IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

CASE NO. 63,346

vs. :

DALE WHEELER,

Respondent. :

REPLY BRIEF OF PETITIONER

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TOPICAL INDEX

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PRELIMINARY STATEMENT

Petitioner, State of Florida was the Appellee in the First District Court of Appeal and the prosecuting authority below. Respondent was the Appellant and defendant below. References to the transcript of testimony will be by the symbol "T" in parentheses followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent has attempted to do in this Court what he could not do in the First District Court of Appeal, i.e., state the facts in a light most favorable to his position rather than in a light most favorable to sustain the judgment and sentence. See Parrish v. State, 97 So.2d 356 (Fla.1st DCA 1957), which stands for the proposition that a reviewing court must assume that the jury believed the credible testimony most unfavorable to the defendant and drew from the facts established those reasonable conclusions most unfavorable to the defendant. Since the jury found Respondent guilty, it must be assumed by a reviewing court that the jury did not believe his version of the testimony.

ARGUMENT

I.

THE JURY WAS CORRECTLY INSTRUCTED ON THE STATE'S BURDEN OF PROOF.

Respondent has premised his argument on his belief that the jury was misled concerning the State's burden of proof in this case. However, the record reveals that the jury was properly instructed that the State had to prove Respondent's guilt beyond a reasonable doubt and that the Respondent was not required to prove anything (T-213).

The State has the burden to prove all elements of a crime beyond a reasonable doubt -- this burden remains with the State throughout an entire trial, regardless of whatever affirmative defense is raised by the defendant. The Constitution permits the government to allow the burden of persuasion to shift to a defendant, but the burden of proof to prove the entire case beyond a reasonable doubt stays with the State throughout an entire trial. The record reveals that the jury was so instructed in this case.

Contrary to Respondent's contentions, the defense of entrapment is affirmative in the sense it requires a defendant to bear the risk of nonpersuasion. See Barnes v. United States, 412 U.S. 837, 846, 93 S.Ct. 2357, 37 L.Ed.2d 380, 387, n.11 (1973). In other words, if a jury finds a defendant guilty beyond a reasonable doubt, then the jury has of necessity found that the

defendant intended to commit the crime and that he was not induced or entrapped.

It is understandable why Respondent would attempt to minimize the affect of the United States Supreme Court's decision in Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), but the fact remains that the standard jury instructions fully comport with the constitutional requirements outlined in Patterson. Compare Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), which discusses the affirmative defense of insanity.

The instructions in this case required Respondent to carry the burden of persuasion, but they did not require him to prove anything. The State was required to prove each essential element of the crime, and the jury was so instructed.

The State specifically disagrees with Respondent's assertion that the First District approved the "so-called federal view" concerning entrapment instructions. See United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982), cert. denied sub nom., Natale v. United States, ____U.S. ____, 33 Cr.L. 4019 (1983). In that case, the defendants specifically requested the Court to instruct the jury that the government had the burden of proving that the defendants were not entrapped (no instruction issue was raised in Respondent's case). The federal court of appeals rejected that argument and stated that the jury instructions were constitutionally sufficient because the jury had been instructed on the government's general burden of proving its entire case

beyond a reasonable doubt and that the jury had been specifically instructed (like Respondent's jury was) that the Defendant did not have to prove anything.

What Respondent is really asking for is a special instruction that the State must disprove beyond a reasonable doubt whatever affirmative defense a defendant might raise, e.g. self-defense or insanity. This would mean that if a defendant presents any evidence at all concerning his affirmative defense, the State's proof must fail. That is not the law, and the Court should not make it the law. Florida's standard jury instructions clearly place the burden of proof upon the State, and the jury was not misled in this case.

II.

THE TRIAL COURT CORRECTLY OVERRULED RESPONDENT'S OBJECTION AND DENIED RESPONDENT'S MOTION FOR MISTRIAL DURING THE PROSECUTOR'S CLOSING ARGUMENT.

Regardless of what Respondent has argued, the fact remains that the First District did not allow the State during closing argument to make reasonable inferences from the evidence which had been presented. Since Respondent had specifically admitted that he was a drug dealer in order to utilize the defense of entrapment, the State's closing argument was not improper at all, much less reversible error. See Spencer v. State, 133 So.2d 729,731 (Fla. 1961); Paramore v. State, 229 So.2d 855 (Fla. 1969), Breedlove v. State, 413 So.2d 1,8 (Fla. 1982); Blair v. State, 406 So.2d 1103,1107 (Fla. 1981).

CONCLUSION

The First District's decision should be quashed, and Respondent's judgments and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been furnished to William K. Jennings, P.O. Box 2706, Fort Walton Beach, Florida 32549 this 16th day of May, 1983.

Lawrence A. Kaden

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