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IN THE SUPREME COURT OF FLORIDA

ISIAH NEAL,

Petitioner,

vs.

Case No. 91,249

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Isiaih Neal, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appropriate volume of the record will be designated by the letter "V" followed by the volume number. The record on appeal will be referred to by the symbol "R" followed by the appropriate page number. The transcript of the trial will be referred to by the symbol "T" followed by the page number. The first supplement will be referred to by the symbol "S" and the second supplement will be referred to by the symbol "SS" followed by the page number.

STATEMENT OF THE CASE

On August 3, 1994, the state attorney of the Twentieth Judicial Circuit in Lee County filed an information charging Petitioner with second degree murder in violation of section 782.04(2), Florida Statutes (1993). (V1, R3) This offense allegedly occurred on July 4, 1994. (V1, R3) Judge Jay B. Rosman presided over the jury trial conducted in this case on June 7 and 8, 1995. (V3,4,S, T1-445) After the attorneys asked voir dire questions, the judge allowed them a few minutes to consider their selections and requested the attorneys to approach the judge at side bar. (SS438) Mr. Neal was not invited to the bench. (SS438) Cause **and** peremptory challenges were exercised at the bench. (SS438-442) Defense counsel accepted the panel, after making strikes, without further consultation with Petitioner. (SS442) The trial court asked if the panel was acceptable to the defense and received a response from defense counsel, but he did not inquire of Petitioner if the jury panel was acceptable to him. (SS442, 444)

On June 8, 1995, the jury returned a verdict of guilty of the lesser included offense of manslaughter. (V1, R13) Petitioner **was** sentenced on July 7, 1995, to the maximum guidelines sentence of 94.7 months imprisonment followed by 7 years probation. (V1, R40) Petitioner was ordered to attend counseling for alcohol abuse and anger management, perform 300 hours of community service, and pay restitution for funeral expenses. (V1, R40, 41, 47, 48) Petitioner timely filed his notice of appeal on July 7, 1995. (V2, R59)

STATEMENT OF THE FACTS

Glenn Nicholson, a detective with the Fort Myers Police Department, received a call on July 4, 1994, to respond to Palmetto Avenue in Fort Myers. (V3, T15, 16) Police officers had requested a detective to process the scene of a reported stabbing. (V3, T16) Upon arrival, Nicholson saw crime scene tape around the area and asked another officer to help him photograph and sketch the scene. (V3, T16) The victim, Mrs. Mary Neal, had already been transported by emergency medical personnel. (V3, T87) There was blood in the driveway of a residential house at 1518 Palmetto Avenue. (V3, T17)

A witness had given a knife to Officer Schwartz who in turn gave it to Nicholson. (V3, T20) Nicholson photographed the knife and took it into evidence. (V3, T20, 21) Nicholson took taped statements from two witnesses, Bobby Marshall and Lawrence Davis, which gave him probable cause to issue a pick up order for Isiaih Neal. (V3, T19, 22, 81) Everyone at the party had been drinking alcohol. (V3, T81) When Davis and Marshall gave their statements, it appeared they had been drinking. (V3, T82, 84) In a deposition, Nicholson stated that he thought their judgment was impaired. (V3, T87) On redirect examination, Nicholson thought Davis' faculties were not impaired. (V3, T96) Marshall and Davis had indicated that Isiaih had walked away from the house on Palmetto. (V3, T84)

Nicholson interviewed another witness, Lena Neal, on July 11. (V3, T82, 83) Lena had picked up a pocket knife from her bedroom. (V3, T83) Lena had fallen into some bushes after she exited the front door and was unconscious for five to ten minutes. (V3, T83)

On July 5, Nicholson was contacted by the Lee County Sheriff's Department. (V3, T23) The person from the sheriff's office indicated there **was** a black male there wanting to turn himself in for killing somebody. (V3, T23) Nicholson went to the sheriff's department and found that the black male was Isiaih Neal. (V3, T23) Nicholson took Neal into custody. (V3, T23)

Nicholson took a taped statement from Neal which lasted about 30 to 40 minutes. (V3, T23) On the tape, Neal indicated he had been drinking with a bunch of people at the house where his daughter was going to fix dinner. (V3, T34) Isiaih was talking to a lady, and Mary Neal, the victim, kept looking at him. (V3, T46)

Isiaih Neal didn't know Mary was going to be there, but he just talked to her. (V3, T35) Isiaih asked her about the house. (V3, T47) They got into an argument about signing some papers or something. (V3, T62) Mary started drinking a little bit and Mary came after Isiaih with **a** knife in her hand. (V3, T36, 47) Isiaih took off down the driveway to get out of Mary's way. (V3, T36) Isiaih grabbed Mary in the back and turned her around. (V3, T36) Isiaih was scared because he knew how she was over the years. (V3, T36) After it happened, Isiaih took off on foot because he heard someone say, "shoot him." (V3, T37) Isiaih got in his car and went to a friend's house for the night. (V3, T37) After Isiaih woke up, he realized what had happened and turned himself into the police. (V3, T37)

When Isiaih turned himself in, he was wearing the same clothes he had on the night of the incident. (V3, T38) Isiaih hardly

remembered stabbing Mary, but thought he might have stabbed her once. (V3, T38, 45) Later during the interview, Isiaih could not remember stabbing Mary. (V3, T44) Isiaih thought the knife was lying there with the food. (V3, T38, 39) Mary jumped up and got the knife. (V3, T39) Isiaih backed up and started out the driveway. (V3, T39) Mary ran behind him and stabbed Isiaih in the back. (V3, T39) Later Isiaih said Mary tried to stab him but only grabbed him in the back. (V3, T59)

Isiaih spun around, grabbed Mary, and she fell down. (V3, T39, 40, 58) Isiaih thought this was when he stabbed Mary. (V3, T58) Isiaih thought he just dropped the knife. (V3, T70) Isiaih fell on top of Mary and the knife fell out of her hand. (V3, T40, 44) Both Mary and Isiaih had a knife. (V3, T52) Isiaih got a knife from the little brick wall before Mary charged him. (V3, T53, 55) Isiaih heard somebody say, "you got the gun, then shoot him." (V3, T40) When Isiaih got up, Mary just laid there. (V3, T45) Isiaih heard his daughter say, "you done stabbed momma." (V3, T45) Isiaih did not see any blood. (V3, T70) Nicholson showed Isiaih a hat, and Isiaih recognized it as the hat he was wearing the night before the interview. (V3, T41) Isiaih said he did not get the knife out of the kitchen, nor did he get it from his waistband. (V3, T43, 44)

Isiaih could not remember having an altercation with his daughter Lena where he slashed at her with a knife and cut her in the back. (V3, T60) When Nicholson interviewed Isiaih on July 5, Nicholson did not see any wounds or cuts on Isiaih's body. (V3, T80) Nicholson did see blood on Neal's tennis shoes. (V3, T80)

Officer Joseph Schwartz of the Fort Myers Police Department was working the night of July 4, 1994. (V3, T99, 100) Around ten O'clock that night, Schwartz was dispatched to 1518 Palmetto Avenue. (V3, T100) A black female in her fifties was lying on the floor and bleeding from her chest. (V3, T100) Schwartz interviewed some of the people at the scene. (V3, T101) Bobby Marshall gave Schwartz a knife and a cap that he picked up after the man stopped stabbing the girl. (V3, T101) Schwartz did not see any other knives at the scene. (V3, T101) Schwartz locked the knife in his trunk and later turned it over to Nicholson. (V3, T102)

There were about ten people at the house when Schwartz first arrived. (V3, T104) Besides Marshall, there were about three males and one female at the scene when the victim was stabbed. (V3, T102) Schwartz told Nicholson who he needed to talk to as far as witnesses that were present. (V3, T102)

Lawrence Davis lives at 1336 Palmetto Avenue. (V3, T109) Davis was at his brother and sister in law's house at 1518 Palmetto Avenue on July 4, 1994. (V3, T109) They were having a cook out. (V3, T110) Davis, his brother, Lena Neal, Mary Neal, Isiaih Neal, and Bobby Brown were present at the cook out. (V3, T110) Most of the evening, Mary Neal was inside the house and Isiaih Neal was outside. (V3, T111) Davis did not see Isiaih and Mary arguing that night. (V3, T118)

Mary went outside of the gate to talk with her daughters. (V3, T112) Isiaih was standing in the doorway. (V3, T113) While inside the house, Isiaih had raised up his shirt and showed Davis and Lena

a knife he had in his shirt. (V3, T114) Davis did not mention this in the report he gave to the detective the night of the incident because he was in shock. (V3, T135)

Mary was closing the big gate and coming back inside. (V3, T115) Lena was standing on the sidewalk that leads to the little gate when she screamed, because Isiaih was charging toward her. (V3, T115) Isiaih knocked Lena down and then headed toward Mary. (V3, T115) Mary was trying to get out of the gate when Isiaih stabbed Mary three times. (V3, T116) Davis and Bobby Brown wrestled Isiaih to the ground. (V3, T117) Isiaih dropped the knife and then walked away. (V3, T117) Davis ran inside the house and told his brother to call the paramedics, while he grabbed a towel and tried to stop the bleeding on Mary. (V3, T117) Davis never saw Mary with a knife that night. (V3, T118)

Lena Neal lives at 1518 Palmetto Avenue. (V3, T141) Lena was having a family cookout on July 4, 1994. (V3, T141, 142) Just Lena, her husband Willie Nance, her father, mother, and children were present at the cook out. (V3, T142) The cook out started in the morning around 11:00 a.m. (V3, T142, 143) Additional people present just before dark included, Lena's sister's children, Lena's brother, Lawrence Davis and Mr. Brown. (V3, T143) Lena's mother and father, Mary Neal and Isiaih Neal, sat at the back of the driveway and talked that day. (V3, T145) The did not argue. (V3, T145) Mary and Isiaih were friends but had not lived together for a year or two. (V3, T145)

As Lena was returning outside from the bathroom, she saw Mary Neal sitting in the chair in the walkway, and Isiaih was coming from the side of the house. (V3, T148) Lena asked Isiaih what was wrong. (V3, T148) After a couple of minutes, Isiaih came out of his shirt and he and Lena argued. (V3, T148) Isiaih swung and Lena swung. (V3, T148) During this exchange, Isiaih hit Lena in the back with a knife, and she passed out. (V3, T148) When Lena got up, she was dazed. (V3, T149)

Lena could see a shadow up against the gate and she yelled "get off my momma." (V3, T149) Lena saw two quick hand throws, and she dove on his back. (V3, T149) They both fell to the ground and tussled in the driveway. (V3, T149) Isiaih was still using the knife, which was in his left hand, and he stuck Lena in the knee. (V3, T149, 150) Lena went over to her mother and a rolled her off her face. (V3, T150) Mary's eyes were white, her mouth was opened, and Lena could not feel a pulse on her. (V3, T150)

Brooke Johnson is a clerk at the jail for the Lee County Sheriff's Department. (V3, T168) On the morning of July 5, 1994, around 9 a.m., Isiaih Neal came into the Lee County Jail and told Johnson that the police were looking for him. (v3, T169, 170) Johnson asked Neal why the police were looking for him, and he said: "my wife and I had a fight last night and I killed her." (V3, T170) Johnson called the desk officer and she indicated that Fort Myers Police Department handled the case. (V3, T170) Johnson instructed Isiaih to go to the desk officer next door, and Neal willingly followed her instructions. (V3, T171)

Doctor Wallace M. Graves Jr., the medical examiner for Lee County, was accepted as an expert witness. (V3, T179-183) On July 5, 1994, Wallace performed an autopsy on Mary Neal. (V3, T183) Wallace recognized state's exhibit 9 as photographs of Mary Neal depicting her appearance, exhibit 6 showed two stab wounds to the chest wall, exhibit 7 showed a cut to the right thumb, and exhibit 8 showed a cut on the left forearm. (V3, T184) Graves determined that Mary Neal bled to death from a stab wound to the heart. (V3, T189) One stab wound in the chest was 3 or 4 inches deep and the fatal wound that penetrated the heart was 5 or 6 inches deep. (T190) The state rested. (V4, T208) Petitioner moved for a judgment of acquittal which was denied as **was** the defense's renewed motion for judgment of acquittal at the close of all evidence. (V4, T210-214, 250-253)

SUMMARY OF THE ARGUMENT

The trial court erred by allowing the attorneys to exercise peremptory challenges at the bench without inviting Petitioner to approach the bench to insure that Petitioner could exercise his right to participate in the process of utilizing peremptory challenges. In absence of inviting Petitioner to the bench, the trial court should have obtained a sworn statement from Petitioner that he ratified the use of peremptory challenges his attorney made. Since this was not done, Petitioner's right to be present at all critical stages of the trial was denied and he is entitled to a new trial.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY ALLOWING THE STATE AND DEFENSE COUNSEL TO EXERCISE PEREMPTORY CHALLENGES TO THE JURORS AT THE BENCH WITHOUT PETITIONER PRESENT?

After the attorneys asked voir dire questions the judge allowed them a few minutes to consider their selections and requested the attorneys to approach the judge at side bar. Cause and peremptory challenges were exercised at the bench. Defense counsel accepted the panel after making strikes without further consultation with Petitioner. The trial court asked if the panel was acceptable to the defense, but he did not inquire of Petitioner if the jury panel was acceptable to him. Although Petitioner's attorney accepted the panel, no inquiry was made by the court as to whether or not Petitioner ratified the exercise of peremptory challenges made by his attorney.

There **was** no indication that Petitioner was present at the bench conference where the attorneys used peremptory challenges. There is nothing in the record to indicate Petitioner ratified defense counsel's actions in making peremptory challenges.

A defendant has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence. Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Snyder v. Massachusetts, 291 U.S. 97 (1934); U.S. Const. amends. VI and XIV; Fla. Const, art. I, §§ 9 and 16. Florida Rule of Criminal

Procedure 3.180(a)(4) recognizes that a defendant's presence is mandated "[a]t the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury."

"The 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, 413 So. 2d at 1178 (citing Pointer v. United States, 151 U.S. 396 (1894)). An accused has a constitutional right to assistance of counsel in making his defense. Faretta v. California, 422 U.S. 806 (1975); Myles v. State, 602 So. 2d 1278, 1280 (Fla. 1992); U.S. Const. amends. VI and XIV; Fla. Const. art. I, § 16.

In Coney v. State, 653 So. 2d 1009 (Fla. 1995), the Florida Supreme Court held that a defendant who is present in the courtroom at counsel table is not present for the purposes of jury challenges made at the bench:

> The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. [Citation deleted.] 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. [Citation deleted.] Again, the court must certify the defendant's approval of the strikes through proper inquiry.

Conducting the critical stage of jury selection in Mr. Neal's absence violated his Florida and United States constitutional rights to counsel and due process. This constitutional violation is

fundamental error and it would be absurd to require an objection at trial as the Second District Court of Appeal would require.

> 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.

Meiia v. State, 675 So. 2d 996, 999 (Fla. 1st DCA 1996); Wilson v. State, 680 So.2d 592 (Fla. 3d DCA 1996) ("Where peremptory challenges are used, the trial court's failure to comply with the requirements of Coney constitutes fundamental error which may be raised for the first time on appeal."); Dorsev v. State, 684 So. 2d 880 (Fla. 4th DCA 1996) (no objection necessary to preserve Coney requirement that the trial court certify waiver of presence or ratification of counsel's strikes); Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1996) ("Patently, the procedure the Coney court prescribed in order for a defendant to waive his presence would be superfluous if the simple failure to make a timely objection had the same result.")

The record in the instant case fails to establish a waiver of presence or a ratification of strikes exercised by counsel; and, therefore, the cause must be reversed and remanded for a new trial. Butler v. State, 676 So. 2d 1034, 1035 (Fla. 1st DCA 1996) ("Because such personal waiver or acquiescence was not obtained in

the present case, the appealed orders are reversed and the case is remanded.").

It is impossible to show that Mr. Neal's absence from the bench conferences during jury selection **was** harmless. Chapman v. California, 386 U.S. 18 (1967) (the burden is on the State as the beneficiary of error to establish there was no reasonable possibility that the error contributed to the conviction).

In this case the Second District Court of Appeal found that even if a Conev error appeared in the record, it was not preserved for review. Judge Northcutt asserted that it would be more appropriate to raise the Coney issues in **a** 3.850 motion. Neal v. State, 18 Fla. L. Weekly D1883(b) (Fla. 2d DCA July 30, 1997). In Hill v. State, 696 So. 2d 798 (Fla. 2d DCA 1997) in Judge Altenbernd's concurrence, he asserted that the Coney issues can only be raised in a 3.850 motion accompanied by a statement swearing the defendant would have had a different jury had he participated in the jury selection. Hill, 696 So. 2d at 800. Mr. Neal disagrees.

Requiring defendants to file a sworn statement about what they would have done during events from which they were excluded has inherent problems. What one would have done, based on memories of feelings and appearances, had a procedure been conducted differently is not a matter susceptible to articulation in a sworn statement. Defendants may not remember what occurred during voir dire with sufficient clarity to support an attestation. A defendant swearing he would have chosen a different jury would be entitled to a hearing on his or her motion while a defendant admitting

confusion or lack of clear memories may be denied. Some records may indicate a juror whose responses may be sufficiently troubling that a peremptory strike may have been appropriate, while in other cases peremptory strikes may be exercised on mere feelings or appearances.

The nature and purpose of peremptory challenges makes impossible an assessment of the prejudice caused when a defendant is not present to consult with counsel during the exercise of the challenges. Francis, 413 So. 2d at 1179; Walker v. State, 438 So. 2d 969, 970 (Fla. 2d DCA 1983). See Dorsev v. State, 684 So. 2d 880 (Fla. 4th DCA 1996) ("If defendant had participated in the exercising of peremptory strikes, it may have resulted in different jurors deciding his guilt or innocence. We cannot, under those circumstances, conclude beyond a reasonable doubt that the error did not affect the verdict.").

Jury challenges are "often exercised on the basis of sudden impressions and unaccountable prejudices based only on bare looks and gestures of another or upon a juror's habits and associations." Matthews v. State, 687 So. 2d 908 (Fla. 4th DCA 1997). The exercise of jury challenges "may involve the formulation of on-the-spot strategy decisions which may be influenced by the actions of the state at the time." Id. at 909 (citing Walker v. State, 438 So. 2d 969 (Fla. 2d DCA 1983)). Mr. Neal, who was not shown to be present during jury selection, could not aid his counsel in making on-the-spot decisions of whether or not to challenge jurors peremptorily

or for cause or how to react to the actions of the State at those conferences.

> While there are many facets to the right to assistance of counsel, there can be no doubt that a core element is ready access to and communication with counsel during trial.
>
> . . .
>
> Any delay in communication between defendant and defense counsel obviously will chill this constitutional right. Communication between defendant and defense counsel must be immediate during the often fast-paced setting of a criminal trial.

Myles, 602 So. 2d at 1280.

Violating a defendant's right to be present during the exercise of jury challenges is fundamental error that may be raised for the first time on appeal. See Francis, 413 So. 2d at 1177-1179. The First, Vann v. State, 686 So. 2d 851 (Fla. 1st DCA 1997) Third, Wilson v. State, 680 So. 2d 592 (Fla. 3d DCA 1996) and Fourth, Dorsey, Brower, District Courts of Appeal have reversed and remanded for a new trial based on Coney, apparently without any sworn statement from the defendant required. The fact that a defendant was absent from proceedings at which the jury was selected and there was no waiver or ratification should be sufficient to require reversal. The requirement of **a** sworn statement may result in the denial of claims of inarticulate pro se movants. Judge Altenbernd's suggestion is unnecessary and inappropriate.

If defense counsel consulted with Mr. Neal before jury selection began, this cannot turn the error into a harmless one. It appears from the record, Mr. Neal was not present when the State

announced its peremptory challenges and could not consult with defense counsel in reaction to the State's challenges. There is error even where the record does not reflect whether the defendant was present at sidebar, because the court or the State need to establish that all due process requirements have been met. Chavez v. State, 22 Fla. L. Weekly D1591 (Fla. 3d DCA July 2, 1997), Ellis v. State, 22 Fla. L. Weekly D1621 (4th DCA July 2, 1997). The court in Ellis recognized conflict with the First District which has found that since it is the appellant's burden to show reversible error, it is the appellant's burden to demonstrate that he was not present at the site where juror challenges were exercised. See Faison v. State, 22 Fla. L. Weekly D1230, (Fla. 1st DCA May 13, 1997). The court in Ellis went on to reason that: "Where the record is silent, we do not see how the appellant would ever be able to meet this burden. We find that the more prudent approach would be to keep the burden on the trial court and the State to show that the Coney requirements have been met." (cites omitted) Ellis, 22 Fla. L. Weekly at D1622.

The instant case is similar to Ellis in that the trial court or the State failed to show that Petitioner was present at the immediate site where juror challenges were exercised, and the record does not reflect that Petitioner knowingly and voluntarily waived his right to be present at the site or that he ratified the juror challenges that were made outside his presence. Thus, the rule set forth in Coney has been violated. Coney, 653 So. 2d at 1013. The court in Ellis found that this error was not harmless and

reversed and remanded for a new trial. Ellis, 22 Fla. L. Weekly at D1622.

The record reflects that defense counsel did not consult with his client at all once the exercise of peremptory challenges began. At the time defense counsel accepted the members of the jury, Mr. Neal had not been consulted; and there were still defense challenges left to be used. Such limited participation in the selection of the jury can hardly be considered to be the meaningful participation in the jury selection process required by Coney. Accordingly, the error of absenting Mr. Neal from being physically present during the exercise of the challenges cannot be deemed harmless. Reversal and new trial are required.

CONCLUSION

Based on the above-stated argument and authorities, this Court should reverse and remand this case for a new trial on the lesser included offense of manslaughter.

APPENDIX

PAGE NO.

1. Second District Court of Appeal's opinion dated July 30, 1997. A1-A3

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ISIAIH NEAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 95-02792

Opinion filed July 30, 1997.

Appeal from the Circuit Court for Lee County; Jay B. Rosman, Judge.

James Marion Moorman, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Jon J. Johnson, Assistant Attorney General, Tampa, for Appellee.

Received By
JUL 30 1997
Appellate Division
Public Defender's Office

NORTHCUTT, Judge.

Isiaih Neal was tried before a jury on a charge of second degree murder. The jury found him guilty of manslaughter. Neal challenges his conviction on the sole ground that the trial court allowed counsel to exercise challenges to prospective jurors

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at a bench conference outside Neal's immediate presence, in violation of the rule announced in Coney v. State, 653 So. 2d 1009, 1013 (Fla.), cert. denied, ___ U.S. ___, 16 S. Ct. 315, 133 L. Ed. 2d 218 (1995). We affirm because no such error appears in the record, and, in any event, this issue was not preserved for review on direct appeal.

Neal was present in the courtroom during jury selection. After voir dire, the judge asked counsel to take a few minutes to consider their selections and then approach the sidebar. The record does not disclose whether Neal attended the sidebar conference. It does reflect that the judge did not inquire whether Neal waived his right to be present at the bench during the juror challenges, and that neither Neal nor defense counsel made any objections in this regard.

An appellant bears the burden to establish the existence of reversible error. E.g., Moore v. State, 504 So. 2d 1311 (Fla. 1st DCA) (claim that reversible error occurred because defense counsel was not present when trial court responded to jury question was mere speculation because the record was silent on the issue), review denied, 513 So. 2d 1062 (Fla. 1987). Here, the record fails to reflect that Neal was not immediately present during the juror challenges; to the contrary, the judge's failure to make a waiver inquiry and the failure of the defense to object on that ground are consistent with the possibility that Neal actually was at the bench conference. Because no error appears in the record, we must affirm. See Mathis v. State, 683 So. 2d 582 (Fla. 1 st DCA 1996) (Criminal Division en banc), decision approved on other grounds, 688 So. 2d 334 (Fla. 1997).

Beyond that, even if a Coney error had appeared in this record, it was not preserved for review. This court recently has held that the failure to obtain a Coney waiver cannot be raised on direct appeal unless an objection on that ground was made at trial. Lee v. State, Case No. 96-00360 (Fla. 2d DCA July 2, 1997). instead, it is more appropriate to allege such an error in a motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We acknowledge that we are in conflict with decisions of other districts holding that Coney errors are fundamental. See, Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996); Wilson v. State, 680 So. 2d 592; Brower v. State, 684 So. 2d 1378 (Fla. 4th DCA 1996), review granted, 694 So. 2d 739 (Fla. 1997).

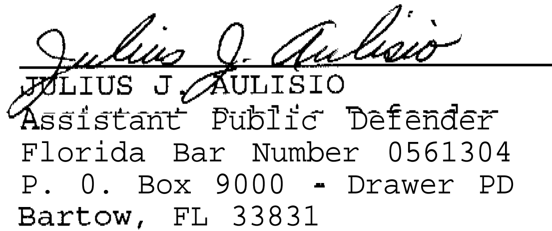
Affirmed.

DANAHY, A.C.J., and FRANK, J., Concur

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Helene S. Parnes, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on 20th day of November, 1997.

Respectfully submitted,



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