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D.A. 4-6-93

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,973

CHARLES MILLS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM DISTRICT COURT OPINION

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RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the prosecution and Petitioner, Charles Mills, was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The State was Appellee and Petitioner was the Appellant before the Fourth District Court of Appeal.

In this brief, the parties will be referred to as they appear before this Court, except that Respondent may also be referred to as "the State."

The following symbols will be used in this brief:

"R"	=	Record on Appeal
"PB"	=	Petitioner's Initial Brief before this Court
"AB"	=	Petitioner's Brief in the District Court
"A"	=	Appendix to Answer Brief

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE

The State of Florida points out that the information filed in this case, in addition to Petitioner, also named **two co-defendants, Carl Rouse and Sterlin Perkins** (R. 419). The two co-defendants were tried together, and each was found guilty of trafficking and conspiracy to traffic. The conviction against Carl Rouse was affirmed by the District Court in Rouse v. State, 583 So.2d 1111 (Fla. 4th DCA 1991). The conviction against co-defendant, Sterlin Perkins, was also affirmed, but the case was remanded for resentencing, see, Perkins v. State, 593 So.2d 324 (Fla. 4th DCA 1992). With those clarifications, the State accepts Petitioner's statement of the case as it appears at page 5 of the initial brief to the extent that it represents an accurate, non-argumentative recitation of the proceedings below.

To the extent that additional procedural actions taken by defense counsel and the court are necessary to address the issues raised by Petitioner before this Court, those facts will be brought out in the argument portion of the brief, as done by Petitioner.

STATEMENT OF THE FACTS

The State of Florida accepts Petitioner's "abbreviated version" of the statement of the facts as it appears at pages 6 and 7 of the initial brief to the extent that it represents an accurate, non-argumentative recitation of the proceedings below. To the extent that this Court considers the facts as set out in Petitioner's initial brief before the district court and attached to the initial brief before this Court as Exhibit A, those portions of the statement of the facts which are argumentative, speculation, or editorial comments by Petitioner [See, for example, third full paragraph on page 4; the first four lines in the bottom paragraph at page 8; middle paragraph at page 9; as well as the middle paragraph at page 13], the State objects, and submits that they may not be considered by this Court.

Finally, in compliance with Fla. R. App. P. 9.210(c), and for a complete and fair recitation of the evidence presented at trial of this case, the state hereby submits the following additions, clarifications and modifications to point out areas of disagreements between Petitioner and the State as to what actually occurred below.

On direct examination, Detective Losey testified that a confidential informant introduced him to Petitioner in May of 1988 (R. 22). That at that time he negotiated with Petitioner for the purchase of one to 12 kilos of cocaine (R. 22). That in May they met once at the Burger King on Broward Blvd. and N.W. 7th Avenue (R. 23), then they conversed on the telephone a couple of times subsequently thereto; but once the deal fell through in

May (R. 23), Detective Losey had no further communications with Petitioner until he called Petitioner on August 15, 1988 (R. 23-24).

During cross-examination, Petitioner again brought out the fact that Detective Losey met Petitioner through a Confidential Informant (R. 79-80). Petitioner identified the Confidential Informant as "Tom" (hereinafter referred to as CI) (R. 81-82). Detective Losey stated that the CI was not working off any charges under any substantial assistance program (R. 84). The CI was working for pay (R. 85).

Detective Losey stated that he went to meet Petitioner, because Petitioner told the CI that he (Petitioner) could get cocaine (R. 92). Then when they met at the Burger King, Petitioner told Detective Losey "face to face" that he could get cocaine (R. 93). Detective Losey testified that the conversation at Burger King in May of 1988 was mainly between he and Petitioner (R. 94); with Petitioner telling Detective Losey that "he had people established already that could deal drugs." (R. 95). Detective Losey testified that once the deal fell through in May, he did not do anything further on Petitioner between May and August (R. 99-100, 102); and he did not instruct the CI to pursue anything with Petitioner (R. 101). Detective Losey explained that the deal in May fell through because at that time he asked Petitioner to find 12 kilos for him; that then Petitioner came back and said that the people with the cocaine were unwilling to sell 12 kilos to a white boy they did not even know (R. 102). Detective Losey stated that during the three-

month period, Petitioner did not call Losey, except for the call after the Burger King meeting when Petitioner called to say "his source wouldn't do the deal" (R. 110).

Defense counsel attempted to have Detective Losey say that Losey called Petitioner everyday between May and August, but Detective Losey denied such allegations (R. 106). Detective Losey explained that when the 12 kilo deal fell through in May because Petitioner's suppliers were unwilling to sell so much to "a white boy they did not know," Detective Losey decided to let time pass, and then when he called in August, he asked Petitioner if he could get him just one kilo (R. 108). In August, Petitioner's response was "I'll see what I can do." (R. 108) In response to defense counsel's allegations, Detective Losey pointed out that the events of May 1988 were described in his police report (R. 110), except he did not write in that "his people won't deal with a white man in that amount." The report only says that the deal fell through, without further explanation (R. 111).

With reference to the tape recordings, Detective Losey agreed that in the first tape of August 16, Petitioner did say that the CI had called him (Petitioner) that day (R. 117), but Detective Losey explained that he called Petitioner directly, that he was dealing with Petitioner directly, and did not check with the CI to see if or what he was talking with Petitioner about (R. 117-8); and that he did not call Petitioner on August 15 on the CI's suggestion (R. 118). As far as Detective Losey was concerned, the CI was not involved in the August 16

negotiations (R. 121-2, 133, 146-7). Detective Losey testified that he received a quote of $22,000 per kilo of cocaine directly from Petitioner (R. 122-3).

During cross-examination, defense counsel had Detective Losey concede that Petitioner does not say the word "supplier" in any of the tape recordings (R. 122, 128). That Petitioner would refer to the person Losey was to meet as "the boy," not supplier (R. 128). Detective Losey explained to the jury that when he testified that Petitioner was waiting for his "supplier" to arrive, Detective Losey was just telling the jury the gist of what is contained in the tapes, and not a verbatim recitation of the words used by Petitioner in the tapes (R. 128).

With reference to the meeting held August 16, Detective Losey testified that is where he met Petitioner, and also met Carl Rouse (hereinafter Rouse) for the first time (R. 139-40). At that time, both Petitioner and Rouse assured Detective Losey that the supplier is trust worthy, and that the supplier would get there soon (R. 140). See Exhibit A.[1] However, on the 16th of August, even after Rouse made the telephone call in Losey's presence, and Detective Losey waited, the person with the cocaine

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[1] While the tape recording of the meeting held August 16, 1988, between Detective Losey, Petitioner and Rouse at Petitioner's autobody shop was admitted into evidence (R. 48-50), it was not transcribed in this record. The State urges this Court to take judicial notice of the transcript of the tape as it appeared in the record on appeal from the two co-defendants, Rouse (Case NO. 90-1606) and Perkins (Case No. 90-1905), a copy of which is attached to the State's Answer Brief as Exhibit A of the Appendix.

did not arrive while Detective Losey was there on the 16th (R. 142, 144).

In response to further cross-examination, Detective Losey testified that he believed Petitioner knew Perkins (the supplier), because Petitioner told Detective Losey "the supplier worked for the City of Sunrise." And ultimately it was discovered that Perkins did work for the City of Sunrise (R. 145).

Detective Losey denied having unrecorded telephone conversations with Petitioner between August 15 and August 18 (R. 151). Detective Losey then testified that after the several telephone calls on August 18, when Petitioner finally says he has "it" in his hands (R. 153), Losey goes over to the garage to consummate the transaction and Perkins is there (R. 154).

Once Detective Losey is introduced to Perkins, Perkins asked Petitioner to get "that thing out of the car" (R. 154). Detective Losey and Perkins walk into the office, and a few seconds later, Petitioner comes in with a yellow bag in his hands (R. 154), which contained the wrapped cocaine (R. 157). See Exhibit B.[2]

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[2] Once again, although the tape recording of the transaction taking place on August 18, 1988, was admitted into evidence at Petitioner's trial (R. 64-65), the transcript of the tape does not appear in this record. The State respectfully requests this Court take judicial notice of the transcript of the tape as it appears in Carl Rouse's appeal record in 4th DCA Case No. 90-1906, and Sterlin Perkins' appeal record in 4th DCA Case No. 90-1905, attached hereto as Exhibit B of the Appendix to the State's Answer Brief.

Petitioner, taking the witness stand on his own behalf, testified that it was only one week and a half (1½) after Tom (the CI) renewed their old relationship that he met Losey for the first time in May of 1988 (R. 238). Petitioner stated that when Tom asked him how he would like to make some easy money (R. 239) by finding some cocaine to sell a friend of Tom's that was in town from New York (R. 240), Petitioner said he would think about it (R. 240).

Petitioner conceded he did meet Detective Losey, introduced to him as "Danny" at the Burger King (R. 241). During that meeting Petitioner knew Detective Losey was looking to buy cocaine, and although he told Losey he did not know anyone who could sell him 12 kilos (R. 242), he did tell Detective Losey that he would look around for someone (R. 242). Petitioner understood his role to be that of finding someone with 12 kilos of cocaine to sell to Losey. Petitioner would introduce the person with the 12 kilos to Losey, and Losey would deal with the people directly (R. 243).

Petitioner testified that although Tom and Losey called him every day throughout the three months between May and August to see if he came up with anyone with the cocaine (R. 244), he "never looked" for anyone (R. 244). However, he also never told either Tom or Losey to stop calling him and bothering him because he "did not want to hurt Tom," saying, "I thought it would make him feel sort of bad." (R. 244) Although the numerous telephone calls were interfering with his work, Petitioner did not tell Tom to stop calling because he did not want "to hurt his feelings"

(R. 271-2). Petitioner did not tell Losey to stop calling, and did not get upset about the numerous phone calls, because Petitioner is "not that easy to get upset" (R. 276-7).

Petitioner testified that Rouse has been a friend of his for a long time prior to the transactions in the case at bar (R. 245). He stated that on the Friday, before August 16, was when Rouse mentioned he needed to find something else to do to make more money. So Petitioner told Rouse he knew a guy from New York (Detective Losey) who was looking for cocaine; so that if Rouse could get it, the guy would pay him well (R. 246).

Petitioner claimed that when he told Detective Losey, on August 16, that he was in touch with a "boy," he was referring to Rouse (R. 249). Then when Petitioner and Rouse met Detective Losey on August 16, Rouse talked directly with Losey (R. 251).[3] And allegedly, Petitioner did not know who Rouse was bringing in with the cocaine (R. 251). Petitioner also stated that when he called Detective Losey on the 18th and said he talked to the guy, he was referring to Rouse (R. 254). So that he was not aware Perkins (the third co-defendant and supplier of the cocaine) was involved until Perkins showed up on the 18th (R. 254). When Perkins arrived, carrying two bags, Rouse said to Petitioner, "this is the man." (R. 255).

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[3] The tape recording of the August 16 meeting was admitted into evidence as Exhibit 6 (R. 49-50). That tape was played for the jury in the trial of the two co-defendants, Rouse and Perkins, and is attached as Exhibit A to this Brief. See also recitation of fact made by this Court in *Rouse v. State*, 583 So.2d 1111 (Fla. 4th DCA NO.90-1606, 1991)

Petitioner testified he knew Perkins from before (R. 256). Then Perkins asked to place one of the two bags into "the trunk of a car" Petitioner was working on (R. 257). When Detective Losey arrived, Petitioner introduced Perkins to Losey as "the guy you have been looking for" (R. 257-8). After the introduction, Petitioner "was told to open the ... trunk of the car. Perkins got the package and they walked inside." (R. 258-9). Petitioner claimed not to have witnessed the rest of the transaction between Losey and Perkins (R. 259).

On cross-examination, Petitioner conceded he had known Tom (the CI) since 1978 (R. 260), but claimed never to have known Tom's last name (R. 261). Petitioner also conceded that when he accompanied Tom to meet Losey at the Burger King in May, it was to discuss obtaining cocaine for Losey (R. 264-5). Petitioner testified that he agreed to look around for someone with cocaine, because he was interested in the easy money Losey promised to pay him (R. 265-6). Petitioner conceded he intended to help Detective Losey locate cocaine because he was interested in the money Losey promised to pay him (R. 277). Petitioner knew that when they met in August 16, the purpose was to produce cocaine for Losey to buy (R. 282). Those were the intentions since May, when he first met Losey (R. 283).

Petitioner also conceded that was him making the statements in the tape recordings admitted into evidence (R. 285). Regarding August 16, Petitioner testified that Rouse did come to the shop to meet Losey (R. 285), and that he heard Losey complain about the cocaine not being there (R. 287). He was present when

Rouse made the telephone call (R. 288), and heard Rouse tell Losey the guy would be there in five minutes (R. 288).

With reference to the August 18 meeting, Petitioner testified that when he called Losey to say "it" was there, he did not know what "it" was, although Perkins said it was cocaine (R. 296, 302). Petitioner also claimed that he did not go in the office with Losey and Perkins for the final transaction (R. 304), but did hear Detective Losey say, "this looks like it's the right stuff." (R. 304-5)

SUMMARY OF ARGUMENT

POINT I The District Court did not err in applying the harmless error rule under the particular circumstances of this case where the Court complied with the notice requirement of Rule 3.410, Petitioner and his attorney were present when the court reinstructed the jury per their request during deliberations. Petitioner was able to present his objections and request for reinstruction on his entrapment defense.

POINT II The jury question requested "clarification or a copy of the law on armed trafficking." This specific request was not asking for re-reading of the instructions in their entirety. The District Court was correct in finding the trial court properly and completely answered the jury question, without the necessity of reinstructing on the defense of entrapment.

POINT III Petitioner failed to establish any police misconduct that would entitle him to discharge based on entrapment as a matter of law. Otherwise, the State presented substantial evidence to support the jury verdict of guilty as to the trafficking count. Thus, the District Court did not err in affirming the conviction without comment on this issue.

POINT IV Without setting forth complete arguments or facts to support his allegations, Petitioner refers this Court to his brief filed with the District Court as to further allegations of reversible error. All these issues were without merit. The District Court after considering same so found and affirmed the conviction, without comment. This Court should not waste its valuable time in reviewing such non-meritorious issues.

POINT I

THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE CONVICTION UPON THE FINDING THAT THE TRIAL COURT COMPLIED WITH THE REQUIREMENTS OF FLA. R. CRIM. P. 3.410 AND ONLY COMMITTED HARMLESS ERROR IN NOT GIVING DEFENSE COUNSEL THE OPPORTUNITY TO BE HEARD BEFORE RESPONDING TO THE JURY QUESTION.

JURISDICTION

This Court accepted conflict jurisdiction over the instant case pursuant to Art. V, §3(b)(4), Fla. Const., on the assumption that the opinion of the Fourth District Court conflicts on the same question of law with Cherry v. State, 572 So.2d 521 (Fla. 1st DCA 1990). However, a reading of the decision of the District Court makes it abundantly clear that there is no express and direct conflict with Cherry. Cherry involved a situation where defense counsel did not have notice and an opportunity to be heard regarding the appropriate response to a jury question. Thus, Cherry is distinguishable from the case at bar since here counsel was given notice and had the opportunity to preserve the issue by objecting to the reinstruction, and requesting that the instruction on entrapment be read **again** to the jury.

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of its brother or father

court. See generally, Mancini v. State, 312 So.2d 732 (Fla. 1975). In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), This Court defined the limited parameters of its conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the terms 'express' include: 'to represent in words; to give expression to.' 'Expressly' is defined: 'in an express manner.' Websters Third New International Dictionary (1961 ed. unabr.)

See also, Reaves v. State, 485 So.2d 829 (Fla. 1986) see generally, Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlacoochee River Electric Co-op v. Tampa Electric Co., 158 So.2d 136 (Fla. 1963). It is not appropriate to allege conflict based on the contents of a dissenting opinion. Jenkins.

A comparison of the facts from the face of the opinion in the instant case and the facts in the Cherry opinion, make it abundantly clear that there is no direct and express conflict. The State submits that this Court should therefore withdraw its order accepting jurisdiction over the case.

ARGUMENT

Should this Court decide to proceed with review of the case, the State responds to Petitioner's allegations as follows. The facts as found by the District Court are as follows:

> During jury deliberations, the jury sent a note to the trial judge. The Trial judge notified **both counsel** that the jury had a question. In the

> **defendant's presence**, defense counsel asked what the question was so that it could be discussed. The trial judge refused to tell defense counsel the question, and told him there was no need to talk about it. **The jury was then brought into the courtroom**. The trial judge said to the jury, "I have your question, 'Judge Coker, could you please clarify or provide a copy of the law on armed trafficking.'" The trial judge told the jury that he could not do that, but would reread to them the instruction on trafficking. The trial court then reread the instructions on armed trafficking that he had earlier given the jury. **The trial judge then asked, "Does that answer your question?" The jury said, "yes"** and then retired to continued their deliberations. After the jury left the courtroom, the trial judge and defense counsel engaged in the following colloquy:
>
> > MR. MORGAN: Judge, show my objection. We didn't get a chance to discuss that.
> >
> > THE COURT: Well, what's your objection?
> >
> > MR. MORGAN: I'd like to have entrapment read to them. It's not an offense to traffic if he was entrapped.
> >
> > THE COURT: I responded to their question exactly as they requested that I respond and your objection is noted.
>
> [Emphasis added.]

Mills v. State, 596 So. 2d 1148, 1149 (Fla. 4th DCA 1992), Exhibit C.

Petitioner now argues that the District Court erred in applying the harmless error rule to the circumstances of this

case, i.e., the trial court did not advise him of the question or gave counsel an opportunity to contribute to the response **before** reinstructing the jury. The State submits that because Petitioner and his counsel were notified of the jury question, were present during the communication of the court with the jury, and then had the opportunity to preserve the record by voicing his objection to the reinstruction, Petitioner has failed to establish reversible error entitling him to a new trial.

As to Petitioner's allegations that he was "foreclosed [from the] opportunity to assist the court in formulating ... [the] response," it must be kept in mind that feasibility and scope of reinstruction of the jury resides within the discretion of the judge. Hedges v. State, 172 So.2d 824 (Fla. 1965); Henry v. State, 359 So.2d 864 (Fla. 1978); Garcia v. State, 492 So.2d 360, 366 (Fla. 1986). The record at bar is clear that during deliberations, the jury submitted the question to the court, in response, the trial court, **in the presence of the Petitioner, defense counsel and the prosecution,** recalled the jury and gave a reinstruction without first conferring with the parties. The record shows, therefore, that all necessary parties were present pursuant to Fla. R. Crim. P. 3.410; this complied with the notice requirement of the Rule. See, Hildwin v. State, 531 So.2d 124, 127 (Fla. 1988); Westlund v. State, 570 So.2d 1133 (Fla. 4th DCA 1990).

As pointed out by the District Court, the cases relied upon by Petitioner hold that per se reversible error occurs when

a trial judge fails to notice defense counsel or the defendant of a jury question. Bradley v. State, 513 So.2d 112 (Fla. 1987); Curtis v. State, 480 So.2d 1277 (Fla. 1985); Ivory v. State, 351 So.2d 26 (Fla. 1977); Lacue v. State, 562 So.2d 388 (Fla. 4th DCA 1990). A review of all these cases shows situations in which counsel were not present prior to the trial court's responding to the jury request. In those cases, defense counsel were denied the opportunity to argue their positions regarding the jury request, or were not able to place objections on the record after the jury reinstructions were given. Even in Cherry v. State, 572 So.2d 521, 521 (Fla. 1st DCA 1990), the case used to obtain conflict jurisdiction sub judice, "the record does not show that counsel was provided notice *and* an opportunity to participate in the discussion of the action to be taken on the jury's request." Such a situation, which is more akin to the situation in Bradley, is clearly not present in this case.

In the case at bar, the trial court, **in the presence of Petitioner and his counsel**, reinstructed the jury on the law of armed trafficking as requested by the jury. After the jury was given the reinstruction, and the jury confirmed the judge answered their question to their satisfaction (R. 409), defense counsel properly preserved the issued by requesting that the judge also reinstruct the jury on his theory of defense of entrapment. Unlike the cases cited by Petitioner, the notice requirement of rule 3.410 was effectively satisfied because counsel had notice, an opportunity to argue, and to object,

after the reinstructions were given. Colbert v. State, 569 So.2d 433, 435 (Fla. 1990).

Therefore, the District Court was correct in applying the harmless error rule to the merits of the objection made by defense counsel after the judge responded to the jury question. See, Colbert; Hildwin v. State, 531 So.2d 124, 127 (Fla. 1988); Williams v. State, 488 So.2d 62, 64 (Fla. 1986). Sub judice, as in Colbert, after the jury was given the [re]instruction, defense counsel properly preserved the issue by objecting and suggesting an additional instruction on the record. Thus defense counsel fully argued his position that the jury should also be reinstructed on the defense of entrapment. Thus, unlike the facts in Ivory, Bradley, and Curtis, the notice requirement of rule 3.410 was effectively satisfied because counsel had notice, an opportunity to argue and to object to the reinstructions as given. Id. at 435.

As it will be discussed under issue II, Petitioner has failed to show that the trial court abused its discretion in limiting the reinstruction to answer the specific question of the jury. Thus, since under this Court's mandate in Colbert; Hildwin; and Williams, the District Court properly applied the harmless error rule to the facts of this particular case to determine that the trial court did not err in denying Petitioner's request for reinstruction on the entrapment defense, no reversible error has been established sub judice, and the District Court's affirmance of the conviction should be approved by this Court.

In support of his argument, as a side issue, Petitioner alleges that the trial court erred in not providing the jury with "a copy of the law" by submitting the "entire" instruction in writing, or giving defense counsel and opportunity to point out case law on this issue to the judge (PB 16). The State would point out that defense counsel, during his opportunity to state his objections to the reinstruction (R. 409-410), did not request the court to provide the jury with a copy of the "entire instructions in writing." As found by the District Court:

> When given the opportunity to object, defense counsel did not object to the re-instruction that was given. He only objected to the trial judge's failure to also give the entrapment instruction. Defense counsel had notice, an opportunity to argue, and to object, both before and after the trial judge denied his request for re-instruction on entrapment.

Therefore, since the court sub judice chose to limit the reinstruction to the specific request of the jury, no error occurred. See, Simmons v. State, 541 So.2d 171 (Fla. 4th DCA 1989), [when reinstructing the jury **orally** the court may limit the reinstructions so as to answer the specific request of the jury. However, when submitting the written instruction to the jury, the entire written instructions must be delivered to the jury as required by Fla. R. Crim. P. 3.400(c).] Thus, the reinstruction given was not an abuse of discretion since it was oral and limited to the request by the jury. Id. Immediately after the reinstruction, the jury asserted the judge had answered their question (R. 409). Thus, it should not be presummed that the jury wanted to hear the instructions in its

entirety, or that the jury was confused on anything other than "the law on armed trafficking."

Further since Petitioner did not raise these arguments in the trial court, he did not preserve the issue for appellate review, thus, no error has been shown by Petitioner.

POINT II

THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE CONVICTION UPON THE FINDING THAT THE TRIAL COURT'S REINSTRUCTION WAS A CORRECT AND COMPLETE RESPONSE TO THE JURY'S QUESTION.

The question asked by the jury was:

> Judge Coker, could you please clarify or provide a copy of the law on armed trafficking.

(R. 407).

Generally, feasibility and scope of reinstruction of the jury resides within the discretion of the judge. Garcia v. State, 492 So.2d 360, 366 (Fla. 1986); Henry v. State, 359 So.2d 864 (Fla. 1978). A trial judge may properly limit the repetition of charges to those requested. However, the repeated charges should be complete on the subject involved. Hedges v. State, 172 So.2d 824 (Fla. 1965); Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986). A review of the facts in this case clearly show that the judge properly answered the question with a correct and complete statement of the law, relative to the jury inquiry. Cf. Garcia.

The jury question simply asked for reinstruction on "the law on armed trafficking." Petitioner strains in asserting that the jury wanted to hear the entirety of the instructions as initially read by the judge. Further, the record is clear that when the judge asked the jury whether his response answered the question, the jury responded "yes" (R. 409). There is no room for speculation that the jury wanted additional instructions, or re-reading of any other portions of the instructions. As

recognized by Petitioner (PB 10), after a "short recess" (R. 410), the jury came back with a verdict of guilty. Therefore, the record does not support Petitioner's speculations that the jury was still confused after the reinstructions, or wanted additional re-instructions.

It is, thus, clear that Petitioner has failed to show abuse of discretion in the trial court's response to the jury's simple request for the "law on armed trafficking" by stating the elements of the offense, without also **re-reading** the previously given instruction concerning the defense of entrapment. See, Singleton v. State, 512 So.2d 1159 (Fla. 3d DCA 1987). The trial court properly limited its response to the jury's request and denied Petitioner request to **re-instruct** the jury on entrapment defense. This was not misleading, Gonzalez v. State, 502 So.2d 66 (Fla. 3d DCA 1987).

The cases cited by Petitioner do not hold that the trial court must always reinstruct on the applicable defenses when it reinstructs on the offense charged. The instructions on armed trafficking did not exclude acts performed under "entrapment." The instructions on armed trafficking was therefore complete, and the trial court did not abuse its discretion in refusing to **reinstruct** on the entrapment defense. See, Gitman v. State, 482 So.2d 367, 371 (Fla. 4th DCA 1985); Bristow v. State, 338 So.2d 553, 556 (Fla. 3d DCA 1976); Reynolds v. State, 438 So.2d 190 (Fla. 1st DCA 1983).

Petitioner has failed to establish that the District Court erred in finding that the trial judge correctly reinstructed the jury, without reinstructing as to entrapment.

POINT III

THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE CONVICTION SINCE THE RECORD DOES NOT SUPPORT PETITIONER'S ALLEGATIONS THAT THE EVIDENCE ESTABLISHED ENTRAPMENT AS A MATTER OF LAW.

In 1980, Article V of the Florida Constitution was amended to limit this Court's mandatory review of district court of appeal decisions, and to provide for discretionary review jurisdiction. This amendment was necessary due to the staggering number of cases reaching this Court. The amendment, thus, turned the district courts of appeal into courts with *final appellate* jurisdiction in most cases. Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983). This Court accepted jurisdiction in the case at bar under Art. V, §3(b)(4), Fla. Const., as the District Court certified its opinion is in conflict with a decision of another district court of appeal on the specific issue discussed in issues I and II above. See, Mills v. State, supra; Exhibit C. Thus, although this Court does have jurisdiction to consider issues ancillary to those directly before the Court, the State urges this Court to decline to entertain the issue raised by Petitioner as his issues III and IV before this Court, since those issues have already been resolved by the District Court, they were not discussed in the opinion issued by the District Court, and the resolution of the issue properly before the Court does not affect the affirmance of the conviction by the District Court. See, Lee v. State, 501 So.2d 591, 592 n. 1 (Fla. 1987); State v. Hill, 492 So.2d 1072 (Fla. 1986) Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983).

Should this Court decide to go ahead and entertain the issues, in response to Petitioner's allegations, the State submits as follows:

Equating the facts in the case at bar with the facts as presented by the Florida Supreme Court in State v. Hunter [and Conklin], 586 So.2d 319 (Fla. 1991), Petitioner argues the trial court erred in denying his motion for judgment of acquittal at the end of the state's case because he either established entrapment "as a matter of law," or proved subjective entrapment. The State submits that Petitioner's allegations are without merit, thus the District Court was correct in affirming the trial court's denial of the motions, without comment.

An appellate court in reviewing the trial court's denial of the motion for judgment of acquittal should be guided by the well-settled principle that a defendant, in moving for a judgment of acquittal, admits all facts stated in the evidence adduced and every conclusion favorable to the prosecution that a jury might fairly and reasonably infer from the evidence. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); McConnehead v. State, 515 So.2d 1046, 1048 (Fla. 4th DCA 1987). A motion for judgment of acquittal should not be granted unless it is apparent that no legally sufficient evidence has been submitted under which a jury could legally find a verdict of guilty. Lynch; Bush v. State, 466 So.2d 1073, 1079 (Fla. 3d DCA 1984). Because conflicts in the evidence and the credibility of the witnesses has to be resolved by the jury, the granting of the motion for judgment of acquittal cannot be based on evidentiary conflict or

witness credibility. Lynch; Hitchcock v. State, 413 So.2d 741, 745 (Fla. 1982). A judgment should not be reversed if there is competent evidence which is substantial in nature to support the jury's verdict. Rose v. State, 425 So.2d 521 (Fla. 1982); Welty v. State, 402 So.2d 1159 (Fla. 1981). Any conflicts in the evidence are properly resolved by the jury. Jent v. State, 408 So.2d 1024 (Fla. 1982); Hampton v. State, 549 So.2d 1059 (Fla. 4th DCA 1989). As held in Brewer v. State, 413 So.2d 1217, 1219-20 (Fla. 5th DCA 1982) rev. denied, 426 So.2d 25 (Fla. 1983).

> Although the State must prove intent just as any other element of the crime, a defendant's mental intent is hardly ever subject to direct proof. Instead, the State must establish the defendant's intent (and jury must reasonably attribute such intent) based on the surrounding circumstances in the case. Keeping in mind the test to be applied to a motion for judgment of acquittal, a trial court should rarely, if ever, grant a motion for judgment of acquittal based on the State's failure to prove mental intent.
> [Citation and footnote omitted.]

Trafficking in Cocaine

Count I of the information charged Petitioner, Carl Rouse and Sterlin Perkins with trafficking in cocaine in an amount in excess of 400 grams (R. 419). Petitioner argues that his motion for judgment of acquittal should have been granted because the evidence established entrapment as a matter of law (objective entrapment), as well as subjective entrapment.

Although no specifically citing to Cruz v. State, 465 So.2d 516 (Fla. 1985), through his analogy to the facts in

Hunter, Petitioner relies on the two part test in Cruz to support the argument that he established an objective entrapment violation below. The State maintains that the two part objective test as articulated in Cruz was abolished by the legislature when §777.201 Fla. Stat. was enacted. State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991), rev. granted, 598 So. 2d 77 (Fla. 1992); Gonzalez v. State, 571 So.2d 1346, 1349 (Fla. 3d DCA 1990), rev. denied, 584 So.2d 998 (Fla. 1991). Whether the State's position is correct is currently before this Court in Munoz; Krajewski v. State, 597 So.2d 814 (Fla. 4th DCA 1992), rev. granted, FSC Case No. 80,087 (Fla. Sept. 30, 1992); and Lewis v. State, 597 So.2d 842 (Fla. 3d DCA 1992), rev. granted, FSC Case No. 80,058 (Fla. Sept. 30, 1992).

In any event, even if the Cruz test is applicable to Petitioner, no objective entrapment occurred. The police activity was designed to interrupt ongoing criminal activity. It was not designed to ensnare innocent individuals or induce the commission of criminal activity by those not otherwise predisposed.

The testimony at trial was that the confidential informant introduced Petitioner to Detective Losey because Petitioner told the CI that he (Petitioner) could get cocaine (R. 92). Then when Detective Losey met Petitioner for the first time at Burger King in May of 1988, Petitioner himself told Detective Losey "face to face" that he (Petitioner) could get cocaine for him (R. 93). The conversation at Burger King was mainly between Detective Losey and Petitioner, although the CI was present (R.

94). Petitioner was well versed in drug dealing, dealt directly with Detective Losey, and said that "he [Petitioner] had people established already that could deal drugs." (R. 95). The deal arranged between Detective Losey and Petitioner in May fell through when Petitioner came back saying the people with the cocaine were unwilling to sell 12 kilos to a white boy they did not know (R. 102).

Detective Losey had no further communications with Petitioner between May and August of 1988 (R. 99-100, 102, 108, 110). Once the 12 kilo fell through, Detective Losey decided to let time pass. Then in August, without talking with the CI first, Detective Losey decided to call Petitioner again and lower his request for just one (1) kilo of cocaine (R. 108). Detective Losey called Petitioner himself August 15, 1988, (R. 24). This conversation was taped recorded (R. 24), admitted into evidence (R. 32-35), and played for the jury (R. 176-178). At that point, Petitioner said he would check to see what he could do and get back with Detective Losey (R. 24, 108). The very next day, August 16, 1988, Petitioner called Detective Losey at 2:40 p.m. to let Losey know he (Petitioner) could get a kilo of cocaine for $22,000 (R. 25, Tape transcript R. 179-180); and they attempted to conduct the transaction that afternoon or evening of August 16, 1988 (R. 26-38).

On August 17, 1988, the transaction was not consummated because Detective Losey pretended he was going to be out of town, so as to not appear too anxious (R. 38-9). Then on August 18, 1988, Petitioner called Detective Losey to say that he had

talked to his source, and if Losey wanted the kilo, Petitioner could get it for him (R. 42). The transaction then took place on August 18, 1988, at Petitioner's car shop (R. 50-54). When Detective Losey arrived, Petitioner introduced Losey to Sterlin Perkins (R. 51), and after Perkins and Losey entered the office, Petitioner walked in with the bag containing the cocaine (R. 53). Losey tested the cocaine, stated he was satisfied, and went outside to bring the money in, thus signaling the back up team to come in for the arrest (R. 54).

Except for Petitioner's self-serving testimony, the evidence is clear that Petitioner negotiated the sale of the cocaine directly with Detective Losey, not through the confidential informant. Petitioner negotiated the price with Detective Losey, and admittedly brought both Carl Rouse and Sterlin Perkins into the transaction within 24 hours of the first telephone conversation with Detective Losey on August 15, 1988. The evidence was clear that Detective Losey was attempting to stop Petitioner's "ongoing" drug dealing. The evidence was just as clear that as soon as Detective Losey contacted Petitioner, both in May and then again in August, it did not take long for Petitioner to check the possibilities out, and then find Carl Rouse and Sterlin Perkins to consummate the transaction the very next day. Contrary to Petitioner's assertions, the confidential informant, Tom, was not working out a substantial assistance agreement (R. 84). Further, the negotiations for the case at bar were conducted strictly between Petitioner and Detective Losey. Without any involvement by the

CI. The confidential informant was not even called to testify at trial, although Petitioner was well aware of his identity (R. 81-82). Clearly, the above shows that police activity did not manufacture this crime. No entrapment, as a matter of law, has been established at bar.

Petitioner also argues that reversal is "appropriate on due process grounds." In Hunter, the court stated: "By focusing on police conduct, this entrapment standard includes due process considerations." Id., 586 So.2d at 322. As held by this Court, however, there can be no due process violation where the informant's testimony was not vital to the State's case. Jaramillo v. State, 576 So.2d 349 (Fla. 4th DCA 1991); Khelifi v. State, 560 So.2d 333 (Fla. 4th DCA 1990). As stated earlier, the alleged confidential informant, Tom, did not testify at Petitioner's trial, thus, it is clear that his testimony was not vital to the state's case sub judice. See, State v. Bergeron, 589 So. 2d 462 (Fla. 4th DCA 1991) (Due process defense only applies when an informant is given a direct financial stake in a successful criminal prosecution and that informant is required to testify in order to produce the testimony. Citing to Hunter.) Further, the evidence presented at trial was clear that the negotiations for the transaction were conducted exclusively between Petitioner and Detective Losey; and that Petitioner had the deal arranged to be consummated within a 24-hour period. Thus, as was the case in Jaramillo, at 350, Petitioner "negotiated directly with the officers regarding the details of the transaction, all of whom testified against

Petitioner" (R. 21-166). Under the facts of this case there can be no violation of Petitioner's due process rights.

POINT IV

THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE CONVICTION WITHOUT OPINION AS TO ISSUES TWO, FOUR, FIVE, SIX, SEVEN AND EIGHT OF PETITIONER'S BRIEF BEFORE THE DISTRICT COURT WHERE THE ISSUES ARE CLEARLY WITHOUT MERIT.

Petitioner once again urges this Court to reconsider issues two, four, five, six, seven and eight of his brief before the District Court, even though the District Court after considering the issues affirmed the conviction without comment. The State submits that these issues are totally without merit. Petitioner does not even makes full arguments on the alleged issues, but merely refers this Court to his brief in the District Court. As such, this Court should decline to entertain review of same. Should the Court decide to consider the issues, the State responds to Petitioner's arguments as follows:

Sub-Issue One

THE TRIAL COURT DID NOT ERR IN OMITTING FLORIDA STANDARD JURY INSTRUCTION 2.04(e) SINCE NO EVIDENCE WAS PRESENTED DURING TRIAL TO REQUIRE THIS INSTRUCTION, OR IN GIVING STANDARD JURY INSTRUCTION 2.04(c) WITHOUT PETITIONER REQUESTING SAME SINCE PETITIONER DID TAKE THE WITNESS STAND IN HIS BEHALF.

Petitioner contends the trial court erred in omitting Florida Standard Jury Instruction 2.04(e) [Defendant's Statements] and in giving Standard Jury Instruction 2.04(c) [Defendant Testifying] without Petitioner having requested same.

The State submits that upon a review of the facts in this case, it is clear that Petitioner's allegations are without merit.

The record is clear that Petitioner exercised his right to remain silent upon arrest, and never gave any statements to the police. The record is just as clear that at trial Petitioner took the witness stand on his own behalf, and conceded he became involved in the plan to sell the cocaine to Detective Losey because he wanted to help his "friend, Tom" who happened to be a confidential informant. Petitioner also acknowledged that was his voice in the taped telephone conversations admitted into evidence.

At the charge conference, the court stated he would give the general standard jury instructions, and said "You all know the generals as well as I do." The court then inquired if counsel was asking for any special instructions (R. 323). The prosecutor asked for the instructions on principals (R. 323), and the defense asked for an instruction on Entrapment, which was granted by the court (R. 323). The court and counsel then discussed the lesser included offenses being requested by the defense, and the verdict form (R. 323 - 327). Defense counsel attempted to have the court modify some of the language in the standard jury instructions (R. 327, 328). Defense counsel then requested a special definition of possession (R. 328-330), and discussed the standards on the elements of trafficking (R. 331-332). Thus, after a charge conference that takes up ten pages of the trial transcript, and at which defense counsel took the opportunity to discuss modifications to the standard jury

instructions he thought necessary, it is unconscionable for Petitioner to now argue on appeal that the trial court "limited" the charge conference, and did not give him an opportunity to voice his opinion as to the "generals" the court announced he would be reading to the jury (AB 23).

In any event, Petitioner has failed to show reversible error in the instructions as read by the trial court.

A. Standard Jury Instruction 2.04(c) [Defendant cTestifying].

Petitioner contends the court erred in giving Standard Jury Instruction 2.04(c) where the defense made no motion or request for such instruction. The record supports the fact that Petitioner took the witness stand on his own behalf. The State submit that even though not requested by the defense, the instruction was not an improper comment on the fact that Petitioner took the stand, and what weight the jury should give to his testimony. Thus, it was not error for the court on its own motion to give the standard jury instruction approved by the Florida Supreme Court to be given when the defendant testifies. Cf., Bundy v. State, 455 So.2d 330, 347 (Fla. 1984); DeLaine v. State, 230 So.2d 168, 175 (Fla. 1970) Stewart v. State, 27 So.2d 752 (Fla. 1946); Fogler v. State, 96 Fla. 68, 117 So. 694 (1928); Lloyd v. State, 218 So.2d 490 (Fla. 2d DCA 1969).

B. Standard Jury Instruction 2.04(e) [Defendant's statements].

It is settled that this instruction should be given when the state has presented evidence or testimony regarding

confessions or admissions made by the defense after Fifth Amendment right to remain silent has attached. In the case at bar, there was no evidence or testimony evidencing that Petitioner did anything but exercise his rights and made no confessions or admission, but maintained his plea of innocence from the time of his arrest and throughout the trial. Thus, once again the record supports the trial court's finding that the evidence presented at trial did not require the reading of this standard jury instruction (R. 402).

Jury instructions must relate to issues concerning evidence received at trial. Further, the court should not give instructions which are confusing, contradictory, or misleading. Butler v. State, 493 So.2d 451, 452 (Fla. 1986). Therefore, under the facts of this case, the instruction was properly refused because there was no evidence before the jury upon which the instruction could have been properly based. Since the instruction was inapplicable to the facts and unwarranted by the evidence, the trial court did not err in refusing to give them. Fleming v. State, 21 So.2d 345, 346 (Fla. 1945); Harvey v. State, 176 So. 439, 441 (Fla. 1937). To give the instruction in the absence of any supporting evidence would have been to confuse the jury, Butler. Thus, no reversible error has been establish by Petitioner sub judice.

Sub-Issue Two

THE TRIAL COURT CONDUCTED A SUFFICIENT RICHARDSON INQUIRY IN RESPONSE TO APPELLANT'S UNFOUNDED ALLEGATIONS OF A DISCOVERY VIOLATION BY THE STATE.

Under this issue, Petitioner made an unfounded, illusive, and convoluted argument alleging per se reversible error in the trial court's failure to conduct a Richardson[4] inquiry on an unexplained discovery violation allegedly committed by the State (AB 30-38). The State submits that since Petitioner, even in his appellate brief, has failed to state what prejudicial material the State failed to disclose, he is not entitled to relief on this ground. It is clear, as conceded by defense counsel, that the State properly provided the tape recordings to Petitioner pre-trial (R. 74), as well as all of Detective Losey's police reports (R. 75); and that defense counsel took Detective Losey's deposition January 26, 1989 (R. 134-135); therefore, no valid discovery violation has been alleged or established in this case.

The record on appeal is clear that through the testimony of Detective Losey, the State presented evidence that Detective Losey dealt directly with Petitioner in setting up the transaction. Detective Losey testified as to his "personal" dealing with Petitioner in setting up the transaction. In support of Detective Losey's testimony it was revealed that all conversations in which Detective Losey and Petitioner were involved beginning August 15, 1988, to and including August 18, 1988, were tape recorded. All these tape recordings were admitted into evidence. During Detective Losey's testimony, defense counsel objected to Detective Losey's live testimony, arguing that the tapes were "the best evidence" (R. 26, 31, 42,

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

50, 65) and that Detective Losey's testimony was not necessary (R. 31, 43).

At the conclusion of Detective Losey's direct testimony, the defense objected to the fact that the State did not publish the tapes to the jury, although they had been admitted into evidence (R. 71, 73). Apparently, Petitioner, even though corrected by the trial court (R. 73), felt that if he published the tapes to the jury, that would be as if the defense had presented evidence (R. 73). At that point, Petitioner claimed "discovery violation" (R. 74), and the court asked defense counsel to explain (R. 74), thereby conducting a Richardson inquiry. In an effort to establish a discovery violation, defense counsel stated he was objecting to the fact that during his testimony, Detective Losey said "things I have never been told about" (R. 74). Apparently Petitioner is complaining about the fact that Detective Losey attributed Petitioner with using the word "supplier" during their taped conversations (AB 33); and second that Detective Losey testified that Petitioner said the deal for 12 kilos did not go through in May 1988 because the person with the 12 kilos refused to deal with Losey, "a white boy," the seller did not know (R. 74-75, AB 33).

During the inquiry by the Court, Petitioner conceded he had been supplied all tape recordings admitted into evidence, as well as all police reports (R. 74, 75). Petitioner failed to inform the court what other material had been kept from him. No discovery violation has been shown. See, State v. Hall, 509 So.2d 1093 (Fla. 1987). On cross examination, Detective Losey

clarified that in the tape recordings, Petitioner did not use the words "source" or "supplier" (R. 104, 122, 128). That Losey's testimony was his interpretation of what was contained in the tapes, and not a verbatim recitation of the language used in the tapes (R. 128). Likewise, regarding the fact that the 12 kilo deal did not go through in May, Detective Losey testified that information was contained in his police report (R. 110), which was in possession of the defense (R. 75), although the report does not say anything about "his people won't deal with a white man in that amount" (R. 111). The state maintains that since all the information was provided to Petitioner by the State, Petitioner took Detective Losey's deposition in preparation for trial; and the reason why the May deal fell through was not crucial or prejudicial to Petitioner's defense, the trial court was correct in not finding a discovery violation had occurred herein. Id. Therefore, no reversible error under Richardson has been established by Petitioner in the case at bar. Cf. Hall.

Relying on Lucero v. State, 564 So.2d 158 (Fla. 3d DCA 1990), and State v. Kakas, 568 So.2d 126 (Fla. 4th DCA 1990), Petitioner fashions a discovery violation for failure to disclose the identity of the confidential informant (R. 38). It must be noted that Petitioner **never** filed a pre-trial motion for disclosure. Rather the record is abundantly clear that Petitioner was well familiar with Tom, the confidential informant (R. 81-82). Petitioner testified that he and Tom were friends since 1978 (R. 260). Petitioner raised the entrapment

defense, choosing not to bring Tom forward as his own witness. Petitioner was aware the State had not listed Tom as a potential witness, and yet never requested disclosure, or an address for Tom. The State presented an overwhelming case against Petitioner without Tom's testimony. The record is clear that Tom took no part in the setting up or conducting of the transaction that took place between Petitioner, his two co-defendants, and Detective Losey between August 15 and 18, 1988. Thus, Petitioner's allegations as to this ground are also totally unfounded, and must be dismissed as being without any semblance of merit.

The trial court conducted an inquiry into Petitioner's allegations of discovery violation (R. 74-75). Petitioner having been unable to specify what material was not provided to him; and then during cross-examination of Detective Losey establishing that no "undisclosed statements (taped and untaped) attributed to Petitioner" (AB 38) were in existence, is not entitled to the relief sought under this point on appeal.

Sub-Issue Three

THE TRIAL COURT DID NOT REVERSIBLY IN DENYING PETITIONER'S MOTION FOR MISTRIAL OR MOTION FOR NEW TRIAL BASED ON DETECTIVE LOSEY'S RESPONSE TO PETITIONER'S QUESTION DURING CROSS-EXAMINATION.

In the District Court Brief, Petitioner alleged the trial court reversibly erred in overruling his objection and denying his motions for mistrial or new trial based on Detective Losey's response to Petitioner's question during cross-examination. The

State maintains that if the response can be characterized as a comment on Petitioner's right to remain silent, the response was invited by Petitioner's argumentative questions to the Detective. Further, if error, the error was harmless beyond a reasonable doubt. Therefore, Petitioner is not entitled to a new trial on this basis.

The record on appeal reveals that Petitioner's entire tone on cross-examination was very antagonistic and accusatory of Detective Losey. Petitioner was attempting to establish police misconduct by insinuating that the confidential informant was pressuring Petitioner into committing the crime at Detective Losey's insistence, or due to Detective Losey's lack of supervision over the confidential informant. The answer challenged by Petitioner was in response to the following question:

> Q. [by defense counsel]: Perkins was arrested. Mills [Petitioner] was arrested and you talked to those three people about what you call substantial assistance, didn't you?
>
> A. [by Detective Losey]: And nobody had anything to say.

(R. 161). It is clear that the response was invited by the question. The witness was allowed to explain the answer in order that the jury would not be mislead.

Assuming arguendo that this Court takes Detective Losey's response as fairly susceptible of being interpreted as a comment on silence, the error is subject to the harmless-error rule. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In the case at bar, it is clear that the error, if any, was harmless beyond a

reasonable doubt. This was the only statement made by Detective Losey that could be interpreted as a comment on silence. The answer was invited by Petitioner's question. The Detective did not repeat the answer, nor did the prosecution make any mention of it in his opening statement or closing argument. Moreover, the evidence of guilt was overwhelming in this case. The dealings between Petitioner and Detective Losey, as well as the actual transaction, were tape recorded and admitted into evidence at trial. There is no reasonable possibility that Detective Losey's innocuous and short response to Petitioner's misleading question contributed to Petitioner's conviction. Therefore, no new trial is necessary on this issue. DiGuilio; see also, Conner v. State, 582 So.2d 750 (Fla. 1st DCA 1991).

Sub-Issue Four

NO REVERSIBLE ERROR WAS COMMITTED IN ADMITTING INTO EVIDENCE THE TAPE RECORDINGS OF PETITIONER'S CONVERSATIONS WITH DETECTIVE LOSEY.

Petitioner contends that the various taped recordings of the conversations between Petitioner and Detective Losey between August 15 and 18, 1988, were "accomplished contrary to" Chapter 934, Fla. Stat. (AB 42), and thus it was reversible error to admit the tapes into evidence at trial. The State submits that this argument is totally without merit.

Section 934.03(2)(c), Fla. Stat. provides:

> (c) It is lawful under ss. 934.03-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic

> communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.
> [Emphasis added.]

It is clear that plain language of the statute allows interception by a law enforcement officer 1) when such a person is a party to the communication, or 2) when one of the parties has given prior consent, if 3) the purpose of the interception is to obtain evidence of a crime.

In the case at bar, the tape-recorded conversations were between Petitioner and Detective Losey himself. It can be assumed that since Detective Losey was a party to the conversation, and he tape recorded his conversation for the purpose of obtaining evidence of trafficking against Petitioner, he consented to the taping of his conversations. Thus, the interception of these communications were lawful under §934.03 (2)(c).

Detective Losey verified that the taped conversations were correct; and he testified as to the contents of the conversations. Petitioner too conceded that was his voice on the tape recordings (R. 284-5). Thus, no reversible error has been established under this issue either.

Sub-Issue Five

> THE EVIDENCE WAS OVERWHELMING TO SUPPORT A CRIMINAL CONSPIRACY CONVICTION.

Petitioner complains that the trial court erred in denying his motion for judgment of acquittal as to the conspiracy count.

Petitioner claims he cannot be found guilty by conspiring with Detective Losey, claiming that he did not have any kind of agreement with Rouse and/or Perkins (AB 45). As to the standard of review on a motion for judgment of acquittal, please see issue three, supra, at pp. 24-25. Under that standard, it is clear that Petitioner's arguments are totally without merit.

The crime of conspiracy consists of an express or implied agreement between two or more persons to commit a criminal offense. Velunza v. State, 504 So.2d 780 (Fla. 3d DCA 1987). The existence of an agreement to support a charge of conspiracy may be shown by circumstantial evidence, State v. Cristodero, 426 So.2d 977 (Fla. 4th DCA 1982), pet. for review denied, sub nom, O'Donnell v. State, 436 So.2d 100 (Fla. 1983); Borders v. State, 312 So.2d 247 (Fla. 3d DCA 1975), cert. denied, 327 So.2d 247 (Fla. 3d DCA 1975), cert. denied, 327 So.2d 31 (Fla. 1976). The jury is free to infer from all of the circumstances involved that there was a common purpose to commit the crime. See, Harris v. State, 450 So.2d 512, 514 (Fla. 4th DCA), rev. denied, 458 So.2d 272 (Fla. 1984); Cristodero; Manner v. State, 387 So.2d 1014, 1016 (Fla. 4th DCA 1980).

The record clearly supports the State's theory that Petitioner was actively and knowingly involved in the agreement and delivery of the cocaine to Detective Losey. Detective Losey negotiated the purchase of the kilo of cocaine with Petitioner on August 15, 1988. Petitioner called Detective Losey back on August 16, 1988, to inform him that he had someone willing to sell Losey the kilo of cocaine for $22,000.00. The transaction

was to take place at Petitioner's auto shop. Petitioner called Losey to come over because the guy with the cocaine was to arrive. The evening of August 16, 1988, Petitioner and Rouse were waiting for Detective Losey, and insisted that the supplier of the cocaine was legitimate and should be arriving shortly. When the transaction did not take place on August 16, 1988, Petitioner called Losey August 17, and then again at numerous times during the day on August 18, 1988, until Losey went to Petitioner's auto shop where Petitioner and Sterlin Perkins were waiting with the kilo of cocaine to sell to Detective Losey.

During his testimony at trial, Petitioner conceded that when he met Detective Losey in May 1988, he (Petitioner) knew Losey was looking to buy cocaine (R. 240-241, 264-5). Petitioner conceded he was friends with Carl Rouse (R. 245), and he told Rouse he knew Losey, who was looking to buy cocaine (R. 246). According to Petitioner, Rouse then brought in Perkins (R. 246, 254). Perkins was someone that Petitioner also knew from before (R. 256). When Perkins arrived with the cocaine, Petitioner knew Perkins brought the cocaine (R. 296, 302), and the purpose of his being at the auto shop (R. 255, 282), because since he first met Losey in May, Petitioner's intentions were to find someone to sell cocaine to Losey (R. 283). Petitioner conceded he expected to make easy money from the transaction (R. 265-6, 277).

Under the facts of this case, as found by the District Court in the co-defendant, Rouse's case, Rouse v. State, 583 So.2d 1111 (Fla. 4th DCA Case NO. 90-1606, 1991), there was

sufficient evidence for the jury to infer that Petitioner agreed with Perkins and Rouse to cause trafficking in cocaine to be committed. The evidence was adequate to sustain the jury's verdict. McCain v. State, 390 So.2d 779 (Fla. 3d DCA 1980), rev. denied, 399 So.2d 1144 (Fla. 1981).

Under Cummings v. State, 514 So.2d 406 (Fla. 4th DCA 1987), a defendant may be found guilty of conspiracy if he had knowledge of its essential objective and voluntarily became part of it, even if he lacked knowledge of all the details of the conspiracy or played only a minor role in the total operation. The record is clear that Petitioner had knowledge of the essential objective since, through his own admissions at trial, he was the one that asked Rouse to find someone that could sell a kilo of cocaine to Detective Losey; that when Perkins showed up with the cocaine, he knew why Perkins was there, and then called Losey for the purpose of Perkins selling the cocaine to Losey. Petitioner conceded he was well aware of the transaction to take place in his auto shop on August 18, 1988, because that was the intention ever since he met Losey in May of 1988 (R. 283). Hence, even if it could be said [which cannot be said in this case] that Petitioner's participation was minor, the requirement for the offense of conspiracy has been satisfied. The evidence presented at trial, even without Petitioner's testimony, was more than enough to form a jury question; and the motion for judgment of acquittal was properly denied.

Sub-Issue Six

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY MAKING CERTAIN COMMENTS TO DEFENSE COUNSEL IN THE PRESENCE OF THE JURY.

Petitioner argues the trial court interfered with his cross-examination of Detective Losey, and thus, he is entitled to a new trial. The State maintains that a review of the record in its entirety shows that Petitioner's allegations are without merit. See, Brown v. State, 367 So.2d 616, 620 n.3 (Fla. 1979); Hayes v. State, 368 So.2d 374, 377 (Fla. 4th DCA 1979); Lister v. State, 226 So.2d 238, 239 (Fla. 4th DCA 1969).

Petitioner points to "interference" by the trial court with cross-examination at R. 90-91, 106, 107, 112-113, 115-116, 119, 132, 137, 141-142, 144, 150, 153, 164, 166. A look at each of these citations, makes it abundantly clear that the trial court was simply attempting to keep order in his courtroom or that the court was simply ruling on objections raised by the State. Defense counsel's demeanor in the courtroom invited the comments now being challenged by Petitioner in that Petitioner kept repeating and asking the same questions of Detective Losey, the questions on cross examination were argumentative, and defense counsel kept arguing with the court upon rulings made by the court.

First, the State would point out that defense counsel did not specifically object to the court, or requested that the court retract the comments, or give curative instructions to the jury. Therefore, Petitioner has failed to preserve the issue

for appellate review. Ross v. State, 386 So.2d 1191 (Fla. 1980).

Second, the Florida Supreme Court has stated that reprimands, in order to constitute reversible error, must prejudice the party whose counsel was rebuked, and that whether new trial should be granted under such circumstances is within the trial judge's discretion. Paramore v. State, 229 So.2d 855 (Fla. 1969). The record on appeal is clear that the rulings made by the trial court were correct and did not constitute rebuke of defense counsel so as to amount to fundamental error.

Since Petitioner did not object to the trial court, the court was unable to correct itself or retract any comment defense counsel found prejudicial. The rulings as they appear on the record were appropriate in each situation. The State submits that by no stretch of the imagination could they be deemed so prejudicial to the rights of Petitioner, that neither rebuke nor retraction could have eradicated its "evil" influence, had Petitioner raised the issue to the trial court. Herzog v. State, 439 So.2d 1372, 1376 (Fla. 1983).

While the remarks of the court were made in the presence of the jury, no reversible error occurred. See, Paramore; Baisden v. State, 203 So.2d 194 (Fla. 4th DCA 1967); Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980). The comments neither prejudiced Petitioner nor deprived him of a fair trial. Ross. Where it appears, as it does in the case at bar, that the comments could not have prejudiced the defendant's trial in any way, the comment will not be sufficient to require a new trial.

Lister; Villageliu v. State, 347 So.2d 445 (Fla. 3d DCA 1977, cert. denied 355 So.2d 518 (Fla. 1978).

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court withdraw its order accepting jurisdiction over the case, or in the alternative APPROVE the decision of the Fourth District Court of Appeal, filed March 25, 1992, **AFFIRMING** the convictions entered against Petitioner.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Answer Brief" has been furnished by U.S. Mail to: KAYO E. MORGAN, Esquire, Counsel for Petitioner, 432 N.E. Third Avenue, Fort Lauderdale, Florida 33301, this 13th day November, 1992.

Georgina Jiménez-Incera
Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,973

CHARLES MILLS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

APPENDIX TO

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INDEX TO APPENDIX

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
WEST PALM BEACH, FLORIDA

CARL ROUSE,

Appellant.

CASE NO. 88-15979CF10B

APPEAL NO. 90-1606

STATE OF FLORIDA,

Appellee.

RECORD-ON-APPEAL FROM THE CIRCUIT COURT OF THE SEVENTHEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA - CRIMINAL DIVISION

VOLUME I PAGES 1 to 200

RICHARD L. JORANDBY, (15TH P.D.)
Attorney for Appellant.

JOAN FOWLER,
Assistant Attorney General.

State of Florido)
) SS: Thomas M. Coker, Jr., J.
County of Broward)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT

STATE OF FLORIDA,
Plaintiff,
vs. Case No. 88-15979 CFB
CARL ROUSE,
Defendant.

Fort Lauderdale, Florida

June 5, 1990

1:30 P.M.

- - -

APPEAL ON BEHALF OF THE DEFENDANT

- - -

APPEARANCES:

ROBERT MOBLEY, ESQUIRE,
Assistant State Attorney,
appearing on behalf of the State of Florida.

MICHAEL L. TENZER, ESQUIRE,
appearing on behalf of the Defendant.

VOLUME I

I N D E X

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BROWARD COUNTY

STATE OF FLORIDA Plaintiff, vs. CARL ROUSE and STERLIN PERKINS, Defendants	88-15979 CFB&C

PROCEEDINGS:	Jury Trial
BEFORE:	Thomas M. Coker, Jr. Circuit Judge
DATE:	June 5, 1990
PLACE:	Broward County Courthouse 201 S.E. Sixth Street Fort Lauderdale, Florida
TIME:	1:30 P.M.
REPORTED BY:	Elizabeth Brodlieb Notary Public State of Florida at Large

E X H I B I T A

Let me say this to you, ladies and gentlemen, they are publishing tapes or playing them. When it comes time for deliberations, you will be allowed to take all of these tapes back with you to listen as long as you wish to listen to them. This is not the only time that you are going to be hearing them, okay?

MR. MOBLEY: You have an objection?

MR. TENZER: That's been marked Exhibit No. 3, Judge?

THE COURT: Yes, State's 3.

MR. HEFFERNAN: Did you note my objection, some objection?

THE COURT: Some objection. Some ruling.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

I don't know.

(Unintelligible)

I hope not. There is a lot of money.

(Unintelligible)

What?

(Unintelligible)

He is walking or what.

(Unintelligible)

I hope not.

(Unintelligible)

This guy's all right. You sure ain't no --

(Unintelligible)

Ain't no --

(Unintelligible)

Oh.

(Unintelligible)

Biggest worry.

(Unintelligible)

Don't want get robbed.

(Unintelligible)

Robbed.

(Unintelligible)

All right. That's all I care about.

(Unintelligible)

Be back because I don't like hanging out here.

(Unintelligible)

You know.

(Unintelligible)

Nobody --

(Unintelligible)

I know. I know.

(Unintelligible)

Yeah, all right.

(Unintelligible)

We can make a lot of money.

(Unintelligible)

You know.

(Unintelligible)

All right.

(Unintelligible)

You know. We talked about before.

(Unintelligible)

You know. This is breaking --

(Unintelligible).

(Thereupon the tape was concluded.)

CONTINUED DIRECT EXAMINATION

BY MR. MOBLEY:

Q That was your voice; correct?

A Yes.

Q Now, you obviously used profanity on this particular tape. Any particular reason for that?

A I am wanting to pose myself as a drug dealer. I can't go in there talking like a police officer and real prim and proper. That's not how a

drug dealer is. A drug dealer is a drug dealer. They don't exactly act like normal civilized persons, if you know what I mean.

Q Okay.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

Nobody.

(Unintelligible)

All them.

(Unintelligible)

When he going to come back?

(Unintelligible)

I feel better.

(Unintelligible)

I got my brother's beeper right --

(Unintelligible)

Car. You can call me on that when he comes back. I will just ride around this area here. I just don't like --

(Unintelligible)

Here, mon.

(Unintelligible)

Yeah. Still --

(Unintelligible)

Why do you do that? Call me when he gets here. I will be driving around. Probably go to the chicken place and get some chicken. I got that beeper. Just put in your number.

(Unintelligible).

(Thereupon the tape was concluded.)

Q (By Mr. Mobley) Is this particular static -- were you around any particular equipment?

A No. That particular static there is caused by the surveillance detectives having the police radio and advising other surveillance detectives of what they're hearing. When they talk on that radio, it drowns out the transmission that they receive on the body bug.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible).

(Thereupon the tape was concluded.)

Q (By Mr. Mobley) Can you make that out?

A Come on, man. He has been waiting on you. That's Mr. Rouse talking on the phone to the phone call

that he received.

Q With the yellow piece of paper?

A Right.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible).

Come on, man.

(Unintelligible)

(Thereupon the tape was concluded.)

Q (By Mr. Mobley) What you hear, what is said after that?

A Yeah, I said how long is it going to be. Then Mr. Rouse was still on the phone talking to the person on the other end. He said still be five minutes. Then Mr. Rouse again talks to the caller and says come on, man.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible).

(Thereupon the tape was concluded.)

Q (By Mr. Mobley) What is that

particular --

A I am in the undercover car and I am getting ready to leave.

Q Is that the radio in the car going?

A Right.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

Thirty-nine.

(Thereupon the tape was concluded.)

Q (By Mr. Mobley) Who said that?

A I said that. I am talking on the radio that I hid in the car. I am telling the other surveillance people that I am leaving and I am going to wait close by.

Q Could you hear Mr. Rouse on this tape before I asked you the question about his saying come on boy, he has been waiting for you?

A Oh, yeah.

Q Numerous other times? Do you recall what else he said?

A He said something along the lines of there ain't going to be no problem.

Q Okay. Did he say anything else that you

E X H I B I T B

would move this exhibit into evidence as State's 5 or 6, I believe.

THE COURT: Objection?

MR. HEFFERNAN: Some objection.

MR. TENZER: Some objection.

THE COURT: Some ruling. Received and filed State's 6

MR. HEFFERNAN: Hearsay.

(State's Exhibit No. 6 was offered and received in evidence.)

MR. MOBLEY: May I publish to the jury at this time?

THE COURT: Sure.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible).

Other day, man.

(Unintelligible)

He was here.

Understand. Was out fucking --

(Unintelligible).

You understand.

(Unintelligible)

I don't blame you, man.

(Unintelligible)

(Thereupon the tape was shut off.)

Q (By Mr. Mobley) Who was talking there?

A Sterlin Perkins.

Q What was he talking about?

A He was talking about the fact that the deal wasn't done yesterday, because wherever he gets the cocaine from, that person was in Miami or whatever and they were unavailable for him to get it.

MR. HEFFERNAN: I'm sorry. Is this the original tape or is this the enhanced?

MR. MOBLEY: This is the original.

THE COURT: Beats me.

MR. HEFFERNAN: I wanted to clarify that. Thank you.

THE COURT: Go ahead.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified to accuracy or content.)

(Unintelligible).

(Thereupon the tape was shut off.)

Q (By Mr. Mobley) Could you tell who was talking at that point?

A Sterlin Perkins.

Q What did he say?

A He told me that yesterday he got took for four keys. I said took for four keys? You got robbed for four keys and he said yeah. He was robbed for four kilos.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

Robbed.

(Unintelligible).

No.

(Unintelligible).

That's good looking.

(Unintelligible)

That's good cocaine right there.

(Unintelligible)

Cook all right.

(Unintelligible).

(Thereupon the tape was concluded.)

Q (By Mr. Mobley) Can you hear who said that particular last phrase about cooking up?

A I'd have to hear it again. I don't know.

It went by so fast. I heard my voice talking about the cocaine. If you want to play it back.

MR. MOBLEY: With the Court's permission.

THE COURT: Sure.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

He was fucking Miami. You know what I mean?

(Unintelligible)

I don't blame you, man.

(Unintelligible)

Fuck, you know. Hey, I know exactly --

(Unintelligible)

Yesterday.

(Unintelligible)

Took for four keys?

(Unintelligible)

They robbed you? No --

(Unintelligible)

That's good looking.

(Unintelligible)

Yeah.

(Unintelligible)

That's some good cocaine right there.

(Unintelligible)

My man loves --

(Unintelligible)

Cook up right --

(Unintelligible)

(Thereupon the tape was concluded.)

Q What is at that point?

A That's Sterlin Perkins. I say will it cook up right, referring to making crack and Sterlin Perkins is commenting it will be good for that.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

All right. I am telling --

(Unintelligible)

I doubt my brother-in-law -- he ain't going to see nobody. He don't know nothing. He thinks I am buying cars in here. He's real straight.

(Thereupon the tape was shut off.)

Q (By Mr. Mobley) Is that your voice?

A That's my voice.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

Get money from him. I will get the money from him.

(Unintelligible)

(Thereupon the tape is shut off.)

Q (By Mr. Mobley) Is that the end of it?

A No. I think you can hear me talking.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

Q (By Mr. Mobley) What's going on at that point?

A I am sitting in the undercover car using a cellular phone to call Detective Daughenbaugh.

(The following is a tape-recorded statement played in open court, which portion of the record is not certified as to accuracy or content.)

(Unintelligible)

It's here. Yeah. Yeah.

(Unintelligible)

Hurry up, man.

(Unintelligible).

(Thereupon the tape was concluded.)

A That's the end of it.

Q (By Mr. Mobley) Now, did you discuss anything else on the tape?

A I went back inside after I made the phone call and I said that my brother-in-law is on his way over here. Would I be able to get more stuff later and both Mills and Perkins --

MR. hEFFERNAN: Objection, Your Honor. It's irrelevant to any issue in this case.

THE COURT: Overruled. Proceed.

A Both Mills and Perkins assured me, yes, I could get more cocaine when I wanted it. A short time later, the surveillance detectives came inside.

Q (By Mr. Mobley) And made the arrest; is that correct?

A That's right.

Q Okay. Now, after the defendant was arrested, did you happen to take a look at the purse that detective -- excuse me -- that Defendant Perkins

EXHIBIT C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

17 FLW D798
596 So.2d 1148

CHARLES MILLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-0905.

Opinion filed March 25, 1992

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; Thomas M. Coker, Jr., Judge.

Kayo E. Morgan, Fort Lauderdale, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

GARRETT, J.

Charles Mills appeals his armed trafficking in cocaine and conspiracy to traffic in cocaine convictions and sentences. We affirm as to all issues. We write, however, to state that the trial court committed harmless error when it responded to a question from the jury without first giving defense counsel the opportunity to be heard.

During jury deliberations, the jury sent a note to the trial judge. The trial judge notified both counsel that the jury had a question. In the defendant's presence, defense counsel asked what the question was so that it could be discussed. The

trial judge refused to tell defense counsel the question, and told him there was no need to talk about it. The jury was then brought into the courtroom. The trial judge said to the jury, "I have your question, 'Judge Coker, could you please clarify or provide a copy of the law on armed trafficking.'" The trial judge told the jury that he could not do that, but would reread to them the instruction on trafficking. The trial court then reread the instructions on armed trafficking that he had earlier given the jury. The trial judge then asked, "Does that answer your question?" The jury said, "yes" and then retired to continue their deliberations. After the jury left the courtroom, the trial judge and defense counsel engaged in the following colloquy:

> MR. MORGAN: Judge, show my objection. We didn't get a chance to discuss that.
>
> THE COURT: Well, what's your objection?
>
> MR. MORGAN: I'd like to have entrapment read to them. It's not an offense to traffic if he was entrapped.
>
> THE COURT: I responded to their question exactly as they requested that I respond and your objection is noted.

Rule 3.410, Florida Rules of Civil Procedure (1991) reads:

> After the jurors have retired to consider their verdict, if they request additional instructions . . . [s]uch instructions shall be given . . . only <u>after notice</u> to the prosecuting attorney and to counsel for the defendant. [Emphasis added.]

We acknowledge that defense counsel's right to be present at re-instruction of the jury includes the right to participate, to

place objections on the record, and to make full argument as to the reasons the jury's request should or should not be honored. Ivory v. State, 351 So.2d 26, 28 (Fla. 1977). However, although the trial judge violated the rule when he failed to give defense counsel the opportunity to be heard, we find such error to be harmless.

Initially, we distinguish those cases that hold per se reversible error occurs when a trial judge fails to notice defense counsel or the defendant of a jury question. Bradley v. State, 513 So.2d 112 (Fla. 1987); Curtis v. State, 480 So.2d 1277 (Fla. 1985); Ivory v. State, 351 So.2d 26 (Fla. 1977); Lacue v. State, 562 So.2d 388 (Fla. 4th DCA 1990). In this case, the trial judge notified defense counsel and the defendant that the jury had a question.

Williams v. State, 488 So.2d 63, 64 (Fla. 1986) reaffirmed the per se rule announced in Ivory, but held that "[c]ommunications outside the express notice requirements of rule 3.410 should be analyzed using harmless error principles." Cherry v. State, 572 So. 2d 521, 522 (Fla. 1st DCA 1990)(emphasis added) found reversible error because defense counsel did not have "notice and an opportunity to be heard regarding the appropriate response" to a jury question. The First District, however, relied on Curtis, 480 So.2d 1277, which held that per se reversible error occurred when the trial judge responded to jury questions out of the presence of defense counsel and the defendant even though the trial judge refused to answer the questions. The state unsuccessfully argued in Curtis that the

supreme court should recede from its per se rule and adopt a harmless error standard. The Curtis court also "reaffirmed the viability of Ivory" and concluded its opinion with the words of then Justice England that "[a] 'prejudice' rule would . . . unnecessarily embroil trial counsel, trial judges and appellate courts in a search for evanescent 'harm,' real or fancied." Curtis, 480 So.2d at 1279. Since Curtis the supreme court decided DiGuilio v. State, 491 So.2d 1129, 1134 (Fla. 1986) and held that "automatic reversal of a conviction is only appropriate when the constitutional right which is violated vitiates the right to a fair trial" and limited per se reversible errors "to those errors which are so basic to a fair trial that their infraction can never be treated as harmless." Id. at 1135. DiGuilio requires appellate courts to determine if harmless error has occurred. Id. Therefore, in direct conflict with Cherry, we hold that the harmless error rule applies where defense counsel and the defendant have notice of a jury question but the trial judge fails to give defense counsel the opportunity to be heard as to the appropriate response.

Our examination of this entire record reveals that the rule 3.410 error had no effect on the trier-of-fact and we can say beyond a reasonable doubt that the error did not affect the verdict. See DiGuilio, 491 So.2d at 1139.

As to the merits of the objection, we find no error as to the re-instructions given. The scope of re-instruction of a jury is within the discretion of the trial judge. Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986).

A trial judge may properly limit the repetition of charges to those requested by the jury. Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986). The trial judge, in this case, correctly re-instructed the jury. He did not have to re-instruct the jury as to entrapment. Unlike the instructions for excusable and justifiable homicide which must be given when a trial judge re-instructs on the degrees of unlawful homicide, Hedges v. State, 172 So.2d 824 (Fla. 1965), the standard jury instruction for the defense of entrapment, Fla. Std. Jury Instr. (Crim.) 3.04(c)(2), does not define any crime. See Gitman v. State, 482 So.2d 367 (Fla. 4th DCA 1985), called into doubt on other grounds, Fletcher v. State, 508 So.2d 506 (Fla. 4th DCA 1987)(where jury requested a re-instruction on the "laws" of the alleged crimes, theft and scheme to defraud, the trial court did not abuse his discretion in re-instructing the jury only on the elements of the crimes and refusing the defense's request to re-instruct on "specific intent").

When given the opportunity to object, defense counsel did not object to the re-instruction that was given. He only objected to the trial judge's failure to also give the entrapment instruction. Defense counsel had notice, an opportunity to argue, and to object, both before and after the trial judge denied his request for re-instruction on entrapment. Colbert v. State, 569 So.2d 433, 435 (Fla. 1990).

AFFIRMED.

DOWNEY, J., and OWEN, WILLIAM C., JR., Senior Judge, concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix to Respondent's Answer Brief on the Merits" has been furnished by U.S. Mail to: KAYO E. MORGAN, Esquire, Counsel for Petitioner, 432 N.E. Third Avenue, Fort Lauderdale, Florida 33301, this 13th day November, 1992.

Georgina Jay-Rosa

Of Counsel