72,244

IN THE SUPREME COURT OF FLORIDA

COREY LYNN COLBERT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Tenth Judicial Circuit
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, COREY LYYN COLBERT, was the Applee/Cross-Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellant/Cross-Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered March 11, *1988.*

STATEMENT OF THE CASE

On September *17, 1986,* the State Attorney for the Tenth Judicial Circuit in and for Polk County, Florida, filed an information charging the Petitioner, Corey Lynn Colbert, with kidnapping contrary to florida Statute *787.01* and *800.04,* two counts of sexual battery contrary to Florida Statute *794.011,* and one count of lewd assault on a child contrary to Florida Statute *800.04,* all of which allegedly occurred on August 28, *1986.* From February *24-27, 1987,* Mr. Colbert had a jury trial; and on February *27, 1987,* the jury deliberated and returned verdicts finding Mr. Colbert guilty of false imprisonment (the court granted a motion for acquittal on the kidnapping charge), one count of sexual battery, and of lewd and lacivious conduct.

On March *9, 1987,* Mr. Colbert timely filed a motion for new trial, a motion for judgment of acquittal, and a motion to set aside the verdict on the lewd and lacivious count. On May *14, 1987,* the trial court granted Mr. Colbert's motion to set aside the verdict on the lewd and lacivious count based on double jeopardy grounds. The trial court then sentenced Mr. Colbert as follows: on the false imprisonment charge--two years of community control to be followed

by three years of probation; and on the sexual battery charge-- two years of community control to be followedby four years of probation, a condition of community control being that Mr. Colbert spend 364 days in the County Jail. Said sentences were to run concurrent. On May 28, 1987, the State timely filed a Notice of Appeal; and on June 4, 1987, Mr. Colbert timely filed a cross Notice of Appeal.

On appeal Mr. Colbert raised several issues including the erroneous giving of amodified "Allen" charge. The Second District Court of Appeal rejected all issues in an opinion rendered March 11, 1988.

STATEMENT OF THE FACTS

On August 28, 1986, seventeen-year-old Corey Colbert went into a bathroom with twelve-year-old M[redacted] E[redacted] at which time Mr. Colbert placed two fingers inside of Ms. B[redacted]s vagina. The contested facts in this case centered around whether or not Ms. B[redacted] went willingly to the bathroom with Mr. Colbert, whether or not she willingly stayed in the bathroom when she got into the bathroom with Mr. Colbert, and whether or not she consented to the sexual acts - which may or may not have included penis insertion as well as digital insertion - with Mr. Colbert.

Ms. B[redacted] testified that August 28 at about 6:30 p.m. she was talking to two friends, J[redacted] and D[redacted] when Mr. Colbert and a friend named Willie approached them. Mr. Colbert whispered in her ear that he is going to make her "suck his dick" and then he grabbed her by the arms. According to Ms. B[redacted] Mr. Colbert then pulled her into the bathroom of the wash house that they were

standing in front of. Ms. [redacted] stated that Mr. Colbert took her into the bathroom by force, he pulled her pants down, and he placed his fingers in her private part over her protestations. At one point her friend D[redacted] came to the bathroom door and tried to open the door, but Mr. Colbert grabbed the door and closed it. When she began bleeding, Mr. Colbert stoppedwhat he was doing and left the bathroom. Ms. B[redacted] then pulled up her pants and also left the bathroom. Ms. E[redacted] indicated that Mr. Colbert had also placed his penis inside of her; however, she admitted that she never actually felt his penis go inside of her and had told the detective that she wasn't sure if his penis had gone inside of her. Ms. E[redacted] also admitted that she did not scream or yell when Mr. Colbert was pulling her into the bathroom and she was not afraid of him while he was pulling her into the bathroom.

D[redacted] E[redacted] testified that she was with Ms. E[redacted] when Ms. B[redacted] and Mr. Colbert walked towards the bathroom in the wash house. Although Ms. E[redacted] stated that Mr. Colbert had Ms. B[redacted] the arm and she was saying "**stop,**" Ms. E[redacted] also indicated that Mr. Colbert was not dragging Ms. E[redacted] into the wash house and Ms. B[redacted] was not acting scared but was saying stop in a normal manner. While still outside the wash house, Ms. E[redacted] could hear Mr. B[redacted] saying "stop, Lynn, stop" from inside the bathroom and tried to open the door; but Mr. Colbert closed it in her face. Before the **door** closed, Ms. E[redacted] did see the Ms. B[redacted]'s pants were down.

It was noted that Ms. B[redacted] was not living with her mother but was stayingwith the Walden family; and while she was staying

with the Walden family, she was obliged to lived by their rules which included not messing around with boys. Ms .B[redacted] had been instructed not to mess around with boys and had been informed that she would be punished if she did mess around with boys.

Mr. Colbert testified that he and Willie Watson approached the three girls in front of the wash house when the girls called over to them. As Mr. Colbert started walking towards the back of the wash house where the bathroom was located, Ms. B[redacted] followed him. Although he was going to utilize the facilities, he did not do so when Ms. B[redacted] followed him into the bathroom. When Mr. Colbert asked Ms. B[redacted] if she was "going to suck my thing" she replied no. But then she stated "you know what I want to do" and pulled her pants halfway down. Mr. Colbert stated that he knew she wanted him to mess with her, but he could not because he had caught gonorrhea from another girl he had had sexual relations with. So at that point he approached her and put his two fingers up inside of her. When he placed his fingers inside her, she jumped a little but did not say anything. When he took his finger out, he noticed some blood and asked her if she was alright. She said she was okay and pulled her pants up. The two then left the bathroom. Mr. Colbert denied ever pulling his pants down or taking out his penis. Although he remembered a girl trying to open the bathroom door at one point, he admitted shutting it cause he wanted some privacy.

As Mr. Colbert was leaving the wash house area with his friend Willie Watson, Willie asked what had happened in the bathroom. Mr. Colbert informed his friend that he had put his fingers in her and got scared when he saw blood coming out. At that po nt Mr. Watson told Mr. Colbert that Mr. Colbert could get in troub e for this

because the girl was young. Mr. Watson did note that before the two went into the bathroom, he saw Ms. [redacted] walk in with Mr. Colbert and she was not being dragged.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's decision finding no reversible error in this case where the trial court gave a modified Allen charge to the jury without prior notice to defense counsel conflicts with Florida Supreme Court case law which holds such an error to be per se reversible.

ARGUMENT

WHETHER THE DECISION IN THIS CASE CONFLICTS WITH FLORIDA SUPREME COURT CASE LAW AS TO WHETHER THE GIVING OF A MODIFIED ALLEN CHARGE WITHOUT PRIORNOTICE TO DEFENSE COUNSEL IS PER SE REVERSIBLE ERROR.

During jury deliberations the jury notified the trial court that it wanted to have the testimony of Ms. [redacted] and her friend [redacted] read back. Because of a change in court reporters, this was impossible; and the trial court informed the jury of this fact. The trial court then asked the jury if a verdict on one or more counts had been reachedwithout the request for rehearing the testimony and the answer was in the affirmative. The trial court, outside the presence of the jury, discussed with counsel the next step. Defense counsel argued that all the counts were interrelated and requested a mistrial on all counts. The prosecutor argued that each count was separate and distinct and verdicts should be rendered on those counts that the jury had already reached verdicts on. The

trial court stated that it would follow the prosecutor's reasoning and obtain verdicts on those counts that the jury had decided on. The trial court then stated it would declare a mistrial on the remaining undecided counts.

When the jury was brought back in, however, the trial court added an additional instruction that was not discussed with counsel:

> I'm going to ask the foreman to bring the verdict forms to the courtroom. When I asked the questions of you, and I'm going to go over this one more time just to be sure there is no misunderstanding, I understood there to be an indication, really from all six of you, that as to those -- that count or those counts that you have already reached a verdict on, that you do not feel -- none of you feel that the reading back of this testimony will have any bearing on those verdicts. So, what I'm going to do is ask you to present the verdicts that you have reached, and it would be my intention to declare a mistrial as to those -- that count or those counts that you have reached a verdict on.
>
> Now, knowing that that is what I intend to do, if you wish to continue your deliberations, you may do that. If you do not feel that you could reach a verdict on those matters that you have not reached one on knowing this testimony is not available, then i'm asking you to submit the verdicts that *you* have to the Court. If you feel that you need to go to the jury room to discuss that, you may do that.

Defense counsel immediately objected to this instruction that gave the jury the option of reconsidering their undecided verdicts in light of the threat of a mistrial, but the trial court felt that this abbreviated Allen charge was appropriate. The time of this instruction was about 7:59 p.m. on a Friday night. The jury came back with verdicts on all counts at 8:03 p.m.

Because the trial court did not discuss her intent to give an abbreviated Allen charge with defense counsel prior to giving

the instruction, per se reversible error occurred. In Bradley v. State, 513 So.2d 112 (Fla. 1987), the court reitterated its prior rulings on this issue by stating that any communications between a judge and jury under Florida Rule of Criminal Procedure 3.410 without notice to state and defense is per se reversible error. In expounding on its prior decisions, Bradley pointed out that defense counsel merely being present is not enough. Defense counsel must be given an opportunity to participate in the discussion of the action to be taken on the jury's request, and participation includes the right to place objections on the records as well as the right to make full argument as to what the jury should or should not be told.

In this case the trial court started out in the proper manner by discussing the communication from the jury with defense counsel and the prosecutor. Defense counsel was able to set forth its arguments as to why a mistrial on the entire case as opposed to on just some counts should be granted. When the trial court spontaneously decided to give an abbreviated Allen charge during the midst of her instructions to the jury, the trial court violated the reasoning in Bradley. The trial court did not discuss the giving or the wording of the abbreviated Allen charge and did not give defense counsel the opportunity to object to it, argue against it, or contribute to the language to be used. The Second District Court of Appeal's decision finding no error in this case conflicts with this court's holding in Bradley and all the Florida Supreme Court cases behind Bradley.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the Florida Supreme Court so as to invoke discretionary review of this Court.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
Assistant Public Defender

Public Defender's Office
Tenth Judicial Circuit
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 31st day of March, 1988.

DEBORAH K. BRUECKHEIMER