IN THE SUPREME COURT OF FLORIDA

LORAN COLE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 87,337

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
CHIEF, CAPITAL APPEALS
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

LORAN COLE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 87,337
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING A PORTION OF THE TESTIMONY OF THE KEY STATE WITNESS TO BE READ BACK TO THE JURY WITHOUT ALSO READING THE PERTINENT CROSS-EXAMINATION.

Appellant concedes that a trial court has wide latitude in deciding whether to have testimony re-read to jurors upon request. However, in this case, the trial court abused its discretion. The error occurred during the jury's deliberations at the penalty phase when Loran Cole's life literally hung in the balance. The court reporter ultimately read back six pages of testimony by Pam Edwards, the surviving victim. (T1586-92) That portion of testimony[1]

[1] The requested testimony occurred during the guilt phase.

dealt with the critical time period during which either Loran Cole or his codefendant, William Paul, may have administered the *coup de grâce*. Within minutes of hearing the re-read testimony, the jury returned with a unanimous recommendation that Loran Cole be executed rather than spend the rest of his life in prison. (T1592)

The cross-examination that should have also been read back to the jury covered several critical issues. Pam Edwards admitted that she was stunned and dizzy from the blow to the back of her head. (T1188-89) William Chris Paul was also cursing John Edwards for injuring him. (T1189-90) During the critical time period following their abduction, Loran Cole took Pamela Edwards to the bathroom just off the trail while William Chris Paul stayed in the area where John had been subdued. (T1190) Additionally, Pam Edwards admitted that she did not see which man actually cut her brother's throat. (T1191) Defense counsel did not want the "whole trial scenario re-read to the jury" as Appellee claims. See, Answer Brief, p.44. The entire cross-examination of Pam Edwards took place in less than seven pages of transcript. (T1185-91) The pertinent portions cited above were contained in a mere four pages. (T1188-91) It would have been a simple and speedy solution to read the requested cross-examination also.

Appellant also disputes the State's contention that this issue was not preserved in some manner. Defense counsel objected to the re-reading of any testimony pointing out that the small fragment would result in undue emphasis. (T1575) Defense counsel pointed out that the requested testimony was a minuscule portion of five solid days of testimony and evidence. (T1575) Counsel asked the trial court to instruct the jury to rely on their own recollection. (T1575) Although the trial court initially ignored Appellant's objection, counsel renewed the

objection "especially to just re-reading a short excerpt dealing with just what they asked." (T1580) Defense counsel explained his concerns at length. Defense counsel also requested that cross-examination and redirect examination be re-read as well, if the court chose to re-read the requested testimony over Appellant's objection. (T1580-81) Once the court reporter located the requested testimony, the trial court announced that he would allow the re-reading of that portion over the objection of defense counsel. (T1583) At that point, defense counsel obviously realized he had lost the battle and voiced no further objections. This issue has been adequately preserved. To require more from defense counsel would place form above substance. See, e.g., Jackson v. State, 451 So.2d 458 (Fla. 1984) and Spurlock v. State, 420 So.2d 875 (Fla. 1982).

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WHERE THE APPELLANT WAS INVOLUNTARILY EXCLUDED RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

Appellant strongly disputes the State's contention that this issue is also procedurally barred. The State makes this claim based on the "lack of an objection or request be present at trial." See Answer Brief, p.45. A defendant need not object nor must he request to be present during his own capital trial. See, e.g., Coney v. State, 653 So.2d 1009 (Fla. 1995) and Garcia v. State, 492 So.2d 360 (Fla. 1986) [a defendant's absence with no express waiver is error.] See also Brower v. State, 21 Fla. L. Weekly D2612 (Fla. 4th DCA December 11, 1996) [error is fundamental with no objection required].

The State points out this Court's recent approval of an amendment to Florida Criminal Rule of Procedure 3.180(b). "A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed." Amendments to the Florida Rules of Criminal Procedure, 21 Fla. L. Weekly S518 (Fla. November 27, 1996). Even this amendment to the rule does not aid the State's position. Loran Cole was not "physically in attendance" where his lawyer, the prosecutor, the trial judge, and the court reporter, stepped out into the hall for a hearing/bench conference outside his presence. Perhaps if Loran Cole

had been present during the "bench conference" on Appellant's motion for mistrial, (Point V), Cole might have disagreed with his lawyer who declined the court's offer of a curative instruction. (T889-92) Cole also may have wanted some input during the hallway "bench conference" regarding defense counsel's "tactics" in the decision to call only one brief witness during Appellant's case-in-chief and, in so doing, giving up final summation.

In contending that Cole's absence was harmless error if it was error at all, the State points to Cole's lack of knowledge regarding trial tactics. See Answer Brief, p.51. In sharp contrast, the State concludes its argument on this issue by pointing out Cole's representation on the record that he (State's emphasis) was satisfied with defense counsel's representation. See Answer Brief, p.52. The State cannot have it both ways. Either Loran Cole is a lay person who knows nothing of trial tactics and has no expertise in assessing his lawyer's performance, or he has such expertise and could assist his lawyer during the proceedings from which he was involuntarily absent.

Finally, the State's quotation of defense counsel's statement on the record concerning the fact that he "conferred" with his client, Loran Cole, deals only with Cole's decision not to testify. See Answer Brief, p.51-52; (R1196-98) There is no similar statement on the record regarding counsel's conferring with Cole about the issues discussed during the numerous other hearings and hallway "bench conferences" during which Loran Cole was involuntarily absent.

CONCLUSION

Based upon the foregoing cases, authorities, and policies cited herein, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I, II, V, VI, VII, VIII, IX, X, and XI, vacate the conviction and sentences and remand for a new trial;

As to Point III, vacate the death sentence and remand for a new penalty phase;

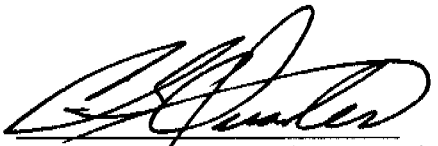
As to Points IV and XIV, vacate Appellant's death sentence and remand for imposition of a life sentence;

As to Point XII, vacate the orders of restitution; and,

As to Point XIII, vacate Appellant's life sentences and remand for a new sentencing proceeding.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

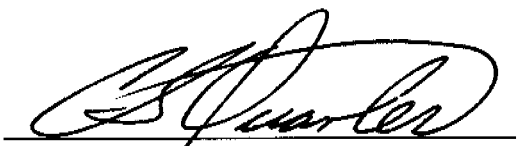


CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Loran Cole, #335421 (R-1-N-17), Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 12th day of March, 1997.



CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER