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IN THE SUPREME COURT OF FLORIDA

BYRON B. BRYANT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,862

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

BYRON B. BRYANT, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 81,862

PRELIMINARY STATEMENT

Appellant, Byron B. Bryant, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings will be by the symbol "R" and references to the transcripts will be by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts the facts presented by Appellant in his supplemental brief.

SUMMARY OF ARGUMENT

The trial court did not err in leaving the courtroom during the readback of trial testimony. Even if it did, however, such error was harmless beyond a reasonable doubt under the circumstances of this case.

ARGUMENT

ISSUE I

DID THE TRIAL JUDGE'S ABSENCE DURING THE READBACK OF TESTIMONY CONSTITUTE FUNDAMENTAL ERROR (Restated).

In the instant case, the jury sent out three questions to the court during its deliberations. The trial court, the State, and defense counsel assembled in court to discuss the questions presented. For whatever reason, the defendant was not brought in. The jury's first question sought twelve copies of the jury instructions. The jury's second question sought "the transcript of the testimony dealing with Sergeant Brand and Hartmann's reasons for the defendant's arrest." The jury's third question sought six copies of Appellant's statement to the police. (T 1339-40). Regarding the officers' testimony, defense counsel suggested that it be read in its entirety in the order that it was originally presented, and all agreed. (T 1340). When the trial court ordered the jury brought in, defense counsel noted Appellant's absence, and the parties waited for him to be brought in. At that point, the following colloquy occurred:[1]

> THE COURT: You lawyers agree I don't have to be here during the readback?
>
> [DEFENSE COUNSEL]: No.
>
> [THE STATE]: No problem.
>
> THE COURT: During the readback, I won't be here by their agreement. I will tell the jury that. What I do is I come in, open court, bring the jury in, and tell them I am

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[1] The record does not indicate when the defendant was brought into the courtroom in reference to this colloquy.

> not going to be here, and that they are not allowed to say anything or do anything or tell the reporter to stop or anything like that. (To the Bailiff.). You don't let them do that. If they start to do that, you say please stop, wait until I get the Judge, you come get me.

(T 1342).

When the jury returned to the courtroom, the trial court told it that arrangements were being made for a readback of the officers' testimony after lunch. The trial court also told the jury:

> At 2:00 when we will convene, you may get back a few minutes earlier, but 2:00 will be the readback. I will come in to court and bring you in. Lawyers have agreed that the Judge does not have to be present during the readback because there is no rulings to make, that has already taken place. And you are not to interrupt or say anything during the readback. And just before the readback is over, I will come back in.

(T 1343-44).

At 2:05 p.m., the jury sent another note out, indicating that it wanted "to hear the testimony regarding the defendant making phone calls to the police headquarters." (T 1348). After an extended discussion among the parties[2] (T 1348-56), the jury was brought in and told to listen to the readback; if the question remained unanswered, then it should rephrase the question. Otherwise, the readback would commence immediately, with a break at 3:00. (T 1358-62).

At 3:10 p.m., the trial judge interrupted the readback for a break. (T 1362). After the recess, the jury sent out another

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[2] The State's reference to "the parties" will always include the prosecutor, defense counsel, and the trial judge.

note seeking to end the readback. The parties discussed the question and defense counsel insisted that the entire testimony be reread. (T 1363-66). Once again, the jury was brought in and the trial court informed it that the testimony would be read back in its entirety. (T 1366-67). At that point, the jury foreman rescinded its question relating to the defendant's phone calls to the police station. (T 1369). The readback continued until 5:22 p.m., at which point the trial judged resumed its presence at the bench. (T 1369).

In his supplemental brief, Appellant claims that the trial court committed per se reversible error when it absented itself from the courtroom during the readback of the testimony. To support his contention, Appellant relies principally on this Court's opinion in Brown v. State, 538 So.2d 833 (Fla. 1989), and two recent district court cases, namely, Maldonado v. State, 634 So.2d 661 (Fla. 5th DCA 1994), and Glee v. State, 639 So.2d 1093 (Fla. 4th DCA 1994). The State submits, however, that these cases either are distinguishable or were wrongly decided, and thus do not warrant a new trial.

In Brown, a capital case, the jury requested transcripts of certain witnesses' testimony. Because the trial judge had left the courthouse, the prosecutor and the defense contacted him by telephone, and all three agreed that the jury should be told to rely on their memories since a transcript was not available. Pursuant to their agreement, both the state and the defense entered the jury room and advised the jury accordingly. This court held, however, that "communications from the jury must be received by the trial judge in person and that the absence of the

judge when a communication is received and answered is reversible error." 538 So.2d at 836. It is clear from the record in the present case that the judge was present when the jury's questions were received and answered. Thus, Brown is inapplicable to the facts of this case.

In Maldonado, the jury asked to hear the testimony of three state witnesses. The judge suggested sending the court reporter into the jury room to read back the testimony, and the state and defense agreed. Ultimately, none of the parties were present during the readback. Relying on Brown, the Fifth District held that the trial court committed fundamental error when it absented itself from the proceedings. In discussing the applicability of the harmless error rule, the court stated: "We agree . . . that our supreme court in Brown 'intended to establish a rule requiring automatic reversal whenever a communication received from a jury during deliberation is answered in the absence of the trial judge; and that, therefore, a harmless error analysis is inappropriate.'" 634 So.2d at 662-63 (quoting Young v. State, 591 So.2d 651, 652 (Fla. 1st DCA 1991)). In any event, it could not say beyond a reasonable doubt that the error was harmless because it did not know what occurred during the readback since the attorneys were also absent. 634 So.2d at 622.

To the extent that the Fifth District has created a per se reversible error rule based solely on the trial court's absence, the State submits that the district court has overextended Brown. As noted previously, this Court held that a judge's absence when a communication from the jury is received and answered constitutes fundamental error. While the result was correct in

Brown since the judge was absent when the communication was received and answered, it was inappropriate for the district court to extend the Brown holding to every case in which the judge is absent during any stage of the proceedings without a voluntary waiver from the defendant.

The Fourth District has similarly misapplied Brown under facts similar to those here. In Glee v. State, 639 So.2d 1092 (Fla. 4th DCA 1994), the trial judge left the courtroom during the readback of testimony. The court reversed for a new trial, citing Brown for the proposition that "[a]n accused has a fundamental right to have the trial judge present at all stages of the proceedings." 639 So.2d at 1093. The court refused to apply a harmless error test. Id.

Under the facts of this case, reversal is clearly not warranted. The trial court was present, along with counsel, when the jury's questions were sent out and discussed. The trial court was also present when the jury was brought before the court and the questions were answered. The trial judge informed the jury that he was going to be absent during the readback and that it was not to interrupt the readback in any way. Before the readback began, the trial court received, discussed, and answered another question from the jury. About thirty minutes into the readback, the trial court interrupted the readback for a refreshment break and inquired of counsel whether anything needed to be discussed. At no time did the state or the defense pose an objection or concern. Again, during that recess, the trial court received, discussed, and answered a question from the jury. Finally, after the readback was concluded, the trial judge

returned and resumed the proceedings without any objection or comment from counsel. Even now, Appellant does not claim that something happened during the readback that required the judge's presence for which he has been irreversibly harmed. Rather, he merely seeks to perpetuate misapplications of Brown. Even were this Court to conclude that the trial court erred in absenting himself from the readback without the defendant's voluntary, knowing, and intelligent waiver, such error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this claim should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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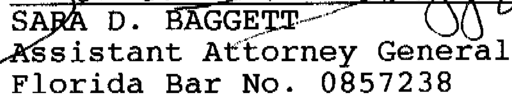

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Charles W. Musgrove, Esquire, 2328 South Congress Avenue, Suite 1D, West Palm Beach, Florida 33406, this 6th day of October, 1994.

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