IN THE SUPREME COURT OF FLORIDA

ANTHONY BANKS,

Petitioner,

vs.

CASE NO. SC00-1161
(L. T. #4D98-4175)

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit In and For Broward County. The record on appeal and and trial transcripts consist of comprise 4 volumes. The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses. The trial transcripts are consecutively numbered independently of the record on appeal. All references to the transcripts will be by the symbol “T” followed by the appropriate page number in parenthesis. All emphasis has been added by Petitioner unless otherwise noted.

CERTIFICATE OF FONT

Counsel for Petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE

Petitioner was charged by information filed in the Seventeenth Judicial Circuit with delivery of cocaine and resisting an officer without violence (R 3-4).

Pretrial, Petitioner moved in limine to prevent the state from presenting hearsay evidence (T 3-5). Petitioner sought to exclude conversations which occurred between the undercover police officer and Jeffrey Goodman, the actual seller of the cocaine in Petitioner's presence where the state did not intend to call Mr. Goodman as a witness (T 3-4). While the court reserved ruling, it determined that generally the conversations would be admissible because they were not offered to prove the truth of the matter asserted therein. Rather, the out-of-court statements have "independent legal significance." (T 5-6). The court indicated that it would consider the testimony on proffer before allowing the witness's examination before the jury (T 5).

The following day, defense counsel renewed the motion in limine. Defense counsel informed the court that the state intended to use some of the out-of-court statements to establish that a cocaine transaction occurred and others to prove that appellant was a principal (T 11-12). Because the objectionable testimony was the state's "entire case" (T 13), the prosecution asked to proffer the contested testimony prior to opening statement (T 14).

On proffer, Marsha Roaden, an undercover police officer for the City of Hallandale, related two conversations that she had with

Jeffrey Goodman, the passenger in a vehicle driven by Petitioner. The conversations took place in Petitioner's presence. However, Petitioner never spoke to the officer (T 28-29).

During the first conversation at a gas station, Roaden asked Goodman if it was okay to speak in front of Petitioner (T 19). Goodman replied that Petitioner was "straight up, he was cool and they were together and there would be no problem discussing business." (T 19,21). Goodman agreed to sell Roaden cocaine for $50.00 and arranged to meet at another location to consummate the transaction because an undercover police vehicle had been spotted near the gas station (T 19-22).

Fifteen minutes later, Roaden met Goodman, still a passenger in a vehicle driven by Petitioner at the prearranged location (T 24-25). According to Roaden, Goodman stated that Petitioner and he discussed the presence of the unmarked car and decided that if they saw it again, it meant that Roaden was either a police officer or a snitch (T 25). However, since Goodman knew Roaden, they weren't too worried about it and because they did not see the marked police car in this area, they were fairly confident that Roaden was okay (T 25). Roaden and Goodman exchanged the money for the cocaine (T 26).

The court ruled that the conversations were not hearsay because they were not offered to prove the truth of the matter asserted therein. Rather, the out-of-court statements were admissible as verbal acts (T 31-36). Petitioner was afforded a

continuing objection to the conversations on the grounds of hearsay and relevancy (T 35-37).

At the close of the state's case in chief, Petitioner moved for judgment of acquittal as to both counts (T 118). As to count I, delivery of cocaine, there was no proof that Petitioner delivered cocaine, only that Jeffrey Goodman delivered cocaine (T 119). There was no proof that Petitioner had knowledge that the substance was cocaine (T 119). The court denied the motion (T 119-120). As to count II, resisting arrest without violence, the court granted the motion for judgment of acquittal (T 121).

During closing argument the prosecutor argued:

> Well, poor Mr. Banks, just found himself in the middle of a drug deal, didn't see what was going on, just kind of got caught there by accident. I don't think so. One thing counsel didn't talk to you about was the facts of this case. You heard a lot about what the law says. Remember what the facts were.
>
> Detective Roaden, undercover, in the Amoco. A car drives up to her driven by Mr. Banks [Petitioner]. He's present when the co-defendant -- or Mr. Goodman, this other man -- starts talking about what is Roaden there for, and Roaden say to Goodman is he okay. Goodman says, yeah, he's cool, he's straight up.
>
> Do you know what that means? He was sitting there in the car listening to what was going on. Roaden tells them -- in clear earshot of the defendant -- I got to call my friend to see if I can get some money. The defendant hears that. Roaden walks over to the car later on after she had got on the phone, at which time the passenger, Goodman, says we were talking it over and there's undercover cops over there; so Roaden says, okay, let's go make the deal over at Ocean's Eleven.
>
> Well, now, you've got to know that Mr.

> Banks knows that behind Ocean's Eleven there's going to be a drug deal for the exchange of money for crack cocaine, and what does he do? He didn't drive away. He didn't say that's it, what are you doing, Mr. Goodman. He drove the car over there. He drove the car over there. (Sic) An act that helped assist -- aided and abetted Mr. Goodman in committing this delivery of cocaine. Drives over there. He's sitting in there. He sees the defendant pull out a big rock of crack cocaine, a fifty-cent piece.
>
> He knew what was going on. He drove that car over there and Mr. Goodman takes the money and he exchanges that cocaine right in front of the defendant, and what's the defendant do? Drives the car away, and you heard the rest of the testimony about what happened after that.

(T 142-144).

During deliberations, the jury requested a readback of officer Roaden's testimony (T 168). A readback of the testimony was conducted (T 174). After a brief recess (T 174), the jury returned its verdict finding Petitioner guilty of delivery of cocaine as charged in the information (T 175). The court adjudicated Petitioner guilty accordingly (T 178, R 43-44).

A written motion for new trial and memorandum of law were filed which reiterated Petitioner's hearsay objection to officer Roaden's hearsay testimony adding that it was the court, not the prosecutor, who advocated the admission of the evidence (R 29-33). The motion was considered in open court (T 182-183). The court acknowledged that it had granted Petitioner a continuing objection to officer Roaden's testimony (T 182). The court denied the motion and entered a written order (R 39, T 183).

A guideline scoresheet was prepared which reflects 26.25 minimum state prison months, 35 state prison months and 43.75 maximum state prison months (R-50). The court determined that Petitioner qualified as an habitual felony offender and sentenced him to serve 43.75 state prison months (R 46-48).

A timely notice of appeal was filed to the Fourth District Court of Appeal (R 53-54). On direct appeal, Petitioner argued, as he did below, that it was error to permit the officer to testify to statements made to her by Goodman because these statements were inadmissible hearsay. The District Court of Appeal determined that the statements were verbal acts despite the state's use of the statements to prove the truth of the matter asserted therein and affirmed the conviction. Banks v. State, 755 So. 2d 142 (Fla. 4th DCA 2000).

Petitioner's motion for rehearing or rehearing *en banc* was denied on April 26, 2000. Notice of invocation of discretionary review was filed on May 24, 2000.

On November 9, 2000, this Court entered its order accepting jurisdiction and setting oral argument. This Brief on the Merits follows.

STATEMENT OF THE FACTS

On May 20, 1998, at approximately 8:00 p.m. Hallandale police officer Marsha Roaden was working in an undercover capacity while Officers Shook and Raphael were conducting surveillance in an unmarked police car (T 57-59). Roaden stood at a pay phone in a gas station parking lot (T 60). Petitioner drove up to Roaden's location (T 60-61). Jeffery Goodman, the passenger in the vehicle driven by Petitioner, called Roaden over to the car and asked her if she remembered him (T 61-62). Roaden did not recall meeting him before (T 62). During this conversation, Petitioner left the car and put air in the tire (T 62).

Goodman asked Roaden what she was waiting on (T 62). Roaden replied that she was waiting on a friend with money (T 62). Goodman asked her what she needed (T 62). Roaden asked if it was okay to speak in front of Petitioner and was he straight up (T 63). Roaden explained that the expression "straight up" implied that the person was "with the game plan or part of the business or not the cops, wouldn't be susceptible to snitch out on you or what not." (T 63). Goodman replied that Petitioner was cool, okay and with him then asked what she needed again (T 63). Roaden said she was looking to purchase a fifty cent piece or $50.00 worth of cocaine (T 63). Goodman indicated it was no problem (T 64). Roaden had to call her friend to see how long it would take her to get the money (T 65).

Prior to the business discussion, Petitioner returned to the

driver's seat and looked at Roaden who was leaning on the window sill of the front passenger window looking at Goodman and Petitioner (T 64). When Roaden picked up the telephone, Petitioner drove the vehicle to the front of the gas station and waited while Goodman went inside (T 65).

Roaden called Shook and Raphael and related what occurred then walked over to the car and spoke to Goodman again (T 66). Goodman told Roaden that the police were parked across the street. Roaden arranged to do the deal in an alleyway behind Ocean's Eleven approximately 10 to 15 minutes later (T 67-68).

Roaden was dropped off at Ocean's Eleven by Shook and Raphael T 68). Petitioner, the driver, and Goodman, the front passenger, arrived (T 68). Roaden testified:

> Mr. Goodman said that he knew that I was straight up, that I was okay and that him and Mr. Banks had had a discussion while they were gone about the undercover vehicle being across the street at the Amoco and that if they saw that vehicle again, then they would know that I was either the cops or a snitch or trying to set them up, and then he went on to talk about how he figured since he knew me from before, that he figured I was okay, but that vehicle would be an indicator to them if they saw it again that I would be a snitch or the cops or something of that nature.

(T 69). While Goodman spoke, Petitioner leaned to look at Roaden (T 69-70).

Goodman acknowledged that he had the cocaine and Roaden acknowledged that she had the money (T 70). Goodman and Roaden exchanged the money and the cocaine (T 70-71). Goodman did not

give anything to Petitioner (T 80). Roaden signaled backup and continued to speak with Goodman (T 71). When the conversation concluded, Petitioner drove away (T 72).

Later, Roaden met Shook at another location, observed Petitioner standing in the roadway and identified him as the driver of the vehicle (T 75).

On cross-examination, Roaden testified that Goodman was not arrested that day (T 81). The marked money was not recovered (T 78-80). Petitioner did not say anything during Roaden and Goodman's conversations or at the time she identified him (T-83). Roaden testified that while she was speaking to both Petitioner and Goodman, only Goodman spoke to her (T 84).

On redirect examination, Roaden testified that Petitioner leaned a little toward the passenger window a couple of times during her conversation with Goodman giving the appearance that he was listening (T 87). On recross-examination, Roaden testified that other than body language, she had no indication that Petitioner understood English (T 87).

Officers Raphael and Shook were seated in an unmarked police vehicle conducting surveillance of Roaden (T 99-100,111). They saw Roaden make contact with two persons inside a vehicle but could not hear what was said (T 90-91,100,110). After several minutes, Roaden signaled to them and they picked her up (T 92). They drove her to the rear of Ocean's Eleven nightclub. Raphael, on foot, surveilled the parking lot (T 92,111). Shook parked on the west

side of the street and could not see Roaden's location (T 93,101). A marked unit occupied by officer Donahue was in the area (T 102).

Raphael saw the same vehicle arrive and pull up to Roaden (T 92). Roaden leaned on the window of the vehicle then gave the take down signal (T 92). Raphael did not hear any conversation (T 96). Raphael radioed to Shook (T 93). When Shook saw the vehicle leave the alleyway, he asked officer Donahue to conduct a routine traffic stop of the vehicle (T 103).

Shook saw Donahue activate his lights (T 103). Traveling behind Donahue, Shook saw the vehicle travel at a high rate of speed and directed Donahue to abandon pursuit (T 104). Shook responded to Dewey Street, saw the car and saw a black male run north across the street and run through a yard (T 104,107). Shook lost sight of the man then observed him a short while later (T 107). As Petitioner walked from behind some bushes, Shook identified himself as a police officer and pushed Petitioner to the ground (T 106). A back up officer arrived and Petitioner was handcuffed (T 106). Roaden responded and identified Petitioner (T 107).

SUMMARY OF ARGUMENT

At trial, over Petitioner's hearsay objection, undercover police officer Roaden testified to two conversations that she had with a passenger in a vehicle driven by Petitioner in which references were made to Petitioner. The passenger did not testify at trial. In closing argument, the prosecution relied upon these out-of-court statements to establish the truth of the matter asserted. Thus, the contents of the conversations were inadmissible hearsay and it was error to allow the testimony under the guise that it was evidence of verbal acts. The decision of the Fourth District Court of Appeal which approved the improper admission of the hearsay evidence should be reversed by this Court.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL INCORRECTLY APPROVED THE ADMISSION OF HEARSAY TESTIMONY BY CHARACTERIZING IT AS VERBAL ACT EVIDENCE.

Every citizen-accused is constitutionally entitled to confront the witnesses against him. VI, XIV Amend. U.S. Const.; Art. I, § 16(a), Fla. Const. The confrontation clause serves three purposes. First, witnesses must give testimony under oath to underscore the importance of the matter and discourage untruthfulness by raising the possibility of a criminal prosecution for perjury. Second, the witness is subject to cross examination designed to ferret out the truth. Third, the witness' presence in the courtroom permits the jury to consider the witness' demeanor when determining his or her credibility. Conner v. State, 748 So. 2d 950 (Fla. 1999) (elderly person exception to the hearsay rule is unconstitutional) The hearsay rule codified in Sections 90.801 - 90.806 Florida Statutes is designed to effectuate this significant constitutional guarantee.

"Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered at trial to prove the truth of the matter asserted." § 90.801(1)(C) Fla. Stat. Hearsay is inadmissible at trial unless it falls within a recognized exception to the rule. §90.802 Fla. Stat. The hearsay rule was explained by this Court in Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982):

> "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." Dutton v. Evans, 400 U.S. 74, 88, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970). In Dutton, the Court went on to say that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' California v. Green, 399 U.S. at 161, 90 S.Ct. at 1936." 400 U.S. at 89, 91 S.Ct. at 219. On the other hand, "[o]ut-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." Anderson v. United States, 417 U.S. 211, 219, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20 (1974). Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose. Hunt v. Seaboard Coast Line Railroad Co., 327 So.2d 193 (Fla.1976); Williams v. State, 338 So.2d 251 (Fla. 3d DCA 1976). The hearsay objection is unavailing when the inquiry is not directed to the truth of the words spoken, but, rather, to whether they were in fact spoken. Id.

Where the prosecution relies upon an out-of-court statement in closing argument to prove the truth of the matter asserted, the evidence is hearsay not withstanding that the state urged its admission for another purpose. Conley v. State, 620 So. 2d 180, 182-183 (Fla. 1993); Keen v. State, 25 Fla. L. Weekly S 754, 757 (Fla. 2000).

At bar, Petitioner was accused of delivery of cocaine based upon Jeffrey Goodman’s delivery of cocaine to undercover officer Roaden. Goodman was a passenger in a vehicle driven by Petitioner and Goodman did not testify at trial. Rather, the state relied

solely upon Roaden's account of her conversations with Goodman admitted over Petitioner's continuing hearsay objection to prove that Petitioner was an aider and abettor to Goodman's crimes. Error occurred.

Roaden testified that Goodman called her over to the car while she was in a gas station parking lot and asked her if she remembered him (T 61-62). Roaden did not recall Goodman (T 62). Goodman asked Roaden what she was waiting on (T 62). Roaden replied that she was waiting for a friend with money (T 62). Goodman asked her what she needed (T 62).

Roaden asked if it was okay to speak in front of Petitioner and was he straight up (T 63). Roaden explained to the jury that the expression "straight up" implied that the person was "with the game plan or part of the business or not the cops, wouldn't be susceptible to snitch out on you or what not." (T 63). Goodman replied that Petitioner " was cool, okay and with him" then asked what she needed again (T 63).

Roaden wanted to purchase a fifty cent piece or $50.00 worth of cocaine (T 63). Goodman indicated it was no problem (T 64). Roaden called her friend to see how long it would take her to get the money (T 65). When Roaden picked up the telephone, Petitioner drove the vehicle to the front of the gas station and waited while Goodman went inside (T 65).

After calling two other police officers to relate what occurred, Roaden walked over to the car and spoke to Goodman again

(T 66). Goodman told Roaden that the police were parked across the street. Roaden arranged to do the deal in an alleyway approximately 10 to 15 minutes later (T 67-68).

Roaden went to the alleyway (T 68). Petitioner, the driver, and Goodman, the front passenger, arrived (T 68). Roaden testified:

> Mr. Goodman said that he knew that I was straight up, that I was okay and that him and Mr. Banks had had a discussion while they were gone about the undercover vehicle being across the street at the Amoco and that if they saw that vehicle again, then they would know that I was either the cops or a snitch or trying to set them up, and then he went on to talk about how he figured since he knew me from before, that he figured I was okay, but that vehicle would be an indicator to them if they saw it again that I would be a snitch or the cops or something of that nature.

(T 69).

Goodman acknowledged that he had the cocaine and Roaden acknowledged that she had the money (T 70). Goodman and Roaden exchanged the money and the cocaine (T 70-71). Goodman did not give anything to Petitioner (T 80).

Roaden signaled backup and continued to speak with Goodman (T 71). When the conversation concluded, Petitioner drove away (T 72).

Roaden's repetition of Goodman's out-of-court statements that Petitioner was "cool, he was okay and that he was with him" in response to her out-of-court question as to whether Petitioner was straight up as well as her testimony concerning Goodman's conversa-

tion with Petitioner[1] and their thoughts about the significance of the surveillance car were hearsay. The only purpose for the testimony was to prove the truth of the matter asserted: that Petitioner was "cool," and aware of what was going on and thus, a willing participant in the transaction. This conclusion is evidenced by the following portion of the prosecutor's closing argument:

> Detective Roaden, undercover, in the Amoco. A car drives up to her driven by Mr. Banks [Petitioner]. He's present when the co-defendant -- or Mr. Goodman, this other man -- starts talking about what is Roaden there for, and Roaden say to Goodman is he okay. Goodman says, yeah, he's cool, he's straight up.
>
> Do you know what that means?

(T-142-143). This excerpt establishes that the purpose for eliciting the out-of-court statements was to prove the truth of the matter asserted therein. Thus, regardless of the reason for the admission of the evidence urged by the state, the testimony is inadmissible hearsay. Conley v. State, 620 So. 2d at 183 ("Regardless of the purpose for which the State claims it offered the evidence, the State used [the evidence in closing argument] to prove the truth of the matter asserted."); Keen v. State, 25 Fla. L. Weekly at S757 ("Thus, regardless of the purpose for which the State now claims the testimony to have been directed, the evidence was in fact used to prove the truth of the content rendering the

[1]The later remark is actually hearsay within hearsay because Roaden related what Goodman claimed he discussed with Petitioner. See, §90.805 Fla. Stat.

content of the statement hearsay.")

Goodman, however, was never called as a state witness. He did not swear under oath to tell the truth. He was not subject to a perjury if he lied. He was not subject to cross-examination. Nor was the jury able to observe his demeanor in order to judge his credibility. The improper admission of his out-of-court statements implicating Petitioner in the crime deprived Petitioner of his constitutional right to confrontation.

The Fourth District Court of Appeal rejected this argument concluding that the objectionable testimony was admissible as verbal acts. Banks v. State, 755 So. 2d 142, 143 (Fla. 4th DCA 2000):

> Banks contends on appeal that the statements made by Goodman were inadmissible hearsay. We conclude, however that Goodman's statements during the transaction, including his comments to the effect that Banks was "cool" and that he and Banks were concerned about whether Roaden was a snitch, were "verbal acts" not offered to prove the truth of the matter asserted and, therefore, not hearsay.

This holding improperly expanded the concept of verbal acts as discussed in Chacon v. State, 102 So. 2d 578 (Fla. 1957), Decile v. State, 516 So. 2d 1139 (Fla. 1987) and Stevens v. State, 642 So. 2d 828 (Fla. 2d DCA 1994), the cases upon which the Fourth District relied.

In Chacon, the defendants were charged with violating state lottery statutes. While conducting a raid at a suspect gambling house, a police officer received telephone calls from various

persons placing bets. At trial, the officer was permitted to testify to the contents of the telephone conversations over the defendants' hearsay objections. This Court held that the conversations were admissible as evidence of a "verbal fact going to prove the nature of the illegal business being conducted in the establishment as distinguished from evidence of the truth of any alleged fact that might have been announced in the course of the conversation." 102 So. 2d at 578.

In Decile, the defendant was charged with sale or delivery of cocaine based upon sale of cocaine to a confidential informant. The discussion leading to the sale was monitored by a police officer. The confidential informant did not testify at trial. However, the officer was permitted to testify that the confidential informant stated that he needed eight after which the defendant replied "No problem, come inside, I get you rocks." concluding with the confidential informant stating, "Thank you, Mr. Decile, I will get back to you later." 516 So. 2d at 1139. The Fourth District Court of Appeal determined that the officer's testimony was admissible as a verbal act. "The subject statements served to prove the nature of the act as opposed to proving the truth of the alleged statements." 516 So. 2d at 1140.

In Stevens, the defendant was charged with delivery of cocaine within 1000 feet of a school, the defendant challenged the admission of a police officer's testimony that a non-testifying co-defendant agreed to sell him $9.00 worth of cocaine then walked

toward the defendant and stated, “I need a dime” after which the officer saw the defendant give the co-defendant a plastic baggie and the co-defendant returned to the officer. The Second District Court of Appeal court held that the statement, “I need a dime” was admissible as verbal acts “since it served to prove the nature of the act or transaction.” 642 So. 2d at 829.

In each of these cases, the appellate court found that the statements which formed the basis of a transaction were admissible verbal acts designed to establish the transaction. See also, Ehrhardt, Florida Evidence, § 801.6 (2000 Edition) (“[I]n an action involving the alleged breach of an oral contract, testimony by witnesses that A said to B ‘I offer to sell you 10,000 widgets at $1 per widget” is not hearsay. [Footnote omitted] In neither situation are the statements being offered to prove their truth; rather they are being offered to prove that they were made. The fact the statement was made is a material issue in each instance as defined by relevant substantive law. [Footnote omitted]”).

By contrast, the nature of the transaction is not established by testimony that Petitioner was straight up and that he and Goodman were concerned that Roaden was an undercover police officer. These statements do not reflect the terms of the transaction and were not pertinent to the negotiations. Instead, they were ancillary to the transaction and thus, should not have been admitted as verbal acts.

Furthermore, the fact that the objectionable statements were

made during the same conversation in which other statements are admissible as verbal acts does not render the contested evidence likewise admissible. See Conley v. State, 620 So. 2d at 183-184 (not all statements made to a physician during the course of a physical examination are admissible under the medical diagnosis exception to the hearsay rule; rather only those statements pertinent to medical treatment fall within the exception). Thus, the Fourth District Court of Appeal incorrectly approved the trial court's admission of Roaden's testimony repeating Goodman's remarks about Petitioner and their thoughts about the surveillance vehicle under the guise of verbal acts.

Assuming arguendo, the entirety of the out-of-court conversations were admissible as verbal acts, the Fourth District Court of Appeal incorrectly sanctioned the prosecutor's use of the testimony as substantive evidence of Petitioner's intent to participate in the transaction. The appellate court wrote:

> We recognize that Goodman's statement to the effect that Banks was part of the deal may be viewed as offered for the truth of the matter asserted, particularly in view of the state's closing argument. However, a statement's inadmissibility for one purpose does not preclude its admissibility for another. See Breedlove v. State, 413 So. 2d 1 (Fla. 1982).
>
> To prove its case against Banks as a principal, the state was required to show that Banks did some act to assist Goodman in the commission of the crime; mere knowledge or presence at the scene are insufficient to establish participation. See Staten v. State, 519 So. 2d 622 (Fla. 1988). Assistance consists of engaging in some act that assists the co-perpetra-

> tor in committing the crime. See T.B. v. State, 732 So. 2d 1163 (Fla. 1st DCA 1999). The act of control of the vehicle in driving to and from the scene of the buy with knowledge of what was occurring is proof of Banks' assistance in the drug deal.
>
> Banks' intent and active assistance is evidenced by Goodman's statements, with Banks looking on, which set up the deal and Banks' response by driving them to the location indicated for the transaction to take place. As the statement was properly admitted as a verbal act, the state's creative use of the admissible testimony in its argument does not impact upon the issue of admissibility.

Banks v. State, 755 So. 2d at 144. This holding is contrary to this Court's decision in Conley v. State, 620 So. 2d at 182-183 and Keen v. State, 25 Fla. L. Weekly at S757. In both cases, this Court held that the prosecutor may not suggest that evidence is outside the hearsay rule because it is not offered to prove the truth of the matter asserted then rely upon the out-of-court statements in closing argument to prove the truth of the matter asserted therein. Where this occurs, the evidence is hearsay and subject to exclusion.

Conley and Keen are in keeping with this court's holdings in other contexts that where evidence is admitted for a limited purpose, it may not be used for other purposes. As this Court wrote in Consalvo v. State, 697 So. 2d 805, 813 (Fla. 1996):

> Appellant also claims that the State improperly argued the collateral burglary as similar fact evidence in closing argument to the jury. Under section 90.107, Florida Statutes (1995), evidence that is admissible for one purpose may be inadmissible for another purpose. See

> Parsons v. Motor Homes of America, Inc., 465 So.2d 1285, 1290 (Fla. 1st DCA 1985). Consequently, **it is error to take the position that once material "is received in evidence, it will be received for any probative value it may have on any issues before the court." Id.**
>
> ..... **The State's claim that it was simply arguing facts elicited during the trial and drawing legitimate inferences from them is not availing. The State's use of the facts from the Walker burglary exceeded the scope for which they were admitted**--i.e., to establish the entire context out of which the criminal action occurred. (Emphasis added.)

Accord, Bolin v. State, 736 So. 2d 1160, 1166 (Fla. 1999)(A prosecutor cannot use as substantive evidence statements admitted under the guise of impeachment evidence.) Thus, the decision of the Fourth District also incorrectly approves the use of verbal act evidence for purposes other than establishing the occurrence of the transaction.

As Roaden's testimony recounting Goodman's statements concerning Petitioner was inadmissible hearsay and not verbal acts, this Court should reverse the decision of the Fourth District Court of Appeal in Banks v. State, 755 So. 2d at 142 and remand the cause for a new trial.

CONCLUSION

Based upon the argument and authorities cited above, this Court should reverse the decision of the Fourth District Court of Appeal in Banks v. State, 755 So. 2d 142 (Fla. 4th DCA 2000), and remand the cause for a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to AUGUST A. BONAVITA, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this _____ day of NOVEMBER, 2000.

_____
MARCY K. ALLEN
Assistant Public Defender