IN THE SUPREME COURT OF FLORIDA

CASE NO. 69.101

HAROLD LEE HARVEY,

Appellant,

vs.

THE STATE OF FLORIDA

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR INDIAN RIVER COUNTY.

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record:

"R" Record on Appeal

"T" Transcript of Trial Proceedings

STATEMENT OF THE CASE

Appellant will rely on his original Statement of the Case.

STATEMENT OF THE FACTS

Appellant will rely on his original Statement of the Facts in addition to and in conjunction with the Statement of the Facts as submitted by the Appellee in its Answer Brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY EXAMINING PROSPECTIVE JUROR KENEVEN'S FATHER AND IN HEARING, RULING ON AND GRANTING THE APPELLEE'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR KENEVEN IN THE ABSENCE OF THE DEFENDANT.

The Appellee is incorrect in that it argues that the trial court did not err in questioning prospective juror Keneven's father without Appellant being present because this was not a stage of the trial where fundamental fairness might be thwarted. Initially, it must be remembered that Rule 3.180 of the Florida Rules of Criminal Procedure provides that in all prosecutions for crime the Defendant shall be present at the beginning of the trial during the examination, challenging, impaneling and swearing of the jury. Additionally, this Court has previously held that a Defendant in a felony prosecution has the right to an open, public trial and to be present at every stage of the proceeding as provided by statute, and that it is an invasion of these rights and reversible error for a trial judge to examine and pass upon the qualifications of a sworn juror, when such is done outside the courtroom and not in the present of the Defendant. Shoultz v. State, 106 So.2d 424 (Fla.1958). Although this case is factually distinguishable in that neither the Defendant nor her counsel were present when the trial judge ruled upon the qualifications of the juror, the Appellant would submit that the rationale applies no less to the case sub judice. Moreover, in Salcedo v. State, _____So.2d_____, 11 FLW 2392 (1 DCA 1986), it was

held that the exercise of a challenge of a juror is one of the essential stages of a criminal trial where the Defendant's presence is required. Citing Lane v. State, 459 So.2d 1145 (Fla. 3d DCA 1984), the Court held that it is not a mere "mechanical function", but may involve the formulation of on-the-spot strategy decisions which may influenced by the acts of the State at the time. The exercise of peremptory challenges is essential to the fairness of a trial by jury Walker v. State, 438 So.2d 969, (Fla. 2d DCA 1983).

Additionally, although this Court raised the issue and refused to answer the question raised in Herzog v. State, 439 So.2d 1372 (Fla.1983), the Appellant would submit that the Defendant's involuntary absence during a non-crucial stage of a trial for a capital offense constitutes reversible error.

The Appellee also argues that the Appellant suffered no resulting prejudice from the dismissal of Ms. Keneven as she had previously stated her belief that the Appellant was guilty of the crime charged. Although the Record would reveal that the trial court held that it had determined that prospective juror Keneven was not competent as a juror and that the trial court reached it's conclusion before speaking with her father, the Appellant would submit that this is not dispositive of the issue. As previously argued, the Appellant would submit that had he been present in chambers during the examination of prospective juror Keneven's father, that he would have requested of his counsel that further inquiry and examination of Ms. Keneven take place. Assuming that had occurred, the Appellant would submit it is impossible for this Court to determine whether or not she would have, in fact, proven to be a competent

juror and an appropriate subject of a challenge for cause. It is clear that the questioning of the said prospective juror's father constituted the functional equivalent of the questioning of the prospective juror herself. The trial court itself understood this when it placed Mr. Keneven under oath. The Appellee's reliance on Garcia v. State, 472 So.2d 360 (Fla.1986) is misplaced. In that case the Court held that the State had the burden of proving that there was no resulting prejudice to the Appellant and the facts of that case are also clearly distinguishable from the case before this Court. For the Appellee to argue that the Appellant should have communicated his desire that Ms. Keneven be allowed to be a juror to his counsel is problematic. How could the Appellant have communicated such thought to his counsel when he wasn't even present? The fact that the Appellant's counsel acquiesced to the State's challenge for cause is irrelevant if the Appellant was not present at that time and if he did not subsequently ratify that decision. Furthermore, for the Appellee to submit that an objection should have been made to properly preserve this issue for appeal is also absurd. How could the Appellant have made any such objection when he did not know what occurred in chambers? The Appellee's reliance on Maggard v. State, 399 So.2d 973 (Fla.1981) is also misplaced as in that case the Defendant was present and still failed to register an objection to the prospective juror on the Record.

The Appellee also argues that the Record reveals that the Appellant had actual notice of the nature and purpose of the in-chambers examination of Ms. Keneven's father. It suggests that the inference to be drawn from the Record is that the Appellant's absence was voluntary.

a defendant who voluntarily absents himself, who knows that juror challenges will take place in his absence and whose attorneys waive his presence, and cooperates without objection during the exercise of challenges, to thereafter claim reversible error on appeal". This case is factually distinguishable, however, because this Court held that Ferry had voluntarily absented himself, thereby rendering the decision in Francis (supra) inapposite. This Court held "it is unequivocal that no one prevented Ferry from being present during challenges and, as stated, Ferry was present when the trial judge noted he was leaving and questioned Ferry's counsel who then waived Ferry's presence. Coupled with the observation that there were numerous instances when the trial court liberally allowed Ferry a break, we conclude that Ferry is not entitled to a new trial on this ground." Contrary, the only reasonable inference which can be drawn from the Record in the case sub judice is that the Appellant was not present in chambers because he was no invited into chambers by the trial judge. As such, it is clear that the Appellant's absence was involuntary, thereby requiring reversal and remand for a new trial.

In conclusion, the Appellee seems to argue that the error, if any, was harmless. It is clear, however, that the harmless-error test places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there was no reasonable possibility that the error contributed to the conviction State vs. Diguilio, 491 So.2d 1129 (Fla.1986). As in Francis (supra), this Court cannot assess the extent of prejudice, if any, which the Appellant

sustained by not being present in chambers during the questioning of prospective juror Keneven's father and the subsequent exercise of and granting of the challenge for cause of prospective juror Keneven.

POINT II

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISCLOSE THE IDENTITY OF THE CONFIDENTIAL INFORMANT OR IN THE ALTERNATIVE IN FAILING TO HOLD AN IN CAMERA HEARING.

The Appellant would submit that in determining whether or not the trial court erred in denying the Appellant's Motion to Disclose the Identity of the confidential informant, it must be determined whether or not the State fulfilled the initial threshold requirement of showing that the person whose identity they sought to protect was, in fact, a "confidential informant", thereby giving rise to the State's privilege of non-disclosure. As the Appellant argued at trial, the Appellee initially has the burden of establishing that there is a legitimate reason not to disclose the identity of the person whose name is sought to be disclosed. Otherwise, the trial court cannot rule on the issue of whether or not that person is entitled to confidential informant protection. Moreover, the State could simply refuse to disclose the identity of a person based upon a bare allegation that the said person is a confidential informant. Rule 3.220 (c) (2) of the Florida Rules of Criminal Procedure provides for confidential informant protection. The Rule, however, does not exist in a vacuum. Where the State does not establish that an anonymous witness should be given confidential informant protection, but chooses to refuse to disclose their identities only because of the alleged request of the witness to remain anonymous, the assertion is insufficient to deny the Defendant's request for the name of the eyewitness. Featherstone vs. State, 440 So.2d 457 (Fla.App. 4 Dist. 1983).

Just as Florida Rule of Criminal Procedure 3.200 (c) (2) protects confidential informants, Rules 3.220 (i) provides a method by which the Court may satisfy itself that a witness is entitled to the protection afforded a "confidential informant". Given the need to balance the public interest in protecting the flow of information from confidential informants against an individual's right to prepare his defense, and in camera hearing should be held. State vs. Jimenez, 428 So.2d 356 (3d DCA 1983). This Court held in State vs. Hassberger, 350 So.2d 1 (Fla.1977), that although Rule 3.220 (c) (2) of the Florida Rules of Criminal Procedure does not require disclosure of the name of a confidential informant unless the confidential informant is to be produced at a hearing or trial, or a failure to disclose his identity will infringe the constitutional rights of the accused, the Rule cannot be presumed to lay down a principle of substantive law. There exists a legitimate interest in balancing the safety of a witness against the need for full and complete cross-examination. Even where the informer never testifies at trial or hearing, but simply provides the police with information which is helpful in their investigation of crime, there are due process limitations on the extent of the privilege. Where disclosure of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause, the privilege must give away. No fixed rule with respect to disclosure exists. State vs. Hassberger (supra). As such, the Appellant would submit that the trial court erred in not requiring the confidential informant to appear before it at an in camera hearing and in further requiring the State of Florida to fulfill it's initial burden of establishing by competent evidence the

specific threat to the life or safety of the anonymous witness, thereby requiring non-disclosure of his or her name. The Appellant would submit that as far as the trial court could tell, without the aid of an in camera hearing, the anonymous witness was no more a "confidential informant" than was any other witness listed by the State in it's Answer to the Demand for Discovery. Wherefore, this Court should reverse the conviction and remand the matter for a new trial.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, in addition to the reasons and points and authorities cited in the Appellant's Initial Brief, the Appellant respectfully requests that the judgment and sentence of the trial court be reversed and that this case be remanded to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail to the Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this 10 day of June, 1987.

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