IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **FSC No. SC01-1906**
2d District No. 2D00-789

ADOLPHUS MERRICKS,

Respondent.

_____/

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

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Second District. Respondent, Adolphus Merricks, was the defendant in the trial court and the Appellant in the District Court of Appeal. The symbol "R" designates the original record on appeal. The symbol "T" designates the transcript of the trial before the court.

STATEMENT OF THE CASE AND FACTS

The respondent, Appellant down below, appealed his convictions and sentences for sexual battery and attempted sexual battery. The Second District Court of Appeal majority opinion reversed these convictions because the trial court erred in denying the defense motion for mistrial based upon an improper communication between a bailiff and the jury in violation of Florida Rule of Criminal Procedure 3.410. Merricks v. State, 25 Fla. L. Weekly D2031 (Fla. 2d DCA August 17, 2001). Rule 3.410 provides

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

After the jury retired to deliberate, a juror informed a bailiff that the jury would like some testimony read back. Another bailiff told the juror "You'll have to rely on your memories," and shut the door. The trial judge was advised, and summoned defense counsel and the prosecutor. (T. 225-226). One minute later, the bailiff returned and advised that the jury reached a verdict. The judge discussed the incident with defense counsel and the prosecutor before receiving the verdict. The judge pointed out that the communication was improper, but he would have likely given

the same response. Defense counsel moved for mistrial, which the trial court denied. The court found that any error would not be prejudicial to the defense since "the communication was inadvertent, and was done without the knowledge of the court or anyone else, and that the jury advised the bailiff that it had reached a verdict immediately after it was given the response by the bailiff." Merricks, supra.

The majority opinion of the Second District Court of Appeal reversed the convictions, finding the violation per se reversible error once the defense counsel objected and moved for mistrial. The dissent pointed out that the per se error rule espoused by Rule 3.410 involved misconduct by the trial judge. Here the rule was violated by a bailiff, not a judge, and should be subject to a harmless error analysis. The dissent further attached an appendix to the opinion which includes the entire discussion between the trial court and opposing counsel as follows:

> (These proceedings took place at 6 p.m.)
>
> **THE COURT:**
> Thank you.
> Okay. Note the presence of the defendant.
>
> Counsel, I need to advise you and confirm that -- what has transpired in this matter and do it of record.
> I was advised by the -- one of the bailiffs a few minutes ago of an incident that took place that all completely took place before I was advised of it, that the bailiff came to my chambers to advise me that the jury -- someone from the jury knocked on the jury room, stuck their head out, and said, "We'd

like to have some of the testimony read back."

And before that bailiff could do anything to respond, another bailiff told the jury, "You'll have to rely on your memories," and shut the door.

The bailiff, the first bailiff, came to my chambers to report that to me. I advised him to gather up the court personnel and counsel so I could advise counsel of that and discuss it.

And frankly, in all likelihood, I want to indicate that my reaction would probably have been to that question "We'd like some testimony read back," would probably have been, in all likelihood to the jury, bring them in and tell them, "You're going to have to rely on your memory," exactly what the bailiff told them, for the record.

Everyone at this point understands and the bailiff will subsequently understand that it is entirely, solely, and exclusively the province of the Court to have such conversations with the jury in the presence of counsel, and not the bailiff. And that's an issue that will be addressed separate and apart from its relationship to this case.

But the rest of the story is that after I sent the bailiff out of my chambers to gather everybody, he returned a minute later and said the jury then notified the bailiffs that they had a verdict. And upon hearing that, I had him continue to notify everybody, and we have discussed it.

We have a verdict that the jury has come back with, and at this time I want to confirm on the record the events that transpired and give counsel an opportunity to be heard on the -- on where we are and discuss receiving the verdict.

Ms. Kennedy, on behalf of the State?

MS. KENNEDY (Assistant State Attorney):

Judge, at this point we're raising no objection and ask that you take the verdict, that I think everything that it -- it would result in harmless error, and for that reason, we ask that we receive the verdict.

THE COURT:

Okay. Thank you.

Mr. Showers.

MR. SHOWERS (Defense Attorney):

Your Honor, at this time we will object to that. We feel that it would be prejudicial to Mr. Merricks.

THE COURT:

Okay. Thank you, Mr. Showers.

Is there any suggestion of anything that the Court -- you would like the Court to do to deal with the issue to mitigate or eliminate any potential prejudice?

MR. SHOWERS (Defense Attorney):

Your Honor, I guess we would move for a mistrial.

THE COURT:

Okay. I will deny that motion. Under the circumstances, I believe that what was done was inadvertent and not -- inadvertent and certainly not with the knowledge of the Court or anyone else and would not have been done had the Court had the opportunity to know about it in advance and deal with it.

But at this point, given the circumstances of the jury immediately advising of a verdict, I do not find that any error involved would be prejudicial to the defendant. And at this time I intend to proceed to receive the verdict from the jury.

Anything further?

Shall we bring the jury back in and receive the verdict?

Mr. Showers, would you like me to inquire of the jury about the issue of the question of the testimony?

MR. SHOWERS (Defense Attorney):

No, your Honor.

THE COURT:

No? Okay. Because I would be happy to do so before receiving the verdict.

MS. KENNEDY (Assistant State Attorney):

Judge, actually, I think to preserve the record for appeal, I mean, in order for the Court to decide whether it truly was harmless error, I think they would have to know whose testimony it was to be read back.

THE COURT:

Well, that was the reason for asking, for

offering the inquiry.
(The jury entered at 6:06 p.m.).
THE BAILIFF:
The jury is in the jury box, your Honor, and they indicated they have reached a verdict.
THE COURT:
Okay. Madam Foreperson, the jury has reached a verdict?
THE FOREPERSON:
M'hum (affirmative).
THE COURT:
Would you hand that to the bailiff, please.
Thank you.
And ladies and gentlemen of the jury, before I read the verdict and publish the verdict, I'd like to inquire. I understand that there was an issue of a possible request to have testimony of a witness read back immediately prior to the jury reaching the verdict.
Madam Foreperson, can you confirm?
THE FOREPERSON:
Yes, sir.
THE COURT:
Okay. And the Court was not advised of that request before the verdict came back. Can you indicate for me what the request was or the nature of the request specifically.
THE FOREPERSON:
We had some discussion trying to recall some of the testimony and thought if it was easy for us to have it read back it might clarify it.
When we were initially told, no, that's normally not the case, we came back and discussed it further and then felt comfortable with our decision.
THE COURT:
Okay. Very good.
Under the circumstances, the advice you should have gotten from me and would have gotten from me, the direction would have been to rely upon your own memories.
So, really, where you are now and where you are, having reached a verdict, sounds like

it's - it's where you intend to be -

THE FOREPERSON:

Right.

THE COURT:

-- where you want to be. Is that right?

THE FOREPERSON:

M'hum (affirmative).

THE COURT:

Okay. Counsel, would you like me to inquire on anything further?

MS. KENNEDY (Assistant State Attorney):

No, Judge.

THE COURT:

Mr. Showers?

MR. SHOWERS (Defense Attorney):

No, your Honor.

THE COURT:

Okay. I will confirm the ruling on the defense's motion previously after having considered the information.

Okay. The Court finds that there are no errors or omissions in the filling out of the verdict form.

(See Merricks, 25 Fla. L. Weekly D2032 (Altenbernd, J., dissenting). The majority certified the following question of great public importance in light of Judge Altenbernd's dissent.

> IS A BAILIFF'S OFF-THE RECORD ANSWER TO A JURY'S QUESTION AN ERROR REQUIRING PER SE REVERSAL OR MAY IT BE SUBJECTED TO A HARMLESS ERROR ANALYSIS UNDER STATE V. DIGUILIO, 491 SO. 2D 1129 (FLA. 1986)?

The Second District Opinion reversing the convictions and certifying the above question was filed on August 17, 2001. The State filed a Notice to Invoke Discretionary Jurisdiction on August 27, 2001. The State's Motion to Stay the Mandate was granted on August 17, 2001. On September 4, 2001, this Court postponed its decision on jurisdiction.

SUMMARY OF THE ARGUMENT

The trial judge properly denied the motion for mistrial since any violation of Rule 3.410 was harmless and could not have prejudiced the verdict. The per se error rule applies to misconduct by the trial judge. A violation by a bailiff is subject to a harmless error analysis.

ARGUMENT

IS A BAILIFF'S OFF-THE RECORD ANSWER TO A JURY'S QUESTION AN ERROR REQUIRING PER SE REVERSAL OR MAY IT BE SUBJECTED TO A HARMLESS ERROR ANALYSIS UNDER STATE V. DIGUILIO, 491 SO. 2D 1129 (FLA. 1986)?

Respondent claims the trial court committed reversible error in denying his motion for mistrial with regard to improper communication between a bailiff and the jury in violation of Florida Rule of Criminal Procedure 3.410. The majority opinion of the Second District Court of Appeal reversed Respondent's conviction. The Second District held that the improper communication between a bailiff and the jury outside of the presence of counsel for the parties was per se reversible error. The State submits that there was no reversible error in this matter.

Rule 3.410 Fla. Rules of Crim Pro provides as follows:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

In Ivory v. State, 351 So. 2d 26 (Fla. 1977) this court held it was per se reversible error for a trial judge to communicate to

the jury outside the presence of opposing counsel. This Court held that a violation of Rule 3.410 "is so fraught with potential prejudice that it cannot be considered harmless." This Court further held that "it is prejudicial error for a **trial judge** to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request." Ivory, 351 So. 2d at 28. (Emphasis added).

More recently in Thomas v. State, 730 So. 2d 667 (Fla. 1998) this Court held that absent waiver, it was per se reversible error for the trial court to respond to a jury question outside the presence of counsel, in order to discuss the proper action. This Court held that the per se reversible error rule in Ivory is prophylactic in nature and must be objected to by defense counsel. In Thomas, defense counsel indicated he had no objection. Therefore this Court determined there was no reversible error.

In the instant case, the trial judge did not violate Rule 3.410. Rather, as the dissent points out, when the Rule is violated by a bailiff, a mistrial is not compelled. It should be subject to harmless error analysis. Here, the bailiff did not tell the jury "about any evidentiary information outside the record and did not give them inaccurate information. He merely gave the jury the same procedural information that the trial judge would have

given them in open court." Merricks, 25 Fla. L. Weekly D2032 (Altenbernd, J., dissenting).

The instant case is similar to that of McKinney v. State, 579 So. 2d 80 (Fla. 1991). McKinney involved a violation of Section 918.07 Florida Statutes (1985). The Statute provides as follows:

> 918.07. Admonition to officer in charge of jurors
>
> When the jury is committed to the charge of an officer, the officer shall be admonished by the court to keep the jurors together in the place specified and not to permit any person to communicate with them on any subject except with the permission of the court given in open court in the presence of the defendant or the defendant's counsel. The officer shall not communicate with the jurors on any subject connected with the trial and shall return the jurors to court as directed by the court.

McKinney claimed fundamental error where the bailiff had an ex-parte communication with the jury. During deliberations, the jurors summoned the bailiff to ask whether they should have separate verdict forms for premeditated and felony first-degree murder. The bailiff "told them premeditated murder was part of the instructions. They were not to rule on premeditated murder." McKinney, 579 So. 2d at 83.

The bailiff then informed the judge of this communication. The trial court did not declare a mistrial, and did not instruct the jury to disregard the bailiff's comments. The trial judge called in the jury and reinstructed it on the verdicts for first-degree murder. Defense counsel neither objected to the

judge's handling of the matter nor moved for a mistrial. This Court held that the bailiff's remark to the jury was in violation of Section 918.07. However, such error requires a reversal only where the error prejudiced the defendant such that his substantive rights were violated. See, Ennis v. State, 300 So.2d 325, 328 (Fla. 1st DCA 1974). "Prejudice exists where there is a reasonable possibility that the bailiff's communication affected the jury's verdict. McKinney, 579 So. 2d at 83. See State v. Hamilton, 574 So.2d 124 (Fla.1991).

As in the present case, the Court in McKinney called the jury in, and in the presence of the defendant and both counsel advised it of the proper procedure for the court to respond to its questions.

> Although the judge did not specifically instruct the jury to disregard the bailiff's comments, he did completely reinstruct it on the possible verdicts for the murder charge. In view of the nonprejudicial nature of the bailiff's comment, as well as the corrective action taken by the trial court, we are persuaded beyond a reasonable doubt that the bailiff's comment did not affect the verdict. Thus, under the facts in this case, the error was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

McKinney, 579 So. 2d at 83. See also Walker v. State, 546 So. 2d 1165 (Fla. 3d DCA 1989)(harmless error where bailiff responded to juror's request for map of crime scene stating that map was not in evidence because statement was innocuous). In the instant case, the action by the bailiff was in violation of Section 918.07

involving the admonition to officers in charge of the jury and a violation of this statute is not per se reversible. Rather it is clearly subject to harmless error analysis. Rule 3.410 is intended to regulate the conduct of trial judges, not bailiffs. The per se reversible error rule similarly is applied to trial judges, not bailiffs. Therefore, the state may show that any error did not prejudice the defense.

The instant case is unlike that of Thomas v. State, 348 So. 2d 634 (Fla. 3d DCA 1977) in which the bailiff told the jury during deliberations that the judge would declare a mistrial unless the jury reached a unanimous decision. This comment was prejudicial to the defense because it may have deprived him of a "hung jury. In Ennis, supra, the court properly determined it was harmless where the bailiff told the jury that the robbery victim kept his money in the bank. Such comment did not prejudice the defense. Of the utmost significance is the fact that a harmless error analysis was applied in all of these cases involving bailiffs communicating with jurors.

Such harmless error analysis is clearly the method used in federal cases involving contact with jurors. Fed. R. Crim. P. 43(a) requires a judge to respond to jury questions in the presence of counsel. Such error requires reversal if it affects a defendant's substantial rights. In effect, a harmless error analysis if performed in the federal courts. See United States v.

Patterson, 644 F. 2d 890 (1st Cir. 1981)(court clerk informing jury that transcripts would not be provided was error in the conduct of trial but was non-prejudicial error).

The trend away from per se reversible error and toward a harmless error analysis is apparent from a number of state holdings. See Johnson v. Kentucky, 12 S.W. 3d 258 (Ky. 1999) (no mistrial warranted where there was improper conversation between juror and deputy where juror asked if there would be separate sentencing phase, and deputy answered yes); Washington v. Bourgeois, 945 P. 2d 1120 (Wash 1997)(defendant not prejudiced by ex parte communication where juror told bailiff that spectators had been glaring at state witness; inconsequential communication may constitute harmless error which state must then show was harmless beyond reasonable doubt); Hallman v. United States, 722 A. 2d 26 (D.C. Cir. 1998) (violation of rule requiring presence of defendant at every stage of trial is subject to harmless error and there was no prejudice where clerk responded directly to jury note seeking written copy of instructions); Michigan v. France, 461 N.W. 2d 621 (Mich. 1990) (substantive communication with jury outside presence of counsel carries presumption of prejudice, while administrative and housekeeping communications carry no such presumption of prejudice, and state may demonstrate lack of prejudicial effect); Wisconsin v. Burton, 112 N.W. 2d 263 (Wis. 1983)(when communication with jury did not involve substance of the case, the error was

harmless).

In the instant case, the court did have a discussion with counsel about the proper action to take. Immediately upon being informed of the jury question, the court brought counsel in for a hearing and determined that he would have instructed the jury in the same manner. A hearing was held, and the jury was given the opportunity to voice their question. All of this took place prior to the announcement of the verdict. Therefore there is no prejudicial violation of Rule 3.410.

As was pointed out by the dissent, the defense may have technically preserved this issue by asking only for a mistrial. However, he "waived the right to claim per se error by rejecting other adequate methods to correct the error in the trial court." Merricks, 25 Fla. L. Weekly D2032 (Altenbernd, J., dissenting). The court asked defense counsel if he wished the court to inquire of the jury about which testimony they wanted read back. Defense counsel refused this. The court then asked the jury foreperson what was the nature of the request. The foreperson indicated the jurors were trying to recall some of the testimony and would like it read back if it was easy. When they were told that's not normally the case, they discussed it further and felt comfortable with the decision. The judge further indicated he would have advised them to rely on their memories. (T. 229-230).

The trial judge carefully considered this matter and discussed

it with the jury in open court before accepting the verdict. As was pointed out in the dissent, there is no preserved error in this record that is not harmless beyond a reasonable doubt. Therefore the per se reversible error rule should not apply. Merricks, 25 Fla. L. Weekly D2032 (Altenbernd, J., dissenting).

The instant case is unlike that of Coley v. State, 431 So.2d 194 (Fla. 2d DCA 1983). In Coley, the trial judge was told by a bailiff that the jurors had a question. The court had the bailiff tell the jurors that they were to rely on their own recollection. The Second District determined that amounted to a communication with jurors during their deliberations outside the presence of counsel. The conviction was reversed. In the instant case the trial judge remedied any error by immediately summoning counsel and conducting a hearing. The court further remedied any error on the part of the bailiff by then questioning the jury foreperson prior to the verdict.

In the instant case, there was no reversible error with regard to a violation of this rule. The record indicates that a juror asked one of the bailiffs to have some of the testimony read back. Before that bailiff could respond, another bailiff told them to rely on their memories. The first bailiff them immediately informed the judge. The court accordingly informed both attorneys and conducted a hearing. (V. 1: R. 48).

The trial court indicated his response would have similarly

been to have the jurors rely on their memory. (V. 1: R. 48). The court denied the defense motion for mistrial and determined it was inadvertent and not prejudicial to the defendant. (V. 1: R. 50). The defense then refused the court's offer to question the jury about their question prior to the rendering of the verdict. (V. 1: R. 51). Nonetheless, the court in an abundance of caution asked the jury about the reading back of some testimony. The jury foreperson responded, "We had some discussion trying to recall some of the testimony and thought if it was easy for us to have it read back it might clarify it. When we were initially told, no that's normally not the case, we came back and discussed it further and then felt comfortable with our decision." (V. 1: R. 52). The court then informed the jury his instruction would have been to rely upon your own memories. Defense counsel then declined the judge's request to inquire further. (V. 1: R. 53).

As was stated in Mills v. State, 620 So. 2d 1006, 1008 (Fla. 1993) the purpose of Rule 3.410 and the per se error were to prevent "lack of notice to counsel, coupled with the lost opportunity for counsel to argue and to place objections on the record." In this case, counsel was given notice and an opportunity to place objections on the record. Since the purpose behind Rule 3.410 was served, there was no error and no violation. Per se reversible error should not apply to a situation where the trial court can fully cure the error at the point when it was discovered.

The error that occurred in the instant case is not of such a type as to result in a "structural defect in the constitution of the trial mechanism, which [defies] analysis by harmless error standards." Arizona v. Fulminante, 499 U.S. 279, 309 (1991). As the dissent points out, "It is relatively easy for appellate courts to regulate the in-court conduct of trial judges. Attempting to police the out-of-court and off-the-record comment of bailiffs to juries is entirely another matter. Regulating such conduct of bailiffs with a rule requiring per se reversal may create more problems than solutions." Merricks, supra.

CONCLUSION

In light of the foregoing facts, arguments, and citation of authority, Petitioner respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Brad Permar, Esquire, Assistant Public Defender, Public Defender's Office, P.O. Box 9000- Drawer PD, Bartow, Florida 33831-9000 on this 27th day of September 2001.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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