Due 4-28-86

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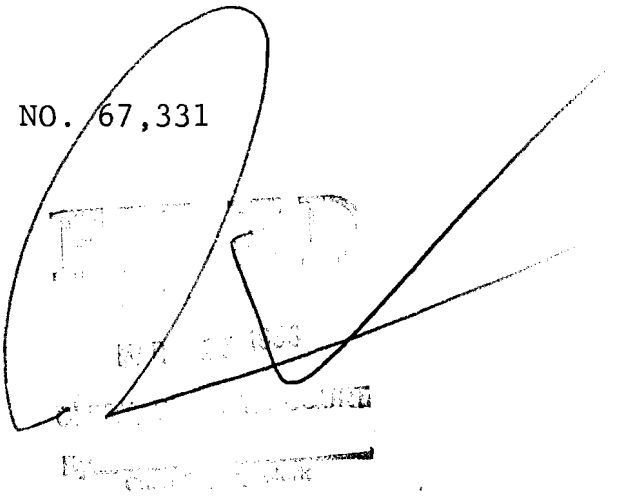
IN THE SUPREME COURT OF FLORIDA

RONALD MATHESON,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 67,331
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
	)	



ANSWER BRIEF OF RESPONDENT

JIM SMITH
Attorney General
Tallahassee, Florida

SARAH B. MAYER
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the appellant in the District Court of Appeal, Fourth District, and the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida; the respondent was the appellee and prosecution, respectively, in the aforementioned courts. In this brief the parties will be referred to as the State and the defendant.

The symbol "R" will be used to denote the record on appeal. All emphasis in this brief is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The state accepts the defendant's statement of the case and facts.

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT PROPERLY DECLINED TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S ALLEGED DISCOVERY VIOLATION FOR THE STATE'S FAILURE TO INFORM THE DEFENSE THAT THE TAPE RECORDING DID NOT CONTAIN THE ENTIRE TRANSACTION? (Restated).

POINT II

WHETHER THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF ENTRAPMENT AS A MATTER OF LAW?

POINT III

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED UPON (A) THE TRIAL COURT'S COMMENTS AND (B) THE PROSECUTOR'S CLOSING ARGUMENTS? (Restated).

POINT IV

WHETHER THE TRIAL COURT PROPERLY REFUSED TO ADMIT THE TWO TAPE RECORDINGS IDENTIFIED AS DEFENDANT'S EXHIBITS B AND C INTO EVIDENCE TO BE PLAYED TO THE JURY TO IMPEACH THE "ORIGINAL" TAPE RECORDING ADMITTED AS STATE'S EXHIBIT 15 AND TO IMPEACH THE TESTIMONY OF DETECTIVE ISRAEL AND SERGEANT SMITH, THUS DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW?

POINT V

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS?

SUMMARY OF ARGUMENT

POINT I

The trial court did not err in declining to hold a Richardson hearing on an alleged discovery violation where the defendant claimed the state failed to notify him that the tape recording of the transaction was incomplete; that is, that the entire transaction had not been recorded. As the state had given the defense everything that it had, including a copy of the tape and notice that the defendant had made incriminating statements, the state was not obligated to do work for the defense. Further where the state notified the defense of the existence of statements by the defendants, and where the statements were testified to without discovery objection, no error occurred.

POINT II

This Court should not exercise its discretion to consider the other four issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. The trial court properly denied the defendant's motion to dismiss based upon entrapment as a matter of law where the defendant, having had no contact with the police (or the C.I.) until the time he was arrested, can not complain with respect to the police conduct towards him; and where the police conduct

in furnishing drugs for sale, in and of itself does not constitute police misconduct.

POINT III

This Court should not exercise its discretion to consider the other four issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. The trial court properly denied the defendant's motions for mistrial predicated on comments by the trial court where the defendant's failure to request curative instructions at the time the comments were made precludes him from asserting the error now. Further the trial court properly denied the defendant's motions for mistrial predicated on comments by the prosecutor where the comments were invited by defense counsel or were comments upon the uncontradicted evidence before the jury; even should this Court find the comments objectionable, they were not so prejudicial as to vitiate the entire trial.

POINT IV

This Court should not exercise its discretion to consider the other four issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. Further, the trial court properly declined to admit needless cumulative material into evidence.

POINT V

This Court should not exercise its discretion to consider the other four issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. The trial court properly denied the motion to dismiss the conspiracy count where there was no confusion with respect to the information in this case as all conspirators were clearly named and the elements of the crime with which the defendants were charged were clearly set out.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DECLINED TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S ALLEGED DISCOVERY VIOLATION FOR THE STATE'S FAILURE TO INFORM THE DEFENSE THAT THE TAPE RECORDING DID NOT CONTAIN THE ENTIRE TRANSACTION. (Restated).

Defendant asserts the trial court erred in denying his motion for a Richardson[1] hearing predicated on an alleged discovery violation by the state. The defendant asserts (in this Court) the discovery violation was the state's failure to produce for the defense incriminating statements made to Detective Israel; in the Fourth District as well as in the trial court, the defendant asserted the discovery violation was that the state failed to inform the defense that the tape recording of the transaction was incomplete, that is that the recording ceased before the transaction was complete.

The state asserts that it was proper for the trial court to deny the Richardson hearing as no discovery violation occurred. As determined by the Fourth District, the state fully complied with its discovery obligation by disclosing the existence of electronic surveillance, providing the defense with a duplicate copy of the tape and by making the original available for inspection and copying by the defense. Matheson v. State, 468 So.2d 1011, 1013 (Fla. 4th DCA 1985).

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971).

The defendant now appears to assert the discovery violation was that the state never informed the defense that the defendant made incriminating statements to Officer Israel, which statements were not recorded on the tape and to which Detective Israel was going to (and was allowed to) testify to at trial. A review of the record below clearly reveals this assertion by the defense is not an accurate account of the trial court proceedings; indeed defendant was well aware of the statements before trial.

Below, defendant moved for a mistrial after Sergeant Smith [the officer who made the recording] testified that, at his pre-trial deposition he stated the tape was complete, but later discovered the tape was incomplete and defense counsel was never informed. Matheson at 1012. A review of defendant's motion for mistrial clearly reveals his complaint was that tape was incomplete and he was never so informed; never does defendant assert that Detective Israel is testifying to incriminating statements made by him, which had not previously been disclosed to him (R. 1325-1331). Rather his complaint appears to have been that had he known the tape was incomplete, that it did not contain his inculpatory statements, he would have changed his opening argument (R. 1326-1327).

During argument as to whether the tape should be admitted into or not, counsel for Defendant Matheson argued it should be excluded because there was no chain of custody

(R. 1440-1441) and that there was a question as to the integrity of the tape (R. 1441-1443), while counsel for Defendant Joyce argued that the tape should be admitted into evidence because the tape contained none of the incriminating statements purportedly made by the defendants according to the arrest report and sworn statements of Detective Israel (R. 1444-1445). Clearly defendants were aware that Detective Kridos was going to testify to incriminating statements made by them; this is evidenced not only by the state's answer to demand for discovery (R. 2872-2873, 2876-2877) but also by their arguments in the trial court.

The basis of the defendant's motion for mistrial was that the defense was never informed that the tape was an incomplete record of the transaction (R. 1325-1331). The state asserts that once it fulfilled its obligation under Rule 3.220 Fla.R.Crim.P. by disclosing the fact of electronic surveillance, permitting inspection and copying of the tape, and by disclosing the existence of and substance of statements by the accused, it was no longer required to do anything more. As the Fourth District quoted from State v. Counce, 392 So.2d 1029, 1031 (Fla. 4th DCA 1981): "The State has no duty to do for the defense work which the defense can do for itself." Matheson at 1013.

That the defense below never complained that they had not been informed of their incriminating statements prior

to trial is further evidenced by the fact that Detective Israel's testimony regarding statements by the defendant were not objected to (R. 1373-1375, 1379-1381, 1393-1397, 1403-1408). Surely counsel would have made such an objection if they had had one.

Thus the finding of the Fourth District that no discovery objection to any portion of Detective Israel's testimony is clearly correct. As defendant has cited no cases holding that the state is obligated to inform the defense of the absence of evidence, the state asserts the decision of the Fourth District in the instant case should be affirmed.

POINT II

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF ENTRAPMENT AS A MATTER OF LAW.

Defendant asserts the trial court erred in denying his motion to dismiss on the grounds of police overreaching because the police produced the marijuana for sale.

Initially, the state would submit that this Court should not exercise its discretion to consider this issue on appeal, where it was raised and rejected by the Fourth District. As this Court stated in State v. Hegstrom, 407 So.2d 1343, 1344 (Fla. 1981), this Court will not accept a case for review on one basis and then reweigh the evidence once reviewed by the district court, in order to provide a second record review of cases already resolved by the district courts of appeal. See also Sobel v. State, 437 So.2d 144, 148 (Fla. 1983). This Court should thus accept the Fourth District's opinion that this point did not warrant discussion. Matheson at 1012.

However, should this Court decide to exercise its discretion to revisit this issue, the state asserts this Court should affirm the trial court's order denying the motion to dismiss.

The defendant complains of actions by the state, i.e., the police selling marijuana and giving "samples" to prospective buyers without prior knowledge of the predisposition of the

"buyers," constitutes governmental misconduct and entrapment as a matter of law.

The state disagrees and asserts that the defendant has wholly failed to show how those acts prejudicially affected him.

The defendant below never came into contact with the police (or the C.I.) until his arrest (R. 1029, 1048, 1633-1634, 1641), nor did he raise an entrapment or duress defense. Neither the police officers nor the informant gave the defendant any samples; nor did they ever call the defendant or meet with him. Clearly there was no contact between the defendant and the officers until the actual transaction. Thus, it is clear the police conduct, whatever it was with respect to the co-defendants, played no part in bringing the defendant to this transaction and thus the defendant may not complain that the police conduct affected him.

In State v. Stella, 454 So.2d 780 (Fla. 4th DCA 1984), the court held that a defendant did not have a right to challenge the impermissible treatment by the police of the C.I. who brought about the defendant's arrest. There, the defendant complained the C.I. who informed on him was not in prison because he was improperly performing "substantial assistance" with respect to persons other than those prescribed by §893.135(3) Fla. Stats.; thus, Stella reasoned, but for the

C.I. receiving the improper benefit, he, Stella, would not have been arrested. The court held that the defendant could not challenge the statute or its (improper) application to the C.I. stating:

> No one has a due process right not to be caught for his criminal conduct merely because the person assisting the police is out of prison when properly he should be behind bars.

Id at 782.

The court noted:

> Stella has no personal stake in what happened to Delannoy [the C.I.] and may not challenge those portions of a statute that do not adversely affect his personal or property rights.

Id at 782.

So too here, the defendant may not complain about the propriety of the acts of the police with respect to his co-defendants unless those acts affect him (or his property) personally.

Defendant further complains that the police gave away samples of marijuana in order to induce his co-defendants to purchase a large quantity of marijuana and that the officers did not recover the samples.

Government infiltration of criminal activity is a recognized and permissible means of investigation; this remains true even though the government agent supplies something of value to the criminal. This is necessary so that

the agent will be taken into the confidence of the illegal entrepreneurs. United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973). However, the government may not instigate the criminal activities, provide the place, equipment, supplies and know-how, and run the entire operation with only meager assistance from the defendants without violating fundamental fairness. United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978).

Below, as in United States v. Tobias, 662 F.2d 381 (5th Cir. 1981), while law enforcement provided something to the defendants, they did not provide financial aid for the operation, thus the officers' conduct stops short of violating fundamental fairness. Tobias at 386. As the samples below were not provided to the defendant, and as the mere provision of samples of marijuana does not rise to the level of police misconduct sufficient to violate due process, the defendant's motion to dismiss was properly denied.

Defendant complains that the conduct of the police in providing cannabis for sale was so outrageous as to be violative of the due process clause. Aside from calling the provision of cannabis to him outrageous, the defendant has pointed to no active conduct on the part of the police, aside from the willingness to sell, that induced the defendant to traffick in cannabis.

Nor can the defendant cite any authority for his assertion that the mere furnishing of contraband constitutes governmental misconduct. The cases are to the contrary.

In State v. Sokos, 426 So.2d 1044 (Fla. 2nd DCA 1983), the defendant purchased from the police 30 cartons of untaxed and purportedly stolen cigarettes. The court found nothing in the record to indicate that the transaction was tainted by governmental misconduct. Sokos at 1045.

A more similar case is State v. Briden, 386 So.2d 818 (Fla. 2nd DCA 1980), where the police provided the cannabis to the defendant. The court stated: "Proceeding on the premise that furnishing the contraband with which the defendant is later charged with handling, without more, does not constitute governmental misconduct,...much less the outrageous governmental misconduct which would be necessary to invoke the due process considerations discussed...in Hampton." Briden at 821. See also State v. Cristodero, 426 So.2d 977 (Fla. 4th DCA 1982).

Lastly the defendant claims the police officers offered to "front" the co-defendant's 300 pounds of marijuana so as to induce them to purchase the 500 pounds. A review of the record clearly reveals that the whole proposition of the "fronting" of marijuana was suggested by the co-defendants and not an inducement by the police.

In the instant case the actions of the police were simply to provide cannabis to an admittedly willing buyer.

The state asserts that defendant's argument with respect to police overreaching, especially in light of the facts of this case, is without merit.

POINT III

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED UPON (A) THE TRIAL COURT'S COMMENTS AND (B) THE PROSECUTOR'S CLOSING ARGUMENTS. (Restated).

As with the issue in Point II of this brief, the state submits that this Court should not exercise its discretion to consider this issue on appeal; it is nothing more than an attempt to have a second record review of a case already resolved by the district court of appeal. State v. Hegstrom, supra.

However, if this Court should decide to exercise its discretion and review this issue, then the state submits that it is without merit.

A) The Trial Court's Comments

The defendant contends the trial court's actions prevented him from receiving a fair trial; the state asserts the defendant's failure to request curative instructions at the time of the alleged error precludes him from asserting error now.

In the course of the instant trial, which began November 29, 1982 and ended December 16, 1982, the defense presented the testimony of Dr. Harry Hollien (R. 1777-1937). In the course of testifying concerning the tape recording of the defendants Professor Hollien had the following exchange with the court:

THE COURT: Can you tell the difference between their voices?

THE WITNESS: No.

THE COURT: Well, I can. (R. 1864).

Rather than request an instruction from the court that the jury disregard the remarks, defendant immediately sought a mistrial (R. 1864). However, a mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile, Johnsen v. State, 332 So.2d 69 (Fla. 1976) as cited in Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982).

As stated in Ferguson:

> Even if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury disregard the remarks.

Though the court's comment herein may have been objectionable, the error could only be preserved if instructions to the jury were requested by defendant and refused. The error was clearly remediable by instructions to the jury and defendant's failure to request such instructions precludes him from asserting this error on appeal. The trial court below correctly denied the motion for mistrial since such a motion is addressed to the sound discretion of the trial judge and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be

done only in cases of absolute necessity." Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978) as quoted in Ferguson, supra. The trial court therefore properly denied defendant's motion for mistrial.

Defendant also contends that the trial court erred in not granting his motion for mistrial when, following an objection by one defense counsel, another defense counsel objected to the objection and the trial court stated:

> THE COURT: Why don't you two have a little meeting and decide what your real objection is so we can hear it?
>
> MR. FERRELL: Judge, we're being tried separately. I don't represent his client, and he doesn't represent mine.
>
> THE COURT: But you're officers of the court.
>
> MR. FERRELL: Yes.
>
> THE COURT: And you can play that charade every time with every question.
>
> MR. FERRELL: It is not a charade, Judge. I've said from the beginning that I represent only my client here.
>
> THE COURT: Correctly. Correctly.

As with the above allegation that the trial court erred in not granting a mistrial, defendant should have requested curative instructions to remedy the situation. See Ferguson, supra. A mistrial was not an absolute legal necessity under the cricumstances of the instant case and the trial court did not abuse its discretion in denying the motion for mistrial. See Johnsen and Salvatore, supra.

B) The Prosecutor's Closing Argument

Defendant asserts a variety of comments by the prosecutor in his closing argument as reversible error. The state asserts that none of these comments, either individually or when taken together, constitute error at all, much less fundamental error.

That the trial of this case was bitterly fought is an understatement. There were four defendants and four defense counsel ; some defendants put on defenses, some did not. One defendant even took the stand himself. The trial took 16 days; by closing arguments emotions were high, tempers were flaring and patience was shot.

In examining the prosecutorial comments of which defendant complains it is first necessary to place his quotes back into context.

The state objects to the defendant making any effort to construe the first quote as inappropriate. The sentence, when placed back in context, is a reiteration of a comment made by defense counsel. The full quote is:

> The statement about, "So you want your children to grow up in this kind of society, where this goes on?" Let me ask you a question. Do you want your children to grow up in a country over-run by drugs and drug dealers, or do you want your police to do their job?" (R. 2524).

The comment is in direct reply to one made by defense counsel in closing:

> MR. DRESNICK: ....You want to grow up like this? You want your children to grow up like -- "Hey, want a joint?" "Sure, I'll take a joint." Bust that kid. (R. 2439).

If a prosecutor is not entitled to respond to statements made by defense counsel, then the state fails to understand the meaning of the word rebuttal. Furthermore where defense counsel has "opened the door" to a topic is then appropriate for the prosecutor to comment on that topic. See Ward v. State, 58 So.2d 146 (Fla. 1952); Darden v. State, 329 So.2d 287 (Fla. 1976); Testasecca v. State, 115 So.2d 584 (Fla. 2nd DCA 1959).

The second, third and fifth complained of comments by the prosecutor pertained the drugs ending up on the streets (R. 2656), to the officers risking their lives enforcing the law (R. 2526-2527, 2659), and that the defendant would laugh at the system if acquitted (R. 2658), while not favored, were clearly insufficient to sway the jury.

Recently, this Court in State v. Murray, 443 So.2d 955 (Fla. 1984), held that "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.'" Id at 956.

The state asserts the comments complained of were not so prejudicial as to vitiate the entire trial. This is

particularly true in light of the following quotes which typify closing arguments in the instant case:

> MR. DRESNICK: Detective Israel, Detective Kridos, Sgt. Smith, all said this is a new technique, this reverse sting. It's nothing new. They could have asked Adolph Hitler. They could have asked Joseph Stalin. They could have asked Fidel Castro. They could have asked Joseph Azristofsky (phonetic). They could have asked any of those people, and they would say, "You think this reverse sting is a new technique?" Every totalitarian government that ever existed knew what it is. You bust whoever you want to bust. You go out, and you plant the seed. Not one of us is safe, not for a second. (R. 2438-2439).

> MR. SALANTRIE: You consider this irresponsible investigation and the testimony by these agents and the inconsistencies and contradictions and the fabrications and "I don't recalls", that should create such a reasonable doubt in your mind, ladies and gentlemen, such a significant doubt in your mind. The biggest fabrication, ladies and gentlemen, is the fact that this whole case was fabricated by the police. It's not a figment of their imagination, but it was fabricated by them. They told Sandy to make the introduction. Right. They set the fire by distributing a half pound of marijuana into the general populace. They negotiated extensively with Gibbs and Scholes and Laboda. They supplied all the drugs. All of them came from the police. The Ft. Lauderdale Police Department Police Officers, ladies and gentlemen, instead of pursuing their sworn obligation to stop crime, prevent crime, and protect its citizens opted to create crime, manufacture it, and entrap its citizens, specifically Mr. Dietrich. Ladies and gentlemen, just that should be more than sufficient to create a doubt. (R. 2609-2610).

> MR. DRESNICK: They are too numerous for me to mention. And I'm not going to hit you over the head with it, because I know you all saw it. It was as clear as anything I've ever seen in any trial. The man is a liar and perjurer and ought to be charged. (R. 2450).

Defendant asserts that within the circumstances of this case the remarks of the prosecutor can hardly have been so inflammatory as to sway the jury, or to vitiate the entire trial.

The law requires a new trial only in those cases in which it is reasonably evident that the statements...were so inflammatory and abusive as to have influenced the jury to reach a more severe verdict...than it would have otherwise... Darden v. State, 329 So.2d 287 (Fla. 1976). It is noteworthy that one of the defendants in the present case was acquitted; apparently the jury had a mind of its own.

Defendant also complains that the prosecutor improperly commented on his right to remain silent and his failure to call witnesses. The entire context is as follows:

> MR. NEAL: It says not unlawful for officers or employees of the State of Florida, Federal Government to possess while acting in their official capacity. And I think there is additional language. If you find they were acting in their official capacity -- you listen to the instruction as the Court gives it to you.
>
> What I'm telling you is that contrary to what defense counsel had told you, the police officers were not breaking the law. They were enforcing the law.

> We may not agree with the way they enforced it or with the law itself, but that's not what we're here to decide. The legislature makes the law. The people vote for the legislature. That's the way we handle the law in a civilized society.
>
> We've heard an awful lot about what the police did or did not do, whether their memories are any good. But what we haven't heard from any defense counsel is why their clients conspired to violate the drug trafficking laws, why two of them carried these guns. We haven't heard any explanation for that, and we haven't heard why --.

The state asserts that this comment in its correct context is a proper reference by the prosecutor to the jury on the evidence or absence thereof. In White v. State, 377 So.2d 1149 (Fla. 1980), the Supreme Court of Florida held that a prosecutor's comment in closing. "You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument." was not error. The court stated: "It is thus firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury. White at 1150. State v. Jones, 204 So.2d 515 (Fla. 1967); Helton v. State, 424 So.2d 137 (Fla. 1st DCA 1982); Smiley v. State, 395 So.2d 235 (Fla. 1st DCA 1981); Smith v. State, 378 So.2d 313 (Fla. 5th DCA 1980).

Further, even if this can be construed as a comment on the defendant's failure to testify, the comment was

harmless in light of the evidence adduced as to defendant's guilt. State v. DiGuilio, 10 F.L.W. 430 (Fla. August 29, 1985).

At trial Detective Israel testified as to the events leading to his meeting Defendant Joyce, in a Howard Johnson's motel room, in the company of co-defendants Laboda, Loos, Matheson and Adams (R. 1332-1374). Mr. Israel was at the motel room to count money which was to be used to purchase marijuana (R. 1372). When he entered the motel room Detective Israel expressed his concern that so many people were in the room (R. 1372). He asked that some leave but none left (R. 1373). Mr. Adams told Detective Israel that he had the money in a paper bag (R. 1374). When Israel said he was going to leave with all the money (R. 1374), Defendant Matheson strenuously objected along with Mr. Adams, saying "That ain't happening. You're not cutting us out." R. 1375). Detective Israel identified Matheson and Joyce as persons in the motel room (R. 1378). Detective Israel testified Joyce told the others in the room "that it would be okay if Harry took out the money." (R. 1379). Harry was a reference to Mr. Scholes; a co-defendant and co-conspirator Laboda stated that all the people in the room would be making money on the deal (R. 1369). The circumstances shown in the instant case were sufficient, when viewed in the light most favorable to the state, to uphold a conviction for conspiracy. Joyce was not merely present at the scene of an

offense. He participated in the conspiracy to obtain the marijuana by seeking to facilitate the transaction. See R. 1379. Proof of conspiracy may be inferred from appropriate circumstances. See, Resnick v. State, 287 So.2d 24 (Fla. 1973). Conspiracy is an expressed or implied agreement between two or more persons to accomplish a criminal offense. See, Ramirez v. State, 371 So.2d 1063 (Fla. 3rd DCA 1979). Joyce's participation in the events at the motel room and the acknowledgment by a co-conspirator that all there would benefit financially (R. 1369), clearly supports the trial court's denial of defendant's motion for judgment of acquittal. Clearly the prosecutor's comment, if indeed one on the defendant's assertion of his right to remain silent was harmless at best.

Courts have also held that the trial judge is the person who is in "a position of experience and intimacy with the case which cannot be duplicated by any other tribunal." James v. State, 334 So.2d 83, 84 (Fla. 3rd DCA 1976); Wingate v. State, supra. Consequently, the state asserts that the Honorable Judge Franza's rulings in this case are correct and should remain undisturbed.

POINT IV

THE TRIAL COURT PROPERLY REFUSED TO ADMIT THE TWO TAPE RECORDINGS IDENTIFIED AS DEFENDANT'S EXHIBITS B AND C INTO EVIDENCE TO BE PLAYED TO THE JURY TO IMPEACH THE "ORIGINAL" TAPE RECORDING ADMITTED AS STATE'S EXHIBIT 15 AND TO IMPEACH THE TESTIMONY OF DETECTIVE ISRAEL AND SERGEANT SMITH, THUS DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

Respondent respectfully adopts its argument at Point II in its Answer Brief to co-defendant Timothy Joyce's Initial Brief.

POINT V

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS.

Respondent respectfully adopts its argument at Point III in its Answer Brief to co-defendant Timothy Joyce's Initial Brief.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, appellee respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

SARAH B. MAYER
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 12th day of March, 1986, by United States Mail to: MARK KING LEBAN, ESQUIRE, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130 and RONALD C. DRESNICK, ESQUIRE, 4770 Biscayne Blvd. - Suite 950, Miami, Florida 33137.

Of Counsel