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IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,947

OLGA ROMANI, M.D.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHEAL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Petitioner, Olga Romani, was the Appellant below and the Defendant in the trial court. The Respondent, the State of Florida, was the Appellee below and the prosecution in the trial court. The parties will be referred to as they stood before the trial court. The symbol R will designate the record on appeal; the symbol T will designate the transcript of proceedings; and the symbol A will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The State adopts the Statement of the Case and Facts as established by the Third District Court of Appeal in the opinion under review. Romani v. State, 528 So.2d 15 (Fla. 3d DCA 1988).

> Defendant, Dr. Olga Romani, was charged with conspiracy to commit first degree murder and the first degree murder of Dr. Gerardo DeMola. Dr. DeMola was killed on February 18, 1981 in the parking lot of a hospital where he worked. At Dr. Romani's trial the state presented the occasionally conflicting testimony of several unindicted coconspirators and codefendants.[1] They described a scheme involving numerous characters who allegedly, acting at Romani's behest, entered into a series of contracts and subcontracts to murder Dr. DeMola. The jury found defendant guilty on both counts. She was sentenced to life imprisonment on the first degree murder count and thirty years imprisonment on the conspiracy count. Romani appealed.

In her appeal Romani contends the trial judge made erroneous evidentiary rulings. Specifically, she claims the trial judge wrongfully admitted: (1) the hearsay statements of coconspirators without establishing by a preponderance of independent evidence the existence of a conspiracy and defendant's participation in the conspiracy; (2) coconspirator statements which were not made during the course, and in furtherance of the conspiracy; (3) statements made by nontestifying coconspirators which incriminated defendant without affording her an opportunity to cross-examine the declarants as provided by the sixth amendment and Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). We reject all of defendant's arguments and affirm the convictions.

According to testimony offered by the state's first witness, Romani's employee, Hortensia Mercedes Alvarez, Romani approached Alvarez and asked if she knew of anyone who could "get rid of these people," handing Alvarez a paper with the names of several individuals, among them Dr. DeMola.[2] Alvarez claimed Julio Garcia, another employee of Romani's, was present during this conversation. Garcia, denied hearing this initial conversation, but did testify Romani also asked him if knew of anyone who would commit a murder for money. Alvarez later told Garcia that Romani wanted to have DeMola killed. Alvarez testified to having asked her son, Anthony Anderson, if his friend, Roger Ibarra, would be willing to commit the murders.

Alvarez stated she met with Anderson, Garcia, and Ibarra to discuss the proposed murders. Ibarra later agreed to commit the murders for $10,000 per person. Alvarez attested Romani agreed to these terms and entrusted Alvarez with $5,000 to give Ibarra as an initial payment. Alvarez ratified the agreement with Ibarra and handed him the $5,000 and the list of names. About a week or two later, Alvarez recalled

week or two later, Alvarez recalled hearing the news of DeMola's murder on the radio. She hurried to Romani's home to relay the news to the doctor, but Romani had already learned of the homicide when Alvarez arrived. Alvarez next told the jury of a dinner she subsequently had with Romani, Ibarra, and Garcia at a restaurant in which Romani brought the final $5,000 payment. Alvarez claimed she gave the money to Garcia who was to pass it on to Ibarra. Garcia, who corroborated having dinner and drinks with Romani, Ibarra and Alvarez after the murder, denied participating in any murder scheme or giving Ibarra any money.

After Alvarez testified, but prior to the state's introduction of testimony by other coconspirators, defense counsel informed the judge she wanted to object to the proposed testimony. Defense counsel anticipated these witnesses would be introducing hearsay statements made by other coconspirators. The trial judge stated he had discretion to accept such testimony before the conspiracy was established; nevertheless, he believed Alvarez's testimony had established the conspiracy, independent of any coconspirator's testimony. Defense counsel contended the conspiracy and defendant's participation had not been established by independent evidence. Defense counsel then requested the judge give the jury cautionary instructions regarding the conspiracy. Thereupon the jury was called in and the judge instructed them that "the conspiracy itself, and each member's participation in it must be established by independent evidence before you can consider the statements of coconspirators."

In the testimony that followed, Roger Ibarra confirmed he met with Alvarez, Garcia and Anderson, at Anderson's suggestion, and agreed he would commit the murders himself or find someone else to be the triggerman. Ibarra then went to see Antonio Gonzalez Valdibia, to subcontract the murders. According to Ibarra, Gonzalez consented

enlist the assistance of a friend, Alberto Vinas. Gonzalez took Ibarra to see Vinas, who agreed to commit the murders for $10,000 per person. Ibarra confirmed the sum with Alvarez. Ibarra retained $1,000 of the initial $5,000 he received from Alvarez and turned over the remaining $4,000 to Gonzalez and Vinas, along with the list of names.

[1] According to the original plan, the first person on the list to be murdered was to have been John Nulty, the Medicaid fraud investigator. Ibarra testified he, Gonzalez and Alvarez conducted a surveillance of Nulty. Ibarra later decided Nulty was too difficult a target. On his own initiative Ibarra selected DeMola as the first victim, but he did not inform Alvarez or Anderson of this change.[3] Alvarez denied ever meeting Gonzalez or participating in any surveillance of Nulty.

After an undetermined number of days, Ibarra became concerned he had not heard any news regarding DeMola's death. He arranged a meeting with Gonzalez and Vinas at a bar. While at the bar, Ibarra testified that he, Vinas and Gonzalez were approached by two individuals who were introduced as Heriberto Nodarse and Papo. Nodarse and Papo allegedly told the others not to worry, that DeMola was dead.

Ibarra recounted joining Romani,[4] Alvarez, and Garcia at a restaurant to "celebrate the news" sometime after being told of the murder. According to Ibarra's report of the evening, Garcia first attempted to give Ibarra the final $5,000 payment, but was unable to do so safely. Ibarra claimed that *sometime* during the course of the evening Romani presented him with an envelope containing the final $5,000. Very late that same evening Ibarra rendezvoused with Gonzalez and Vinas. Together they heard the news of DeMola's murder on the radio. Ibarra then gave Gonzalez and Vinas $4,000 and kept another $1,000 for himself.

Antonio Gonzalez Valdibia offered testimony which at times conflicted with Ibarra's version of the events. Gonzalez claimed he declined to participate in the murders when Ibarra first approached him, but he nonetheless took Ibarra to see Vinas. Gonzalez maintained this was the extent of his participation. He learned the details of the murder scheme from Vinas. Approximately a week after Ibarra initially approached Gonzalez, Ibarra handed him an envelope containing $4,000 to deliver to Vinas. Vinas took $2,000 and paid Gonzalez with the remaining $2,000 to "keep his mouth shut." Sometime after this episode, Vinas informed Gonzalez that he was going to subcontract the murder. Gonzalez accompanied Vinas to a bar later that day, where he observed Vinas talking to three individuals outside. Shortly thereafter, Gonzalez learned the individuals were Nodarse, William and Papo, the men Vinas allegedly paid to kill DeMola. On cross-examination Gonzalez denied ever meeting Alvarez, conducting any surveillance of Nulty, or actively participating in the murder of DeMola.

Evidence was presented at trial that thirteen days before the murder, Romani withdrew $10,000 from her bank account. She kept $5,000 in cash and deposited the remaining $5,000 in a new bank account. Six days later, $4,800 was withdrawn from the new account. A hospital employee, who worked at the hospital where DeMola was killed, testified he observed two suspicious latin-looking men in the doctor's parking lot and later saw them jump into the back of a white pickup truck driven by another man and speed away, shortly before he discovered the body of DeMola. Gonzalez in his testimony reported Nodarse drove a white pickup truck. All the conspirators who testified, with the exception of Romani, denied ever meeting DeMola.

At the close of the state's case and again after the defense rested, defense counsel moved for a judgment of

acquittal and to exclude the hearsay statements of the coconspirators. The court denied the motions, ruling that sufficient evidence had been adduced to show a conspiracy between the named parties.

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1. The grand jury indictment named Olga Romani, Roger Ibarra, Antonio Gonzalez Valdibia and Alberto Vinas as codefendants. Romani's trial was severed from that of the other codefendants. Ibarra and Gonzalez ultimately agreed to plead guilty to reduced charges in exchange for their testimony against Romani. Codefendant Vinas had not entered into any plea agreement when the trial commenced, thus he did not testify against Romani. Three of the unindicted coconspirators, Heriberto Nodarse, "William" and "Papo," also did not testify; they had not been apprehended when Romani's trial began.

2. Romani was the subject of a Medicaid fraud investigation. Romani suspected DeMola to be the government's chief witness against her. Two other individuals on the list were John Nulty, an investigator assigned to Romani's case, and James Harris, a former employee. Romani was subsequently convicted of Medicaid fraud and violation of the Racketeer Influenced and Corrupt Organizations Act. The convictions were affirmed on appeal. Romani v. State, 429 So.2d 332 (Fla. 3d DCA 1983).

3. "[A] single conspiracy may have as its object the violation of two or more ... substantive offenses." Brown v. State, 130 Fla. 479, 178 So. 153, 156 (1938). This conspiracy was formed to kill the individuals on the list. Contrary to defendant's contention, the change in the order of the murders did not alter or in any manner affect the

conspiracy, its objective, or continuation. State v. Wilson, 466 So.2d 1152 (Fla. 2d DCA 1985).

4. Ibarra offered conflicting testimony regarding when he first met Romani. He first claimed to have met her before the murder, at her clinic, whereupon she informed him of the Medicaid fraud investigation. Later Ibarra stated he met Romani for the first time after the murder.

528 So.2d at 16-18

The Third District, based on the foregoing facts, rejected Defendant's claims and affirmed the convictions and sentences. The Third District reviewed the present state of the law in Florida concerning the admission of coconspirator hearsay statements and found it lacking. Instead, the Third District found that the Federal law concerning the admission of coconspirator hearsay was more in line with modern trial procedures and therefore adopted the standard for admission as established in Bourjaily v. United States, 483 U.S. _____, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

Prior to the instant decision, under the case law interpreting Section 90.803(18)(e) Florida Statutes (1987), the coconspirator rule, coconspirator hearsay statements are admissible against coconspirators only if substantial evidence, independent of the statements themselves, is presented which establishes the conspiracy and that the statement was made during the course and furtherance of the conspiracy. Honchell v. State,

257 So.2d 889 (Fla. 1970), State v. Morales, 460 So.2d 410 (Fla. 2d DCA 1984). The initial determination regarding the admissibility of the coconspirator hearsay statement is an evidentiary matter for the trial court. Saavedra v. State, 421 So.2d 725 (Fla. 4th DCA 1982).

In Morales, the Second District adopted the two-prong procedure established in United States v. James, 590 F.2d 575 (5th Cir. 1979) which procedure calls for the trial judge to: (1) first make an initial determination of admissability, applying a substantial evidence standard; and (2) then, after presentation of all the evidence, the trial judge determines whether there is a preponderance of independent evidence that the conspiracy existed, that the conspirators and defendant were members of the conspiracy, and the statements were made in the furtherance of the conspiracy. 590 F.2d at 582. In applying the first prong, the Morales court said that, in conformance with Section 90.803(18)(e), the trial court should, upon defendant's motion, instruct the jury that the conspiracy and each member's participation in it must be established by independent evidence. As pointed out by the Morales opinion, this instruction is often called the "Apollo instruction" based upon United States v. Apollo, 476 F.2d 156 (5th Cir. 1973) and that James overruled Apollo. Nevertheless, as held in Boyd v. State, 389 So.2d 642 (Fla. 2d DCA 1980), the Apollo rule "lives on in Florida" because of the express language of Section 90.803(18)(e), which is not included in the federal counter-

part, Rule 801(d)(2)(E), Federal Rules of Evidence. In applying the second prong, Morales endorses the preponderance test to be applied at the conclusion of all the evidence.

The Third District, in accordance with Bourjaily, held that only one determination is necessary concerning the admissibility of coconspirator hearsay statements and that is by the trial court and that the quatum of proof is by a preponderance of the evidence. 528 So.2d at 20. Accord State v. Edwards, 13 F.L.W. 2680 (Fla. 1st DCA Dec. 12, 1988).

The Third District then tackled the type of evidence the trial court may consider in determining whether hearsay may be admitted under the coconspirator exception. Once again the Third District looked to Bourjaily and adopted its holding that the hearsay statement itself may be considered along the independent and circumstantial evidence to establish by a preponderance of the evidence the existence of the conspiracy and the defendant's participation in it. 528 So.2d at 20-22. The Third District, after recognizing that Bourjaily relied on the Federal Evidence Code which is different from the Florida Code in this area, analyzed the difference and found the two provisions consistent, thereby making Bourjaily applicable.

> The Florida Evidence Code does not contain a provision equivalent to that found in the Federal Rules stating a judge is not bound by the rules of evidence in making preliminary determinations. No Florida cases have had an

opportunity to construe this difference between the Federal and Florida Rules of Evidence. Nonetheless, at least two commentators have argued that the absence of this sentence should not be interpreted to mean that a judge is required to abide by the evidence rules in making preliminary determinations. "As a practical matter, it would be impossible for a judge to follow all the rules of evidence in making preliminary determinations." 31 U.Miami L.Rev. 951, 954 (1977). The fourth district, in Saavedra, recognized that section 90.105(1) is patterned after Federal Evidence Rule 104(a). 421 So.2d at 725. Furthermore, it is well-established law in this state that if a Florida law is patterned after a federal law, on the same subject, it should be given the same construction in the Florida courts as its prototype has been given in the federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject. State v. Cook, 108 Fla. 157, 146 So. 223, 224 (1933); Pasco County School Board v. Florida Pub. Employees Relations Comm'n., 353 So.2d 108, 116 (Fla. 1st DCA 1977); accord Sike v. Seaboard Coast Line R. Co., 429 So.2d 1216 (Fla. 1st DCA 1983); Dinter v. Brewer, 420 So.2d 932 (Fla. 3d DCA 1982). Having found no authority to the contrary, we find the commentators' arguments to be persuasive in construing section 90.105(1). Accordingly, we hold that a judge, "in making a preliminary factual determination under [section 90.803(2)(3)], may examine hearsay statements sought to be admitted[,]" Bourjaily, 107 S.Ct. at 2782, and "give [the evidence] such weight as his judgment and experience counsel." United States v. Matlock, 415 U.S. 164, 175, 94 S.Ct. 988, 995, 39 L.Ed.2d 242 (1974).

(footnote omitted).
528 So.2d at 21-22.

In applying the new standard, the Third District found there was substantial independent and circumstantial evidence of the conspiracy and the Defendant's participation in it, to allow the hearsay statements, made by Vinas and the actual "hit men" to be admitted into evidence. 528 So.2d at 22.

After finding that the trial court correctly found there was a conspiracy and the Defendant participated in it, the Third District found that the hearsay statements were made in furtherance of the conspiracy and were admissible against the Defendant. Although the Court acknowledged that the hearsay statements of the actual perpetrators were made after the murder, the Court found they were made in furtherance of the conspiracy. The Court found that the conspiracy had a dual purpose; the first to kill the victim and the second to get paid for the murder. Since the admissions were made before payment the Court reasoned they were in furtherance of the conspiracy and admissible against the Defendant. 528 So.2d at 22-23. Based on the finding that the statements were correctly admitted the Third District found, in accordance with United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), that their admission did not violate the confrontation clause.

The Defendant's motion for rehearing was denied. Thereafter discretionary review was sought and accepted.

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS WHEN SAID STATEMENTS WERE WITHIN THE COCONSPIRATOR EXCEPTION TO THE HEARSAY RULE.

II

WHETHER THE ADMISSION OF HEARSAY TESTIMONY, THROUGH IBARRA AND GONZALEZ VIOLATED DEFENDANT'S RIGHT TO CONFRONT WITNESSES.

SUMMARY OF THE ARGUMENT

Defendant contends that she is entitled to a new trial since inadmissible hearsay was admitted at her trial. This position is meritless since the hearsay was admitted under the firmly rooted coconspirator exception to the hearsay rule. This so whether this Court chooses to adopt the Third District's analysis and applies the Bourjaily standard or whether the Court analyzes the case on traditional principles.

If this Court adopts the Third District's opinion, which the State strongly urges, then, the evidence was properly admitted. If traditional principles are used, then any improperly admitted evidence was harmless beyond a reasonable doubt. It was harmless since independent and circumstantial evidence conclusively established the conspiracy and murder and an instruction to disregard the hearsay would have cured the situation.

Defendant also contends that her right of confrontation was violated by the admission of the hearsay. This is meritless since the hearsay was admitted under a recognized exception and even if it weren't any error was harmless.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN ADMITTING HEARSAY STATEMENTS WHEN SAID STATEMENTS WERE WITHIN THE COCONSPIRATOR EXCEPTION TO THE HEARSAY RULE.

The Defendant contends that a new trial is mandated since inadmissible hearsay was admitted at her trial. The State submits that no such error occurred, so the relief requested is unwarranted. Further, even if inadmissible hearsay was admitted in evidence it was harmless and therefore a new trial is also unwarranted.

The Third District in its opinion in Romani, completely analyzed the state of the law concerning the coconspirator exception to the hearsay rule. Based on this analysis, which is contained in the statement of the case and facts, the Court held that the preliminary facts which establish the basis for the admission of coconspirator statements must be proved by a preponderance of the evidence and that in making the preliminary factual determination as to admissibility, the trial court may examine the hearsay statements sought to be admitted and give them such weight as his judgment and experience counsel. Further, the Court held that coconspirator statements made after the murder, but during the course of meetings to arrange payment was made in furtherance of the conspiracy. The State urges this Court to adopt, in total, the Third District's opinion as its own.

If this Court so chooses, it can affirm the Defendant's convictions based on traditional legal principles. The coconspirator exception to the hearsay rule provides that a hearsay statement of a defendant's alleged coconspirator is admissible against the defendant if the statement is made during the pendency of the conspiracy and in furtherance of its objectives. Further, such testimony of hearsay statements is admissible only if the conspiracy itself has been established by independent evidence. Bricklod v. State, 365 So.2d 1023 (Fla. 1978). The independent evidence required can be either direct or circumstantial. Resnick v. State, 287 So.2d 24 (Fla. 1974) This rule only operates to establish criminal liability of conspirators for the acts of their coconspirators. It has no application to the admissibility of testimony of acts or statements of the accused nor of probative evidence relevant to the case and not otherwise excludable. Adirim v. State, 350 So.2d 1082 (Fla. 3d DCA 1977). Finally, a defendant's own extra-judicial acts and statements constitute independently admissible evidence of a conspiracy as well as of defendant's participation in it, thus making the remaining portions of the witness' testimony admissible under the coconspirator exception. Damon v. State, 289 So.2d 720 (Fla. 1973).

Applying the foregoing to the instant case, the trial court correctly ruled that after Alvarez' testimony, a conspiracy was established independent of any coconspirator testimony.

Alvarez, who was employed by Defendant, was asked by Defendant if she knew of anyone who could get rid of the people who were on a list, given to Alvarez by Defendant. The victim was on the list. This evidence alone was independent evidence of a conspiracy to murder the victim as well as Defendant's participation in it, thereby making the rest of Alvarez' testimony admissible under the coconspirator exception. Damon v. State, supra. Alvarez later told Julio Garcia that Defendant wanted the victim killed. She testified that she asked her son, Anthony Anderson, if his friend, Roger Ibarra, would be willing to commit the murder. Alvarez met with Anderson, Garcia, and Ibarra to discuss the proposed murders. She testified that Ibarra agreed to commit the murders for $10,000 per person and that Defendant agreed to these terms and gave Alvarez $5,000 to give to Ibarra as an initial payment. Alvarez ratified the agreement with Ibarra and gave him the list and the money. Within two weeks, Alvarez heard the news of the victim's murder on the radio and she went to Defendant's home to relay the news, but Defendant had already learned of the murder when Alvarez arrived. After the murder Alvarez, Defendant, Ibarra and Garcia had dinner at a restaurant where the Defendant was to make the final payment. At this point, the conspiracy was established without hearsay statements and therefore the coconspirator rule was inapplicable. Adirim v. State, supra.

Ibarra testified and he confirmed that he met with Alvarez, Garcia and Anderson and that he agreed to commit the

murders himself or find someone else to the triggerman. This testimony was admissible, regardless of the coconspirator exception, as an admission against interest. Ibarra also corroborated having dinner with Alvarez, Defendant and Garcia after the murder to collect the second $5,000 payment. He testified that the Defendant herself gave him the second payment. This evidence concerned acts of the Defendant and also constituted independent evidence of the conspiracy and Defendant's participation in it. The remaining portions of Ibarra's testimony was admissible under the coconspirator exception. Damon v. State, supra.

Ibarra's testimony established that after he agreed to commit the murders, he met with Antonio Gonzalez Valdibia in order to subcontract the murders. Gonzalez consented to the scheme but wanted help so he took Ibarra to Alberto Vinas, who agreed to commit the murders for $10,000 per person. This sum was confirmed with Alvarez and after the initial transfer he kept $1,000 and gave $4,000 over to Gonzalez and Vinas along with the list of names. Ibarra then selected the victim, but did not inform Alvarez or Anderson of this decision. Shortly thereafter Ibarra met with Gonzalez and Vinas at a bar because he was concerned that the victim was still alive. At the bar, he met Nodarse and Papo. They told him that the victim was dead. (This is one of the statements Defendant contends warrants a new trial.) After dining with Defendant, Alvarez and Garcia, Ibarra met with Gonzalez and Vinas. At that time they heard the news of the victim's murder on the radio and Ibarra then gave the another $4,000 and he kept another $1,000.

There was circumstantial evidence that was admissible as relevant evidence regardless of the coconspirator exception. It consisted of Defendant's withdrawal of $10,000 from her bank account some thirteen days before the murder. It was established that out of the $10,000 she kept $5,000 in cash and deposited the remaining $5,000 in a new bank account. Six days later she withdrew $4,800 from the new account. A hospital employee testified that he saw two suspicious latin-looking men in the doctor's parking lot and later saw them jump into the back of a white pickup truck driven by another man, shortly before he discovered the body of the victim in the doctor's parking lot.

Based on the totality of the admissible evidence, the conspiracy to murder the victim, and the Defendant's participation in it was established. However, under traditional legal principles the hearsay testimony concerning who actually murdered the victim and when it occurred, should not have been admitted since their participation in the conspiracy was not established by independent evidence. However, failure of the trial court to instruct the jury to disregard the hearsay statements of the actual perpetrators, was harmless since without this evidence the evidence was more than sufficient to support a finding of guilt on both the conspiracy and murder charges. Bricklod v. State, supra at 1026. Therefore, the failure to instruct the jury to disregard the statements attributted to Vinas, Nodarse and Papo was harmless beyond a reasonable doubt.

II

THE ADMISSION OF HEARSAY TESTIMONY THROUGH IBARRA AND GONZALEZ DID NOT VIOLATE DEFENDANT'S RIGHT TO CONFRONT WITNESSES.

Defendant contends that his right to confront witnesses, in accordance with Act 1, Section 16. Fla. Const. and the Sixth Amendment of the United States Constitution, was violated when the hearsay attributted to the nontestifying declarants of Vinas, Nodarse, Papo and Williams was admissible into evidence. This position does not warrant reversal on two grounds.

Initially, since the hearsay was admitted under the firmly rooted coconspirator exception to the hearsay rule, the confrontation clause was not violated. The reason therefore is that the need to establish unavailability is not required when the hearsay statement is the out of court declaration of a co-conspirator and since the coconspirator exception is firmly rooted there is no need to independently establish the reliability of the evidence. Inadi, supra, Bourjaily, supra. See also Ohio v. Roberts, 488 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). (Hearsay admissible only when unavailability of the declarant and indicia of reliability can be demonstrated.)

Assuming arguendo that the hearsay was improperly admitted, reversal is still not warranted since any error was harmless beyond a reasonable doubt. Cruz v. New York, ___U.S.___,

107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), Grossman v. State, 525 So.2d 833 (Fla. 1988).

A review of the record clearly establishes that the alleged improper admission of the hearsay statement was harmless. The non-hearsay and circumstantial evidence of Defendant's acts and declarations clearly establishes the conspiracy and the actual murder. The testimony of Alvarez establishes the conspiracy and Defendant's participation in it. The fact that the victim was murdered is not in dispute. The evidence of Defendant's withdrawals from her bank coincided with and corroborated the murder payments. Defendant admitted meeting Ibarra when the final payment transpired.

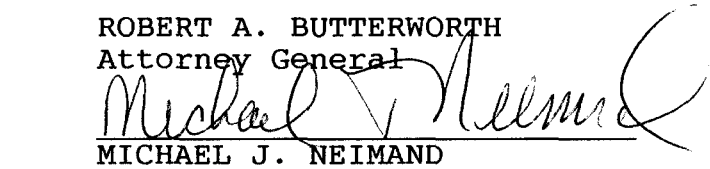
Based on the evidence, the alleged improperly admitted hearsay did not have an effect on the verdict. The conspiracy was established without the testimony of the perpetrators. The murder was established through the conspiracy and circumstantial evidence. Therefore, the hearsay admission, if error, was harmless.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully urges this Court to adopt the Third District's opinion as its own and affirm the convictions and sentences. In the alternative, the State respectfully urges the Court to affirm the convictions and sentences under traditional principles.

Respectfully submitted,

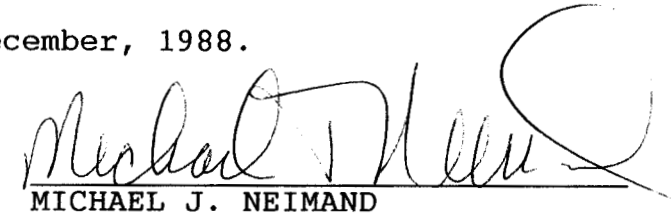
ROBERT A. BUTTERWORTH
Attorney General



MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to BRADLEY R. STARK, Attorney for Petitioner, Executive Plaza, Suite 700, 3050 Biscayne Boulevard, Miami, Florida 33137, on this 27th day of December, 1988.



MICHAEL J. NEIMAND
Assistant Attorney General

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