IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,178

DARRYL HENDERSON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Petitioner, DARRYL HENDERSON, was the Defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings.

STATEMENT OF THE CASE AND FACTS

The Petitioner and codefendant, Jimmy McMillan, were charged as principals by Information on October 6, 1994 in Case No. 94-30300 with the armed robbery of Gloria Perla and armed robbery of Edith Perla on September 4, 1994. (R. 1-2).

Prior to conducting *voir dire* of the jury panel on February 13, *1995,* the Honorable Arthur Snyder, introduced the State Attorney Adam Cohen, Defense Counsel Leon Tozo, and the Defendant

Darryl Henderson. (T. 5). There is no further reference in the record indicating that the Defendant absented himself from the proceedings or that he was removed from the courtroom during jury selection. (R. 6; T.3-53). Following ***voir dire*** of the panel Defense Counsel exercised six peremptory challenges without objection by the State and a backstrike as well as one peremptory challenge of an alternate juror. (T. 47-48). The State exercised no peremptory challenges or backstrikes. (T. 47-48). Both Defense Counsel and the State Attorney tendered the panel and the jury was sworn. (T. 49). At no time was any reference made to the absence or presence of the Defendant, and it may be presumed that following his introduction he remained in the courtroom assisting his attorney in his defense. (T. 3-53).

At trial on February 14, 1995, Gloria Perla testified that she in the back seat, her husband Augusto driving and her sister-in-law Edith in the front passenger seat drove up to the sister's house and prepared to get out of their car when two men approached, coming up the driveway. (T. 105-106). There was no car parked in front of the house when they arrived. (T. 116). Everything happened very fast. One of the men grabbed her purse which was on the seat next to her, and she held on to it. She saw him clearly.

(T. 106): Gloria Perla also saw the other man pointing a firearm at her husband. (T. 106-107). She screamed and released the purse when she saw the gun, and **saw** that the man who took her purse hit Edith Perla with his elbow and grabbed her purse as well. (T. 107). Gloria Perla watched the two men run towards a white car that was stopped in the street in front of Edith's house. There was a third person in that car .-- in the driver's seat, and when the gunman and the man who took the two purses got into the car, the third person drove the car away. (T. 109). Gloria Perla was concerned that her husband was pursuing the two men and called out to him to stop because one of them had **a** gun. (T. 110). Gloria Perla was able to identify the codefendant as the person who grabbed her purse. (T. 112) .

Augusto Perla testified that the three of them in his party arrived at his sister Edith's house, and as they were exiting their vehicle, two men rapidly approached up the driveway entrance. (T. 121). At first he thought they were inquiring about an address, but when he **saw** one with a gun pointing at him he became concerned. He advanced on the gunman, **as** his wife entreated him not to. (T. 121-122). Augusto Perla saw the man with the gun and the man who grabbed Gloria and Edith's purses run and jump into a white

Cadillac which was stopped in the street in front of the house with the engine running. (T. 134). He saw that there was a driver in the car and he followed close on their heels to a point where he was able to see the driver's face at a distance of no more than three feet. (T. 122-123). Augusto Perla made a definitive in-court identification of the Petitioner as the driver of the white Cadillac getaway vehicle. (T. 123-124). Both Gloria and Augusto Perla testified that they called a description of the car and a partial tag number into 911. (T. 111, 127).

Officer Ryan testified that he responded to the scene of a robbery, and that a few blocks away other officers had detained some suspects in connection with the same robbery. (T. 161). Ryan then conducted a "show up" in which he transported the victims separately and individually to where the suspects were detained in order to see if an identification could be made. (T. 161). Gloria Perla was not sure she could identify either of the robbers, and could not identify the driver of the getaway vehicle. (T. 162). Edith Perla's reaction at the "show up" was the same. (T. 162). Augusto Perla was taken to the "show up" first and was able to distinguish between the person who took the purses and the driver of the getaway vehicle. Augusto Perla identified the Petitioner as

being the driver of the car. (T. 163-164). Ryan made an in-court identification of the Petitioner as the person that Augusto indicated was the driver of the car. (T. 164).

At close of all the evidence the Petitioner moved for judgment of acquittal on grounds that the evidence was insufficient to show that the Petitioner was anything other than an innocent driver who was going to drop his friends off at the Metrorail station. (T. 198-199, 203). The trial court denied Petitioner's motion finding that there was sufficient evidence for the jury to decide the issue of his participation as a principal in the robbery. (T. 199).

The jury returned verdicts of guilty as to both counts of the Information. (R. 22-23, T. 306-307). The Petitioner was adjudicated accordingly. (R. 24; T. 308). On April 6, 1995, the trial court made the appropriate findings pursuant to Section 775.084 of the Florida Statutes, determining that the Petitioner qualified as an habitual violent felony offender and sentenced him to thirty (30) years state prison with a fifteen (15) year minimum mandatory term of years as an habitual violent felony offender. (T. 335, 339).

Petitioner filed an appeal in the Third District Court of Appeal, DCA Case No. 95-1421 challenging the trial court's denial of his motion for judgment of acquittal on the charges of robbery with a firearm, and seeking reversal for the trial court's purported error in conducting jury selection outside the Petitioner's presence. Following the State's Answer, the Third District Court affirmed the judgment and sentence of the lower court, on July 31, 1996, DCA Case No, 95-1421. The Mandate issued and Petitioner's case became final on October 4, 1996. On motion of the Petitioner, the Third District Court certified the following question to this Court as one of great public importance:

> DOES THE DECISION IN ***CONEY v. STATE, 653 So.*** 2d 1009 (Fla.), ***cert. denied,*** ____ ***U.S.*** ____, **116** S.Ct. 315, 133 L.Ed.2d 218 (1995) APPLY TO CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE ***CONEY*** OPINION BUT PRIOR TO THE TIME THAT CONEY BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?

Henderson v. State, 679 So. 2d 805 (Fla. 3d DCA 1996).

This petition for discretionary review followed.

QUESTION PRESENTED

I

WHETHER THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGES OF ROBBERY AS AN AIDER AND ABETTOR WHERE THE EVIDENCE SHOWED THAT HE WAS THE DRIVER OF THE VEHICLE IN WHICH THEY LEFT THE SCENE?

II

DOES THE DECISION IN CONEY v. *STATE, 653 So.* **2d 1009 (Fla.), cert.** **denied,* _____ ***U.S.*** _____, **116 S.Ct. 315, 133 L.Ed.2d 218 (1995) APPLY TO CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE** *CONEY* **OPINION BUT PRIOR TO THE TIME THAT** *CONEY* **BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?**

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal correctly affirmed the trial court's denial of Petitioner's motion for judgment of acquittal where the evidence adduced at trial -- that Petitioner drove the vehicle to the Perla's, waited with the engine running while his codefendants jumped out of his car, ran up the Perla's driveway and accosted the victims, robbing them of their purses at gunpoint, and took off as soon as his codefendants ran back and got into his car -- was legally sufficient evidence upon which the jury could base its verdict.

The rule announced in ***Coney v. State*** providing that **defendants** have the right to be physically present at the immediate site where pretrial juror challenges are exercised is not applicable in cases where the defendant is present in the courtroom, as here, and is prospective in application only from the time of its finality **following disposition of rehearing in the case.**

ARGUMENT I

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGES OF ROBBERY AS AN AIDER AND ABETTOR WHERE THE EVIDENCE SHOWED THAT HE WAS THE DRIVER OF THE VEHICLE IN WHICH THEY LEFT THE SCENE?

This case is before the Court for review of the question certified by the Third District Court of Appeal as one of great public importance on the issue of the application of the rule in Coney v. State, ***653 So.*** 2d 1009 (Fla. 1995) to cases in which the jury selection process took place and the entire trial concluded during the period of time after the issuance of the Coney opinion but prior to the time that ***Coney*** became final by the disposition of all motions for rehearing directed to that opinion. The issue of the propriety of the denial of Petitioner's motion for judgment of acquittal is not dispositive of the certified question, but only as to the matter of the sufficiency of the evidence put to the jury. Therefore, the Respondent submits that this Court should decline to answer the first question posed by the Petitioner herein, as failing to meet the standard for this Court's discretionary review on issues of great public importance. Savoie v. State, 422 So. 2d ***308, 312*** (Fla. 1982).

Should this Court decide to address this issue as within its discretion to consider issues other than those upon which jurisdiction is based, the Respondent submits that it is wholly without merit and the Third District Court of Appeal properly affirmed the trial court's denial of judgment of acquittal. The Petitioner contends that the evidence shows that he did not actually commit the robbery and therefore cannot be convicted of aiding and abetting except upon proof that he intended to participate in the perpetration of the crime.

A motion for judgment of acquittal challenges the legal sufficiency of the evidence, and a trial court should not grant a judgment of acquittal where the State has introduced competent evidence to support every element of the crime and competent evidence which is inconsistent with the Petitioner's theory of events. State v. Law, 559 so. 2d 187 (Fla. 1989); Toole v. State, 472 So. 2d 1174 (Fla. 1985); State v. Allen, 335 So. 2d 823 (Fla. 1976).

Moreover, when moving for a judgment of acquittal the defendant admits all facts stated, evidence adduced and every reasonable inference favorable to the State. Jones v. State, 466

So. 2d 301, 302 (Fla. 3d DCA 1985); Presslev v. State, 395 So. 2d 1175, 1177 (Fla. 3d DCA 1981); Gant v. State, 640 So. 2d 1180, 1181 (Fla. 4th DCA 1994). The standard of review for denial of a motion for judgment of acquittal is not whether in the opinion of the trial judge or the appellate court the evidence fails to exclude every reasonable hypothesis other than guilt, but rather whether the jury must reasonably so conclude. Perez v. State, 565 so. 2d 743, 744 (Fla. 3d DCA 1990). To be found guilty as a principal, it is not necessary for an aider and abettor to know of every detail of the crime, so long as there exists evidence of the aider's intent to participate, and it is sufficient for the jury to find the defendant aided and abetted the codefendant to find him also guilty of any crime committed by the codefendant in pursuance of a common scheme. Jones v. State, 648 So. 2d 1210, 1211 (Fla. 4th DCA 1995) (where the victim's friend testified that the defendant was grabbing for her purse when the victim's alarm went off, thus evincing intent to participate in the crime on the part of the defendant.)

In the instant case the Petitioner was properly charged as a principal with armed robbery where his codefendant carried a firearm and threatened the victims during the robbery. The

evidence adduced at trial clearly showed that the white Cadillac driven by the Petitioner was not innocently parked on the street, but had followed closely behind the Perla's vehicle and stopped at the same time as they did, with the motor running, on the street at the driveway in front of the house. The victims did not see the white car either parked or stopped anywhere on the street as they approached their driveway, and by the time their car had advanced up the driveway and they got out, the robbers were already moving quickly up the driveway to intercept them. Two occupants of the white car jumped out and approached the Perlas in their driveway while the Petitioner remained in their car with the engine running, in the street at the entrance of the Perla's driveway. As soon as the two codefendants had grabbed the purses and run back to the car, the white car sped away. Mr. Perla chased the codefendants to their car and got a good look at the driver. He was able to identify him in the "show up" and later made a definitive in-court identification of the Petitioner as the driver of the getaway car. This direct eyewitness testimony of the Petitioner's participation in the robbery as the 'wheelman" was sufficient evidence upon which the jury could reasonably base its conviction. State, 559 so. 2d at 189. Furthermore, the jury could reasonably conclude that the Petitioner had knowledge of the crime and the intent to

participate in it by his action of dropping the two codefendants off at the Perla's driveway, his presence in the car with the motor running and the fact that he took off immediately when his two codefendants ran back to the car, making him an aider and abettor in the crime committed by his codefendants. Lincoln v. State, 459 so. 2d 1030 (Fla. 1984); Jones v. State, 648 So. 2d at 1211.

Moreover, the Petitioner's hypothesis of innocence **was** that he was giving his two friends a ride to the Metrorail Station (U.S. 1 or 72d Avenue and Kendall-88th Street). Officer Ryan testified that the Petitioner's car **was** stopped about three to four miles south of the Metrorail Station at 87th Avenue and 128th Street. The jury could reasonably conclude that by stopping at the Perla's long enough for the codefendants to descend from the car, run up the Perla's driveway, rob the victim's at gunpoint, and return at **a** run to the car which was ready to speed away, the Petitioner knew what his passengers were doing and was acting as the "wheelman" in helping them flee the scene of the crime. State v. Law, 559 So. 2d at 189. Particularly where the white car was visible in the street from the Perla's car, it is reasonable to suppose that the driver of the getaway vehicle could see what was happening in the driveway. The Petitioner would naturally be surprised if the

victim appeared at the window of the car no more than three feet away from him. Petitioner argues that his surprise was motivated by his ignorance about what was happening, but the jury was able to conclude that, with Mrs. Perla's screams, the immediacy with which the whole robbery was accomplished within two minutes, and the visibility of the Perla's car from the street and from Petitioner's vantage point, the whole robbery was coordinated by all three assailants, Petitioner included as the driver of the getaway car.

Therefore, there was sufficient competent evidence inconsistent with the Petitioner's theory of innocence, to deny the motion for judgment of acquittal and for the jury to determine that the evidence was sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. The Third District Court of Appeal properly affirmed the trial court's denial judgment of acquittal where there was legally sufficient evidence for the question to go to the jury. State v. Law, 559 so. 2d at 189.

ARGUMENT II

DOES THE DECISION IN CONEY v. *STATE, 653 So.* 2d 1009 (Fla.), cert. denied, ____ U.S. ____, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) APPLY TO CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE CONEY OPINION BUT PRIOR TO THE TIME THAT *CONEY* BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION.

The Defendant contends that the trial court conducted jury selection at sidebar with only the attorneys present, and the exclusion of the Defendant warrants reversal based upon this Court's rule in Conev v. State, 653 So. 2d 1009 (Fla. 1995).

The question of whether the rule in Coney is applicable in Petitioner's case -- falling, as it did, within the window period for final disposition pending a decision on the petition for rehearing -- is now moot in light of this Court's decision in Bovett v. State, 21 Fla. Law Weekly, S535 (Fla. December 13, 1996) where this Court held that a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced. Therefore, the rule in *Coney* does not apply here. On April 27, 1995, this Court denied rehearing in *Coney,* announcing that a defendant has a right under

Rule 3.180, Fla.R.Crim.P., to be physically present at the immediate site where challenges are exercised. Coney v. State, 653 so. 2d at 1013. The instant case was tried on February 13 and 14, 1995, prior to the announcement of the rule in Coney on April 27, 1995.

Furthermore, there was no error in this case, as the Petitioner was in the room at the time the jurors were struck on peremptory challenge. In Bovette v. State, 21 Fla. L. Weekly, S535 (Fla. December 13, 1996), this Court receded from it's decision in *Coney, supra.* The defendant in Boyette argued that there was error because he was not present at the site where peremptory challenges were exercised. This Court found that issue to be without merit. The record in *Boyette* reflects that the defendant was present in the courtroom but not at the bench. The Court referred to it's decision in *Coney,* where the State conceded that the defendant's absence from the immediate site where challenges were held was error. The Court in *Boyette* stated:

> "It was incorrect for us to accept the state's concession of error. Because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site. Although the result in Coney would have been the same whether we found no error or harmless error,

> we recede from Coney to the extent that we held the new definition of presence applicable to Coney himself," Id.

Recent amendments to Rule 3.180, although not changing the analysis in *Boyette,* were noted by the Court as providing a clearer standard to resolve such issues:

> A defendant is present for the purpose of this rule if the Defendant is physically in attendance for the court room proceeding and has a meaningful opportunity to be heard through counsel on the issues being discussed. *Id.*

There is nothing in the instant record to indicate that Petitioner was prevented or limited in any way from consulting with his attorney concerning jury selection. The record is clear that the Petitioner was present in the room during the questioning of prospective jurors, because prior to commencement of *voir dire* the judge introduced the prospective jurors to the State Attorney, to defense counsel and to the Petitioner. (T. 5-6). The Petitioner was also present during defense counsel's questioning of potential jurors. (T. 39-44). Immediately after *voir dire* the judge spoke to the jury regarding the next step in jury selection, the challenges for cause and peremptory challenges. (T. 44-46). During this time, defense counsel was presumably at the defense table and

afforded time to speak with the Petitioner regarding the use of his challenges in striking potential jurors. It is the defendant's burden to show that he was absent during proceedings before he would have even an arguable complaint on appeal. Robert v. State, 510 So. 2d 885, 890-891 (Fla. 1987). Thus, as in *Boyette,* there was no error in not ensuring the Petitioner's presence at the immediate site, if indeed he was not present.

Conducting a bench conference with counsel for the State and the Defendant, at which the defendant himself is not present, is not reversible error where trial counsel is given the opportunity to consult with the defendant just prior to the bench conference, Ogden v. State, 658 So. 2d 621, 622 (Fla. 3d DCA 1995) (where the case establishing that waiver of defendant's presence be expressly made was prospective and not applicable in Ogden). Even assuming that the rule in Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) applies in this case, and that if the Defendant was not present, he must have expressly waived his presence, there is nothing in the record, nor cited by the Defendant, which demonstrates that the Defendant was not at sidebar. The trial judge asked:

Can I **see the attorneys** sidebar, **please?**

(T. 46). That was the extent of the record on the presence or absence of the Defendant. It is not sufficient to disturb the judgment and sentence on appeal where the record is silent with respect to the absence or presence of the Defendant. The constitutional right to be present at stages of a defendant's trial where fundamental fairness might be thwarted by his absence may be presumed to be protected by defense counsel and the trial court, and where no objection is made by trial counsel, no record of the error is preserved, and this Court has no basis upon which to base its review. Therefore, the trial court's discretion in conducting jury selection and the district court's affirmation comes to this Court with the presumption of correctness, absent any clear indication of error on the record,

The decision of the Third District Court should be affirmed and the certified question should be answered in the negative.

CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the District Court of Appeal should be reversed and the certified question answered in the negative.

Respectfully submitted,

ROBERT A. A. BUTTER WORTH
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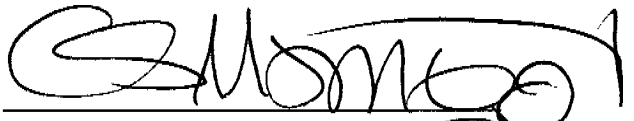
Tallahassee, Florida



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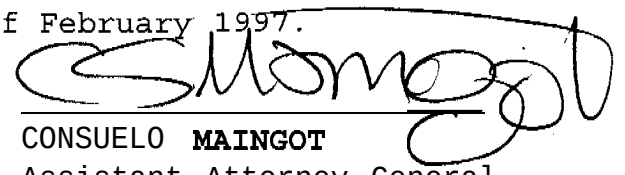
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to BRUCE A. ROSENTHAL, Esq., Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 17 day of February 1997.



CONSUELO **MAINGOT**
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,178

DARRYL HENDERSON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

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App. B	Order Granting Motion For Certification September 18, 1996.
App. C	Henderson v. State, **679 so,** 2d 805 (Fla. 3d DCA 1996).

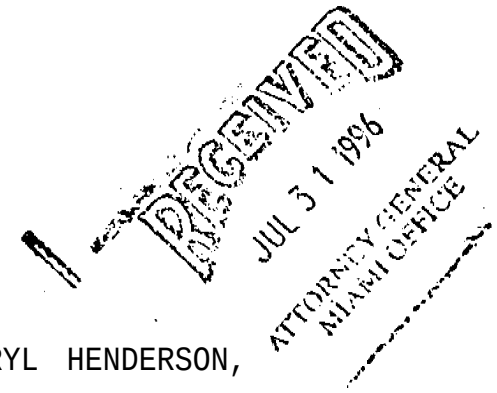
CERTIFICATE **OF** SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to BRUCE A. **ROSENTHAL,** Esq., Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 17 day of February 1997.

CONSUELO MAINGOT
Assistant Attorney General

95-73976-W

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

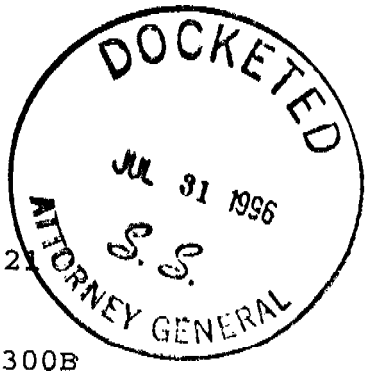


IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996



DARRYL HENDERSON, **

Appellant, **

vs. ** CASE NO. 95-1421

THE STATE OF FLORIDA, ** LOWER TRIBUNAL CASE NO. 94-30300B

Appellee. **

Opinion filed July 31, 1996.

An appeal from the Circuit Court of Dade County, Alex E. Ferrer, Judge.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot and Paulette R. Taylor, Assistants Attorney General, for appellee.

Before COPE, LEVY, and FLETCHER, JJ.

FLETCHER, Judge.

Defendant Darryl Henderson appeals his conviction for two counts of robbery with a firearm, contending that the trial court

erred in (1) denying his motion for judgment of acquittal as, he claims, he unknowingly was the driver of the get-away car; and (2) conducting juror challenges at sidebar without his being present. We reject both contentions and affirm his convictions.

1.

Henderson argues that the trial court erred in not granting his motion for judgment of acquittal as the State's evidence did not prove beyond a reasonable doubt and inconsistent with any reasonable hypothesis of innocence, his intent to participate in the perpetration of the crime. Henderson's position is based on his role in events that made him the driver of the automobile in which he and the two persons who actually committed the robbery fled the crime scene.

While we must agree with Henderson that the State was required to provide evidence inconsistent with any reasonable hypothesis Of innocence, we emphasize that the State was not required to exclude any unreasonable hypothesis. Our review of the facts in this case reveals that Henderson's stated reason for having the two passengers in his car, in light of the evidence, created a legitimate question for the jury to determine.

Specifically, the victims of the robbery were driving to their home, having been out on business, They pulled into their driveway some forty to fifty feet off their street and opened their car doors, at which time two men (one with a firearm) immediately

hurried down the driveway and robbed the victims. The two robbers then immediately turned around and, with their booty, ran directly to an older model Cadillac automobile waiting at the end of the driveway, in the street, with the engine running. Arriving at the automobile, the two men opened the doors and got inside. The car then drove off, but not before one of the victims was able to observe Henderson as the driver.

It should be noted that the testimony reflects that the entire incident took only a few minutes. ("Two minutes," according to defense counsel in his closing argument.) It should also be noted that when the victims drove their vehicle into their driveway, neither Henderson's Cadillac nor Henderson and his passengers were on the scene. Finally, when Henderson was stopped by the police, the explanation he gave was that he was simply driving his two passengers to the Metrorail station (four or five miles distant).

From the foregoing facts, all in evidence, several indisputable inferences follow: (1) The Cadillac, with Henderson and his companions, arrived on the scene almost simultaneously with the victims (as the speed with which the two robbers appeared and then arrived at the victim's car reveals). (2) Henderson's car and passengers were following the victims (as the victims observed neither Henderson's car, nor Henderson and his passengers, through the front window of their car as they arrived and pulled into the driveway). (3) Henderson deliberately stopped and let his

passengers exit at the end of the victims' driveway, making it possible for the robberies to be committed. (4) Henderson's statement that he was only taking his passenqers to the Metrorail Station is inconsistent with his having stopped four or five miles from the station to let his passengers exit the car at the victims' home. (5) The sheer nanosecond timing of the events leaves no room for any explanation but a planned event.

The foregoing -facts and inferences are consistent with a reasonable hypothesis of Henderson's quilt. They are inconsistent with any reasonable hypothesis of ignorance on Henderson's part, including Henderson's stated theory of the events, i.e., that he was merely takinq his passengers to a Metrorail station. Accordingly, the trial court correctly denied Henderson's motion for judgment of acquittal and allowed the case to go to the jury. State v. Law, 559 So. 2d 187 (Fla. 1989); Toole v. State, 472 So. 2d 1174 (Fla. 1985); State v. Allen, 335 So. 2d 823 (Fla. 1976). As the Court held in State v. Law:

> "The state is not required to 'rebut Conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events."

559 So.2d at 189 (Footnote and citation omitted).

We have carefully reviewed the cases brought to our attention by Henderson. In Stuckey v. State, 414 so. 2d 1160 (Fla. 3d DCA 1982), this Court noted that the State had failed to present

evidence sufficient to exclude the defendant's explanation of events, whereas such was accomplished here. In A.Y.G. v. State, 414 so. 2d 1158 (Fla. 3d DCA 1982), this Court concluded that evidence of the defendant's presence at the scene and her driving the getaway car at the request of the perpetrator did not refute the reasonable inference that she did not know of the crime until after it was committed. Here, the method of arrival of the perpetrators on the scene, the timing, and the poised getaway car, with Henderson behind the wheel, sufficiently refute a lack of knowledge of what was about to occur and refute lack of the requisite intent. In J.H. v. State, 370 So. 2d 1219 (Fla. 3d DCA 1979), cert. denied, 379 So. 2d 209 (Fla. 1980), the defendant was merely present at the scene and fled on foot after his companion snatched a purse. The defendant volunteered when apprehended that he had done nothing wrong, but that his companion grabbed the purse and they both ran. As there was no other evidence than this, we concluded that the State had not excluded lack of knowledge and thus intent. In Douglas v. State, 214 So. 2d 653 (Fla. 3d DCA 1968), the defendant was a passenger in a car driven by another person, who stopped the vehicle, left the defendant seated in the car, entered a house and robbed the victim. On exiting, the perpetrator asked the defendant to drive, which he did. We concluded that the evidence was insufficient to prove aiding and abetting. The facts here differ substantially as seen. In E.H. v. State, 452 So. 2d 664 (Fla. 3d DCA 1984), the defendant drove

one of the robbers to a bar (the crime scene) and then drove both robbers home afterwards. She subsequently testified (uncontradicted) that she had no previous knowledge of the crime (which this Court noted was corroborated by the fact that she did not attempt to escape).

The facts here are much stronger than those of the cited cases. Here, there are added elements which properly led to the jury's conclusion that Henderson knew exactly what was occurring and that he was an active participant in the robberies, aiding and abetting his passengers as a wheelman. These additional elements are legally sufficient, as were the additional facts in Lincoln v. State, 459 So. 2d 1030 (Fla, 1984), to show knowledge and intent. Although the evidence of Henderson's intent was circumstantial (the jury could not poke around in his gray matter for clues), there was sufficient competent evidence inconsistent with Henderson's theory of events to deny the acquittal motion. It thus became the jury's duty to determine whether the evidence was sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. This duty the jury carried out.

2.

Henderson's second argument, that the trial court erred in conducting jury challenges at sidebar in the absence of the defendant, is based upon Coney v. State, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995).

Indeed, Conev does require the defendant's presence at sidebar to assist in making peremptory challenges, or his specific waiver of that right, or his ratification of the peremptory strikes. In Henderson's case, we are not certain that the record sufficiently reflects his absence from the sidebar. Assuming, however, that he was absent, we find that Coney is inapplicable as its application is prospective only, 653 So. 2d at 1013, and Henderson's trial took place prior to the effective date of Conev.[1] See Ogden v. State, 658 So.2d 621 (Fla. 3d DCA), rev, denied, 666 So. 2d 144 (Fla. 1995).

Affirmed.

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[1] Conev was pending on rehearing at the time of Henderson's trial. Opinions of appellate courts are not final until the time for rehearing and the disposition thereof, if any, has run. Caldwell v. State, 232 So. 2d 427 (Fla. 1st DCA 1970).

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

DARRYL HENDERSON, **

Appellant, **

vs. ** CASE NO. 95-1421

THE STATE OF FLORIDA, ** LOWER TRIBUNAL CASE NO. 94-30300B

Appellee. **

Opinion filed September 18, 1996.

An appeal from the Circuit Court of **Dade** County, Alex E. Ferrer, Judge.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot and Paulette R. Taylor, Assistants Attorney General, for appellee.

Before COPE, LEVY, and FLETCHER, JJ.

ON MOTION FOR CERTIFICATION

PER CURIAM.

On motion of the appellant, we certify that the opinion issued in this case on July 31, 1996 passes upon a question of great public importance so as to permit further review by the Supreme

Court of Florida. Fla.R.App.P. 9.030(a)(2)(A)(v). We certify the following question to the Florida Supreme Court:

> DOES THE DECISION IN CONEY v. STATE, 653 So. 2d 1009 (Fla.), cert. denied, ___ U.S. ___, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995) APPLY TO CASES IN WHICH THE JURY SELECTION PROCESS TOOK PLACE AND THE ENTIRE TRIAL CONCLUDED DURING THE PERIOD OF TIME AFTER THE ISSUANCE OF THE CONEY OPINION BUT PRIOR TO THE TIME THAT CONEY BECAME FINAL BY THE DISPOSITION OF ALL MOTIONS FOR REHEARING DIRECTED TO THAT OPINION?

*805 679 So.2d 805

21 Fla. L. Weekly D1710, 21 Fla. L. Weekly D2068

Darryl HENDERSON, Appellant,
v.
The STATE of Florida, Appellee.

No. 95-1421.
District Court of Appeal of Florida,
Third District.
July 31, 1996.
Opinion Certifying Question
Sept. 18, 1996.

Defendant was convicted in the Circuit Court, Dade County, Alex E. Ferrer, J., of robbery with firearm and defendant appealed. The District Court of Appeal, Fletcher, J., held that: (1) evidence was inconsistent with any reasonable hypothesis of defendant's innocence, and (2) decision of Coney *v. State* was prospective and, thus, did not apply to defendant's trial.

Affirmed.

1. ROBBERY 342 ---- 24.20
342k24 Weight and Sufficiency of Evidence
342k24.20 Participation in offense.
Fla.App. 3 Dist. 1996.

Evidence that victims drove into driveway, that two men immediately hurried after them, robbed victims and ran directly back to automobile which was waiting with engine running, and that defendant who was driving automobile immediately took off was inconsistent with any reasonable hypothesis of defendant's innocence despite defendant's claim that he did not knowingly participate in robbery but was merely driving his friends to train station which was few miles down road.

2. CRIMINAL LAW 110 ---- 753.2(3.1)
110XX Trial
110XX(F) Province of Court and Jury in General
110k753 Direction of Verdict
110k753.2 Of Acquittal
110k753.2(3) Insufficiency of Evidence
110k753.2(3.1) In general.
Fla.App. 3 Dist. 1996.

Although state must provide evidence inconsistent with any reasonable hypothesis of innocence in order to submit case to jury, state is not required to exclude any unreasonable hypothesis.

3. COURTS 106 ---- 100(1)
10611 Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) In general.
Fla.App. 3 Dist. 1996.

Decision of Coney *v. State* which requires defendant's presence at sidebar to assist in making peremptory challenges, or his waiver of that right, or his ratification of peremptory strikes was inapplicable to defendant's trial which took place after Coney 's effective date as Coney decision applied only prospectively.

4. COURTS 106 ---- 107
10611 Establishment, Organization, and Procedure
106II(K) Opinions
106k107 Operation and effect in general.
Fla.App. 3 Dist. 1996.

Opinions of appellate courts are not final until time for rehearing and disposition thereof, if any, has run.

*806 Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot and Paulette R. Taylor, Assistant Attorneys General, for appellee.

Before COPE, LEVY and FLETCHER, JJ.

FLETCHER, Judge.

Defendant Darryl Henderson appeals his conviction for two counts of robbery with a firearm, contending that the trial court erred in (1) denying his motion for judgment of acquittal as, he claims, he unknowingly was the driver of the get-away car; and (2) conducting juror challenges at sidebar without his being present. We reject both contentions and affirm his convictions.

1.

[1] Henderson argues that the trial court erred in not granting his motion for judgment of acquittal as the State's evidence did not prove beyond a reasonable doubt and inconsistent with any reasonable hypothesis of innocence, his intent to participate in the perpetration of the crime. Henderson's position is based on his role in events that made him the driver of the automobile in which he and the two persons who actually committed the robbery fled the crime scene.

[2] While we must agree with Henderson that the State was required to provide evidence inconsistent with any reasonable hypothesis of innocence, we emphasize that the State was not required to exclude any *unreasonable* hypothesis. Our review of the facts in this case reveals that Henderson's stated reason for having the two passengers in his car, *in light* of *the* evidence, created a legitimate question for the jury to determine.

Specifically, the victims of the robbery were driving to their home, having been out on business. They pulled into their driveway some forty to fifty feet off their street and opened their car doors, at which time two men (one with a firearm) *immediately* hurried down the driveway and robbed the victims. The two robbers then immediately turned around and, with their booty, ran directly to an older model Cadillac automobile waiting at the end of the driveway, in the street, with the engine running. Arriving at the automobile, the two men opened the doors and got inside. The car then drove off, but not before one of the victims was able to observe Henderson as the driver.

It should be noted that the testimony reflects that the entire incident took only a few minutes. ("Two minutes, " according to defense counsel in his closing argument.) It should also be noted that when the victims drove their vehicle into their driveway, neither Henderson's Cadillac nor Henderson and his passengers were on the scene. Finally, when Henderson was stopped by the *807 police, the explanation he gave was that he was simply driving his two passengers to the Metrorail station (four or five miles distant).

From the foregoing facts, all in evidence, several indisputable inferences follow: (1) The Cadillac, with Henderson and his companions, arrived on the scene almost simultaneously with the victims (as the speed with which the two robbers appeared and then arrived at the victim's car reveals). (2) Henderson's car and passengers were following the victims (as the victims observed neither Henderson's car, nor Henderson and his passengers, through the front window of their car as they arrived and pulled into the driveway). (3) Henderson deliberately stopped and let his passengers exit at the end of the victims' driveway, making it possible for the robberies to be committed. (4) Henderson's statement that he was only taking his passengers to the Metrorail station is inconsistent with his having stopped four or five miles from the station to let his passengers exit the car at the victims' home. (5) The sheer nanosecond timing of the events leaves no room for any explanation but a planned event.

The foregoing facts and inferences are consistent with a reasonable hypothesis of Henderson's guilt. They are inconsistent with any reasonable hypothesis of ignorance on Henderson's part, including Henderson's stated theory of the events, i.e., that he was merely taking his passengers to a Metrorail station. Accordingly, the trial court correctly denied Henderson's motion for judgment of acquittal and allowed the case to go to the jury. *State v. Law,* 559 So.2d 187 (Fla.1989); *Toole v. State, 472* So.2d 1174 (Fla.1985); *State v. Allen, 335* So.2d 823 (Fla. 1976). As the Court held in *State* v. *Law:*

> "The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. "

559 So.2d at 189 (Footnote and citation omitted).

We have carefully reviewed the cases brought to our attention by Henderson. In *Stuckey v. State,* 414 So.2d 1160 (Fla. 3d DCA 1982), this Court noted that the State had failed to present evidence sufficient to exclude the defendant's explanation of events, whereas such was accomplished here. In *A. Y.G.* v. *State,* 414 So.2d 1158 (Fla. 3d DCA 1982), this Court concluded that evidence of the defendant's presence at the scene and her driving the getaway car at the request of the perpetrator did not refute the reasonable inference that she did not know of the crime until after it was committed. Here, the method of arrival of the perpetrators on the scene, the timing, and the poised getaway car, with

Henderson behind the wheel, sufficiently refute a lack of knowledge of what was about to occur and refute lack of the requisite intent. In J.H. v. State, 370 So.2d 1219 (Fla. 3d DCA 1979), ***cert. denied,*** 379 So.2d 209 (Fla. 1980), the defendant was merely present at the scene and fled on foot after his companion snatched a purse. The defendant volunteered when apprehended that he had done nothing wrong, but that his companion grabbed the purse and they both ran. As there was no other evidence than this, we concluded that the State had not excluded lack of knowledge and thus intent. In ***Dough*** v. ***State, 214*** So.2d 653 (Fla. 3d DCA 1968), the defendant was a passenger in a car driven by another person, who stopped the vehicle, left the defendant seated in the car, entered a house and robbed the victim. On exiting, the perpetrator asked the defendant to drive, which he did. We concluded that the evidence was insufficient to prove aiding and abetting. The facts here differ substantially as seen. In ***E.H. v. State, 452*** So.2d 664 (Fla. 3d DCA 1984), the defendant drove one of the robbers to a bar (the crime scene) and then drove both robbers home afterwards. She subsequently testified (uncontradicted) that she had no previous knowledge of the crime (which this Court noted was corroborated by the fact that she did not attempt to escape).

The facts here are much stronger than those of the cited cases. Here, there are added elements which properly led to the jury's conclusion that Henderson knew exactly what was occurring and that he was an active participant in the robberies, aiding and abetting his passengers as a wheelman. *808. These additional elements are legally sufficient, as were the additional facts in ***Lincoln v.*** *State, 459* So.2d 1030 (Fla.1984), to show knowledge and intent. Although the evidence of Henderson's intent was circumstantial (the jury could not poke around in his gray matter for clues), there was sufficient competent evidence inconsistent with Henderson's theory of events to deny the acquittal motion. It thus became the jury's duty to determine whether the evidence was sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. This duty the jury carried out.

2.

[3] [4] Henderson's second argument, that the trial court erred in conducting jury challenges at sidebar in the absence of the defendant, is based upon Coney *v. State,* 653 So.2d 1009 (Fla.), ***cert. denied, ---*** U.S. ----, 116 S.Ct. 315. 133 L.Ed.2d 218 (1995). Indeed, Coney does require the defendant's presence at sidebar to assist in making peremptory challenges, or his specific waiver of that right, or his ratification of the peremptory strikes. In Henderson's case, we are not certain that the record sufficiently reflects his absence from the sidebar. Assuming, however, that he was absent, we find that Coney is inapplicable as its application is prospective only, 653 So.2d at 1013, and Henderson's trial took place prior to the effective date of ***Coney.*** (FN1) See ***Ogden v. State, 658*** So.2d 621 (Fla. 3d DCA), rev. ***denied, 666*** So.2d 144 (Fla. 1995).

Affirmed.

ON MOTION FOR CERTIFICATION

PER CURIAM.

On motion of the appellant, we certify that the opinion issued in this case on July 31, 1996 passes upon a question of great public importance so as to permit further review by the Supreme Court of Florida. Fla.R.App.P. 9.030(a)(2)(A)(v). We certify the following question to the Florida Supreme Court:

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FN1. Coney was pending on rehearing at the time of Henderson's trial. Opinions of appellate courts are not final until the time for rehearing and the disposition thereof, if any, has run. *Caldwell* ***v. State, 232*** So.2d 427 (Fla. 1st DCA 1970).