other cases were irrelevant to case at hand. Improper to claim def was breaching it's contract

with insured since UM action is based on existing contract but is a tort action in which def stands in the shoes of the uninsured driver. Moreover, attacking defs for aggressively defending the lawsuit was further improper since def had the right to raise any and all defenses that other driver could have raised. *NONETHELESS*, despite numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] **Note**: Generally, improper references to insurance matters in closing argument can be cured by an appropriate curative instruction. Affirmed.)

Sanchez v. Nerys, 954 So.2d 630 (3rd DCA 2007) (where there was no evidence in the record that doctor had destroyed any computer lists of attorneys who had retained him or that such documents ever existed on his computer, it was improper for plaintiff's counsel to argue to jury that doctor had deliberately destroyed documents and that his testimony should be disregarded as a result. In fact, although not required to do so, doctor had kept a list of court appearances and produced that list for plaintiff's counsel prior to trial. An expert may not be compelled to compile non-existent documents. Therefore, Plaintiff's argument that he had destroyed documents that had never been created and that he was under no duty to compile was a prohibited attack on his character. Reversed.)

State Farm Mut.Auto Ins. Co. v. Revuelta, 901 So.2d 377 (3rd DCA 2005) (asking jury to call plaintiff's uninsured motorist carrier to account for failing to pay benefits is clearly prejudicial where trial was not over bad faith in failing to pay uninsured benefits but over issue of driver negligence, which carrier claimed did not exist due to sudden brake failure. Such comment amounts to a prohibited "send a message" argument." Similarly, plaintiff continued to argue: "on one hand State Farm is a good neighbor and they want to help you, [yet when it comes time to pay] ... it is like the sales department and the claims department has never met," improperly insinuating that State Farm acted in bad faith in defending the action rather than paying the benefits. This type of argument was improper because State Farm, standing in the shoes of the uninsured motorist, was entitled to raise and assert any defense that the uninsured motorist could have argued. Reversed.)

Conde v. State of Florida, 860 So.2d 930 (Fla. 2003) (Prosecutor's suggestion that the defense's focus on certain issues was designed to lead the jury down the wrong road was not improper. Prosecutor's comments referring to Def. as an adulterer and sociopath, which were not properly preserved and were not fundamental, were also remedied by a curative instruction. Affirmed.)

Wall v. Costco Wholesale Corp., 857 So.2d 975 (3rd DCA 2003) (it was improper for defense counsel in personal injury action to argue that plaintiff/husband was hiding the fact that he was a lawyer for devious reasons, make repeated comments about plaintiff/wife being a "lawyer's wife" and further argue that plaintiff's were committing a fraud upon the court. Reversed.)

F.P.L. v. Goldberg, 856 So.2d 1011 (3rd DCA 2002) (*On rehearing En Banc* - Generally, "[w]here counsel accuses another counsel of discovery misconduct in front of the jury to

persuade the jury that counsel was concealing evidence or committing a fraud and where no pretrial discovery violation was established, a new trial is warranted. ... Further, comments by counsel accusing opposing counsel of fabricating and misrepresenting evidence and during rebuttal insinuating opposing counsel had been less than forthright about the evidence is fundamental error [citation omitted]." Comment by plaintiff's counsel that uncalled witness (employee of def. who the evidence showed had been present) was not called to testify by opposing counsel because "he knows the truth. They never produced him for deposition" did not accuse def. of hiding evidence or discovery misconduct. [???] Plaintiff's counsel was improperly arguing the missing witness inference without first establishing that the witness was available to be called. However, def. counsel objected on the incorrect grounds [facts not in evidence] and error was not fundamental. Affirmed and remanded for remittitur. *[Decision quashed and remanded on other grounds-899/1105]*)

Manhardt v. Tamton, M.D., 832 So.2d 129 (2nd DCA 2002) (it was improper for defense counsel to point out to jury that this was defendant's first trial, especially where trial court had prohibited the mentioning of prior lawsuits. Such comment is usually intended to prejudice a plaintiff's case in the eyes of the jury. Error compounded an earlier error where def. counsel was allowed to question plaintiff's medical expert about whether he had ever been sued himself. Reversed.)

Wilbur, et. al v. Hightower, 778 So.2d 381 (4th DCA 2001) (Plaintiff's unobjected to argument: "Don't let these people go back to their offices and [laugh] in the hall room and say, we put one over on them," although not an improper "send a message" or "conscience of the community" argument, could reasonably be understood as accusing defense counsel of attempting to mislead the jury. However, error does not seem to have been prejudicial given the compelling evidence of medical negligence and devastating loss to the surviving spouse, the fact that the jury more than halved the plaintiff's requested damages and the fact that the statement was a single excess at the end of a five week trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [citing *Murphy* 766/1010] Error harmless. Order granting a new trial reversed.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) (In the case at bar, def. counsel's repeated use of term "B.S. detector, comment that if jury found for the plaintiff they would be "accessories, after the fact, to tax fraud, and characterization of plaintiff's case as cashing in on a "lottery ticket" were all improper. However it was not an abuse of discretion to conclude that the improper arguments were not harmful, incurable or requiring of a new trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [NOTE: Subsequently, *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014) held that the a party benefitting from an error has the burden of proving that the error was harmless, ie. that there is no reasonable possibility that the error complained of contributed to the verdict—the same standard as used in

criminal cases. Going forward, this may affect prong 2 of the *Murphy* 4-part test.] Affirmed)

Fravel v. Haughey, 727 So.2d 1033 (5th DCA 1999) (Although it was improper for plaintiff's counsel to request a jury to act as the conscience of the community and to accuse the defendant, his counsel and his witnesses of committing perjury, improper comments were not preserved by appropriate objection and error was not fundamental. [NOTE: court indicated it is receding from its prior practice of liberally reversing cases without objecting based on fundamental error. In the future, such reversals will be rare exceptions rather than the rule. The court pointed out that it would be inappropriate to punish litigants with the cost of retrial for the unethical conducts of their lawyers and suggested that some lawyers would intentionally withhold an objection in order to obtain a "second bite of the apple" if the trial result was unfavorable.] Affirmed.)

Wal-Mart Stores, Inc. v. Sommers, 717 So.2d 178 (4th DCA 1998) (where def.'s manager made reference to his incident report that was not introduced into evidence while testifying, error of plaintiff's counsel telling jury that report was a "document protected from disclosure under work product privilege" was partially invited and harmless, especially where trial court instructed jury to base its decision on the evidence introduced at trial and limited closing so that incident report did not become a feature of trial. Affirmed)

Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (4th DCA 1997) (improper for plaintiff to argue: "that's the kind of defense and evidence and forthrightness that you get from this side of the room [indicating def.],""the last thing that the defense wants in this case is for you to be fair and reasonable. That is why they come in here with this bogus counterclaim to try and make it look like they have something to argue about . . . ." Plaintiff's judgment reversed on these and other comments)

Rutherford v. Lyzak, 698 So.2d 1305 (4th DCA 1997) (Quoting Hagan - in determining whether remarks during closing argument constitute fundamental error the trial court must first: determine whether the error was so pervasive, inflammatory, and prejudicial as to preclude the jury's rational consideration of the case. . . . The trial court has discretion in making this case - specific determination. Second, the trial court must decide whether the error was fundamental. In essence, this is a legal decision that the error was so extreme that it could not be corrected by an instruction if an objection had been lodged, and that it so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial even when no lawyer took the steps necessary to give a party the right to demand a new trial. No fundamental error appears to exist in this case and counsel may discuss both an expert witness' interest in the outcome of the case and the referral relationship between the attorney and the treating physician that testifies as an expert. Order granting new trial reversed.)

Donahue v. FPA Corp., 677 So.2d 882 (4th DCA 1996) (PCA. Concurring opinion was written to chastise defense counsel for unethical argument. It was improper for defense counsel to compare a video introduced into evidence by plaintiff to a staged film, prepared by a television station, which showed a GMC truck blowing up [implying something prejudicial and personal

attack on plaintiff and counsel]. It was also improper for defense counsel to compare def. expert dentist who holds free seminars for lawyers on TMJ problems to lawyers who advertise on benches "call 1-800, you know, sue you, whatever. If you are a lawyer that's embarrassing"[personal attack on witness]. Concurring judge suggests that PCA was entered because errors were not objected to and were not fundamental.)

Cohen v. Pollack, 674 So.2d 805 (3rd DCA 1996) (in auto accident case, improper for plaintiff's counsel to argue: "[Defense counsel] and his witnesses will say anything. He had to create a defense, . . . He can't even tell the truth about a picture staring at him. . . . How can he continue to misrepresent things to the jury?" Combined with other errors in closing argument, judgment for plaintiffs reversed.)

Hammond v. Mulligan, 667 So.2d 854 (5th DCA 1996) (CONCURRING OPINION: Def. counsel improperly argued that opposing counsel was attempting to "fool" them by hiding relevant evidence from them, and that he and the plaintiff "should not be rewarded for not telling the truth." Comments were improper, inflammatory, highly prejudicial, and constitute fundamental error. [NOTE: case was reversed on other grounds so concurring opinion is dicta.])

Owens-Corning Fiberglas Corp. v. Morse, 653 So.2d 409 (3rd DCA 1995) (Derogatory comments accusing plaintiff's counsel of "trickery" and "hiding the ball," together with allegations that other trial counsel "prodded" plaintiff into giving answers and that his responses "had been told to him by his attorneys" constitute fundamental error which deprived plaintiff of a fair trial. Def. counsel attacked the integrity of counsel, accusing them of perpetrating a fraud upon the court and jury. [**Note**: although co-def. OCF did not make any improper closing argument, appellate court concluded that def.'s argument prejudiced jury to such extent that retrial as to both def.'s was warranted.] Order granting new trial affirmed)

Emerson Electric Co. v. Garcia, 623 So.2d 523 (3rd DCA 1993) (at several points during the trial, def. counsel was accused of "fraud, hiding evidence, putting up roadblocks to the discovery of relevant evidence, and picking and choosing the evidence it would produce in response to discovery demands. No pretrial discovery violation was ever established and, even if there had been evidence of a violation, an appropriate sanction was a matter for the court and not for the jury. Reversed. [Note: case is not clear about whether comments occurred during closing or questioning but same rule would apply.])

Pippin v. Latosynski, 622 So.2d 566 (1st DCA 1993) (It is improper for plaintiff's counsel to argue the amount of money defense has spent in defending the case and "damage control." Combined with other errors verdict for plaintiff reversed.)

George v. Mann, 622 So.2d 151 (3rd DCA 1993) (defense counsel's repeated reference to plaintiff's "lawsuit pain" and suggestion that she "set up" the entire lawsuit, implying that she was a liar, was perpetrating a fraud upon the court, had concealed evidence and violated discovery orders "fatally compromised" plaintiff's right to a fair and legitimate trial. Even if not

objected to, such error is reversible. Defense judgment reversed.)

Schubert v. Allstate Ins. Co., 603 So.2d 554 (5th DCA 1992) (It was improper for defense counsel to argue, among other improper arguments, that plaintiff's doctor "as he usually does, has found a permanency"; argue that the treating healthcare providers had ulterior, self-interested, motives in testifying and admonish the jury not to be deceived by them [bias??]; and attacked appellant's lawyer by saying he would do "anything to advance the cause." While some of the remarks alone may not have required reversal, [they were not objected to by plaintiff's counsel] the cumulative effect of the improper comments warrants reversal and the award of a new trial. Reversed.)

Riley v. Willis, 585 So.2d 1024 (5th DCA 1991) (improper for plaintiff's counsel to suggest to jury about def.: "here's a good man that has been trying to do the best he can to protect his side but also trying to stick to the truth as best he can and would really like to say up there, folks, I really wasn't paying attention to what I should have. I'm sorry. It's my fault. . . . Did you get that idea he'd really like to be doing that but his lawyers are keeping him from it? I would suggest to you that's a possibility." Reversed)

Sanchez v. Bengochea, 573 So.2d 992 (3rd DCA 1991) (defense counsel's display of three photographs during closing argument that were not admitted into evidence was not fundamental error where they had also been mistakenly shown to the jury during trial. Showing the photos a second time was merely cumulative. Comment by def.'s counsel that photos show exactly what was at the scene and that plaintiff was trying to keep the jury from seeing them were improper but not highly prejudicial or inflammatory. Plaintiff did not move for a mistrial. Court's curative instruction extinguished any harm. Affirmed.)

Sun Supermarket v. Fields, 568 So.2d 480 (3rd DCA 1990) (it was improper for plaintiff's counsel to repeatedly remark to jury that def. counsel had lied to the jury and committed a fraud upon the court and the jury. The conduct of plaintiff's counsel devastated any chance the def. might have had to secure a fair trial in front of a jury who had been told not to trust def.'s counsel. Reversed)

Hyster Co. v. Stephens, 560 So.2d 1334 (1st DCA 1990) (Improper arguments during which both counsel accused the other side of being involved in a "cover up" when viewed together with the entire closing argument, where not so prejudicial as to unduly influence the jury. Affirmed.)

Carnival Cruise Line v. Rosania, 546 So.2d 736 (3rd DCA 1989) (improper for counsel to suggest opposing expert was bought and urge jury to consider in verdict how defendant defended the case: "They want to hide the truth. . . . There are certain companies and organizations that look for a way to taint. . . . I think the evidence shows that they have taken the position that they're going to put roadblock after roadblock and say she wasn't fit to make this trip. . . . They have a doctor, the best money could buy. . . . In putting up roadblocks such as we've seen here through this entire trial, keep in mind when you make a verdict when you render a verdict, your

verdict has to be unanimous. And think about how Carnival Cruise Lines defended this particular case." Reversed)

Riggins v. Mariner Boat Works, Inc., 545 So.2d 430 (2nd DCA 1989) (it was improper for def. counsel to challenge plaintiff's counsel during closing argument to tell the jury why plaintiff's 3 witnesses did not testify live at trial but, instead, by deposition - arguing that it was "unfair" to the jurors because def. counsel could not cross-examine them to "test the truth." Argument was not a comment upon the evidence nor any inference thereon, although it would have been appropriate for def. counsel to point out that the jury would have a harder time determining the believability of the deposition witnesses because it could not observe their demeanor. Challenging his opponent to explain their absence, however, urged opposing counsel to improperly testify or to allude to matters which his opponent knew were unsupported by the evidence, both of which he was ethically prohibited from doing [when counsel objected to challenge, trial court ruled that he could argue the issue in rebuttal, thereby requiring him to explain that he had subpoenaed the witnesses and that he was legally permitted to use their depositions as though they had testified]. Given the trial court's improper ruling that may have led jury to believe that argument was appropriate and deposition testimony was suspect, judgment for def. reversed.)

Knepper v. Genstar Corp., 537 So.2d 619 (3rd DCA 1989) (Plaintiff's counsel stressing defendant's Canadian affiliations in a manner designed to incite the prejudice of the American jury, including specific admonishment to the jury to "send a message" to Canada and, shortly thereafter, to Montreal, combined with counsel's reference to the fact that defendants were protected by Canadian law firms responding to plaintiff's request for production, were inflammatory, prejudicial and reversible error.)

LaBerge v. Vancleave, 534 So.2d 1176 (5th DCA 1988) (Defense attorney's comment that plaintiffs' attorneys routinely ask 8 to 10 times "what a case is worth" were improper. However, jury's determination that there was no permanent injury obviates any necessity to retry the damage issue in the case, since it is determinative of the lawsuit. Affirmed).

27th Ave.Gulf Srv.Ctr. v. Smellie, 510 So.2d 996 (3rd DCA 1987) (Improper for counsel to characterize settlement agreement or Mary Carter agreement between plaintiff and co-defendant as, among other things, a conspiracy with implications that go beyond what occurs in this courtroom. Even though agreement was not a true Mary Carter agreement, improper characterization required reversal.)

Borden, Inc. v. Young, 479 So.2d 850 (3rd DCA 1985) ("They have done things that you can't possibly imagine and Eddie [plaintiff] is supposed to be able to go in and counteract this type of resources. It's absolutely and totally impossible. . . . They say but don't hold it against us. Don't hold it against Elsie. Well, I got to tell you something. Elsie isn't the sweet little cow you see on the milk can. Obviously, Elsie is a big corporation and they are there to do one thing, lay it off on somebody else . . . ." Plaintiff's argument alleged personal knowledge of nefarious activities

supposedly engaged in by the corporate defendant, on top of which allegations were untrue. Arguments of both plaintiff and defense were entirely improper and both counsel were referred to the Fla. Bar for disciplinary action. Error fundamental. Reversed despite absence of objection or motion for mistrial. [Note: pre-Murphy v. Intl. Robotics])

Hartford Accident & Indem. Co. v. Ocha, 472 So.2d 1338 (4th DCA 1985) (while it was improper for def. counsel to compare the case being tried to other lawsuits by arguing that "[a]ny plaintiff's attorney always asks for at least ten or fifteen times what they want, especially if they don't have any –" [argument interrupted by objection] comment was not so highly prejudicial as to require court to overturn trial court's determination that new trial was not warranted. Suggesting that all claimant's lawyers always ask for more than they expect to receive or that defense lawyers always say their clients are innocent or that the damages are minor, adds nothing to the orderly resolution of the factual disputes before the jury, and does considerable harm to the already impaired reputation of the legal profession. Counsel can, however, point out the lack of factual or legal support for an opposing party's contention, or the lack of reasonableness or rationality in an approach.)

Erie Ins. Co. v. Bushy, 394 So.2d 228 (5th DCA 1981) (it was improper for plaintiff's counsel to criticize insurance company def. for not having a corporate representative at defense table, rather than just its insured, to state that he had never seen such "subtle, hidden deception of any defendant," and to suggest bad faith on the part of the insurer where there was no basis for such an allegation. Together with other closing errors, plaintiff judgment reversed.)

Tate v. Gray, 292 So.2d 618 (2nd DCA 1974) (where def. counsel termed the acts of the occupants of the automobile as "criminal acts" and trial court instructed jury that their verdicts must be based on the evidence that had been received, new trial not warranted. "Counsel is entitled to a wide field of discretion in arguing his case. Unless closing argument is highly prejudicial and inflammatory, improper statements will not result in a mistrial, reversal or a new trial." Affirmed)

Grand Union Co. v. Devlin, 213 So.2d 488 (3rd DCA 1968) (It was improper for plaintiff's counsel to accuse defendant of destroying evidence when there was no evidence presented to that effect. Combined with other comments, the collective impact of the improper arguments resulted in inflaming and prejudicing the jury against the defendant. Reversed.)

Seaboard Air. RR v. Strickland Air, 88 So.2d 519 (Fla. 1956) (It was improper for plaintiff's counsel to argue that he could just see defendant's agents sitting with their feet up on their desk, laughing at plaintiff and his injuries and that "if you think, under the evidence, we are entitled to a verdict, I would like to wipe that smile off [his] face. . . . I don't suppose he has ever worked with his hands or his back; and I don't suppose he will have to work with his hand and his back. . . . When people get so careless they can sit up in a plush office in Norfolk, Virginia and laugh about a man 30 years old who has a permanent back injury, then things are coming to a said state of affairs. . . . I think in this case the Seaboard Airline has pulled every sly trick in the books."

Despite the absence of timely objections, case reversed due to the collective impact of the numerous improper arguments which were so extensive that their influence pervaded the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury. *[In Murphy, 766/1010, the Sup. Ct. receded from this case on the limited issue of the ability to seek appellate review for unobjected to improper arguments.]*)

Conner v. State Road Dep't of Fla., 66 So.2d 257 (Fla. 1953) (in condemnation proceeding, it was improper for counsel for the State to argue, inter alia, that "The testimony of the oil companies . . . is nothing but trickery to get money, . . ." and "These Jacksonville attorneys have come over here and tried to put something over on the Court." Comments were unwarranted and inexcusable. Reversed.)

III. Facts not in evidence

A. Generally

Vargas v. Gutierrez, 176 So.3d 315 (3rd DCA 2015) (in medical malpractice case, it was improper for plaintiff's counsel to tell jury that testifying physician had stated 6 year old, who had to have both kidneys removed, would have been completely cured with relatively minimal, non-invasive treatment if condition had been treated at the outset. Statement was completely fabricated as there was no testimony she could have been cured by that method, or even that she could have been cured at all. Error was significant because causation was a hotly contested issue. Error was exacerbated because plaintiff's counsel violated judge's "1 expert per specialty" ruling, calling 4 pathologists to testify by improperly categorizing them as treating physicians and using them to give expert opinions (while def complied with the court's ruling and was strictly limited to one expert). Further, plaintiff's counsel capitalized on the violation by arguing that 4 doctors – including treating physicians who didn't have an "axe to grind"— had agreed with his position; thereby categorizing the improperly presented expert testimony as unbiased treating physicians and comparing that to def's single expert doctor. [NOTE: court warned trial courts to be wary of litigants attempting to elicit expert testimony disguised as fact testimony from a treating physician. Reversed.)

Hguyen v. Wigley, 161 So.3d 486 (5th DCA 2014) (where plaintiff witness identified pictures taken 4 weeks after injury and testified that she took many more pictures than the ones plaintiff's counsel placed in evidence, it was not improper for def. counsel to argue: "Isn't it interesting, none of those were produced. Where are they? If she has them, why didn't we see them? Because those weren't the condition of her nails nine months later. Otherwise, you would have seen photographs nine months later." Witness' testimony about the other photographs made them part of the evidence. Order granting new trial reversed.)

Borden Dairy v. Kuhajda, 152 So.3d 763 (1st DCA 2014) (Trial court did not err by allowing

plaintiff's counsel to play def's video deposition during closing arguments. While it would have been error for counsel to have presented facts to the jury in closing that were not presented in the taking of evidence, def's videotaped deposition had been admitted into evidence and used during testimony to impeach him. Pursuant to FRCP 1.330(a)(2), the deposition of a party may be used by an adverse party for any purpose. Failure to permit the use of deposition testimony by a party when such use is expressly authorized pursuant to the rules would have been reversible as a matter of law. [Note: compare *Shoaf v. Geiling*, below])

Reffaie v. Wal-Mart Stores, 96 So.3d 1073 (4th DCA 2012) (It was error for defense counsel to argue that law firms transported their clients to plaintiff's medical expert, en masse, for procedures and that he would bus them "right back up for the purposes of litigation," or that the expert had any "business relationships" with personal injury law firms, where he had asked such questions on cross examination and the expert had answered in the negative or denied knowledge of any "bussing" of people to his office. Such improper comments were intended to, and did, impugn the doctor's credibility and objectivity in the eyes of the jurors. Defense counsel did not obtain the desired answers during questioning but continued in closing argument as though he had. Comments were objected to and were not harmless. Reversed for retrial on damages.)

Fasani, et al. v. Kowalski, 43 So.3d 805 (3rd DCA 2010) (in a premises liability action for injuries from a piece of granite that struck plaintiff when it fell from the wall of an elevator, where liability was admitted before trial, it was improper for plaintiff's counsel to argue that the accident happened because of def's "corporate greed and arrogance" in "wanting to put beauty over safety" as there was no evidence that defendant's installed the granite in a way to sacrifice safety in favor of aesthetics. Further counsel improperly told the jury that defendants tried to hide evidence at the scene by cleaning up the plaintiff's blood. Such argument was completely without basis as there was no evidence of tampering presented at trial (and notably, the condition of the elevator was not at issue as the defendants had admitted liability). Given the cumulative effect of numerous improper arguments, case reversed and remanded.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including, but not limited to, a statement in opening that plaintiff was "still sitting here in debt with over $80,000 in medical expenses" ("the general rule in Florida, especially in garden variety personal injury trials such as this one, is that no reference may be made to the wealth or poverty of a party during the course of the trial"); misrepresentations of evidence in opening and closing suggesting that plaintiff had lost a testicle by saying plaintiff "will be living for 50 years with half his manhood missing" and was "half a man right now," when evidence did not support such a claim at all and his own urologist found him to be fertile with 100% sperm production ("[C]ounsel both legally and ethically is prohibited from telling the jury he will prove something he cannot prove or that is doubtful."]; and suggesting the defense was suborning perjury and was involved in other improper actions by arguing: "We all make mistakes. But you make a bigger one when you don't admit it; and you make a bigger one to try to avoid responsibility. And you make a bigger one when you call in

witnesses that don't tell the truth. Anything to win. Anything to save the day." Finally, defense counsel wrapped up his summation with an improper argument for a comparative verdict, asking the jury to compare plaintiff's injury to a piece of property like a $10 million dollar Picasso painting and pointed out that if the case were about that painting, the jury would fill in the blank check for that amount on the spot. Reversed and remanded for new trial.)

Aills v. Boemi, 29 So.3d 1105 (Fla. 2010) (where postoperative negligence was neither pled nor "tried by consent" (through the admission of evidence and subsequent motion to amend the pleadings), and plaintiff's counsel argued postoperative negligence to the jury and told them that they could find for the plaintiff on three different grounds of negligence, including postoperative negligence, defense counsel's objection that there was no evidence in the record "that the postoperative care was negligent" and "that it would have made a difference" failed to properly preserve the argument made on appeal (that postoperative negligence was not plead) District court opinion quashed and case remanded to DCA for further proceedings).

Gold v. West Flagler Associates, Ltd., 997 So.2d 1129 (3rd DCA 2008) (in slip and fall case, it was improper for defense counsel to argue: "I've been doing this almost 30 years now, and it invariably happens somebody falls down somewhere. They don't know why they fell. They don't know for sure where they fell. The investigator and the photographer go back to the scene of the accident. They go around and take pictures of everything they can find that looks bad. … [S]o you can parade all these pictures of allegedly dangerous conditions in front of the jury in the hopes you'll find that, well, even though it didn't happen here, it must have been the same thing here." [Court did not specify errors, i.e.-attacking opposing party and counsel suggesting they were suborning perjury or manufacturing a claim, arguing facts not in evidence, expressing personal opinion, etc.] Error harmless after reviewing entire record. Affirmed)

SDG Dadeland Assoc. v. Anthony, 979 So.2d 997 (3rd DCA 2008) (it was improper for Plaintiff's counsel to repeatedly attack defendant and defense counsel, during opening and closing, by arguing that they had committed discovery violations and hidden and manufactured evidence (i.e., among others, "[T]o come in here and know there is a spill and walk over after an accident and put the cone down because you know you can't win the case if she falls on a spill that you didn't clean up that you didn't find … let's put the cone there and she tripped over there. … Their defense is in the toilet, and they're trying to save the day by trying to change his testimony"). Such arguments accused the defendant and it's counsel of perpetrating a fraud on the court and the jury. Moreover, the existence of alleged discovery violations was unsupported by any evidence, had been ordered excluded from closing argument by the court and, in any event, would have been a matter for the court, not the jury. *NOTE: beware of dicta about whether objection would have been necessary in light of Murphy case-766/1010.* Reversed.)

Lefave v. Bordonaro, 975 So.2d 470 (2nd DCA 2007) (where plaintiff's counsel successfully objected to defense counsel's request for an IME of plaintiff by a neurosurgeon and, as a result, def's neurosurgeon was limited to reviewing plaintiff's medical records, it was reversible error for plaintiff's counsel to then argue to the jury: "They didn't have her examined and they could

have. They have him review records. Why not get another neurosurgeon to come in and testify? Why? Were they afraid of what he was going to say?" Def. was ambushed. Plaintiff's counsel improperly suggested that def chose not to have plaintiff examined by a neurosurgeon because he knew the findings would not be favorable, when all along def's counsel wanted that examination and it was plaintiff's counsel who prevented such an examination from occurring. "[T]he trial judge should always grant a motion for a new trial when 'the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record.'" [citation omitted] Reversed.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (In suit by cruise line employee who claimed that ship doctor failed to provide adequate care, where employee's 25 years of smoking and failure to modify his lifestyle was raised by defense as possible cause for his stroke, it was improper for plaintiff's counsel to urge jury to speculate on type of diet (i.e. fatty, high-sodium) cruise line provided for employees such as Plaintiff where there was no such evidence presented. Reversed.)

Shoaf v. Geiling, 960 So.2d 41 (5th DCA 2007) (it was improper for Plaintiff's counsel to play a witness' videotape deposition during closing argument where that videotape had not been presented to the jury during the presentation of evidence. Although most of the content had been relayed to the jury in the form of impeachment, the video clip had never been shown to the jury and some portions in the clip had never been relayed to the jury at all. Moreover, allowing a party to play any videotape deposition testimony that has not previously been admitted into evidence in that form is error. A videotape not only provides the testimony but also the witness's demeanor, tone of voice and body language. In essence, plaintiff's counsel was allowed to introduce substantive evidence for the first time in closing argument. While counsel may comment on or read to the jury matter that forms part of the record at trial, counsel may not show the jury evidence which was not introduced at trial. Reversed.)

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel to malign insurer def. in UM action for not living up to its contractual obligation and to argue to jury that this was def's alleged claims handling practice and usual litigation tactics. Such facts were not in evidence and defs alleged practices in other cases were irrelevant to case at hand. Lastly, it was improper of plaintiff's counsel to tell the jury what his 14 year old son would have thought about insurer's defense. In addition to such facts not being in evidence as son had not testified, son's opinion would be completely irrelevant and such argument was simply a transparent attempt to curry favor with the jury. *NONETHELESS*, despite numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] **Note**: Generally, improper references to insurance matters in closing argument can be cured by an appropriate curative instruction. Affirmed.)

Sanchez v. Nerys, 954 So.2d 630 (3rd DCA 2007) (where there was no evidence in the record that doctor had destroyed any computer lists of attorneys who had retained him or that such documents ever existed on his computer, it was improper for plaintiff's counsel to argue to jury

that doctor had deliberately destroyed documents and that his testimony should be disregarded as a result. In fact, although not required to do so, doctor had kept a list of court appearances and produced that list for plaintiff's counsel prior to trial. An expert may not be compelled to compile non-existent documents. Therefore, Plaintiff's argument that he had destroyed documents that had never been created and that he was under no duty to compile was a prohibited attack on his character. Reversed.)

McPherson v. Phillips, M.D., 877 So.2d 755 (4th DCA 2004) (although it was improper for defense attorney to argue that plaintiff's counsel would be "delighted" if the jury awarded ten percent of what he requested in his closing argument, incomplete record on appeal prevents the determination that error required reversal. Affirmed.)

Bocher v. Glass, 874 So.2d 701 (1st DCA 2004) (*voir dire* - it was improper for plaintiff's counsel to ask the jury their views on owning a confederate flag and then tell the jury that the decedent had a confederate flag but that he was not a racist and that he had black friends and white friends. Also improper for plaintiff's counsel to tell the jury that the Florida Times Union publishes an article every 30 days about frivolous lawsuits. Reversed based on cumulative errors.)

GM v. McGee, et. al, 837 So.2d 1010 (4th DCA 2002) (In response to defense argument that plaintiff's expert was not even present when crash test was performed, it was improper for plaintiff's counsel to vouch for the credibility of co-counsel who was present at crash test: "John Uustal was there, they know he was at that test. You think John Uustal would do anything improper?" It is clear error for an atty. to ask the jury to believe him, or his co-counsel, based on his personal credibility. The jury is required to decide a case on the basis of the law and evidence, not on their affinity for or faith in a particular lawyer. Moreover, a statement of personal belief inevitably suggests that the lawyer has access to off-the-record information, and therefore invites the jury to decide the case on the basis of non-record evidence. Error harmless. Affirmed.)

Target Stores v. Detje, 833 So.2d 844 (4th DCA 2002) (in slip-and-fall case, where parties stipulated that "any violations of the building code will need not be determined" and parties agreed not to call any experts on building code violations, it was improper for plaintiff's counsel to argue "What makes this an exacerbating form of negligence is not only the fact that the condition existed, but they created it based on the evidence in this case without the permission, consent of any authority." Although comment did not violate agreement in stipulation, the argument suggested that jury base its decision on matters outside the evidence." Error harmless. [Note: see dissent for argument why error was not harmless] Affirmed.)

F.J.W. Enterprises Inc., v. Johnson, 746 So.2d 1145 (5th DCA 1999) (in suit over injuries resulting from scuffle and subsequent shooting, it was proper for def. counsel to ask why the plaintiff's wife, who was an eyewitness, did not testify if plaintiff was not the aggressor and did not have an open knife as alleged by the def. It was error, however, for plaintiff's counsel to

respond that def. counsel had deposed wife and knew that she would testify to the same facts as her husband. Reversed)

Sawczak v. Goldenberg, 710 So.2d 996 (4th DCA 1998) and on remand *Sawczak v. Goldenberg*, 781 So.2d 450 (4th DCA 2001) (While it was improper for defense counsel to make arguments that, among other things, referred to facts not in evidence and personally attacked the plaintiff's expert as "a hired gun who was asked to put the biggest numbers he could conceivably think of up on the board," plaintiff's counsel improperly objected and moved for mistrial on incorrect grounds of "Golden Rule". Having failed to assert the appropriate grounds in her objection, counsel failed to properly preserve the issue for appeal. Affirmed. [Subsequently, the Supreme Court ordered reconsideration in light of the opinion in *Murphy v. Int'l Robotics*, 766 So.2d 1010 (Fla. 2000), on remand, court held that plaintiff failed to demonstrate that the challenged arguments were "improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."] Affirmed)

Parker v. Hoppock, 695 So.2d 424 (4th DCA 1997) (in automobile accident case involving claim for personal injuries, it was improper for def. counsel to argue: "Our society is such that, for whatever reason, it seems that we've gotten to the point that every time something happens, it has to be somebody else's fault. Even criminals in courtrooms now, blaming the system, their parents, their upbringing, their schooling; it's somebody else's fault." Conjuring up distasteful images of society's ills, from frivolous lawsuits to the refusal of criminals to take responsibility for their own actions, was beyond the scope of permissible argument, especially considering the facts of the case. Reference to criminals and other societal problems had no place in this lawsuit. It is inappropriate to comment on what other lawyers have done and what has occurred in other lawsuits or with other corporations. Remarks alone would not warrant reversal but case was reversed on other grounds.)

Superior Indus. Int'l v. Faulk, 695 So.2d 376 (5th DCA 1997) (reference to imaginary "parade of horribles," [i.e. If this part had failed in a jet aircraft . . .; If this accident had resulted in a collision killing everyone in the other vehicle . . . .] was an improper argument based on facts not in evidence. Reversed based on cumulative effect of improper arguments despite the fact that there was not an objection to every improper argument).

Donaldson v. Cenac, 675 So.2d 228 (1st DCA 1996) (improper for def. counsel to argue to jury that "It's not uncommon for plaintiff's attorneys to put up some ridiculous number 50 times what they really do expect to get. . . ." [Case already reversed on other grounds so effect of argument was not discussed further])

Baptist Hosp. v. Rawson, 674 So.2d 777 (1st DCA 1996) (When considered together with other improper arguments, errors were so pervasive as to affect the fairness of the proceeding and will not be condoned. Improper for counsel to refer to facts not in evidence: "[T]hat doesn't happen in medical malpractice cases. Usually the doctor says I did everything I could, and you've got the whole community of doctors saying he was trying to do his best." Note: pre

Murphy v. Intl. Robotics] Reversed.)

Dutcher v. Allstate Ins. Co., 655 So.2d 1217 (4th DCA 1995) (it was improper for def. counsel to argue "I don't think there is a chiropractor that would ever stop someone from having more care. . . . Folks, asking a chiropractor to cut off another chiropractor is sort of like throwing kerosene on a fire." What other chiropractors have done, when not supported by evidence, is as improper as arguing what other lawyers have done, what has occurred in other law suits, and what other corporations have done. Direct references to them violate ethical rules against referring to facts not in evidence or asserting personal opinions [Rule 4-3.4(e)])

Martino v. Metropolitan Dade County, 655 So.2d 151 (3rd DCA 1995) (It was improper for defense counsel to argue, among other improprieties, that "this verdict will ring out through the State of Florida and it will say, hey, Dade County is really vulnerable in these negligent hiring cases . . .. I will tell you right now it was I, . . . who decided to try this lawsuit based upon my recommendation to Dade County. . . . I don't like Mr. Martino [plaintiff]. . . . We went back years before when he was bringing in $5,000, $6,000, $20,000.00 and then one shipment $336,000.00." Although there were no objections to these improper comments, the cumulative effect rises to the level of fundamental error because fundamental error occurs if the error extinguishes "a party's right to a fair trial, or the argument was so prejudicial as to be incapable of cure by rebuke or retraction." Reversed.)

Sacred Heart Hosp. v. Stone, 650 So.2d 676 (1st DCA 1995) (it was improper for plaintiff's counsel to bolster his clients credibility by telling the jury about matters outside the evidence. "Walking out of court yesterday, Billy [plaintiff] wants to know what are they going to do to Mr. Wiggins. For what? Well, he didn't tell the truth. He's so honest that he would believe that people who take an oath are going to tell the truth." Combined with other improper argument, plaintiff judgment reversed)

Walt Disney World Co. v. Blalock, 640 So.2d 1156 (5th DCA 1994) (in personal injury action involving child whose thumb was amputated following an injury on an amusement ride, it was improper for counsel to "evoke the following parade of imaginary horribles," commenting on facts that were not only not in evidence but completely fabricated: ". . . you know, why don't you consider the fact that maybe instead of Luke, a ten year old, that we have a three or four year old sitting in this seat and they had their little ears on, okay, that they bought at the Magic Kingdom and the ears fell off into the water and so they go to pick them up. . . . The boat, it takes their arm off or if they're leaning over it smashes them in the head? . . . I mean, you know, but for the grace of God, you know, we'd have some other catastrophic circumstance. . . ." Despite the absence of objection, error fundamental. Reversed. [Note: pre-Murphy v. Intl. Robotics])

Kaas v. Atlas Chemical Co., 623 So.2d 525 (3rd DCA 1993) ("The only defense witness on Andre Kass' impotency was Dr. Suarez who does hate me and who I did call a liar . . . ." Order granting new trial affirmed based primarily on other errors that were egregious.)

Emerson Electric Co. v. Garcia, 623 So.2d 523 (3rd DCA 1993) (at several points during the trial, def. counsel was accused of "fraud, hiding evidence, putting up roadblocks to the discovery of relevant evidence, and picking and choosing the evidence it would produce in response to discovery demands. No pretrial discovery violation was ever established and, even if there had been evidence of a violation, an appropriate sanction was a matter for the court and not for the jury. Reversed. [Note: case is not clear about whether comments occurred during closing or questioning but same rule would apply.])

Silva v. Nightingale, 619 So.2d 4 (5th DCA 1993) (comment that "it's well known that chiropractors will give a permanent impairment rating much quicker than any other physician," even if true, was not supported by competent evidence in the record. Reversed on these and other improper comments.)

Venning v. Roe, 616 So.2d 604 (2nd DCA 1993) (it was improper for def. counsel to indicate that plaintiff's medical expert was "nothing more than an unqualified doctor who prostitutes himself . . . for the benefit of lawyers," who is paid to perform a service by giving "magic testimony" for plaintiff's lawyer; that there was a "special relationship" between plaintiff's medical expert and plaintiff's lawyer, that plaintiff's counsel had presented "a work of fiction" which he "created and orchestrated" with the assistance of the medical expert and that he had personally been involved in seven cases where the two of them worked together. Comments essentially accused the expert of perjury and opposing counsel of unethically committing fraud upon the court. Reversed)

Schubert v. Allstate Ins. Co., 603 So.2d 554 (5th DCA 1992) (It was improper for defense counsel to argue that plaintiff's doctor "as he usually does, has found a permanency"; argue that the treating healthcare providers had ulterior, self-interested, motives in testifying and admonish the jury not to be deceived by them [bias??]; and attacked appellant's lawyer by saying he would do "anything to advance the cause." While some of the remarks alone may not have required reversal, [they were not objected to by plaintiff's counsel] the cumulative effect of the improper comments warrants reversal and the award of a new trial. Reversed.)

City Provisioners, Inc. v. Anderson, 578 So.2d 855 (5th DCA 1991) (improper for plaintiff's counsel to argue: "If you give him too much money, the judge can take away some of that money. It's to be--he can order remittitur or cut it down. If you don't give Mr. Anderson enough money, he can't order more money." In addition to being a misstatement on the law of additur and remittitur, this argument has no place in closing argument. Closing argument is an opportunity for counsel to discuss the evidence, not invite the jury to shift responsibility for their verdict to the judge. Reversed.)

Currie v. Palm Beach County, 578 So.2d 760 (4th DCA 1991) (where trial court sustained several objections to improper questions, it was error for plaintiff's counsel to comment to jurors on the same issue that he was precluded from pursuing during questioning. When combined with other errors including plaintiff counsel's repeated attempts to also raise subsequent remedial

measures during questioning, despite adverse rulings, trial court properly granted a new trial. Affirmed)

Sanchez v. Bengochea, 573 So.2d 992 (3rd DCA 1991) (defense counsel's display of three photographs during closing argument that were not admitted into evidence was not fundamental error where they had also been mistakenly shown to the jury during trial. Showing the photos a second time was merely cumulative. Comment by def.'s counsel that photos show exactly what was at the scene and that plaintiff was trying to keep the jury from seeing them were improper but not highly prejudicial or inflammatory. Plaintiff did not move for a mistrial. Court's curative instruction extinguished any harm. Affirmed.)

Darley v. Marquee Enterprises, Inc., 565 So.2d 715 (4th DCA 1990) (where there was no evidence in the record to show that the personal representative of the deceased knew of the existence of any blood sample of the deceased at a time when such sample could be tested for alcohol, no predicate was laid and it was improper for defense counsel to argue her failure to have an independent analysis performed. When combined with other errors, reversed in part and affirmed in part)

Carroll v. Dodsworth, 565 So.2d 346 (1st DCA 1990) (in automobile accident case, it was improper for defense counsel to interject matters outside of the record by commenting to the jury regarding his having obtained certain records concerning a previous accident and expressing his personal belief regarding the value of plaintiff's claim, especially after the trial court sustained an objection to a very similar comment. Reversed on other grounds so improper arguments were not considered further.)

Cardona v. Gutierrez, 562 So.2d 766 (4th DCA 1990) (in wrongful death action, it was improper for def. counsel to argue the benefits and support that decedent's child would derive from living with her aunt and uncle as those issues are not properly considered in determining loss of services and support of claimant's mother and argue facts not in evidence. Arguments were inflammatory and prejudicial. Reversed.)

Maercks v. Birchansky, 549 So.2d 199 (3rd DCA 1989) (it was improper for plaintiff's counsel to comment on the expense of past medical bills when there was no claim for past medical expenses as damages. It was also error for counsel to display to the jury a plastic bag filled with canceled checks when those checks had been excluded from evidence. Reversed.)

Carnival Cruise Line v. Rosania, 546 So.2d 736 (3rd DCA 1989) (improper for counsel to comment on what an uncalled witness would have said had he been called to testify or otherwise refer to facts not in evidence: "I didn't let Mr. Rosania testify. He didn't see the accident. All he would testify to is he and his wife had a good family life beforehand. . . . Mr. Rosania, I could have put him on the stand and said hey, I couldn't have sex with my wife or cook the way she could." Reversed based on cumulative errors.)

Riggins v. Mariner Boat Works, Inc., 545 So.2d 430 (2nd DCA 1989) (it was improper for def. counsel to challenge plaintiff's counsel during closing argument to tell the jury why plaintiff's 3 witnesses did not testify live at trial but, instead, by deposition - arguing that it was "unfair" to the jurors because def. counsel could not cross-examine them to "test the truth." Argument was not a comment upon the evidence nor any inference thereon, although it would have been appropriate for def. counsel to point out that the jury would have a harder time determining the believability of the deposition witnesses because it could not observe their demeanor. Challenging his opponent to explain their absence, however, urged opposing counsel to improperly testify or to allude to matters which his opponent knew were unsupported by the evidence, both of which he was ethically prohibited from doing [when counsel objected to challenge, trial court ruled that he could argue the issue in rebuttal, thereby requiring him to explain that he had subpoenaed the witnesses and that he was legally permitted to use their depositions as though they had testified]. Given the trial court's improper ruling that may have led jury to believe that argument was appropriate and deposition testimony was suspect, judgment for def. reversed.)

Goff v. 392208 Ontario, Ltd., 539 So.2d 1158 (3rd DCA 1989) (Improper for defense counsel to comment to jury that a VA hospital room "doesn't cost him anything" referring to the plaintiff who was a military veteran where the comment was not based on any evidence before the court. Improper comment was appropriately preserved when objection was overruled and was highly prejudicial and may have influenced the jury to return an inadequate amount of damages based upon its belief that plaintiff's future medical expenses would be extremely limited. Reversed)

LaBerge v. Vancleave, 534 So.2d 1176 (5th DCA 1988) (Defense attorney's comment that plaintiffs' attorneys routinely ask 8 to 10 times "what a case is worth" were improper. It was also improper for defense counsel to comment on plaintiff's first treating physician (who did not testify). However, comments with regard to first treating physician were not so outrageous and improper as to merit a new trial and jury's determination that there was no permanent injury obviates any necessity to retry the damage issue in the case, since it is determinative of the lawsuit).

Hickling v. Moore, 529 So.2d 1270 (4th DCA 1988) (plaintiff not entitled to mistrial for def. counsel's argument to jury as to economic impact a plaintiff's verdict would have on his client: "[Plaintiff's counsel] said he was going to ask you for a lot of money and my client should be responsible for it. She ought to go back to Martin Memorial Hospital and work everyday for the rest of her life." Def.'s motion for mistrial was denied but trial court instructed jury that they "shall disregard the last comment by [def. counsel]. In reaching a verdict you are not to consider whether or not the Defendant Moore has the financial ability to pay." In light of jury verdict finding no negligence by def. Moore appellate court concluded that comment about economic impact did not warrant a mistrial [jury could have found her negligent but also conclude that her negligence was not the legal cause of damage]. Affirmed)

Call v. Tirone, 522 So.2d 533 (3rd DCA 1988) (in medical malpractice case where claim was

that def.'s failure to give patient blood-thinning drug Heparin was the cause of fatal blood clot, def. counsel asked plaintiff's expert whether he was familiar with an article entitled "Failure of Low Dose Heparin To Prevent Significant Thromboembolic Complications in High Risk Surgical Patients." When Dr. said he was not familiar with it, counsel stated that he did not have a copy of the article but continued to point out in cross, over objection and without authenticating the alleged article or establishing it to be authoritative, that "it's pretty clear to me it says 'failure of.'" On other occasions and over objection, counsel again, by carefully wording his questions to plaintiff's expert, put details of an alleged study in front of the jury without laying a proper predicate for the questions. In closing, counsel then improperly argued facts not in evidence by arguing that the Dr. was not satisfied with his [def. counsel's] study and wanted to see a study of a lot of people and that "Ladies and Gentlemen, I had such an article. I had such a study of over 3,000 patients and I stood right here." Reversed.)

Mein, Joest & Hayes v. Weiss, 516 So.2d 299 (1st DCA 1987) (In a lawsuit against a physician claiming that the negligent use of forceps during a delivery resulted in a severe urethrovaginal laceration in the mother, it was error for defense counsel, on two occasions to comment that had the obstetrician not intervened with the forceps' rotations and the baby had suffered brain damage, plaintiffs would be in court with a healthy mother and a brain damaged baby where there was no evidence supporting counsel's "brain damaged baby" and "litigious plaintiffs" arguments. Although the trial court gave a curative instruction on each occasion, advising the jury that there was no evidence of the baby ever being in danger of suffering brain damage had the forceps rotation not been performed, it was not an abuse of discretion for the trial court to conclude that the two defense arguments improperly influenced the jury. Order granting new trial affirmed.)

American Auto. Ass'n. v. Tehrani, 508 So.2d 365 (1st DCA 1987) (improper for plaintiff's counsel to argue matters which had previously been stricken. Although reference to stricken testimony did not warrant a mistrial, trial court erred in refusing to give a cautionary instruction to the jury to disregard the portion of the argument based on the stricken testimony.)

S.H. Inv. & Dev. Corp. v. Kincaid, 495 So.2d 768 (5th DCA 1986) (it was improper for plaintiff's counsel argue that he had never seen so much evidence and such strong "fingers of guilt" pointing to the culpable parties [facts outside the evidence/personal opinion]. When combined with other improper arguments, Reversed.)

Bloch v. Addis, 493 So.2d 539 (3rd DCA 1986) (Improper for plaintiff's counsel to comment that defense doctor wrote his examination notes in the hallway immediately before taking the stand and then testified that he wrote them at the time of the examination where there was no evidence whatsoever to support that allegation. Also improper for plaintiff's counsel to testify in closing: "I know what I said to him on the telephone. And I know and it's clear from the evidence that he never heard of the carpal tunnel syndrome until he got the EMG. When combined with other improper comments, error was fundamental. Reversed. [Note: pre-Murphy v. Intl. Robotics])

Bertoglio v. Amer. S & L, 491 So.2d 1216 (3rd DCA 1986) (Improper for defense counsel to comment that he was "a shareholder in American Savings [defendant]". However, where no objection was made to improper argument, no dissatisfaction was expressed with trial courts *sua sponte* instruction that jury disregard the statement and comment did not rise to level that created an unfair trial, reversal was not warranted. Affirmed)

Tito v. Potashnick, 488 So.2d 100 (4th DCA 1986) (in response to plaintiff's argument in wrongful death case about impact on child of having lost his father, it was error for def. counsel to argue that child's mother was certainly going to remarry because she was "an attractive young lady" and that therefore "this boy is going to have a father" as there was not one scintilla of evidence that the mother was going to ever remarry and that could not be presumed. Further, even if she married, there was no evidence that the new husband would adopt the child or obligate himself to the child's support. Comment was not permissible response to plaintiff's argument. Reversed.)

Wasden v. Seaboard Coast Line RR., 474 So.2d 825 (2nd DCA 1985) (plaintiff counsel's comment: "I can't tell you and I won't tell you what others have done, but I will tell you that this verdict should be in the range of $1,750,000," was not improper. Nothing in the Code or case law prohibits an attorney from suggesting to the jury the size of a damage award, and counsel's prefacing comment that he could not tell the jury about other awards must be taken at face value [????] and not as an underhanded attempt to prejudice the jury. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Hartford Accident & Indem. Co. v. Ocha, 472 So.2d 1338 (4th DCA 1985) (while it was improper for def. counsel to compare the case being tried to other lawsuits by arguing that "[a]ny plaintiff's attorney always asks for at least ten or fifteen times what they want, especially if they don't have any –" [argument interrupted by objection] comment was not so highly prejudicial as to require court to overturn trial court's determination that new trial was not warranted. Suggesting that all claimant's lawyers always ask for more than they expect to receive or that defense lawyers always say their clients are innocent or that the damages are minor, adds nothing to the orderly resolution of the factual disputes before the jury, and does considerable harm to the already impaired reputation of the legal profession. Counsel can, however, point out the lack of factual or legal support for an opposing party's contention, or the lack of reasonableness or rationality in an approach.)

Louisiana-Pacific v. Mims, 453 So.2d 211 (1st DCA 1984) (The use of a chart during closing argument is not a matter of right but is discretionary with the judge. But if allowed, when the argument is concluded the chart must be promptly removed from the jury's observation and must not be sent to the jury room. Where chart was sent back to jury as a "court exhibit," plaintiff's verdict reversed.)

Conklin Shows v. Clementi, 448 So.2d 588 (5th DCA 1984) (where trial court directed a

verdict for plaintiff on the issue of his lack of contributory negligence it was not error for trial court to deny motion for mistrial based on plaintiff's counsel's informing jury that they would not hear further about the issue of the plaintiff's negligence because the trial court had ruled as a matter of law that the plaintiff was not negligent. Affirmed.)

Honda Motor Co. v. Marcus, 440 So.2d 373 (3rd DCA 1983) (Plaintiff counsel's comment that "maybe if she's got that ten million dollars, she can help do the research" was not fundamental error [not objected to] where jury verdict was for 3 million dollars and amount was supported by the evidence. Therefore court cannot assume that jury verdict reflects improper element of damages [research] which jury could not properly consider.)

Sosa v. Knight-Ridder Newspapers, 435 So.2d 821 (Fla. 1983) (in wrongful death action against newspaper arising from an accident which caused the death of news carrier, it was error for trial court to allow def. to argue to jury in closing that plaintiff had received workman's compensation benefits [facts not in evidence] and also argue that jury needed to know that fact in determining whether decedent was covered by workman's compensation and therefore was not entitled to sue. Statements about compensation benefits were not supported by evidence and could have improperly influenced the jury. Since the facts are not in dispute, trial court should decide whether decedent was an employee or independent contractor and whether he was working within the scope of his duties at the time of the accident as a matter of law. Appellate court mandate reversing order granting new trial reversed and case remanded for new trial [court did not decide whether trial court was correct in its decision that decedent was not working within scope of duties because issue was not briefed.])

Sears Roebuck & Co. v. Jackson, 433 So.2d 1319 (3rd DCA 1983) (it was improper for def. counsel to comment to jury, in opening statement, that plaintiff's had previously taken a voluntary dismissal of case on eve of trial when trial court refused to allow the addition of a last minute "mysterious" witness. When def. counsel later asked the court to take judicial notice of the voluntary dismissal and to so instruct the jury, the trial court on its own responded: "that has absolutely no bearing on this case and, members of the jury, disregard what he just said. Scratch it. Ignore it. It's completely irrelevant and immaterial to what we're here for." Plaintiff, apparently satisfied with the instruction, did not move for a mistrial. Error not fundamental. Affirmed. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Ashby v. Rendezvous Farms, 381 So.2d 755 (5th DCA 1980) (in action brought against fire insurer by insured seeking to recover damages caused by a fire, it was improper for insured's counsel to comment to the jury that no one had been arrested or convicted as a result of the fire. Error was prejudicial and trial court erred in not granting a new trial. Reversed.)

Walker v. City of Miami, 337 So.2d 1002 (3rd DCA 1976) (it was improper for plaintiff's counsel to urge a liberal verdict because of the value of a human life by referring to the earning capacity of certain persons in professional sports, and for def. counsel to respond by referring to

the amounts paid under workman's compensation law and an average insurance contract. Both arguments were outside the scope of the evidence. However, in view of the latitude allowed in argument and the court's instruction that such arguments were not evidence, not grounds for reversal. Affirmed)

Decks, Inc. v. Nunez, 299 So.2d 165 (2nd DCA 1974) (it was improper for plaintiff's counsel, in discussing amount of damages they should award, to inform the jury that he was "not here representing him for nothing" because atty's fees were not recoverable damages in the case. Comment was not invited by def. counsel's argument as to possible investment of $100,000 award and possible interest gained from such investment. Error was harmless. Affirmed.)

Albertson v. Stark, 294 So.2d 698 (4th DCA 1974) (Despite fact that plaintiff's counsel moved to strike and obtain curative instruction but failed to move for mistrial, new trial warranted where defense counsel commented to the jury that defendant was not cited in accident, especially where comment appeared intentional. Reversed)

Harrold v. Schluep, 264 So.2d 431 (4th DCA 1972) (Closing argument is restricted to the evidence and issues presented and the inferences which can be drawn from the evidence. It was improper for trial court to allow party to read complaint during closing argument where complaint was not in evidence and, in all likelihood, could not be introduced in evidence [court distinguished between pleadings in instant case and admissions in pleadings in earlier case that may have some impeachment value.])

Grand Union Co. v. Devlin, 213 So.2d 488 (3rd DCA 1968) (It was improper for plaintiff's counsel to accuse defendant of destroying evidence when there was no evidence presented to that effect. Objection to multiple improper arguments was sustained and the collective impact of the improper arguments resulted in inflaming and prejudicing the jury against the defendant. Reversed.)

Carlton v. Johns, 194 So.2d 670 (4th DCA 1967) (unclear whether it was improper for counsel to argue that witness had motive to lie because of fear of going to "State Penitentiary" for manslaughter in automobile accident case where entire transcript was not provided to court on appeal and it is therefore possible that such argument was a fair inference to be drawn from the evidence. Court also noted that def. counsel did not object to the statement until it was raised a second time. Reversed on other grounds.)

Payne v. Alvarez, 156 So.2d 659 (1st DCA 1963) (Despite an objection by defense counsel to the use of a per diem calculation for pain and suffering based on a mathematical formula involving numbers not adduced in evidence but proposed by plaintiff's counsel during closing, the issue of whether this type of argument should be permitted rests in the sound judicial discretion of the trial judge, and will not be reversed absent an abuse of discretion. Affirmed.)

Perdue v. Watson, 144 So.2d 840 (2nd DCA 1962) (Where there was evidence in the record

that the plaintiff suffered pain at all times, that there was never a period during which he did not feel pain and that his injury was permanent, it was proper for the trial court to allow plaintiff's counsel to make a "per diem argument" using a mathematical formula to determine the monetary value of plaintiff's injuries and decision on whether or not to allow such argument rests within the sound discretion of the trial judge. Affirmed. [Dissent argues that use of the per diem argument inevitably brings into play a Golden Rule Argument])

Ratner v. Arrington, 111 So.2d 82 (3rd DCA 1959) (The use of a blackboard or chart in aid of counsel's argument to the jury is permissible, at the court's discretion, when the use thereof is limited so as not to prejudice an opposing party. A distinction should be recognized between a chart that is in evidence -- such as for disclosing objects or places -- which may be exhibited throughout the trial, and a chart which is not in evidence but is used to illustrate and aid in conveying an argument to the jury, which should be withdrawn from the jury's observation at the conclusion of the argument in which it is employed and which should refer only to matters which are in evidence or reasonable inferences drawn therefrom. Suggestion by counsel of figure for "pain and suffering" was not error as such damages do not have a fixed market price.)

Westbrook v. Bacskai, 103 So.2d 241 (3rd DCA 1958) (trial court properly prevented plaintiff from arguing permanent injuries to the jury where there were successive injuries and there was no evidence from which reasonable persons could have assigned permanent injury to the subject accident. Arguing facts not in evidence or not warranted from the evidence is not permitted. A jury verdict finding permanent injury would have been speculation. Affirmed)

Tampa Transit Lines v. Corbin, 62 So.2d 10 (Fla. 1953) (comment by plaintiff's counsel that he had known plaintiff for many years and that she was a well and healthy woman up until the time of the accident amounted to testimony given by such attorney, out of order, without being under oath. Reversed on these and other improper comments)

B. Comments concerning "empty chair" or prior settlement with co-defendant

Vucinich v. Ross, et. al, 893 So.2d 690 (5th DCA 2005) (where plaintiff sued urgent care physician and radiologist but settled with urgent care physician before trial, it was improper for defense attorney to argue to jury: "It's not an issue of you apportioning damages whether you care for or don't care for what Dr. Baringer [the urgent care physician] did; whether you draw any conclusions or don't draw any conclusions from his absence here or that of his partner. That's not for your consideration. No portion of the verdict will ever be paid by them." Section 768.041(3), Florida Statutes, prohibits mentioning to the jury about releases, covenants not to sue and dismissals of defendants by the court. Defense counsel's statement suggested to the jury that the urgent care physician had settled. Order granting new trial affirmed.)

Ricks v. Loyola, 822 So.2d 502 (Fla. 2002) (It was improper for defense counsel to comment during *opening statement* that jury would hear of alleged negligence by other health providers in

addition to Dr./Defendant but "[i]t will not be something that you need to consider as to why they aren't in this courtroom, although you might want to ask yourself that question. I assure you, though, that this Miss Ricks and her attorney aren't going to tell you why they aren't here." Section 768.941(3) of the Florida Statutes (2000) provides that releases, covenants not to sue, and dismissals of defendants by order of court "shall not be made known to the jury." Although comment did not reference any of the prohibited categories contained in statute, jurors logically could have interpreted counsel's statement to imply that a settlement had been reached with others involved in the case. Further, the statement imposed an improper burden upon plaintiffs to explain why the others were not present in the courtroom and parties to the suit. Reversing DCA opinion which reversed trial court's order granting new trial.)

Muhammad v. Toys "R" Us, Inc., 668 So.2d 254 (1st DCA 1996) (it is improper for a party to disclose to the jury that a settlement has been made with an "empty chair." See Section 768.041(3). Here error was even more egregious because counsel who stated "they may have already settled with the manufacturer" knew there had been no such settlement. [Note: although comment in this case was made during voir dire, prohibition applies in closing as well]. Court's curative instruction not only failed to cure but may have served to further mislead the jury. Reversed)

Samick Corp. v. Jackson, 645 So.2d 1095 (4th DCA 1994) (It was improper for defense counsel to mention that a witness had previously been sued by the plaintiff in the same case and settled prior to trial in the same case, purportedly so that the jury could consider whether the witness had an interest in the outcome of the case, [violation of section 768.041(3) precluding disclosing to a jury the fact of a release, covenant not to sue or dismissal of a defendant]. Reversed and remanded for trial court to consider whether the error was harmless.)

Black v. Montgomery Elevator Co., 581 So.2d 624 (5th DCA 1991) (While it is not per se impermissible to point to an empty chair and argue that the non-party is responsible for the plaintiff's injuries, Section 768.041(3) of the Florida Statutes (1991) prohibits informing the jury that a settlement has been made with the "empty chair," that the "empty chair" was once the defendant in the case, or that there has been a prior action against the "empty chair." Defense counsel's argument that Florida Law made an elevator owner responsible for the safe operation and proper maintenance of the elevator was not an improper "empty chair" argument. In any event, the comment was not objected to and was not fundamental error.)

Hough v. Huffman, 555 So.2d 942 (5th DCA 1990) (Defense counsel's brief reference in opening and closing argument to the absence of a person who had previously been dismissed as a party from the law suit, even if properly preserved, did not prejudice the fairness of the trial.)

Ed Ricke & Sons v. Green, 468 So.2d 908 (Fla. 1985) (While it may be proper for a party to make a traditional empty chair argument stating that the "empty chair" is the one who is responsible for the damages, it is inappropriate to inform the jury that there has been a prior suit with the "empty chair." Error was highly prejudicial and improper. Appellate court order

reversing the judgment is affirmed.)

Henry v. Beacon Ambulance Serv., Inc., 424 So.2d 914 (4th DCA 1982) (it was improper for def. counsel to disclose to jury that plaintiff had previously settled his claim with co-defendant. Although def. claimed that Plaintiff had "opened the door" by commenting that co-defendant "had an ax to grind" and def. was simply explaining that co-def. did not have an ax to grind because the claim against him was settled, settlement may have removed financial concerns but not any bias resulting from the accident or lawsuit and def. counsel's comment was made after being expressly admonished by the trial court not to pursue the settlement during trial. Although plaintiff failed to obtain a specific ruling on motion for mistrial, court finds that curative instruction was insufficient to cure. Reversed.)

C. Comments on witness or party's failure to testify

Griffin v. Ellis Aluminum & Screen, Inc., 30 So.3d 714 (3rd DCA 2010) (*opening statement*- although it was improper for defense counsel to mention in opening statement that plaintiff was not going to call his wife as a witness, error was harmless and would be deemed harmless even if plaintiff had properly proffered on appeal that witness was equally available to both sides. Moreover, plaintiff made the same argument during trial by commenting on def's failure to call installer of handrail that allegedly failed and caused plaintiff's injury. Affirmed.)

Community Asphalt Corp. v. Bassols, 13 So.3d 538 (3rd DCA 2009) (in motorcycle accident case where plaintiff's sister testified about negotiations that plaintiff had with Red Bull for a 1.4 million dollar marketing contract, it was not improper for defense counsel to argue during closing "Mr. Bassols admitted on the stand that at no time before the day that he heard his sister testify did he know about a $1.4 million deal with Red Bull. … He let his sister handle all of that stuff. … You should expect more evidence than his sister coming into court. You should expect something from Red Bull." Comment was not a reference to failure to call a witness that may be equally available to both parties. After objection was overruled, counsel continued "you should expect a contract." A party is allowed to comment on the lack of evidence supporting the opposing party's position. It was permissible for the defense to point out that plaintiff had not produced a contract. Defense counsel's next comments, "You should expect perhaps one of his coaches to come in here. You should expect someone to come in and talk about his true opportunities to make the Olympics, not just [Plaintiff's] word for it or his sister's word for it," [even if improper] were not objected to and were neither highly prejudicial nor inflammatory so as to warrant a mistrial. Order granting new trial reversed and jury verdict reinstated.)

Barkett et. al v. Gomez, 908 So.2d 1084 (3rd DCA 2005) (*dicta*- It is improper to comment upon one party's failure to call a witness when the witness is equally available to both parties. Although it was improper in a motor vehicle/pedestrian accident case for defense counsel to comment on the fact that the passenger in the car did not testify, where such passenger was equally available to both sides, error was not properly preserved because after the trial court

sustained defense counsel's objection to the improper comment, defense counsel failed to request a curative instruction or move for a mistrial. Reversed on other grounds.)

Bulkmatic Transport Co. v. Taylor, 860 So.2d 436 (1st DCA 2003) (Trial court erred in granting a new trial for defense counsel's unobjected-to comment during closing argument on plaintiff's failure to call certain witnesses and the resulting inability of the jury to evaluate the credibility of those uncalled witnesses, in violation of trial court's order in limine precluding such comment, where new trial order did not find argument to be incurable or to have so impaired the fairness of the trial that the public's interest in our system of justice required a new trial [prong 3 and 4 as set forth in Murphy v. Int'l Robotics Systems, 766/1010].

Wall v. Costco Wholesale Corp., 857 So.2d 975 (3rd DCA 2003) (it was improper for defense counsel in personal injury action to comment on the fact that plaintiff's daughter did not testify. Counsel was aware that daughter was estranged from the plaintiffs and had disappeared but suggested that she did not testify because she would have indicated that plaintiff/wife was at fault for the accident. Reversed.)

F.P.L. v. Goldberg, 856 So.2d 1011 (3rd DCA 2002) (*On rehearing En Banc*- Comment by plaintiff's counsel that uncalled witness (employee of def. who the evidence showed had been present) was not called to testify by opposing counsel because "he knows the truth. They never produced him for deposition" did not accuse def. of hiding evidence or discovery misconduct. [???] Plaintiff's counsel was improperly arguing the missing witness inference without first establishing that the witness was available to be called. However, def. counsel objected on the incorrect grounds [facts not in evidence] and error was not fundamental. Affirmed and remanded for remittitur. *[Decision quashed and remanded on other grounds-899/1105]*)

Target Stores v. Detje, 833 So.2d 844 (4th DCA 2002) (Rule which permits one side to urge the jury to draw a negative inference upon the other party's failure to testify did not warrant allowing counsel to tell the jury that witness "admitted that there were at least four photos attached to the incident report. What do they put into evidence? ... One out of four is not bad. I wonder what the other three look like." Counsel had seen the other three photos in discovery and knew that they were cumulative to the photograph in evidence and negative inference upon a party's failure to testify is not warranted when there has been a sufficient explanation for such absence or failure to testify [including a finding that it would be cumulative, see Fine below]. Error harmless where def. counsel was able to respond effectively by pointing out that he could not be hiding anything because plaintiff's counsel had seen the photographs. [Note: see dissent for argument why error was not harmless] Affirmed)

F.J.W. Enterprises Inc., v. Johnson, 746 So.2d 1145 (5th DCA 1999) (in suit over injuries resulting from scuffle and subsequent shooting, it was proper for def. counsel to ask why the plaintiff's wife, who was an eyewitness, did not testify if plaintiff was not the aggressor and did not have an open knife as alleged by the def. It was error, however, for plaintiff's counsel to respond that def. counsel had deposed wife and knew that she would testify to the same facts as

her husband. Reversed)

Lowder v. Economic Opportunity Family Health Ctr., Inc., 680 So.2d 1133 (3rd DCA 1996) (in medical malpractice case, it was proper for trial court to preclude plaintiff from arguing to jury that it should draw adverse inference from def.'s failure to call physician who treated plaintiff as a witness where doctor was no longer employed by defendant medical center, was equally available to both sides and her testimony would have been cumulative to the testimony of her supervisor who did testify. ***RULE:*** *In order to comment on a party's failure to call a witness to testify, it must first be shown that the witness is peculiarly within the control of that party and the testimony of the witness would elucidate the transaction.* While an employee is normally within a party's control, the doctor was a former employee and nothing rendered her peculiarly within the def.'s power to produce. She was equally available to both parties by subpoena. In addition, cumulative testimony does not warrant the imposition of the negative inference for a witnesses failure to testify. Affirmed)

Fino v. Nodine, 646 So.2d 746 (4th DCA 1994) (in civil case, trial court erred in preventing counsel from commenting to jury about party's failure to testify where the party was available to be called by either side. The failure of a party to appear and testify as to material facts within his knowledge creates an inference that he refrained from appearing or testifying because the truth, if made to appear, would not aid his contention. While counsel may be required to show that a witness is available before commenting on his or her failure to testify, because a witness may not have a great interest in the case, a party's failure to testify, absent a showing of unavailability, may be raised as a negative inference because parties presumably have the most knowledge of the circumstances and the most interest in how the case is resolved. The unfavorable inference which may be drawn from the failure of a party to testify is not warranted *when there has been a sufficient explanation for such absence or failure to testify.* Among other reasons which might be considered as sufficient explanation would be a showing that *the party has no personal knowledge or memory of the facts* in issue, or a showing that any *testimony of such party would be purely cumulative* of that already established by other competent evidence. Whether appellee's live testimony would be cumulative would be determined by the trial court. Reversed on these and other grounds.)

Cuozzo v. Ronan & Kunzl, 453 So.2d 902 (4th DCA 1984) (where plaintiff did not testify that he had been examined at appellee's insistence, or otherwise introduce evidence as a predicate, it was proper for trial court to prevent plaintiff's counsel from commenting on def.'s failure to call an independent medical expert. Affirmed)

Linehan v. Everett, 338 So.2d 1294 (1st DCA 1976) (it was error for trial court to prevent plaintiff's counsel from commenting on def.'s failure to call doctor who examined plaintiff at def.'s request where plaintiff testified as to the examination by doctor. Counsel may comment on the failure of def. to call such doctor as a witness and may have the jury draw such inference as they might deem appropriate. Reversed.)

IV. Comments on insurance or lack of prior accidents

State Farm Mut. Auto. Ins. Co. v. Gold, 41 Fla. L. Weekly D257 (4th DCA 2016) (in uninsured motorist case, it was improper for plaintiff's counsel to comment on how plaintiff purchased an uninsured motorist policy "so this wouldn't happen" and that *"State Farm has denied his claim and now he's facing down a stack of medical bills. And he's been carrying this burden with him until today and State Farm to this day, to this minute has never taken responsibility for the damages in the crash and for the injuries that are covered under this policy, and they're not going to do it until you force them to do it with your verdict."* Error was exacerbated by powerpoint which displayed, among other things, *"Michael Gold has been carrying a debt. State Farm promised to pay stacks of medical bills. Paying the price for someone else's mistake State Farm refuses to take responsibility for the debt it owes to Mr. Gold, forcing us to bring them to trial,"* and *"Gold has done the right thing all along. Has the Defendant?"* Comment, powerpoint and questionable judge's instruction improperly focused the jury's attention on def's liability and culpability rather than on the issue of damages, and painted a clear picture in the jury's minds of a company breaking an obligation rather than a company simply attempting to determine actual damages attributable to the accident. [NOTE: this DCA has also interpreted similar comments as a suggestion that jury "punish" def.—See *Marotta*] Reversed.)

Carvajal v. Penland, 120 So.3d 6 (2d DCA 2013) (in auto accident case where P was suing D and her own uninsured motorist coverage carrier, and where only issues were causation and damages, it was improper for P's counsel to argue that P had paid her premiums so she would be covered in a case like this but carrier was not living up to its responsibilities and putting P under a microscope to minimize their exposure for injuries caused in the crash. '[A]rgument that [insurer] was shirking its responsibilities or otherwise acting in bad faith shifted the focus from injuries and damages to claims handling and bad faith, neither of which were issues at trial … and 'improperly suggested that [insurer] should be punished for contesting damages at trial and that its defense of the claim in court was improper.'" Reversed.)

Cascanet v. Allen, 83 So.3d 759 (5th DCA 2011) (in auto accident case where 18 year old def rear-ended plaintiff, lifting and dropping his car and causing 2 herniated disks and the undisputed need for future surgery, it was improper for defense counsel to argue, with his very young client sitting alone at the defense table, that there was "[n]o need to burden my client with some hundreds of thousands of dollars, if not $1 million worth of money they're asking for here. Is it fair that she be burdened . . . . we think it's fair to burden $23,000, whatever the medical bills were, that's a fair burden to be placed here. … But what it looks -- the term come to mind is, kind of an old football term, "piling on…." This was nothing more than an attempt to conjure sympathy for the young defendant to reduce the damage award by improperly asking the jury to weigh the effect a substantial award would have on her while ignoring her absent father, who was also a defendant, and ignoring the fact that there was insurance coverage. Courts have

consistently prohibited a party from currying sympathy from the jury for a favorable verdict and asking a jury to consider the economic status of either party or the potential impact a substantial verdict would have on a defendant. Stratagem worked when jury awarded $23,764.57, which represented his past medical bills and lost wages. It awarded no future economic or non-economic damages and found that Plaintiff had not sustained a permanent injury, despite uncontroverted evidence of the two herniated disks and that plaintiff will require future surgeries and cannot continue in his prior occupation. Reversed when combined with error of allowing IME to testify concerning opinions not in his report [NOTE: no mention of whether issue of improper argument was preserved].)

Griffin v. Ellis Aluminum & Screen, Inc., 30 So.3d 714 (3rd DCA 2010) (*opening statement*- in suit against def for negligently installing a handrail in plaintiff's home, plaintiff argues it was improper for def counsel to comment, in opening statement, that def had never been sued before. "[A]nd he's suing the respected businessman Bill Ellis and his wife Joyce whose railing never had a failure of this nature except for this claim." Generally, it is not proper to allow testimony of no prior accidents. Although this comment is susceptible of the interpretation that def has never been sued for a railing failure, it is also reasonable to interpret the statement to mean, in context, that there were no complaints from the plaintiffs for the ten months between installation and the plaintiff's fall. The comment, if error, was harmless. Affirmed.)

Hollenbeck v. Hooks, 993 So.2d 50 (1st DCA 2008) (*voir dire* - defense counsel's comment to venire: "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate" was improper and misleading where counsel was retained by def's insurer ("a big conglomerate") and comment served to suggest to jury that def would be individually responsible to pay any damages, an implication that could not be refuted at trial since the jury is not allowed to hear about the existence of insurance. Reversed.)

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel to malign insurer def. in UM action for not living up to its contractual obligation to insured and leaving him "out hanging." Pre-trial order limited such comment to establishing the existence of the business relationship and prohibited counsel from such emotional argument. Also improper for plaintiff's counsel to argue to jury that this was def's alleged claims handling practice and usual litigation tactics. Such facts were not in evidence and defs alleged practices in other cases were irrelevant to case at hand. Improper to claim def was breaching it's contract with insured since UM action is based on existing contract but is a tort action in which def stands in the shoes of the uninsured driver. Moreover, attacking defs for aggressively defending the lawsuit was further improper since def had the right to raise any and all defenses that other driver could have raised. *NONETHELESS*, despite numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] **Note**: Generally, improper references to insurance matters in closing argument can be cured by an appropriate curative instruction. Affirmed.)

Melara v. Cicione, 712 So.2d 429 (3rd DCA 1998) (*not a closing argument case* - "The long-

standing purpose of excluding improper references of a defendant's insurance coverage in civil proceedings is to preclude jurors from affixing liability where none otherwise exists or to arrive at excessive amounts through sympathy for the injured party with the thought that the burden would not have to be borne by the defendant." However, an improper reference to insurance matters in a civil proceeding is not fundamental error requiring per se reversal. Affirmed.)

South Motor Co. v. Accountable Constr. Co., 707 So.2d 909 (3rd DCA 1998) (Unless the existence or amount of insurance coverage has direct relevancy to a matter at issue, it is not a proper matter for the jury's consideration of liability and damages because it may influence the jury to find liability where none exists or to award an excessive amount out of sympathy for one party and the knowledge that the other party will not have to pay. The improper admission of such evidence does not per se warrant a mistrial or justify reversal because when coupled with a timely curative instruction such error may be rendered harmless. In this case, def. counsel's repeated and pervasive references to insurance coverage, including a suggestion that plaintiff may have defrauded its insurer by retaining money that it had been given for repairs, warranted the granting of a new trial. Reversed.)

Nicaise v. Gagnon, 597 So.2d 305 (4th DCA 1992) (plaintiff's comment that jury did not need to "worry about whether the defendant will contribute a dime of money" was an implicit and inappropriate reference to the existence of insurance. The introduction of the subject of insurance in an action where insurance is not a proper issue constitutes prejudicial error, particularly when the suggestion relates to whether an adverse judgment will be paid by the def. or its insurer. Order granting new trial affirmed.)

Ballard v. American Land Cruisers, Inc., 537 So.2d 1018 (3rd DCA 1989) (Although defendant was more than adequately covered as an additional insured under American Land Cruisers Insurance policy, defense counsel incorrectly implied to the jury that defendant would harshly be subject to the payment of any verdict himself, notwithstanding he had already "suffered enough" through the loss of his daughter.)

Allstate Ins. Co. v. Wood, 535 So.2d 699 (1st DCA 1988) (Although it was improper for plaintiff's counsel to comment on existence of insurance on two occasions, where defense counsel failed to move for mistrial, mention of insurance was curable by instruction from the court to the effect that insurance was not the issue and not to inject it into the proceedings. Affirmed)

Skislak v. Wilson, 472 So.2d 776 (3rd DCA 1985) (in response to def. counsel's argument that def. should not have to pay for plaintiff's injuries because accident was unavoidable, it was improper for plaintiff's counsel to reply that def. would not have to pay; that it is "the insurance company that will have to pay." Plaintiff's comment about insurance paying for the damages was not a fair reply since def.s argument was proper. Further, plaintiff's counsel knew that def. only had $10,000 of coverage and plaintiff demanded $500,000 [jury returned $200,000 verdict]. Fact that during voir dire def. counsel briefly addressed whether jurors would be effected by

existence of insurance did not make reply proper. Jurors may be apprised of the existence of an insurance company as the real party in interest but comments concerning the amount of coverage are inappropriate. Reversed.)

Auto-Owners Ins. Co. v. Dewberry, 383 So.2d 1109 (1st DCA 1980) (in claim by insured against his insurer for damages resulting from the death of his two minor children in an accident involving an uninsured motorist, it was error for plaintiff's counsel to repeatedly refer to policy limits. Improper comment was reversible where damages awarded were exact amount of policy limits. Argument that claim was an action on an insurance contract and, therefore, policy limits were admissible and could be commented to the jury incorrect. Before plaintiff could recover under the contract he was required to prove that the under insured motorist was negligent. Prejudicial effect of reference to policy limits was no different than in a direct negligence action against a tortfeasor. Plaintiff judgment reversed.)

Klein v. Herring, et. al, 347 So.2d 681 (3rd DCA 1977) (plaintiff's comment to jurors to "think about the resources and the ability that State Farm Insurance Co. has," followed by a request to return a verdict for $35,000 had the cumulative effect of misinforming the jury as to the actual amount of insurance coverage [actual coverage was $10,000 policy limit] of which the jury should never be informed. Reversed)

Peppe v. Clow, 307 So.2d 886 (3rd DCA 1975) (Just as the amount of policy limits should not go to the jury, a plaintiff is not entitled to inform the jury that the subject insurance policy will cover the amount of damages which plaintiff is seeking. Comment by plaintiff's counsel to the effect that the defendant's insurance would pay all that plaintiffs need was highly prejudicial and impaired a calm and dispassionate consideration of the case by the jury. Reversed.)

Pierce v. Smith, 301 So.2d 805 (2nd DCA 1974) (argument by plaintiff's counsel that his client "does not have the resources nor the ability to go out and compete with [def.] and [his insurance company] in bringing expert doctors to you," that an "adverse verdict would not affect [def.'s] ability to practice . . . . an adverse verdict will only call for his insurance company to pay the verdict that is imposed against him," and that ". . . when this is over, you all can go back to living your normal lives and the Court can go about conducting its duties. . . .and we can all walk away from this case and forget it. But there are two people in this courtroom who can't walk away and forget . . ." were prejudicial and inflammatory, constituted an impermissible appeal to sympathy predicated on economic disparity and improperly suggested that insurance coverage would be available to pay the judgment. Comments appealed to the passion or prejudice of the jury. Reversed)

Allred v. Chittenden Pool Supply, Inc., 298 So.2d 361 (Fla. 1974) (although it was improper for plaintiff's counsel to comment as to why "Liberty Mutual Insurance Company" was fighting so hard and that they "should be made to pay," error did not warrant a new trial where it was not of such magnitude as to imply a plea of passion or be suggestive of bias or prejudice, and where court immediately gave curative instruction and insurer was a named party in the suit. Order

granting new trial reversed.)

Carlton v. Johns, 194 So.2d 670 (4th DCA 1967) (while the existence of insurance purchased by a particular defendant can be established at trial where the issue of ownership is in dispute, plaintiff's counsel improperly argued the existence of insurance that would pay any judgment against the defendants. While def. counsel objected but did not request the court to instruct the jury to disregard the remarks or otherwise remove the prejudicial effect, a new trial should still be granted under the rule that "where the prejudicial conduct is so extensive that it impairs a calm and dispassionate consideration of the case by the jury," a new trial is warranted regardless of whether or not an objection was made. Reversed)

McKinney Supply Co. v. Orovitz, 96 So.2d 209 (Fla. 1957) (Where plaintiffs originally injected the subject of their insurance into the case, referred to it repeatedly throughout the trial, made no specific objection when counsel for defendants pursued the subject in closing argument and failed to request that the jury be instructed to disregard references to insurance, claimed error was not properly preserved. Affirmed)

Sutton v. Hancock, 141 So. 532 (Fla. 1932) (improper for plaintiff's counsel to argue that he did not know whether def. witnesses expenses were being paid by def. or insurance company. However, objection to comments and instruction from court to disregard them rendered comments harmless. Affirmed)

V. Golden Rule

Panchoo v. State of Florida, 41 Fla. L. Weekly D249 (5th DCA 2016) (in aggravated child abuse case, it was improper for state to argue: "Think how bad a broken elbow would hurt by itself. Imagine getting bashed in the head like this. Bashed on the back of the head . . . . I submit to you that's torture" as that argument violated the "Golde Rule" by requesting that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." Harmless error. Reversed.)

Phillip Morris et. al v. Cuculino, 165 So.3d 36 (3rd DCA 2015) (it was improper for plaintiff's counsel, in tobacco trial, that people get paid for the time they work, including actors, who make "astronomical sums," professional athletes, who make "tremendous sums," and expert witnesses, who make $750 per hour and that Philip Morris and R.J. Reynolds gave Mr. Cuculino the "job" of "suffer[ing] from progressive heart disease," and he deserves to get paid for this "job." [comparative verdict] It was also improper for plaintiff's counsel to argue: "You know, what is it that's going to be a just and appropriate figure? Who in their right mind would want to trade places with Mr. Cuculino and take this job? Would someone do it for a million dollars an hour? Probably not. Would someone do it for anything? Probably not." [Golden rule]. Nonetheless, the verdict reflects that the jury was not inflamed or highly prejudiced by the improper comments

and the defs were not denied their right to a fair trial.)

Fasani, et al. v. Kowalski, 43 So.3d 805 (3rd DCA 2010) (in a premises liability action for injuries from a piece of granite that struck plaintiff when it fell from the wall of an elevator, where liability was admitted before trial, it was improper for plaintiff's counsel to ask the jury to consider "how much money would you take for me to hit you in the head with a baseball bat as hard as I can?" Given the cumulative effect of numerous improper arguments, case reversed and remanded.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including a statement in opening and closing that "by their negligence" the defendants "wrote a blank check" and it was up to the jury to fill it in (this constitutes an appeal to sympathy and for jurors to award damages in accordance with the standard of what they themselves would want [golden rule]); other improper golden rule arguments telling jury that "we can't feel plaintiff's pain," and urging them to "guess, only imagine it." On appeal, plaintiff's counsel attempted to shift the focus away from these improprieties by arguing that defense counsel's opening was improper (defense commented in opening about how plaintiff was making remarkable improvement but that once those uplifting medical reports came in, plaintiff's counsel referred him to another doctor and all of a sudden plaintiff started limping and claiming new injuries as well as a decline in his recovery. At that point, defense counsel claimed, the case went from being a medical case to a legal case—suggesting that def's referral to a doctor was for financial profit). In addressing plaintiff's claim, the court responded "the legal profession has as much right as anyone else to make an appropriate referral to other professionals. However, if there is evidence that such activity is occurring solely for personal financial profit, then the jury also is entitled to have those facts brought before them for consideration." Reversed and remanded for new trial.)

SDG Dadeland Assoc. v. Anthony, 979 So.2d 997 (3rd DCA 2008) (it was improper for Plaintiff's counsel to argue to jury a "puppy story" where a little disabled boy selected an injured puppy over a group of healthy puppies because the injured puppy needed someone who knew what it was like "to feel that bad." Such argument is a veiled Golden Rule argument because it implicitly asks the jury to place itself in the place of the injured person. Reversed.)

Bocher v. Glass, 874 So.2d 701 (1st DCA 2004) (although plaintiff's counsel did not expressly ask the jurors to imagine themselves in the place of the victim's parents, argument which told the jury that if a "magic button" were placed in front of Mrs. Williams, a juror, and $6 million were placed in front of Mr. Brooks, another juror, the plaintiffs would walk past the money and push the button that would bring their son back was a golden rule violation because only conceivable purpose for argument was to suggest that jurors imagine themselves in the place of decedent's parents; especially where counsel utilized jurors actual names and even set up the jury box as a prop for the "magic button" and the $6 million. "'Golden rule' arguments are improper because they depend upon inflaming the passions of the jury and inducing fear and self interest. … If jurors are to remain fair decision-makers, the trial court must guard against a deliberate act of

counsel that serves to put the jury center stage in the drama that should be the trial." Reversed based upon cumulative errors.)

Goutis v. Express Transport, Inc., 699 So.2d 757 (4th DCA 1997) (While a "golden rule argument suggests to jurors that they put themselves in the shoes of one of the parties, and is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence, to be impermissible, the argument must strike at that sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to receive in a similar situation." *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Grushoff v. Denny's, Inc., 693 So.2d 1068 (4th DCA 1997) (where plaintiff's counsel argued: "They sawed off a piece of her bone, what's that worth? How much is it worth to you when you go to the dentist and he's going to do some work. . . ," and upon def. counsel's objection which was sustained, plaintiff apologized and clarified stating that the "you" was generic and attempted to restate his point referring to when "people" go to the dentist, argument was not an improper "golden rule" violation. Counsel was simply trying to analogize that pain can be measured by how much is paid (i.e. for Novocain) to avoid it in a dentist's chair and was not asking the jury to place themselves in the position of the appellant to experience her pain. The use of one small "you" was not highly prejudicial and inflammatory therefore a new trial was not warranted. Order granting a new trial reversed.)

Tremblay v. Santa Rosa County, 688 So.2d 985 (1st DCA 1997) (in nuisance action for damages caused by sod transfer and pine straw facility's proximity to residential home, it was improper for homeowner's counsel to argue to jury that they should imagine themselves pulling rats out of their pools, bales of pine straw starting fires in their yards, and thousands of mosquitoes and other vermin flying in their neighborhood or their children's neighborhood. Arguments were so inflammatory that they constitute fundamental error. [NOTE: court rejected requirement of *Hagan* test for unobjected to error that the trial court identify not only the improper comment but also the jury's actions that resulted from that comment. In 1st DCA, courts will follow *Bullock's* holding that in the case of some improper arguments prejudicial and inflammatory effect can be presumed.] Order granting new trial affirmed *[**NOTE**: the holding of presumed prejudice has since been rejected by the Supreme Court in Murphy 766/1010. Murphy is now the controlling case on unpreserved error and requires that, among other things, the closing argument be harmful to warrant a new trial. It also disapproved of this case as to standard of review on appeal]*)

Cleveland Clinic Florida v. Wilson, 685 So.2d 15 (4th DCA 1997) (en banc court recedes from prior rule that "golden rule" argument is per se prejudicial. Harmless error rule will apply to "golden rule" arguments. "Not every golden rule type argument is so prejudicial as to sway the jury from its dispassionate consideration of the case." Trial court sustained objection to improper argument and reserved on motion for mistrial, subsequently denying same. Considering the comment, all other comments, the trial as a whole and the result in the case, the trial court is in

the best position to determine whether the claimed errors affected the result. Affirmed)

Cohen v. Pollack, 674 So.2d 805 (3rd DCA 1996) (in auto accident case, plaintiff's counsel argued: "How do you judge these damages? Let's start with pain and suffering. Like [Brittany] felt when [her doctor] operated on her while she was at home for three weeks in agony, or most importantly, when these headaches keep coming and coming each day, each month. Try this. If a dentist told you he's got to do a root canal and he's only going to charge five dollars for the root canal and ninety-five dollars for the Novocain, you would pay that ninety-five dollars . . . . No one wants pain." Argument improperly "suggested that the jury should measure damages by considering the pain Brittany endured." Combined with other errors, plaintiff's judgment reversed.)

Norman v. Gloria Farms, 668 So.2d 1016 (4th DCA 1996) (in rural community of Okeechobee where hunting is a popular sport as evidenced by the fact that only two of the 7 jurors and alternate had never hunted, it was highly improper and prejudicial for def. counsel to argue, in claim for injuries sustained while hog hunting, that a plaintiff's verdict would "bring an immediate halt to hog hunting in Okeechobee," and that "this is just a decision [the jurors] need to make based on being an Okeechobee resident and knowing there is lots of ranch property around and hog hunting is something special in Okeechobee." Although court is committed to proposition that objection to improper argument is necessary in all but a few rare instances, def. counsel's argument went far beyond traditional golden rule argument in that a golden rule argument asks the jury to put themselves in the shoes of the litigant, and def. told the jury that they, personally, would be affected by the outcome of the case. When combined with a "conscience of the community" argument pitting the jury against the plaintiff in an "us-against-them" scenario, the argument was calculated to produce a verdict based upon fear and self-interest and constitutes fundamental error. Reversed without objection)

Hagan v. Sun Bank of Mid-Fla., 666 So.2d 580 (2nd DCA 1996) (Even a golden rule argument is not sufficiently "sinister" to fall automatically to the level of fundamental error. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Tucker v. Mariani, 655 So.2d 221 (1st DCA 1995) (where allegedly improper "golden rule" argument was made, mistrial was not warranted where no objection was posed at the time of the comment thereby precluding review on appeal absent irreparable and fundamental error, and comments were not of such a "sinister influence" as to constitute fundamental error.)

State Farm Mut. Auto. Ins. Co. v. Curry, 608 So.2d 587 (3rd DCA 1992) (improper golden rule argument for plaintiff to ask the jury to: "[p]ut yourself in [the plaintiff's] position, you can imagine the mental anguish and frustration." Reversed)

Metropolitan Dade County v. Zapata, 601 So.2d 239 (3rd DCA 1992) ("a golden rule argument suggests to jurors that they put themselves in the shoes of one of the parties, and is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias

rather than on the evidence. To be impermissible the argument must strike at the sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to receive in a similar situation. In discussing damages, plaintiff's counsel told jury "walk in their shoes." Comment was sufficiently prejudicial to constitute harmful error warranting a new trial. Reversed.)

Budget Rent A Car Sys. v. Jana, 600 So.2d 466 (4th DCA 1992) (While some of plaintiff's counsel's statement were clearly improper Golden Rule arguments, verdict will not be reversed because defense counsel failed to object and preserve the issue for review. Absent a contemporaneous objection, an improper comment made during closing remarks will not support reversal except where the comments are of such sinister influence as to constitute irreparable and fundamental error. Reversed on other grounds)

Simmonds v. Lowery, 563 So.2d 183 (4th DCA 1990) (Argument asking the jury "to think about what you would **pay someone** for one day of what you will hear she has to go through and for the rest of her life" was not an improper golden rule argument. A golden rule argument suggests to jurors that they put themselves in the shoes of one of the parties, and is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence. "To be impermissible the argument must strike at that sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to receive in a similar situation." Rather than asking the jury what they might wish to receive as compensation themselves, appellant's argument asked the jury to do just what they must do - - to determine how much to award or pay the plaintiff for her injuries and asked them to do it on a per diem basis.)

Cummins Ala. Inc. v. Allbritten, 548 So.2d 258 (1st DCA 1989) (defense counsel's reference to jurors by their names during closing argument [i.e. "I saw Mrs. Stiltner watching my diesel engine expert take that pump off, and I saw Mr. Boggess shake that line like I did, and I saw the reverend, Mrs. Smith–"] although an improper attempt to curry favor with the jurors, was not a golden rule argument because the jurors were not asked to assume the position of either party. In view of court's intervention, *sua sponte,* instructing def. counsel to terminate this argument and warning him not to personalize the remainder of his argument, comments were not sufficiently prejudicial to constitute harmful error warranting a new trial. Counsel's second argument requesting that the jurors analyze the def.'s actions and judge the def. in light of what the jurors themselves would have done "as reasonable people" was not a golden rule violation. Reference to what they would have done "as reasonable people" is consistent with the reasonable person standard found in the standard jury instructions defining negligence. Even if argument was improper, counsel failed to object and move for a mistrial and error was not fundamental. Order granting new trial reversed.)

Coral Gables Hosp. v. Zabala, 520 So.2d 653 (3rd DCA 1988) (it was an improper golden rule argument for plaintiff's counsel to ask the jurors to place themselves in the plaintiff's position and to award the plaintiff whatever amount of money they would desire if they had been the

victims. Argument attempts to undermine the neutrality of the jury by asking them to identify with the plaintiff and make a determination from a personal perspective. Reversed)

Shaffer v. Ward, 510 So.2d 602 (5th DCA 1987) ("You all drive, you're on the road, you know how far you can see when you drive. You know the importance of brake lights and how that assists you. And you watch and see brake lights come on and you start braking. . . . I think everyone has had a close call because of what happened in front of them. And it wasn't a close call because you were negligent or not paying attention, it was a close call because the car in front of you unexpectedly stopped, stopped with no warning." Argument was not a "golden rule" violation because it was not in any way directed to damages. Rather, prior to the quoted comment counsel asked the jury to use their common, everyday experience in deciding the case. In order for "golden rule" argument to be impermissible it must strike that sensitive area of financial responsibility and hypothetically request the jury to consider how much they would wish to receive in a similar situation. Further, even if error it was not objected to and was not of such a character that "neither rebuke nor retraction may entirely destroy their sinister influence. Order granting new trial reversed.)

Schreidell v. Shoter, 500 So.2d 228 (3rd DCA 1987) (It was improper for plaintiff's counsel to argue that defendant was the type of person who sets people up and that "they do end up getting your job or having you thrown out of town, and everyone of you has felt that twinge. . . . . Are you capable of child molesting? Are you capable of stealing from your employer?" An argument that jurors place themselves in the plaintiff's shoes, commonly referred to as "Golden Rule" argument is impermissible and constitutes reversible error because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. However, in order to challenge a Golden Rule argument a proper objection is required and failure to secure a ruling on an objection waives the objection unless the court deliberately and patently refuses to so rule. Where counsel objected and moved for a mistrial but the trial judge made no response to either request nor did she issue a curative instruction, the objection and motion are waived due to counsel's failure to secure a ruling. [Court found it unnecessary to discuss whether the error was fundamental because case was reversed on other grounds])

Harbor Ins. Co. v. Miller, 487 So.2d 46 (3rd DCA 1986) (In this case involving the alleged wrongful death of a 13 year old child as a result of an automobile accident, plaintiff's counsel violated the "Golden Rule" by repeatedly addressing the jury directly as "you" in comments referring to parents and children. When combined with other highly emotional testimony, verdict for plaintiff was reversed.)

National Car Rental Sys. v. Bostic, 423 So.2d 915 (3rd DCA 1982) (Although other improper comments alone may or may not have warranted a new trial, when combined with golden rule argument: "If the shoe is on the other foot, would you wear it?" invoking the proposition of the jury putting themselves in the place of the plaintiff, reversible error occurred. Judgment for plaintiff reversed.)

Fuller v. Rinebolt, 382 So.2d 1239 (4th DCA 1980) (Personal references to jury by defense counsel were improper but did not constitute "Golden Rule" argument. Affirmed.)

City of Belle Glade v. Means, 374 So.2d 1110 (4th DCA 1979) (Plaintiff counsel's argument: "And I want you to figure out when you decide, well, why hire him if he is going to be lifting things for me . . . . what about my workman's compensation? Am I going to hire a man who has blood pressure over 200 and has a bad back?" Although awkwardly phrased, argument was not a golden rule violation. Evidence supported argument that someone suffering from a bad back or heart condition would experience serious difficulty securing employment. Affirmed)

Bew v. Williams, 373 So.2d 446 (2nd DCA 1979) (argument by plaintiff's counsel that it's a good thing that plaintiff was not told on the morning of the accident: "You will be taken to a hospital because your face would have been lacerated . . . . You have suffered something called an aneurysm which was caused by a piece of glass plunging into the area adjacent near the left ear . . . ," did not have the inflammatory quality of a true golden rule argument because it did not strike at that sensitive area of financial responsibility and hypothetically require the jury to consider how much it would wish to pay or receive if it were involved in a similar situation. The use of the pronoun "you" clearly referred to the plaintiff, not the jury. Order granting new trial reversed.)

LeRetilley v. Harris, 354 So.2d 1213 (4th DCA 1978) (in personal injury action, it was improper for plaintiff to argue: "Wouldn't you, if your son was injured and you couldn't get some responses or if he has injuries you don't understand . . . the first thing you're going to want to know as a parent . . . 'What can I do for my son? What is the future going to hold for him?' . . . I remember when I was a kid growing up hearing, 'Walk a mile in my shoes.' I always thought about that in trying these kind of cases because you have got to in your own mind see what it's like. You've got to walk a mile in that man's shoes to see what the day is like when he gets up in the morning, what he's faced with. . . . How would you like to be on jury duty for the rest of your life? . . . Well, he's sentenced to this for the rest of his life and there's nothing he can do about it." Comment was a clear effort to have the jury put themselves in the shoes of the injured party and personally identify with his injuries. Although some of the comments strike at the "sensitive area of financial responsibility and hypothetically require the jury to consider how much it would wish to pay or receive," error was not preserved by appropriate objection and was not fundamental because allowing it to be raised for the first time on appeal is not "necessary to serve the ends of substantial justice or prevent the denial of fundamental rights." The comments did not create the injuries, nor did they strike at the theory of the liability of the case, although they may have caused the jury to become involved more personally on the issue of damages. Affirmed.)

Klein v. Herring, et. al, 347 So.2d 681 (3rd DCA 1977) (in action for injuries allegedly suffered as a result of a motor vehicle accident, it was improper for plaintiff's counsel to argue to the jury: "Any of us would be frustrated and irritable if their spare time was taken away. I know how I

would feel if that was taken away from me. . . . Mr. Herring has had something that God has given to him taken away: a healthy, completely accident-free body. That is what he had. Something we all want. Something we all cherish." Remarks, in effect, asked the jury to put itself in the place of the plaintiff and mandate a new trial. Reversed)

Americana of Bal Harbour, Inc. v. Kiester, 245 So.2d 121 (3rd DCA 1971) (Improper for plaintiff's counsel to urge jury, in deciding future pain and suffering, to "treat it like you would treat your own husband or wife or son". However, no objection was made to this Golden Rule argument and the court did not find it to be so flagrant and prejudicial as to require reversal and a new trial. Affirmed)

Stewart v. Cook, 218 So.2d 491 (4th DCA 1969) (def. counsel's argument to the jury: "We can always say: There but for the grace of God go I. . . . [Y]ou examine it in the light of the circumstances. . . . Do we always check our brakes before we start out? I don't. I am sure you don't either. . . . Would you and I expect that on our own car . . . are we supposed to get out and look under it every time we go down to the grocery store? This determination, as the Judge will tell you, is governed by your own common experience. . . . It's easy to say he should have done something else. But put yourselves in that situation. Within seconds you are approaching peril and you don't have brakes. What do you do?" Typical golden rule arguments ask the jury how much they would want to be paid if in plaintiff's shoes. This argument had nothing to do with damages. It did, however, ask the jury to use its own conduct as a standard by which to measure the performance of the def. driver and in that regard may have exceeded proper bounds by focusing on an improper standard of care. Remarks did not have the inflammatory quality of a true golden rule argument. Not fundamental. No objection. Order granting new trial reversed.)

Grand Union Co. v. Devlin, 213 So.2d 488 (3rd DCA 1968) (It was improper for plaintiff's counsel to resort to the use of a "Golden Rule argument" to argue matters which are not in evidence and to accuse defendant of destroying evidence when there was no evidence presented to that effect. Further, where plaintiff's counsel made no reference to the specific amount of damages he was seeking in his initial closing argument, and defense counsel made no reference to any specific amount of damages but advised the jury that he would leave the amount up to their judgment. It was also error for plaintiff's counsel to raise a specific amount of damages for the first time in his final summation, asking the jury to award $65,000.00 to his client. Objection was sustained and the collective impact of the improper arguments resulted in inflaming and prejudicing the jury against the defendant. Reversed.)

Ward v. Orange Memorial Hosp. Assn., 193 So.2d 492 (4th DCA 1967) (the thrust of a "golden rule" argument is that the jury is asked to put itself in the place of the plaintiff in deciding the amount of damages. In suit for death of hospital patient brought by his widow, comment by plaintiff's counsel that the jury had heard about what her losses will be, that she has been reasonable, that counsel would hate to think his wife would think he was worth less if he died under similar circumstances and that it was up to the jury in considering the case to determine what amount of money will compensate the plaintiff for her loss were not improper

arguments and did not constitute "golden rule" violations. Order granting new trial reversed.)

Miku v. Olmen, 193 So.2d 17 (4th DCA 1966) (improper for def. counsel to argue: "Now, I ask you, if you had been the unfortunate person who had slid into the rear end of that car, how would you want to be judged? All I ask you to do is bring back your verdict as you would want some jury to bring back a verdict for you." Although def. counsel claimed on appeal that he only meant for jury to base their deliberations on the evidence and the law as they would want any jury in the community to do, the jury could reasonably have believed that reference was being made to their own financial responsibility as if they were defendants in such a case and this would be as prejudicial as reference to their pain and suffering should they be plaintiffs. Golden Rule violations are *per se* prejudicial in 4th DCA. Reversed. *[Note: Cleveland Clinic Florida v. Wilson, 685 So.2d 15 (4th DCA 1996) recedes from this case by eliminating the per se rule in 4th DCA. Thereafter, Golden Rule violations are evaluated under harmless error analysis.]*)

Magid v. Mozo, 135 So.2d 772 (1st DCA 1961) (it was an improper "Golden Rule" argument for plaintiff's counsel to argue: "Gentlemen, there is no way that you can measure his pain and suffering and the only thing I can suggest for you to do is put yourself in the plaintiff's place and try to figure out how much it would be worth to you to go through the pain and suffering which Mr. Mozo went through." Reversed where trial court took no curative action.)

Bullock v. Branch, 130 So.2d 74 (1st DCA 1961) (Comments by attorney to jury asking them "how much would you pay to have a half inch cut inflicted in your skull . . . to render you unconscious . . . to leave you . . . with your walk affected . . . with your memory affected . . . . How much would I have to pay you to shorten your life?" and similar arguments are entirely improper. Objections were overruled and no curative instruction was requested or given. While it is true that defense counsel did not follow up his objection with a request for a curative instruction, the argument was so palpably prejudicial and inflammatory that the trial court should have on its own motion instructed the jury to disregard the argument. Generally, it is considered improper for an attorney, in his argument in a personal injury case, to ask the jury what would compensate them for a similar injury. Reversed. *[Court held that in a case of such error, prejudicial and inflammatory effect on jury can be presumed, however, the holding of presumed prejudice has since been rejected by the Supreme Court in Murphy 766/1010]*)

VI. Comments that mislead the jury, misstate the law or ask the jury to disregard the law

Vargas v. Gutierrez, 176 So.3d 315 (3rd DCA 2015) (in medical malpractice case, it was improper for plaintiff's counsel to tell jury that testifying physician had stated 6 year old, who had to have both kidneys removed, would have been completely cured with relatively minimal, non-invasive treatment if condition had been treated at the outset. Statement was completely fabricated as there was no testimony she could have been cured by that method, or even that she could have been cured at all. Error was significant because causation was a hotly contested

issue. Error was exacerbated because plaintiff's counsel violated judge's "1 expert per specialty" ruling, calling 4 pathologists to testify by improperly categorizing them as treating physicians and using them to give expert opinions (while def complied with the court's ruling and was strictly limited to one expert). Further, plaintiff's counsel capitalized on the violation by arguing that 4 doctors – including treating physicians who didn't have an "axe to grind"— had agreed with his position; thereby categorizing the improperly presented expert testimony as unbiased treating physicians and comparing that to def's single expert doctor. [**NOTE**: court warned trial courts to be wary of litigants attempting to elicit expert testimony disguised as fact testimony from a treating physician. Reversed.)

Saunders v. Dickens, 151 So.3d 434 (Fla. 2014) (it was improper for def counsel to argue to jury that negligent care by initial doctor did not "cause" plaintiff's injuries because subsequent treating physician testified that, even if first doctor had not acted negligently, subsequent doctor would not have done anything different. "[A] physician cannot insulate himself or herself from liability for negligence by presenting a subsequent treating physician who testifies that adequate care by the defendant physician would not have altered the subsequent care." Counsel's causation argument was a misstatement of the law. Reversed.)

Allstate Ins. Co. v. Marotta, 125 So.3d 956 (4th DCA 2013) (comment that "[t]here was a debt created ... by that uninsured motorist" and that it was time for plaintiff to collect ran afoul of the rule that an uninsured motorist insurance carrier is "entitled to raise and assert any defense that the uninsured motorist could have argued." Reversed due to multiple improper arguments.)

State Farm, et. al v. Thorne, et. al, 110 So.3d 66 (2nd DCA 2013) (where plaintiff was involved in consecutive car accidents 2 years apart, creating a question as to which injuries were caused by which accident, and plaintiff's counsel successfully excluded opinion testimony from defense experts as to the cause of the plaintiff's different injuries because of an alleged discovery violation (late disclosure), it was improper for plaintiff's counsel to then argue to the jury that the defendant's had not put on any evidence to refute plaintiff's claim of causation because they couldn't find any such evidence. "[I]t is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented." [citation omitted] Reversed in part on multiple grounds. Remanded for a new trial.)

Health First v. Cataldo, 92 So.3d 859 (5th DCA 2012) (Plaintiff's counsel's closing was replete with improper comment, including: 1) religious references and appeals to a higher power which improperly suggested to the jury that God favored a verdict in favor of Plaintiff, coupled with a request that the jury "punish" Defendants, who had not "repented" for their sins. ["And call it fate or call it whatever you want to call it, but I believe that there was a reason why you were selected. … And as I've watched you carefully for the last two weeks … it dawned on me that whoever it is that decides what's right and wrong in this world, had some say in you all being the one's [sic] selected to decide this case. … I was reading about the concept of repentance. And it applies here, folks, because part of what you're going to be doing in this case, through your verdict, is to make sure that the Defendants who caused the wrong we're here on, really have

repented for what they've done."], 2) claiming that Defendants were trying to sidetrack the jury and make them take their eye off the ball, that Defendants had to be dragged "kicking and screaming" into the courtroom, that the jury had to force Defendants to take care of Plaintiff, and that it would be a victory for the defense if they got an "unfair" verdict, all of which improperly disparaged the defense and implied that Defendants had done something improper by defending the case, and 3) grossly misstating the compensation that had been paid to Defendants' only medical witness by arguing, incorrectly, that he had been paid almost $1,000,000 over three years for cases on which he had worked with defense counsel, and implying that no one knew how much the doctor received from defense counsel's firm after considering he had worked with three or four other lawyers at the firm, which comments were factually inaccurate. However, no objection to the improper arguments was made and, even cumulatively, they fail to reach the standard of fundamental error pronounced in Murphy v. International Robotics. Affirmed.)

Linzy et. al v. Rayburn et. al, 58 So.3d 424 (1st DCA 2011) (In auto accident case where liability was admitted and trial was only on damages for which insurance coverage existed, it was improper for defense counsel, in violation of motions in limine prohibiting comment on the financial status of either party or the defendant's ability to pay damages, to comment in opening statement "My client is Mr. Randy Crews, sitting over there. Mr. Crews runs a small business… Mr. Crews hasn't tried to run away from responsibility for the accident. … [T]he reward for standing up and saying, "Hey, we caused this accident, and it was our fault," is now Mr. Rayburn wants him [Mr. Crews] to buy his entire back condition that he said has plagued him since he was a child. … Mr. Crews is being asked to pay for something that was there." After being again ordered to refrain from such comment in closing, defense counsel again argued: "This man over here, Mr. Crews, is being asked to pay for a lifetime of pain management that [Mr. Rayburn] received two separate referrals for within two weeks of this accident. Two separate doctors said, "You have to go to pain management." [Mr. Crews'] company unfortunately gets in an accident with [Mr. Rayburn], and those two other referrals don't matter. Now it's all you [Mr. Crews]. You pay for everything [Mr. Crews]. … [I]f you're going to do that, then you've got to come prepared … to put up on the table the evidence that makes this man [Mr. Crews] responsible." Despite the fact that Mr. Crews was not a named defendant in the case and that defense counsel was retained by an insurance company to represent the defendants [his company and driver], defense counsel repeatedly stated that Mr. Crews [the small business owner] would be solely responsible for any award of damages. By making such statements, defense counsel misled the jury and improperly attempted to appeal to the jury's sympathy. Properly preserved. Order granting new trial affirmed.)

JVA Enterprises v. Prentice, 48 So.3d 109 (4th DCA 2010) (where trial court improperly excluded evidence of plaintiff's prior neck and back injuries, it was error for plaintiff's counsel to argue in closing: "[W]here is the testimony to support the speculation of some big, bad neck injury, or shoulder [injury] in the past? ... Where is the testimony or evidence?" It is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented. Reversed on these and other grounds.)

Greenberg v. Schindler Elevator Corp., 47 So.3d 901 (3rd DCA 2010) (in personal injury suit for injuries allegedly sustained when escalator on which plaintiff was riding suddenly stopped short, it was improper for defense counsel to seek exclusion of evidence of prior problems with the escalator and, having succeeded, proceed to argue in closing the absence of any such evidence. Reversed on these and other grounds.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including, but not limited to, misrepresentations of evidence in opening and closing suggesting that plaintiff had lost a testicle by saying plaintiff "will be living for 50 years with half his manhood missing" and was "half a man right now," when evidence did not support such a claim at all and his own urologist found him to be fertile with 100% sperm production ("[C]ounsel both legally and ethically is prohibited from telling the jury he will prove something he cannot prove or that is doubtful."]; statement in opening and closing that "by their negligence" the defendants "wrote a blank check" and it was up to the jury to fill it in (this constitutes an appeal to sympathy and for jurors to award damages in accordance with the standard of what they themselves would want [golden rule]). Finally, counsel wrapped up his summation with an improper argument for a comparative verdict, asking the jury to compare plaintiff's injury to a piece of property like a $10 million dollar Picasso painting and pointed out that if the case were about that painting, the jury would fill in the blank check for that amount on the spot. On appeal, plaintiff's counsel attempted to shift the focus away from these improprieties by arguing that defense counsel's opening was improper (defense commented in opening about how plaintiff was making remarkable improvement but that once those uplifting medical reports came in, plaintiff's counsel referred him to another doctor and all of a sudden plaintiff started limping and claiming new injuries as well as a decline in his recovery. At that point, defense counsel claimed, the case went from being a medical case to a legal case—suggesting that def's referral to a doctor was for financial profit). In addressing plaintiff's claim, the court responded "the legal profession has as much right as anyone else to make an appropriate referral to other professionals. However, if there is evidence that such activity is occurring solely for personal financial profit, then the jury also is entitled to have those facts brought before them for consideration." Reversed and remanded for new trial.)

Hollenbeck v. Hooks, 993 So.2d 50 (1st DCA 2008) (*voir dire* - defense counsel's comment to venire: "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate" was improper and misleading where counsel was retained by def's insurer ("a big conglomerate") and comment served to suggest to jury that def would be individually responsible to pay any damages, an implication that could not be refuted at trial since the jury is not allowed to hear about the existence of insurance. Reversed.)

Lefave v. Bordonaro, 975 So.2d 470 (2nd DCA 2007) (where plaintiff's counsel successfully objected to defense counsel's request for an IME of plaintiff by a neurosurgeon and, as a result, def's neurosurgeon was limited to reviewing plaintiff's medical records, it was reversible error for plaintiff's counsel to then argue to the jury: "They didn't have her examined and they could have. They have him review records. Why not get another neurosurgeon to come in and testify?

Why? Were they afraid of what he was going to say?" Def. was ambushed. Plaintiff's counsel improperly suggested that def chose not to have plaintiff examined by a neurosurgeon because he knew the findings would not be favorable, when all along def's counsel wanted that examination and it was plaintiff's counsel who prevented such an examination from occurring. "[T]he trial judge should always grant a motion for a new trial when 'the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record.'" [citation omitted] Reversed.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (where plaintiff's counsel successfully moved in limine to preclude defendant cruise line's medical director from testifying as to whether plaintiff received proper medical care, it was improper for plaintiff's counsel to then argue in closing that the doctor did not testify that the records reflect the ship's doctors did everything correctly. Counsel was implying to the jury that the doctor failed to testify as to standard of care because such testimony would not have been favorable to the defendant, when in reality the doctor was precluded from testifying as to the quality of care because plaintiff prevailed on his motion to preclude precisely such testimony. Similarly, def. attempted to amend it's witness list to add an economist who would prepare an alternative life-care plan and testify concerning plaintiff's economic damages. After successfully objecting to such amendment, it was improper for plaintiff's counsel to question his own expert about the surprising fact that def. failed to provide an alternative life-style plan and to argue in closing that damages were unrefuted and def. could have produced it's own expert and alternative life-care plan, but failed to do so. Such tactics have been called disingenuous and misleading. Reversed.)

Engle v. Liggett Group, et al., 945 So.2d 1246 (Fla. 2006) (although attorney's comments in closing argument were improper and attempts to incite racial passions were "conduct unbecoming an attorney practicing in our state courts," reversal based upon improper closing argument and comment was not warranted when viewed under the totality of the circumstances in this two year trial. Many of the comments were not objected to, were the subject of a curative instruction or were taken out of context by the District Court. A review of the verdicts reveals that the jury carefully analyzed the issues of comparative fault and individual damages, contrary to the image of a runaway and inflamed jury portrayed by the District Court. District Court's ruling affirmed in part and reversed in part. **NOTE: SEE DISTRICT COURT OPINION BELOW (Ligget Group, et al. v. Engle) FOR REFERENCE TO ARGUMENTS NOT INCLUDED IN SUPREME COURT OPINION**)

Werneck, et. al v. Worrall, 918 So.2d 383 (5th DCA 2006) (*[opening and closing]* In a wrongful death auto accident case where punitive damages were not recoverable, it was error for plaintiff's counsel, in opening statement and closing argument, to tie compensation for pain and suffering to a calculation that included the number of tractor trailers owned by the defendant. Such an argument suggested to the jury that plaintiff's recovery for pain and suffering was based upon the wealth or assets of the defendant, an improper measure of damages. Judge's curative instruction worsened the situation. "The amount of sales [def.] has is of no relevance…. Its sales are very different than profits or assets. *** And so the jury will completely disregard that

comment." Rather than curing the problem, the instruction might have created the false impression that the only objectionable aspect of the statement was the reference to sales because it differentiated between profits or assets and sales. "The fact that counsel could have suggested a wholly arbitrary number to the jury [rather than the number of tractor trailers in def.'s inventory] does not give counsel carte blanche to mislead the jury by knowingly urging it to employ specious methodology, especially when the defendant's assets are part of the equation in a case where punitive damages are not an issue." [Note: prejudice was supported by the fact that jury awarded very close to the amount improperly calculated by plaintiff's counsel] Reversed and remanded for new trial on damages.)

Bocher v. Glass, 874 So.2d 701 (1st DCA 2004) (it was improper for plaintiff's counsel to try to make a "value of human life" argument by saying: "I want to talk a little about money in our society. Our society values paint on a canvas to the tune of $82.5 million." "Value of human life" arguments are those which ask a jury to "place a monetary value on the life of the decedent," an improper measure of damages. Reversed based on cumulative errors.)

Liggett Group, et. al v. Engle, 853 So.2d 434 (3rd DCA 2003) (it was improper for plaintiff's counsel to interject racism into the trial of the tobacco company defendants without basis in the evidence or relevance to the case. Counsel argued to the jury how tobacco companies would "divide the American consumer up into groups," including "white" and "black," then proceeded to tie this racial argument into an appeal for jury nullification arguing that "before we get all teary-eyed about the law ... [h]istorically, the law has been used as an instrument of oppression and exploitation." Counsel then juxtaposed the def.'s conduct with the genocide of the Holocaust and slavery and urged the jury to fight "unjust laws" with reference to Martin Luther King and Rosa Parks. [Note: four of the six jurors were African American and, even more egregiously, counsel had previously published a book where he identified this strategy almost verbatim and acknowledged that it is tremendously effective because it is incurably prejudicial.] Further, counsel continually told the jury that a large award would not bankrupt the defendants if paid over time in violation of the rule that a def.'s ability to pay punitive damages is measured as of the time of trial and although counsel knew there was no such "installment payment" protection. Reversed. **NOTE: THIS CASE WAS SUBSEQUENTLY REVERSED IN PART AS TO CLOSING ARGUMENTS BY THE SUPREME COURT [see Engle v. Ligget above] but is included here for reference to arguments not included in the Supreme Court opinion.**)

Wilbur, et. al v. Hightower, 778 So.2d 381 (4th DCA 2001) (plaintiff's argument: "In this day and age where inanimate objects like paintings are sold at auctions for ten million dollars, a living, breathing person has died, Barbara Hightower .... What that means to Mr. Hightower that this living person is gone from his life. What is the value of that loss?" was not an improper "value of human life argument." Counsel's argument, when taken in context, did not urge the jury to place a monetary value on the decedent's life but, rather, on her surviving spouse's loss. Although the value of a human life is not an element of damages and is not a proper subject for final argument, the value of a surviving spouse's loss of his wife's companionship and

protection, as well as his mental pain and suffering as a result of her wrongful death, is a proper measure of damages within the Wrongful Death Statute. Reversed on other grounds.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) (In the case at bar, def. counsel's repeated use of term "B.S. detector, comment that if jury found for the plaintiff they would be "accessories, after the fact, to tax fraud, and characterization of plaintiff's case as cashing in on a "lottery ticket" were all improper. However it was not an abuse of discretion to conclude that the improper arguments were not harmful, incurable or requiring of a new trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [NOTE: Subsequently, *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014) held that the a party benefitting from an error has the burden of proving that the error was harmless, ie. that there is no reasonable possibility that the error complained of contributed to the verdict—the same standard as used in criminal cases. Going forward, this may affect prong 2 of the *Murphy* 4-part test.] Affirmed)

Green v. USAA Cas. Ins. Co., 754 So.2d 774 (1st DCA 2000) (It was improper for defense counsel to argue that the evidence did not justify a $300,000 award because plaintiff could invest that amount to produce an income stream of $30,000 per year, a sizeable income stream that could well exceed plaintiff's annual income. Such argument invites the jury to make either additional reduction in sums already reduced to present cash value by expert witnesses or improper reduction in sums that should not be reduced to present cash value, such as damages for pain and suffering. Error harmless where comment was brief in a rather lengthy closing, was not repeated, was not a feature of the trial and court properly instructed jury on the reduction to present value of future economic damages and correct determination of award for pain and suffering. Affirmed.)

Hernandez v. Home Depot USA, Inc., 695 So.2d 484 (3rd DCA 1997) (Having successfully and wrongfully excluded testimony from plaintiff's expert that def's manner of stacking items on shelves was dangerous, violated safety standards in the industry and led to plaintiff's injury, it was improper for plaintiff's counsel to then argue to jury: "What is the evidence that we were negligent? What is the evidence that Home Depot did something or did not do something? … Where is the evidence? Where is the proof that Home Depot should not have done that? … Where is there any evidence that Home Depot was wrong; that they did something bad? Where is the evidence? There's no evidence. … So, again, you're faced with a lack of evidence. … Where is the evidence that Home Depot violated any standards?" Def counsel "in what must be the ultimate gotchaism-whipsawed the plaintiff for not producing" the very testimony he successfully and wrongfully excluded. Reversed.)

Elsass v. Hankey, 662 So.2d 392 (5th DCA 1995) (it was improper for def. counsel to argue to the jury that the officers who testified never said that the def. was at fault ["I didn't hear Mike Richie say it was Cecil Hankey's fault. I didn't hear Trooper Edsall say it's Cecil Hankey's fault. . . .] where such testimony was not admissible. Moreover the permissible scope of the officers'

testimony was the subject of a pretrial motion in limine and, even more egregiously, def. Hankey was the person to whom the investigating officers issued a citation. Error was fundamental and not harmless. Defense judgment reversed)

Public Health Trust v. Geter, 613 So.2d 126 (3rd DCA 1993) (in medical malpractice case, it was improper for plaintiff's counsel to urge the jury to place a monetary value on the life of the plaintiff's decedent, just as a monetary value is placed on an 18 million dollar Boeing 747 or an 8 million dollar SCUD missile. Argument was improper, highly inflammatory, and deprived the def. of a fair trial on damages. Reversed)

Goodman v. West Coast Brace & Limb, Inc., 580 So.2d 193 (2nd DCA 1991) (Where plaintiff filed a personal injury action for injuries received in the use of prosthetic devises and then filed bankruptcy which resulted in bankruptcy trustee substituting as proper party plaintiff. It was improper for defense counsel to characterize the action in argument as being filed by the bankruptcy trustee for the benefit of plaintiff's creditors and to comment on the absence of the bankruptcy trustee from the proceedings. Error was compounded where trial court refused to allow plaintiff's counsel to clarify the statement and explain that the action was filed by plaintiff and that he will receive any amount of the judgment in excess of what is owed to creditors. Defense argument made it appear that the bankruptcy trustee brought the action and that plaintiff had little or no involvement in the action. This misleading argument may have caused the zero verdict. Reversed.)

City Provisioners, Inc. v. Anderson, 578 So.2d 855 (5th DCA 1991) (improper for plaintiff to tell jury that if they awarded too much, court could reduce by remittitur but could not increase. Even if it were a correct statement of the law, it was an improper argument because closing argument is an opportunity for counsel to discuss the evidence, not to invite the jury to shift responsibility for their verdict to the judge. This argument alone could warrant reversal, however, in this case there were numerous improper arguments. Reversed)

Craft v. Kramer, 571 So.2d 1337 (4th DCA 1990) (improper for plaintiff's counsel to suggest to the jury in his closing argument of a medical malpractice case that the deviation of the standard of care could be determined by looking at the result. This improper argument was compounded by the trial court's failure to give the def.'s requested instruction, pursuant to 768.45(4) which states, in part, that the existence of medical injury does not create any inference or presumption of negligence. Failure to give a curative instruction was prejudicial. Reversed)

Ballard v. American Land Cruisers, Inc., 537 So.2d 1018 (3rd DCA 1989) (Although defendant was more than adequately covered as an additional insured under American Land Cruisers insurance policy, defense counsel incorrectly implied to the jury that defendant would harshly be subject to the payment of any verdict himself, not withstanding he had already "suffered enough" through the loss of his daughter.)

Good Samaritan Hosp. v. Saylor, 495 So.2d 782 (4th DCA 1986) (Sometimes emotional and

heated debate are to expected in counsel's closing summation to jury and given wide latitude afforded during closing arguments, reversal is not warranted unless the remarks are highly prejudicial and inflammatory. Plaintiff's argument concerning the value of the mother [in wrongful death/medical malpractice case] even if error, was waived when defendant failed to object [other cases have found that such argument misleads the jury as to proper calculation of damages]. The emotional aspects of trial were no greater than those that understandably pervade a trial of this type and defendants have failed to demonstrate that plaintiff's closing argument exceeded the wide latitude generally permitted. Affirmed.)

Bloch v. Addis, 493 So.2d 539 (3rd DCA 1986) (Improper for counsel to allege that defense doctor had fraudulently created examination notes in the hallway outside the courtroom immediately prior to taking the stand and then testified that they were from the time of the examination and that another witness had testified that she saw him create the notes in the hallways where the witness did not so testify and there was no evidence that defense counsel had manufactured the notes at the time of his testimony. When combined with other improper comments, error was fundamental. Reversed. [Note: pre-Murphy v. Intl. Robotics])

Russell, Inc. v. Trento, 445 So.2d 390 (3rd DCA 1984) (Plaintiff told the jury, not in response to any question, how tragic it was to hold her child and feel the life go out of the child's body as he died and went cold, explaining how she could not adequately express that feeling to the jury. Plaintiff's counsel commented about having "lived with the case and represented" the plaintiff for 3 years. In reality, counsel's retainer agreement indicated he had represented her for 16 months and the plaintiff did not see, much less hold, her son after the accident in question. Moreover, plaintiff and her counsel each had an emotional breakdown before the jury that was calculated to evoke sympathy. "These sympathetic ploys used by counsel will not be condoned." Furthermore, counsel misled the jury as to appropriate damages, again seeking an emotional response, by arguing: "You six people have the ultimate say-so on what a life is worth and what Anthony's life was worth to [his mother]. . . ." ". . . [Def. counsel] knows a life, such as Anthony's, was worth three million dollars." Parents of a deceased minor child may recover for loss of support, loss of services, and mental pain and suffering from the date of death. However, the value of a human life is not an element of damages and is not a proper subject for final argument. Reversed.)

Seshadri v. Morales, 412 So.2d 39 (3rd DCA 1982) (comments by parent's trial counsel concerning "value of human life" and "value of an innocent baby" constituted error both inappropriate and prejudicial. [other cases have found that such argument misleads the jury as to proper calculation of damages] Reversed.)

Lollie v. General Motors Corp., 407 So.2d 613 (1st DCA 1981) (Defense counsel's argument to the jury that the federal motor vehicle safety standard 301 relating to fuel tank performance was "indicative of what is reasonably required" although "it does not mean that negligence couldn't be found simply because the standard is passed . . ." was a fair argument. Affirmed.)

Bishop v. Watson, 367 So.2d 1073 (3rd DCA 1979) (where def. counsel's argument was factually misleading to the jury and improperly implied greater credibility for the def. by stating that the plaintiff was seeking $100,000 but the def. had nothing to gain by her testimony - although def. had a severed counterclaim for damages of which the jury was not aware - new trial was not warranted where plaintiff's counsel did not object or move to strike. Had motion been made, error could have been cured by instruction of the court. Error not fundamental. Order granting new trial reversed.)

Levin v. Hanks, 356 So.2d 21 (4th DCA 1978) (in action by insurance company which concededly was properly subrogated to its insured, it was improper for def. counsel to repeatedly argue to the jury that insurance co. was in effect trying to recover for second time because it had previously collected premiums from boat owner. Argument was directed to the prejudice and passions of the jury against insurance companies. Reversed.)

Klein v. Herring, et. al, 347 So.2d 681 (3rd DCA 1977) (plaintiff's comment to jurors to "think about the resources and the ability that State Farm Insurance Co. has," followed by a request to return a verdict for $35,000 had the cumulative effect of misinforming the jury as to the actual amount of insurance coverage [actual coverage was $10,000 policy limit] of which the jury should never be informed. Reversed)

Decks, Inc. v. Nunez, 299 So.2d 165 (2nd DCA 1974) (it was improper for plaintiff's counsel, in discussing amount of damages they should award, to inform the jury that he was "not here representing him for nothing" because atty's fees were not recoverable damages in the case. Comment was not invited by def. counsel's argument as to possible investment of $100,000 award and possible interest gained from such investment. Error was harmless. Affirmed.)

Fla. E. Coast Railway v. Soper, 146 So.2d 605 (3rd DCA 1962) (In railroad liability case, plaintiff's argument that the accident would not have happened if appellant had equipped the railroad crossing with flashing lights, bells and gates, although the law only required a "cross buck" warning sign, was not improper despite defendant's claim that plaintiff was urging the jury to convict him of failing to have a particular type of safety device not required by law, rather than of negligence. Plaintiff's argument was proper where the jury was entitled to know the conditions that existed at the crossing in order to determine whether defendant's compliance with duties required by law absolved him of a charge of negligent conduct under the circumstances or whether a greater duty existed beyond the law's requirements. Affirmed.)

Biscayne Beach Theatre v. Hill, 9 So.2d 109 (Fla. 1942) (Where statute allows for contradictory pleas to be filed by a defendant and the defendant entered a general denial as well as an affirmative defense of assumption of risk, it was improper for plaintiff's counsel to argue to the jury that "they [the petitioner] admit the negligence but they try to excuse it by saying 'well, Mr. Hill, [the respondent] should have know it as well as we did'". "[I]t is impermissible for counsel to use one plea, and admission of fact necessarily contained therein, to negative the issues raised in the case by an entirely separate and distinct plea. A plea of not guilty puts in

issue the breach of duty or wrongful act alleged and this issue cannot be negatived by what is contained in other please which confess and undertake to avoid." Trial courts instruction to the jury did not cure the error where it failed to specifically instruct the jury that the affirmative defense did not admit defendant's negligence.)

VII. Comments that improperly seek to evoke sympathy, emotional response, appeal to "community conscience" or ask jury to "send a message"

Hguyen v. Wigley, 161 So.3d 486 (5th DCA 2014) (isolated comment: "This is a courtroom, not a lottery," despite objection, was not enough to so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. Order granting new trial reversed.)

Borden Dairy v. Kuhajda, 152 So.3d 763 (1st DCA 2014) (In determining whether a challenged argument is improper, the trial court must consider whether the attorney confined closing argument to the facts and evidence presented to the jury and whether the argument improperly invoked emotional responses from the jury which could have affected the verdict. [citing *Murphy*].)

Choy v. Faraldo, 120 So.3d 92 (4th DCA 2013) (in auto accident case where P's counsel had argued for future earnings claiming that his client could no longer work, it was improper for defense counsel to hold up a Sports Illustrated magazine to display Marc Buoniconti on the cover in a wheelchair to compare to P's claim that she could not work. Trial court's finding that objected-to argument was so inflammatory as to warrant a new trial was affirmed but only as to damages. Finding of liability that placed blame exclusively on D but found he was not acting within scope of employment was not affected by improper argument. [Note: court stated in dicta that it upheld trial courts granting of new trial because of trial court's better vantage point and would have similarly upheld trial court's denial of new trial for same argument] Affirmed in part, reversed in part).

Carvajal v. Penland, 120 So.3d 6 (2d DCA 2013) (in auto accident case where P was suing D and her own uninsured motorist coverage carrier, and where only issues were causation and damages, it was improper for P's counsel to argue that P had paid her premiums so she would be covered in a case like this but carrier was not living up to its responsibilities and putting P under a microscope to minimize their exposure for injuries caused in the crash. '[A]rgument that [insurer] was shirking its responsibilities or otherwise acting in bad faith shifted the focus from injuries and damages to claims handling and bad faith, neither of which were issues at trial … and 'improperly suggested that [insurer] should be punished for contesting damages at trial and that its defense of the claim in court was improper.'" [C]losing argument was not intended to encourage a "logical analysis of the evidence in light of the applicable law"; rather it was designed to inflame the jurors' emotions. Reversed.)

Cascanet v. Allen, 83 So.3d 759 (5th DCA 2011) (in auto accident case where 18 year old def rear-ended plaintiff, lifting and dropping his car and causing 2 herniated disks and the undisputed need for future surgery, it was improper for defense counsel to argue, with his very young client sitting alone at the defense table, that there was "[n]o need to burden my client with some hundreds of thousands of dollars, if not $1 million worth of money they're asking for here. Is it fair that she be burdened . . . . we think it's fair to burden $23,000, whatever the medical bills were, that's a fair burden to be placed here. … But what it looks -- the term come to mind is, kind of an old football term, "piling on…." This was nothing more than an attempt to conjure sympathy for the young defendant to reduce the damage award by improperly asking the jury to weigh the effect a substantial award would have on her while ignoring her absent father, who was also a defendant, and ignoring the fact that there was insurance coverage. Courts have consistently prohibited a party from currying sympathy from the jury for a favorable verdict and asking a jury to consider the economic status of either party or the potential impact a substantial verdict would have on a defendant. Stratagem worked when jury awarded $23,764.57, which represented his past medical bills and lost wages. It awarded no future economic or non-economic damages and found that Plaintiff had not sustained a permanent injury, despite uncontroverted evidence of the two herniated disks and that plaintiff will require future surgeries and cannot continue in his prior occupation. Reversed when combined with error of allowing IME to testify concerning opinions not in his report [NOTE: no mention of whether issue of improper argument was preserved].)

City of Orlando v. Pineiro, 66 So.3d 1064 (5th DCA 2011) (in a lawsuit against the City of Orlando where the police department's chase of a suspect resulted in a collision that killed the plaintiff's son, plaintiff's counsel's argument, that if the jury did not compensate the parents of a deceased child in an amount equal to the harm they caused, the police department would be laughing outside the courtroom , was an improper and calculated attempt to elicit an emotional response from the jury. In addition, plaintiff's "How do you value a human life" argument ["Think about the times an individual is lost at sea or by boat or plane. We don't hesitate to send helicopters, the Coast Guard, hundreds of men and women and divers to search for person. When considering spending money to save a stranded person, we don't stop first and ask the person's age, race or social status. We all recognize the value of human life"] combined with his urging the jury to send a message ["You may be asking yourself, what good is the money going to do? We all know that money cannot bring back Edwin, … the money does help to tell Edwin's mother and father that you, the jury, recognize that what has been done is wrong and should not have ever happened. … The law in Florida recognizes that the loss of a loved one is a traumatic and tragic experience. We want to do everything we can to stop these experiences from happening unnaturally. We want others to act responsibly {not raised on appeal but improper}"] and other improper arguments were properly objected to and constitute reversible error. The comments that were not objected to, including an additional improper value of human life argument ["If someone injured Dwight Howard, and Dwight Howard broke a bone and couldn't play basketball for a year, no jury in the world would have any problem compensating Dwight Howard $20 million or whatever the value of one year's salary is for Dwight. But we're all here today trying to evaluate Mom and Dad's pain and suffering for the loss of their son. Edwin was

not famous. He was not a star. Very few people even knew who he was. Edwin was one of many faces in the crowd, but to Mom and Dad, he was the most important person in the world."], although equally improper were not objected to and fail to warrant reversal on their own under Murphy. Reversed and remanded for new trial because of preserved errors.)

Linzy et. al v. Rayburn et. al, 58 So.3d 424 (1st DCA 2011) (In auto accident case where liability was admitted and trial was only on damages for which insurance coverage existed, it was improper for defense counsel, in violation of motions in limine prohibiting comment on the financial status of either party or the defendant's ability to pay damages, to comment in opening statement "My client is Mr. Randy Crews, sitting over there. Mr. Crews runs a small business… Mr. Crews hasn't tried to run away from responsibility for the accident. … [T]he reward for standing up and saying, "Hey, we caused this accident, and it was our fault," is now Mr. Rayburn wants him [Mr. Crews] to buy his entire back condition that he said has plagued him since he was a child. … Mr. Crews is being asked to pay for something that was there." After being again ordered to refrain from such comment in closing, defense counsel again argued: "This man over here, Mr. Crews, is being asked to pay for a lifetime of pain management that [Mr. Rayburn] received two separate referrals for within two weeks of this accident. Two separate doctors said, "You have to go to pain management." [Mr. Crews'] company unfortunately gets in an accident with [Mr. Rayburn], and those two other referrals don't matter. Now it's all you [Mr. Crews]. You pay for everything [Mr. Crews]. … [I]f you're going to do that, then you've got to come prepared … to put up on the table the evidence that makes this man [Mr. Crews] responsible." Despite the fact that Mr. Crews was not a named defendant in the case and that defense counsel was retained by an insurance company to represent the defendants [his company and driver], defense counsel repeatedly stated that Mr. Crews [the small business owner] would be solely responsible for any award of damages. By making such statements, defense counsel misled the jury and improperly attempted to appeal to the jury's sympathy. Properly preserved. Order granting new trial affirmed.)

Fasani, et al. v. Kowalski, 43 So.3d 805 (3rd DCA 2010) (in a premises liability action for injuries from a piece of granite that struck plaintiff when it fell from the wall of an elevator, where liability was admitted before trial, it was improper for plaintiff's counsel to suggest to jury that defendants should be punished for contesting the claim ("Why didn't they send him to a doctor instead of kicking him out on the street like a dog and telling him we're giving you nothing….They told him we're wrong, we shouldn't have done it, it's our fault, we did the right thing, we're giving you nothing. Well that isn't really doing the right thing." Counsel continued arguing that def's "drug [plaintiff] through all of this" and attributed this behavior and the condition of the elevator to "corporate greed and arrogance." Plaintiff's counsel also urged jury to punish defendants and "make them do the right thing because they haven't done it on their own and they have no intentions of doing it on their own" (although there was no claim for punitive damages). Arguments served no purpose other than to inflame and prejudice the jury. Further, plaintiff's counsel contrasted def's "corporate greed and arrogance" in "wanting to put beauty over safety" (despite there being no evidence that defendant's installed the granite in a way to sacrifice safety in favor of aesthetics) with plaintiff who was "just a simple man trying to

get by. Not trying to get anything from anybody." This argument of the economic disparity between the parties was "not relevant in determining the issues before the jury, and could only have served to prejudice the members of the jury." Plaintiff's counsel also concluded his request for non-economic damages by repeatedly referring to his client as "retarded." Lastly, plaintiff's counsel implied that the appellants tried to hide evidence at the scene based only on speculation as there was no evidence of tampering presented at trial (and notably, the condition of the elevator was not at issue as the defendants had admitted liability). Given the cumulative effect of numerous improper arguments, case reversed and remanded.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including a statement in opening that plaintiff was "still sitting here in debt with over $80,000 in medical expenses" ("the general rule in Florida, especially in garden variety personal injury trials such as this one, is that no reference may be made to the wealth or poverty of a party during the course of the trial"); misrepresentations of evidence in opening and closing suggesting that plaintiff had lost a testicle by saying plaintiff "will be living for 50 years with half his manhood missing" and was "half a man right now," when evidence did not support such a claim at all and his own urologist found him to be fertile with 100% sperm production ("[C]ounsel both legally and ethically is prohibited from telling the jury he will prove something he cannot prove or that is doubtful."]; statement in opening and closing that "by their negligence" the defendants "wrote a blank check" and it was up to the jury to fill it in (this constitutes an appeal to sympathy and for jurors to award damages in accordance with the standard of what they themselves would want [golden rule]); other improper golden rule arguments telling jury that we can't feel plaintiff's pain, and urging them to "guess, only imagine it"; statements attacking the character of every person involved with the defense, including defense counsel; painting the defense as "frivolous"—designed to "add insult to injury"; and suggesting the defense was suborning perjury and was involved in other improper actions by arguing: "We all make mistakes. But you make a bigger one when you don't admit it; and you make a bigger one to try to avoid responsibility. And you make a bigger one when you call in witnesses that don't tell the truth. Anything to win. Anything to save the day." Finally, counsel wrapped up his summation with an improper argument for a comparative verdict, asking the jury to compare plaintiff's injury to a piece of property like a $10 million dollar Picasso painting and pointed out that if the case were about that painting, the jury would fill in the blank check for that amount on the spot. On appeal, plaintiff's counsel attempted to shift the focus away from these improprieties by arguing that defense counsel's opening was improper (defense commented in opening about how plaintiff was making remarkable improvement but that once those uplifting medical reports came in, plaintiff's counsel referred him to another doctor and all of a sudden plaintiff started limping and claiming new injuries as well as a decline in his recovery. At that point, defense counsel claimed, the case went from being a medical case to a legal case—suggesting that def's referral to a doctor was for financial profit). In addressing plaintiff's claim, the court responded "the legal profession has as much right as anyone else to make an appropriate referral to other professionals. However, if there is evidence that such activity is occurring solely for personal financial profit, then the jury also is entitled to have those facts brought before them for consideration." Reversed and remanded for new trial.)

Samuels v. Torres, 29 So.3d 1193 (5th DCA 2010) (*opening statement*-in auto accident case where liability had been admitted and punitive damages were not being sought (and where first trial had already been mistried when defense counsel during voir dire and opening statement had pointed out to the jury that there was no insurance available and that any judgment they entered would have to be paid personally by def) it was improper for defense counsel to disclose to second jury in opening statement amount of def's meager earnings, expenses he must pay and other unrelated financial matters intended solely to curry sympathy with jury. "Interjection of the wealth or poverty of any party has been consistently held by the courts to be irrelevant to the issue of compensatory damages in a personal injury case based on negligence, highly prejudicial because it diverts the jury from a fair assessment of damages, and a basis for reversal." Reversed.)

Hollenbeck v. Hooks, 993 So.2d 50 (1st DCA 2008) (*voir dire* - defense counsel's comment to venire: "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate" was improper and misleading where counsel was retained by def's insurer ("a big conglomerate") and comment served to suggest to jury that def would be individually responsible to pay any damages, an implication that could not be refuted at trial since the jury is not allowed to hear about the existence of insurance. Reversed.)

Ocwen Financial Corp. v. Kidder, 950 So.2d 480 (4th DCA 2007) (In a civil case, the problem with a "send a message" argument is that it could motivate a jury to be punitive. Plaintiff's argument to jury that it should send a message "loud and clear from this courtroom that you are not going to permit these corporations to treat people this way" was not improper where jury was presented with a claim for punitive damages [although it chose not to award any]. Affirmed.)

Engle v. Liggett Group, et al., 945 So.2d 1246 (Fla. 2006) (although attorney's comments in closing argument were improper and attempts to incite racial passions were "conduct unbecoming an attorney practicing in our state courts," reversal based upon improper closing argument and comment was not warranted when viewed under the totality of the circumstances in this two year trial. Many of the comments were not objected to, were the subject of a curative instruction or were taken out of context by the District Court. A review of the verdicts reveals that the jury carefully analyzed the issues of comparative fault and individual damages, contrary to the image of a runaway and inflamed jury portrayed by the District Court. District Court's ruling affirmed in part and reversed in part. **NOTE: SEE DISTRICT COURT OPINION BELOW (Ligget Group, et al. v. Engle) FOR REFERENCE TO ARGUMENTS NOT INCLUDED IN SUPREME COURT OPINION**)

Gatten v. Zachar, 932 So.2d 543 (5th DCA 2006) (trial court did not err in denying plaintiff's motion for mistrial when defense counsel argued to jury that defendant Dr.'s livelihood was being challenged. Although trial court felt that comment was directed at three-strikes law, an inappropriate matter for the jury's consideration, it's decision to sustain the objection and give a curative instruction ("The jury will disregard that remark. Livelihood is not being challenged.")

but deny the motion for mistrial was not an abuse of discretion. Plaintiff has failed to show that there was "an absolute legal necessity" for the court to grant the motion.)

USAA Casualty Insurance Co. v. Howell, 901 So.2d 876(4th DCA 2005) (in uninsured motorist claim, plaintiff counsel's argument comparing the defendant insurer to the Iraqi Minister of Information, who continually spread disinformation about the Second Gulf War, bore no relation to the evidence introduced at trial and posed a risk of inflaming the minds and passions of the jurors. No objection was made by defense counsel to the arguments in question. Although improper, when considered collectively with other improper arguments by plaintiff's counsel, arguments were not harmful, incurable or such that they so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial. See Murphy 766/1010 below. Affirmed.)

State Farm Mut.Auto Ins. Co. v. Revuelta, 901 So.2d 377 (3rd DCA 2005) (asking jury to call plaintiff's uninsured motorist carrier to account for failing to pay benefits is clearly prejudicial where trial was not over bad faith in failing to pay uninsured benefits but over issue of driver negligence, which carrier claimed did not exist due to sudden brake failure. Such comment amounts to a prohibited "send a message" argument." Similarly, plaintiff continued to argue: "on one hand State Farm is a good neighbor and they want to help you, [yet when it comes time to pay] ... it is like the sales department and the claims department has never met," improperly insinuating that State Farm acted in bad faith in defending the action rather than paying the benefits. This type of argument was improper because State Farm, standing in the shoes of the uninsured motorist, was entitled to raise and assert any defense that the uninsured motorist could have argued. Reversed.)

Bocher v. Glass, 874 So.2d 701 (1st DCA 2004) (*voir dire* - it was improper for plaintiff's counsel to try to ingratiate himself to the jury by, among other things, telling the jury that he had a child near the age of the deceased child, arguing that def. counsel where going to unfairly second guess the decedent's actions but that he knew all about "armchair quarterbacks" because he used to be a professional football player and, after trial court sustained objection, telling jurors "I'm pretty much a straight ahead guy." Reversed based on cumulative errors.)

Wall v. Costco Wholesale Corp., 857 So.2d 975 (3rd DCA 2003) (it was improper for defense counsel in personal injury action to argue that plaintiff/husband was hiding the fact that he was a lawyer for devious reasons, make repeated comments about plaintiff/wife being a "lawyer's wife" and further argue that plaintiff's were committing a fraud upon the court. Reversed.)

Liggett Group, et. al v. Engle, 853 So.2d 434 (3rd DCA 2003) (it was improper for plaintiff's counsel to interject racism into the trial of the tobacco company defendants without basis in the evidence or relevance to the case. Counsel argued to the jury how tobacco companies would "divide the American consumer up into groups," including "white" and "black," then proceeded to tie this racial argument into an appeal for jury nullification arguing that "before we get all teary-eyed about the law ... [h]istorically, the law has been used as an instrument of oppression

and exploitation." Counsel then juxtaposed the def.'s conduct with the genocide of the Holocaust and slavery and urged the jury to fight "unjust laws" with reference to Martin Luther King and Rosa Parks. [Note: four of the six jurors were African American and, even more egregiously, counsel had previously published a book where he identified this strategy almost verbatim and acknowledged that it is tremendously effective because it is incurably prejudicial.] Counsel also accused the def.'s of engaging in "the longest running con in the history of the world" and stated that "our kids and grandchildren" will ask "how did you let them get away with it?" Reversed. **NOTE: THIS CASE WAS SUBSEQUENTLY REVERSED IN PART AS TO CLOSING ARGUMENTS BY THE SUPREME COURT [see Engle v. Ligget above] but is included here for reference to arguments not included in the Supreme Court opinion.**)

Wilbur, et. al v. Hightower, 778 So.2d 381 (4th DCA 2001) (plaintiff's argument: "In this day and age where inanimate objects like paintings are sold at auctions for ten million dollars, a living, breathing person has died, Barbara Hightower .... What that means to Mr. Hightower that this living person is gone from his life. What is the value of that loss?" was not an improper "value of human life argument." Counsel's argument, when taken in context, did not urge the jury to place a monetary value on the decedent's life but, rather, on her surviving spouse's loss. Although the value of a human life is not an element of damages and is not a proper subject for final argument, the value of a surviving spouse's loss of his wife's companionship and protection, as well as his mental pain and suffering as a result of her wrongful death, is a proper measure of damages within the Wrongful Death Statute. Plaintiff's unobjected to argument: "Don't let these people go back to their offices and [laugh] in the hall room and say, we put one over on them," although not an improper "send a message" or "conscience of the community" argument, could reasonably be understood as accusing defense counsel of attempting to mislead the jury. However, error does not seem to have been prejudicial given the compelling evidence of medical negligence and devastating loss to the surviving spouse, the fact that the jury more than halved the plaintiff's requested damages and the fact that the statement was a single excess at the end of a five week trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [citing *Murphy* 766/1010] Error harmless. Order granting a new trial reversed.)

Allstate Ins. Co. v. Buzdigian, 776 So.2d 1104 (5th DCA 2001) (it was improper for plaintiff's counsel to argue: "Now, you know, if these insurance policies are going to mean anything to Allstate, seems to me it's all got to start today with your jury verdict. Without that, Allstate's going to continue to have the attitude -." Following *sua sponte* admonition by trial judge that counsel should not "go there," that argument was improper and that jury should disregard it, counsel continued: "It's all going to start with your verdict." Comment was an improper "send a message" argument which was interrupted by the trial court's instruction and, although counsel inexplicably continued, trial court cured the error by again interrupting counsel and advising him again, in the presence of the jury, that the argument was improper. Effect of the exchanges was to demonstrate to the jury that counsel had erred such that the court was forced to chastise him

twice for his improper conduct. Trial court handled the situation properly by immediately putting a stop to the improper remarks and advising the jury to disregard them. Affirmed.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) (In the case at bar, def. counsel's repeated use of term "B.S. detector, comment that if jury found for the plaintiff they would be "accessories, after the fact, to tax fraud, and characterization of plaintiff's case as cashing in on a "lottery ticket" were all improper. However it was not an abuse of discretion to conclude that the improper arguments were not harmful, incurable or requiring of a new trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [NOTE: Subsequently, *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014) held that the a party benefitting from an error has the burden of proving that the error was harmless, ie. that there is no reasonable possibility that the error complained of contributed to the verdict—the same standard as used in criminal cases. Going forward, this may affect prong 2 of the *Murphy* 4-part test.] Affirmed)

Kammer v. Hurley, 765 So.2d 975 (4th DCA 2000) (although it was improper in medical malpractice action for plaintiff's counsel to question, during closing argument, whether the defendant/doctor "had a license to kill," there was no objection, therefore, error was not preserved. *Receded from on other grounds, 79 So.3d 755*).

Kloster Cruise Ltd. v. Grubbs, 762 So.2d 552 (3rd DCA 2000) (plaintiff counsel's argument to jury to "tell [cruise line] by your verdict in this case to do something about this ... Tell them by the verdict that it's significant. They need to anticipate ... accidents before they happen" was an improper "send a message" argument. Plaintiff counsel aggravated error by arguing that the cruise line had failed to produce safety certifications where such testimony was excluded by his own objection. Reversed and remanded.)

Fravel v. Haughey, 727 So.2d 1033 (5th DCA 1999) (Although it was improper for plaintiff's counsel to request a jury to act as the conscience of the community and to accuse the defendant, his counsel and his witnesses of committing perjury, improper comments were not preserved by appropriate objection and error was not fundamental. [NOTE: court indicated it is receding from its prior practice of liberally reversing cases without objecting based on fundamental error. In the future, such reversals will be rare exceptions rather than the rule. The court pointed out that it would be inappropriate to punish litigants with the cost of retrial for the unethical conducts of their lawyers and suggested that some lawyers would intentionally withhold an objection in order to obtain a "second bite of the apple" if the trial result was unfavorable.] Affirmed.)

Kiwanis Club of Little Havana, Inc. v. de Kalafe, 723 So.2d 838 (3rd DCA 1998) (Plaintiff's counsel improperly appealed to the sympathies and emotions of the jury when he repeatedly appealed to the jury's "community conscience" continuously analogized defendant's exclusion of the plaintiff to political methods in Cuba and repeatedly appealed to the jury's political and social interests. Arguments which are nothing more than "impassioned and prejudicial pleas intended

to evoke a sense of community law through common duty and expectation" are consistently rejected. It is inappropriate for counsel to include appeals to "community conscience" and "civic responsibility" in closing argument. "The prejudicial conduct in its collective import is so extensive that it's influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and merits by the jury." Court indicated it was reversing the case on other grounds and simply stated that these types of comments stray dangerously close to constituting reversible error as a warning for retrial.)

Davis v. South Fla. Water Mgmt. Dist., 715 So.2d 996 (4th DCA 1998) (It is patently improper for counsel to suggest that a jury consider that whatever they award will come out of their pockets as taxpayers. In condemnation proceeding, although def. counsel's comment to jury that plaintiff was "asking you to pay" could be interpreted as reminding jurors that they are taxpayers who would pay for the condemnation value of the property, comment did not rise to reversible error, especially in light of counsel's clarification, following objection and motion, that he meant what a willing buyer would have to pay. Affirmed)

Knoizen v. Bruegger, 713 So.2d 1071 (5th DCA 1998) (To warrant reversal because a closing argument was an improper appeal to the jury's emotion, the argument must be "highly and patently prejudicial." Plaintiff's counsel's argument that plaintiff had suffered "the most devastating injury a woman can suffer. Devastating to her, devastating to her family, to her kids . . . please don't leave her alone to deal with that. Don't leave her bare and naked like this accident has already left her, and her children and her family" was not an improper appeal to the jury's emotions or a veiled attempt to argue for punitive damages. The closing argument was supported by the facts which indicated that plaintiff, a 34 year old mother of 6, was previously involved with many physical activities alone and with her children. There was testimony from her children and other family members about the substantial changes in her life and how the serious and debilitating injuries have affected her. Based on the foregoing, plaintiff's closing argument was only marginally objectionable and defense counsel has not been able to establish that the improper argument was so "pervasive, inflammatory and prejudicial [as] to preclude the jury's rational consideration of the case." Affirmed.)

Sawczak v. Goldenberg, 710 So.2d 996 (4th DCA 1998) and on remand *Sawczak v. Goldenberg,* 781 So.2d 450 (4th DCA 2001) (While it was improper for defense counsel to make arguments that appealed to the community conscience of the jury, expressed counsel's personal beliefs, referred to facts not in evidence and personally attacked the plaintiff's expert as "a hired gun who was asked to put the biggest numbers he could conceivably think of up on the board," plaintiff's counsel improperly objected and moved for mistrial on incorrect grounds of "Golden Rule". Having failed to assert the appropriate grounds in her objection, counsel failed to properly preserve the issue for appeal. Affirmed. [Subsequently, the Supreme Court ordered reconsideration in light of the opinion in *Murphy v. Int'l Robotics,* 766 So.2d 1010 (Fla. 2000), on remand, court held that plaintiff failed to demonstrate that the challenged arguments were "improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."] Affirmed)

Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (4th DCA 1997) (A conscience of the community argument "extends to all impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation." Plaintiff counsel's argument that tomorrow the jury would "get to go home and tell everyone about this case that you sat on and I want you to tell them what you get in Broward County if a taxi driver runs a red light and injures somebody" constituted an impermissible conscience of the community argument and is more egregious in light of the fact that the def. was from Jamaica. Plaintiff's judgment reversed)

Parker v. Hoppock, 695 So.2d 424 (4th DCA 1997) (in automobile accident case involving claim for personal injuries, it was improper for def. counsel to argue: "Our society is such that, for whatever reason, it seems that we've gotten to the point that every time something happens, it has to be somebody else's fault. Even criminals in courtrooms now, blaming the system, their parents, their upbringing, their schooling; it's somebody else's fault." Conjuring up distasteful images of society's ills, from frivolous lawsuits to the refusal of criminals to take responsibility for their own actions, was beyond the scope of permissible argument, especially considering the facts of the case. Reference to criminals and other societal problems had no place in this lawsuit. It is inappropriate to comment on what other lawyers have done and what has occurred in other lawsuits or with other corporations. Remarks alone would not warrant reversal but case was reversed on other grounds.)

Superior Indus. Int'l v. Faulk, 695 So.2d 376 (5th DCA 1997) (plaintiff's argument that the jury has a civic responsibility to let the def. know that actions have consequences and "when the consequences of our actions are severe, we better be prepared to step up and take responsibility" was an improper community conscience/civic responsibility argument. Reference to 16 year old's life being "snuffed out" improperly implies deliberate infliction of injury. Considering all improper arguments - Reversed)

Baptist Hosp. v. Rawson, 674 So.2d 777 (1st DCA 1996) (Improper for counsel to caution the jury "do not grant this hospital and Life Flight and it's emergency room immunity for irresponsible acts. Don't grant them immunity from the incredible stories and what happened after the accident because if doctors and hospitals have no responsibility for their bad acts, then this breeds bad medicine. This is not what the medical community wants in this case. . . "None of these things are believable, but when you think about it . . . it's insulting to you that he would think that you might believe this. It's also worse, and it's an insult to your system of justice. No one, not a president or doctor is above the law. . . . If you let them get away with irresponsible medicine then you breed irresponsible medicine.")

Klose v. Coastal Emergency Servs., 673 So.2d 81 (4th DCA 1996) (In medical malpractice case, it was improper for defense to suggest to the jury that their verdict should, in some part, be motivated by the effect a finding of liability might have on the defendant doctor. Considering other errors in the trial, error was not harmless. Reversed)

Norman v. Gloria Farms, 668 So.2d 1016 (4th DCA 1996) (in rural community of Okeechobee where hunting is a popular sport as evidenced by the fact that only two of the 7 jurors and alternate had never hunted, it was highly improper and prejudicial for def. counsel to argue, in claim for injuries sustained while hog hunting, that a plaintiff's verdict would "bring an immediate halt to hog hunting in Okeechobee," and that "this is just a decision [the jurors] need to make based on being an Okeechobee resident and knowing there is lots of ranch property around and hog hunting is something special in Okeechobee." Although court is committed to proposition that objection to improper argument is necessary in all but a few rare instances, def. counsel's argument went far beyond traditional golden rule argument in that a golden rule argument asks the jury to put themselves in the shoes of the litigant, and def. told the jury that they, personally, would be affected by the outcome of the case. When combined with a "conscience of the community" argument pitting the jury against the plaintiff in an "us-against-them" scenario, the argument was calculated to produce a verdict based upon fear and self-interest and constitutes fundamental error. Further, counsel also played on jurors general fears and prejudices by evoking images of runaway verdicts and frivolous lawsuits ["What is happening to our American system of justice if that is what is supposed to be justice?"] and attacked plaintiffs counsel in general with impermissible comments concerning how plaintiff's lawyers always ask for as much money as they can and hope they "don't turn people off." Reversed without objection)

Martino v. Metropolitan Dade County, 655 So.2d 151 (3rd DCA 1995) (It was improper for defense counsel to argue, among other things, that "this verdict will ring out through the State of Florida and it will say, hey, Dade County is really vulnerable in these negligent hiring cases . Although there were no objections to the various improper comments, the cumulative effect rises to the level of fundamental error because fundamental error occurs if the error extinguishes "a party's right to a fair trial, or the argument was so prejudicial as to be incapable of cure by rebuke or retraction." Reversed.)

Eichelkraut v. Kash N' Karry, 644 So.2d 90 (2nd DCA 1994) (Plaintiff counsel's two references to def.'s "multimillion dollar" corporation and emotional appeal to the jury concerning "the hell that they've [plaintiffs] been through" did not have such a pervasive influence as to constitute fundamental error. Order granting new trial reversed. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Bellsouth Human Resources Admin., Inc. v. Colatarci, 641 So.2d 427 (4th DCA 1994) (improper for defense counsel to thank jury "on behalf of your telephone company" and to argue that it's alarming that "trial lawyers" will come before a jury and try to get 1 ½ million dollars for a broken leg, how that says a lot about "the deterioration of our society" and that our system of justice has "created a situation that every time we do something if it doesn't turn out the way we thought we sue." Defense counsel's argument attacked trial lawyers in general and suggested that their bringing of frivolous lawsuits was one of the major ills of our society. [Upon objection, court's response that def. counsel is a "seasoned attorney" and that he hoped he would "do what is right" and def. counsel's reply: "I would do nothing but what is right" did not help the

situation] It was also improper for plaintiff's counsel to suggest in his rebuttal that def. counsel's arguments were "designed to make you feel prejudice or sympathy" and to refer to def. as corporate America, "You know, the folks that brought you the gas tank that explodes, and agent orange, and silicone breast implants. Court was unwilling to say that judgment would stand because both sides participated in improper arguments. Plaintiff judgment reversed)

Walt Disney World Co. v. Blalock, 640 So.2d 1156 (5th DCA 1994) (in negligence action for personal injuries suffered by child at amusement park, it was improper for plaintiff's counsel to accuse def. of treating the jurors as "fools" and "idiots," and to insinuate an intentional injury by repeated references to def. having "ripped off the plaintiff's thumb." It was also improper for counsel to "evoke the following parade of imaginary horribles," commenting on facts that were not only not in evidence but completely fabricated: ". . . you know, why don't you consider the fact that maybe instead of Luke, a ten year old, that we have a three or four year old sitting in this seat and they had their little ears on, okay, that they bought at the Magic Kingdom and the ears fell off into the water and so they go to pick them up. . . . The boat, it takes their arm off or if they're leaning over it smashes them in the head? . . . I mean, you know, but for the grace of God, you know, we'd have some other catastrophic circumstance. . . ." Despite the absence of objection, error fundamental. Reversed. [Note: pre-Murphy v. Intl. Robotics])

Pippin v. Latosynski, 622 So.2d 566 (1st DCA 1993) (Plaintiffs counsel's rebuke of defense counsel's failure to address plaintiff, who is a catholic priest, as "father" appears to have been solely made for the purpose of raising sympathy for the plaintiff and was totally outside of the realm of materiality in the lawsuit. When combined with other errors in the case, verdict for plaintiff was reversed.)

Murphy v. Murphy, 622 So.2d 99 (2nd DCA 1993) (in conversion case, it was improper for plaintiff's counsel to ask jury to "send a message" to plaintiff that justice has prevailed and to the community and to anyone else that has "that kind of depraved mind, so they won't think they can get away with stealing some elderly folks monies." Combined with improper questions by counsel, plaintiff's judgment is reversed.)

Padrino v. Resnick, 615 So.2d 698 (3rd DCA 1992) (in motor vehicle accident case for personal injuries, it was improper for def. counsel to attempt to capitalize on jurors expressed concern over who would pay damages awarded to plaintiff by arguing in closing: "This is serious stuff. And it is serious to [def] because nobody mentioned that this is her golden years. Nobody mentioned that this is her retirement. Nobody mentioned she worked all her life to be able to retire. And nobody mentioned what this kind of money would do to her, nobody mentioned that." Reversed.)

Blue Grass Shows, Inc. v. Collins, 614 So.2d 626 (1st DCA 1993) (in suit by fair patron for injuries sustained on fair slide, it was improper for plaintiff's counsel to argue to jury: "The fair is coming back to Jacksonville . . . . You folks, . . . you become the conscience of the community. It is you who will tell the fair what kind of standard and what kind of protection you

want for the citizens of this town by your verdict . . . .” This type of “us against them” argument is repeatedly condemned because it can only cause prejudice by pitting “the community” against a nonresident corporation. Such argument is an improper distraction from the jury’s sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial. In order for this argument to be improper, it is not necessary that the words “community conscience” be uttered. The prohibition extends to all impassioned and prejudicial please intended to evoke a sense of community law through common duty and expectation. No objection. Counsel did not follow improper argument with a request or suggestion that the jury punish the def. Not fundamental. Affirmed)

Public Health Trust v. Geter, 613 So.2d 126 (3rd DCA 1993) (in medical malpractice case, it was improper for plaintiff’s counsel to urge the jury to place a monetary value on the life of the plaintiff’s decedent, just as a monetary value is placed on an 18 million dollar Boeing 747 or an 8 million dollar SCUD missile. Argument was improper, highly inflammatory, and deprived the def. of a fair trial on damages. Reversed)

Fowler v. N. Goldring Corp., 582 So.2d 802 (1st DCA 1991) (defense counsel’s closing argument about the “new American dream” was a blatant appeal to the sympathy and prejudice of the jurors and was not based upon any facts in evidence. Trial court erred in allowing argument to continue following objection and in not granting new trial. Reversed.)

City Provisioners, Inc. v. Anderson, 578 So.2d 855 (5th DCA 1991) (Plaintiff’s argument was laced with numerous improper comments that sought sympathy for the extreme poverty and lack of resources of the plaintiff and the injustice foiled upon the plaintiff by the cruel and overreaching conduct of the defendant in defending the lawsuit, expressed personal experiences or beliefs, referred to facts not in evidence, violated golden rule and suggested a comparative verdict. [i.e. “He doesn’t have the money to go pay the doctor . . . like you and I have. . . . He’s an uneducated shrimper. . . . He asked me he said boy, I don’t know about that Jury. . . . You know he can’t relate to you any more than you can relate to him.”] Taken together, arguments warrant reversal on damages. [evidence overwhelming as to liability] Reversed [Note: plaintiff also told jury that if they awarded too much, court could reduce by remittitur but could not increase. Even if it were a correct statement of the law, it was an improper argument that alone could warrant reversal])

Davidoff v. Segert, 551 So.2d 1274 (4th DCA 1989) (improper for defense counsel in personal injury action to make comments about “insurance crisis.” While counsel is accorded great latitude in making argument to the jury, this leeway is not unbridled. The comments made by defense counsel were an improper attempt to appeal to the conscience of the community. No curative instruction was given. Order granting new trial is affirmed.)

Maercks v. Birchansky, 549 So.2d 199 (3rd DCA 1989) (in case for only compensatory damages, it was improper for plaintiff’s counsel to repeatedly ask the jury as the “conscience of the community” to “send a message with its verdict.” Reversed)

Cummins Ala. Inc. v. Allbritten, 548 So.2d 258 (1st DCA 1989) (defense counsel's reference to jurors by their names during closing argument [i.e. "I saw Mrs. Stiltner watching my diesel engine expert take that pump off, and I saw Mr. Boggess shake that line like I did, and I saw the reverend, Mrs. Smith–"] although an improper attempt to curry favor with the jurors, was not a golden rule argument because the jurors were not asked to assume the position of either party. In view of court's intervention, *sua sponte*, instructing def. counsel to terminate this argument and warning him not to personalize the remainder of his argument, comments were not sufficiently prejudicial to constitute harmful error warranting a new trial. Order granting new trial reversed.)

Florida Crushed Stone Co. v. Johnson, 546 So.2d 1102 (5th DCA 1989) (it was improper for plaintiff's counsel to suggest to the jury that they were the conscience of the community and to ask them to "send a message forward about this family." Since plaintiff's counsel did not follow up improper argument with a suggestion or request that the jury punish the defendant [unlike Erie v. Bushy], reversal not warranted even if properly preserved. Affirmed.)

Carnival Cruise Line v. Rosania, 546 So.2d 736 (3rd DCA 1989) (improper for counsel to express personal opinion, attack opposing party, suggest opposing expert was bought and urge jury to consider in verdict how defendant defended the case: "They want to hide the truth. . . . There are certain companies and organizations that look for a way to taint. . . . Carnival Cruise Lines, in my opinion, ... I think the evidence shows that they have taken the position that they're going to put roadblock after roadblock and say she wasn't fit to make this trip. . . . They have a doctor, the best money could buy. . . . In putting up roadblocks such as we've seen here through this entire trial, keep in mind when you make a verdict when you render a verdict, your verdict has to be unanimous. And think about how Carnival Cruise Lines defended this particular case." Reversed)

Pier 66 v. Poulos, 542 So.2d 377 (4th DCA 1989) (it was improper for plaintiff's counsel to make inflammatory remarks in opening and closing [i.e. that the def.s had destroyed the plaintiff's brain, which, like Humpty Dumpty, could not be put back together; that the plaintiff thought she was going insane; that her heart could bleed only tears], repeatedly express his opinion that the def.s were liars and that they engaged in a cover up and a conspiracy to lie and falsify, and urge the jury to send a message to others. Such comments were completely improper and, among other things, went far beyond simply asking the jury to consider whether they believed the witnesses' testimony. Due to the added risk of prejudice affecting the verdict and based upon extensive emotionalism of trial, inadmissible evidence and improper argument, judgment reversed.)

Ballard v. American Land Cruisers, Inc., 537 So.2d 1018 (3rd DCA 1989) (Although defendant was more than adequately covered as an additional insured under American Land Cruisers Insurance policy, defense counsel incorrectly implied to the jury that defendant would harshly be subject to the payment of any verdict himself, not withstanding he had already "suffered enough" through the loss of his daughter. In action by ex-wife of defendant for death of their twelve year

old daughter in an automobile accident in which the defendant was driving, it was improper for defense counsel to seek to invoke sympathy from the jury with inflammatory arguments such as: "he [defendant Ballard) was there and he has to live with that everyday of his life. . . . we are not here for punishment. Calvin Ballard knows he was driving the vehicle and he knows his daughter is dead and if you want a punishment, maybe that is enough. . . . this man's loss is as great as anybody's loss in this lawsuit.")

Simpson v. K-Mart, 537 So.2d 677 (3rd DCA 1989) (alleged extensive "humanizing" of defendant's store manager in trip-and-fall negligence action was entirely proper trial tactic and, in any event, plaintiff only objected once and that objection was sustained without any mistrial being requested or warranted. Affirmed)

Knepper v. Genstar Corp., 537 So.2d 619 (3rd DCA 1989) (Plaintiff's counsel stressing defendant's Canadian affiliations in a manner designed to incite the prejudice of the American jury, including specific admonishment to the jury to "send a message" to Canada and, shortly thereafter, to Montreal, combined with counsel's reference to the fact that defendants were protected by Canadian law firms responding to plaintiff's request for production, were inflammatory, prejudicial and reversible error.)

Hickling v. Moore, 529 So.2d 1270 (4th DCA 1988) (plaintiff not entitled to mistrial for def. counsel's argument to jury as to economic impact a plaintiff's verdict would have on his client: "[Plaintiff's counsel] said he was going to ask you for a lot of money and my client should be responsible for it. She ought to go back to Martin Memorial Hospital and work everyday for the rest of her life." Def.'s motion for mistrial was denied but trial court instructed jury that they "shall disregard the last comment by [def. counsel]. In reaching a verdict you are not to consider whether or not the Defendant Moore has the financial ability to pay." In light of jury verdict finding no negligence by def. Moore appellate court concluded that comment about economic impact did not warrant a mistrial [jury could have found her negligent but also conclude that her negligence was not the legal cause of damage]. Affirmed)

DeAlmeida v. Graham, 524 So.2d 666 (4th DCA 1987) (Although it was improper in medical malpractice case for plaintiff's counsel to ask for retribution for the injuries suffered by plaintiff, there was no objection and the remarks were not fundamental error. Reversed in part on other grounds)

Stokes v. Wet 'N Wild, 523 So.2d 181 (5th DCA 1988) (def. counsel's comment that plaintiff's damage demand was "absolutely ridiculous" and "That is why our courtrooms are crowded and this is why we read articles in the newspaper, because of things like that," were improper attempts to appeal to the conscience of the community and improperly expressed counsel's personal opinion. Combined effect of various improper comments warrants new trial. Reversed. *Note: 1st DCA found this court's ruling to be dicta in Blue Grass Shows, 614/626.*)

Brumage v. Plummer, 502 So.2d 966 (3rd DCA 1987) (although it was improper in medical

mal./wrongful death case for plaintiff's counsel to tell the jury: "For you to allow them to get away with it, it's going to happen to other people. You've got to stop it right here and right now," error was not objected to and comment was neither "of such character that neither rebuke nor retraction may entirely destroy [its] sinister influence, nor so inflammatory as to extinguish the [party's] right to a fair trial and to therefore constitute fundamental error." [It should be noted that if counsel had gone the extra step and asked the jury to punish the defendant, error would most likely have been found to be fundamental.] Additional comment that it would be unconscionable to allow the doctor to walk out of the courtroom and make deceased's son an orphan was not improper where def. expert testified that if the plaintiff's witnesses were correct, the def.'s medical supervision of the decedent would have been "grossly improper." As a result, statement was a permissible comment on the evidence and, even if error, trial court concluded that its instruction cured any possible prejudice. Subsequent order granting new trial reversed.)

Cox v. Shelley Tractor & Equip., 495 So.2d 841 (3rd DCA 1986) (comment that characterized plaintiff's foot as "crushed" and put together like a "shish kabob" were entirely fair, though graphic, and were not so inflammatory as to warrant a new trial. Order granting new trial reversed.)

Good Samaritan Hosp. v. Saylor, 495 So.2d 782 (4th DCA 1986) (Sometimes emotional and heated debate are to expected in counsel's closing summation to jury and given wide latitude afforded during closing arguments, reversal is not warranted unless the remarks are highly prejudicial and inflammatory. Plaintiff's argument concerning the value of the mother [in wrongful death/medical malpractice case] even if error, was waived when defendant failed to object. The emotional aspects of trial were no greater than those that understandably pervade a trial of this type and defendants have failed to demonstrate that plaintiff's closing argument exceeded the wide latitude generally permitted. Affirmed.)

S.H. Inv. & Dev. Corp. v. Kincaid, 495 So.2d 768 (5th DCA 1986) (it was improper for plaintiff's counsel, among other errors, to urge the jury that they have an opportunity to speak with a loud voice from Orange County to corporations in Miami and New York [send a message]. "Us-against-them" arguments serve no purpose other than to pit "the community" against a non-resident corporation. Reversed.)

Bloch v. Addis, 493 So.2d 539 (3rd DCA 1986) (And I'm saying send [Dr. Bloch] a bill for [denying that his operation caused plaintiff's problem] and I'm saying in this case I want a message sent to the community that you will not allow Dr. Goodson to come and . . . ." When combined with other improper comments, error was fundamental. Reversed. [Note: pre-Murphy v. Intl. Robotics])

Kelley v. Mutnich, 481 So.2d 999 (4th DCA 1986) (it was improper for plaintiff's counsel to comment to jury that he liked the jury when he picked them and liked them now. Comment was both inaccurate and inappropriate. Such attempts to curry favor with members of the jury are unprofessional and should be met with rebuke. Nonetheless, effect of the precise words used in

the instant case are not of such magnitude in their appeal to passion, prejudice, sympathy or other emotion "that neither rebuke nor retraction will destroy their sinister influence. . . ." Every inappropriate remark does not justify a mistrial, although trial court is given broad discretion in that decision. In addition, comment on def.'s prior arrest, although inappropriate, did not warrant new trial where it had already been raised by def. himself while testifying. Order granting new trial reversed.)

Eagle-Picher Indus. v. Cox, 481 So.2d 517 (3rd DCA 1985) (Plaintiff's exhortation to jury that it "send a message" to the def. was not per se reversible since, unlike in Erie Insurance v. Bushy, below, argument was not followed by a reference to def.'s having to "pay a penalty" and def.'s were not claiming that the damages awarded were excessive. Affirmed)

Wasden v. Seaboard Coast Line RR., 474 So.2d 825 (2nd DCA 1985) (in suit stemming from accident when railroad bridge collapsed, comment by plaintiff's counsel that railroad had made a business decision not to spend the money to keep their bridges from collapsing was not so prejudicial as to warrant a new trial. Order granting new trial reversed. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Metro. Dade Cty. v. Cifuentes, 473 So.2d 297 (3rd DCA 1985) (In highly emotional trial for the death of a mother where children cried while testifying and other family members cried in the audience, it was improper for plaintiff's counsel to make overly emotional argument to the jury including: "I know it was a devastating horrible loss to these people. I know last night I did not sleep. I know that last night was probably the first time in a long time that I told my wife that I loved her. I know that I was in fear last night, not fear of dying but fear of living if someone I loved died." Although defense objection was sustained, trial court did not, on its own motion, rebuke counsel for this highly improper argument or declare a mistrial. Overall impact of the emotional outbursts and improper closing argument deprived defendant of a fair trial. Reversed)

A.H. Robins Co. v. Ford, 468 So.2d 318 (3rd DCA 1985) (in Dalkon Shield litigation, while it was appropriate for jury to hear of other claims of infections from use of product in order to prove notice, argument that those other claims proved that the product caused the infection to plaintiff in this case was improper. However, error was not objected to and was not fundamental. Affirmed)

Russell, Inc. v. Trento, 445 So.2d 390 (3rd DCA 1984) (Plaintiff told the jury, not in response to any question, how tragic it was to hold her child and feel the life go out of the child's body as he died and went cold, explaining how she could not adequately express that feeling to the jury. Plaintiff's counsel commented about having "lived with the case and represented" the plaintiff for 3 years. In reality, counsel's retainer agreement indicated he had represented her for 16 months and the plaintiff did not see, much less hold, her son after the accident in question. Moreover, plaintiff and her counsel each had an emotional breakdown before the jury that was calculated to evoke sympathy. "Theses sympathetic ploys used by counsel will not be condoned." Furthermore, counsel misled the jury as to appropriate damages, again seeking an

emotional response, by arguing: "You six people have the ultimate say-so on what a life is worth and what Anthony's life was worth to [his mother]. . . ." ". . . [Def. counsel] knows a life, such as Anthony's, was worth three million dollars." Parents of a deceased minor child may recover for loss of support, loss of services, and mental pain and suffering from the date of death. However, the value of a human life is not an element of damages and is not a proper subject for final argument. Reversed.)

Honda Motor Co. v. Marcus, 440 So.2d 373 (3rd DCA 1983) (even aside from the general proposition that in a case involving disfigurement, the loss of a limb, and severe mental trauma, counsel may be expected to be emotional and are accorded a wide latitude in making arguments to the jury, counsel's argument that plaintiff "didn't ask to be born. None of us did. Diana didn't ask for her father to leave the family when she was a baby . . . to be a battered child whose mother fractured her nose . . .to go into various foster homes but the law is you take the person as you find them" were well within the evidence presented on the issue of the mental trauma suffered by plaintiff as a result of the accident and by no means was so inflammatory as to constitute fundamental error. Comment that "maybe if she's got that ten million dollars, she can help do the research" was not fundamental error [not objected to] where jury verdict was for 3 million dollars and amount was supported by the evidence. Therefore court cannot assume that jury verdict reflects improper element of damages [research] which jury could not properly consider.)

Rudy's Glass Constr. v. Robins, 427 So.2d 1051 (3rd DCA 1983) (Although plaintiff counsel's argument that the jury should "set the standard for business morality" was arguably improper, the error was waived when defense counsel failed to move either for a mistrial or for an instruction that the jury disregard the comment. Since the remark was not highly inflammatory or prejudicial, reversal is not mandated. Affirmed.)

National Car Rental Sys. v. Bostic, 423 So.2d 915 (3rd DCA 1982) (plaintiff's argument that def. was trying to sell jury "a bill of goods" and that def.'s executives were sitting "in their ivory towers, puffing on their cigars in their multimillion dollar buildings" making plaintiff try the case and saying "Bring them all the way. If they give it to him, we'll pay it, . . . He gets up here, their hired gun, their man," was an improper appeal to the passions and prejudices of the jury. Although these comments alone may or may not have warranted a new trial, when combined with golden rule argument: "If the shoe is on the other foot, would you wear it?" invoking the proposition of the jury putting themselves in the place of the plaintiff, reversible error occurred. Judgment for plaintiff reversed.)

Seshadri v. Morales, 412 So.2d 39 (3rd DCA 1982) (comments by parent's trial counsel concerning "value of human life" and "value of an innocent baby" constituted error both inappropriate and prejudicial. Reversed.)

Erie Ins. Co. v. Bushy, 394 So.2d 228 (5th DCA 1981) (Plaintiff counsel improperly argued: "I want you to send a message to Erie, Pennsylvania, that you can't defend a case by coming down

here and just subtly hinting that we don't owe it and it must have been something else. Send a message to those people and let them know that they are going to have to pay a penalty." Trial judge denied motion for mistrial after jury retired and made no clarifying admonition or warning that punitive damages were not appropriate in this case. Appellate court unable to tell whether damages awarded were punitive. Together with other closing errors, plaintiff judgment reversed.)

Martin v. State Farm, 392 So.2d 11 (5th DCA 1980) (in case for wrongful death of a child as a result of an auto accident, def. counsel's comments to jury were highly improper, inflammatory and patently prejudicial. "You don't buy a boy as you would on the market. . . . Should you also ought to be sorry also for Dr. Norris? . . . [H]e has to wear and bear that thought the rest of his life. . . . I say the doctor is a victim as well. . . . She should not have to think about this any more. But if you give her an award, then every time she spends those dollars, she's going to think about this case, and I submit that that's just too much for her to bear. . . . [I]f the truth means nothing, then we can accept people like Ricky Hicks and David Sikes and we can give Mrs. Martin lots of money just like we are selling beef. . . . In my heart, and from what I've heard, I believe that your only just verdict can be one for the defendants." The callousness of some of these remarks is unworthy of a member of the bar. Reversed.)

Eastern Steamship v. Martial, 380 So.2d 1070 (3rd DCA 1980) (in case involving injuries allegedly sustained by plaintiff while working on a vessel, plaintiff counsel's remarks that plaintiff "has been plagued by having his son brought before his eyes and seeing him shot to death" were totally improper, inappropriate and irrelevant to the issues of the cause. Comments appear to have been made for the sole purpose of raising sympathy for the plaintiff based upon a tragic experience totally outside the realm of materiality in the instant lawsuit. Trial court overruled the objection and denied motion for mistrial. Judgment for plaintiff reversed.)

Russell v. Guider, 362 So.2d 55 (4th DCA 1978) (although it was improper for def. counsel to attempt, on more than one occasion, to inject an emotional issue before the jury concerning the relationship between verdicts in automobile negligence cases and rising insurance premiums, error was not preserved and was not fundamental. Affirmed.)

Levin v. Hanks, 356 So.2d 21 (4th DCA 1978) (in action by insurance company which concededly was properly subrogated to its insured, it was improper for def. counsel to repeatedly argue to the jury that insurance co. was in effect trying to recover for second time because it had previously collected premiums from boat owner. Argument was directed to the prejudice and passions of the jury against insurance companies. Reversed.)

Davis v. Lewis, 331 So.2d 320 (1st DCA 1976) (where plaintiff's counsel argued for lost wages for plaintiff's wife on the basis that she quit her job to be with her injured husband, and trial court sustained def. objection to that argument and instructed jury that those wages were not a proper item of damage, it was improper for plaintiff's counsel to seek to inflame the jury by arguing that the defendants were concerned only with money and that he and the jury were

concerned with the lives of the plaintiff's. Comments were emotional and unnecessary. However, there was no objection and comments were not so highly inflammatory and prejudicial as to require reversal without objection. Affirmed)

Pierce v. Smith, 301 So.2d 805 (2nd DCA 1974) (argument by plaintiff's counsel that his client "does not have the resources nor the ability to go out and compete with [def.] and [his insurance company] in bringing expert doctors to you," that an "adverse verdict would not affect [def.'s] ability to practice . . . . an adverse verdict will only call for his insurance company to pay the verdict that is imposed against him," and that ". . . when this is over, you all can go back to living your normal lives and the Court can go about conducting its duties. . . .and we can all walk away from this case and forget it. But there are two people in this courtroom who can't walk away and forget . . ." were prejudicial and inflammatory, constituted an impermissible appeal to sympathy predicated on economic disparity and improperly suggested that insurance coverage would be available to pay the judgment. Comments appealed to the passion or prejudice of the jury. Reversed)

Rogers v. Myers, 240 So.2d 516 (1st DCA 1970) (in wrongful death case, improper for plaintiff's counsel to argue to jury that "this case involves the community and social interests of the community" because decedent's "children have to be fed and clothed . . . this then becomes a social problem because welfare becomes involved, because we have to pay this . . . ." Argument amounts to an improper appeal to the jury's self-interest because it conveys to the jury that if a verdict favorable to the plaintiff is not returned, the jurors as taxpayers will have to pay for the care of the decedent's children through welfare system. Comment is similar to other improper arguments [sometimes made by counsel for governmental defendants] that direct jury's attention to fact that judgment against governmental agency will be paid from tax funds. Reversed.)

Clark v. Galloway, 217 So.2d 151 (1st DCA 1969) (it was not error for def. counsel to tell the jury that a verdict against the def. would have a profound detrimental effect upon their economic well-being. Taking comment in light of evidence and entire argument, not error. Affirmed [Note: case involves a collision by an intoxicated plaintiff who crossed the center line and crashed head-on into def. who was operating his vehicle in a completely lawful and proper manner. Plaintiff then sued for his injuries. It appears that the justness of the cause may have influenced the court's conclusion on the propriety of the argument])

Green v. The Jesters, 199 So.2d 785 (1st DCA 1967) (While it was improper for defense counsel to argue to the jury that plaintiff, who was charter member of the club [the defendant], was suing his own brothers in the club and trial court was correct in sustaining the objection, remarks were not or such sufficient weight or viciousness as to sway the normal mental processes of a jury. Defense counsel's comments did not render the verdict biased or prejudiced, or in other words tainted by misconduct. Affirmed.)

Clark v. Yellow Cab Co., 195 So.2d 39 (3rd DCA 1967) (although in automobile accident case it was an improper appeal to the jury's passions and prejudices for def. counsel to argue "if you

allow damages for that and make us pay it, then You are asking for it" as that comment obviously referred to increased insurance rates, objection was sustained and jury ordered to disregard the comment. Affirmed.)

Bullock v. Branch, 130 So.2d 74 (1st DCA 1961) (Comments by attorney to jury asking them "how much would you pay to have a half inch cut inflicted in your skull . . . to render you unconscious . . . to leave you . . . with your walk affected . . . with your memory affected . . . . How much would I have to pay you to shorten your life?" and similar arguments are entirely improper. Objections were overruled and no curative instruction was requested or given. While it is true that defense counsel did not follow up his objection with a request for a curative instruction, the argument was so palpably prejudicial and inflammatory that the trial court should have on its own motion instructed the jury to disregard the argument. Generally, it is considered improper for an attorney, in his argument in a personal injury case, to ask the jury what would compensate them for a similar injury. Reversed. *[Court held that in a case of such error, prejudicial and inflammatory effect on jury can be presumed. However, the holding of presumed prejudice has since been rejected by the Supreme Court in Murphy 766/1010]*)

Seaboard Air. RR v. Strickland Air, 88 So.2d 519 (Fla. 1956) (It was improper for plaintiff's counsel to argue that he could just see defendant's agents sitting with their feet up on their desk, laughing at plaintiff and his injuries and that "if you think, under the evidence, we are entitled to a verdict, I would like to wipe that smile off [his] face. . . . I don't suppose he has ever worked with his hands or his back; and I don't suppose he will have to work with his hand and his back. . . . When people get so careless they can sit up in a plush office in Norfolk, Virginia and laugh about a man 30 years old who has a permanent back injury, then things are coming to a said state of affairs. . . . I think in this case the Seaboard Airline has pulled every sly trick in the books." Despite the absence of timely objections, case reversed due to the collective impact of the numerous improper arguments which were so extensive that their influence pervaded the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury. *[In Murphy, 766/1010, the Sup. Ct. receded from this case on the limited issue of the ability to seek appellate review for unobjected to improper arguments.]*)

Conner v. State Road Dep't of Fla., 66 So.2d 257 (Fla. 1953) (in condemnation proceeding, it was improper for counsel for the State to argue, inter alia, that "The testimony of the oil companies . . . is nothing but trickery to get money, . . ." and "These Jacksonville attorneys have come over here and tried to put something over on the Court." Comments were unwarranted and inexcusable. Reversed.)

Tampa Transit Lines v. Corbin, 62 So.2d 10 (Fla. 1953) (comment by plaintiff's counsel that def. employed "high price attorneys on retainer," to "fight all claims made against them, regardless of how just they may be, and that was what the average man, or average woman, was up against," and other similar comments were highly prejudicial. Reversed on these and other improper comments.)

Blackwood v. Jones, 149 So. 600 (Fla. 1933) (In case of auto/pedestrian accident, it was improper for attorney for the plaintiff to tell the jury that the defendant was trying to have them believe that the decedent "deliberately committed suicide" where defense counsel gave no such impression. Statement was intended and calculated to prejudice defendant in the minds of the jury by making it appear that defendant was trying to escape legal liability by casting aspersions on decedents character. Statement extremely prejudicial. Reversed.)

VIII. Personal opinion of counsel

Gold v. West Flagler Associates, Ltd., 997 So.2d 1129 (3rd DCA 2008) (in slip and fall case, it was improper for defense counsel to argue: "I've been doing this almost 30 years now, and it invariably happens somebody falls down somewhere. They don't know why they fell. They don't know for sure where they fell. The investigator and the photographer go back to the scene of the accident. They go around and take pictures of everything they can find that looks bad. … [S]o you can parade all these pictures of allegedly dangerous conditions in front of the jury in the hopes you'll find that, well, even though it didn't happen here, it must have been the same thing here." [Court did not specify errors, i.e.-attacking opposing party and counsel suggesting they were suborning perjury or manufacturing a claim, arguing facts not in evidence, expressing personal opinion, etc.] Error harmless after reviewing entire record. Affirmed)

SDG Dadeland Assoc. v. Anthony, 979 So.2d 997 (3rd DCA 2008) (it was improper for Plaintiff's counsel to offer his personal opinion that witness had lied as to the placement of a warning cone and to tell the jury that they had just witnessed a frivolous defense "up close and personal." Reversed on cumulative errors.)

Engle v. Liggett Group, et al., 945 So.2d 1246 (Fla. 2006) (although attorney's comments in closing argument were improper and attempts to incite racial passions were "conduct unbecoming an attorney practicing in our state courts," reversal based upon improper closing argument and comment was not warranted when viewed under the totality of the circumstances in this two year trial. Many of the comments were not objected to, were the subject of a curative instruction or were taken out of context by the District Court. A review of the verdicts reveals that the jury carefully analyzed the issues of comparative fault and individual damages, contrary to the image of a runaway and inflamed jury portrayed by the District Court. District Court's ruling affirmed in part and reversed in part. **NOTE: SEE DISTRICT COURT OPINION BELOW (Ligget Group, et al. v. Engle) FOR REFERENCE TO ARGUMENTS NOT INCLUDED IN SUPREME COURT OPINION**)

Liggett Group, et. al v. Engle, 853 So.2d 434 (3rd DCA 2003) (it was improper for plaintiff's counsel to assert that the defendant's position made him grit his teeth and say to himself: "Can anyone buy this?" Also improper to state he wanted to punch one witness, that he was sure another witness "was ashamed to give his answer, but he gave it ... under oath," and that another

witness "hasn't been prepped on the subject [by counsel], so maybe I'll get an honest answer." Reversed. **NOTE: THIS CASE WAS SUBSEQUENTLY REVERSED IN PART AS TO CLOSING ARGUMENTS BY THE SUPREME COURT [see Engle v. Ligget above] but is included here for reference to arguments not included in the Supreme Court opinion.**)

GM v. McGee, et. al, 837 So.2d 1010 (4th DCA 2002) (In response to defense argument that plaintiff's expert was not even present when crash test was performed, it was improper for plaintiff's counsel to vouch for the credibility of co-counsel who was present at crash test: "John Uustal was there, they know he was at that test. You think John Uustal would do anything improper?" It is clear error for an atty. to ask the jury to believe him, or his co-counsel, based on his personal credibility. The jury is required to decide a case on the basis of the law and evidence, not on their affinity for or faith in a particular lawyer. Error harmless. Affirmed.)

Lingle v. Dion, et. al, 776 So.2d 1073 (4th DCA 2001) (it was improper for plaintiff's counsel to attack def. counsel's analogy in closing as "about the dumbest story I've ever heard in a courthouse in front of a jury of intelligent people" and to refer to def.'s testimony as follows: "...I'm going to show you what real B.S. is from the defendant. Real B.S." It is improper for an attorney to express personal opinion as to the credibility of a witness, the arguments presented by his opposition or his personal knowledge of facts. Moreover, use of the term "B.S." was not only improper but highly unprofessional." Dicta because already reversed on other grounds.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) (it is not improper for trial counsel to refer to a witness as a "liar" or to say he has "lied" provided such characterizations are supported by the record. When supported by the record, counsel is not offering a personal opinion but submitting to the jury a conclusion that reasonably may be drawn from the evidence. Similarly, the use of the personal pronoun "I" during closing argument is not, in and of itself, improper. "I think" and "I believe" can be a figure of speech and trial courts should not, in analyzing those expressions, put form over substance. Affirmed)

Mayo v. Gazarosian, 727 So.2d 1140 (5th DCA 1999) (While it was improper for defense counsel to express personal opinion concerning the credibility of witnesses and to assert personal knowledge of facts, only some of the improper arguments or comments were objected to by the plaintiff's counsel and, after review of the entire record, they do not rise to the level of fundamental error. A judgment will not reversed for unpreserved error unless the prejudicial conduct, in its collective impact, is so extensive that its influence pervades the trial "gravely impairing a calm and dispassionate consideration of the evidence and merits.")

Owens-Corning v. McKenna, 726 So.2d 361 (3rd DCA 1999) ([opening statement case] where def. counsel's opening statement repeatedly denigrated asbestos litigation and lawyers who tried asbestos cases, claimed that there was an entire industry of lawyers and doctors who became dependant on such litigation, and stated that in plaintiff's case "litigation generated the disease," and plaintiff's counsel's objections to those statements were overruled, it was not reversible error for plaintiff's counsel to comment, at one point during his objections: "Just for the record, I think

this is the most unethical opening statement I have ever heard." Even if comment had been properly preserved for appellate review, plaintiff's lawyer was simply defending himself and his client's case against a barrage of blatant improprieties by his opponent and his comment was an accurate description of defense counsel's tirade. Affirmed.)

Davis v. South Fla. Water Mgmt. Dist., 715 So.2d 996 (4th DCA 1998) (it was improper for defense counsel to argue that as an "officer of the court" and an attorney for the Water Management District and other authorities he would tell the jury that the $18 million demanded was too much for full compensation because those comments express counsel's opinion of the evidence and improperly bolster his own credibility. However, error was not objected to and remarks do not constitute fundamental error. Affirmed)

Sawczak v. Goldenberg, 710 So.2d 996 (4th DCA 1998) and on remand *Sawczak v. Goldenberg*, 781 So.2d 450 (4th DCA 2001) (While it was improper for defense counsel to make arguments that appealed to the community conscience of the jury, expressed counsel's personal beliefs, referred to facts not in evidence and personally attacked the plaintiff's expert as "a hired gun who was asked to put the biggest numbers he could conceivably think of up on the board," plaintiff's counsel improperly objected and moved for mistrial on incorrect grounds of "Golden Rule". Having failed to assert the appropriate grounds in her objection, counsel failed to properly preserve the issue for appeal. Affirmed. [Subsequently, the Supreme Court ordered reconsideration in light of the opinion in *Murphy v. Int'l Robotics*, 766 So.2d 1010 (Fla. 2000), on remand, court held that plaintiff failed to demonstrate that the challenged arguments were "improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."] Affirmed)

Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (4th DCA 1997) (plaintiff's argument: "that's the kind of defense and evidence and forthrightness that you get from this side of the room [indicating def.],""the last thing that the defense wants in this case is for you to be fair and reasonable. That is why they come in here with this bogus counterclaim to try and make it look like they have something to argue about . . . ." and "but [plaintiff] is not going to lie to you. That's my client. She is not. . . . She's not going to tell you something- - " were improper expressions of personal opinion as to the justness of the defense, the credibility of the witnesses and the credibility of his client. An attorney's expression of personal opinion as to the credibility of a witness or of his personal knowledge of facts is fundamentally improper. Plaintiff's judgment reversed on these and other comments)

Goutis v. Express Transport, Inc., 699 So.2d 757 (4th DCA 1997) (counsel's use of phrases such as "I would propose" or "I submit" were not improper expressions of personal opinion [citing Forman v. Wallshein, below]. The comments at issue do not put the lawyer's credibility on the line, nor do they suggest that the attorney has access to additional information which he is inviting the jury to consider. Such phrases, in this case, merely reflect ordinary patterns of speech, which are not unethical. Likewise, counsel's argument that there was no evidence to support the opinions of the defense expert and that such opinions were "pure groundless

speculation" was appropriate comment upon evidence presented. Lastly, counsel's suggestion that def. was "95%" responsible for the accident was not an improper expression of personal opinion, such argument is a conclusion based upon the evidence before the jury. Order granting new trial reversed. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Winterberg v. Johnson, 692 So.2d 254 (1st DCA 1997) (counsel's expression of personal beliefs in closing was not so egregious as to constitute fundamental error. Test is whether level of conduct was so pervasive that it could not be corrected by proper instruction from the trial court, and whether the conduct was so "pervasive, inflammatory, and prejudicial to preclude the jury's rational consideration of the case." Affirmed)

Lowder v. Economic Opportunity Family Health Ctr., Inc., 680 So.2d 1133 (3rd DCA 1996) (def. counsel's use of phrases "I think," "I believe," and "I disagree" were figures of speech and did not constitute prohibited vouching or expressions of personal opinion. Affirmed)

Segarra v. Mellerson, 675 So.2d 980 (3rd DCA 1996) (In order to impeach co-defendant as to her version of the accident, defense counsel called her English professor as a witness to testify that she was absent from class on the day of the accident, although she claimed to be returning from class at the time the accident occurred. Following that testimony, defense counsel argued to the jury "I personally have always been of the belief that if you stretch things a bit about A, you might stretch things about B. . . . [W]e don't think (co-defendant) has been completely candid with you about the accident. . . . What we wanted to show you is we didn't think she was straight forward about something as simple as where she was that day." Because the professor's testimony about co-defendant's absence from class was proper impeachment testimony, there was no error in allowing co-defendant's attorney to comment on that evidence, and on his view of that evidence, in his closing argument. [Court cites Craig v. State, 510 So.2d 857 (Fla. 1987) ("When counsel refers to a witness or a defendant as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.) Note that in this context the court is not bothered by counsel's expression of personal opinion])

Cohen v. Pollack, 674 So.2d 805 (3rd DCA 1996) (in auto accident case, improper for plaintiff's counsel to argue: "She [plaintiff's witness] told the truth. . . . Everything we told you is true, . . . Everything we've been telling you about [plaintiff], every single last detail is true. . . ." Comments were improper expressions of personal opinion. An attorney's personal beliefs or feelings toward a case or the trial's participants are irrelevant and create reversible error. Combined with other errors in closing, judgment for plaintiff reversed.)

Baptist Hosp. v. Rawson, 674 So.2d 777 (1st DCA 1996) (Improper for counsel to express his personal reaction and opinion after seeing his client's "day in the life" video: "I woke up . . . in just a cold sweat, and somehow I had transposed myself into Keith. . . . and I said listen, calm

down, your health is reasonably good. You've got children and grandchildren. . . . And then I got to thinking, you know, everyday, everyday that he wakes up, he wakes up to this nightmare. When considered together with other improper arguments, errors were so pervasive as to affect the fairness of the proceeding and will not be condoned. Reversed. [Note: pre-Murphy v. Intl. Robotics])

D'Auria ex rel. Mendoza v. Allstate Ins. Co., 673 So.2d 147 (5th DCA 1996) (PCA - concurring opinion is written solely to remind trial judges of their "long-standing responsibility to protect jurors from improper closing arguments, even in the absence of a proper objection." Judge pointed out that defense counsel engaged in character assassination of the 16 year old plaintiff, her counsel and witnesses; injected his personal opinions on the credibility of the witnesses, belittled the plaintiff, urged jury to "send a message" and apologized for plaintiff's case. According to concurring judge, reversal would have been mandated if a proper objection and motion for mistrial had been made. Affirmed)

Rockman v. Barnes, 672 So.2d 890 (1st DCA 1996) (While it was improper for plaintiff's counsel, on a number of occasions, to express his personal beliefs concerning the evidence which was presented, defense counsel properly objected and the trial judge properly sustained the objection and issued a curative instruction. Under these circumstances, the improper activity did not reach the level of reversible error, especially since defense counsel failed to move for a mistrial. Court notes that the expression of a personal opinion by counsel violates Rule 4-3.4 of the Rules of Professional Conduct that regulate the Fla. Bar. Affirmed.)

Forman v. Wallshein, 671 So.2d 872 (3rd DCA 1996) (it is improper for counsel to inject his personal opinions, beliefs, and attitudes into the case at any time because it puts counsel's credibility at issue [the jury is required to decide a case on the basis of the law and evidence, not on their affinity for or faith in a particular lawyer] and it inevitably suggests that the lawyer has access to off-the-record information, and invites the jury to decide the case on the basis of non-record evidence. Therefore, such comments as "I think" and "I believe," unless clearly and directly linked to the evidence, are improper and since such phrases often draw objections when used they are best excised from counsel's trial vocabulary. Nonetheless, it is not unethical to fall occasionally into first person references, nor is it necessary to preface every assertion with "the evidence has shown," "we have proven," or the like. [Quoting Mauet, Fundamentals of Trial Technique]. In this case, counsel's use of "I think" and "I believe" was a figure of speech and could not reasonably be understood as an expression of personal opinion. Affirmed)

Muhammad v. Toys "R" Us, Inc., 668 So.2d 254 (1st DCA 1996) (def. counsel's expression of personal opinions: "I think that's way too much based on what I've observed," "This is not a hill. . . . I don't think this is a fair - -," "I will give you 3,000 reasons why he [expert] testified about that bike [being defective]; that's what he got paid. . . . That was so ludicrous even Mr. Loehr couldn't bring it up. It was so ludicrous that they didn't even bring him down here [suggesting that the reason witness' deposition was read in lieu of live testimony was because his opinion was ludicrous]" were improper and constitute fundamental error. Comments in which counsel

asserts personal knowledge of facts in issue except when testifying as a witness, or states personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accuse constitute ethical violations of the Rules Regulating the Fla. Bar. While evidence may be introduced to impeach a witness's testimony, opposing counsel should not do so in terms of his own opinion. Reversed.)

Dutcher v. Allstate Ins. Co., 655 So.2d 1217 (4th DCA 1995) (it was improper for def. counsel to argue "I don't think there is a chiropractor that would ever stop someone from having more care. . . . Folks, asking a chiropractor to cut off another chiropractor is sort of like throwing kerosene on a fire." What other chiropractors have done, when not supported by evidence, is as improper as arguing what other lawyers have done, what has occurred in other law suits, and what other corporations have done. Direct references to them violate ethical rules against referring to facts not in evidence or asserting personal opinions [Rule 4-3.4(e)])

Martino v. Metropolitan Dade County, 655 So.2d 151 (3rd DCA 1995) (It was improper for defense counsel to argue, among other things, I will tell you right now it was I, . . . who decided to try this lawsuit based upon my recommendation to Dade County. . . . I don't like Mr. Martino [plaintiff]. . . . We went back years before when he was bringing in $5,000, $6,000, $20,000.00 and then one shipment $336,000.00." Although there were no objections to the various improper comments, the cumulative effect rises to the level of fundamental error because fundamental error occurs if the error extinguishes "a party's right to a fair trial, or the argument was so prejudicial as to be incapable of cure by rebuke or retraction." Reversed.)

Sacred Heart Hosp. v. Stone, 650 So.2d 676 (1st DCA 1995) (it was improper for plaintiff's counsel to express his personal opinion as to the justness of the cause and the culpability of the civil litigant, in violation of Rule 4-3.4(e) of the Rules Regulating the Fla. Bar, by commenting that def. presented "ridiculous testimony" and a "ridiculous" theory of fault, as well as asserting that he thought the logging truck driver did an exceptional job in avoiding fatalities. "Combined with other improper argument, plaintiff judgment reversed)

Walt Disney World Co. v. Blalock, 640 So.2d 1156 (5th DCA 1994) (in personal injury action involving a child plaintiff, it was improper for plaintiff's counsel to comment on how he "had heard nothing but wonderful things" about the plaintiff; that it was "outrageous" for def. to assert its def. of contributory negligence [despite evidence in the record to support it]; and to give his personal opinion on the credibility of several def. witnesses. Reversed.)

Kaas v. Atlas Chemical Co., 623 So.2d 525 (3rd DCA 1993) (def. counsel's argument ["It's so ridiculous and I can prove that that guy is a liar on this issue because, ladies and gentlemen of the jury, take a look at this. . . . Now , here's how I am going to prove to you that he was a liar. . . . That's a lie. Dr. Mackler showed you an anatomy book. . . . The only defense witness on Andre Kass' impotency was Dr. Suarez who does hate me and who I did call a liar and who I will take some more time with you to show that he really is a liar because I mean, the guy flip flops in a deposition . . . . I feel the two to three nights thing was phony. I think he is a liar"] falls squarely

within that category of fundamental error – requiring no preservation – in which the basic right to a fair and legitimate trial has been fatally compromised. Counsel improperly expressed his feelings or beliefs concerning the credibility of a witness and impugned the integrity of a witness by calling him a liar. Counsel may "demonstrate inconsistencies between witnesses' testimony and within a witness's own testimony. But lines have been drawn as to what constitutes proper comment and what is egregious. The statements in the instant case were egregious." Order granting new trial affirmed.)

Pippin v. Latosynski, 622 So.2d 566 (1st DCA 1993) (Plaintiff's argument that: "I'm absolutely outraged at the defense of State Farm and Mr. Pippin in this case. They could have come in here and said "Mr. Pippin made a mistake, we owe you the damage." What did they do? No, they don't admit liability. They come and say "you prove it, you prove Mr. Pippin was at fault." Constitutes and expression of personal opinion and violates the rules regulating the Fla. Bar, Rule 4-3.4(e). When combined with other errors in the case, verdict for plaintiff was reversed.)

Silva v. Nightingale, 619 So.2d 4 (5th DCA 1993) (comments by def. counsel, with regard to part of plaintiff's testimony, that jury should "forget that, forget that was ever said"; with regard to plaintiff's inability to work as a housekeeper, that counsel had made beds himself and vacuumed and didn't find it to be a debilitating experience; with regard to the reason why plaintiff sought additional medical treatment, "I'm sure there were some legal considerations, too"; and statement "I don't believe that," referring to what plaintiff allegedly told her treating physicians were all improper expressions of personal opinion that cumulatively warranted a new trial despite the fact that plaintiff failed to object to all errors. Reversed on these and other improper comments. [Note: pre-Murphy v. Intl. Robotics])

Schubert v. Allstate Ins. Co., 603 So.2d 554 (5th DCA 1992) (It was improper for defense counsel to argue that plaintiff's doctor "as he usually does, has found a permanency"; give his own opinion on the qualifications and truthfulness of his witnesses; tell the jury that plaintiffs were seeking "not a small fortune, a large one;" argue "I'm here to tell you the truth" and many other improper comments. While some of the remarks alone may not have required reversal, [they were not objected to by plaintiff's counsel] the cumulative effect of the improper comments warrants reversal and the award of a new trial. Reversed.)

Riley v. Willis, 585 So.2d 1024 (5th DCA 1991) (improper for plaintiff's counsel to express his personal opinion on what he would have done at accident scene: "You think they'd be going just to the yellow line with two children and a dog there? I suggest to you out of that hundred there would be a whole lot that would be over in the left side where I think I would be . . . ." Expression of personal opinion violates ethical rules. Reversed despite absence of objection)

Carroll v. Dodsworth, 565 So.2d 346 (1st DCA 1990) (in automobile accident case, it was improper for defense counsel to interject matters outside of the record by commenting to the jury regarding his having obtained certain records concerning a previous accident and expressing his

personal belief regarding the value of plaintiff's claim, especially after the trial court sustained an objection to a very similar comment. Reversed on other grounds so improper arguments were not considered further.)

Moore v. Taylor Concrete, 553 So.2d 787 (1st DCA 1989) (def. counsel's comments: "I believe, and the circumstances are out there, that Mr. Broxton was reasonable in the efforts that he was trying to make on that night. . . . Was there negligence . . . . I believe you found - - . . . . [as to percentage of negligence] I think if not fifty-fifty, even more than that, . . .We didn't get the truth from the stand or from the witnesses - - form her, I mean, under oath. I think we got it, hopefully, from everyone else" were improper expressions of personal opinion. An attorney's interjection of his beliefs is improper, however, such impropriety does not equate to fundamental error warranting a new trial unless the error is so fundamental as to extinguish a party's right to a fair trial, or the prejudicial conduct in its collective import is so extensive that its influence pervades the trial so as to impair the jury's calm and dispassionate consideration of the evidence. Reversed on other grounds)

Maercks v. Birchansky, 549 So.2d 199 (3rd DCA 1989) (it was improper for plaintiff's counsel to assert his personal opinion as to the credibility of a witness, the justness of his client's cause and the perfidy of the defendant. Reversed)

Carnival Cruise Line v. Rosania, 546 So.2d 736 (3rd DCA 1989) (improper for counsel to express personal opinion, attack opposing party, suggest opposing expert was bought and urge jury to consider in verdict how defendant defended the case: "They want to hide the truth. . . . There are certain companies and organizations that look for a way to taint. . . . Carnival Cruise Lines, in my opinion, ... I think the evidence shows that they have taken the position that they're going to put roadblock after roadblock and say she wasn't fit to make this trip. . . . They have a doctor, the best money could buy. . . . In putting up roadblocks such as we've seen here through this entire trial, keep in mind when you make a verdict when you render a verdict, your verdict has to be unanimous. And think about how Carnival Cruise Lines defended this particular case." Reversed)

Pier 66 v. Poulos, 542 So.2d 377 (4th DCA 1989) (it was improper for plaintiff's counsel to repeatedly express his opinion that the def.s were liars and that they engaged in a cover up and a conspiracy to lie and falsify, and urge the jury to send a message to others. Such comments were completely improper and, among other things, went far beyond simply asking the jury to consider whether they believed the witnesses' testimony. Due to the added risk of prejudice affecting the verdict and based upon extensive emotionalism of trial, inadmissible evidence and improper argument, judgment reversed.)

Stokes v. Wet 'N Wild, 523 So.2d 181 (5th DCA 1988) (def. counsel's comment that plaintiff's damage demand was "absolutely ridiculous" and "That is why our courtrooms are crowded and this is why we read articles in the newspaper, because of things like that," were improper attempts to appeal to the conscience of the community and improperly expressed

counsel's personal opinion. Counsel also went on to repeatedly express his personal opinion concerning the justness of his client's defenses, the credibility of witnesses [he did not think what plaintiff testified to was true and he disliked plaintiff's expert and thought he was misleading] and plaintiff's own culpability. Combined effect of improper comments warrants new trial. Reversed)

S.H. Inv. & Dev. Corp. v. Kincaid, 495 So.2d 768 (5th DCA 1986) (it was improper for plaintiff's counsel to argue that if jurors were not as incensed about the corporate def.s insensitivity as he was [personal opinion] he had failed the jury and his clients; and that he had never seen so much evidence and such strong "fingers of guilt" pointing to the culpable parties [facts outside the evidence/personal opinion]. Counsel also expressed his personal knowledge that certain evidence and statements presented by the def.s were not true, that his clients had testified truly, honestly and candidly, and expressed his opinion as to the veracity of various adverse witnesses. Together with various other improper arguments, expressions of personal opinion in violation of the rules of ethics will not be condoned even absent objection. Reversed.)

Bloch v. Addis, 493 So.2d 539 (3rd DCA 1986) (Improper for plaintiff's counsel to testify in closing: "I know what I said to him on the telephone. And I know and it's clear from the evidence that he never heard of the carpal tunnel syndrome until he got that EMG. When combined with other improper comments, error was fundamental. Reversed. [Note: pre-Murphy v. Intl. Robotics])

Bertoglio v. Amer. S & L, 491 So.2d 1216 (3rd DCA 1986) (Improper for def. counsel to comment that he was "a shareholder in American Savings [defendant]". However, where no objection was made to improper argument, no dissatisfaction was expressed with trial courts *sua sponte* instruction that jury disregard the statement and comment did not rise to level that created an unfair trial, reversal was not warranted. Affirmed)

Gregory v. Seaboard System RR, 484 So.2d 35 (2nd DCA 1986) (Even if a lawyer asserts his personal knowledge of the facts in issue in violation of the code of professional responsibility, such impropriety does not necessary equate to fundamental error. Where counsel argued 1. (. . . and I have never seen a witness in my life that looked like that man on the stand.) 2. (Here is a true scientist . . .) 3. (We have brought the leading experts in here . . .) 4. (Folks, I think it defies belief that this railroad after this trial is going to continue anything for Mr. Gregory.) 5. (... and I commend TCO, I commend their lawyers) and 6. (And [they] have elected under this lawsuit not to tell the truth.) The six comments do not support a finding that the closing argument by plaintiff's counsel constituted conduct of such a pervasive or prejudicial influence as to deny defendant a fair trial on the issue of liability. Although comments were objected to and court reserved ruling in request of counsel, subsequently granting a new trial, order granting a new trial is reversed.)

Borden, Inc. v. Young, 479 So.2d 850 (3rd DCA 1985) ("They have done things that you can't possibly imagine and Eddie [plaintiff] is supposed to be able to go in and counteract this type of

resources. It's absolutely and totally impossible. . . . They say but don't hold it against us. Don't hold it against Elsie. Well, I got to tell you something. Elsie isn't the sweet little cow you see on the milk can. Obviously, Elsie is a big corporation and they are there to do one thing, lay it off on somebody else . . . ." Plaintiff's argument alleged personal knowledge of nefarious activities supposedly engaged in by the corporate defendant, on top of which allegations were untrue. Arguments of both plaintiff and defense were entirely improper and both counsel were referred to the Fla. Bar for disciplinary action. Error fundamental. Reversed despite absence of objection or motion for mistrial. [Note: pre-Murphy v. Intl. Robotics])

Albertson's Inc. v. Brady, 475 So.2d 986 (2nd DCA 1985) (improper for plaintiff's counsel to express personal opinion as to his client's credibility: "This case for me personally is extremely difficult to try. I have a tendency to get very personally involved with my clients, and in this particular case it's no exception. I strongly believe Ruth Brady [plaintiff]. I strongly believe her disability." Not reversible error where remarks, although improper, were not highly prejudicial nor inflammatory and, thus, were not a proper basis for a new trial. Judgment reversed on other grounds.)

Wasden v. Seaboard Coast Line RR., 474 So.2d 825 (2nd DCA 1985) (counsel's use of the words, "I'm telling you," "I say baloney," "I would suggest to you," "we knew," and other such phrases were not improper as they were used in the context of commenting upon matters which were in evidence. Although they would have been better avoided, they do not render the closing argument inflammatory. Order granting new trial reversed. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Seguin v. Hauser Motor Co., 350 So.2d 1089 (4th DCA 1977) (it was improper for defense counsel to assert his personal opinion as to the credibility of a witness: ". . . I am an officer of the Court. If I lie to you, ladies and gentlemen of the jury, they would take my license away, and the practice of law and justice means too much to me and I tell you this; yes, Mr. Berrie was telling the truth. He told me that. He said, 'That fellow, I knew him, he was limping long before this accident occurred. I can't remember which leg it was. He had a limp and they called him, "the Penguin." I don't know why. I always assumed it was by reason of the limp he had,' and that was what the man told me." Defense judgment reversed. [no mention of additional error of referring to facts not in evidence])

Miami Coin-O-Wash v. McGough, 195 So.2d 227 (3rd DCA 1967) (plaintiff counsel's argument: "In my humble judgment and I would not be here before you with this case and these people if I did not believe with all my heart that this is a case in which plaintiffs are entitled to your verdict . . ." was an improper expression of personal opinion . An attorney should not assert in argument his personal belief in his client nor in the justice of his cause. By doing so, counsel removes himself from his position as an advocate and as an officer of the court and, in effect, becomes an additional witness for his client, not subject to cross examination.)

Seaboard Air. RR v. Strickland Air, 88 So.2d 519 (Fla. 1956) (It was improper for plaintiff's

counsel to repeatedly express his person opinion: "I don't know whether Strickland is normal, but I think I am and I am telling you I would have an antagonistic attitude toward people who would write stuff like these people have written. . . . Now, frankly, the demonstration out there made, as far as I am concerned, the question of their liability easy. . . . Now, gentlemen, it was a strange thing that happened out there today and to my way of thinking it is typical of Seaboard Airlines Attitude in this entire case. . . . I am confident that after you have heard this evidence, and after you have seen that demonstration out there that there is no question in your mind and certainly there is none in mine - - about the failure of this railroad to use ordinary care. . . . I don't think railroads are bad. I think the railroads have done a lot to help this country; but I think in this case the Seaboard Airline has pulled every sly trick in the books." Although no objections were made to the improper closing argument, collective impact of numerous incidents of improper argument is so extensive that it's influence pervades the trial, gravely impairing a calm dispassionate consider of the evidence and the merits by the jury. Reversed. *[In Murphy, 766/1010, the Sup. Ct. receded from this case on the limited issue of the ability to seek appellate review for unobjected to improper arguments.]*)

IX. Judicial conduct

A. Duty of court

Vargas v. Gutierrez, 176 So.3d 315 (3rd DCA 2015) (in medical malpractice case, it was improper for plaintiff's counsel to tell jury that testifying physician had stated 6 year old, who had to have both kidneys removed, would have been completely cured with relatively minimal, non-invasive treatment if condition had been treated at the outset. Statement was completely fabricated as there was no testimony she could have been cured by that method, or even that she could have been cured at all. Error was significant because causation was a hotly contested issue and trial court failed to sustain objection, instead instructing jury to rely on their recollection of the testimony during the several week trial. Error was exacerbated because plaintiff's counsel violated judge's "1 expert per specialty" ruling, calling 4 pathologists to testify by improperly categorizing them as treating physicians and using them to give expert opinions (while def complied with the court's ruling and was strictly limited to one expert). Further, plaintiff's counsel capitalized on the violation by arguing that 4 doctors – including treating physicians who didn't have an "axe to grind"— had agreed with his position; thereby categorizing the improperly presented expert testimony as unbiased treating physicians and comparing that to def's single expert doctor. [**NOTE**: court warned trial courts to be wary of litigants attempting to elicit expert testimony disguised as fact testimony from a treating physician. Reversed.)

D'Auria ex rel. Mendoza v. Allstate Ins. Co., 673 So.2d 147 (5th DCA 1996) (PCA - concurring opinion is written solely to remind trial judges of their "long-standing responsibility to protect jurors from improper closing arguments, even in the absence of a proper objection." Judge pointed out that defense counsel engaged in character assassination of the 16 year old

plaintiff, her counsel and witnesses; injected his personal opinions on the credibility of the witnesses, belittled the plaintiff, urged jury to "send a message" and apologized for plaintiff's case. According to concurring judge, reversal would have been mandated if a proper objection and motion for mistrial had been made. Affirmed)

Muhammad v. Toys "R" Us, Inc., 668 So.2d 254 (1st DCA 1996) (In light of the propensity of appellate courts to reverse where an attorney's conduct violates the rules of professional conduct, trial judges are advised to take appropriate measures to prevent such conduct. The courts must curtail any unseemly conduct that lowers the professional reputation of the Bar and brings disrepute to our judicial system.)

Olbek v. Kraut, 650 So.2d 1138 (5th DCA 1995) (although this is a PCA, concurring opinion urges trial courts to take appropriate action to curb improper closing arguments given this districts [5th] commitment to reverse even in the absence of objection when argument violates the code of professional responsibility. [counsel apparently made "smoke and mirrors" type argument and argument of facts not in evidence which, although improper, did not warrant reversal without objection])

Bellsouth Human Resources Admin., Inc. v. Colatarci, 641 So.2d 427 (4th DCA 1994) (It is the trial court's responsibility, when objections are made to improper argument, to sustain the objections and let counsel know that these tactics will not be tolerated. Since the basic parameters of proper argument are the issues reflected in the pleadings; the facts shown by the evidence and the differences to be drawn therefrom; and the instructions given to the jury, with some latitude for rhetoric, it should not be difficult for trial judges to recognize when counsel are exceeding the bounds of propriety. [Trial court failed to control or even sustain objections from either side to outrageous arguments by counsel.] Plaintiff judgment reversed)

Murphy v. Murphy, 622 So.2d 99 (2nd DCA 1993) (unless trial judges are willing to grant mistrials or new trials based upon prejudicial conduct of counsel, there will be no elimination of such conduct.)

Knapp v. Shores, 550 So.2d 1155 (3rd DCA 1989) (Trial court committed reversible error in limiting the combined closing arguments for both plaintiffs to 35 minutes after 7 days of trial in which 20 witnesses were called and complex medical evidence was adduced concerning a claimed brain injury to the plaintiff. Reversed. *[Subsequently disapproved of on other grounds - i.e. issues relating to seat-belt defense, in Bulldog Leasing Co. v. Curtis, 630 So.2d 1060 (Fla. 1994)]*).

Sharp Electronics v. Romeka, 513 So.2d 721 (1st DCA 1987) (trial judge could have been more direct and definitive in his rulings on some of appellant's objections to the closing argument. [inter alia, in response to objection to def.'s "infinite resources" in case where punitive damages were not being sought, trial judge responded: "I think probably 'infinite resources' is an overstatement. I think only God has those."])

Gregory v. Seaboard System RR, 484 So.2d 35 (2nd DCA 1986) (Although a trial judge should intervene to prohibit counsel's improper comment even when opposing counsel does not object the duty of counsel to object is not alleviated.)

Borden, Inc. v. Young, 479 So.2d 850 (3rd DCA 1985) ("[I]t is no longer-if it ever was-acceptable for the judiciary to act simply as a fight promoter, who supplies an arena in which parties may fight it out on unseemly terms of their own choosing, and then, on the ground that the loser has asked for what he received, obediently raise the hand of the one who emerges victorious. We demean ourselves and the system of justice we serve when we permit this to occur." The proper performance of a judge's duties requires something more than letting the children settle their playground disputes among themselves. Reversed despite absence of objection or motion for mistrial. [Note: pre-Murphy v. Intl. Robotics])

Wasden v. Seaboard Coast Line RR., 474 So.2d 825 (2nd DCA 1985) (A trial judge can and should intervene to prohibit improper comments even when opposing counsel does not object. However, that does not alleviate counsel's duty to object to preserve error. — Where a trial judge grants a new trial because the improper conduct was so pervasive as to make it appear that the jury has acted on matters outside the record or from sympathy, prejudice or passion, the trial judge should identify the actions of the jury he feels results from the pervasive influence. He should not only clearly set forth the error he feels occurred, but also the result of that error. Otherwise the trial judge improperly sits as a seventh juror with veto power. Order granting new trial reversed. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Hartford Accident & Indem. Co. v. Ocha, 472 So.2d 1338 (4th DCA 1985) (The trial court should not hesitate to keep tight reins on a lawyer who seeks to win his case by castigating an entire segment of the legal profession. [counsel had argued how plaintiff's lawyers always ask for 10 to 15 times what they want in damages])

Honda Motor Co. v. Marcus, 440 So.2d 373 (3rd DCA 1983) ("The proposition that a trial court may - - even should - - intervene to restrain improper comments despite the lack of objection by counsel does not, as appellant seems to suggest, relieve counsel from his obligation to object.")

Schreier v. Parker, 415 So.2d 794 (3rd DCA 1982) (Even absent objection, trial court should not condone arguments in derogation of Fla. Bar Code of Professional Responsibility EC7-24, DR7-106(C) (3),(4). Reversed.)

Beaches Hosp. v. Lee, 384 So.2d 234 (1st DCA 1980) (Court did not err in admonishing counsel not to read from a deposition in closing argument. Directions to counsel during closing argument are within the broad description of the court and counsel was not embarrassed before the jury. Affirmed)

Hillson v. Deeson, 383 So.2d 732 (3rd DCA 1980) (even absent objection, trial court should restrain comments in which counsel assert personal belief in the justness of the cause and the credibility of the parties as witnesses and personal knowledge of facts. Since both parties engaged in improper conduct and neither objected, judgment affirmed.)

King Pest Control v. Binger, 379 So.2d 660 (4th DCA 1980) (Although lawyers should be allowed to try their case without undo interference by the presiding judge as long as they conduct themselves appropriately within the confines of ethics and accepted courtroom decorum, it was inappropriate for counsel to resort to stump speeches and speaking motions and objections and engage petulant quarreling with each other which distracts the jury from its mission. In such circumstance the trial judge should exercise that degree of control necessary to prevent such unseemly and unprofessional conduct. Where appellant's counsel participated in the offensive conduct during the trial and failed to object during appellee's final argument, reversible error has not been demonstrated.)

Nelson v. Reliance Ins. Co., 368 So.2d 361 (4th DCA 1978) ("While all judges are required by judicial dictates to exercise control over a trial, absent proper objections, neither trial nor appellate judges, can be expected to take on the roll of school teachers, continually correcting argument or comments unobjected to by opposing counsel.")

Bishop v. Watson, 367 So.2d 1073 (3rd DCA 1979) (where def. counsel's argument was factually misleading to the jury and improperly implied greater credibility for the def. by stating that the plaintiff was seeking $100,000 but the def. had nothing to gain by her testimony - although def. had a severed counterclaim for damages of which the jury was not aware - it was the duty of the court to give a cautionary instruction thereto, even in the absence of objection. New trial was not warranted where plaintiff's counsel did not object or move to strike. Had motion been made, error could have been cured by instruction of the court. Error not fundamental. Order granting new trial reversed.)

Clay v. Thomas, 363 So.2d 588 (4th DCA 1978) ("It is the duty of the trial judge, whether requested or not, to check improper remarks of counsel to the jury and to seek by proper instructions to the jury to remove any prejudicial effect they may be calculated to have against the opposite party." [citation omitted, see *Baggett* below] Reversed on other grounds.)

Carlton v. Johns, 194 So.2d 670 (4th DCA 1967) ("It is the duty of the trial judge, whether requested or not, to check improper remarks of counsel to the jury and to seek by proper instructions to the jury to remove any prejudicial effect they might have had upon the jury." [citation omitted, see *Baggett* below] Reversed on other grounds.)

Baggett v. Davis, 169 So. 372 (Fla. 1936) (The law seems to be well settled that it is the duty of the trial judge, whether requested or not, to check improper remarks of counsel to the jury, and to seek by proper instructions to the jury to remove any prejudicial effect they may be calculated

to have against the opposite party. *[Note: Murphy 766/1010 receded from an aspect of Baggett by holding that a party cannot seek relief in an appellate court for unobjected-to argument unless he has at least challenged the argument by a motion for new trial]*)

Bullock v. Branch, 130 So.2d 74 (1st DCA 1961) (Comments by attorney to jury asking them "how much would you pay to have a half inch cut inflicted in your skull . . . to render you unconscious . . . to leave you . . . with your walk affected . . . with your memory affected . . . . How much would I have to pay you to shorten your life?" and similar arguments are entirely improper. Objections were overruled and no curative instruction was requested or given. While it is true that defense counsel did not follow up his objection with a request for a curative instruction, the argument was so palpably prejudicial and inflammatory that the trial court should have on its own motion instructed the jury to disregard the argument. Generally, it is considered improper for an attorney, in his argument in a personal injury case, to ask the jury what would compensate them for a similar injury. Reversed. *[Court held that in a case of such error, prejudicial and inflammatory effect on jury can be presumed. However, the holding of presumed prejudice has since been rejected by the Supreme Court in Murphy 766/1010]*)

Seaboard Air. RR v. Strickland Air, 88 So.2d 519 (Fla. 1956) (It is the responsibility of the trial of the trial court to protect litigants against such interference by counsel with the orderly administration of justice and the protection of the right of the litigant to a verdict "uninfluenced by the appeals of counsel to passion or prejudice." [Quoting United States v. American Dye and Instrument Works, Inc., 213 F.2d 731] *[In Murphy, 766/1010, the Sup. Ct. receded from this case {Strickland} on the limited issue of the ability to seek appellate review for unobjected to improper arguments.]*)

Tampa Transit Lines v. Corbin, 62 So.2d 10 (Fla. 1953) (where plaintiff's counsel made improper comments attacking def.s and their counsel and expressing personal knowledge of facts not in evidence, it became the duty of the trial Judge to reprimand the attorney and to do all that he could to eradicate such illegal testimony and highly prejudicial remarks from the minds of the jury. [In response to objection, Judge simply stated that he had tried for years, without success, to keep counsel from going outside the record, and then told counsel that he should confine his argument to the record but that he might make illustrations of common knowledge] Reversed.)

St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So.2d 670 (Fla. 1950) ("Counsel should be careful to refrain from improper argument. Trial judges should require them to do so.")

B. Limitations on closing argument

Shoaf v. Geiling, 960 So.2d 41 (5th DCA 2007) (*concurring* – with regard to trial judge's decision to allow counsel to play portions of video depositions to the jury during closing arguments, "the practice seems to run contrary to the premise that closing argument is an

opportunity for counsel to comment on the evidence—it is not supposed to be an instant replay.")

Gianos v. Baum, et al., 941 So.2d 581 (4th DCA 2006) (in medical malpractice case where plaintiff presented testimony of a pathologist who opined as to cause of death and defendant did not call a pathologist as a witness but instead relied on the testimony of an internist, trial court erred in precluding plaintiff's counsel from arguing that he had presented the testimony of a well qualified pathologist while the defendant had not. Plaintiff's comment that defendant had not presented such evidence was a fair comment on the evidence presented.)

Lowder v. Economic Opportunity Family Health Ctr., Inc., 680 So.2d 1133 (3rd DCA 1996) (in medical malpractice case, it was proper for trial court to preclude plaintiff from arguing to jury that it should draw adverse inference from def.'s failure to call physician who treated plaintiff as a witness where doctor was no longer employed by defendant medical center, was equally available to both sides and her testimony would have been cumulative to the testimony of her supervisor who did testify. In order to comment on a party's failure to call a witness to testify, it must first be shown that the witness is peculiarly within the control of that party and the testimony of the witness would elucidate the transaction. While an employee is normally within a party's control, the doctor was a former employee and nothing rendered her peculiarly within the def.'s power to produce. She was equally available to both parties by subpoena. In addition, cumulative testimony does not warrant the imposition of the negative inference for a witnesses failure to testify. Affirmed)

Slawson v. Fast Food Enterprises, 671 So.2d 255 (4th DCA 1996) (where defendant sought the benefit of §768.81 regarding apportionment of damages between tortfeasors, trial court should have allowed plaintiff's counsel to argue to the jury the effects of any apportionment between the defendants and should instruct the jury that apportionment of fault does not permit any reduction by the jury in the assessment of damages. Failure to allow the argument and give the instruction requires a new trial on damages. Reversed. *4th DCA declined to follow this case on totally different issue: 724/672.*)

Winn Dixie Stores v. Merchant, 652 So.2d 1206 (4th DCA 1995) (where def. failed to object or seek to have redacted portion of training tape that stated that accident claims cost the company $72,000,000 per year, def. could not seek new trial for plaintiff counsel's reference to that portion of tape in his closing. Affirmed)

Fino v. Nodine, 646 So.2d 746 (4th DCA 1994) (in civil case, trial court erred in preventing counsel from commenting to jury about party's failure to testify where the party was available to be called by either side. The failure of a party to appear and testify as to material facts within his knowledge creates an inference that he refrained from appearing or testifying because the truth, if made to appear, would not aid his contention. While counsel may be required to show that a witness is available before commenting on his or her failure to testify, because a witness may not have a great interest in the case, a party's failure to testify, absent a showing of unavailability, may be raised as a negative inference because parties presumably have the most knowledge of

the circumstances and the most interest in how the case is resolved. The unfavorable inference which may be drawn from the failure of a party to testify is not warranted *when there has been a sufficient explanation for such absence or failure to testify.* Among other reasons which might be considered as sufficient explanation would be a showing that *the party has no personal knowledge or memory of the facts* in issue, or a showing that any *testimony of such party would be purely cumulative* of that already established by other competent evidence. Whether appellee's live testimony would be cumulative would be determined by the trial court. Reversed on these and other grounds.)

Metropolitan Dade County v. Zapata, 601 So.2d 239 (3rd DCA 1992) (trial court improperly restricted def.'s closing by preventing counsel from using the words "assumption of risk." Although under present facts legal doctrine of assumption of risk was merged into comparative negligence, trial court should not have prohibited argument that the decedent contributed to his injury by assuming a risk he was aware of, when def. counsel introduced evidence demonstrating that decedent was a weak swimmer.)

Bell v. Harland Rayvals Transp. Ltd., 501 So.2d 1321 (4th DCA 1987) (In determining a proper period of time for closing argument, the court should consider the length of the trial, the number of witnesses, amount of evidence, importance of the case, number and complexity of issues, amount involved and press of time. It was error for trial court to limit closing argument to thirty minutes where the case took a week to try and involved complex issues of liability and damages. Pressure to move cases and keep dockets current, while admirable goals, should not be accomplished at the expense of fairness to the litigants and without consideration for the juror who could be greatly assisted in rendering their verdict by the attorneys' closing arguments. Reversed.)

Strong v. Mt. Dora Growers, 495 So.2d 1238 (5th DCA 1986) (it was improper for trial court to make the length of closing argument contingent upon whether a charge conference is required. A party has a clear right to be heard on proposed charges and is not required or expected to waive this right in order to obtain adequate time to present his closing [court stated it would give 30 minutes if charge conference is not required and 20 minutes if it were required]. "In establishing the appropriate time limitations for closing argument, the court should consider the complexity of the testimony and issues, the number of witnesses, the length of their testimony, the seriousness of the case, and a host of other factors which distinguish one trial from another."[Case had over 13 witnesses, 20 exhibits and 500 pages of testimony. Fact that issue was only whether requirements of No Fault Law were met did not justify the limitation] Reversed)

Maleh v. Fla. E. Coast Prop., 491 So.2d 290 (3rd DCA 1986) (It is an abuse of discretion, and therefore reversible error, for a trial court to set arbitrary time limits on counsel's final arguments to the jury in a criminal or civil case. Trial court committed reversible error in limiting opening statement to 5 minutes and closing argument to 15 minutes or a combined time of 20 minutes where 16 witnesses testified over a 2 ½ day trial and liability and damages were hotly contested

by both parties. Reversed.)

Woodham v. Roy, 471 So.2d 132 (4th DCA 1985) ("In establishing appropriate time limitation for closing argument, the court should consider the following factors: length of trial, number of witnesses, amount of evidence, importance of the case, number and complexity of issues, amount involved and press of time In all events, the time must be reasonable and should permit counsel an adequate opportunity to relate the factual argument to the governing principles of law." Twelve minute closing argument in three witness case [one was an insurance expert] tried over a day and a half was an abuse of discretion. [trial court had said 20-30 minutes originally but when counsel's cross went long, court deducted time from closing.] Reversed)

Louisiana-Pacific v. Mims, 453 So.2d 211 (1st DCA 1984) (The use of a chart during closing argument is not a matter of right but is discretionary with the judge. But if allowed, when the argument is concluded the chart must be promptly removed from the jury's observation and must not be sent to the jury room. Where chart was sent back to jury as a "court exhibit," plaintiff's verdict reversed.)

Sosa v. Knight-Ridder Newspapers, 435 So.2d 821 (Fla. 1983) (in wrongful death action against newspaper arising from an accident which caused the death of news carrier, it was error for trial court to allow def. to argue to jury in closing that plaintiff had received workman's compensation benefits [facts not in evidence] and further that jury needed to know that in determining whether decedent was covered by workman's compensation and therefore was not entitled to sue. Statements about compensation benefits were not supported by evidence and could have improperly influenced the jury. Since the facts are not in dispute, trial court should decide whether decedent was an employee or independent contractor and whether he was working within the scope of his duties at the time of the accident as a matter of law. Appellate court mandate reversing order granting new trial reversed and case remanded for new trial [court did not decide whether trial court was correct in its decision that decedent was not working within scope of duties because issue was not briefed.])

Janke v. Corinthian Gardens, 405 So.2d 740 (4th DCA 1981) (In personal injury action against condominium association and condominium developer for alleged person injuries, plaintiff failed to show prejudice in trial court limitation of closing argument which prevented plaintiff or remaining defendant from arguments which placed the blame on the developer who is released from the suit at the close of all the evidence. Plaintiff's objections to the limitation are not clear and there is not demonstration of prejudice. Affirmed.)

Davidson v. Metro. Dade Cty., 405 So.2d 245 (3rd DCA 1981) (it was not an abuse of discretion for trial court to deny third-party plaintiff a three minute rebuttal argument at the close of plaintiffs' final argument. Trial judges must be given broad latitude in the control of causes before them, particularly jury cases. Affirmed)

Linehan v. Everett, 338 So.2d 1294 (1st DCA 1976) (it was error for trial court to prevent

plaintiff's counsel from commenting on def.'s failure to call doctor who examined plaintiff at def.'s request where plaintiff testified as to the examination by doctor. Counsel may comment on the failure of def. to call such doctor as a witness and may have the jury draw such inference as they might deem appropriate. Reversed.)

Chandler Leasing v. Gibson, 227 So.2d 889 (3rd DCA 1969) (where def. did not plead contributory negligence and did not seek any instructions on the issue of contributory negligence as a result of plaintiff wife's failure to wear a seatbelt, it was not error for trial court to preclude def. from making such argument to the jury. *[Subsequently, Ridley v. Safety Kleen Corp, 693 So.2d 934 (Fla. 1996) held that failure to wear a seatbelt had to be raised as an affirmative defense of comparative negligence.]* Affirmed.)

Potock v. Turek, 227 So.2d 724 (3rd DCA 1969) (Generally, the manner of conducting a trial and the time for closing argument lies within the discretion of the trial judge. [Note the age of this case as more recent opinions have chastised judges for unreasonably limiting the amount of time for closing argument]).

Thrifty Super Market v. Kitchener, 227 So.2d 500 (3rd DCA 1969) (it was not improper for trial court to allow plaintiff to tally up the separate damage claims and, for the first time, state to the jury the total amount of damages requested during final rebuttal argument where the record reflects that the specific items of damage and costs were enumerated in plaintiff's initial closing argument and, therefore, the totaling of those figures during final rebuttal could not be viewed as a surprise. Affirmed)

Fla. E. Coast Railway v. Morgan, 213 So.2d 632 (3rd DCA 1968) (it was not error to allow plaintiff's counsel to argue, for the first time in final summation, for a punitive damage award between $10,000 and $20,000 where he had indicated in opening argument that a $5,000 award for punitive damages would be insufficient. No surprise to amount demanded. Affirmed.)

Collins Fruit Co. v. Giglio, 184 So.2d 447 (2nd DCA 1966) (where "last clear chance" doctrine was properly injected into the case by evidence, plaintiff mentioned it in original closing argument and it would have been directly responsive to the def.'s strong discourse on contributory negligence, trial court should not have sustained defense objection to further argument on "last clear chance" in plaintiff's final closing because it had not been mentioned by defense in its closing. When combined with other errors, trial courts granting of a new trial was affirmed)

Ratner v. Arrington, 111 So.2d 82 (3rd DCA 1959) (The use of a blackboard or chart in aid of counsel's argument to the jury is permissible, at the court's discretion, when the use thereof is limited so as not to prejudice an opposing party. A distinction should be recognized between a chart that is in evidence -- such as for disclosing objects or places -- which may be exhibited throughout the trial, and a chart which is not in evidence but is used to illustrate and aid in conveying an argument to the jury, which should be withdrawn from the jury's observation at the

conclusion of the argument in which it is employed and which should refer only to matters which are in evidence or reasonable inferences drawn therefrom.)

Andrews v. Cardosa, 97 So.2d 43 (2nd DCA 1957) (Denial by trial judge of the request of plaintiff's counsel to use a blackboard during final argument for the purpose of illustrating numerous items of damage to the jury, and to give the jury pads of paper and pencils for the purpose of making notes, rested within the sound discretion of the trial judge.)

Daniel v. Rogers, 72 So.2d 391 (Fla. 1954) (trial court did not err in limiting closing arguments to 45 minutes for each side. Trial court commended for "exercising a firm control of the trial." [Note: This is an old case. Recently appellate courts have been more concerned about time limits. Affirmed)

X. Argument for a comparative verdict or "Value of life"

Phillip Morris et. al v. Cuculino, 165 So.3d 36 (3rd DCA 2015) (it was improper for plaintiff's counsel, in tobacco trial, that people get paid for the time they work, including actors, who make "astronomical sums," professional athletes, who make "tremendous sums," and expert witnesses, who make $750 per hour and that Philip Morris and R.J. Reynolds gave Mr. Cuculino the "job" of "suffer[ing] from progressive heart disease," and he deserves to get paid for this "job." [comparative verdict] It was also improper for plaintiff's counsel to argue: "You know, what is it that's going to be a just and appropriate figure? Who in their right mind would want to trade places with Mr. Cuculino and take this job? Would someone do it for a million dollars an hour? Probably not. Would someone do it for anything? Probably not." [Golden rule]. Nonetheless, the verdict reflects that the jury was not inflamed or highly prejudiced by the improper comments and the defs were not denied their right to a fair trial.)

Choy v. Faraldo, 120 So.3d 92 (4th DCA 2013) (in auto accident case where P's counsel had argued for future earnings claiming that his client could no longer work, it was improper for defense counsel to hold up a Sports Illustrated magazine to display Marc Buoniconti on the cover in a wheelchair to compare to P's claim that she could not work. Trial court's finding that objected-to argument was so inflammatory as to warrant a new trial was affirmed but only as to damages. Finding of liability that placed blame exclusively on D but found he was not acting within scope of employment was not affected by improper argument. [Note: court stated in dicta that it upheld trial courts granting of new trial because of trial court's better vantage point and would have similarly upheld trial court's denial of new trial for same argument] Affirmed in part, reversed in part).

City of Orlando v. Pineiro, 66 So.3d 1064 (5th DCA 2011) (in a lawsuit against the City of Orlando where the police department's chase of a suspect resulted in a collision that killed the plaintiff's son, plaintiff's "How do you value a human life" argument ["Think about the times an

individual is lost at sea or by boat or plane. We don't hesitate to send helicopters, the Coast Guard, hundreds of men and women and divers to search for person. When considering spending money to save a stranded person, we don't stop first and ask the person's age, race or social status. We all recognize the value of human life"] combined with other improper arguments were properly objected to and constitute reversible error. The comments that were not objected to, including improper value of human life argument ["If someone injured Dwight Howard, and Dwight Howard broke a bone and couldn't play basketball for a year, no jury in the world would have any problem compensating Dwight Howard $20 million or whatever the value of one year's salary is for Dwight. But we're all here today trying to evaluate Mom and Dad's pain and suffering for the loss of their son. Edwin was not famous. He was not a star. Very few people even knew who he was. Edwin was one of many faces in the crowd, but to Mom and Dad, he was the most important person in the world."], although equally improper were not objected to and fail to warrant reversal on their own under Murphy. Reversed and remanded for new trial because of preserved errors.)

Fasani, et al. v. Kowalski, 43 So.3d 805 (3rd DCA 2010) (in a premises liability action for injuries from a piece of granite that struck plaintiff when it fell from the wall of an elevator, where liability was admitted before trial, it was improper for plaintiff's counsel to suggest to the jury that they compare Plaintiff's brain to a damaged Picasso painting: "If that was a Picasso painting that was in the elevator and it got ripped, no one would argue with paying $80 million to replace it. Why is it any different when it's a man's brain?" Such "value of life" arguments are improper. Given the cumulative effect of numerous improper arguments, case reversed and remanded.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including a request for a comparative verdict, asking the jury to compare plaintiff's injury to a piece of property like a $10 million dollar Picasso painting. Counsel pointed out that if the case were about that painting, the jury would fill in the blank check for that amount on the spot. On appeal, plaintiff's counsel attempted to shift the focus away from these improprieties by arguing that defense counsel's opening was improper (defense commented in opening about how plaintiff was making remarkable improvement but that once those uplifting medical reports came in, plaintiff's counsel referred him to another doctor and all of a sudden plaintiff started limping and claiming new injuries as well as a decline in his recovery. At that point, defense counsel claimed, the case went from being a medical case to a legal case—suggesting that def's referral to a doctor was for financial profit). In addressing plaintiff's claim, the court responded "the legal profession has as much right as anyone else to make an appropriate referral to other professionals. However, if there is evidence that such activity is occurring solely for personal financial profit, then the jury also is entitled to have those facts brought before them for consideration." Reversed and remanded for new trial.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (It was improper for plaintiff's counsel to suggest to jury that they should evaluate the monetary value of his past and future suffering by comparing a $20 million Van Gogh painting "created by one of the greatest artists in

history," to plaintiff's life, which "was created by the greatest creator there is." Reversed.)

City Provisioners, Inc. v. Anderson, 578 So.2d 855 (5th DCA 1991) (although def. counsel did not object to all improper arguments, he raised three appropriate objections which were overruled and moved for a mistrial, which was denied. Plaintiff's argument was laced with numerous improper comments that sought sympathy for the extreme poverty and lack of resources of the plaintiff and the injustice foiled upon the plaintiff by the cruel and overreaching conduct of the defendant in defending the lawsuit, expressed personal experiences or beliefs, referred to facts not in evidence, violated golden rule and suggested a comparative verdict. Taken together, arguments warrant reversal on damages. [evidence overwhelming as to liability] Reversed [Note: plaintiff also told jury that if they awarded too much, court could reduce by remittitur but could not increase. Even if it were a correct statement of the law, it was an improper argument that alone could warrant reversal])

Wasden v. Seaboard Coast Line RR., 474 So.2d 825 (2nd DCA 1985) (plaintiff counsel's comment: "I can't tell you and I won't tell you what others have done, but I will tell you that this verdict should be in the range of $1,750,000," was not improper. Nothing in the Code or case law prohibits an attorney from suggesting to the jury the size of a damage award, and counsel's prefacing comment that he could not tell the jury about other awards must be taken at face value [????] and not as an underhanded attempt to prejudice the jury. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Wright & Ford Millworks v. Long, 412 So.2d 892 (5th DCA 1982) (It was improper for plaintiff's counsel to refer to a one and a half million dollar judgment obtained by Carol Burnet for slander (including punitive damage claim) and to suggest to the jury that Paul Newman would have received two and half million dollars for a foot injury because he is a race care driver then ask the jury why plaintiff's foot injury in the subject case hurt him any less or why he should be entitled to any less. "Comparative verdict" argument was inflammatory, prejudicial and properly reserved with an objection that was overruled. Reversed.)

XI. Standards for new trial

Carnival Corporation v. Jimenez, 112 So.3d 513 (2nd DCA 2013) ("If the issue of an opponent's improper argument [or conduct] has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the [objecting] party its right to a fair trial.' " [See Engle, infra]. If, however, the improper argument is NOT properly preserved, a motion for new trial can only be granted if the improper argument amounts to fundamental error according to the 4-prong test announced by the Supreme Court in Murphy v. International Robotic Systems, 766/1010. Although defense counsel suggested, without supporting evidence, that plaintiff's treating physician who was friends with Plaintiff's counsel had his testimony "scripted," implying it was

by defense counsel, error was not properly preserved and does not satisfy Murphy's 4-prong test for fundamental error. Order granting new trial reversed.)

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel to malign insurer def. in UM action for not living up to its contractual obligation to insured and leaving him "out hanging." Pre-trial order limited such comment to establishing the existence of the business relationship and prohibited counsel from such emotional argument. Also improper for plaintiff's counsel to argue to jury that this was def's alleged claims handling practice and usual litigation tactics. Such facts were not in evidence and defs alleged practices in other cases were irrelevant to case at hand. Improper to claim def was breaching it's contract with insured since UM action is based on existing contract but is a tort action in which def stands in the shoes of the uninsured driver. Moreover, attacking defs for aggressively defending the lawsuit was further improper since def had the right to raise any and all defenses that other driver could have raised. Lastly, it was improper of plaintiff's counsel to tell the jury what his 14 year old son would have thought about insurer's defense. In addition to such facts not being in evidence as son had not testified, son's opinion would be completely irrelevant and such argument was simply a transparent attempt to curry favor with the jury. *NONETHELESS,* despite numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] **Note**: Generally, improper references to insurance matters in closing argument can be cured by an appropriate curative instruction. Affirmed.)

Lora v. Escaffi, 913 So.2d 613 (3rd DCA 2005) ("even improper argument will not require a new trial if the remarks are not so egregious as to interfere with the essential justice of the result." *** "Generally, a mistrial or new trial should be granted only when counsel's arguments are so inflammatory and prejudicial that they deny the opposing party a fair trial." [citations omitted] [NOTE: Court cites Fla. Stat. § 59.041 : "No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury … unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed".] Affirmed.)

Bakery Assoc., LTD. et. al v. Rigaud, 906 So.2d 366 (3rd DCA 2005) ("Improper comments made during closing argument will not serve as a basis for the granting of a new trial unless the improper comments are highly prejudicial and inflammatory.")

Castillo v. Bush, et. al, 902 So.2d 317 (5th DCA 2005) ("Generally, a mistrial or new trial should be granted only when counsel's [closing] arguments are so inflammatory and prejudicial that they deny the opposing party a fair trial." [citations omitted] In medical malpractice case involving the allegedly improper reading of a CT scan by radiologist, where both parties agreed that ER doctor would not be asked whether he would have done anything different had he received different information from radiologist, trial court did not abuse it's discretion in denying a new trial when defense counsel argued that 1) ER doctor did not testify that he would have done something different if different information had been provided, and 2) there was no

evidence from any expert in the case that anybody in the ER would have done something different if different information had been provided. The first statement drew an objection which was properly sustained and the jury was instructed to disregard the comment. The second statement did not speak to ER doctor's testimony but rather to the absence of expert testimony and the lack of a causal connection to the decision making process undertaking during the decedent's stay in the hospital. Therefore, the pre-trial stipulation was not implicated and the objection to the second comment was properly overruled. Further, trial court did not abuse it's discretion in denying plaintiff's motion for new trial based upon two "trust me" comments made by defense counsel in closing. First comment drew no objection and objection to second comment was followed by defense counsel's apology and was sustained by court. No motion for mistrial or to strike was made. Affirmed.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) (civil litigant may not seek appellate relief of improper but un-objected to argument unless he has at least challenged such argument in the trial court by a motion for new trial. In order for a new trial to be warranted based upon un-objected to argument, the trial court must find: 1)the argument is improper [the purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." Closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response ... rather than a logical analysis...."]; 2) the argument must be harmful [i.e. how the improper argument affected the fairness of the trial proceedings. "Harmfulness also requires that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury. ... In sum, the improper closing argument comments must be of such a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments"]; 3) the argument must be incurable ["the complaining party must establish that even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the ... argument resulted in an improper verdict. ... [I]t will be extremely difficult for a complaining party to establish that the unobjected-to argument is incurable."]; AND 4) the argument must be such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial [this category is narrow and, by way of example, arguments that appeal to racial, ethnic or religious prejudices are the types that traditionally fit within this narrow category.] Trial court's order granting a new trial MUST specifically identify the improper arguments of counsel and the actions of the jury resulting from those arguments. In the case at bar, def. counsel's repeated use of term "B.S. detector, comment that if jury found for the plaintiff they would be "accessories, after the fact, to tax fraud, and characterization of plaintiff's case as cashing in on a "lottery ticket" were all improper. However it was not an abuse of discretion to conclude that the improper arguments were not harmful, incurable or requiring of a new trial as set forth above. [NOTE: Subsequently, *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014) held that the a party benefitting from an error has the burden of proving that the error was harmless, ie. that there is no reasonable possibility that the error complained of contributed to the verdict—the same standard as used in criminal cases. Going forward, this may affect prong 2 of the

Murphy 4-part test.] Affirmed)

Leyva v. Samess, 732 So.2d 1118 (4th DCA 1999) (Trial court erred in concluding that a new trial was warranted solely because of a violation of a order in limine during closing arguments. In order to grant a new trial for improper comments in closing argument, this trial court must find that the argument was "highly prejudicial and inflammatory" plaintiff counsel's reference to defendant's status as a doctor during closing argument, in violation of order in limine, did not warrant a new trial where defendant's status as doctor was discussed with jury during voir dire. Order granting new trial reversed.)

Wal-Mart Stores, Inc. v. Gutierrez, 731 So.2d 151 (3rd DCA 1999) (trial court sustained objections when necessary and properly gave curative instructions when necessary, thereby obviating the harm. No new trial required.)

Grushoff v. Denny's, Inc., 693 So.2d 1068 (4th DCA 1997) (The question for a trial court to consider on golden rule arguments is the same as it is for any other allegedly improper argument: whether the comment was highly prejudicial and inflammatory.)

Hagan v. Sun Bank of Mid-Fla., 666 So.2d 580 (2nd DCA 1996) (If the issue has been properly preserved [by contemporaneous objection and, if sustained, a motion for mistrial before the jury retires to deliberate], the standard for trial courts to use in deciding motions for new trial based upon counsel's improper argument is whether the comment was highly prejudicial and inflammatory.*[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Anderson v. Watson, 559 So.2d 654 (2nd DCA 1990) (Where improper statement was not calculated to do harm nor to influence the jury and upon appropriate objection the trial court immediately cautioned the jury to disregard the statement, court thereby corrected any error, irregularity or prejudicial influence of the remark.)

Getelman v. Levey, 481 So.2d 1236 (3rd DCA 1986) (Unless a statement is highly prejudicial or inflammatory, a new trial is not required.)

Cameron v. Sconiers, 393 So.2d 11 (5th DCA 1980) (where def. counsel made allegedly improper argument and plaintiff's counsel objected and asked that the jury be instructed to disregard the comment and court complied, new trial would be "second bite at the apple" since no other relief was requested of the trial court. Affirmed)

Eastern Steamship v. Martial, 380 So.2d 1070 (3rd DCA 1980) (If improper remarks are of such character that neither rebuke nor retraction will destroy their prejudicial and sinister influence, a new trial should be awarded. In case involving injuries allegedly sustained by plaintiff while working on a vessel, plaintiff counsel's remarks that plaintiff "has been plagued by having his son brought before his eyes and seeing him shot to death" were totally improper,

inappropriate and irrelevant to the issues of the cause. Comments appear to have been made for the sole purpose of raising sympathy for the plaintiff based upon a tragic experience totally outside the realm of materiality in the instant lawsuit. Objection was overruled and mistrial denied. Judgment for plaintiff reversed.)

Sharp v. Lewis, 367 So.2d 714 (3rd DCA 1979) (In general, reversible error from comments of counsel may appear in various ways: (1) comments of counsel that, per se, give rise to reversible error; (2) comments of counsel that give rise to reversible error because their very utterance has such a profound effect upon the trial, under the circumstances of the case, that an appellate court is unable to find an adequate basis in the record to assure itself that there was a fair trial; and (3) Cumulative comments of counsel which, when viewed together in light of the record, give rise to reversible error.)

Dixie-Bell Oil Co. v. Gold, 275 So.2d 19 (3rd DCA 1973) (although it was improper for plaintiff's counsel to personally attack def. counsel in his closing, error was not reversible where trial court instructed jury that only testimony that comes from the witness stand shall be considered evidence. Improper statements in arguments before a jury will not be considered grounds for mistrial, reversal, or new trial unless they are highly prejudicial and inflammatory. Affirmed.)

H.I. Holding Co. v. Dade County, 129 So.2d 693 (3rd DCA 1961) (improper statements in arguments before a jury will not be considered grounds for mistrial, reversal or new trial unless they are highly prejudicial and inflammatory.)

XII. Arguments that improperly seek punitive damages or suggest punishing defendant

State Farm Mut. Auto. Ins. Co. v. Gold, 41 Fla. L. Weekly D257 (4th DCA 2016) (in uninsured motorist case, it was improper for plaintiff's counsel to comment on how plaintiff purchased an uninsured motorist policy "so this wouldn't happen" and that *"State Farm has denied his claim and now he's facing down a stack of medical bills. And he's been carrying this burden with him until today and State Farm to this day, to this minute has never taken responsibility for the damages in the crash and for the injuries that are covered under this policy, and they're not going to do it until you force them to do it with your verdict."* Error was exacerbated by powerpoint which displayed, among other things, *"Michael Gold has been carrying a debt. State Farm promised to pay stacks of medical bills. Paying the price for someone else's mistake State Farm refuses to take responsibility for the debt it owes to Mr. Gold, forcing us to bring them to trial,"* and *"Gold has done the right thing all along. Has the Defendant?"* Comment, powerpoint and questionable judge's instruction improperly focused the jury's attention on def's liability and culpability rather than on the issue of damages, and painted a clear picture in the jury's minds of a company breaking an obligation rather than a company simply attempting to determine actual damages attributable to the accident. [NOTE: this DCA

has also interpreted similar comments as a suggestion that jury "punish" def.—See *Marotta*] Reversed.)

Allstate Ins. Co. v. Marotta, 125 So.3d 956 (4th DCA 2013) (it was improper for plaintiff's counsel to argue that Allstate "made up issues" and "manufacture[d]" a defense. Statements improperly denigrated Allstate's defense and counsel. It is improper for counsel to suggest in closing argument that a "defendant should be punished for contesting damages at trial," that defending a "claim in court" is improper or to suggest that a party should be punished for contesting a claim. Plaintiff's comments included: *"[T]hey denied accepting responsibility. I ask you, is that what it means to be in good hands? ... [C]onsistently, in this case, didn't want to accept the responsibility at all for causing the accident ... and they still don't want to accept the responsibility to ... make up all of the losses and harms caused by this automobile crash. ... Allstate could have come to this trial saying, I'm sorry, I want to fairly pay you for the injuries ... but they didn't. ... Make Allstate repent."* Further, Plaintiff's counsel, referring to def witness/doctors, argued that Allstate can pay doctors who know what Allstate "really wants," called Allstate's experts "paid opinion courtroom doctors" and, over objection, stated that Allstate "made up issues." These and other improper comments "shifted the focus of the case from compensating the plaintiff to punishing the defendant." Reversed.)

State Farm, et. al v. Thorne, et. al, 110 So.3d 66 (2nd DCA 2013) (Plaintiff's counsel's contention in closing that the defendants' evidence and argument were an attempt "to avoid responsibility" and that, as a result, the defendants exhibited shameful conduct was improper. Such argument suggested that defendant should be punished for contesting damages and that defending the claim in court was improper. Reversed on these and other grounds.)

Intramed, Inc. v Guider, 93 So.3d 503 (4th DCA 2012) (Plaintiff's closing argument improperly shifted the focus of the case from compensating the plaintiff to punishing the defendant. The purpose of damages in this case was to compensate, not to make the defendant care, "take responsibility," or say it was sorry. Counsel's arguments improperly suggested that the defendant should be punished for contesting damages at trial and that its defense of the claim in court was improper ["*The only way to get this company to care is to force them to pay all of the harms they have caused. That's what the law is for, to get a company to care, to change, to do what is right. ... They have never taken responsibility. They have been forced to admit they sent the wrong medication . . . and they still take zero responsibility. ... How did they respond? Have you heard sorry once in this courtroom, we are sorry we sent you the wrong medication? . . . Not one time have you heard that, ...There are things your verdict cannot fix . . . But you can fix the harms that were caused her, the way they defend this case. ... [The defendant] will get off cheap. [The defendant] will sweep it under the rug. [The defendant] will move on. [The defendant] won't change. [The defendant] won't care.... Slap on the wrist ... How does a company defend itself that way?*"] The closing argument urged the jury to punish the defendant for having the temerity to be in court. Under the circumstances, the error was not harmless. Reversed and remanded for new trial on damages.)

Health First v. Cataldo, 92 So.3d 859 (5th DCA 2012) (Plaintiff's counsel's closing was replete with improper comment, including but not limited to: Religious references and appeals to a higher power which improperly suggested to the jury that God favored a verdict in favor of Plaintiff, coupled with a request that the jury "punish" Defendants, who had not "repented" for their sins. ["And call it fate or call it whatever you want to call it, but I believe that there was a reason why you were selected. … And as I've watched you carefully for the last two weeks … it dawned on me that whoever it is that decides what's right and wrong in this world, had some say in you all being the one's [sic] selected to decide this case. … I was reading about the concept of repentance. And it applies here, folks, because part of what you're going to be doing in this case, through your verdict, is to make sure that the Defendants who caused the wrong we're here on, really have repented for what they've done."], and claiming that Defendants were trying to sidetrack the jury and make them take their eye off the ball, that Defendants had to be dragged "kicking and screaming" into the courtroom, that the jury had to force Defendants to take care of Plaintiff, and that it would be a victory for the defense if they got an "unfair" verdict, all of which improperly disparaged the defense and implied that Defendants had done something improper by defending the case. However, no objection to the improper arguments was made and, even cumulatively, they fail to reach the standard of fundamental error pronounced in Murphy v. International Robotics. Affirmed.)

Fasani, et al. v. Kowalski, 43 So.3d 805 (3rd DCA 2010) (in a premises liability action for injuries from a piece of granite that struck plaintiff when it fell from the wall of an elevator, where liability was admitted before trial, it was improper for plaintiff's counsel to suggest to jury that defendants should be punished for contesting the claim ("Why didn't they send him to a doctor instead of kicking him out on the street like a dog and telling him we're giving you nothing….They told him we're wrong, we shouldn't have done it, it's our fault, we did the right thing, we're giving you nothing. Well that isn't really doing the right thing." Counsel continued arguing that def's "drug [plaintiff] through all of this" and attributed this behavior and the condition of the elevator to "corporate greed and arrogance." Plaintiff's counsel also urged jury to punish defendants and "make them do the right thing because they haven't done it on their own and they have no intentions of doing it on their own" (although there was no claim for punitive damages). Arguments served no purpose other than to inflame and prejudice the jury. Given the cumulative effect of numerous improper arguments, case reversed and remanded.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (It was improper for plaintiff's counsel to suggest def. should be punished for defending against plaintiff's claim. "They won't accept the harm that they have caused him. They are fighting on both. It is time to hold them responsible." Reversed for cumulative errors.)

Werneck, et. al v. Worrall, 918 So.2d 383 (5th DCA 2006) (*[opening and closing]* In a wrongful death auto accident case where punitive damages were not recoverable, it was error for plaintiff's counsel, in opening statement and closing argument, to tie compensation for pain and suffering to a calculation that included the number of tractor trailers owned by the defendant. Such an argument suggested to the jury that plaintiff's recovery for pain and suffering was based

upon the wealth or assets of the defendant, an improper measure of damages. Judge's curative instruction worsened the situation. "The amount of sales [def.] has is of no relevance…. Its sales are very different than profits or assets. *** And so the jury will completely disregard that comment." Rather than curing the problem, the instruction might have created the false impression that the only objectionable aspect of the statement was the reference to sales because it differentiated between profits or assets and sales. "The fact that counsel could have suggested a wholly arbitrary number to the jury [rather than the number of tractor trailers in def.'s inventory] does not give counsel carte blanche to mislead the jury by knowingly urging it to employ specious methodology, especially when the defendant's assets are part of the equation in a case where punitive damages are not an issue." [Note: prejudice was supported by the fact that jury awarded very close to the amount improperly calculated by plaintiff's counsel] Reversed and remanded for new trial on damages.)

Knoizen v. Bruegger, 713 So.2d 1071 (5th DCA 1998) (To warrant reversal because a closing argument was an improper appeal to the jury's emotion, the argument must be "highly and patently prejudicial." Plaintiff's counsel's argument that plaintiff had suffered "the most devastating injury a woman can suffer. Devastating to her, devastating to her family, to her kids . . . please don't leave her alone to deal with that. Don't leave her bare and naked like this accident has already left her, and her children and her family" was not an improper appeal to the jury's emotions or a veiled attempt to argue for punitive damages. The closing argument was supported by the facts which indicated that plaintiff, a 34 year old mother of 6, was previously involved with many physical activities alone and with her children. There was testimony from her children and other family members about the substantial changes in her life and how the serious and debilitating injuries have affected her. Based on the foregoing, plaintiff's closing argument was only marginally objectionable and defense counsel has not been able to establish that the improper argument was so "pervasive, inflammatory and prejudicial [as] to preclude the jury's rational consideration of the case." Affirmed.)

Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (4th DCA 1997) (Plaintiff's comment "I wish you could punish them, but you can't" improperly "planted the seed" to motivate the jury to include a punitive damage award. Plaintiff's judgment reversed on these and other comments.")

Sacred Heart Hosp. v. Stone, 650 So.2d 676 (1st DCA 1995) (it was improper for plaintiff's counsel to invite the jury to "deal very, very harshly" with the def.s if it found their defenses were not credible. This suggested to the jury that they punish the def.s in a case where punitive damages were not at issue. Combined with other improper argument, plaintiff judgment reversed)

Florida Crushed Stone Co. v. Johnson, 546 So.2d 1102 (5th DCA 1989) (it was improper for plaintiff's counsel to suggest to the jury that they were the conscience of the community and to ask them to "send a message forward about this family." Since plaintiff's counsel did not follow up improper argument with a suggestion or request that the jury punish the defendant [unlike Erie v. Bushy], reversal not warranted even if properly preserved. Affirmed.)

Sharp Electronics v. Romeka, 513 So.2d 721 (1st DCA 1987) (trial judge could have been more direct and definitive in his rulings on some of appellant's objections to the closing argument. [inter alia, in response to objection to def.'s "infinite resources" in case where punitive damages were not being sought, trial judge responded: "I think probably 'infinite resources' is an overstatement. I think only God has those."])

Bloch v. Addis, 493 So.2d 539 (3rd DCA 1986) (Improper for plaintiff's counsel to repeatedly argue that defendant and his doctor friends [who presumably would testify favorably for him as a favor] all belong to the same country club and do each other favors in regards to testifying on their behalf in court. The defendant's means and membership, if any, in a country club are simply not matters to be discussed before a jury not called upon to assess punitive damages. Counsel also improperly exhorted to the jury to punish the [doctor and his doctor friends] because of their financial means and alleged [although unsupported by the record] willingness to falsely testify on each others behalf. Also improper to suggest the jury that they punish defendant for his expert's testimony. Reversed because fundamental. [Note: pre-Murphy v. Intl. Robotics])

White Constr. Co. v. Dupont, 455 So.2d 1026 (Fla. 1984) (although some latitude is permitted when arguing "smart money" to punish defendants, comments by plaintiff's counsel concerning differences in race and economic standing between the two parties were improper, especially were punitive damages were not appropriate. Error not fundamental. Affirmed in part. *[In Murphy, 766/1010, the Sup. Ct. receded from this case on the limited issue of the ability to seek appellate review for unobjected to improper arguments.]*)

Erie Ins. Co. v. Bushy, 394 So.2d 228 (5th DCA 1981) (Plaintiff counsel improperly argued: "I want you to send a message to Erie, Pennsylvania, that you can't defend a case by coming down here and just subtly hinting that we don't owe it and it must have been something else. Send a message to those people and let them know that they are going to have to pay a penalty." Trial judge denied motion for mistrial after jury retired and made no clarifying admonition or warning that punitive damages were not appropriate in this case. Appellate court unable to tell whether damages awarded were punitive. Together with other closing errors, plaintiff judgment reversed.)

School Bd. of Palm Bch. v. Taylor, 365 So.2d 1044 (4th DCA 1978) (In an action by parents of school children against the school board for injuries sustained as a result of assaults by other students at school, it was improper for plaintiff's counsel to argue to the jury that the damage awards should set an example to prevent future incidents and that this was the main purpose why the suits were brought since this argument "smacks of a demand for a punitive award rather than compensatory damages." Since there was no claim for punitive damages in the case and no factual basis for such a claim against the school board, closing argument was improper. Since no objection was made to this argument, the court would not have overturned the verdict if the damage award was not clearly outside what the court considered to be a maximum reasonable range of damages. However, the argument clearly furnished an improper motive for the jury's

award and the excessive verdict indicates that the jury was influenced by the improper tactic as reflected in the amount of damages awarded. Reversed in part, affirmed in part.)

XIII. Arguments on matters that were ordered or agreed would not be discussed in closing or were otherwise excluded from evidence

Carvajal v. Penland, 120 So.3d 6 (2d DCA 2013) (in auto accident case where P was suing D and her own uninsured motorist coverage carrier, and where only issues were causation and damages, it was improper for P's counsel to argue that P had paid her premiums so she would be covered in a case like this but carrier was not living up to its responsibilities and putting P under a microscope to minimize their exposure for injuries caused in the crash. '[A]rgument that [insurer] was shirking its responsibilities or otherwise acting in bad faith shifted the focus from injuries and damages to claims handling and bad faith, neither of which were issues at trial … and 'improperly suggested that [insurer] should be punished for contesting damages at trial and that its defense of the claim in court was improper.'" [C]losing argument was not intended to encourage a "logical analysis of the evidence in light of the applicable law"; rather it was designed to inflame the jurors' emotions. [**NOTE**: although not playing a significant role in the court's ruling, the trial court had granted insurer's pretrial motion seeking to preclude all evidence or argument pertaining to any failure of insurer to comply with its contractual obligations to P] Reversed.)

State Farm, et. al v. Thorne, et. al, 110 So.3d 66 (2nd DCA 2013) (where plaintiff was involved in consecutive car accidents 2 years apart, creating a question as to which injuries were caused by which accident, and plaintiff's counsel successfully excluded opinion testimony from defense experts as to the cause of the plaintiff's different injuries because of an alleged discovery violation (late disclosure), it was improper for plaintiff's counsel to then argue to the jury that the defendant's had not put on any evidence to refute plaintiff's claim of causation because they couldn't find any such evidence. "[I]t is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented." [citation omitted] Reversed in part on multiple grounds. Remanded for a new trial.)

Linzy et. al v. Rayburn et. al, 58 So.3d 424 (1st DCA 2011) (In auto accident case where liability was admitted and trial was only on damages for which insurance coverage existed, it was improper for defense counsel, in violation of motions in limine prohibiting comment on the financial status of either party or the defendant's ability to pay damages, to comment in opening statement "My client is Mr. Randy Crews, sitting over there. Mr. Crews runs a small business… Mr. Crews hasn't tried to run away from responsibility for the accident. … [T]he reward for standing up and saying, "Hey, we caused this accident, and it was our fault," is now Mr. Rayburn wants him [Mr. Crews] to buy his entire back condition that he said has plagued him since he was a child. … Mr. Crews is being asked to pay for something that was there." After being again ordered to refrain from such comment in closing, defense counsel again argued: "This man over

here, Mr. Crews, is being asked to pay for a lifetime of pain management that [Mr. Rayburn] received two separate referrals for within two weeks of this accident. Two separate doctors said, "You have to go to pain management." [Mr. Crews'] company unfortunately gets in an accident with [Mr. Rayburn], and those two other referrals don't matter. Now it's all you [Mr. Crews]. You pay for everything [Mr. Crews]. … [I]f you're going to do that, then you've got to come prepared … to put up on the table the evidence that makes this man [Mr. Crews] responsible." Despite the fact that Mr. Crews was not a named defendant in the case and that defense counsel was retained by an insurance company to represent the defendants [his company and driver], defense counsel repeatedly stated that Mr. Crews [the small business owner] would be solely responsible for any award of damages. By making such statements, defense counsel misled the jury and improperly attempted to appeal to the jury's sympathy. Properly preserved. Order granting new trial affirmed.)

JVA Enterprises v. Prentice, 48 So.3d 109 (4th DCA 2010) (where trial court improperly excluded evidence of plaintiff's prior neck and back injuries, it was error for plaintiff's counsel to argue in closing: "[W]here is the testimony to support the speculation of some big, bad neck injury, or shoulder [injury] in the past? ... Where is the testimony or evidence?" It is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented. Reversed on these and other grounds.)

Greenberg v. Schindler Elevator Corp., 47 So.3d 901 (3rd DCA 2010) (in personal injury suit for injuries allegedly sustained when escalator on which plaintiff was riding suddenly stopped short, it was improper for defense counsel to seek exclusion of evidence of prior problems with the escalator and, having succeeded, proceed to argue in closing the absence of any such evidence. Reversed on these and other grounds.)

Philippon, M.D., et al. v. Shreffler & Smith, et al., 33 So.3d 704 (4th DCA 2010) (in medical malpractice action, it was improper for patient's counsel to argue: "Where is the chronology? Why isn't it in evidence if it's so important?" because the chronology was a document that patient's own witness/doctor used to testify but patient's counsel objected to turning over to the defense (claiming work product) when requested to do so during trial. Although together with other improper comments, arguments could be considered close to running afoul the "permissible bounds of advocacy," they were not so prejudicial as to deny appellant a fair trial, either individually or collectively. Affirmed.)

SDG Dadeland Assoc. v. Anthony, 979 So.2d 997 (3rd DCA 2008) (it was improper for Plaintiff's counsel to repeatedly attack defendant and defense counsel, during opening and closing, by arguing that they had committed discovery violations and hidden and manufactured evidence (i.e., among others, "[T]o come in here and know there is a spill and walk over after an accident and put the cone down because you know you can't win the case if she falls on a spill that you didn't clean up that you didn't find … let's put the cone there and she tripped over there. … Their defense is in the toilet, and they're trying to save the day by trying to change his testimony"). Such arguments accused the defendant and it's counsel of perpetrating a fraud on

the court and the jury. Moreover, the existence of alleged discovery violations was unsupported by any evidence, had been ordered excluded from closing argument by the court and, in any event, would have been a matter for the court, not the jury. *NOTE: beware of dicta about whether objection would have been necessary in light of Murphy case-766/1010.* Reversed.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (where plaintiff's counsel successfully moved in limine to preclude defendant cruise line's medical director from testifying as to whether plaintiff received proper medical care, it was improper for plaintiff's counsel to then argue in closing that the doctor did not testify that the records reflect the ship's doctors did everything correctly. Counsel was implying to the jury that the doctor failed to testify as to standard of care because such testimony would not have been favorable to the defendant, when in reality the doctor was precluded from testifying as to the quality of care because plaintiff prevailed on his motion to preclude precisely such testimony. Similarly, def. attempted to amend it's witness list to add an economist who would prepare an alternative life-care plan and testify concerning plaintiff's economic damages. After successfully objecting to such amendment, it was improper for plaintiff's counsel to question his own expert about the surprising fact that def. failed to provide an alternative life-style plan and to argue in closing that damages were unrefuted and def. could have produced it's own expert and alternative life-care plan, but failed to do so. Such tactics have been called disingenuous and misleading. Reversed.)

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel to malign insurer def. in UM action for not living up to its contractual obligation to insured and leaving him "out hanging." Pre-trial order limited such comment to establishing the existence of the business relationship and prohibited counsel from such emotional argument. Also improper for plaintiff's counsel to argue to jury that this was def's alleged claims handling practice and usual litigation tactics. Such facts were not in evidence and defs alleged practices in other cases were irrelevant to case at hand. Improper to claim def was breaching it's contract with insured since UM action is based on existing contract but is a tort action in which def stands in the shoes of the uninsured driver. *NONETHELESS*, despite numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] **Note**: Generally, improper references to insurance matters in closing argument can be cured by an appropriate curative instruction. Affirmed.)

Tanner v. Beck, 907 So.2d 1190 (3rd DCA 2005) (in slip and fall case, where trial court ruled that defense could bring up plaintiff's prior fall to show a propensity for tripping but prohibited mentioning prior litigation, defense counsel did not violate pretrial ruling by arguing: "You can see how the mind works. Look at this. This is 1993, we have almost the identical situation. This is when he tripped over in Bradenton. And it is very similar to this. There is a raised ledge at the threshold, kind of like this. His mother, click, click, click, you know how it works, his mother feels that the raised ledge was a little over an inch and was not painted a bright color." Although plaintiff's counsel argued that "click, click, click" referred to the prior lawsuit, it could have just as easily referred to the pictures plaintiff's mother took for this litigation, which were in dispute. Moreover, even if it referred to her taking pictures in the earlier fall for an earlier court

case, the court here gave a curative instruction that the jury should only consider that statement as part of defense counsel's argument that the plaintiff had a propensity to fall. The court thereby cured any error. Order granting new trial reversed.)

Castillo v. Bush, et. al, 902 So.2d 317 (5th DCA 2005) (in medical malpractice case involving the allegedly improper reading of a CT scan by radiologist, where both parties agreed that ER doctor would not be asked whether he would have done anything different had he received different information from radiologist, trial court did not abuse it's discretion in denying a new trial when defense counsel argued that 1) ER doctor did not testify that he would have done something different if different information had been provided, and 2) there was no evidence from any expert in the case that anybody in the ER would have done something different if different information had been provided. The first statement drew an objection which was properly sustained and the jury was instructed to disregard the comment. The second statement did not speak to ER doctor's testimony but rather to the absence of expert testimony and the lack of a causal connection to the decision making process undertaking during the decedent's stay in the hospital. Therefore, the pre-trial stipulation was not implicated and the objection was properly overruled. Affirmed.)

USAA Casualty Insurance Co. v. Howell, 901 So.2d 876(4th DCA 2005) (in uninsured motorist action where trial court ruled in limine that plaintiff could not argue about defendant/insurer's claim handling procedure or the number of years premiums had been paid, plaintiff's counsel arguably violated such order by arguing, in part: "USAA happily took his money, but when it comes to paying his claim, they are not so happy. Is that just? Is that fair? USAA won't pay Sam for the protection he already purchased. … He paid them every single cent of premium, and do you think if he had missed one cent, don't you think they would have been there collecting it?" Nonetheless, where def. counsel failed to object and counsel's comments, although improper, were not harmful, incurable or such that they so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial, new trail was not warranted. See Murphy, 766/1010 herein. Affirmed.)

Manhardt v. Tamton, M.D., 832 So.2d 129 (2nd DCA 2002) (it was improper for defense counsel to point out to jury that this was defendant's first trial, especially where trial court had prohibited the mentioning of prior lawsuits. Such comment is usually intended to prejudice a plaintiff's case in the eyes of the jury. Error compounded an earlier error where def. counsel was allowed to question plaintiff's medical expert about whether he had ever been sued himself. Reversed.)

White v. Consolidated Freight., 766 So.2d 1228 (1st DCA 2000) ([opening statement case] it was improper for counsel to comment that while officer was investigating accident and talking "to everyone who was there ... no one claimed that [def.'s driver] had anything to do with the accident" and that the first time driver heard that anyone claimed he had anything to do with the accident was "months after it occurred." Comment violated the accident report privilege of section 316.066(4), Florida Statutes (1995). Purpose of statute is to clothe with statutory

immunity the statements and communications that a driver, owner, or occupant of a vehicle is compelled to make. Privilege applies to both civil and criminal trials as well as administrative proceedings and "questions or allusions which suggest that a driver has or has not been charged with a traffic violation are considered sufficiently prejudicial to require a new trial." Reversed)

Kloster Cruise Ltd. v. Grubbs, 762 So.2d 552 (3rd DCA 2000) (improper for Plaintiff's counsel to argue that the cruise line had failed to produce safety certifications where such testimony was excluded by his own objection. Reversed and remanded.)

Leyva v. Samess, 732 So.2d 1118 (4th DCA 1999) (Trial court erred in concluding that a new trial was warranted solely because of a violation of a order in limine during closing arguments. In order to grant a new trial for improper comments in closing argument, this trial court must find that the argument was "highly prejudicial and inflammatory" plaintiff counsel's reference to defendant's status as a doctor during closing argument, in violation of order in limine, did not warrant a new trial where defendant's status as doctor was discussed with jury during voir dire. Order granting new trial reversed.)

Hernandez v. Home Depot USA, Inc., 695 So.2d 484 (3rd DCA 1997) (Having successfully and wrongfully excluded testimony from plaintiff's expert that def's manner of stacking items on shelves was dangerous, violated safety standards in the industry and led to plaintiff's injury, it was improper for plaintiff's counsel to then argue to jury: "What is the evidence that we were negligent? What is the evidence that Home Depot did something or did not do something? … Where is the evidence? Where is the proof that Home Depot should not have done that? … Where is there any evidence that Home Depot was wrong; that they did something bad? Where is the evidence? There's no evidence. … So, again, you're faced with a lack of evidence. … Where is the evidence that Home Depot violated any standards?" Def counsel "in what must be the ultimate gotchaism-whipsawed the plaintiff for not producing" the very testimony he successfully and wrongfully excluded. Reversed.)

Elsass v. Hankey, 662 So.2d 392 (5th DCA 1995) (it was improper for def. counsel to argue to the jury that the officers who testified never said that the def. was at fault ["I didn't hear Mike Richie say it was Cecil Hankey's fault. I didn't hear Trooper Edsall say it's Cecil Hankey's fault. . . .] where such testimony was not admissible. Moreover the permissible scope of the officers' testimony was the subject of a pretrial motion in limine and, even more egregiously, def. Hankey was the person to whom the investigating officers issued a citation. Error was fundamental and not harmless. Defense judgment reversed)

Lindos Rent A Car v. Standley, 590 So.2d 1114 (4th DCA 1991) ([opening statement case] it was improper for def. counsel to tell jury that no citations were issued by investigating officer. Order granting new trial affirmed.)

Maercks v. Birchansky, 549 So.2d 199 (3rd DCA 1989) (It was error for counsel to display to the jury a plastic bag filled with canceled checks when those checks had been excluded from

evidence. Reversed.)

Henry v. Beacon Ambulance Serv., Inc., 424 So.2d 914 (4th DCA 1982) (it was improper for def. counsel to disclose to jury that plaintiff had previously settled his claim with co-defendant. Although def. claimed that Plaintiff had "opened the door" by commenting that co-defendant "had an ax to grind" and def. was simply explaining that co-def. did not have an ax to grind because the claim against him was settled, settlement may have removed financial concerns but not any bias resulting from the accident or lawsuit and def. counsel's comment was made after being expressly admonished by the trial court not to pursue the settlement during trial. Although plaintiff failed to obtain a specific ruling on motion for mistrial, court finds that curative instruction was insufficient to cure [no further explanation on failure to preserve error or fundamental nature of comment]. Reversed.)

Murray-Ohio Mfg. v. Patterson, 385 So.2d 1035 (5th DCA 1980) (Although it was improper for plaintiff's counsel to refer to the Ford Pinto and Firestone 500 cases not withstanding the fact that the trial judge had twice sustained objections to such references during the course of the trial, no contemporaneous object was made and a motion for mistrial was only raised after the jury had retired to deliberate. Since the comment, taken in context, was not so inflammatory as destroy the defendant's right to a fair trial, it does not constitute fundamental error and the motion for mistrial came far too late to preserve the issue for review. Affirmed.)

XIV. Comments that state or imply opposing counsel or trial court's belief or opinions

SDG Dadeland Assoc. v. Anthony, 979 So.2d 997 (3rd DCA 2008) (it was improper for Plaintiff's counsel to argue that defense counsel knew his client was liable but had to protect the "wallet of the corporate defendant." Reversed.)

GM v. McGee, et. al, 837 So.2d 1010 (4th DCA 2002) (during *voir dire*, it was improper for plaintiff's counsel to ask the venire, "Do you all understand ... it may be that General Motors does feel responsibility for this, but that they cannot buy my client's silence?" Comment improperly suggested admission of liability. Error harmless. Affirmed.)

Matthews v. St. Pete. Auto Auct'n, 190 So.2d 215 (2nd DCA 1966) (Where defense counsel had attempted to shift the blame of plaintiff's injuries to the chiropractor who treated him rather than the defendant who allegedly injured him, it was improper for plaintiff, in arguing to the jury that "the chiropractor is a phony defense, and the law says so," to tell the jury "ask Judge Smith. He will read it to you, because he told me so, about ten minutes ago in his chambers." Although plaintiff's counsel may have been referring to the charging conference in the judge's chambers where the judge indicated that he would give a particular instruction to the jury, the implication of plaintiff's statement is that he had an ex parte communication with the judge and that the judge was on his side. Any indication, even in the slightest degree, that the judge has departed

from a position of absolute impartiality and has become a champion of any litigant is fatal. Order grating new trial affirmed.)

XV. Contents of and right to rebuttal argument

Safeway Ins. Co. v. Saxon, 452 So.2d 60 (3rd DCA 1984) (Where plaintiff's counsel did not address damages during his initial closing argument but defense counsel called upon the jury to return a "zero verdict" and "not give her a cent," defense counsel opened the door to plaintiff's counsel addressing damages in his rebuttal. Affirmed.)

Smith v. Hill, 409 So.2d 141 (4th DCA 1982) (where plaintiff's counsel did not mention punitive damages in initial closing argument and simply requested $100-$125 for compensatory damages "plus some money for his mental anguish and anger," and defense counsel did not discuss damages in closing, it was error to allow plaintiff's counsel to then suggest to jury the amount of $10,000 for compensatory damages and between $35,000 and $50,000 in punitive damages in his rebuttal when defense counsel would have no opportunity to reply. Rebuttal was not a true rebuttal but raised additional matters at improper time. Reversed.)

Fla. E. Coast Railway v. Morgan, 213 So.2d 632 (3rd DCA 1968) (it was not error to allow plaintiff's counsel to argue, for the first time in final summation, for a punitive damage award between $10,000 and $20,000 where he had indicated in opening argument that a $5,000 award for punitive damages would be insufficient. No surprise to amount demanded. Affirmed)

Grand Union Co. v. Devlin, 213 So.2d 488 (3rd DCA 1968) (Where plaintiff's counsel made no reference to the specific amount of damages he was seeking in his initial closing argument, and defense counsel made no reference to any specific amount of damages but advised the jury that he would leave the amount up to their judgment, it was error for plaintiff's counsel to raise a specific amount of damages for the first time in his final summation, asking the jury to award $65,000.00 to his client. Objection was sustained and the collective impact of this error and all of the other improper arguments resulted in inflaming and prejudicing the jury against the defendant. Reversed.)

Heddendorf v. Joyce, 178 So.2d 126 (2nd DCA 1965) (The purpose of allowing [an opening and rebuttal during closing argument] is that in his opening address counsel shall fairly state his case - - the particular evidence, and the law upon which he relies - - so that the opposite attorney may have an opportunity to discuss his position. The attorney who has thus opened his case has an opportunity to reply to his adversary. If counsel refuses to fairly open his case, he should not be permitted to reply to his adversary; or, if he is permitted to do so, then the opposite attorney should be permitted to reply to him. To allow plaintiff's counsel to trap def. by briefly mentioning what he plans to argue and then bear down and explore a new method for the edification of the jury in computing damages at a point when the def. has no opportunity to rebut

is not only unfair to def. but is prejudicial. A trial is not a game to see by what legal stratagem one may procure an advantage over the other. Counsel should not be allowed, in concluding argument, to take new ground, to state new points of law or to read new authorities in support of the positions which he has assumed. However, trial court possesses the power, in the exercise of sound discretion, of permitting comment to be offered in concluding argument that has been inadvertently overlooked although it was not referred to by opposing counsel and to which opposite counsel has no opportunity to reply. Trial judge erred in allowing plaintiff's counsel to utilize per diem argument and demonstrative charts for the first time in "final summation," "rebuttal argument," or "concluding argument" without allowing def. counsel to respond thereto. Plaintiff's judgment reversed.)

Davidow v. Seyfarth, 58 So.2d 865 (Fla. 1952) (where plaintiff's counsel completed his initial closing argument and def. counsel stated that he was waiving his closing argument, plaintiff's counsel was not entitled to a final summation because there was nothing to rebut.)

Germak v. Florida East Coast Ry. Co., 117 So. 391 (Fla. 1928) (Where the court allowed each side one hour for argument, plaintiff's counsel made a 20 minute opening argument and defendant waived his right of argument, trial court correctly denied plaintiff's request to be allowed his remaining 40 minutes of argument. "The defendant's counsel having made no argument, there was nothing to be met or replied to by counsel for the plaintiff." Affirmed.)

XVI. Fair reply/ Invited comment

Owens-Corning v. McKenna, 726 So.2d 361 (3rd DCA 1999) ([opening statement case] where def. counsel's opening statement repeatedly denigrated asbestos litigation and lawyers who tried asbestos cases, claimed that there was an entire industry of lawyers and doctors who became dependant on such litigation, and stated that in plaintiff's case "litigation generated the disease," and plaintiff's counsel's objections to those statements were overruled, it was not reversible error for plaintiff's counsel to comment, at one point during his objections: "Just for the record, I think this is the most unethical opening statement I have ever heard." Even if comment had been properly preserved for appellate review, plaintiff's lawyer was simply defending himself and his client's case against a barrage of blatant improprieties by his opponent and his comment was an accurate description of defense counsel's tirade. Affirmed.)

Tito v. Potashnick, 488 So.2d 100 (4th DCA 1986) (in response to plaintiff's argument in wrongful death case about impact on child of having lost his father, it was error for def. counsel to argue that child's mother was certainly going to remarry because she was "an attractive young lady" and that, therefore, "this boy is going to have a father" as there was not one scintilla of evidence that the mother was going to ever remarry and that could not be presumed. Further, even if she married, there was no evidence that the new husband would adopt the child or obligate himself to the child's support. Comment was not permissible response to plaintiff's

argument. Reversed.)

Borden, Inc. v. Young, 479 So.2d 850 (3rd DCA 1985) (In a case "fatally infected" by improper argument from both counsel, court rejected plaintiff's argument that plaintiff's judgment should not be reversed because def. counsel participated in the impropriety and failed to object to challenged arguments. Plaintiff counsel's assertion of personal knowledge of nefarious activities supposedly engaged in by the large corporation defendant which were not only not in evidence but did not in fact exist – plumbed such depths of impropriety that the argument (a) cannot be deemed to have been in fair response to the tactics or statements of the defense, which while certainly impermissible, did not go nearly so far; and (b) was so prejudicial as to be incapable of cure by rebuke or retraction. Error fundamental. Reversed despite absence of objection or motion for mistrial. [Note: pre-Murphy v. Intl. Robotics])

Skislak v. Wilson, 472 So.2d 776 (3rd DCA 1985) (in response to def. counsel's argument that def. should not have to pay for plaintiff's injuries because accident was unavoidable, it was improper for plaintiff's counsel to reply that def. would not have to pay; that it is "the insurance company that will have to pay." Plaintiff's comment about insurance paying for the damages was not a fair reply since def.s argument was proper. Further, plaintiff's counsel knew that def. only had $10,000 of coverage and plaintiff demanded $500,000 [jury returned $200,000 verdict]. Fact that during voir dire def. counsel briefly addressed whether jurors would be effected by existence of insurance did not make reply proper. Jurors may be apprised of the existence of an insurance company as the real party in interest but comments concerning the amount of coverage are inappropriate. Reversed.)

Springfield Life Ins. v. Edwards, 375 So.2d 1120 (3rd DCA 1979) (where plaintiff's counsel argued in closing that plaintiff would not "give up his working life for $200 a month" which he received in government disability pay, it was an appropriate and justified rebuttal for def. to point out, in referring to "testimony about real estate investments," that the plaintiff obviously had other sources of income. In any event, no objection was made to the comment. Order granting new trial reversed.)

Thundereal Corp. v. Sterling, 368 So.2d 923 (1st DCA 1979) (where def.'s counsel had discussed in his argument the benevolence of his client and the ease with which plaintiff could apply for and receive workman's compensation benefits, plaintiff counsel's comment that def. had been pushing plaintiff around for 2 or 3 years and that it was the "day of reckoning, and it's time that this lady got what she is entitled to and not all these inconsistent positions" from the defendant were in the context of fair reply. Affirmed)

Metro. Dade Cty. v. Dillon, 305 So.2d 36 (3rd DCA 1974) (while plaintiff's counsel used "strong and zealous" language in characterizing def. counsel as the "insurance company's lawyer" who was seeking to "soft-soap" the jury and who wanted to be the "hero" of the insurance company by "getting out as cheap as he can," defense counsel was not timid and also referred to plaintiff's counsel as "a great salesman" attempting to turn tragedy into a "commercial

enterprise" because "somebody wants the Cadillacs and the big houses." Affirmed)

Wise v. Jacksonville Gas Corp., 97 So.2d 704 (1st DCA 1957) ("When evidence is introduced which is calculated to disparage, or which may reflect unfavorably upon the character of opposing parties or witnesses, it is proper for opposing counsel to retaliate with such force and vigor as is reasonably necessary to neutralize the damaging effect that type of evidence may have upon the outcome of the cause. Such retaliation of course cannot be unbridled or unrestrained, but must be controlled and kept within proper bounds. We think such was done here." [In action against gas company for injuries allegedly resulting from inhaling carbon monoxide gas, def. counsel presented expert who suggested that plaintiff's injuries were from syphilis and plaintiff's counsel apparently responded forcefully in closing – although his closing is not quoted in case] Order denying new trial affirmed. *[Subsequently overruled in part on other grounds, Johnson v. Pensacola, 164 So.2d 844]*)

XVII. Arguments that seek to invoke geographic, racial, ethnic or economic prejudice

Cascanet v. Allen, 83 So.3d 759 (5th DCA 2011) (in auto accident case where 18 year old def rear-ended plaintiff, lifting and dropping his car and causing 2 herniated disks and the undisputed need for future surgery, it was improper for defense counsel to argue, with his very young client sitting alone at the defense table, that there was "[n]o need to burden my client with some hundreds of thousands of dollars, if not $1 million worth of money they're asking for here. Is it fair that she be burdened . . . . we think it's fair to burden $23,000, whatever the medical bills were, that's a fair burden to be placed here. … But what it looks -- the term come to mind is, kind of an old football term, "piling on…." This was nothing more than an attempt to conjure sympathy for the young defendant to reduce the damage award by improperly asking the jury to weigh the effect a substantial award would have on her while ignoring her absent father, who was also a defendant, and ignoring the fact that there was insurance coverage. Courts have consistently prohibited a party from currying sympathy from the jury for a favorable verdict and asking a jury to consider the economic status of either party or the potential impact a substantial verdict would have on a defendant. Stratagem worked when jury awarded $23,764.57, which represented his past medical bills and lost wages. It awarded no future economic or non-economic damages and found that Plaintiff had not sustained a permanent injury, despite uncontroverted evidence of the two herniated disks and that plaintiff will require future surgeries and cannot continue in his prior occupation. Reversed when combined with error of allowing IME to testify concerning opinions not in his report [NOTE: no mention of whether issue of improper argument was preserved].)

Linzy et. al v. Rayburn et. al, 58 So.3d 424 (1st DCA 2011) (In auto accident case where liability was admitted and trial was only on damages for which insurance coverage existed, it was improper for defense counsel, in violation of motions in limine prohibiting comment on the financial status of either party or the defendant's ability to pay damages, to comment in opening

statement "My client is Mr. Randy Crews, sitting over there. Mr. Crews runs a small business… Mr. Crews hasn't tried to run away from responsibility for the accident. … [T]he reward for standing up and saying, "Hey, we caused this accident, and it was our fault," is now Mr. Rayburn wants him [Mr. Crews] to buy his entire back condition that he said has plagued him since he was a child. … Mr. Crews is being asked to pay for something that was there." After being again ordered to refrain from such comment in closing, defense counsel again argued: "This man over here, Mr. Crews, is being asked to pay for a lifetime of pain management that [Mr. Rayburn] received two separate referrals for within two weeks of this accident. Two separate doctors said, "You have to go to pain management." [Mr. Crews'] company unfortunately gets in an accident with [Mr. Rayburn], and those two other referrals don't matter. Now it's all you [Mr. Crews]. You pay for everything [Mr. Crews]. … [I]f you're going to do that, then you've got to come prepared … to put up on the table the evidence that makes this man [Mr. Crews] responsible." Despite the fact that Mr. Crews was not a named defendant in the case and that defense counsel was retained by an insurance company to represent the defendants [his company and driver], defense counsel repeatedly stated that Mr. Crews [the small business owner] would be solely responsible for any award of damages. By making such statements, defense counsel misled the jury and improperly attempted to appeal to the jury's sympathy. Properly preserved. Order granting new trial affirmed.)

Fasani, et al. v. Kowalski, 43 So.3d 805 (3rd DCA 2010) (in a premises liability action for injuries from a piece of granite that struck plaintiff when it fell from the wall of an elevator, where liability was admitted before trial, it was improper for plaintiff's counsel to suggest to jury that def's "drug [plaintiff] through all of this" attributing defendant's behavior and the condition of the elevator to "corporate greed and arrogance." Plaintiff's counsel also urged jury to punish defendants and "make them do the right thing because they haven't done it on their own and they have no intentions of doing it on their own" (although there was no claim for punitive damages). Arguments served no purpose other than to inflame and prejudice the jury. Further, plaintiff's counsel contrasted def's "corporate greed and arrogance" in "wanting to put beauty over safety" (despite there being no evidence that defendant's installed the granite in a way to sacrifice safety in favor of aesthetics) with plaintiff who was "just a simple man trying to get by. Not trying to get anything from anybody." This argument of the economic disparity between the parties was "not relevant in determining the issues before the jury, and could only have served to prejudice the members of the jury." Given the cumulative effect of numerous improper arguments, case reversed and remanded.)

Chin v. Caiaffa, 42 So.3d 300 (3rd DCA 2010) (case reversed on incredible multitude of improper arguments by defense counsel including a statement in opening that plaintiff was "still sitting here in debt with over $80,000 in medical expenses" ("the general rule in Florida, especially in garden variety personal injury trials such as this one, is that no reference may be made to the wealth or poverty of a party during the course of the trial. On appeal, plaintiff's counsel attempted to shift the focus away from these improprieties by arguing that defense counsel's opening was improper (defense commented in opening about how plaintiff was making remarkable improvement but that once those uplifting medical reports came in, plaintiff's

counsel referred him to another doctor and all of a sudden plaintiff started limping and claiming new injuries as well as a decline in his recovery. At that point, defense counsel claimed, the case went from being a medical case to a legal case—suggesting that def's referral to a doctor was for financial profit). In addressing plaintiff's claim, the court responded "the legal profession has as much right as anyone else to make an appropriate referral to other professionals. However, if there is evidence that such activity is occurring solely for personal financial profit, then the jury also is entitled to have those facts brought before them for consideration." Reversed and remanded for new trial.)

Samuels v. Torres, 29 So.3d 1193 (5th DCA 2010) (*opening statement*-in auto accident case where liability had been admitted and punitive damages were not being sought (and where first trial had already been mistried when defense counsel during voir dire and opening statement had pointed out to the jury that there was no insurance available and that any judgment they entered would have to be paid personally by def) it was improper for defense counsel to disclose to second jury in opening statement amount of def's meager earnings, expenses he must pay and other unrelated financial matters intended solely to curry sympathy with jury. "Interjection of the wealth or poverty of any party has been consistently held by the courts to be irrelevant to the issue of compensatory damages in a personal injury case based on negligence, highly prejudicial because it diverts the jury from a fair assessment of damages, and a basis for reversal." Reversed.)

Hollenbeck v. Hooks, 993 So.2d 50 (1st DCA 2008) (*voir dire* - defense counsel's comment to venire: "I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate" was improper and misleading where counsel was retained by def's insurer ("a big conglomerate") and comment served to suggest to jury that def would be individually responsible to pay any damages, an implication that could not be refuted at trial since the jury is not allowed to hear about the existence of insurance. Reversed.)

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (Plaintiff counsel's argument that jury had to consider who is involved in the litigation; plaintiff, who was already identified to them as being relatively poor and this "shipping company … that operates how many cruise ships; how many cruise members?" Although comment alone was not sufficiently prejudicial to warrant a new trial, it must be considered in weighing the cumulative effect of the improper arguments. Reversed.)

Engle v. Liggett Group, et al., 945 So.2d 1246 (Fla. 2006) (although attorney's comments in closing argument were improper and attempts to incite racial passions were "conduct unbecoming an attorney practicing in our state courts," reversal based upon improper closing argument and comment was not warranted when viewed under the totality of the circumstances in this two year trial. Many of the comments were not objected to, were the subject of a curative instruction or were taken out of context by the District Court. A review of the verdicts reveals that the jury carefully analyzed the issues of comparative fault and individual damages, contrary to the image of a runaway and inflamed jury portrayed by the District Court. District Court's

ruling affirmed in part and reversed in part. **NOTE: SEE DISTRICT COURT OPINION BELOW (Ligget Group, et al. v. Engle) FOR REFERENCE TO ARGUMENTS NOT INCLUDED IN SUPREME COURT OPINION**)

Werneck, et. al v. Worrall, 918 So.2d 383 (5th DCA 2006) (*[opening and closing]* In a wrongful death auto accident case where punitive damages were not recoverable, it was error for plaintiff's counsel, in opening statement and closing argument, to tie compensation for pain and suffering to a calculation that included the number of tractor trailers owned by the defendant. Such an argument suggested to the jury that plaintiff's recovery for pain and suffering was based upon the wealth or assets of the defendant, an improper measure of damages. Judge's curative instruction worsened the situation. "The amount of sales [def.] has is of no relevance…. Its sales are very different than profits or assets. *** And so the jury will completely disregard that comment." Rather than curing the problem, the instruction might have created the false impression that the only objectionable aspect of the statement was the reference to sales because it differentiated between profits or assets and sales. "The fact that counsel could have suggested a wholly arbitrary number to the jury [rather than the number of tractor trailers in def.'s inventory] does not give counsel carte blanche to mislead the jury by knowingly urging it to employ specious methodology, especially when the defendant's assets are part of the equation in a case where punitive damages are not an issue." [Note: prejudice was supported by the fact that jury awarded very close to the amount improperly calculated by plaintiff's counsel] Reversed and remanded for new trial on damages.)

Liggett Group, et. al v. Engle, 853 So.2d 434 (3rd DCA 2003) (it was improper for plaintiff's counsel to interject racism into the trial of the tobacco company defendants without basis in the evidence or relevance to the case. Counsel argued to the jury how tobacco companies would "divide the American consumer up into groups," including "white" and "black," then proceeded to tie this racial argument into an appeal for jury nullification arguing that "before we get all teary-eyed about the law ... [h]istorically, the law has been used as an instrument of oppression and exploitation." Counsel then juxtaposed the def.'s conduct with the genocide of the Holocaust and slavery and urged the jury to fight "unjust laws" with reference to Martin Luther King and Rosa Parks. [Note: four of the six jurors were African American and, even more egregiously, counsel had previously published a book where he identified this strategy almost verbatim and acknowledged that it is tremendously effective because it is incurably prejudicial.] Reversed. **NOTE: THIS CASE WAS SUBSEQUENTLY REVERSED IN PART AS TO CLOSING ARGUMENTS BY THE SUPREME COURT [see Engle v. Ligget above] but is included here for reference to arguments not included in the Supreme Court opinion.**)

Target Stores v. Detje, 833 So.2d 844 (4th DCA 2002) (references to def. as "big corporation," taken in context, were not an invitation to decide the case on the improper basis of the financial status of the parties. Affirmed.)

Manhardt v. Tamton, M.D., 832 So.2d 129 (2nd DCA 2002) (*dicta concerning question, not closing*: Attorney stated to witness that he would try to speak without a "an accent from Miami

Beach" [opposing counsel was from Miami Beach and argued that the comment was an improper reference to his religion]. Court re-emphasizes that a comment purportedly made in jest can be prejudicial and that their trial conduct "must always be so guarded that it will not impair or thwart the orderly processes of a fair consideration and determination of the cause by the jury." [citations omitted] Reversed on totality of errors.)

Telemundo v. Spanish TV Serv., 812 So.2d 461 (3rd DCA 2002) ([although the majority opinion only states that the Murphy new-trial requirements for unobjected-to error have not been met, the concurring opinion by Judge Sorondo sets forth a detailed analysis of the requirements and the difficulty of satisfying them in the context of an argument appealing to nationalistic/ethnic prejudices.])

Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (4th DCA 1997) (improper for plaintiff to attack def.'s counterclaim on the basis that he was from another country [Jamaica], stating that he "has to make a claim because I guess he knows in America, you can make a claim like this." Reversed on these and other comments.)

Superior Indus. Int'l v. Faulk, 695 So.2d 376 (5th DCA 1997) (plaintiff's repeated reference to defendant's status as a California corporation, when considered with other improper arguments that sought to evoke excessive sympathy from jury, seems designed to convey to the jury an "us versus them" mentality and was improper. Reversed on these and other improper arguments.)

S.H. Inv. & Dev. Corp. v. Kincaid, 495 So.2d 768 (5th DCA 1986) (it was improper for plaintiff's counsel to urge the jury that they have an opportunity to speak with a loud voice from Orange County to corporations in Miami and New York [send a message. "Us-against-them" arguments serve no purpose other than to pit "the community" against a non-resident corporation and other improper arguments expressing personal opinion in violation of the rules of ethics will not be condoned even absent objection. Reversed.)

White Constr. Co. v. Dupont, 455 So.2d 1026 (Fla. 1984) (although some latitude is permitted when arguing "smart money" to punish defendants, comments by plaintiff's counsel concerning differences in race and economic standing between the two parties were improper, especially were punitive damages were not appropriate. Error not fundamental. Affirmed in part. *[In Murphy, 766/1010, the Sup. Ct. receded from this case on the limited issue of the ability to seek appellate review for unobjected to improper arguments.]*)

XVIII. Improper personalizing with jury

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel tell the jury what his 14 year old son would have thought about insurer's defense. In addition to such facts not being in evidence as son had not testified, son's opinion would be

completely irrelevant and such argument was simply a transparent attempt to curry favor with the jury. *NONETHELESS*, despite numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] Affirmed.)

Bocher v. Glass, 874 So.2d 701 (1st DCA 2004) (*voir dire and closing* - it was improper for plaintiff's counsel to try to ingratiate himself to the jury by, among other things, telling the jury that he had a child near the age of the deceased child, arguing that def. counsel where going to unfairly second guess the decedent's actions but that he knew all about "armchair quarterbacks" because he used to be a professional football player and, after trial court sustained objection, telling jurors "I'm pretty much a straight ahead guy." During closing, it was also improper for plaintiff's counsel to provide "irrelevant familial rhetoric" by attempting to tell the jury a story about him and his grandfather walking in the Florida woods when he was a child and, upon objection, attempting to revise the story to a hypothetical grandfather and child. Reversed based on cumulative errors.)

Cummins Ala. Inc. v. Allbritten, 548 So.2d 258 (1st DCA 1989) (defense counsel's reference to jurors by their names during closing argument [i.e. "I saw Mrs. Stiltner watching my diesel engine expert take that pump off, and I saw Mr. Boggess shake that line like I did, and I saw the reverend, Mrs. Smith–"] although an improper attempt to curry favor with the jurors, was not a golden rule argument because the jurors were not asked to assume the position of either party. In view of court's intervention, *sua sponte*, instructing def. counsel to terminate this argument and warning him not to personalize the remainder of his argument, comments were not sufficiently prejudicial to constitute harmful error warranting a new trial. Order granting new trial reversed.)

XIX. Generally

Borden Dairy v. Kuhajda, 152 So.3d 763 (1st DCA 2014) (In determining whether a challenged argument is improper, the trial court must consider whether the attorney confined closing argument to the facts and evidence presented to the jury and whether the argument improperly invoked emotional responses from the jury which could have affected the verdict. [citing *Murphy*].)

Airport Rent-A-Car, Inc. v. Lewis, 701 So.2d 893 (4th DCA 1997) (While attorney is given broad latitude in closing argument, his remarks must be confined to evidence, issues, and inferences that can be drawn from evidence. Generally, where an argument is not otherwise inflammatory or egregious, an isolated statement is only harmful if coupled with an argument for punitive damages.)

Davidoff v. Segert, 551 So.2d 1274 (4th DCA 1989) (While counsel is accorded great latitude in making argument to the jury, this leeway is not unbridled.)

Miller v. Court, 510 So.2d 926 (4th DCA 1987) (During closing argument, counsel is limited by the evidence and issues presented and the inferences which can be drawn from the evidence.)

Sharp v. Lewis, 367 So.2d 714 (3rd DCA 1979) (In general, reversible error from comments of counsel may appear in various ways: (1) comments of counsel that, per se, give rise to reversible error; (2) comments of counsel that give rise to reversible error because their very utterance has such a profound effect upon the trial, under the circumstances of the case, that an appellate court is unable to find an adequate basis in the record to assure itself that there was a fair trial; and (3) Cumulative comments of counsel which, when viewed together in light of the record, give rise to reversible error.)

Regan Ins. v. Krause & Sons, 325 So.2d 35 (3rd DCA 1976) ("Counsel are accorded a wide latitude in making arguments to the jury and, unless their remarks are highly prejudicial and inflammatory, statements made to the jury during closing arguments will not serve as a basis for reversing a judgment.")

Metro. Dade Cty. v. Dillon, 305 So.2d 36 (3rd DCA 1974) (in cases involving horrible human tragedy, such as death of a child, it must be expected that counsel during closing argument will engage in sometimes emotional and heated debate. Counsel are accorded a wide latitude in making their arguments to the jury and unless their remarks are highly prejudicial and inflammatory, they will not serve as a basis for reversing a judgment.)

Harrold v. Schluep, 264 So.2d 431 (4th DCA 1972) (Closing argument is restricted to the evidence and issues presented and the inferences which can be drawn from the evidence. It was improper for trial court to allow party to read complaint during closing argument where complaint was not in evidence and, in all likelihood, could not be introduced in evidence [court distinguished between pleadings in instant case and admissions in pleadings in earlier case that may have some impeachment value.])

Lovell v. Henry, 212 So.2d 67 (3rd DCA 1968) (Counsel is accorded a wide latitude in making his argument to a jury. Whether the bounds of propriety in such regard have been exceeded, however, must be measured against the prejudicial effect, if any, that is likely to be had upon the jury. Jury arguments will not be considered grounds for mistrial unless they are highly prejudicial and inflammatory. Affirmed)

Schnedl v. Rich, 137 So.2d 1 (2nd DCA 1962) (in addressing the jury, counsel should "confine his arguments fairly within the range of the issues and the evidence with logical deductions therefrom; but he is accorded wide latitude.)

Alford v. Barnett Nat. Bank, 188 So. 322 (Fla. 1939) (Although counsel is allowed a broad latitude in presenting case to jury, they should confine argument to evidence and issues presented with logical deductions therefrom, and should at all times stay within the record.)

XX. Objection v. fundamental error

Allstate Ins. Co. v. Marotta, 125 So.3d 956 (4th DCA 2013) (When an improper comment has been properly preserved, the trial court should grant a new trial if the argument was "so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial." For unpreserved comments, however, a new trial should only be granted if the comments were improper, harmful, incurable, and damaged the fairness of the trial such that the public interest requires a new trial. [*See Murphy v. International Robotics* for 4-prong test]. Reversed.)

Phillip Morris, USA v. Tullo, 121 So.3d 595 (4th DCA 2013) (In tobacco trial, although it was improper for counsel to make several comments to the effect that the Tobacco Companies failed to take responsibility for their actions [because that disparages them for defending themselves in court] and comparing their distribution of cigarettes to a drug dealer's distribution of heroin to a heroin addict [because that went beyond commenting on the addictive properties of tobacco and compared the D's to criminal drug dealers], errors were not preserved by contemporaneous objection and do not rise to the level necessary to be fundamental error under *Murphy*. [**Note**: D's had made a pretrial motion to prevent P's counsel from comparing them to criminals however trial court specifically said it's granting of said motion was "preliminary" and only "definitive and unequivocal" pretrial orders can serve as objections for the purpose of preservation of subsequent error.] Affirmed.)

Carnival Corporation v. Jimenez, 112 So.3d 513 (2nd DCA 2013) ("If the issue of an opponent's improper argument [or conduct] has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the [objecting] party its right to a fair trial.' " [See Engle, infra]. If, however, the improper argument is NOT properly preserved, a motion for new trial can only be granted if the improper argument amounts to fundamental error according to the 4-prong test announced by the Supreme Court in Murphy v. International Robotic Systems, 766/1010. Although defense counsel suggested, without supporting evidence, that plaintiff's treating physician who was friends with Plaintiff's counsel had his testimony "scripted," implying it was by defense counsel, error was not properly preserved and does not satisfy Murphy's 4-prong test for fundamental error. Order granting new trial reversed.)

Health First v. Cataldo, 92 So.3d 859 (5th DCA 2012) (Plaintiff's counsel's closing was replete with improper comment, including: 1) religious references and appeals to a higher power which improperly suggested to the jury that God favored a verdict in favor of Plaintiff, coupled with a request that the jury "punish" Defendants, who had not "repented" for their sins. ["And call it fate or call it whatever you want to call it, but I believe that there was a reason why you were selected. … And as I've watched you carefully for the last two weeks … it dawned on me that whoever it is that decides what's right and wrong in this world, had some say in you all being the one's [sic] selected to decide this case. … I was reading about the concept of repentance. And it

applies here, folks, because part of what you're going to be doing in this case, through your verdict, is to make sure that the Defendants who caused the wrong we're here on, really have repented for what they've done."], 2) claiming that Defendants were trying to sidetrack the jury and make them take their eye off the ball, that Defendants had to be dragged "kicking and screaming" into the courtroom, that the jury had to force Defendants to take care of Plaintiff, and that it would be a victory for the defense if they got an "unfair" verdict, all of which improperly disparaged the defense and implied that Defendants had done something improper by defending the case, and 3) grossly misstating the compensation that had been paid to Defendants' only medical witness by arguing, incorrectly, that he had been paid almost $1,000,000 over three years for cases on which he had worked with defense counsel, and implying that no one knew how much the doctor received from defense counsel's firm after considering he had worked with three or four other lawyers at the firm, which comments were factually inaccurate. However, no objection to the improper arguments was made and, even cumulatively, they fail to reach the standard of fundamental error pronounced in Murphy v. International Robotics. Affirmed.)

R.J. Reynolds Tobacco v. Townsend, 90 So.3d 307 (1st DCA 2012) (By waiting until the end of closing argument to object to the allegedly improper argument and move for mistrial and by failing to object specifically to distinct portions of the argument, def. failed to preserve this issue for appellate review. Reversed in part on other grounds.)

City of Orlando v. Pineiro, 66 So.3d 1064 (5th DCA 2011) ("If the issue of an opponent's improper argument has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the opposing party its right to a fair trial.' " Engle v. Liggett Group, 945/1246 (Fla. 2006) (quoting Tanner v. Beck, 907/1190). However, for an unobjected-to improper argument to support a new trial order, the unobjected-to improper argument must be "of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments." Id.; see also Murphy, 766/1010.)

Mercury Insur. Co. v. Moreta, 957 So.2d 1242 (2nd DCA 2007) (it was improper for plaintiff's counsel to malign insurer def. in UM action for not living up to its contractual obligation to insured and leaving him "out hanging." Pre-trial order limited such comment to establishing the existence of the business relationship and prohibited counsel from such emotional argument. Also improper for plaintiff's counsel to argue to jury that this was def's alleged claims handling practice and usual litigation tactics. Such facts were not in evidence and defs alleged practices in other cases were irrelevant to case at hand. Improper to claim def was breaching it's contract with insured since UM action is based on existing contract but is a tort action in which def stands in the shoes of the uninsured driver. Moreover, attacking defs for aggressively defending the lawsuit was further improper since def had the right to raise any and all defenses that other driver could have raised. Lastly, it was improper of plaintiff's counsel to tell the jury what his 14 year old son would have thought about insurer's defense. In addition to such facts not being in evidence as son had not testified, son's opinion would be completely irrelevant and such argument was simply a transparent attempt to curry favor with the jury. *NONETHELESS*, despite

numerous improper comments def failed to object and comments were not incurable [prong 3 of Murphy analysis] **Note**: Generally, improper references to insurance matters in closing argument can be cured by an appropriate curative instruction. Affirmed.)

Thompson v. Hodson, et. al, 825 So.2d 941 (1st DCA 2002) (where def. counsel argued: "Does this death become the responsibility of Dr. Hodson only. . . . They want to single [Hodson] out . . . . [D]id he really do anything that was so different than the other people in this case to make his actions incompetent. . . . [Hodson] somehow had to know more than all the people he involved who are not blamed," possibly suggesting that it was unfair that def. was the only one out of nine possible defendants that the plaintiff sued but, as def. counsel knew, plaintiff had actually sued many doctors and settled his claim with them, plaintiff was not entitled to a new trial because, assuming it was improper, the unobjected-to error was neither harmful, incurable nor so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial according to *Murphy*, below. Affirmed.)

Telemundo v. Spanish TV Serv., 812 So.2d 461 (3rd DCA 2002) ([although the majority opinion only states that the Murphy new-trial requirements for unobjected-to error have not been met, the concurring opinion by Judge Sorondo sets forth a detailed analysis of the requirements and the difficulty of satisfying them.])

Garbutt v. LeFarnara, 807 So.2d 83 (2nd DCA 2001) (error preserved where objections were made to some, but not all, of the improper arguments and a motion for mistrial based on improper argument was made before the case was submitted to the jury. Reversed.)

Padilla v. Buell, 797 So.2d 609 (3rd DCA 2001) (plaintiff's failure to object with specificity to defense counsel's remarks during closing argument waived any error that might have occurred. Affirmed.)

Platz v. Auto Recycling & Rep., 795 So.2d 1025 (2nd DCA 2001) (Court's order which characterized counsel's conduct as "inflammatory and prejudicial" and stated that it "precluded the jurors' rational consideration of the evidence and the merits of the case" was insufficient for the granting of a new trial absent contemporaneous objection by counsel and motion for mistrial. As stated in *Murphy v. Int'l Robotics Systems* below, a new trial based upon unpreserved error is only warranted upon a showing by the movant that the argument was: 1) improper, 2) harmful, 3) incurable and 4) so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial [on this last point, the court gave as an example closing arguments that appeal to racial, ethnic, or religious preferences]. If the trial court finds that these criteria have been met, it must enter an order specifically identifying both the improper arguments of counsel *and* the actions of the jury resulting from those arguments. If anything, trial court's conclusion that it was "unconvinced that the jury accepted the law as presented to it based upon Counsel's conduct" flies against the conclusive nature of the above requirements. Order for new trial reversed.)

Wilbur, et. al v. Hightower, 778 So.2d 381 (4th DCA 2001) (Plaintiff's unobjected to argument: "Don't let these people go back to their offices and [laugh] in the hall room and say, we put one over on them," although not an improper "send a message" or "conscience of the community" argument, could reasonably be understood as accusing defense counsel of attempting to mislead the jury. However, error does not seem to have been prejudicial given the compelling evidence of medical negligence and devastating loss to the surviving spouse, the fact that the jury more than halved the plaintiff's requested damages and the fact that the statement was a single excess at the end of a five week trial. *TEST:* Absent an objection, in order for an argument to warrant a new trial it must be (1) improper, (2) harmful, (3) incurable and (4) it must so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. [citing *Murphy* 766/1010] Error harmless. Order granting a new trial reversed.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) (civil litigant may not seek appellate relief of improper but un-objected to argument unless he has at least challenged such argument in the trial court by a motion for new trial. In order for a new trial to be warranted based upon un-objected to argument, the trial court must find: 1)the argument is improper [the purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." Closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response ... rather than a logical analysis...."]; 2) the argument must be harmful [i.e. how the improper argument affected the fairness of the trial proceedings. "Harmfulness also requires that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury. ... In sum, the improper closing argument comments must be of such a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments"]; 3) the argument must be incurable ["the complaining party must establish that even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the ... argument resulted in an improper verdict. ... [I]t will be extremely difficult for a complaining party to establish that the unobjected-to argument is incurable."]; AND 4) the argument must be such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial [this category is narrow and, by way of example, arguments that appeal to racial, ethnic or religious prejudices are the types that traditionally fit within this narrow category.] Trial court's order granting a new trial MUST specifically identify the improper arguments of counsel *and* the actions of the jury resulting from those arguments. In the case at bar, def. counsel's repeated use of term "B.S. detector, comment that if jury found for the plaintiff they would be "accessories, after the fact, to tax fraud, and characterization of plaintiff's case as cashing in on a "lottery ticket" were all improper. However it was not an abuse of discretion to conclude that the improper arguments were not harmful, incurable or requiring of a new trial as set forth above. [**NOTE**: Subsequently, *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014) held that the a party benefitting from an error has the burden of proving that the error was harmless, ie. that there is no reasonable possibility that the error complained of contributed to the verdict—the same standard as used in criminal cases. Going forward, this may affect prong 2 of the

Murphy 4-part test.] Affirmed)

Cedar's Medical v. Ravelo, 738 So.2d 362 (3rd DCA 1999) (Except where a comment is so egregious as to constitute fundamental error, a contemporaneous objection to an improper comment in summation is necessary in order to preserve the claim for appellate review. Fundamental error in closing argument occurs when the "prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." [citations omitted] Reversed in part. [on other grounds].)

Dubus v. Pietz, 728 So.2d 769 (1st DCA 1999) ("Jury arguments will not be considered grounds for a mistrial nor will they serve as a basis for reversing a judgment unless they are highly prejudicial and inflammatory." Argument in which plaintiff's counsel asked jury not to consider one def.'s intoxication in determining compensatory damages and urging: "It doesn't mean that you forget about the conduct that resulted in this accident, that they have admitted is reckless conduct in causing this accident" was not so inflammatory or prejudicial as to warrant a new trial. Order granting new trial is affirmed in part and reversed in part.)

Mayo v. Gazarosian, 727 So.2d 1140 (5th DCA 1999) (While it was improper for defense counsel to express personal opinion concerning the credibility of witnesses and to assert personal knowledge of facts, only some of the improper arguments or comments were objected to by the plaintiff's counsel and, after review of the entire record, they do not rise to the level of fundamental error. A judgment will not reversed for unpreserved error unless the prejudicial conduct, in its collective impact, is so extensive that its influence pervades the trial "gravely impairing a calm and dispassionate consideration of the evidence and merits.")

Fravel v. Haughey, 727 So.2d 1033 (5th DCA 1999) (Although it was improper for plaintiff's counsel to request a jury to act as the conscience of the community and to accuse the defendant, his counsel and his witnesses of committing perjury, improper comments were not preserved by appropriate objection and error was not fundamental. [NOTE: court indicated it is receding from its prior practice of liberally reversing cases without objecting based on fundamental error. In the future, such reversals will be rare exceptions rather than the rule. The court pointed out that it would be inappropriate to punish litigants with the cost of retrial for the unethical conducts of their lawyers and suggested that some lawyers would intentionally withhold an objection in order to obtain a "second bite of the apple" if the trial result was unfavorable.] Affirmed.)

King v. Byrd, 716 So.2d 831 (4th DCA 1998) (While it was improper for plaintiff's counsel to refer to defense expert as "hired gun", among other improper arguments, none of the arguments were objected to and they do not rise to the level of fundamental error. Affirmed)

Simmons v. Swinton, 715 So.2d 370 (5th DCA 1998) (Where plaintiff's counsel claims that defense counsel made personal comments on the evidence, expressed personal knowledge of facts not in evidence and stated personal opinions during his closing argument including

allegations that plaintiff's treating physician negligently treated the plaintiff and therefore had and an ulterior motive in blaming her injuries on the accident, new trial not warranted because comments were not improper since the attorney confined closing argument to the evidence presented and reasonable inferences that could be drawn from the evidence and, in any event, comments do not go to the foundation of the case and absent an objection to allow the trial court to correct any alleged error, plaintiff's are not entitled to a new trial.)

Sawczak v. Goldenberg, 710 So.2d 996 (4th DCA 1998) and on remand *Sawczak v. Goldenberg*, 781 So.2d 450 (4th DCA 2001) (While it was improper for defense counsel to make arguments that appealed to the community conscience of the jury, expressed counsel's personal beliefs, referred to facts not in evidence and personally attacked the plaintiff's expert as "a hired gun who was asked to put the biggest numbers he could conceivably think of up on the board," plaintiff's counsel improperly objected and moved for mistrial on incorrect grounds of "Golden Rule". Having failed to assert the appropriate grounds in her objection, counsel failed to properly preserve the issue for appeal. Affirmed. [Subsequently, the Supreme Court ordered reconsideration in light of the opinion in *Murphy v. Int'l Robotics*, 766 So.2d 1010 (Fla. 2000), on remand, court held that plaintiff failed to demonstrate that the challenged arguments were "improper, harmful, incurable, and so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."] Affirmed)

Murphy v. Int'l Robotics Systems, 710 So.2d 587 (4th DCA 1998) (In order to properly preserve an improper comment for appeal, there must be an objection at the time the remarks are made. If the court sustains the objection, there must be a motion for mistrial and, although the objection must be made at the time of the improper remarks, the motion for mistrial can be made later, at the close of argument, in order to give counsel time to think about whether to seek a mistrial. Although defense counsel improperly accused plaintiff of wanting to "cash in a lottery ticket in this litigation" and suggested that if the jurors awarded plaintiff damages based on a "phony consultancy agreement" they would be "accessories, after the fact, to tax fraud," improper arguments were not objected to and will not be heard for the first time of appeal [court gave a very detailed history of closing arguments and the reasons why it will not consider unobjected to arguments for the first time on appeal] Affirmed. [*See* Supreme Court's affirmance in *Murphy*, above 766/1010])

Rutherford v. Lyzak, 698 So.2d 1305 (4th DCA 1997) (Quoting Hagan - in determining whether remarks during closing argument constitute fundamental error the trial court must first: determine whether the error was so pervasive, inflammatory, and prejudicial as to preclude the jury's rational consideration of the case. . . . The trial court has discretion in making this case - specific determination. Second, the trial court must decide whether the error was fundamental. In essence, this is a legal decision that the error was so extreme that it could not be corrected by an instruction if an objection had been lodged, and that it so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial even when no lawyer took the steps necessary to give a party the right to demand a new trial. No fundamental error appears to exist in this case and counsel may discuss both an expert witness' interest in the outcome of the

case and the referral relationship between the attorney and the treating physician that testifies as an expert. Order granting new trial reversed.)

Superior Indus. Int'l v. Faulk, 695 So.2d 376 (5th DCA 1997) (Plaintiff's argument that the jury has a civic responsibility to let the def. know that actions have consequences and "when the consequences of our actions are severe, we better be prepared to step up and take responsibility" was an improper community conscience/civic responsibility argument. Reference to 16 year old's life being "snuffed out" improperly implies deliberate infliction of injury. Reference to imaginary "parade of horribles," [i.e. If this part had failed in a jet aircraft . . .; If this accident had resulted in a collision killing everyone in the other vehicle . . . .] was an improper argument based on facts not in evidence. Reversed based on cumulative effect of improper arguments despite the fact that there was not an objection to every improper argument.)

Hicks v. Yellow Freight Systems, 694 So.2d 869 (1st DCA 1997) (Motion for new trial was properly denied because plaintiff failed to object to the allegedly improper statements by defense counsel during closing argument and because counsel's conduct during closing argument was not so egregious as to constitute fundamental error. Court reminds all counsel that if they intend to appeal an allegedly improper closing argument "they would be well advised to object". Affirmed.)

Holub v. Kinder Mobile Home, 691 So.2d 8 (5th DCA 1997) (Although many of defense counsel's remarks during closing argument were improper and, had they been objected to, undoubtedly would have been stricken, no objections were lodged nor was a motion for mistrial made. Court unable to find that the cumulative effect of defense counsel's comments "gravely impair[ed] a calm and dispassionate consideration of the evidence and the merits by the jury." Collective impact of prejudicial statements was not so extensive that it deprived plaintiff of a fair trial. Affirmed in part and reversed in part on other grounds.)

Tremblay v. Santa Rosa County, 688 So.2d 985 (1st DCA 1997) (in nuisance action for damages caused by sod transfer and pine straw facility's proximity to residential home, it was improper for homeowner's counsel to argue to jury that they should imagine themselves pulling rats out of their pools, bales of pine straw starting fires in their yards, and thousands of mosquitoes and other vermin flying in their neighborhood or their children's neighborhood. Arguments were so inflammatory, appealed to the jury's passions and tried to induce fear and self-interest that they constitute fundamental error. [NOTE: Court rejected requirement of *Hagan* test for unobjected-to error that the trial court identify not only the improper comment but also the jury's actions that resulted from that comment. In 1st DCA, courts will follow *Bullock's* holding that in the case of some improper arguments prejudicial and inflammatory effect can be presumed.] Order granting new trial affirmed *[**NOTE**: the holding of presumed prejudice has since been rejected by the Supreme Court in Murphy 766/1010. Murphy is now the controlling case on unpreserved error and requires that, among other things, the closing argument be harmful to warrant a new trial. Murphy also disapproved of this case as to standard of review on appeal]*)

Owens-Corning Fiberglas Corp. v. Crane, 683 So.2d 552 (3rd DCA 1996) (When defense counsel was making its closing argument, it was inappropriate for plaintiff's counsel to continuously interrupt with a speaking objection in which he stated that defense counsel was fabricating evidence. While it is perfectively permissible for trial attorneys to point out perceived discrepancies in the evidence introduced at trial and opposing counsel's characterization of the same, it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury in the process. Even in the absence of a contemporaneous objection, such comments about opposing counsel made during closing arguments are fundamental error and require no preservation below.)

Donahue v. FPA Corp., 677 So.2d 882 (4th DCA 1996) (PCA. Concurring opinion was written to chastise defense counsel for unethical argument. It was improper for defense counsel to compare a video introduced into evidence by plaintiff to a staged film, prepared by a television station, which showed a GMC truck blowing up [implying something prejudicial and personal attack on plaintiff and counsel]. It was also improper for defense counsel to compare def. expert dentist who holds free seminars for lawyers on TMJ problems to lawyers who advertise on benches "call 1-800, you know, sue you, whatever. If you are a lawyer that's embarrassing"[personal attack on witness]. Concurring judge suggests that PCA was entered because errors were not objected to and were not fundamental.)

D'Auria ex rel. Mendoza v. Allstate Ins. Co., 673 So.2d 147 (5th DCA 1996) (PCA - concurring opinion is written solely to remind trial judges of their "long-standing responsibility to protect jurors from improper closing arguments, even in the absence of a proper objection." Judge pointed out that defense counsel engaged in character assassination of the 16 year old plaintiff, her counsel and witnesses; injected his personal opinions on the credibility of the witnesses, belittled the plaintiff, urged jury to "send a message" and apologized for plaintiff's case. According to concurring judge, reversal would have been mandated if a proper objection and motion for mistrial had been made. Affirmed)

Rockman v. Barnes, 672 So.2d 890 (1st DCA 1996) (While it was improper for plaintiff's counsel, on a number of occasions, to express his personal beliefs concerning the evidence which was presented, defense counsel properly objected and the trial judge properly sustained the objection and issued a curative instruction. Under these circumstances, the improper activity did not reach the level of reversible error, especially since defense counsel failed to move for a mistrial. Court notes that the expression of a personal opinion by counsel violates Rule 4-3.4 of the Rules of Professional Conduct that regulate the Fla. Bar. Affirmed.)

Norman v. Gloria Farms, 668 So.2d 1016 (4th DCA 1996) (in rural community of Okeechobee where hunting is a popular sport as evidenced by the fact that only two of the 7 jurors and alternate had never hunted, it was highly improper and prejudicial for def. counsel to argue, in claim for injuries sustained while hog hunting, that a plaintiff's verdict would "bring an immediate halt to hog hunting in Okeechobee," and that "this is just a decision [the jurors] need

to make based on being an Okeechobee resident and knowing there is lots of ranch property around and hog hunting is something special in Okeechobee." Although court is committed to proposition that objection to improper argument is necessary in all but a few rare instances, def. counsel's argument went far beyond traditional golden rule argument in that a golden rule argument asks the jury to put themselves in the shoes of the litigant, and def. told the jury that they, personally, would be affected by the outcome of the case. When combined with a "conscience of the community" argument pitting the jury against the plaintiff in an "us-against-them" scenario, the argument was calculated to produce a verdict based upon fear and self-interest and constitutes fundamental error. Reversed without objection [def. counsel's closing argument was described as a "veritable catalogue of improper closing arguments".)

Muhammad v. Toys "R" Us, Inc., 668 So.2d 254 (1st DCA 1996) (def. counsel's expression of personal opinions: "I think that's way too much based on what I've observed," "This is not a hill. . . . I don't think this is a fair - -," "I will give you 3,000 reasons why he [expert] testified about that bike [being defective]; that's what he got paid. . . . That was so ludicrous even Mr. Loehr couldn't bring it up. It was so ludicrous that they didn't even bring him down here [suggesting that the reason witness' deposition was read in lieu of live testimony was because his opinion was ludicrous]" were improper and constitute fundamental error. A new trial is required regardless of the want of an objection where an attorney's prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing the jury's calm and dispassionate consideration of the evidence and the merits. Here, neither rebuke nor a retraction of the comments would have served to destroy their sinister and prejudicial influence. Reversed.)

Hagan v. Sun Bank of Mid-Fla., 666 So.2d 580 (2nd DCA 1996) (If a trial court grants a motion for new trial on the basis of unpreserved error, then such error must be "fundamental," that is, it must go to the "foundation of the case" or to the "merits of the cause of action," or "extinguish a party's right to a fair trial." It is not accurate to state that a party has a "right" to a post-trial remedy in a civil case for fundamental error. Relief is granted for a fundamental error not because the party has preserved a right to relief form a harmful error, but because the public's confidence in our system of justice would be seriously weakened if the courts failed to give relief as a matter of grace for certain, very limited and serious mistakes. To preserve an opponent's improper comment for review, an objection must be raised when the remark is made. If the objection is sustained, then a motion for mistrial must also be made before the jury retires to deliberate. Failure to both object and then make a motion for mistrial waves the issue for appellate review. This rule exists because it is difficult if not impossible to determine whether the failure to move for a mistrial in a timely fashion was a tactical decision or an oversight. If error is NOT properly preserved, then no new trial unless: 1) trial court determines error was so pervasive, inflammatory, and prejudicial as to preclude the jury's rational consideration of the case [trial court has discretion in making this case-specific determination]; 2) trial court determines that error was fundamental [i.e. this is a legal decision that the error was so extreme that it could not be corrected by an instruction if an objection had been lodged, and that it so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial even when no lawyer took the steps necessary to give a party the right to demand a new

trial]; 3) [although not identified as a 3rd prong] trial court should identify not only counsel's improper arguments but also the actions of the jury that resulted from such argument -- error must have demonstrably misled the jury. If the record does not disclose that the improper argument resulted in a miscarriage of justice, there is no harmful error justifying a new trial, especially in the absence of an objection. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Tucker v. Mariani, 655 So.2d 221 (1st DCA 1995) (where allegedly improper "golden rule" argument was made, mistrial was not warranted where no objection was posed at the time of the comment thereby precluding review on appeal absent irreparable and fundamental error, and comments were not of such a "sinister influence" as to constitute fundamental error.)

Owens-Corning Fiberglas Corp. v. Morse, 653 So.2d 409 (3rd DCA 1995) (A contemporaneous objection to improper comments during closing argument is necessary to preserve error, unless the error can be said to be fundamental. Fundamental error occurs if the argument "was so prejudicial as to be incapable of cure by rebuke or retraction," or if the error extinguishes "a party's right to a fair trial." Derogatory comments accusing plaintiff's counsel of "trickery" and "hiding the ball," together with allegations that other trial counsel "prodded" plaintiff into giving answers and that his responses "had been told to him by his attorneys" constitute fundamental error which deprived plaintiff of a fair trial. Def. counsel attacked the integrity of counsel, accusing them of perpetrating a fraud upon the court and jury. [Note: although co-def. OCF did not make any improper closing argument, appellate court concluded that def.'s argument prejudiced jury to such extent that retrial as to both def.'s was warranted.] Order granting new trial affirmed)

Al-Site Corp. v. Della Croce, 647 So.2d 296 (3rd DCA 1994) (Improper for plaintiff's counsel to engage in character attacks and name calling during closing and rebuttal: "character wise he is a small man . . . he is a bully . . . he wanted to become a big shot . . . some jerk . . .." Even absent a timely objection, court will not permit the result to stand because it resulted in less than a fair trail. Reversed [Note: pre-Murphy v. Intl. Robotics])

Eichelkraut v. Kash N' Karry, 644 So.2d 90 (2nd DCA 1994) (Failure to request a mistrial after an objection to an improper argument has been sustained constitutes a waiver of the objection. Where a trial judge grants a new trial on the basis of unpreserved error, it is not a matter of discretion and the ruling will be upheld only if the error was fundamental as a matter of law. While a new trial may be based on conduct by counsel in closing argument without an objection, such conduct must be so pervasive, inflammatory and prejudicial as to preclude the jury's rational consideration of the case. Plaintiff counsel's two references to def.'s "multimillion dollar" corporation and emotional appeal to the jury concerning "the hell that they've [plaintiffs] been through" did not have such a pervasive influence as to constitute fundamental error. Order granting new trial reversed. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Pippin v. Latosynski, 622 So.2d 566 (1st DCA 1993) (Plaintiff counsel's arguments that defense doctor will continue to "offer these ludicrous opinions" until he is run out of town, expression of personal outrage at the defense of the case, attack on defense counsel's failure to refer to catholic priest/plaintiff as "father" and comment on the amount of money the defense has spent in defending the case as well as in "damage control" was to extensive as to have prejudicially pervaded the entire trial. The cumulative affect of counsel's remarks precluded the jury's rational consideration of the evidence and merits, resulting in an unfair trial and thus constituting fundamental error. Reversed.)

George v. Mann, 622 So.2d 151 (3rd DCA 1993) (defense counsel's repeated reference to plaintiff's "lawsuit pain" and suggestion that she "set up" the entire lawsuit, implying that she was a liar, was perpetrating a fraud upon the court, had concealed evidence and violated discovery orders "fatally compromised" plaintiff's right to a fair and legitimate trial. Even if not objected to, such error is reversible. Defense judgment reversed.)

Silva v. Nightingale, 619 So.2d 4 (5th DCA 1993) (comments by def. counsel, with regard to part of plaintiff's testimony, that jury should "forget that, forget that was ever said"; with regard to plaintiff's inability to work as a housekeeper, that counsel had made beds himself and vacuumed and didn't find it to be a debilitating experience; with regard to the reason why plaintiff sought additional medical treatment, "I'm sure there were some legal considerations, too"; and statement "I don't believe that," referring to what plaintiff allegedly told her treating physicians were all improper expressions of personal opinion that cumulatively warranted a new trial despite the fact that plaintiff failed to object to all errors. Reversed on these and other improper comments. [Note: pre-Murphy v. Intl. Robotics])

Blue Grass Shows, Inc. v. Collins, 614 So.2d 626 (1st DCA 1993) (in suit by fair patron for injuries sustained on fair slide, it was improper for plaintiff's counsel to argue to jury: "The fair is coming back to Jacksonville . . . . You folks, . . . you become the conscience of the community. It is you who will tell the fair what kind of standard and what kind of protection you want for the citizens of this town by your verdict . . . ." This type of "us against them" argument is repeatedly condemned because it can only cause prejudice by pitting "the community" against a nonresident corporation. Such argument is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial. In order for this argument to be improper, it is not necessary that the words "community conscience" be uttered. The prohibition extends to all impassioned and prejudicial please intended to evoke a sense of community law through common duty and expectation. No objection. Counsel did not follow improper argument with a request or suggestion that the jury punish the def. Not fundamental. Affirmed)

Schubert v. Allstate Ins. Co., 603 So.2d 554 (5th DCA 1992) (It was improper for defense counsel to argue that the jury was the "conscience of the community; that plaintiff's doctor "as he usually does, has found a permanency"; give his own opinion on the qualifications and truthfulness of his witnesses; tell the jury that plaintiffs were seeking "not a small fortune, a

large one;" argue "don't let little Nicholas [appellant's child] think that this is the way you get from one end of life to the other;" argue "I'm here to tell you the truth"; argue that plaintiff "should have said thank goodness I wasn't injured more seriously" instead of seeking compensation for the injuries she received; argue that the treating healthcare providers had ulterior, self-interested, motives in testifying and admonish the jury not to be deceived by them; and attacked appellant's lawyer by saying he would do "anything to advance the cause." While some of the remarks alone may not have required reversal, [they were not objected to by plaintiff's counsel] the cumulative effect of the improper comments warrants reversal and the award of a new trial. Reversed.)

Budget Rent A Car Sys. v. Jana, 600 So.2d 466 (4th DCA 1992) (While some of plaintiff's counsel's statement were clearly improper Golden Rule arguments, verdict will not be reversed because defense counsel failed to object and preserve the issue for review. Absent a contemporaneous objection, an improper comment made during closing remarks will not support reversal except where the comments are of such sinister influence as to constitute irreparable and fundamental error. Reversed on other grounds)

Keene v. Chicago Bridge & Iron, 596 So.2d 700 (5th DCA 1992) (Where defendant claimed numerous improper arguments were made by plaintiff's counsel but during trial defendant only objected to one improper argument and, following that objection, the trial courts sustained and gave a curative instruction, defendant not entitled to a new trial where the remaining comments did not rise to the level of fundamental error and were not adequately preserved.)

Riley v. Willis, 585 So.2d 1024 (5th DCA 1991) (improper for plaintiff's counsel to express his personal opinion on what he would have done at accident scene: "You think they'd be going just to the yellow line with two children and a dog there? I suggest to you out of that hundred there would be a whole lot that would be over in the left side where I think I would be . . . ." Expression of personal opinion violates ethical rules. Reversed despite absence of objection)

City Provisioners, Inc. v. Anderson, 578 So.2d 855 (5th DCA 1991) (although def. counsel did not object to all improper arguments, he raised three appropriate objections which were overruled and moved for a mistrial, which was denied. Plaintiff's argument was laced with numerous improper comments that sought sympathy for the extreme poverty and lack of resources of the plaintiff and the injustice foiled upon the plaintiff by the cruel and overreaching conduct of the defendant in defending the lawsuit, expressed personal experiences or beliefs, referred to facts not in evidence, violated golden rule and suggested a comparative verdict. Taken together, arguments warrant reversal on damages. [evidence overwhelming as to liability] Reversed [Note: plaintiff also told jury that if they awarded too much, court could reduce by remittitur but could not increase. Even if it were a correct statement of the law, it was an improper argument that alone could warrant reversal])

Anderson v. Watson, 559 So.2d 654 (2nd DCA 1990) (In order for unobjected to comment to warrant a new trial "they must have been so fundamental as to have deprived the plaintiff of a

fair trial or their collective import must have been so extensive as to pervade the trial and gravely impair a calm and dispassionate consideration of the evidence and the merits by the jury." Court quoted with approval the opinion in Nelson v. Reliance Ins. Co. in which the court held: "We view, with some skepticism appellant's . . . cries that comments by opposing counsel deprived him of a fair and impartial trial, when not so much as an objection was deemed necessary upon the occasion of the supposedly fatal utterances. We must assume that silence from experienced counsel is a judgment play predicated on his or her concept of how the trial is going. As such the failure to object constitutes intentional trial tactics, mistakes of which are not to be corrected on appeal simply because they backfire, saving the most rare of circumstances . . .." A verdict will not be set aside by an appellate court because of [improper remarks] or because of any omission of the judge to perform his duty in the matter, unless objection is made at the time of their utterance. An exception to this rule requiring an appropriate objection exists where the improper remarks are of such character that "neither rebuke nor retraction may entirely destroy their sinister influence." Trial courts order granting new trial reversed.)

Moore v. Taylor Concrete, 553 So.2d 787 (1st DCA 1989) (def. counsel's comments: "I believe, and the circumstances are out there, that Mr. Broxton was reasonable in the efforts that he was trying to make on that night. . . . Was there negligence . . . . I believe you found - - . . . . [as to percentage of negligence] I think if not fifty-fifty, even more than that, . . .We didn't get the truth from the stand or from the witnesses - - form her, I mean, under oath. I think we got it, hopefully, from everyone else" were improper expressions of personal opinion. An attorney's interjection of his beliefs is improper, however, such impropriety does not equate to fundamental error warranting a new trial unless the error is so fundamental as to extinguish a party's right to a fair trial, or the prejudicial conduct in its collective import is so extensive that its influence pervades the trial so as to impair the jury's calm and dispassionate consideration of the evidence. Reversed on other grounds)

Roadway Express v. Dade County, 537 So.2d 594 (3rd DCA 1989) (Absent a timely and proper objecting, for whatever reason, reversal may be had only if the comments were so prejudicial as to amount to fundamental error. Affirmed.)

DeAlmeida v. Graham, 524 So.2d 666 (4th DCA 1987) (Although it was improper in medical malpractice case for plaintiff's counsel to ask for retribution for the injuries suffered by plaintiff, there was no objection and the remarks were not fundamental error. Reversed in part on other grounds)

Brumage v. Plummer, 502 So.2d 966 (3rd DCA 1987) (although it was improper in medical mal./wrongful death case for plaintiff's counsel to tell the jury: "For you to allow them to get away with it, it's going to happen to other people. You've got to stop it right here and right now," error was not objected to and comment was neither "of such character that neither rebuke nor retraction may entirely destroy [its] sinister influence, nor so inflammatory as to extinguish the [party's] right to a fair trial and to therefore constitute fundamental error." [It should be noted that if counsel had gone the extra step and asked the jury to punish the defendant, error would

most likely have been found to be fundamental.] Additional comment that it would be unconscionable to allow the doctor to walk out of the courtroom and make deceased's son an orphan was not improper where def. expert testified that if the plaintiff's witnesses were correct, the def.'s medical supervision of the decedent would have been "grossly improper." As a result, statement was a permissible comment on the evidence and, even if error, trial court concluded that its instruction cured any possible prejudice. Subsequent order granting new trial reversed.)

Schreidell v. Shoter, 500 So.2d 228 (3rd DCA 1987) (It was improper for plaintiff's counsel to argue that defendant was the type of person who sets people up and that "they do end up getting your job or having you thrown out of town, and everyone of you has felt that twinge. . . . . Are you capable of child molesting? Are you capable of stealing from your employer?" An argument that jurors place themselves in the plaintiff's shoes, commonly referred to as "Golden Rule" argument is impermissible and constitutes reversible error because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. However, in order to challenge a Golden Rule argument a proper objection is required and failure to secure a ruling on an objection waives the objection unless the court deliberately and patently refuses to so rule. Where counsel objected and moved for a mistrial but the trial judge made no response to either request nor did she issue a curative instruction, the objection and motion are waived due to counsel's failure to secure a ruling. [Court found it unnecessary to discuss whether the error was fundamental because case was reversed on other grounds])

Bloch v. Addis, 493 So.2d 539 (3rd DCA 1986) (An error is "fundamental" and can be considered on appeal even though no objection has been made in the trial court where the error "goes to the foundation of the case or goes to the merits of the cause of action." Where plaintiff's counsel, by design, took on the roll of an impeaching witness and impugned the professional opinion and veracity of the defendant's expert witness on the basis of counsel's alleged personal knowledge and asked the jury to make an example of defense expert through a verdict against the defendant, he thereby placed the conduct of the defense expert doctor [and his alleged "country club buddies"] on trial rather than the conduct of the defendant. Error was particularly heightened where the trial court failed to inform jury that arguments of counsel are not to be considered as evidence. Reversed. [Note: pre-Murphy v. Intl. Robotics])

Bertoglio v. Amer. S & L, 491 So.2d 1216 (3rd DCA 1986) (Although it was improper for defense counsel to state that he was a shareholder in American Savings, "a timely objection to a prejudicial statement by counsel must be interposed in order to assert the error as grounds for a new trial. . . . Appellant did not contend in the trial court, and the record does not reflect, that a recognized exception to the requirement for a contemporaneous objection is applicable." Affirmed)

Kinya v. Lifter, 489 So.2d 92 (3rd DCA 1986) (Allegedly improper statements made on closing arguments were not grounds for reversal or they were not objected to and they did not constitute fundamental error because they were not so inflammatory as to extinguish the [plaintiff's] right

to a fair trial. Affirmed.)

Gregory v. Seaboard System RR, 484 So.2d 35 (2nd DCA 1986) (There are two exceptions to the rule requiring a timely objection in order to preserve an improper closing argument: First, if the error is so fundamental as to extinguish a party's right to a fair trial. Second, if the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration or the evidence and the merits by the jury. Where the great majority of improprieties have been identified by opposing counsel or the judge only after close scrutiny of the written transcript of proceedings, it is less likely that there was in fact such a pervasive prejudicial affect.)

Kelley v. Mutnich, 481 So.2d 999 (4th DCA 1986) (it was improper for plaintiff's counsel to comment to jury that he liked the jury when he picked them and he liked them now. Comment was both inaccurate and inappropriate. Such attempts to curry favor with members of the jury are unprofessional and should be met with rebuke. Nonetheless, effect of the precise words used in the instant case are not of such magnitude in their appeal to passion, prejudice, sympathy or other emotion "that neither rebuke nor retraction will destroy their sinister influence. . . ." Every inappropriate remark does not justify a mistrial, although trial court is given broad discretion in that decision. In addition, comment on def.'s prior arrest, although inappropriate, did not warrant new trial where it had already been raised by def. himself while testifying. Order granting new trial reversed.)

Borden, Inc. v. Young, 479 So.2d 850 (3rd DCA 1985) (In a case "fatally infected" by improper argument from both counsel, court rejected plaintiff's argument that plaintiff's judgment should not be reversed because def. counsel participated in the impropriety and failed to object to challenged arguments. Plaintiff counsel's assertion of personal knowledge of nefarious activities supposedly engaged in by the large corporation defendant which were not only not in evidence but did not in fact exist – plumbed such depths of impropriety that the argument (a) cannot be deemed to have been in fair response to the tactics or statements of the defense, which while certainly impermissible, did not go nearly so far; and (b) was so prejudicial as to be incapable of cure by rebuke or retraction. Error fundamental. Reversed despite absence of objection or motion for mistrial. [Note: pre-Murphy v. Intl. Robotics])

Ed Ricke & Sons v. Green, 468 So.2d 908 (Fla. 1985) (Unless improper argument constitutes a fundamental error, a motion for a mistrial must be made "at the time the improper comment was made." However, to avoid interruption in the continuity of the closing argument and to afford the party an opportunity to evaluate the prejudice as compared to the entire argument, there is no strict rule that motion for mistrial be made in the next breath following the objection to the remark.)

Nazareth v. Sapp, 459 So.2d 1088 (5th DCA 1984) (Although defense counsel assertion of collusion, subornation of perjury and extortion was unobjected to, order granting new trial would be affirmed where defense counsel also argued concerning the "affliction of litigiousness" which

was objected to by plaintiff's counsel but overruled and where "the prejudicial conduct in its collective import [was] so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the merits by the jury.")

Honda Motor Co. v. Marcus, 440 So.2d 373 (3rd DCA 1983) (as stated in *Nelson v. Reliance,* court is skeptical about "appellants agonized cries that comment by opposing counsel below deprived [it] of a fair and impartial trial, when not so much as an objection was deemed necessary upon the occasion of the supposedly fatal utterances." Nonetheless, remarks were not so inflammatory as to extinguish Honda's right to a fair trial and to, therefore, constitute fundamental error. "The proposition that a trial court may - - even should - - intervene to restrain improper comments despite the lack of objection by counsel does not, as appellant seems to suggest, relieve counsel from his obligation to object.")

Rudy's Glass Constr. v. Robins, 427 So.2d 1051 (3rd DCA 1983) (Although plaintiff counsel's argument that the jury should "set the standard for business morality" was arguably improper, the error was waived when defense counsel failed to move either for a mistrial or for an instruction that the jury disregard the comment. Since the remark was not highly inflammatory or prejudicial, reversal is not mandated. Affirmed.)

Henry v. Beacon Ambulance Serv., Inc., 424 So.2d 914 (4th DCA 1982) (it was improper for def. counsel to disclose to jury that plaintiff had previously settled his claim with co-defendant. Although def. claimed that Plaintiff had "opened the door" by commenting that co-defendant "had an ax to grind" and def. was simply explaining that co-def. did not have an ax to grind because the claim against him was settled, settlement may have removed financial concerns but not any bias resulting from the accident or lawsuit and def. counsel's comment was made after being expressly admonished by the trial court not to pursue the settlement during trial. Although plaintiff failed to obtain a specific ruling on motion for mistrial, court finds that curative instruction was insufficient to cure [no further explanation on failure to preserve error or fundamental nature of comment]. Reversed.)

Lollie v. General Motors Corp., 407 So.2d 613 (1st DCA 1981) (While it was offensive and inexcusable for defense counsel to refer to a party who had plead guilty to manslaughter as an "admitted murderer", the comment was not objected to by plaintiff's counsel and even if objected to, would not be so egregious as to require a new trial. Affirmed.)

Cameron v. Sconiers, 393 So.2d 11 (5th DCA 1980) (where def. counsel made allegedly improper argument and plaintiff's counsel objected and asked that the jury be instructed to disregard the comment and court complied, new trial would be "second bite at the apple" since no other relief was requested of the trial court. Affirmed)

Martin v. State Farm, 392 So.2d 11 (5th DCA 1980) (in case for wrongful death of a child as a result of an auto accident, def. counsel's comments to jury were highly improper, inflammatory and patently prejudicial. "You don't buy a boy as you would on the market. . . . Should you also

ought to be sorry also for Dr. Norris? . . . [H]e has to wear and bear that thought the rest of his life. . . . I say the doctor is a victim as well. . . . She should not have to think about this any more. But if you give her an award, then every time she spends those dollars, she's going to think about this case, and I submit that that's just too much for her to bear. . . . [I]f the truth means nothing, then we can accept people like Ricky Hicks and David Sikes and we can give Mrs. Martin lots of money just like we are selling beef. . . . In my heart, and from what I've heard, I believe that your only just verdict can be one for the defendants." The callousness of some of these remarks is unworthy of a member of the bar. Reversed.)

Murray-Ohio Mfg. v. Patterson, 385 So.2d 1035 (5th DCA 1980) (Although it was improper for plaintiff's counsel to refer to the Ford Pinto and Firestone 500 cases not withstanding the fact that the trial judge had twice sustained objections to such references during the course of the trial, no contemporaneous object was made and a motion for mistrial was only raised after the jury had retired to deliberate. Since the comment, taken in context, was not so inflammatory as destroy the defendant's right to a fair trial, it does not constitute fundamental error and the motion for mistrial came far too late to preserve the issue for review. Affirmed.)

Nelson v. Reliance Ins. Co., 368 So.2d 361 (4th DCA 1978) (Although there were numerous improper arguments by defense counsel which, when viewed cumulatively, would have lead to a reversal had the appropriate objections been made by counsel for the plaintiff, few if any objections were lodged. Court views "with some skepticism, plaintiff's agonized cries that comment by opposing counsel deprived him of a fair and impartial trial, when not so much as an objection was deemed necessary upon the occasion of supposedly fatal utterance." This court assumes that "silence from experienced counsel is a judgment play predicated on his or her concept of how the trial is going. As such, the failure to object constitutes intentional trial tactics, mistakes of which are not to be corrected on appeal simply because they backfire, save in the most rare of circumstances." Affirmed.)

Bishop v. Watson, 367 So.2d 1073 (3rd DCA 1979) (where def. counsel's argument was factually misleading to the jury and improperly implied greater credibility for the def. by stating that the plaintiff was seeking $100,000 but the def. had nothing to gain by her testimony - although def. had a severed counterclaim for damages of which the jury was not aware - it was the duty of the court to give a cautionary instruction thereto, even in the absence of objection. New trial was not warranted where plaintiff's counsel did not object or move to strike. Had motion been made, error could have been cured by instruction of the court. Error not fundamental. Order granting new trial reversed.)

School Bd. of Palm Bch. v. Taylor, 365 So.2d 1044 (4th DCA 1978) (In an action by parents of school children against the school board for injuries sustained as a result of assaults by other students at school, it was improper for plaintiff's counsel to argue to the jury that the damage awards should set an example to prevent future incidents and that this was the main purpose why the suits were brought since this argument "smacks of a demand for a punitive award rather than compensatory damages." Since there was no claim for punitive damages in the case and no

factual basis for such a claim against the school board, closing argument was improper. Since no objection was made to this argument, the court would not overturn the verdict if it were not for the fact that the damage award was clearly outside what the court considered to be a maximum reasonable range of damages. However, the existence of such argument clearly furnished an improper motive for the jury's award and reflects that the jury was influenced by the improper tactic and that influence is reflected in the amount of damages awarded. Reversed in part, affirmed in part.)

Clay v. Thomas, 363 So.2d 588 (4th DCA 1978) (there are very few instances where remarks by an attorney are of such sinister influence as to constitute reversible error, absent objection. Affirmed despite numerous improper arguments by both sides.)

Russell v. Guider, 362 So.2d 55 (4th DCA 1978) (although it was improper for def. counsel to attempt, on more than one occasion, to inject an emotional issue before the jury concerning the relationship between verdicts in automobile negligence cases and rising insurance premiums, error was not preserved and was not fundamental. Affirmed.)

LeRetilley v. Harris, 354 So.2d 1213 (4th DCA 1978) (in personal injury action, it was improper for plaintiff to argue: "Wouldn't you, if your son was injured and you couldn't get some responses or if he has injuries you don't understand . . . the first thing you're going to want to know as a parent . . . 'What can I do for my son? What is the future going to hold for him?' . . . I remember when I was a kid growing up hearing, 'Walk a mile in my shoes.' I always thought about that in trying these kind of cases because you have got to in your own mind see what it's like. You've got to walk a mile in that man's shoes to see what the day is like when he gets up in the morning, what he's faced with. . . . How would you like to be on jury duty for the rest of your life? . . . Well, he's sentenced to this for the rest of his life and there's nothing he can do about it." Comment was a clear effort to have the jury put themselves in the shoes of the injured party and personally identify with his injuries. Although some of the comments strike at the "sensitive area of financial responsibility and hypothetically require the jury to consider how much it would wish to pay or receive," error was not preserved by appropriate objection and was not fundamental because allowing it to be raised for the first time on appeal is not "necessary to serve the ends of substantial justice or prevent the denial of fundamental rights." The comments did not create the injuries, nor did they strike at the theory of the liability of the case, although they may have caused the jury to become involved more personally on the issue of damages. Affirmed.)

Davis v. Lewis, 331 So.2d 320 (1st DCA 1976) (where plaintiff's counsel argued for lost wages for plaintiff's wife on the basis that she quit her job to be with her injured husband, and trial court sustained def. objection to that argument and instructed jury that those wages were not a proper item of damage, it was improper for plaintiff's counsel to seek to inflame the jury by arguing that the defendants were concerned only with money and that he and the jury were concerned with the lives of the plaintiff's. Comments were emotional and unnecessary. However, there was no objection and comments were not so highly inflammatory and prejudicial

as to require reversal without objection. Affirmed)

Caughey v. Beller, 322 So.2d 83 (2nd DCA 1975) (following a default entered in an action by law enforcement officers for compensatory and punitive damages suffered at the hands of the def., a trial on damages was held where the plaintiffs and their counsel characterized def. as one of the largest illegal drug traders in Florida, ostensibly as part of the proof of def.'s financial worth. Court found since comments may have been ruled inadmissible upon appropriate objection but no objection was made [def. and counsel also failed to appear for trial on damages] and comments were not fundamental error, verdict would not be reversed. Court declined to hold that a party may NEVER be granted relief because of what occurs in a trial subsequent to a default being entered against him. Affirmed)

American Express Co. v. Juhasz, 281 So.2d 244 (3rd DCA 1973) (Where defense counsel fails to object to statements in plaintiff's closing argument and does not move for a mistrial until after jury retires, reversal not warranted unless improper statement was so prejudicial as to be incurable by instruction [statement not included in opinion] Affirmed)

Gatlin v. Jacobs Constr. Co., 218 So.2d 188 (4th DCA 1969) (Although plaintiff's counsel engaged in certain improper, prejudicial and inflammatory statement during closing arguments, arguments were objected to and sustained by the trial court, which directed plaintiff's counsel accordingly. Defense counsel failed to move for an instruction to disregard the argument or for a mistrial and other allegedly improper remarks were not objected to, therefore, precluding a new trial on that basis unless they could be said of such a prejudicial character that no amount of objection or instruction to the jury could eliminate the prejudicial effect. Since the trial court's order granting a new trial indicated that the evidence supported a finding of negligence on the part of the defendant, it affirmatively appears the jury verdict was not influenced by the improper arguments. Order granting a new trial reversed.)

Carlton v. Johns, 194 So.2d 670 (4th DCA 1967) (A verdict should not be set aside by an appellate court because of improper remarks or omissions of the trial court to perform its duty unless objection is made at the time of their utterance, except where improper comments are of such character that neither rebuke nor retraction may entirely destroy their sinister influence.)

Baggett v. Davis, 169 So. 372 (Fla. 1936) (The grounds for objection to improper argument to the jury should be stated. Absent a proper objection, no verdict will be set aside because of such remarks except "if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence, in which event a new trial should be awarded regardless of the want of objection or exception."*[Note: Murphy 766/1010 receded from an aspect of Baggett by holding that a party cannot seek relief in an appellate court for unobjected-to argument unless he has at least challenged the argument by a motion for new trial]*)

Tyus v. Apalachicola Northern RR., 130 So.2d 580 (Fla. 1961) (In the ordinary case, unless timely objection to counsel's prejudicial remarks is made, the appellate court will not reverse on

review unless the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, in which case a new trial should be awarded regardless of want of objection. [Note: Despite the use of the word "pervade" from an earlier case, the conduct need not run throughout or permeate the trial] District court mandate reversing trial court judgment for plaintiff is reversed. *[In Murphy, 766/1010, the Sup. Ct. receded from this case on the limited issue of the ability to seek appellate review for unobjected to improper arguments.]*)

H.I. Holding Co. v. Dade County, 129 So.2d 693 (3rd DCA 1961) (where counsel moved for a mistrial at the end of the opposing party's closing argument and again after the jury was instructed, but failed to object at the time the allegedly offending comments were made, any such error was not properly preserved. It is the duty opposing counsel to object at the time of the abuse of the privilege of argument. This gives the court an opportunity to rule upon the objection and to instruct the jury at the same time, so as to remove any effect of the statement. Any improper effect that the remarks in this case might have had on the jury could have been cured by timely objection and an appropriate instruction to the jury. Affirmed)

Seaboard Air. RR v. Strickland Air, 88 So.2d 519 (Fla. 1956) (Despite lack of objection to improper closing argument, case reversed where the impact of numerous improper arguments was so extensive that its influence pervaded the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury. *[In Murphy, 766/1010, the Sup. Ct. receded from this case on the limited issue of the ability to seek appellate review for unobjected to improper arguments. See Murphy for requirements.]*)

XXI. Motion for mistrial/new trial

Hguyen v. Wigley, 161 So.3d 486 (5th DCA 2014) (isolated comment: "This is a courtroom, not a lottery," despite objection, was not enough to so damage the fairness of the trial that the public's interest in our system of justice requires a new trial. Order granting new trial reversed.)

Carvajal v. Penland, 120 So.3d 6 (2d DCA 2013) (Provided the improper argument has been properly preserved, "the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the [objecting] party its right to a fair trial.' " [quoting *Engle* below] Reversed.)

Carnival Corporation v. Jimenez, 112 So.3d 513 (2nd DCA 2013) ("If the issue of an opponent's improper argument [or conduct] has been properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was 'so highly prejudicial and inflammatory that it denied the [objecting] party its right to a fair trial.' " [See Engle, infra]. If, however, the improper argument is NOT properly preserved, a motion for new trial can only be granted if the improper argument amounts to fundamental error according to the 4-prong test

announced by the Supreme Court in Murphy v. International Robotic Systems, 766/1010. Although defense counsel suggested, without supporting evidence, that plaintiff's treating physician who was friends with Plaintiff's counsel had his testimony "scripted," implying it was by defense counsel, error was not properly preserved and does not satisfy Murphy's 4-prong test for fundamental error. Order granting new trial reversed.)

Companioni v. City of Tampa, 51 So.3d 452 (Fla. 2010) (when a party objects to instances of attorney misconduct during trial [including closing argument], and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for appellate review and for a trial court's review of a motion for a new trial. If the issue is not preserved in this manner, then the conduct is subject to fundamental error analysis under this Court's opinion in Murphy.

Philippon, M.D., et al. v. Shreffler & Smith, et al., 33 So.3d 704 (4th DCA 2010) ("A civil litigant may not seek relief in an appellate court based upon improper, but unobjected-to , closing argument, unless the litigant has at least challenged such argument in the trial court by way of a motion for new trial even if no objection was voiced during trial." [Quoting Murphy v. Int'l Robotic Sys., Inc. below]).

Carnival Corp. v. Pajares, 972 So.2d 973 (3rd DCA 2007) (Cumulative prejudicial effect of improper comments requires a new trial to protect the overall fairness of the trial court proceedings and to ensure def. receives a fair trial. Reversed.)

Engle v. Liggett Group, et al., 945 So.2d 1246 (Fla. 2006) (If properly preserved by objection and motion for mistrial, the trial court should grant a new trial if the argument was "so *highly prejudicial and inflammatory* that it denied the opposing party its right to a fair trial." [emphasis added by author])

Gatten v. Zachar, 932 So.2d 543 (5th DCA 2006) (trial court did not err in denying plaintiff's motion for mistrial when defense counsel argued to jury that defendant Dr.'s livelihood was being challenged. Although trial court felt that comment was directed at three-strikes law, an inappropriate matter for the jury's consideration, it's decision to sustain the objection and give a curative instruction ("The jury will disregard that remark. Livelihood is not being challenged.") but deny the motion for mistrial was not an abuse of discretion. Plaintiff has failed to show that there was "an absolute legal necessity" for the court to grant the motion.)

Castillo v. Bush, et. al, 902 So.2d 317 (5th DCA 2005) ("Generally, a mistrial or new trial should be granted only when counsel's [closing] arguments are so inflammatory and prejudicial that they deny the opposing party a fair trial." [citations omitted] In medical malpractice case involving the allegedly improper reading of a CT scan by radiologist, where both parties agreed that ER doctor would not be asked whether he would have done anything different had he received different information from radiologist, trial court did not abuse it's discretion in denying a new trial when defense counsel argued that 1) ER doctor did not testify that he would have done something different if different information had been provided, and 2) there was no

evidence from any expert in the case that anybody in the ER would have done something different if different information had been provided. The first statement drew an objection which was properly sustained and the jury was instructed to disregard the comment. The second statement did not speak to ER doctor's testimony but rather to the absence of expert testimony and the lack of a causal connection to the decision making process undertaking during the decedent's stay in the hospital. Therefore, the pre-trial stipulation was not implicated and the objection to the second comment was properly overruled. Further, trial court did not abuse it's discretion in denying plaintiff's motion for new trial based upon two "trust me" comments made by defense counsel in closing. First comment drew no objection and objection to second comment was followed by defense counsel's apology and was sustained by court. No motion for mistrial or to strike was made. Affirmed.)

USAA Casualty Insurance Co. v. Howell, 901 So.2d 876(4th DCA 2005) (In order for a new trial to be granted for improper arguments to which no objection was raised, the arguments must be 1) Improper - a proper argument helps the jury understand the issues by applying the evidence to the law, an improper argument bears the risk of inflaming the minds and passions of the jurors so that their verdict reflects an "emotional response … rather than a logical analysis of the evidence in light of the applicable law;" 2) Harmful - focusing on how the argument affected the validity of the trial. If the comments were "so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury," then the harmfulness requirement is satisfied; 3) Incurable – no jury instruction or similar curative measure could eliminate the likelihood of an improper verdict based on the argument; and 4) The argument must be such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial – examples include comments appealing to racial, ethnic, or religious prejudices. [citations omitted])

Bulkmatic Transport Co. v. Taylor, 860 So.2d 436 (1st DCA 2003) (Trial court erred in granting a new trial for defense counsel's unobjected-to comment during closing argument on plaintiff's failure to call certain witnesses and the resulting inability of the jury to evaluate the credibility of those uncalled witnesses, in violation of trial court's order in limine precluding such comment, where new trial order did not find argument to be incurable or to have so impaired the fairness of the trial that the public's interest in our system of justice required a new trial [prong 3 and 4 as set forth in Murphy v. Int'l Robotics Systems, 766/1010].

Dozier v. Hodges, 849 So.2d 1094 (3rd DCA 2003) (mistrial was unnecessary where trial court sustained all appropriate objections to closing argument, gave curative instructions where appropriate and the evidence supported the jury's verdict.)

Maksad v. Kaskel, et.al, 832 So.2d 788 (4th DCA 2002) ("Generally, a mistrial or new trial should be granted only when counsel's arguments are so inflammatory and prejudicial that they deny the opposing party a fair trial." Affirmed.)

Thompson v. Hodson, et. al, 825 So.2d 941 (1st DCA 2002) (Although plaintiff's counsel

made no contemporaneous objection to allegedly improper error, issue was preserved for review because he filed a motion for new trial. Where def. counsel argued: "Does this death become the responsibility of Dr. Hodson only. . . . They want to single [Hodson] out . . . . [D]id he really do anything that was so different than the other people in this case to make his actions incompetent. . . . [Hodson] somehow had to know more than all the people he involved who are not blamed," possibly suggesting that it was unfair that def. was the only one out of nine possible defendants that the plaintiff sued but, as def. counsel knew, plaintiff had actually sued many doctors and settled his claim with them, plaintiff was not entitled to a new trial because, assuming it was improper, the unobjected-to error was neither harmful, incurable nor so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial according to *Murphy*, below. Affirmed.)

Ricks v. Loyola, 822 So.2d 502 (Fla. 2002) (Trial court has broad discretion in ruling on motion for mistrial and in deciding whether to reserve ruling on a motion for mistrial. Fact that motion was made during opening statement but court reserved ruling until after jury verdict in 6 day trial was not an abuse of discretion. Reversing DCA opinion which reversed trial court's order granting new trial.)

Platz v. Auto Recycling & Rep., 795 So.2d 1025 (2nd DCA 2001) (Court's order which characterized counsel's conduct as "inflammatory and prejudicial" and stated that it "precluded the jurors' rational consideration of the evidence and the merits of the case" was insufficient for the granting of a new trial absent contemporaneous objection by counsel and motion for mistrial. As stated in *Murphy v. Int'l Robotics Systems* below, a new trial based upon unpreserved error is only warranted upon a showing by the movant that the argument was: 1) improper, 2) harmful, 3) incurable and 4) so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial [on this last point, the court gave as an example closing arguments that appeal to racial, ethnic, or religious preferences]. If the trial court finds that these criteria have been met, it must enter an order specifically identifying both the improper arguments of counsel *and* the actions of the jury resulting from those arguments. If anything, trial court's conclusion that it was "unconvinced that the jury accepted the law as presented to it based upon Counsel's conduct" flies against the conclusive nature of the above requirements. Order for new trial reversed.)

Murphy v. Int'l Robotics Systems, 766 So.2d 1010 (Fla. 2000) (civil litigant may not seek appellate relief of improper but un-objected to argument unless he has at least challenged such argument in the trial court by a motion for new trial. In order for a new trial to be warranted based upon un-objected to argument, the trial court must find: 1)the argument is improper [the purpose of closing argument is to help the jury understand the issues in a case by "applying the evidence to the law applicable to the case." Closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response ... rather than a logical analysis...."]; 2) the argument must be harmful [i.e. how the improper argument affected the fairness of the trial proceedings. "Harmfulness also requires that the comments be so highly prejudicial and of such collective impact as to gravely impair a fair consideration and

determination of the case by the jury. ... In sum, the improper closing argument comments must be of such a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments"]; 3) the argument must be incurable ["the complaining party must establish that even if the trial court had sustained a timely objection to the improper argument and instructed the jury to disregard the improper argument, such curative measures could not have eliminated the probability that the ... argument resulted in an improper verdict. ... [I]t will be extremely difficult for a complaining party to establish that the unobjected-to argument is incurable."]; AND 4) the argument must be such that it so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial [this category is narrow and, by way of example, arguments that appeal to racial, ethnic or religious prejudices are the types that traditionally fit within this narrow category.] Trial court's order granting a new trial MUST specifically identify the improper arguments of counsel *and* the actions of the jury resulting from those arguments. In the case at bar, def. counsel's repeated use of term "B.S. detector, comment that if jury found for the plaintiff they would be "accessories, after the fact, to tax fraud, and characterization of plaintiff's case as cashing in on a "lottery ticket" were all improper. However it was not an abuse of discretion to conclude that the improper arguments were not harmful, incurable or requiring of a new trial as set forth above. [NOTE: Subsequently, *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014) held that the a party benefitting from an error has the burden of proving that the error was harmless, ie. that there is no reasonable possibility that the error complained of contributed to the verdict—the same standard as used in criminal cases. Going forward, this may affect prong 2 of the *Murphy* 4-part test.] Affirmed)

Nigro v. Brady, 731 So.2d 54 (4th DCA 1999) (NOTE: this is not a closing argument case but the ruling applies] A trial judge has the discretion to grant a new trial even if the party did not move for a mistrial and there was no fundamental error. Rule requiring preservation of error by a motion for mistrial does not apply to motions for new trial because a trial judge has broad discretion to set aside a jury verdict [which appellate court does not share] because the trial judge is "in a much better position than an appellate court to pass on the ultimate correctness of the jury's verdict" and Rules allow trial judge to order a new trial even without a motion. [But see Murphy 766/1010.] New trial affirmed)

Murphy v. Int'l Robotics Systems, 710 So.2d 587 (4th DCA 1998) (In order to properly preserve an improper comment for appeal, there must be an objection at the time the remarks are made. If the court sustains the objection, there must be a motion for mistrial and, although the objection must be made at the time of the improper remarks, the motion for mistrial can be made later, at the close of argument, in order to give counsel time to think about whether to seek a mistrial. Although defense counsel improperly accused plaintiff of wanting to "cash in a lottery ticket in this litigation" and suggested that if the jurors awarded plaintiff damages based on a "phony consultancy agreement" they would be "accessories, after the fact, to tax fraud," improper arguments were not objected to and will not be heard for the first time of appeal [court gave a very detailed history of closing arguments and the reasons why it will not consider unobjected to arguments for the first time on appeal] Affirmed. [*See* Supreme Court's affirmance

in *Murphy*, above 766/1010])

South Motor Co. v. Accountable Constr. Co., 707 So.2d 909 (3rd DCA 1998) (Unless the existence or amount of insurance coverage has direct relevancy to a matter at issue, it is not a proper matter for the jury's consideration of liability and damages because it may influence the jury to find liability where none exists or to award an excessive amount out of sympathy for one party and the knowledge that the other party will not have to pay. The improper admission of such evidence does not per se warrant a mistrial or justify reversal because when coupled with a timely curative instruction such error may be rendered harmless. In this case, def. counsel's repeated and pervasive references to insurance coverage, including a suggestion that plaintiff may have defrauded its insurer by retaining money that it had been given for repairs, warranted the granting of a new trial. Reversed.)

CAC-Ramsey v. Mull, 706 So.2d 928 (3rd DCA 1998) ([E]ven improper argument will not require a new trial if the remarks are not so egregious as to interfere with the essential justice of the result.)

Weise v. Repa Film Int'l, 683 So.2d 1128 (4th DCA 1996) (if an objection to an improper argument is sustained, a motion for mistrial must be made before the jury retires to deliberate in order to preserve the issue for appellate review.)

Tucker v. Mariani, 655 So.2d 221 (1st DCA 1995) (where allegedly improper "golden rule" argument was made, mistrial was not warranted where no objection was posed at the time of the comment thereby precluding review on appeal absent irreparable and fundamental error, and comments were not of such a "sinister influence" as to constitute fundamental error.)

Eichelkraut v. Kash N' Karry, 644 So.2d 90 (2nd DCA 1994) (Failure to request a mistrial after an objection to an improper argument has been sustained constitutes a waiver of the objection. *[Note: Murphy 766/1010 disapproved of this case as to standard of review on appeal]*)

Bellsouth Human Resources Admin., Inc. v. Colatarci, 641 So.2d 427 (4th DCA 1994) (When counsel engages in misconduct so prejudicial as to warrant a mistrial, opposing counsel is in the unenviable position of having to move for one which, if granted, can be devastating to the client in terms of both time and expense. It is appropriate for the trial judge to reserve ruling on a motion for mistrial until after the jury returns a verdict since the jury may still return a verdict which is satisfactory to the aggrieved party.)

Newton v. S. Fla. Baptist Hosp., 614 So.2d 1195 (2nd DCA 1993) (whether a party is required to seek a mistrial following an improper closing argument, depends on whether the trial court sustained or overruled the objection. If a trial court sustains the objection, the party must move for a mistrial to preserve his objection. If a trial court overrules the objection, it is preserved for appeal without a motion for mistrial because since the trial court has determined that the comment was not improper, a motion for mistrial would be fruitless. Where trial court neither

sustained nor overruled objection but merely instructed jury that what the lawyers say is not evidence, party's failure to secure a ruling or clarification waived objection. Affirmed)

Rohrback v. Dauer, 528 So.2d 1362 (3rd DCA 1988) (following several improper arguments which appellant preserved by objection and motion for mistrial, appellant prevailed upon trial court (which had indicated that it might grant motion) to await the verdict pending a possible motion for new trial for improper argument. Upon receipt of the verdict with which appellant considered unfavorable, appellant moved for new trial and the trial court denied the motion. "[E]ven improper argument will not require a new trial if the remarks are not so egregious as to interfere with the essential justice of the result." Affirmed.)

Ed Ricke & Sons v. Green, 468 So.2d 908 (Fla. 1985) (if a party moves for a mistrial and asks the court to reserve ruling on the motion until after the jury deliberates, the request does not constitute a waiver of the motion.)

Tate v. Gray, 292 So.2d 618 (2nd DCA 1974) ("Counsel is entitled to a wide field of discretion in arguing his case. Unless closing argument is highly prejudicial and inflammatory, improper statements will not result in a mistrial, reversal or a new trial." Affirmed)

Gatlin v. Jacobs Constr. Co., 218 So.2d 188 (4th DCA 1969) (Although plaintiff's counsel engaged in certain improper, prejudicial and inflammatory statement during closing arguments, arguments were objected to and sustained by the trial court, which directed plaintiff's counsel accordingly. Defense counsel failed to move for an instruction to disregard the argument or for a mistrial and other allegedly improper remarks were not objected to, therefore, precluding a new trial on that basis unless they could be said of such a prejudicial character that no amount of objection or instruction to the jury could eliminate the prejudicial effect. Since the trial court's order granting a new trial indicated that the evidence supported a finding of negligence on the part of the defendant, it affirmatively appears the jury verdict was not influenced by the improper arguments. Order granting a new trial reversed.)

Lovell v. Henry, 212 So.2d 67 (3rd DCA 1968) (Counsel is accorded a wide latitude in making his argument to a jury. Whether the bounds of propriety in such regard have been exceeded, however, must be measured against the prejudicial effect, if any, that is likely to be had upon the jury. Jury arguments will not be considered grounds for mistrial unless they are highly prejudicial and inflammatory. Affirmed)

Williams v. City of Ocala, 203 So.2d 185 (1st DCA 1967) (where def. objected to improper argument and requested that jury be instructed to disregard the argument, and trial court sustained the objection and instructed the jury as requested but def. did not move for mistrial until after jury retired to deliberate, there is no proper ground for reversal and prejudicial effect of improper argument was cured by court's admonition.)

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