

IN THE SUPREME COURT OF FLORIDA

DONALD JAMES SMITH,

Appellant,

Case No.: SC18-822

L.T. No.: 16-2013-CF-005781

v.

STATE OF FLORIDA,
DIRECT APPEAL

DEATH PENALTY—

Appellee.

_____/

MOTION FOR REHEARING

COMES NOW, the Appellant DONALD JAMES SMITH, by and through the undersigned counsel, who files this Motion for Rehearing of this Honorable Court's Order dated April 22, 2021 denying Appellant's Appeal from the Fourth Judicial Circuit, and in support thereof would state:

This Court stated in the Order affirming the judgment of conviction and the sentence of death that the opening statement was "dramatic, but not untrue", and that the closing statement was proper because "...a prosecutor's words may, indeed sometimes must, elicit an emotional response from the jury." SC18-822 at page 24.

As this Court has pointed out, an opening statement or a closing statement "must not be used to inflame the minds and passions of the jurors

RECEIVED, 05/07/2021 12:51:34 PM, Clerk, Supreme Court

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.” *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). This Court also pointed out that any comments that “invit[e] the jury to imagine the victim’s final pain, terror, and defenselessness” are prohibited. *Id.* at 133. The statements made by the State in her opening statement, “Every mother’s darkest nightmare became Rayne Perrywinkle’s reality” elicit such a response. R. Vol. II, p. 1015. It is well-settled that the “purpose of an opening statement is for counsel to outline the facts expected to be proved at trial. It is not the appropriate place for argument.” *First v. State*, 696 So.2d 1357, 1358 (Fla. 2d DCA 1997). When speaking to a jury, “[i]t is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion or prejudice.” *See Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983). The testimony given by the mother of the victim states that she “started to panic” and, during the 911 call, she states “Why on earth would he take my little girl?” R. Vol. II, p. 1060, 1071. The State failed to convey the evidence of “every mother’s darkest nightmare” as the statements issued by the mother did not convey anything more than confusion and a slight amount of panicking, which hardly reflects “every mother’s worst nightmare.” The statements made by the state

were intended to indulge in an appeal to “sympathy, bias, passion” and “prejudice.” *See Edwards*, 428 So. 2d at 359. Therefore, the trial court erred in denying the defense’s objection to this statement.

If the statements made during opening statements were prejudicial enough to warrant miscarriage of justice, the closing statements were significantly worse. The State argued that through the physical evidence, Cherish Perrywinkle had a voice that “from the grave” is “crying out to you, Donald Smith raped me. Donald Smith sodomized me. Donald Smith strangled me until every last breath left my body.” R. Vol. II, p. 1436. The defense, improperly, did not object to this argument. The purpose of a closing argument is to “review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.” *Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992). Where a prosecutor’s comments seek to inflame the passions of the jury, the prosecutor’s conduct may rise to the level of reversible error. *See, e.g., King v. State*, 623 So. 2d 486, 488 (Fla. 1993) (stating that closing argument “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”); *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988) (“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.”). In their closing statements, the State argued that the victim, herself, was speaking to the jury from beyond death, describing words and actions that the victim would not have known, and were only designed to make the jury feel more sympathetic towards the victim and create a strong emotional response against the Defendant.

The five factors in Darden v. Wainwright, 477 U.S. 168 (1986) applied to this case create reversible error. As stated in *Darden*, there is prosecutorial error when the prosecution’s argument includes improper remarks that can reflect an emotional reaction to the case. It is clear that the facts of this case illicit a guttural response, this has been conceded by both Trial and Appellate counsel. The statement made by the State in opening statements that “Every mother’s darkest nightmare became Rayne Perrywinkle’s reality” were designed to illicit a sympathetic response to the victim’s mother. The statement made by the State in closing arguments about the victim “crying out from the grave for justice” were just as, if not more so, inflammatory and emotionally charged. Even though trial counsel did not preserve the issue of the closing arguments on appeal by failing to raise an issue at trial or attempt to correct the error via rebuttal closing argument available to them under *Darden*, the undersigned must raise the issue to prevent further miscarriage of justice. These errors, along with the other errors previously articulated in the

briefs, require reversal because of the cumulative effect of these errors on the trial proceeding. *See, e.g., State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984).

Therefore, Mr. Smith is entitled to a new guilt phase of his trial.

WHEREFORE, the undersigned counsel moves this Honorable Court for a rehearing in this matter.

Respectfully submitted,

/s/ H. Kate Bedell, Esq.
H. KATE BEDELL, ESQ.
BEDELL & KURITZ
P.O. Box 56618
Jacksonville, FL 32241
Telephone: (904) 355-1999
E-Mail: kate@kuritzlaw.com
Secondary E-Mail:
contact@kuritzlaw.com
Florida Bar No.: 0632457
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, Duval County, Florida; and to the Office of the Attorney General, Dept. of Legal Affairs, The Capitol, PLO1, Tallahassee, Florida 32399-1050 this 7th day of May, 2021.

/s/ H. Kate Bedell, Esq.
H. Kate Bedell, Esq.