

027

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

FEB 8 1997

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

<p>STATE OF FLORIDA,</p> <p>Petitioner,</p> <p>v.</p> <p>CARLOS OMAR MEJIA,</p> <p>Respondent.</p>
--

CASE NO. 88,568

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

GISELLE LYLEN RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	11
ARGUMENT	12
<u>ISSUE I</u>	
DID THE DISTRICT COURT OF APPEAL ERRONEOUSLY APPLY, AND DIRECTLY CONFLICT WITH, DECISIONS OF THIS COURT?	12
CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Amendments to the Florida Rules of Criminal Procedure,</u> 21 Fla. L. Weekly S518 (November 27, 1996) . . .	11,12,17,18
<u>Armstrong v. State,</u> 642 So. 2d 730 (Fla. 1994), <u>cert. denied</u> , 115 S. Ct. 1799, 131 L. Ed. 2d 720 (1995)	17
<u>Boyette v. State,</u> 21 Fla. L. Weekly S535 (Fla. December 5, 1996) .	11-13,16-18
<u>Coney v. State,</u> 653 So. 2d 1009 (Fla.), <u>cert. denied</u> , 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995)	passim
<u>Francis v. State,</u> 413 So. 2d 1175 (Fla. 1982)	2,6,9,10,16
<u>Gibson v. State,</u> 661 So. 2d 288 (Fla. 1995)	6,11,12,14,15
<u>Lett v. State,</u> 668 So. 2d 1094 (Fla. 1st DCA 1996)	7
<u>Lewis v. United States,</u> 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)	6
<u>Mejia v. State,</u> 675 So. 2d 996 (Fla. 1st DCA 1996)	1,10
<u>Pointer v. United States,</u> 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894)	6
<u>Salcedo v. State,</u> 497 So. 2d 1294 (Fla. 1st DCA 1986), <u>review denied</u> , 506 So. 2d 1043 (Fla. 1987)	7

<u>Small v. State,</u>	
630 So. 2d 1087 (Fla. 1994)	8
<u>State v. Clark,</u>	
614 So. 2d 453 (Fla. 1992)	8
<u>State v. DiGuilio,</u>	
491 So. 2d 1129 (Fla. 1986)	8
<u>State v. Johnson,</u>	
616 So. 2d 1 (Fla. 1993)	7
<u>Steinhorst v. State,</u>	
412 So. 2d 332 (Fla. 1982)	14
<u>Turner v. State,</u>	
530 So. 2d 45 (Fla. 1988)	10
<u>United States v. McCoy,</u>	
8 F.3d 495 (7th Cir. 1993)	15
<u>Witt v. State,</u>	
465 So. 2d 510 (Fla. 1985)	19

FLORIDA STATUTES

924.33, Florida Statutes (1995)	7
---------------------------------	---

OTHER

Fla. R. Crim. P. 3.180	2,5,13,16-18
Fed. R. Crim. P. 43(a)	15

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Carlos Omar Mejia, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The historical facts, as established by the First District Court of Appeal opinion in Mejia v. State, 675 So. 2d 996 (Fla. 1st DCA 1996), issued June 13, 1996, are as follows:

Appellant was charged by indictment with first-degree murder and robbery. Jury selection commenced on January 23, 1995, eighteen days after release of the

opinion in Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S. Ct. 315, 133 L. Ed. 2d 218 (1995). In Coney, the supreme court purported to "clarify" the intent behind Florida Rule of Criminal Procedure 3.180(a)(4), which states that, "[i]n all prosecutions for crime [,] the defendant shall be present ... at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury"; and its previous decision on the same subject in Francis v. State, 413 So. 2d 1175 (Fla. 1982). It held:

The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. ...Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made.... Again, the court must certify the defendant's approval of the strikes through proper inquiry.

653 So. 2d at 1013 (citations omitted). The court held, further, that a violation of rule 3.180(a)(4), as interpreted, is subject to a harmless error analysis. Id. Without elucidation, the court pronounced that its ruling was "prospective only." Id.

Although appellant, a native of Honduras, spoke and understood some English, at his request, an interpreter was appointed to translate during the trial. The record reflects that counsel and the trial court were aware of the recently released Coney opinion, and that they attempted to comply with what they understood its holding to require. When it came time to discuss challenges to the prospective jurors, the trial court, counsel, appellant and the interpreter all adjourned to

chambers, at which point the transcript reflects the following:

THE COURT: All right.

[DEFENSE COUNSEL]: (To the interpreter) You tell him this is a hearing, and he has a right to be here any time. He can waive it, though, like during the trial when the lawyers go up to the bench to see the judge. We may be discussing an objection or some legal point. He can waive his coming up to the bench, or he can come up there and have you come up and say what is going on.

THE DEFENDANT (In English) Okay.

[DEFENSE COUNSEL]: Well --

THE INTERPRETER: It is okay.

[DEFENSE COUNSEL]: Is he waiving it?

THE DEFENDANT: (In English) Yes.

[DEFENSE COUNSEL]: Good idea. Okay.

After three prospective jurors had been stricken for cause, the trial court asked counsel whether they wished to address peremptory challenges in chambers, or in the courtroom. With appellant still present in chambers, defense counsel responded:

If I can have a moment, Judge, I may be able to kind of--I had told the defendant to look them over and tell me, too, and he had a couple. I will see if we can--I can do some of our peremptories now, provided we have an additional opportunity when I see who is in the box.

Defense counsel then struck three jurors, after which he said that he "would like for the defendant to

have an opportunity when we put them back in the box to just take a quick look at them."

After everyone, including appellant, had returned in the courtroom, the trial court dismissed the stricken jurors, replacing them with new prospective jurors. After the new jurors had been questioned, the trial court asked counsel if they needed "a moment." Defense counsel responded in the affirmative. It is apparent that defense counsel then conferred with appellant regarding the prospective jury panel. Defense counsel then asked if counsel could approach the bench, saying that "we did waive that other matter, for the record," an obvious reference to the fact that appellant had waived his right to be present at bench conferences. Although the transcript reflects that a bench conference followed, it was not recorded. Clearly, however, the subject was peremptory challenges, as seven additional prospective jurors were excused. Additional jurors were called and questioned. The trial court again asked if counsel needed "a minute," and defense counsel again responded in the affirmative. Again, it is apparent that defense counsel conferred with appellant. Another unreported bench conference took place, after which defense counsel said "Judge, I want the record to reflect that the defendant has waived his presence at these bench conferences." Seven additional jurors were then excused. These jurors were replaced and, after the replacements had been questioned, another unreported bench conference took place. Four more jurors were excused, after which both parties accepted the panel. The record reflects that defense counsel exercised all ten of his peremptory challenges.

At the conclusion of the presentation of evidence, the trial court, counsel, appellant and the interpreter adjourned to chambers for the charge conference. Before taking up the matter of jury instructions, the following took place:

THE COURT: Well, let me put a couple of things on the record first.

....

Mr. Mejia, are you satisfied with the translator's services...?

[THE DEFENDANT]: Yes.

THE COURT: Mr. Adams [defense counsel], we have had a number of bench conferences, I think, earlier on. You waived the defendant's presence, but we have also had some that were not on the record. I think we ought to reflect on the record that nothing took place during those conferences where we did not have the reporter present that would in any way affect the outcome of this trial or would affect an appealable issue.

[DEFENSE COUNSEL]: That's correct, Your Honor. And I did discuss that through the interpreter with [the defendant], and he waived his presence. It is a much more orderly fashion, and we all know that is in light the [sic] relatively new case.

On appeal, appellant argues that Coney applies; and that he is entitled to a new trial because the trial court failed either to certify, after a proper inquiry, that appellant's waiver of his right to be present at bench conference during which peremptory challenges were exercised by his counsel was intelligent and voluntary; or to require appellant to ratify the strikes after they had been made, and to certify, after proper inquiry, that such ratification was intelligent and voluntary. According to appellant, his absence from the bench conferences "thwarted the fundamental fairness of the proceedings," and "was, in any event, a clear violation of [r]ule 3.180(a)(4)." Moreover, appellant argues that the trial court's error cannot be considered harmless because it is impossible "to assess the extent of prejudice sustained by appellant's absence" and, therefore, one cannot conclude "beyond a reasonable doubt that his error did not affect the fairness of the trial."

The state responds, first, that any error was not preserved by contemporaneous objection. Next, the state argues that Coney is inapplicable because the supreme court expressly stated that the holding was to be "prospective only" (653 So. 2d at 1013), and the decision did not become final until April 27, 1995, four days after appellant's trial had begun. According to the state, under pre-Coney case law, it was sufficient if a defendant was physically present in the courtroom during jury selection--actual presence at bench conferences was not required. Finally, the state argues that, even if Coney is applicable, reversal is not appropriate because it is apparent from the record that appellant's "absence at [sic] the bench conferences did not prejudice him" and, therefore, any technical error on the part of the trial court was clearly harmless.

Regarding the state's preservation argument, we note that the initial version of the Coney opinion includes the following sentence, which was deleted, without explanation, after both sides had filed motions for rehearing: "Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." Coney v. State, 20 Fla. L. Weekly S16, 17 (Fla. Jan. 5, 1995). The state argues that this deletion "indicates that appellant must preserve the issue." We are unwilling to read so much into such a revision. But see Gibson v. State, 661 So. 2d 288, 291 (Fla. 1995) (denying claim that defendant's right to be present at bench conferences at which challenges for cause were made by his counsel had been violated and noting, in apparent dicta, that "no objection to the court's procedure was ever made").

According to the supreme court, "[t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." Francis v. State, 413 So. 2d 1175, 1178-79 (Fla. 1982) (citing Pointer v. United States, 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894), and Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed

1011 (1892). Clearly, it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that a defendant's right to meaningful participation in the decision of how peremptory challenges are to be used is assiduously protected. If a contemporaneous objection were required to preserve for appeal the issue of deprivation of that right, it seems to us that, as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the supreme court in Coney, we conclude that a violation of that rule constitutes fundamental error, which may be raised for the first time on appeal, notwithstanding the lack of a contemporaneous objection. See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) ("for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"): Salcedo v. State, 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986) (allegation that defendant was absent from courtroom during exercise of peremptory challenges "alleged fundamental error which no objection was necessary to preserve"), review denied, 506 So. 2d 1043 (Fla. 1987).

The supreme court's failure to elucidate as to its intent when it pronounced that the holding in Coney was to be "prospective only" (653 So. 2d at 1013) has engendered considerable confusion, in both trial and appellate courts, regarding the applicability of the holding to "pipeline," and other, cases. E.g., Lett v. State, 668 So. 2d 1094 (Fla. 1st DCA 1996) (Certifying question of great public importance on motion for rehearing). However, because we conclude that appellant is not entitled to a new trial even if Coney applies, we find it unnecessary to undertake the task of prognostication in an effort to divine the court's intent regarding those cases to which Coney will apply. Instead, we assume, for purposes of this opinion, that Coney does apply.

Section 924.33, Florida Statutes (1995), mandates that "[n]o [criminal] judgement shall be reversed unless the appellate court is of the opinion, after an

examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant." Referring to this statute, the supreme court has said that, "[u]nder both the statutory law and case law of this state, a [criminal] judgment shall not be reversed unless the appellate court is of the opinion that the error injuriously affected the substantial rights of the appellant." Small v. State, 630 So. 2d 1087, 1089 (Fla. 1994). According to the supreme court, in applying this harmless error test, "the burden [is] 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 is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). The fact that an error may be classified as fundamental, so that it may be raised for the first time on appeal, does not necessarily preclude application of a harmless error analysis. State v. Clark, 614 So. 2d 453 (Fla. 1992). In fact, the supreme court expressly applied a harmless error analysis in Coney. 653 So. 2d at 1013.

Although it is apparent that, at trial, all parties concerned were attempting to comply with what they understood the recently released Coney decision to require, it is equally apparent that the trial court failed to fully comply with the rule laid down. A waiver of appellant's right to be present at bench conferences during which peremptory challenges were exercised was obtained. However, the trial court failed to either ensure, "through proper inquiry", that appellant's waiver was intelligent and voluntary; or to obtain an intelligent and voluntary ratification of the jury chosen. Id. This was error. Accordingly, we must next determine whether there is any reasonable possibility that this error had an adverse impact on appellant's right to a fair trial.

It seems relatively clear that the procedural rule set out in Coney is intended to ensure that a defendant's right to meaningful participation in

decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected. Assuming such an underlying purpose, our review of the record satisfies us, to the exclusion of all reasonable doubt, that appellant suffered no prejudice to his right to a fair trial as the result of the trial court's technical failure to comply with all of Coney's requirements. It is apparent from the trial transcript that appellant understood that he had the right to participate in the choice of jurors. It is equally apparent that appellant's counsel consistently consulted with appellant regarding the exercise of peremptory challenges. Accordingly, there can be no question but that, although he was not "physically present at the immediate site where pretrial juror challenges [were] exercised" (id.)--i.e., at the bench--appellant did participate in a meaningful way in the decisions regarding the exercise of peremptory challenges. Thus, it would seem that the important right which the Coney decision was intended to protect was not impaired in any way.

Appellant offers nothing to suggest that he was, in fact, prejudiced as a result of the technical error committed by the trial court. Instead, he relies on Francis v. State, 413 So. 2d 1175 (Fla. 1982), for the proposition that, because it is possible that he might have been prejudiced as a result of the error, we should not conclude that the error was harmless. However, we believe that Francis is factually distinguishable. In Francis, the defendant was permitted to leave the courtroom to go the bathroom. While he was gone, his counsel waived his presence without consulting him, and jury selection commenced. The defendant returned to the courtroom before the selection process had been completed. However, the court and counsel then decided to conduct the remainder of the process in chambers, because it was too crowded around the bench. When everyone else adjourned to chambers, the defendant was left sitting in the courtroom. The defendant was never asked whether he waived his presence, or to ratify the jury selected. On appeal, the supreme court concluded that it was unable to say that the error was harmless because it

was "unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised." Id. at 1179. Here, in contrast, it is apparent that appellant was not prejudiced, because he did consult with counsel prior to the exercise of his peremptory challenges. Accordingly, we hold that the trial court's failure to ensure that appellant's waiver of his right to be present at the bench conferences during which peremptory challenges were exercised was intelligent and voluntary, or to obtain an intelligent and voluntary ratification of the jury chosen, was harmless. See Turner v. State, 530 So. 2d 45, 49 (Fla. 1988) (opinion after remand) (holding that defendant did not waive right to be present during exercise of juror challenges, or constructively ratify counsel's actions; but that, notwithstanding absence when challenges were actually exercised, error was harmless because defendant "had an opportunity to participate in choosing which jurors would be stricken").

675 So. 2d at 997-1001.

The State thereafter sought and obtained discretionary review by this Court on the basis of conflict jurisdiction and as an issue of great public importance.

SUMMARY OF ARGUMENT

ISSUE I.

The decision below conflicts with this Court's decisions in Coney v. State, 653 So. 2d 1009 (Fla. 1995), Gibson v. State, 661 So. 2d 288 (Fla. 1995), Boyette v. State, 21 Fla. L. Weekly S535 (Fla. December 5, 1996), and Amendments to the Florida Rules of Criminal Procedure, 21 Fla. L. Weekly S518 (November 27, 1996). Conflict jurisdiction results from the lower court's application of Coney to this case despite the lack of preservation of the issue and the fact that the Appellant's trial commenced prior to Coney's effective date, as well as, the court's erroneous conclusion that presence in the court room during the exercise of peremptory challenges was insufficient.

The conflicting portions of the decision below should be disapproved.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT OF APPEAL ERRONEOUSLY APPLY, AND DIRECTLY CONFLICT WITH, DECISIONS OF THIS COURT?

After first assuming that the Coney decision applied, the court below held that, under the circumstances of the instant case, the trial court failed to ensure that appellant's waiver of his right to be present at the bench conferences during which peremptory challenges were exercised was intelligent and voluntary, or to obtain an intelligent and voluntary ratification of the jury chosen, but that this failure was harmless error. This conclusion was based upon the fact that the record established that appellant was not prejudiced as he did consult with counsel prior to the exercise of his peremptory challenges.

The decision of the lower court expressly and directly conflicts with this Court's decision in Coney, Gibson v. State, 661 So. 2d 288 (Fla. 1995), Boyette v. State, 21 Fla. L. Weekly S535 (Fla. December 5, 1996), and Amendments to the Florida Rules of Criminal Procedure, 21 Fla. L. Weekly S518 (Fla. November 27, 1996).

The decision in Coney specifically provides that the interpretation of "presence" asserted in that case was to be given prospective application only. In the instant case, the defendant's trial commenced four days **prior to** the time that Coney became final on April 27, 1995 and jury selection was thus complete. Given the fact that Coney was not final at the time the defendant's jury was selected, it should not have been applied to the defendant's case. Thus, the lower court's assumption that Coney was applicable to avoid "undertak[ing] the task of prognostication in an effort to divine the court's intent regarding those cases to which Coney will apply" is erroneous and conflicts with this Court's recognition in Boyette that it announced a new rule of law in Coney.

Additionally, in its original opinion in Coney, appearing at 20 Fla. L. Weekly S16, 17 (Fla. January 5, 1995), this Court stated that "no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." This assertion by the Court was deleted from the final opinion issued following rehearing, in which the Court held that Fla. R. Crim. P. 3.180(a)(4) means that:

a defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. Again, the court must certify the defendant's approval of the strikes through proper inquiry. Our ruling today clarifying this issue is prospective only. 653 So. 2d 1009, 113 (Fla. 1995).

Nine months after Coney was decided, this Court issued its decision in Gibson v. State, in which Gibson contended that the trial court erred in denying his request to consult with counsel prior to exercising peremptory challenges, despite counsel's proceeding with jury selection without objection, and further violated his right to be present while challenges were exercised at the bench. The Gibson Court held that

[i]n Steinhorst v. State, 412 So. 2d 332 (Fla. 1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of

juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) (holding trial court's error in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond reasonable doubt). Gibson, 661 So. 2d at 290-291.

Gibson clearly holds that the failure of counsel to object waives any Coney issue. The Court below, despite the holding in Gibson, stated that it was unwilling to read too much into the deletion on rehearing of that portion of Coney which refers to the need for objection. Conflict jurisdiction thus results from the lower court's holding that a violation of the Rule enunciated in Coney "constitutes fundamental error, which may be raised for the first time on appeal, notwithstanding the lack of contemporaneous objection." As noted by Judge Lawrence in his dissent below, this language is in conflict with and is thus irreconcilable with this Court's language in Gibson. See also: United States v. McCoy, 8 F. 3d 495, 496-497 (7th Cir. 1993) (the United States Supreme Court has interpreted the federal counterpart to the State rule, Fed. R. Crim. P. 43(a) to mean that "[a] defendant may not assert a Rule 43 right for the first time on appeal" where the defendant did not previously invoke that right either during trial or in a post-trial motion).

The decision of the First District Court of Appeal below is also expressly in conflict with this Court's ruling in Boyette v. State, 21 Fla. L. Weekly S535 (Fla. December 5, 1996). Boyette contended that although he was present in the courtroom, but not at the bench during the exercise of peremptory challenges, he was entitled to reversal based upon the Coney decision, despite the Court's pronouncement that Coney was to be applied prospectively only. He asserted entitlement to relief based upon his contention that the decision in his case was not yet final when the Coney decision issued, or, in the alternative, that the rule announced in Coney was actually not new, and thus should entitle him to reversal. In rejecting both arguments, the Court stated:

[i]n Coney, we interpreted the definition of "presence" as used in Florida Rule of Criminal Procedure 3.180. We expanded our analysis from Francis v. State, 413 So. 2d 1175 (Fla. 1982), which concerned both a defendant whose right to be present had been unlawfully waived by defense counsel, and a jury selection process which took place in a different room than the one where the defendant was located. In Coney, we held for the first time that a defendant has a right to under rule 3.180 to be physically present at the *immediate site* where challenges are exercised. See Coney, 653 So. 2d at 1013. Thus we find Boyette's argument on this issue to be without merit.¹

¹ Although it does not change our analysis in this case, we note that we have recently approved an amendment to rule 3.180(b) which will provide a clearer standard by which to resolve such issues in the future. The rule will now read: "A defendant is

Boyette's second Coney argument-- that the rule of that case should be applied because Boyette's case was non-final when the decision issued--is also without merit. In *Coney*, we expressly held that "our ruling today clarifying this issue is prospective only." *Coney* 653 So. 2d at 1013. Unless we explicitly state otherwise a rule of law which is to be given prospective application does not apply to those cases which have been *tried* before the rule is announced. See *Armstrong v. State*, 642 So. 2d 730, at 737-38 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799, 131 L. Ed. 2d 720 (1995). Because Boyette had already been tried when *Coney* issued, *Coney* does not apply.

We recognize that in *Coney* we applied the new definition of "presence" to the defendant in that case: the state conceded that the defendant's absence from the immediate site where challenges were held was error, and we found that the error was nonetheless harmless. *Coney*, 653 So. 2d at 1013. **It was incorrect for us to accept the state's concession of error. Because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site. Although the result in Coney would have been the same whether we found no error or harmless error, we recede from Coney to the extent that we held the new definition of "presence" applicable to Coney himself.** 21 Fla. L. Weekly S535-36.

Thus under the rationale of Boyette, the defendant below is not entitled to relief because the Court has recognized that it erred in accepting the state's erroneous confession of error to

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*, No. 87,769, slip op. at 2 (Fla. Nov. 27, 1996) [21 Fla. L. Weekly S518a].

the effect that Coney had a right to be physically present at the immediate site where peremptory challenges were exercised.² Even more significant is the fact that the Court has acknowledged, pursuant to Amendments to Fla. R. Crim. P. 3.180, that for purposes of the rule, physical presence means presence in the courtroom with a meaningful opportunity to be heard through counsel on issues under discussion. 21 Fla. L. Weekly at S519. This clarification of the rule is expressly intended to supersede the holding in Coney. Id., at footnote 2.

The lower court in the instant case, while ultimately correct in its decision denying relief, erred in finding that the defendant's failure to object did not bar consideration of the issue before it pursuant to Gibson. The result reached was also in direct conflict with this Court's pronouncement in Boyette that it had erred in accepting a confession of error that a defendant had the right to be physically present at side bars where peremptory challenges are exercised; instead holding that

² Numerous other cases, in which questions certified by District Courts of Appeal have been answered by this Court which has referred to its decision in Boyette, which acknowledged its error in Coney. The State would respectfully suggest that this Court instruct the lower courts that continued certification of legal questions on this issue is not necessary or in the best use of judicial and state resources.

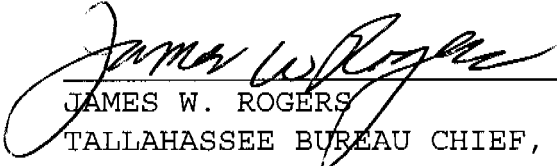
physical presence means present in the courtroom. This clarification of the holding in Coney does not announce a new rule of law, but merely clarifies one by returning the law to its state prior to Coney which the Court recognized was based upon its erroneous acceptance of a confession of error. Witt v. State, 465 So. 2d 510 (Fla. 1985).

CONCLUSION

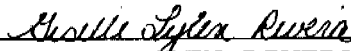
Based on the foregoing, the State respectfully submits the Court should disapprove those portions of the opinion below which state that a Coney issue does not have to be preserved, that Coney should be applied to trials commenced before its effective date, and that presence in the court room is not sufficient.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791




GISELLE LYLE RIVERA
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER
[AGO# L96-1-3470]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of February, 1997.



Giselle Lyles Rivera
Assistant Attorney General

[C:\USERS\CRIMINAL\GISELLE\L9613470\MEJIABI2.WPD --- 2/3/97,8:55 am]

Appendix

Citation/Title

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

*996 675 So.2d 996

21 Fla. L. Weekly D1355

Carlos Omar MEJIA, Appellant,

v.

STATE of Florida, Appellee.

No. 95-1182.

District Court of Appeal of Florida,

First District.

June 13, 1996.

Rehearing Denied July 12, 1996.

Defendant was convicted in the Circuit Court, Washington County, Russell A. Cole, Jr., J., of first-degree murder and robbery, and he appealed. The District Court of Appeal, Webster, J., held that: (1) trial court's failure to ensure that defendant's waiver of his right to be present at bench conferences during which peremptory challenges were exercised was harmless, and (2) defendant was not entitled to instruction on defense of voluntary intoxication.

Affirmed.

Lawrence, J., concurred in part and dissented in part and filed an opinion.

- 1. CRIMINAL LAW ↪1035(3)
 - 110 ----
 - 110XXIV Review
 - 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 - 110XXIV(E)1 In General
 - 110k1035 Proceedings at Trial in General
 - 110k1035(3) Course and conduct of trial in general.

Fla.App. 1 Dist. 1996.

Violation of rule giving defendant a right to be present when pretrial juror challenges are exercised constitutes fundamental error, which may be raised for first time on appeal, notwithstanding lack of a contemporaneous objection. West's F.S.A. RCrP Rule 3.180(a)(4).

- 2. CRIMINAL LAW ↪1030(1)
 - 110 ----
 - 110XXIV Review

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of
Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in General

• 110k1030(1) In general.

Fla.App. 1 Dist. 1996.

• Fact that an error may be classified as fundamental, so that it may be raised for first time on appeal, does not necessarily preclude application of a harmless error analysis.

3. CRIMINAL LAW ↪636(1)

110 ----

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k636 Presence of Accused

110k636(1) In general.

Fla.App. 1 Dist. 1996.

Trial court is required to ensure through proper inquiry that defendant's waiver of right to be present at bench conferences regarding peremptory challenges is intelligent and voluntary, or is required to obtain an intelligent and voluntary ratification by defendant of jury chosen. West's F.S.A. RCrP Rule 3.180(a)(4).

4. CRIMINAL LAW ↪1166.14

110 ----

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1166.5 Conduct of Trial in General

110k1166.14 Absence of accused.

Fla.App. 1 Dist. 1996.

Defendant was not prejudiced by trial court's erroneous failure to ensure that defendant intelligently and voluntarily waived his right to be present at bench conferences during which peremptory challenges were exercised; defendant understood that he had the right to participate in choice of jurors, and defendant's counsel consistently consulted with defendant regarding exercise of peremptory challenges. West's F.S.A. RCrP Rule 3.180(a)(4).

5. CRIMINAL LAW ↪55

110 ----

110VI Capacity to Commit and Responsibility for Crime

110k52 Drunkenness

• 110k55 Existence of specific intent essential to offense.

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

[See headnote text below]

5. HOMICIDE ~~286~~
 203 ----
 203II Murder
 203k28 Intoxication.

Fla.App. 1 Dist. 1996.

First-degree murder and robbery are specific intent crimes, as to which voluntary intoxication may be a valid affirmative defense.

6. CRIMINAL LAW ~~772(6)~~
 110 ----
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k772 Elements and Incidents of Offense, and Defenses in General
 110k772(6) Defenses in general.

Fla.App. 1 Dist. 1996.

As a general rule, defendant is entitled to have jury instructed on rules of law applicable to his theory of defense if there is any evidence to support such instructions.

7. CRIMINAL LAW ~~814(8)~~
 110 ----
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k814 Application of Instructions to Case
 110k814(8) Matters of defense in general.

Fla.App. 1 Dist. 1996.

To entitle defendant to an instruction on an affirmative defense, it is not sufficient that there be evidence to support such a defense; requested instruction must also be consistent with defendant's theory of defense.

8. CRIMINAL LAW ~~814(10)~~
 110 ----
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k814 Application of Instructions to Case
 110k814(10) Insanity or intoxication.

Fla.App. 1 Dist. 1996.

Defendant was not entitled to an instruction on defense of voluntary intoxication, where defendant's testimony was that another person had been responsible for charged crimes.

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Jean-Jacques Darius, Assistant Attorney General, Tallahassee, for Appellee.

• *997 WEBSTER, Judge.

In this direct criminal appeal, appellant argues that the trial court committed two errors, either of which entitles him to a new trial: (1) failing to ensure that appellant's absence from bench conferences at which jury challenges were exercised was the result of an intelligent and voluntary choice; and (2) denying appellant's requested jury instruction on voluntary intoxication as a defense to first-degree murder and robbery. Appellant also asserts that the trial court failed to grant credit on his sentences for time spent in jail prior to sentencing. We affirm.

Participation in Jury Selection

Appellant was charged by indictment with first-degree murder and robbery. Jury selection commenced on January 23, 1995, eighteen days after release of the opinion in *Coney v. State*, 653 So.2d 1009 (Fla.), cert. denied, --- U.S. ---, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995). In *Coney*, the supreme court purported to "clarify" the intent behind Florida Rule of Criminal Procedure 3.180(a)(4), which states that, "[i]n all prosecutions for crime[,] the defendant shall be present ... at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury"; and its previous decision on the same subject in *Francis v. State*, 413 So.2d 1175 (Fla.1982). It held:

The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised.... Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made.... Again, the court must certify the defendant's approval of the strikes through proper inquiry.

653 So.2d at 1013 (citations omitted). The court held, further, that a violation of rule 3.180(a)(4), as interpreted, is subject to a harmless error analysis. *Id.* Without elucidation, the court pronounced that its ruling was "prospective only." *Id.*

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

Although appellant, a native of Honduras, spoke and understood some English, at his request, an interpreter was appointed to translate during the trial. The record reflects that counsel and the trial court were aware of the recently released Coney opinion, and that they attempted to comply with what they understood its holding to require. When it came time to discuss challenges to the prospective jurors, the trial court, counsel, appellant and the interpreter all adjourned to chambers, at which point the transcript reflects the following:

THE COURT: All right.

[DEFENSE COUNSEL]: (To the Interpreter) You tell him this is a hearing, and he has a right to be here any time. He can waive it, though, like during the trial when the lawyers go up to the bench to see the judge. We may be discussing an objection or some legal point. He can waive his coming up to the bench, or he can come up there and have you come up and say what is going on.

THE DEFENDANT: (In English) Okay.

[DEFENSE COUNSEL]: Well--

THE INTERPRETER: It is okay.

[DEFENSE COUNSEL]: Is he waiving it?

THE DEFENDANT: (In English) Yes.

[DEFENSE COUNSEL]: Good idea. Okay.

After three prospective jurors had been stricken for cause, the trial court asked counsel whether they wished to address peremptory challenges in chambers, or in the courtroom. With appellant still present in chambers, defense counsel responded:

If I can have a moment, Judge, I may be able to kind of--I had told the defendant to look them over and tell me, too, and he had a couple. I will see if we can--I can do some of our peremptories now, provided we have an additional opportunity when I see who is in the box.

Defense counsel then struck three jurors, after which he said that he "would like for *998 the defendant to have an opportunity when we put them back in the box to just take a quick look at them."

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

After everyone, including appellant, had returned in the courtroom, the trial court dismissed the stricken jurors, replacing them with new prospective jurors. After the new jurors had been questioned, the trial court asked counsel if they needed "a moment." Defense counsel responded in the affirmative. It is apparent that defense counsel then conferred with appellant regarding the prospective jury panel. Defense counsel then asked if counsel could approach the bench, saying that "we did waive that other matter, for the record," an obvious reference to the fact that appellant had waived his right to be present at bench conferences. Although the transcript reflects that a bench conference followed, it was not recorded. Clearly, however, the subject was peremptory challenges, as seven additional prospective jurors were excused. Additional jurors were called and questioned. The trial court again asked if counsel needed "a minute," and defense counsel again responded in the affirmative. Again, it is apparent that defense counsel conferred with appellant. Another unreported bench conference took place, after which defense counsel said, "Judge, I want the record to reflect that the defendant has waived his presence at these bench conferences." Seven additional jurors were then excused. These jurors were replaced and, after the replacements had been questioned, another unreported bench conference took place. Four more jurors were excused, after which both parties accepted the panel. The record reflects that defense counsel exercised all ten of his peremptory challenges.

At the conclusion of the presentation of evidence, the trial court, counsel, appellant and the interpreter adjourned to chambers for the charge conference. Before taking up the matter of jury instructions, the following took place:

THE COURT: Well, let me put a couple of things on the record first.

....

Mr. Mejia, are you satisfied with the translator's services ... ?

[THE DEFENDANT]: Yes.

[THE DEFENDANT]: (Through the interpreter) Yes.

THE COURT: Mr. Adams [defense counsel], we have had a number of bench conferences, I think, earlier on. You waived the defendant's presence, but we have also had some that were not on the record. I think we ought to reflect on the record that nothing took place during those conferences where we did not have the reporter present that would in any way affect the outcome of this trial or would affect an appealable issue.

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

[DEFENSE COUNSEL]: That's correct, Your Honor. And I did discuss that through the interpreter with [the defendant], and he waived his presence. It is a much more orderly fashion, and we all know that is in light the [sic] relatively new case.

On appeal, appellant argues that *Coney* applies, and that he is entitled to a new trial because the trial court failed either to certify, after a proper inquiry, that appellant's waiver of his right to be present at bench conferences during which peremptory challenges were exercised by his counsel was intelligent and voluntary; or to require appellant to ratify the strikes after they had been made, and to certify, after proper inquiry, that such ratification was intelligent and voluntary. According to appellant, his absence from the bench conferences "thwarted the fundamental fairness of the proceedings" and "was, in any event, a clear violation of [r]ule 3.180(a)(4)." Moreover, appellant argues that the trial court's error cannot be considered harmless because it is impossible "to assess the extent of prejudice sustained by appellant's absence" and, therefore, one cannot conclude "beyond a reasonable doubt that this error did not affect the fairness of the trial."

The state responds, first, that any error was not preserved by contemporaneous objection. Next, the state argues that *Coney* is inapplicable because the supreme court expressly stated that the holding was to be "prospective only" (653 So.2d at 1013), and the decision did not become final until April 27, 1995, four days after appellant's trial had *999 begun. According to the state, under pre-*Coney* case law, it was sufficient if a defendant was physically present in the courtroom during jury selection--actual presence at bench conferences was not required. Finally, the state argues that, even if *Coney* is applicable, reversal is not appropriate because it is apparent from the record that appellant's "absence at [sic] the bench conferences did not prejudice him" and, therefore, any technical error on the part of the trial court was clearly harmless.

Regarding the state's preservation argument, we note that the initial version of the *Coney* opinion includes the following sentence, which was deleted, without explanation, after both sides had filed motions for rehearing: "Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." *Coney v. State*, 20 Fla. L. Weekly S16, 17 (Fla. Jan.5,1995). The state argues that this deletion "indicates that appellant must preserve the issue." We are unwilling to read so much into such a revision. *But see Gibson v. State*, 661 So.2d 288, 291 (Fla.1995) (denying claim that defendant's right to be present at bench conferences at which challenges for cause were made by his counsel had been violated and noting, in

675 So.2d 996, *Mejia v. State*, (Fla.App. 1 Dist. 1996)

apparent dicta, that "no objection to the court's procedure was ever made").

[1] According to the supreme court, "[t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." *Francis v. State*, 413 So.2d 1175, 1178-79 (Fla.1982) (citing *Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894), and *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)). Clearly, it is because this is considered such a critical stage of the proceedings that the court has undertaken to ensure that a defendant's right to meaningful participation in the decision of how peremptory challenges are to be used is assiduously protected. If a contemporaneous objection were required to preserve for appeal the issue of deprivation of that right, it seems to us that, as a practical matter, the right would be rendered meaningless. Accordingly, to ensure the viability of the rule laid down (or "clarified") by the supreme court in *Coney*, we conclude that a violation of that rule constitutes fundamental error, which may be raised for the first time on appeal, notwithstanding the lack of a contemporaneous objection. See *State v. Johnson*, 616 So.2d 1, 3 (Fla.1993) ("for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process"); *Salcedo v. State*, 497 So.2d 1294, 1295 (Fla. 1st DCA 1986) (allegation that defendant was absent from courtroom during exercise of peremptory challenges "alleged fundamental error which no objection was necessary to preserve"), review denied, 506 So.2d 1043 (Fla.1987).

The supreme court's failure to elucidate as to its intent when it pronounced that the holding in *Coney* was to be "prospective only" (653 So.2d at 1013) has engendered considerable confusion, in both trial and appellate courts, regarding the applicability of the holding to "pipeline," and other, cases. E.g., *Lett v. State*, 668 So.2d 1094 (Fla. 1st DCA 1996) (certifying question of great public importance on motion for rehearing). However, because we conclude that appellant is not entitled to a new trial even if *Coney* applies, we find it unnecessary to undertake the task of prognostication in an effort to divine the court's intent regarding those cases to which *Coney* will apply. Instead, we assume, for purposes of this opinion, that *Coney* does apply.

[2] Section 924.33, Florida Statutes (1995), mandates that "[n]o [criminal] judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant." Referring to this statute, the supreme court has said that, "[u]nder both the statutory law and case law of this state, a [criminal]

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

judgment shall not be reversed unless the appellate *1000 court is of the opinion that the error injuriously affected the substantial rights of the appellant." *Small v. State*, 630 So.2d 1087, 1089 (Fla.1994). According to the supreme court, in applying this harmless error test, "the burden [is] 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 is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986). The fact that an error may be classified as fundamental, so that it may be raised for the first time on appeal, does not necessarily preclude application of a harmless error analysis. *State v. Clark*, 614 So.2d 453 (Fla.1992). In fact, the supreme court expressly applied a harmless error analysis in *Coney*. 653 So.2d at 1013.

[3] Although it is apparent that, at trial, all parties concerned were attempting to comply with what they understood the recently released *Coney* decision to require, it is equally apparent that the trial court failed fully to comply with the rule laid down. A waiver of appellant's right to be present at bench conferences during which peremptory challenges were exercised was obtained. However, the trial court failed either to ensure, "through proper inquiry," that appellant's waiver was intelligent and voluntary; or to obtain an intelligent and voluntary ratification of the jury chosen. *Id.* This was error. Accordingly, we must next determine whether there is any reasonable possibility that this error had an adverse impact on appellant's right to a fair trial.

[4] It seems relatively clear that the procedural rule set out in *Coney* is intended to ensure that a defendant's right to meaningful participation in decisions regarding the exercise of challenges, particularly peremptory challenges, is zealously protected. Assuming such an underlying purpose, our review of the record satisfies us, to the exclusion of all reasonable doubt, that appellant suffered no prejudice to his right to a fair trial as the result of the trial court's technical failure to comply with all of *Coney's* requirements. It is apparent from the trial transcript that appellant understood that he had the right to participate in the choice of jurors. It is equally apparent that appellant's counsel consistently consulted with appellant regarding the exercise of peremptory challenges. Accordingly, there can be no question but that, although he was not "physically present at the immediate site where pretrial juror challenges [were] exercised" (*id.*)--i.e., at the bench--appellant did participate in a meaningful way in the decisions regarding the exercise of peremptory challenges. Thus, it would seem that the important right which the *Coney* decision was intended to protect was not impaired in any way.

Appellant offers nothing to suggest that he was, in fact, prejudiced as a

675 So.2d 996, Mejia v. State, (Fla.App. 1 Dist. 1996)

result of the technical error committed by the trial court. Instead, he relies on *Francis v. State*, 413 So.2d 1175 (Fla.1982), for the proposition that, because it is possible that he might have been prejudiced as a result of the error, we should not conclude that the error was harmless. However, we believe that *Francis* is factually distinguishable. In *Francis*, the defendant was permitted to leave the courtroom to go to the bathroom. While he was gone, his counsel waived his presence without consulting him, and jury selection commenced. The defendant returned to the courtroom before the selection process had been completed. However, the court and counsel then decided to conduct the remainder of the process in chambers, because it was too crowded around the bench. When everyone else adjourned to chambers, the defendant was left sitting in the courtroom. The defendant was never asked whether he waived his presence, or to ratify the jury selected. On appeal, the supreme court concluded that it was unable to say that the error was harmless because it was "unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised." *Id.* at 1179. Here, in contrast, it is apparent that appellant was not prejudiced, because he did consult with counsel prior to the exercise of his peremptory challenges. Accordingly, we hold that the trial court's failure to ensure that appellant's waiver of his right to be present at the bench conferences during *1001 which peremptory challenges were exercised was intelligent and voluntary, or to obtain an intelligent and voluntary ratification of the jury chosen, was harmless. See *Turner v. State*, 530 So.2d 45, 49 (Fla.1987) (opinion after remand) (holding that defendant did not waive right to be present during exercise of juror challenges, or constructively ratify counsel's actions; but that, notwithstanding absence when challenges were actually exercised, error was harmless because defendant "had an opportunity to participate in choosing which jurors would be stricken").

Voluntary Intoxication

Appellant next complains about the trial court's refusal to give a requested voluntary intoxication instruction to the jury. He argues that both of the charges against him were specific intent crimes, and that there was evidence that he was intoxicated at relevant times. Therefore, he asserts that the trial court was obliged to give a voluntary intoxication instruction upon request, and that the refusal to do so entitles him to a new trial. We disagree.

[5] [6] [7] It is true, as appellant argues, that both first-degree murder and robbery are specific intent crimes, as to which voluntary intoxication may be a valid affirmative defense. *Gardner v. State*, 480 So.2d 91 (Fla.1985). It is also true that there was evidence that appellant was intoxicated at relevant times. As a general rule, a "[d]efendant is entitled to have the jury

675 So.2d 996, *Mejia v. State*, (Fla.App. 1 Dist. 1996)

instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions." *Hooper v. State*, 476 So.2d 1253, 1256 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986). However, as the supreme court made clear in *Hooper*, to entitle a defendant to an instruction on an affirmative defense, it is not sufficient that there be evidence to support such a defense--the requested instruction must also be consistent with the defendant's theory of defense.

In *Hooper*, the defendant argued that the trial court had committed reversible error when it denied his requested instruction on voluntary intoxication in a first-degree murder case. The defendant had taken the stand at trial and denied that he had committed the offenses with which he was charged. Instead, he had testified that the offenses had been committed by an unknown intruder, whom he described in some detail. According to the supreme court, the defendant's "entire defense rested on his claim that someone else had committed the[] murders." *Id.* at 1255. Because "intoxication was not defendant's theory of defense," the court affirmed the refusal to give the requested voluntary intoxication instruction. *Id.* at 1256. See also *Broxson v. State*, 505 So.2d 1361, 1363 (Fla. 1st DCA) (affirming refusal to give voluntary intoxication instruction, in part, because defense of intoxication was "totally inconsistent with the defense presented at trial"), review denied, 518 So.2d 1273 (Fla.1987). One compelling reason for refusing to require an instruction on a defense which is inconsistent with that asserted at trial is to discourage (or, at least, not to reward) perjury. See *Wilson v. State*, 577 So.2d 1300 (Fla.1991) (affirming refusal to give instruction on entrapment when defendant testified, denying having committed acts constituting crime charged).

[8] Here, as in *Hooper*, appellant took the stand and denied under oath that he had committed the offenses with which he was charged. Instead, he testified that another person, whom he identified by name, had been responsible for the crimes. Accordingly, here, as in *Hooper*, we conclude that, because appellant elected to rely on a defense built around the assertion that someone else had committed the crimes, which defense was inconsistent with a voluntary intoxication defense, it was not error to refuse to give an instruction on voluntary intoxication.

Jail-Time Credit

Finally, appellant asserts that, although, at sentencing, the trial court orally credited 412 days spent in jail against his sentence, the written judgment does not reflect any credit. The state concedes error on this point. Frankly, we are puzzled by the parties' positions regarding the 412 days of jail credit because, although there are two written judgments in the record, both

675 So.2d 996, *Mejia v. State*, (Fla.App. 1 Dist. 1996)

reflect that *1002 appellant is to receive such credit. Accordingly, we affirm on this point, as well.

AFFIRMED.

MICKLE, J., concurs.

LAWRENCE, J., concurs in part and dissents in part with written opinion.

LAWRENCE, Judge, concurring in part and dissenting in part.

I fully concur in affirming the judgment and sentences in this case. However, I must respectfully dissent from the language of the majority opinion which holds that a violation of Florida Rule of Criminal Procedure 3.180(a)(4) constitutes fundamental error, thus permitting the issue to be raised for the first time on appeal without a proper objection in the trial court.

I agree that *Coney v. State*, 653 So.2d 1009 (Fla.1995), cert. denied, --- U.S. ----, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), did not specifically address this issue. Nevertheless, nine months after rendition of its opinion in *Coney*, the supreme court decided *Gibson v. State*, 661 So.2d 288 (Fla.1995), and in addressing a *Coney* issue said:

Based on this brief exchange, Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.

In *Steinhorst v. State*, 412 So.2d 332 (Fla.1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. *Coney v. State*, 653 So.2d 1009, 1013 (Fla.1995) (holding trial

675 So.2d 996, *Mejia v. State*, (Fla.App. 1 Dist. 1996)

court's error in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond reasonable doubt).

Gibson v. State, 661 So.2d at 290-91.

I cannot reconcile this language with the majority view of fundamental error in the instant case. We cannot tell whether the date of the trial in *Gibson* occurred before or after the decision in *Coney*. (FN1) Either way, there was no logical reason for the supreme court, in its *Gibson* decision rendered nine months after its opinion in *Coney*, to dwell on the failure of *Gibson* to preserve the issue, unless the court intended that preservation constitute a requirement for review.

The majority also cites *Francis v. State*, 413 So.2d 1175 (Fla.1982), in support of its position. However, the circumstances in *Francis* were much more egregious than those in the instant case. There, the defendant was excused for the purpose of going to the rest room. Jury selection continued during his absence; then the prosecutor, defense counsel, and judge retired to the jury room for the purpose of exercising peremptory challenges. They returned to the courtroom and a jury was sworn without consultation between the defendant and his counsel. *Francis* testified on his motion for new trial that he had been told by his counsel that he would not be permitted to go into the jury room for the purpose of selecting the jury. In contrast, the trial judge in the instant case *1003. was aware of the decision in *Coney*, but simply failed to follow it flawlessly.

I find it difficult to conclude that a routine trial practice followed in the vast majority of cases in the State of Florida for a period of almost 15 years (FN2) was so fundamentally flawed that it amounted to a denial of due process. To do so is to likewise conclude that those same cases spanning a 15-year period resulted in a denial of due process. (FN3) Thus, I would hold that violation of Florida Rule of Criminal Procedure 3.180(a)(4) is not fundamental error, and therefore may not be raised for the first time on appeal.

FN1. The opinion in *Gibson* does not reflect the date of the trial in that case, although the capital offense was committed on September 30, 1991. Therefore, it is more likely that the trial in *Gibson* predated the decision in *Coney*.

FN2. The Florida Rules of Criminal Procedure were amended in 1980 to provide that peremptory challenges be made outside the hearing of the jury panel.

FN3. The holding in *Coney* was prospective only.