IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,479

THE STATE OF FLORIDA,

Petitioner,

-vs-

BOB MICHAEL CHAMPAGNE,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

AMENDED REPLY BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Petitioner was the appellee in the appellate court; Respondent was the appellant.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the state; Respondent may also be referred to as Defendant.

The following symbols will be used:

"R"	Record on Appeal
"T"	Trial Transcript
"Ex."	Petitioner's Exhibits (included in appendix to Petitioner's Brief on the Merits).

Petitioner will address only those additional claims presented by Respondent and will not re-address the certified question presented in Petitioner's brief filed on or about May 1, 1995.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case set forth in the Petitioner's brief on the merits. Petitioner relies on the Statement of the Facts set forth in the state's brief filed in the Third District Court of Appeal, which was attached to Petitioner's initial brief on the merits.

SUMMARY OF THE ARGUMENT

Because the State could not anticipate the need to call Iris Deegan as a rebuttal witness and Iris Deegan's name was easily obtained from the Miranda rights waiver form, to which Respondent never claimed that he had been denied access, Petitioner submits that there was no discovery violation in failing to list Iris Deegan as a trial witness. Because Respondent was told about Iris Deegan and her involvement in the case before trial began and before he testified and because Respondent never claimed to be surprised by the substance of Iris Deegan's testimony, Petitioner submits that the discovery violation, if any was non-prejudicial. Because Respondent was allowed to depose Iris Deegan before she testified, the procedural prejudice caused by any belated disclosure was cured. Respondent cannot complain about the prejudice inherent in all relevant evidence to support his claim for relief since he knew what Iris Deegan had to say before he testified as he did. Respondent has failed to demonstrate an abuse of discretion in the court's rulings regarding the admission of Iris Deegan's testimony and is, therefore, entitled to no relief.

The jury verdict is supported by the evidence presented at trial. All discrepancies in the witnesses' testimony were weighed by the jury and decided against Respondent. Unless there is no record support for the jury verdict, the appellate court may not substitute its judgment for that of the trier of fact.

ARGUMENT

II.

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO CALL AN UNLISTED REBUTTAL WITNESS WHERE THE COURT FOUND THAT THE FAILURE TO LIST THE WITNESS WAS INADVERTENT AND WHERE THE COURT ALLOWED THE DEFENSE TO DEPOSE THE WITNESS BEFORE SHE TESTIFIED. (RESTATED).

Respondent contends that the trial court erred in allowing the state to call Detective Iris Deegan as a rebuttal witness where Detective Deegan was not listed as a witness before trial. In support of this contention, Respondent argues that the testimony of Iris Deegan improperly suggested uncharged criminal conduct. Respondent further complains that the failure to list Iris Deegan as a witness before trial caused Respondent to testify in a certain manner and that he would not have so testified had he known Iris Deegan would testify. Respondent also suggests that the trial court committed reversible error in failing to conduct an adequate Richardson hearing. Petitioner submits that these claims are wholly without merit.

Once it is alleged that the state has committed a discovery violation, the trial court must determine whether there was in fact a discovery violation, whether the violation was willful or inadvertent, whether the violation was trivial or substantial, and what effect, if any, the violation had on the defendant's ability to prepare for trial. Richardson v. State, 246 So. 2d 771 (Fla. 1971). The failure to comply with the discovery rules should be remedied in a manner consistent with the seriousness of the breach Zeigler v. State, 402 So. 2d 365 (Fla. 1981).

a. Existence of a Discovery Violation

During the cross-examination of Respondent, the state attempted to impeach Respondent's claim that he spoke to Detective John Deegan at length before giving his taped statement by discussing the sequence of events preceding the taped statement. (T. 146-149). To avoid inadvertently discussing the fact that Respondent had been charged with other crimes on the night he gave his statement, the State was precluded from asking Respondent whether he spoke to other officers that night. (T. 146-150). Notwithstanding Detective Deegan's testimony that he spoke to Respondent for less than five minutes, Respondent told the jury that he spoke to Detective John Deegan for "about an hour, hour thirty minutes." (T. 151-152). At a sidebar discussion requested by the state, the prosecutor again explained the need to rebut Respondent's claim that he spoke to John Deegan for nearly an hour. (T. 153). The court asked the State whether "the other detective" was available and the state began to explain that John Deegan was probably home sleeping as he worked nights. (T. 152-153). Defense counsel suggested that the court was referring to Detective Iris Deegan and objected to any testimony from Iris Deegan as she had not been listed as a witness before trial. (T. 153).

In explaining his position to the court, defense counsel indicated that he first learned of Iris Deegan and her participation in the case earlier that morning when he spoke to John Deegan about John Deegan's upcoming testimony.[1] The court was then asked to allow the State to ask Respondent about the period of time immediately

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[1] Defense counsel apparently spoke to John Deegan before trial due to the fact that John Deegan failed previously for deposition. (T. 153).

preceding the taping of Respondent's statement. (T. 155). Defense counsel objected by stating

> I haven't asked him anything bout Iris Deegan, don't know what he's going to say about Iris Deegan. You're leading him down the path to open the door.

(T. 156). With the court's permission, the State asked Respondent about the events that transpired between 12:35, when the Miranda form was executed, and 1:40, when the taped statement began. (T. 156-157). Respondent repeatedly stated that he was getting harassed by John Deegan and his "lynch mob." (T. 157-165).

Once the defense rested its case, the State asked permission to call Iris Deegan as a rebuttal witness. (T. 170). The prosecutor proffered that he did not know where Iris Deegan was and that he had not spoken to Iris Deegan. (T. 171). The prosecutor also expressed his belief that, based upon conversations with John Deegan and two other detectives, Iris Deegan would testify that she spoke to Respondent for approximately forty-five minutes often executing the Miranda waiver form and that John Deegan spoke to Respondent for only five minutes. (T. 172). The State further represented that defense counsel was told about the circumstances preceding the taped statement. (T. 172-173). Defense counsel did not deny that he had been told about Iris Deegan and her involvement, but objected to allowing Iris Deegan to testify because

> a) she's not a witness; b) the only thing she will say it didn't happen the way he said it happened. We already have that testimony from Detective John Deegan.

(T. 171). Defense counsel also claimed that he instructed his client not to mention Iris Deegan and that any testimony from Iris Deegan

would be indicative of other crimes. (T. 173-182). Defense counsel maintained that he would have counseled his client differently if he had known that "Iris Deegan was going to testify." (T. 178). Counsel did not claim that Respondent would have testified differently if he knew Iris Deegan was with him during the relevant time period. The court found that there had been a discovery violation, that the violation was inadvertent and that the violation could be cured by allowing defense counsel to "talk to her or take her deposition." (T. 183-184). When court convened the following day, the court repeated these findings and added that there was no significant procedural prejudice to the defense. (T. 192). Defense counsel argued that the failure to list Iris Deegan caused him to disclose his defense without knowing that Iris Deegan would refute Respondent's testimony. (T. 193-195). The court responded to this argument by noting that the State was not on notice that Respondent would claim that he was with John Deegan for over an hour before his statement because there had been no motion to suppress filed before trial. (T. 195-196). Accordingly, the State was not apprised of the need to call Iris Deegan as a trial witness. (T. 196-197). The court further noted that defense counsel represented Respondent in eleven different cases and, therefore, had to be aware that Respondent spoke to more than one officer on the night he gave his taped statement. (T. 197-198). Defense counsel claimed that he did not speak to John Deegan earlier because of John Deegan's failure to appear previously and that he learned of Iris Deegan from John Deegan the morning before trial. (T. 198). Defense counsel claimed that he had no reason to suspect that Iris Deegan knew anything about the case because he did not have a

copy of the written Miranda waiver form in his possession. (T. 198). Defense counsel further claimed that he did not know if the State had a copy of the form prior to trial. (T. 198).

Even though the trial court found that there was a discovery violation, it is clear from the foregoing arguments that there was in fact no discovery violation. It is also clear from the record that the state could not anticipate the need to call Iris Deegan as a rebuttal witness as Respondent had failed to challenge the voluntariness of his confession in general, and had failed to specifically claim that he was with John Deegan rehearsing his statement for over one hour before his statement was taped. (T. 195-197).

Because the state could not have anticipated the need to call Iris Deegan in rebuttal, the state did not violate the discovery rules by failing to list her as a trial witness. See, e.g. Heath v. State, 594 So. 2d 332 (Fla. 4th DCA 1992); Grant v. State, 474 So. 2d 259 (Fla. 1st DCA 1985). Moreover defense counsel never claimed that he was in any way surprised by John Deegan's testimony. Nor did defense counsel claim that he had been deprived pretrial access to the Miranda rights waiver form which had been signed by both John and Iris Deegan. Respondent's complaint at trial was not that he was surprised by what Iris Deegan had to say, nor even that he did not know about Iris Deegan before he testified. Respondent's chief complaint seemed to be simply that Iris Deegan had not been listed as a witness prior to trial and that instead of only one witness to contradict his testimony there would be two.

Because Respondent chose to proceed with trial and his testimony knowing that John Deegan would tell the jury that he spoke to Respondent for less than five minutes before Respondent gave his taped statement and that Iris Deegan spoke to Respondent about another matter between the time that the Miranda rights waiver form was executed and the taped statement was made, Respondent waived any objection to the belated disclosure of Iris Deegan's name. (T. 172-173). This is especially true since Respondent never claimed that he had been deprived of the Miranda rights waiver form by the state before trial.[2] The rights waiver form, disclosed that Iris and John Deegan witness the waiver of Respondent's Miranda rights. Because the form was available to Respondent before trial, Iris Deegan's involvement was discoverable with little or no effort. Thus, Respondent can hardly claim a discovery violation by the state.[3] See Carter v. State, 485 So. 2d 1282 (Fla. 4th DCA 1986) (a discovery violation occurs where one is deprived of appropriate notice and an opportunity for counsel to timely address the subject matter of the discovery). See also Pizzo v. State, 289 So. 2d 26 (Fla. 2d DCA 1974) (where defendant's counsel knew of existence of fingerprint evidence prior to trial, where defendant never sought, and was not deprived of the opportunity to have expert examine fingerprint evidence, and where

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[2] While objecting to the state's request to call Iris Deegan as a rebuttal witness, defense counsel stated that he did not have a copy of the form in his possession. (T. 198). Counsel did not claim that he had been denied access to the form nor that he was unaware that the form existed. (T. 198). Because the form was admitted into evidence without any objection, it is unlikely that the form had been withheld prior to trial. (T. 113).

[3] This is especially true since defense counsel represented Respondent on at least eleven charges. (T. 197-198).

fact that defendant's fingerprints were found at the scene was never challenged, the state's failure to produce the fingerprint evidence prior to trial was not a discovery violation).

b. Willfulness or Inadvertence of the Alleged Discovery Violation

Assuming for the sake of argument that the trial court correctly found that the failure to actually list Iris Deegan as a trial witness was a discovery violation by the state. Petitioner submits that the trial court properly found that the failure to list Iris Deegan as a witness was inadvertent as the need to call Iris Deegan as a rebuttal witness could not have been anticipated prior to trial. (T. 170-184; 196-198; 202). As the court noted, Respondent made no pretrial claim that his confession was involuntary. Nor did Respondent claim pretrial that he rehearsed his statement with John Deegan for an hour before his statement was actually taped. In the absence of the foregoing claims, the state reasonably believed that it was unnecessary to call Iris Deegan to establish the fact that Respondent was advised of his Miranda rights where John Deegan, as a witness to the waiver, could establish this fact before discussing the taped confession. See Huffman v. State, 472 So. 2d 470 (Fla. 1st DCA 1985) (state did not violate discovery rule by offering in rebuttal a book-in photograph of defendant wearing a white, button-down shirt with collar which had not been previously seen by defense counsel where the state relied on the direct testimony of a police officer to identity the defendant, the need for the photograph for rebuttal purposes did not occur until defense counsel presented testimony denying that defendant owned a white dress shirt, the state did not have the

photograph in its possession on the day of trial, the police officer was available for deposition by the defendant and defense counsel was aware of the existence of the photograph; thus trial court did not err in admitting the photograph as rebuttal evidence). It is clear from the record that Respondent's primary defense was that of mistaken identity and that the claim that he was brow-beaten by John Deegan and "his lynch mob" was a secondary defense developed at trial after the state rested its case.

c. Trivial or Substantial Nature of the Alleged Discovery Violation

Because Respondent was aware of John Deegan's testimony and John Deegan's assertion that Iris Deegan spoke to Respondent between 12:35 and 1:40 before he told the jury that he spoke to John Deegan and Deegan's "lynch mob" during that time, the trial court properly rejected Respondent's claim of substantial procedural prejudice. The trial court properly ruled that Iris Deegan's testimony was relevant to his claim that he was coerced by John Deegan. The prejudice resulting from allowing the state to call Iris Deegan as a rebuttal witness was no the procedural prejudice inherently avoided by the rules of discovery, but was, instead, the prejudice which naturally flows from relevant evidence. The fact that evidence is prejudicial does not make it inadmissible. Ruffin v. State, 397 So. 2d 277, 280 (Fla.), cert. denied 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed. 2d 194 (1981). Because Respondent knew of John Deegan's assertion that Iris Deegan advised Respondent of his Miranda rights and spoke to Respondent about another matter during the relevant time period before trial began, Respondent could have asked for an opportunity to speak

to Iris Deegan before taking the stand and testifying as he did. See State v. Lewis, 543 So. 2d 760 (Fla. 2d DCA), rev. denied, 549 So. 2d 1014 (Fla. 1989).

Respondent's claim that Iris Deegan's testimony improperly suggested Respondent's involvement in other crimes was properly rejected by the trial court. Iris Deegan simply stated that while Respondent claimed to have been talking to John Deegan and his "lynch mob," she was speaking to Respondent alone about an unrelated matter. (T. 210-214). This testimony in no way suggests that Respondent was accused of other crimes. Moreover because Iris Deegan's testimony was necessitated by Respondent's own testimony suggests involvement in other crimes. Once Respondent voluntarily chose to take the stand, he had an obligation to speak truthfully and accurately. Johnson v. State, 380 So. 2d 1024 (Fla. 1979).

d. Effect, If any, On Ability To Prepare For Trial

Petitioner submits that the failure to list Iris Deegan as a trial witness did not affect Respondent's ability to prepare for trial. Respondent was aware before trial of John Deegan's claim that Iris Deegan spoke to Respondent before John Deegan taped Respondent's confession. (T. 172-173; 154). Respondent could have requested an opportunity to speak to Iris Deegan before trial began or before he took the stand. Instead, he chose to testify with the knowledge that Iris Deegan, if called, would be able to refute his claim, as did John Deegan. Respondent simply chose to rely on the fact that Iris Deegan had not been listed and chose to risk that she would not be called in rebuttal. See Huffman v. State, 472 So. 2d 469 (Fla. 1st DCA 1985).

e. Adequacy of Richardson Hearing and Remedy Offered To Cure Alleged Discovery Violation

Respondent contends that the trial court failed to conduct an adequate Richardson hearing and that the court erred in allowing Iris Deegan to testify in rebuttal. Both claims are without merit.

The failure to call the inquiry into an alleged discovery violation a "Richardson" hearing or to make formal findings concerning the pertinent Richardson considerations does not constitute reversible error. Wilkerson v. State, 462 So. 2d 1376 (Fla. 1st DCA 1985). It is clear from the record in the instant case that trial court adequately inquired into the circumstances surrounding the failure to list Iris Deegan as a rebuttal witness before ruling that any discovery violation was inadvertent, that the need to call Iris Deegan as a rebuttal witness could not be anticipated before trial, that any prejudice resulting from the failure to list Iris Deegan as a rebuttal witness was minimized by the fact that her testimony was consistent with the testimony of John Deegan and by the fact that defense counsel would have an opportunity to depose Iris Deegan before she testified.

The ruling on whether alleged discovery violation calls for exclusion of testimony is discretionary and should not be disturbed absent a clear abuse of discretion. State v. Tascarella, 580 So. 2d 154 (Fla. 1991). In fact, exclusion of evidence for failure to comply with the rules of discovery should be a last resort and should be reserved for extreme or aggravated circumstances where no other remedy will suffice. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 87 S.Ct. 2200, 53 L.Ed. 2d 239 (1977), State v. Kerr, 562 So. 2d 840 (Fla. 4th DCA 1990); Peterson v. State, 465 So.

2d 1349 (Fla. 5th DCA 1985). Because the state did not change its theory of the case based upon Respondent's testimony, exclusion of Iris Deegan's testimony was not required. See, e.g., Hatcher v. State, 568 So. 2d 472 (Fla. 1st DCA 1990) (excluding witnesses' testimony was only way to avoid prejudice to defendant from untimely disclosure of witnesses, where disclosure was made after defendant had testified and the defense had rested, and state relied on testimony to change its theory of the case). Because the discovery rules were designed to provide the defendant with information that would assist him in defense of the charge against him and were not designed to provide the defendant with a procedural device to escape justice where the state fails to disclose trivial information,[4] Respondent cannot demonstrate that the trial court abused its discretion in allowing Iris Deegan to testify after she had been deposed by defense counsel.

Sharif v. State, 589 So. 2d 960 (Fla. 2d DCA 1991), cited by Respondent is inapplicable to the instant case because in Sharif the court's inquiry was inadequate. In the instant case, the trial court fully inquired into the circumstances surrounding the failure to list Iris Deegan as a trial witness.

III.

THE TRIAL COURT PROPERLY ADJUDICATED RESPONDENT GUILTY OF THREE COUNTS OF ARMED ROBBERY IN ACCORD WITH THE JURY VERDICT. (RESTATED).

Respondent contends that the evidence of identity was insufficient to prove that he committed the crimes for which he was convicted. Petitioner submits that this claim is without merit.

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[4] See State v. Zamora, 538 So. 2d 95 (Fla. 3d DCA 1989).

Although the initial police report described the gunman as being much shorter that six feet and two inches tall, the investigating officer explained the discrepancy. (T. 85-86, 99). The three victims identified Respondent in a photographic lineup shortly after the robbery. (T. 30-31, 55-57, 74). The victims also identified Respondent in court as the man who robbed them. (T. 22, 25, 31-32, 40, 42-44, 55, 67, 70, 79). Chantole Xavier explained that he was not very good at estimating heights, but she was certain that Respondent was the man who robbed her because she remembered his face. (T. 37-40). Even when looking at Respondent, Maria Zizi expressed her belief that Respondent was five feet and five or six inches tall, thereby demonstrating her inability to estimate heights and explaining the discrepancy in her initial description to the police. (T. 53). Samuel Darcius also explained the discrepancy in his initial description by expressing his inability to estimate height in feet and inches. (T. 79).

The positive identification of Respondent by the victims, together with his taped confession, amply supports the jury verdict. Any inconsistencies in the descriptions and the testimony of the victims are questions of fact properly resolved by the jury. Unless wholly unsupported by the evidence presented at trial, the jury verdict cannot be second guessed on appeal. Because the evidence supports the jury verdict, Respondent is entitled to no relief.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, Petitioner submits that Respondent is not entitled to reversal of his conviction and respectfully requests that Respondent's judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **AMENDED REPLY BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **BENNETT H. BRUMMER,** Public Defender, and **SHERYL J. LOWENTHAL,** Special Appointed Public Defender, Suite 911 Douglas Centre, 2600 Douglas Road, Coral Gables, Florida 33134 on this 15th day of June, 1995.

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