

A man was on trial for the murder of his former business partner. During closing arguments, the prosecutor made a remark about the man's failure to testify during the proceedings. The man's attorney promptly objected to the prosecutor's remark and moved for a mistrial. The trial judge overruled the objection, denied the motion for mistrial, and ordered the prosecutor to carry on with her closing argument. After considering the overwhelming evidence of the man's guilt, the jury returned a guilty verdict. The man's attorney has challenged the man's conviction on appeal, arguing that the trial court erred in overruling the objection to the prosecutor's remark and denying the man's motion for mistrial.

How is the court of appeals likely to rule?

- A. Affirm the conviction, because of the harmless-error rule.
- B. Affirm the conviction, because of the plain-error rule.
- C. Reverse the conviction, because there was reversible error.
- D. Reverse the conviction, because there was structural error.

## Explanation:

### Fifth Amendment

Self-incrimination – secures right to refuse to testify against oneself

Grand jury – requires grand jury indictment for felony offense charged in federal court

Double jeopardy – bars multiple prosecutions for same offense

Due process – protects against unfair deprivation of life, liberty, or property

Takings – prohibits taking private property for public use without just compensation

The **Fifth Amendment** privilege against self-incrimination prohibits the prosecution from commenting on a criminal defendant's **failure to testify at trial**. However, a trial court's erroneous admission of such a comment does not result in the automatic reversal of a conviction on appeal. Instead, under the **harmless-error rule**, the appellate court should determine whether admission of the improper comment:

was **sufficiently prejudicial** as to **require reversal** *or* constituted only harmless error.

An improper prosecutorial comment is sufficiently prejudicial to require reversal if the comment **contributed** to the **guilty verdict**. Conversely, if the appellate court is convinced beyond a reasonable doubt that the comment did **not contribute** to the verdict, then the erroneous admission constitutes **harmless error**.\*

Here, the trial court erroneously admitted a remark by the prosecutor regarding the man's failure to testify. But since there was overwhelming evidence of the man's guilt, the appellate court is likely to determine that the remark was not sufficiently prejudicial to require reversal (**Choice C**). Therefore, the appellate court is likely to affirm the man's conviction because of the harmless-error rule.

\*The trial judge may attempt to cure potential error by immediately instructing the jury that the prosecutor's comment was improper and that the defendant has a constitutional right not to testify.

**(Choice B)** Under the plain-error doctrine, a defendant who failed to **preserve** a claim of error is still entitled to appellate relief if (1) the district court committed error under the law in effect at the time of the appeal, (2) the error was obvious under that law, and (3) the error affected the defendant's substantial rights. Here, the claim was preserved when the man's attorney objected and moved for mistrial, so this doctrine does not apply.

**(Choice D)** An appellate court should automatically reverse a defendant's conviction if the trial court committed **structural error**—ie, error that affected the entire framework of the criminal trial and rendered it fundamentally unfair. However, reference to the defendant's failure to testify does not constitute structural error.

### Educational objective:

The privilege against self-incrimination prohibits the prosecution from commenting on a defendant's failure to testify at trial. However, an improper prosecutorial comment warrants a reversal on appeal only if it contributed to the guilty conviction.

### **References**

U.S. Const. amend. V (privilege against self-incrimination).

Chapman v. California, 386 U.S. 18, 24–26 (1967) (applying the harmless error rule to an improper prosecutorial comment).

Barbara E. Bergman et al., 3 Wharton's Criminal Evidence § 3:22 (15th ed. 2020) (discussing improper comments or inferences regarding a defendant's failure to testify).

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