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SID J. WHITE
JUN 26 1992
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IN THE SUPREME COURT OF FLORIDA

ROY NEBRASKA SCOTT, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 79,823

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RESPONDENT'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

ROY NEBRASKA SCOTT, Petitioner, **vs.** **STATE OF FLORIDA,** Respondent.	))))))))))	**CASE NO. 79,823**

PRELIMINARY STATEMENT

Respondent, the State of Florida, was the prosecuting authority in the trial court and appellee below and will be referred to herein as "the State" or "Respondent." Petitioner, Roy Nebraska Scott, was the defendant in the trial court and appellant below and will be referred to herein as "Petitioner." Reference to the record will be by the symbol "R" and references to the transcripts will be by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Based on this Court's recent Ross decision, this Court should decline to accept jurisdiction in this **case**, as the certified questions are no longer of great public importance. If jurisdiction is accepted, however, this Court should answer the certified questions in the negative based on Ross.

With respect to the ancillary issue presented by Petitioner, the State submits that this Court should decline to review it since it lies outside the scope of the certified questions, which provide Petitioner's basis for jurisdiction. If this Court decides to review this issue, however, **the** State submits that Petitioner did not properly preserve the sufficiency of the evidence issue for review, and that, even if it were preserved, the trial court did not err in denying Petitioner's motion for judgment of acquittal.

With respect to the comment made by the prosecutor during the rebuttal portion of Petitioner's closing argument, the State would again argue that Petitioner did not preserve the argument he makes on appeal. Even if it was preserved, it too is without merit, as the prosecutor's comment did not constitute reversible error. When the comment was made, Petitioner did not even ask for a curative instruction or a mistrial. Yet, now, Petitioner wants a new trial. Such relief is not appropriate. The prosecutor's comment was harmless at best, and there is no reasonable likelihood that it influenced the jury's verdict.

ARGUMENT

ISSUE I

WHETHER THE HABITUAL VIOLENT FELONY OFFENDER **PROVISIONS** OF FLA. STAT. § 775.084 (1989) ARE VIOLATIVE OF **SUBSTANTIVE DUE** PROCESS AND DOUBLE JEOPARDY PRINCIPLES (Restated).

Initially, the State submits that acceptance of jurisdiction in this case would be improvident in light of this Court's recent decision in Ross v. State, 17 F.L.W. S367 (Fla. June 18, 1992). In Ross, this Court held:

> The entire focus of the statute is not on the present offense, but on the criminal offender's prior record. Provided the offender is charged with an offense punishable by more than a year in prison, that offender remains subject to habitualization if the other terms of the statute are met; and this is true even if the present offense is not itself violent. There is nothing irrational about this process. The State is entirely justified in enhancing an offender's present penalty for a nonviolent crime based an an extensive or violent criminal history.

Id. at **368.** Because of this Court's decision, the questions certified to this Court in the present case are no longer of great public importance. Therefore, this Court should decline to accept jurisdiction.

If this Court decides to accept jurisdiction in this case, however, the State submits that Ross directly controls. Petitioner first claims that the habitual violent felony offender statute violates due process because it does not require the current offense to be an enumerated violent felony. Consequently, according to Petitioner, there is no reasonable and substantial relationship to the object sought to be obtained.

Pet.'s Merits **Brief** at 11-13. As quoted above, this Court expressly rejected this argument.

Petitioner next claims that the statute violates double jeopardy because "the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony. The almost exclusive focus on this prior offense renders use of the statute a second punishment for that offense , . . ." **Pet.'s Merits Brief** at 14. Again, this Court addressed this issue in Ross, contrary to Petitioner's assertion: "The entire focus af the statute is not on the present offense, but an the criminal offender's prior record. . . . The State is entirely justified in enhancing an offender's present penalty for a nonviolent crime based on an extensive or violent criminal history." 17 F.L.W. at **368** (emphases added). Thus, Petitioner's double jeopardy claim likewise fails. As a result, this Court should answer both certified questions in the negative.

ISSUE IT

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AND WHETHER THE **STATE** COMMITTED REVERSIBLE ERROR IN CLOSING ARGUMENTS (Restated).

A. Propriety of Discretionary Review

In its opinion below, the First District affirmed per curiam Petitioner's conviction for possession of cocaine, but on rehearing, certified two questions relating solely to the constitutionality of the habitual violent felony offender statute. Based upon the district court's certification, Petitioner sought review in this Court. Instead of presenting argument solely on the issues framed by the certified questions, Petitioner now seeks review of an issue which would otherwise not **have** been reviewable from the per curiam affirmance below.

Florida's constitution contemplates that the district courts are generally the final courts of appellate jurisdiction. See Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1982) ("[W]e recognize the function of the district courts as courts of final jurisdiction and will refrain from using that authority [to review "ancillary" issues] unless those issues affect the outcome of the petition after review of the certified **case.").** Here, there **is** no need to repeat the First District's effort on a point so well-settled that the district court affirmed **it** per **curiam** without any discussion whatsoever. Thus, because this issue "**lie[s]** beyond the scope of the issue for which jurisdiction lies," this Court should decline to exercise its prerogative to entertain it. Ross, 17 F.L.W. at **368.** See also Stephens **v.**

State, 572 So.2d 1387 (Fla. 1991) ("We do not reach the other issue raised by the parties, which lies beyond the scope of the certified question.").

B. Response on the Merits[1]

Petitioner has framed the initial part of this issue as whether there was sufficient evidence to support the conviction. The only way Petitioner could have preserved such an issue was to move to dismiss or to move for a judgment of acquittal in the trial court. In this case, Petitioner moved for a judgment of acquittal at the end of the State's case. (T 119). Thus, it seems more appropriate to frame the issue as whether the trial court erred in denying Petitioner's motion for judgment of acquittal. Although this may seem like a distinction without a difference, the focus actually changes from whether the State presented "sufficient" evidence on the convicted offenses to whether the State presented "substantial, competent" evidence on the charged offenses. Because the State believes that the focus should be on the latter, it has rephrased the issue and will respond accordingly.

At the close of the State's case, Petitioner made the following motion for judgment of acquittal:

> [T]he state has a burden of putting forth evidence to show in this particular case that Mr. Scott knew the item was there and that he knew what it was, and there has been absolutely nothing presented to the jury to

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[1] Although it constitutes a waste of finite judicial resources, the State will nevertheless address the merits of this issue out of an abundance of caution.

> indicate that he knew it was there or that he knew what it was, Your Honor, and therefore I believe a judgment of acquittal should be granted.

(T 119). Without argument from the State, the trial court ruled that the State had presented a prima facie case and that whether Petitioner **knew** of the contraband's presence was a question of fact for the jury. (T **120).** Thereafter, the defense rested without presenting any evidence or testimony. (T **120).**

From this general motion for judgment of acquittal, Petitioner claims in this appeal that there was insufficient evidence that he knew of the contraband's presence.[2] In doing so, however, Petitioner greatly expands on the argument made below and claims that, because Petitioner did not own the vehicle which he was driving and in which the cocaine was found, his knowledge of the presence of the contraband could not be inferred. In other words, he argues that, because there was joint possession of the vehicle, the State failed to prove his knowledge of the contraband by independent proof. Pet.'s Merits Brief at **19-24.** Petitioner has **failed,** however, to preserve this argument for review.

Florida Rule of Criminal Procedure 3.380(b) states that a motion for judgment of acquittal "must fully set forth the grounds upon which it is based." (emphasis added). District courts around the State have interpreted this to mean that

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Appellant has not renewed his argument relating to his knowledge of the illicit nature of the contraband.

defendants must adequately specify to the trial court to what extent the evidence was insufficient. Otherwise, the issue is not preserved and cannot be raised on appeal. See, e.g., Cornwell v. State, 425 So.2d 1189 (Fla. 1st DCA 1983) (wherein the defendant only alleged in his motion for judgment of acquittal that the testimony was ambiguous, vague, and indefinite and that the evidence was simply insufficient); Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985) (wherein the defendant in a capital sexual battery case "employed a general 'boilerplate' motion in which he asserted, without explanation or argument, that the state had failed to prove a 'prima facie case' of the crime charged in the indictment, which counsel then tracked as to each element, including age."), cause dismissed, 488 So.2d 830 (Fla. 1986); Patterson v. State, 391 So.2d 344 (Fla. 5th DCA 1980) ("A bare bones motion for directed verdict will not permit a defendant to raise every possible claimed insufficiency in the evidence."). Petitioner did not make the argument below that he makes here. Therefore, he has failed to preserve the issue for this Court's review.

Even if it could be asserted that Petitioner preserved this particular argument for appeal, the trial court properly denied Petitioner's motion for judgment of acquittal. To prove that Petitioner was in possession of cocaine, the State was required to prove that Petitioner possessed a certain substance, that the substance was cocaine, and that Petitioner had knowledge of the presence of the substance. "Possession may be actual or constructive. If a thing is in the hand of or on the person, or

in a bag or container in the hand of or on the person, or is so close as to be within ready reach and is under the control of the person, it is in the actual possession of that person." Fla. **Stand.** Jury **Instr. in Crim. Cases 225 (1981)** (emphasis added).

Petitioner's claim that he did not have personal possession of the cocaine, thereby requiring the State to prove constructive possession, is clearly erroneous. Petitioner was the only person in the car. (T 30). The cocaine was found **in** plain view in a clear plastic bag "[b]eside the passenger seat towards the inside near the hump in the middle of the vehicle." (T **96-97).** In other words, the bag of crack cocaine was "so close as to be within ready reach and [was] under the control of [Petitioner]." Fla. Stand. **Jury Instr. in Crim. Cases** 225 (1981). Therefore, Petitioner's possession was actual, not constructive, and his knowledge of the presence of the contraband could be inferred or assumed. Id.

Knowledge, like intent, is not usually subject to direct proof, but must be inferred from the acts of the parties and surrounding circumstances. Thus, being a state of mind, knowledge is usually a question of fact for the jury to determine. **See** State v. Norris, **384** So.2d **298, 299** (Fla. 4th **DCA** 1980). "The trier of fact has the duty of weighing the evidence, judging the credibility of the witnesses, and ultimately determining a defendant's state of mind." State v. Alexander, **406** So.2d 1192, **1194** (Fla. **4th DCA 1981).** Consequently, "[a]ny interpretation of the facts . . . should be **made** by the trier of

fact." State v. Wise, **464 So.2d** 1245, **1247** (Fla. **1st** DCA), rev. denied, 476 So.2d 676 (Fla. 1985).

When Petitioner moved for a judgment of acquittal, he admitted all facts in evidence and all reasonable inferences in favor of the State arising therefrom. See Anderson v. State, **504 So.2d 1270, 1271** (Fla. 1st DCA 1986). "The purpose of a motion for judgment of acquittal is to challenge the legal sufficiency of the evidence, and where the State has brought forth competent evidence to support every element of the crime, a judgment of acquittal is not proper." Id. Here, the State had presented competent evidence to support the charge. Therefore, the trial court properly denied Petitioner's motion and allowed the jury to determine whether the evidence proved Petitioner's guilt beyond a reasonable doubt. The jury properly found that it did.

Even if Petitioner only had constructive possession of the contraband, his knowledge of its presence could have been inferred or assumed. Petitioner argues to the contrary, because the vehicle did not belong to Petitioner, but the focus should be on the status of Petitioner's possession of the vehicle at the time the contraband was discovered. At the time of Petitioner's arrest, there was no one else in the car with him. Likewise, there was no evidence to support his theory that the cocaine belonged to someone else, and thus he did not know it was there.

When the State's case rests on constructive possession, the State must present substantial, competent evidence from which the jury could infer guilt to the exclusion of every reasonable hypothesis of innocence. However, this Court has held that

> [t]he state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d 187, 189 (Fla. 1989) (footnote, citation omitted). ~~See also~~ Saffor v. State, 558 So.2d 69, 71 (Fla. 1st DCA) (The State presented evidence "directly contradict[ing] appellant's 'theory of defense,' thereby meeting its threshold for submitting the case to the jury."), rev. denied, 570 So.2d 1306 (Fla. 1990).

In order to determine whether the State presented evidence sufficient to meet its threshold burden below, it is first necessary to examine the "theory of defense" offered by Petitioner. An examination of the record here reveals that Petitioner did not present any evidence on his own behalf. The only real "theory" of defense was presented by defense counsel, who argued that Petitioner could not have been expected to search a car that did not belong to him, and that, even if the contraband were in plain view, he could not have been expected to know the illicit nature of the substance. More generally, Petitioner's defense was simply that the State had failed to meet its burden of proof.

Initially, the State submits that Petitioner's hypothesis was hardly the "theory of defense'' contemplated by this Court in

Law. The defendant's testimony in Law included four different theories of defense, each of which provided a somewhat detailed account of innocent actions by the defendant and the child victim that could have resulted in the injuries consistent with those that caused the victim's death. Law, 599 So.2d at 190-92. Similarly, the defendant in Saffor explained that a tire iron, allegedly used by a codefendant during a burglary, was in his car because he had earlier used it to work on a car generator at his girlfriend's house. Saffor, 558 So.2d at 71. By contrast, Petitioner in this case offered only his attorney's argument that someone else put the cocaine in the vehicle unbeknownst to Petitioner. The State submits that this is not a "theory of defense" that the prosecution was obliged to contradict.

Even if Petitioner's hypothesis was a viable "theory of defense," the State presented the following evidence of guilt: Petitioner was stopped for speeding at approximately 3:00 a.m. by Officer Case, who responded to a call for assistance by Officers Douberly and Webb. (T 14-20, 47-49, 93-94). When Petitioner pulled over, he got out of his vehicle and met Officer Case at the back of his vehicle. (T 49). No one else was in the vehicle with Petitioner. (T 30). At that point Officers Douberly and Webb arrived, (T 49-50). Officer Douberly ran a check on Petitioner's driver's license, and arrested Petitioner because of an outstanding capias.[3] (T 20, 36, 50, 95). He was asked if he wanted to leave his car there or have it towed, and Petitioner

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[3] The jury was aware that Appellant was detained, but was not informed of the capias.

responded that he wanted to leave it there. (T 50, 53, 95). In order to secure the vehicle, which was standard procedure, Officer Douberly approached the driver's side and looked around with his flashlight, but did not enter the vehicle. (T 50-52, 57). Officer Webb, on the other hand, approached the passenger's side, rolled **up** the window and locked the door, and "checked the rear seat area by leaning over the passenger side . . . to make sure there were no articles back there of value that the subject may want." (T *95-96).* As he did *so*, he saw a cellophane bag containing what looked like crack cocaine in plain view "[b]eside the passenger seat towards the inside near the hump in the middle of the vehicle." (T 96-97).

In contrast, the only evidence relating to the ownership of the car was elicited during the examination of Officer Douberly. Petitioner asked him, over the State's objection, whether the vehicle was registered to Petitioner. (T 26). Initially the court sustained the objection, but Petitioner was allowed to elicit a response from Officer Douberly that it was not Petitioner's vehicle. On redirect, the State asked the officer how he knew that it was not Petitioner's vehicle, and Officer Douberly responded that a computer check revealed it was registered in someone else's name. The State then asked Officer Douberly if anyone else was in the vehicle with Petitioner when he was stopped, to which the officer responded that there was not. (T 30). Petitioner did not testify or present *any* evidence of who the car belonged to, how long Petitioner had been in possession of the car, or who else might have been in the car.

Although he tried to argue several times during opening and closing arguments that the car was borrowed, there was no evidence to support this, and the State objected to the argument several times. (T 12, 128, 146).

Citing to several contraband possession and firearm possession cases, Petitioner claims that because the vehicle did not belong to him, he only had joint possession, and thus knowledge of the contraband's presence could not be inferred or assumed. As a result, the State was required to present independent proof of knowledge. Pet.'s Merits Brief at 19-24. All of Petitioner's supporting case law, however, can be distinguished in several respects.

First, all of the contraband cases cited to by P titi ner involve contraband found <u>hidden</u> throughout a residence occupied by several persons. In none of the cases, unlike in the present case, was the defendant found alone within ready reach of contraband in plain view.

Second, in two of the firearm possession cases cited to by Petitioner, the defendant was with another person in a car in which a firearm was found. In <u>Parnell v. State</u>, 438 So.2d 407 (Fla. 4th DCA 1983), a shotgun was found on the floor behind the front seat. The defendant's companion admitted owning the car and possessing the weapon, which he had taken from his cousin, who was a policeman in Miami. Likewise, in <u>Broughton v. State</u>, 528 So.2d 1241 (Fla. 1st DCA 1988), an officer responding to a suspicious vehicle saw furtive movement in the car before the

defendant, who was the driver, and the passenger exited the car. As the officer approached, he saw the passenger's door slightly ajar, and under the car he found a brand new pistol on the ground where he had not seen one shortly before. The defendant claimed that the passenger disposed of the gun, and he **knew** nothing about it. This Court found that Petitioner's theory of defense had not been adequately rebutted.

In the third firearm possession case cited to by Petitioner, the issue involves the trial court's rejection of a jury instruction requested by the defendant. Although the instruction related to the elements of the offense of possession of a firearm by a convicted felon, there was no analysis of the elements or any application of the elements to the facts. While the language seized upon by Petitioner is instructional, it has no application to the present case. Therefore, this Court should not rely on it as persuasive authority.

In sum, based on the evidence presented by the State, the trial court's denial of Petitioner's motion for judgment of acquittal was justified. Petitioner's hypothesis that he did not see the cocaine in the clear plastic bag in plain view between the seats was not credible. The jury obviously did not find it reasonable either. Thus, the trial court did not err in denying Petitioner's motion for judgment of acquittal, and this Court should affirm Petitioner's conviction.

B. Prosecutorial Misconduct

In this subsection, which has nothing to do with the first subsectian, Petitioner claims that the prosecutor committed reversible error when he objected during defense counsel's closing argument and commented that Petitioner might have stolen, **as** opposed to borrowed, the vehicle in which he was stopped. Specifically, Petitioner claims that the prosecutor's comment suggested to the jury that the State had other evidence, not introduced, against Petitioner. Pet.'s Merits Brief at 24-30. Not only was this argument not preserved for appellate review, it has no merit whatsoever.

During opening statements, defense counsel stated, "You will find that [Petitioner] didn't know every single item that was in the borrowed vehicle." The State objected to this statement as argumentative. (T 12). During defense counsel's initial closing argument, he stated, "What [the State's evidence] shows is [Petitioner] was driving a borrowed vehicle." The State made no objection. (T 128). Then, during Petitioner's rebuttal portion of closing arguments, defense counsel stated, "When people borrow vehicles they don't search them stem to stern to *see* what is in them and examine everything. That is not reasonable." At that point, the following colloquy occurred in the presence of the jury:

> [BY THE STATE]: I am going to object. There is no testimony this car was borrowed or whether it was stolen for that matter. We don't know.

> [BY DEFENSE COUNSEL]: I would object to that statement. There is no evidence it was stolen. He knows that was not stolen.
>
> [BY THE STATE]: He didn't know it was borrowed either.
>
> THE COURT: Let's stick with what the evidence showed and let you comment an that.

(T 146).

While perhaps the prosecutor's choice of words was somewhat inappropriate, the point he was trying to make was that defense counsel was arguing facts not in evidence. There had been no testimony or evidence of any kind, other than the fact that the vehicle was not registered to Petitioner, regarding who owned the car or how Petitioner came to be in possession of it. There was absolutely no indication that the prosecutor had undisclosed information that the car had been stolen. Yet, Petitioner is making this argument for the first time on appeal.

"[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). See also Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued an appeal or review must be part of that presentation if it is to be considered preserved."). Even a liberal interpretation of defense counsel's objection below could not lead to the absurd argument made by Petitioner in this appeal. At most, defense

counsel below claimed prejudice because of the implication that Petitioner was a car thief as well as a crack cocaine possessor, but since Petitioner has now abandoned that argument for this unpreserved one, the State will not address the one that should have been made.

Even assuming for argument's sake that Petitioner's captious argument was preserved, it is wholly without merit. Initially, the State would note that at the time Petitioner objected to the prosecutor's comment, he made no request for relief. He did not ask for a curative instruction, nor did he move for mistrial. He merely objected to the statement. Yet, now, Petitioner wants a new trial because of an allegedly prejudicial statement which he did not even think warranted a mistrial at the time it was made. Such draconian relief is hardly appropriate under the circumstances.

While the State would agree that the prosecutor's comment was inappropriate, it did not constitute reversible error (especially on the ground raised here). When viewed in context, it is obvious that the State did not intend to imply that Petitioner stole the car which he was driving. The State was merely protesting the repeated comments by defense counsel that the car was borrowed, when there was absolutely no evidence to support such an argument. In light of the overwhelming evidence of guilt--Petitioner's presence in a car by himself within ready reach of a clear plastic bag containing five rocks of cocaine laying in plain view between the driver's seat and the

passenger's seat--there is no reasonable possibility that the prosecutor's comment influenced the jury's verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Murray, 443 So.2d 955 (Fla. 1984); State v. Jones, 571 So.2d 1374 (Fla. 1st DCA 1990). Therefore, this Court should affirm Petitioner's conviction for possession of crack cocaine.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully asserts that this Honorable Court should decline to accept jurisdiction in this case or, if jurisdiction is accepted, this Court should answer the certified questions in the negative based on this Court's Ross decision and affirm Petitioner's conviction and sentence.

Respectfully submitted,

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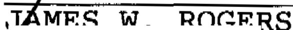

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Fourth Floor North! 301 South Monroe Street, Tallahassee, Florida 32301, this 26th day of June, 1992.

SARA D. BAGGETT
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