

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 01-1569

**ROBERT ARGUELLES,**

Petitioner,

- versus -

**STATE OF FLORIDA,**

Respondent.

RESPONDENT'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, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

A copy of the order issued by the Fourth District Court of Appeal is attached as Appendix A.

## Statement Of The Case and Facts

Respondent accepts Petitioner's Statement of the Case and Facts subject to the additions and clarifications set forth below and in the argument portion of this Brief which are necessary to resolve the legal issues presented upon appeal. In addition, Respondent relies upon those facts set forth in the opinion of the Fourth District Court of Appeal in the instant case, Arguelles v. State, 791 So. 2d 500 (Fla. 4th DCA 2001):

Petitioner, along with Codefendants Jose Gajate and Michael Green, was charged by Information with trafficking in cocaine (Count I) and conspiracy to traffic in cocaine (Count II) (R. 4-5).

On the day of trial, Petitioner filed a written motion in limine to exclude, inter alia, the statements of Codefendants Gajate and Green under § 90.803(18)(e), Fla. Stat. (1997), on the ground that the State could not prove the existence of a conspiracy by a preponderance of the evidence (R. 26). The trial court heard argument on the motion immediately prior to opening statements. Petitioner argued that apart from the statements of the codefendants, there was no independent evidence of a conspiracy (T. 215). The State countered that, based on the evidence presented at the motion to suppress hearing held the day before, the trial court could find that the State was going to be able to prove a prima facie case of conspiracy (T. 217). The trial court determined that the statements were admissible based on the evidence from the motion to suppress hearing (T. 218, 219).

Petitioner renewed his motion in limine by objection during the testimony of the confidential informant, Harold Gomez ("CI") (T. 321-23, 368-69). Petitioner also

renewed the motion at the conclusion of Gomez' testimony (T. 359). At that point, the State presented an alternative theory of admissibility: that the statements were also admissible as verbal acts (T. 360). Petitioner renewed his objection a third time during the testimony of the agent who overheard the conversations (T. 369). The trial court granted Petitioner a continuing objection (T. 369).

Petitioner was ultimately convicted as charged of conspiracy to traffic in cocaine (Count I), and trafficking in cocaine (Count II) (R. 35-36; T. 507-08). He was sentenced to two concurrent fifteen-year mandatory minimum terms of imprisonment (R. 45-50).

Petitioner filed a direct appeal of his conviction and sentence to the Fourth District Court of Appeal. On appeal, he raised five issues: (1) the trial court erred when it admitted Gajate's hearsay statements; (2) there was insufficient evidence of conspiracy to traffic in cocaine; (3) there was insufficient evidence to prove trafficking in cocaine; (4) the trial court erred when it denied Petitioner's requested jury instruction on accomplice testimony; and (5) his conviction for an uncharged offense was improper.

The Fourth District Court of Appeal affirmed Petitioner's convictions and sentences. Arguelles v. State, 791 So. 2d 500 (Fla. 4th DCA 2001). As to Petitioner's first contention, the court determined that some of Codefendant Gajate's statements could properly be considered non-hearsay verbal acts because they were part of the transaction: (1) Gajate's statements concerning the initial set-up of the drug deal at the first meeting with Gomez; (2) Gajate's statement at the second meeting that he had

money; and (3) Gajate's statement that he needed to show the cocaine to Petitioner and Codefendant Green before the transaction was completed because they had the last word. Id. at 501, 503. When those statements were combined with the other non-hearsay evidence, the State had met the requirements of § 90.803(18)(e) by sufficiently establishing, by a preponderance of the evidence, a conspiracy to traffic in cocaine and Petitioner's participation in that conspiracy. Id. at 501, 504. The Fourth District then determined that at this point, **all** of Codefendant Gajate's statements were admissible as coconspirator hearsay statements and could be used for the truth of the matter asserted. Id. at 501, 504. Those statements included the three previously described "verbal act" statements, as well as two others: (1) Petitioner was the middleman, and (2) the money belonged to Petitioner or Green and Gajate could not have brought it alone. Id. at 503. As to Petitioner's second and third claims, the Fourth District determined that there was competent substantial evidence to support the jury's verdict as to each count. Id. at 504.

Prior to the issuance of mandate, Petitioner filed his notice to invoke the discretionary jurisdiction of this Court. Petitioner sought review on the ground that the opinion of the Fourth District expressly and directly conflicted with this Court's opinion in Banks v. State, 790 So. 2d 1094 (Fla. 2001); Consalvo v. State, 697 So. 2d 805 (Fla. 1996), cert. denied, 523 U.S. 1109 (1998); Breedlove v. State, 413 So. 2d 1 (Fla. 1982); and Stevens v. State, 642 So. 2d 828 (Fla. 2d DCA 1994). After considering the parties' briefs on the issue of jurisdiction, this Court accepted jurisdiction, set a briefing schedule, and has set the case for oral argument. This Brief

on the Merits is filed in accordance with that briefing schedule.

## Summary Of The Argument

I. The decision of the Fourth District Court of Appeal should be affirmed because the court properly characterized three of the statements as verbal act evidence. The statements at issue were not hearsay because they were not offered to prove the truth of the matters asserted therein. Rather, they were introduced as a verbal act to prove Petitioner's participation in the conspiracy. Furthermore, assuming, arguendo, that the statements were hearsay, there was other sufficient independent evidence of Petitioner's participation in the conspiracy. Once the State showed the existence of the conspiracy and Petitioner's participation in it, **all** of the statements were then properly admitted as coconspirator hearsay. Finally, even if the statements were improperly admitted, the error was harmless.

II. The trial court properly denied the motion for judgment of acquittal as to Count II, conspiracy to traffic in cocaine. The evidence showed Petitioner's participation in the conspiracy.

III. The trial court properly denied the motion for judgment of acquittal as to Count III, trafficking in cocaine. The State presented sufficient evidence to support either of its theories of the case: that petitioner committed the offense by possession or by purchase.

## Argument

### **I. THE TRIAL COURT PROPERLY ADMITTED THE COCONSPIRATOR HEARSAY STATEMENTS.**

Petitioner claims that the admission of hearsay statements of Codefendant Gajate, a coconspirator, was error. According to Petitioner, the State failed to independently show the existence of the conspiracy and Petitioner's participation in it by a preponderance of the evidence. Petitioner argues that the Fourth District Court of Appeal erred when it concluded that "Gajate's statement that appellant and Green needed to approve of the deal before it was complete, a verbal act, provided competent evidence from which the trial court could have concluded that appellant participated in the conspiracy." Arguelles v. State, 791 So. 2d 500, 504 (Fla. 4th DCA 2001). More specifically, Petitioner contends that this statement was, in fact, not a verbal act as described by the court, but was, instead, used for the truth of the matter asserted, and he contends that use was contrary to this Court's recent decision in Banks v. State, 790 So. 2d 1094 (Fla. 2001).

In the trial court, the State sought admission of Codefendant Gajate's statements pursuant to the coconspirator exception to the hearsay rule, found in § 908.03(18)(e), Fla. Stat. (1997). The trial court determined that the State had satisfied the prerequisites for admission of this testimony (T. 218, 219, 369).

On appeal to the Fourth District, Petitioner claimed that the trial court erred when it admitted Gajate's hearsay statements. The Fourth District rejected Petitioner's arguments, determining that some of Codefendant Gajate's statements could properly

be considered non-hearsay verbal acts because they were part of the transaction: (1) Gajate's statements concerning the initial set-up of the drug deal at the first meeting with Gomez; (2) Gajate's statement at the second meeting that he had money; and (3) Gajate's statement that he needed to show the cocaine to Petitioner and Codefendant Green before the transaction was completed because they had the last word. Arguelles, 791 So. 2d at 501, 503. When those statements were combined with the other non-hearsay evidence, the State had met the requirements of § 90.803(18)(e) by sufficiently establishing, by a preponderance of the evidence, a conspiracy to traffic in cocaine and Petitioner's participation in that conspiracy. Id. at 501, 504. The Fourth District then determined that at this point, **all** of Codefendant Gajate's statements were admissible as coconspirator hearsay statements and could be used for the truth of the matter asserted. Id. at 501, 504. Those statements included the three previously described "verbal act" statements, as well as two others: (1) Petitioner was the middleman, and (2) the money belonged to Petitioner or Green and Gajate could not have brought it alone. Id. at 503.

It is a fundamental principle of appellate procedure that an order or judgment of the trial court is presumed to be correct until reversible error has been demonstrated by the party seeking review. Applegate v. Barnett Bank, 377 So. 2d 1150 (Fla. 1979). This Court has stated that the "[a]dmission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); see also Alston v. State, 723 So. 2d 148, 156 (Fla. 1998).

It is also a well-settled rule that relevant evidence is evidence which tends "to prove or disprove a material fact," § 90.401, Fla. Stat. (1997), and all relevant evidence is generally admissible unless the law provides otherwise. Id.; § 90.402, Fla. Stat. (1997). Furthermore, the trial court must utilize a balancing test to determine if the probative value of this relevant evidence is outweighed by its prejudicial effect. See § 90.403, Fla. Stat. (1997); Gore v. State, 719 So. 2d 1197 (Fla. 1998).

Conceding that the evidence is relevant, Petitioner objects to the admission of the evidence of Codefendant Gajate's statements on the ground that they are hearsay. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (1997). However, a statement may be offered to prove a variety of things besides its truth. Foster v. State, 778 So. 2d 906, 914-15 (Fla. 2000); see also Williams v. State, 338 So.2d 251 (Fla. 3d DCA 1976) ("Merely because a statement would not be admissible for one purpose (i.e., its truth or falsity) does not mean it is not admissible for another (e.g., to show the declarant's state of mind.")). As noted above, the trial court admitted the evidence under the exception found in § 90.803(18)(e), which permits the admissions of coconspirator hearsay under certain conditions. This Court recently summarized the applicable law concerning the admission of coconspirator hearsay as follows:

Section 90.803(18)(e) provides that "[a] statement by a person who was a co-conspirator of the party [made] during the course and in furtherance of the conspiracy" is not inadmissible as evidence even though the declarant is unavailable as a witness. In order to admit evidence under this exception, the State must establish:

(1) that a conspiracy existed; (2) that the declarant/coconspirator and the defendant against whom the statements are offered were members of the conspiracy; and (3) that the statements were made during the course and in furtherance of the conspiracy.

State v. Edwards, 536 So. 2d 288, 292 (Fla. 1st DCA 1988); see also Charles W. Ehrhardt, Florida Evidence § 803.18e (2000 ed.). The State must prove the existence of the conspiracy and each member's participation in it by a preponderance of the evidence independent of the hearsay statements sought to be admitted. See Foster v. State, 679 So. 2d 747, 753 (Fla. 1996).

Brooks v. State, 787 So. 2d 765, 778 (Fla. 2001). "The trustworthiness and rationale behind the co-conspirator hearsay exception is 'that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not.'" Id. at 773 (quoting United States v. Trowery, 542 F.2d 623, 626 (3d Cir.1976)).

In its opinion below, the Fourth District summarized the applicable law regarding the proof of a conspiracy and a defendant's participation in that conspiracy as follows:

To establish a conspiracy and appellant's participation in it, the state must prove "an express or implied agreement or understanding between two or more persons to commit a criminal offense," and an intention to commit that offense. Sheriff v. State, 780 So. 2d 920, 921 (Fla. 4th DCA 2001). Direct proof of the agreement is not necessary; it may be inferred from the circumstances. See Harris v. State, 450 So. 2d 512, 513-14 (Fla. 4th DCA 1984). However, this circumstantial evidence must be consistent with a hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence. See McClain v. State, 709 So. 2d 136, 138 (Fla. 1st DCA 1998). Thus, a defendant cannot be a conspirator by merely being present at the scene of the offense, driving to the scene knowing the purpose of the journey, or aiding and abetting in the commission of the offense. See Sheriff, 780 So. 2d at 921; Mickenberg v. State, 640 So. 2d 1210, 1211 (Fla. 2d DCA 1994)

(reversed conspiracy conviction where defendant merely aided and abetted); Pennington v. State, 526 So.2d 87 (Fla. 4th DCA 1987) (reversed conspiracy conviction where defendant was merely present at the scene and aided in its commission without knowing the nature of the contraband transferred).

Arguelles, 791 So. 2d at 503-04.

**A. The State Presented Sufficient Independent Proof Of The Conspiracy And Petitioner's Participation In It By A Preponderance Of The Evidence.**

The State sufficiently established the conspiracy and Petitioner's participation in it so as to properly admit the hearsay statements. The Fourth District found that the State had met this burden by presenting both (1) independent proof of the conspiracy, and (2) Gajate's non-hearsay verbal acts. Arguelles, 791 So. 2d at 501, 504. Based on the record before this Court, that determination was correct. However, even should this Court determine that the Fourth District erred in categorizing three of Codefendant Gajate's statements as verbal acts, any error was harmless because the State nevertheless presented sufficient independent proof of the conspiracy.

**1. Independent Proof Of The Conspiracy.**

Although the Fourth District did not specifically enumerate the independent proof presented by the State, the record reveals that the following evidence was presented in the trial court. The number dialed by Codefendant Gajate at the 1:00 meeting on Gomez' cellular telephone was subscribed to by an individual with Petitioner's same last name: Olga Arguelles at 1001 N.W. 25th Avenue in Miami, Florida (T. 332, 363). When Codefendant Gajate left the meeting, he drove down to Miami and picked up Petitioner at the same address: 1001 N.W. 25th Street (T. 374,

364, 389). Codefendant Gajate was in the car with Petitioner and Codefendant Green and he rode with them back to the location of the cocaine transaction at the appointed time (T. 337, 397). Petitioner handed Codefendant Gajate the grocery bag which contained the open cereal box with the money inside (T. 337, 397). Petitioner was a passenger in the car while Codefendant Green drove around the parking lot for seven minutes during the drug transaction, passing up open parking spaces (T. 290, 312). As soon as he was arrested, Petitioner stated that he had nothing to do with drugs, even though the officers had not mentioned anything about the drug arrest (T. 292). During the pat down, the officers found \$3,000 in cash on Petitioner (T. 292). At the station, Petitioner gave his address as 1001 N.W. 25th Avenue in Miami (T. 292). Finally, Petitioner made statements while in custody about what sentence the defendants should get for conspiracy and that they should have run (T. 428-29).

The State argued to the Fourth District that this evidence alone was sufficient to establish Petitioner's participation in the conspiracy. However, apparently rejecting that argument, the Fourth District determined that additional evidence was necessary to prove the conspiracy and Petitioner's participation in it, and found that three specific groups of statements made by Codefendant Gajate qualified as nonhearsay verbal acts, which would supply not only additional evidence of the conspiracy, but also Petitioner's participation in it. Arguelles, 791 So. 2d at 501, 503.

## **2. Gajate's Non-Hearsay Verbal Acts.**

The Fourth District determined that three of Codefendant Gajate's statements could properly be considered non-hearsay verbal acts because they were part of the

transaction: (1) Gajate's statements concerning the initial set-up of the drug deal at the first meeting with Gomez; (2) Gajate's statement at the second meeting that he had money; and (3) Gajate's statement that he needed to show the cocaine to Petitioner and Codefendant Green before the transaction was completed because they had the last word. Arguelles, 791 So. 2d at 501, 503. Although not specifically stated in the opinion, the Fourth District apparently found that the first two statements were verbal acts showing the existence of the conspiracy, while the third statement showed Petitioner's participation in the conspiracy. Id. at 503. The Fourth District properly characterized these three statements as verbal acts.

a. **Gajate's Statements Concerning The Initial Set-Up Of The Drug Deal At The First Meeting With Gomez.**

The first of the verbal act statements, Gajate's statements concerning the initial set-up of the drug deal at the first meeting with Gomez, clearly qualify as verbal act evidence and, as correctly determined by the Fourth District, were admissible to show the existence of the conspiracy. Those statements deal with price, quantity and the location of the deal (T. 327-30). They were properly admitted because they showed the nature of the illegal cocaine transaction being conducted. It is well-settled that statements which are offered to prove the nature of the illegal business being conducted are properly admitted as verbal acts. Chacon v. State, 102 So. 2d 578, 591 (Fla. 1957); Decile v. State, 516 So. 2d 1139 (Fla. 4th DCA 1987). Furthermore, these statements regarding amount, price and location were all part of the transaction. See Decile v. State, 516 So. 2d at 1140 (officer permitted to testify about conversation

between informant and defendant regarding purchasing cocaine rocks because the statements themselves were part of the transaction).

Petitioner contends, however, that the admission of these statements was error because they were not verbal acts, but were offered instead **solely** to prove the truth of the matters asserted therein, and therefore were inadmissible hearsay (Petitioner's Brief on the Merits at p. 18). That claim fails. At this point, the statements were clearly used to prove the nature of the illegal business transaction being conducted as distinguished from evidence of the truth of any alleged fact that might have been announced in the course of the conversation. The fact to be proved was not whether the deal was for one kilogram, whether the agreed upon price was \$16,000, or whether the deal would take place in a certain parking lot at a certain time. The ultimate fact was that Codefendant Gajate and Gomez successfully negotiated a drug transaction for an agreed upon price. Therefore, because the statements proved the nature of the act, rather than the truth of the alleged statements, the statements were properly admitted, at this point, as verbal act evidence.

Petitioner also objects to the admission of these statements because the initial set up of the drug deal contained an incriminating reference to him (Petitioner's Brief on the Merits at p. 18 and citing to (T. 327)). The statement, that Gajate had "someone" that wanted to buy one kilo and possibly nine more, was not offered for its truth, i.e., that there really was "someone" that wanted to buy one, then nine kilos. Rather, it was offered to show the agreed upon quantity of cocaine and the extent of the transaction. Additionally, to the extent that this statement is offered for the truth

of its content, the opinion of the Fourth District reflects that the statement was then considered as coconspirator hearsay which would come in only if the State satisfied the requirements of § 90.803(18)(e). Arguelles, 791 So. 2d at 503 (describing one category of coconspirator hearsay as Gajate's statements that the money belonged to Petitioner or Codefendant Green and he could not have brought it alone).

**b. Gajate's Statement At The Second Meeting That He Had The Money.**

Codefendant Gajate's statement at the second meeting that he had the money also qualifies as a verbal act and, as properly determined by the Fourth District, was admissible to show the existence of the conspiracy. Contrary to Petitioner's assertion, at this point, the State did not offer the statement for the truth of the matter asserted, i.e., that Gajate really had the money. Instead, it was offered to show that Gajate was continuing to participate in the drug transaction.

Petitioner contends that admission of this statement was error, because "[a]s the Fourth District describes it, 'Gajate told Gomez that the money belonged to his "buddy" who would accompany him later when the transaction was conducted.' Arguelles, 791 So. 2d at 501." (Petitioner's Brief on the Merits at p. 18). However, that statement was made by Gajate in the **first** meeting, and the statement to which the Fourth District is referring to as a verbal act was made at the **second** meeting. Furthermore, the statement to which the Fourth District refers to is only Gajate's contention that he had the money and extends no further.

Petitioner appears to claim that because Gajate asserted that he was bringing his

"buddy" to the second meeting, and he showed up at the second meeting with his "buddy," then Gajate's statement that he had the money was transformed from a verbal act to "incriminating hearsay." Petitioner offers no support or analysis for this argument. Indeed, there is no authority for the point that where the verbal act evidence, when viewed in light of the other evidence adduced in the case, is incriminating, it is suddenly transformed into "incriminating hearsay."

Finally, it should be noted that because neither of the two verbal acts discussed above directly incriminate Petitioner, they merely show the existence of the conspiracy, any error in their admission should be considered harmless. In the first statement, Gajate merely arranges the transaction with Gomez. In the second statement, Gajate merely says that he has the money. Neither statement even mentions Petitioner.

c. **Gajate's Statement That He Needed To Show The Cocaine To Petitioner And Codefendant Green Before The transaction Was Completed Because They Had The Last Word.**

Petitioner's primary contention on appeal is that the Fourth District erred when it determined that Gajate's statement that he needed to show the cocaine to Petitioner and Codefendant Green for approval before the deal was completed provided competent evidence from which the trial court could have concluded that Petitioner participated in the conspiracy. Arguelles, 791 So. 2d at 504. It is not quite clear, however, from the opinion whether the Fourth District relied on this evidence alone, or in conjunction with the other independent evidence discussed above, to find that the State had established Petitioner's participation in the conspiracy by a preponderance

of the evidence:

In this case, there was more than mere presence at the scene. **The non-hearsay evidence, including Gajate's verbal acts, established the existence of the conspiracy and appellant's participation in it by a preponderance of the evidence.** Gajate's statement that appellant and Green needed to approve of the deal before it was complete, a verbal act, provided competent evidence from which the trial court could have concluded that appellant participated in the conspiracy. Admitting Gajate's remaining coconspirator statements was thus justified pursuant to section 90.803(18)(e).

Arguelles, 791 So. 2d at 504 (emphasis added). Certainly the combination of the independent evidence discussed above, Codefendant Gajate's first two verbal act statements, along with Codefendant Gajate's third verbal act statement, showed Petitioner's participation in the conspiracy by a preponderance of the evidence.

Petitioner contends, however, that the third statement was clearly not a verbal act, but was instead hearsay used by the State to establish the truth of the matter asserted in the statement, *i.e.*, Petitioner's participation in the transaction. The statement was properly admitted as a verbal act because it served to prove the nature of the subsequent act by Gajate, directing Gomez to go back to the waiting car with him so that his "buddy" and Codefendant Green could approve of the transaction. This statement was not offered for its truth, *i.e.*, whether Petitioner and Codefendant Green needed to approve of the cocaine, but to explain the conduct of Petitioner and Codefendant Green of driving around the parking lot passing empty spaces for seven minutes while they waited for Gajate's return, and Gajate's direction to Gomez to leave the money and accompany him back to the restaurant.

In support of his argument that the third statement was not a verbal act,

Petitioner relies on this Court's opinion in Banks v. State, 790 So. 2d 1094 (Fla. 2001). In Banks, a police officer testified that the codefendant made comments during the drug transaction to the effect that Banks was "cool" and "straight up" and that he and Banks were concerned that the officer was a snitch. Id. at 1096. The officer also testified that "straight up" meant that the person was "with the game plan or part of the business." Id. This Court rejected the Fourth District's characterization of these statements as verbal acts, and instead identified them as hearsay. Id. at 1098. In doing so, this Court determined that the statements did not serve to explain the nature of the transaction, but instead directly implicated Banks in the transaction. Id. This Court also noted that the State could not point to any purpose for the admission of the testimony other than for the truth of the matter asserted therein, *i.e.*, that the codefendant had stated that Banks was part of the deal. Id.

The statements in the present case are clearly distinguishable from those in Banks. In the case at bar, the State used Gajate's statement to show that Petitioner acted in conformity with the statement when he and Codefendant Green drove around the parking lot for seven minutes, passing up empty parking spaces. In Banks, there was apparently no action taken by the defendant when these statements were made by his codefendant other than he looked at the police officer. Banks, 790 So. 2d at 1096. Furthermore, unlike in Banks, the statement itself in the case at bar was part of the transaction. The transaction was not complete and another step had to be followed. Gajate's statement explained to Gomez what the next step was, which was part of the transaction. A third point of distinction is that the State has much more proof in the

present case than it did in Banks. In Banks, the only proof of Bank's participation in the conspiracy was the police officer's testimony. However, in the present case, there is other significant independent evidence of Petitioner's participation in the conspiracy.

A case relied upon by this Court in Banks is instructive. In Stevens v. State, 642 So. 2d 828 (Fla. 2d DCA 1994), an undercover police officer had a conversation with a man named Hill who asked him what he was looking for. The police officer responded that he was looking for a dime (\$10 worth of cocaine). Id. at 829. After some discussion regarding the type and price, Hill stated that there was no problem. Id. The police officer then testified that Hill walked away and met up with Stevens; at that point the police officer heard Hill yell out to Stevens, "I need a dime." Id. The police officer then stated he saw Stevens reach in his pocket, grab several baggies, give one to Hill, and put the rest back in his pocket. Id. The Second District held that Hill's statements to both the police officer and to Stevens were admissible as proof of the crime and Stevens' response thereto, not for the truth of any matter asserted. Id. Similarly, in this case Gajate's statements explained Petitioner's actions of driving around the parking lot with Codefendant Green. They were verbal acts offered to prove the conspiracy and Petitioner's participation in it.

Another instructive case is Decile v. State, 516 So. 2d 1139 (Fla. 4th DCA 1987). A police officer had arranged for a wired confidential informant to go into a house and purchase cocaine rocks while the officer stayed in an unmarked police van listening to what transpired. Id. At trial, the officer was permitted to testify as to the conversation between the informant and the Decile. Id. The Fourth District held that

the statements made by the confidential informant to Decile regarding the drug sale were properly admissible into evidence as verbal acts. The court concluded that "[t]he subject statements served to prove the nature of the act as opposed to proving the truth of the alleged statements. Id. at 1140. The case at bar is similar. The statement that the buyers had to approve of the kilo was part of the transaction. Without those words, the act of leaving the money and having Gomez return with Gajate to Gajate's car would have been incomplete. Until those words are taken into consideration, the proper significance cannot be attributed to the conduct of returning to Gajate's car.

The opinion of the First District in State v McPhadder, 452 So. 2d 1017 (Fla. 1st DCA 1984), reversed on other grounds, 475 So. 2d 1215 (Fla. 1985), is also instructive. In that case, the First District reversed an order of the trial court striking certain taped statements of a confidential informant made to a defendant charged with a narcotics violation. The trial court had excluded the taped statements of the informant on hearsay grounds. Reversing, the First District stated:

[T]he record shows that [the informant's] statements were not being offered by the State to prove the truth of the matters she asserted thereon, but instead her statements were being presented into evidence for the purpose of showing that [the defendant] engaged in the conversation with [the informant] and took part in plans to supply illegal drugs to her. Therefore, her recorded statements are not hearsay and are admissible. See Breedlove v. State, 413 So. 2d 1 (Fla. 1982).

McPhadder, 452 So. 2d at 1018.

Clearly then, based on the foregoing cases, the Fourth District correctly determined that Gajate's third statement was a verbal act. However, even if this Court determines that the Fourth District erred when it determined that the third statement

was a verbal act, there was still sufficient evidence, based on the independent evidence adduced at trial and the first two verbal act statements, of Petitioner's participation in the conspiracy. Furthermore, even if this Court determines that all of the verbal act evidence was erroneously admitted, the independent evidence adduced at trial was sufficient for the State to establish the conspiracy and Petitioner's participation in it by a preponderance of the evidence.

Finally, any erroneous admission of these three statements as verbal acts was harmless beyond a reasonable doubt in that there is no reasonable probability that they affected the outcome of this case. See § 924.051(7), Fla. Stat. (1997); Goodwin v. State, 751 So. 2d 537 (Fla. 1999); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As discussed above, the State presented sufficient independent evidence of the conspiracy and Petitioner's participation in it to satisfy the requirements of the coconspirator hearsay rule. As will be discussed more fully below, all of Gajate's statements would then be properly admitted under the coconspirator hearsay exception.

**3. The State Showed More Than Petitioner's Mere Presence.**

Petitioner next contends that the State has failed to show nothing more than his mere presence. On the contrary, the independent evidence alone shows much more than Petitioner's mere presence, it shows Petitioner's participation in that conspiracy. When combined with the verbal act evidence discussed above, it is even more clear that the State went well beyond merely proving Petitioner's mere presence. While mere

presence at the scene is not enough to establish participation in a conspiracy, a conspiratorial agreement can be inferred from circumstantial evidence. Perez v. State, 561 So.2d 1265 (Fla. 3d DCA), rev. denied, 576 So. 2d 289 (Fla. 1990). Furthermore, it can be inferred from the surrounding circumstances, including the defendant's presence at the scene, that a common purpose to commit a crime existed and that the defendant was a part thereof. See Wilder v. State, 587 So. 2d 543, 546 (Fla. 1st DCA 1991) ("While presence at the scene of a crime is not sufficient to establish a conspiracy, presence is a factor that may be considered in determining whether a conspiracy existed."); Gonzalez v. State, 571 So. 2d 1346, 1348 (Fla. 3d DCA 1990) (the jury is free to consider surrounding circumstances and defendant's presence at the place of the sale to determine defendant's guilt), rev. denied, 584 So. 2d 998 (Fla. 1991).

Here, the State provided sufficient evidence to show by a preponderance of the evidence that Petitioner participated in the conspiracy with Gajate and Green. Codefendant Gajate dialed Petitioner's telephone number during the negotiations for the kilo of cocaine. Shortly after the meeting ended, Codefendant Gajate went down to Miami and picked Petitioner up. Petitioner rode back to Ft. Lauderdale with Codefendants Gajate and Green to the location of the transaction at the appointed time. Petitioner handed Gajate the grocery bag which contained the cereal box containing the money used to buy the cocaine. Petitioner was a passenger in the car while Codefendant Green drove around the parking lot for seven minutes during the drug transaction, passing up open parking spaces. When arrested, Petitioner had

\$3,000 in cash in his pocket. Petitioner stated that he had nothing to do with drugs, even though the officers had not yet mentioned anything about a drug arrest. Petitioner then made statements while in custody about what sentence the defendants could get for conspiracy and that they should have run.

Petitioner also complains that this evidence was insufficient because it failed to rebut his reasonable hypothesis of innocence that he was on his way to a dental appointment. However, the case law is clear that the State is not required to conclusively rebut every possible variation of the events which can be inferred from the evidence. Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994). The State is **only** required to introduce competent evidence which is **inconsistent with the defendant's theory of events**. Id. Interestingly, Petitioner's "theory" that he was on his way to a dental appointment has been raised for the first time ever before this Court in his Brief on the Merits. It was never presented in the trial court, either in opening or closing statements or through cross-examination, nor was it ever presented to the Fourth District on appeal. Therefore, since Petitioner never presented the "reasonable hypothesis of innocence," that he was on his way to a dental appointment, in the trial court, the State cannot be faulted for any failure to rebut it. Furthermore, this "reasonable hypothesis of innocence is not supported by the testimony. Codefendant Gajate merely stated that they had to leave soon because one of either Petitioner or Codefendant Green had a dental appointment. Gajate never specified which man had the appointment.

**B. Codefendant Gajate's Statements Were Admissible Under The Coconspirator Exception To The Hearsay Rule.**

Once the State satisfied the requirements of the coconspirator exception to the hearsay rule, **all** of Codefendant Gajate's statements were admissible. Petitioner, relying on this Court's opinion in Banks, claims this as error, arguing that the State cannot rely on coconspirator hearsay statements to prove a conspiracy. However, that is clearly not the case here. The State relied on both independent evidence and Codefendant Gajate's nonhearsay verbal acts to support the admission of the coconspirator hearsay statements. Merely because the coconspirator hearsay statements may also properly be considered verbal acts does not make their admission improper under this Court's opinion in Banks.

In Banks, this Court determined that because the subject statements did not qualify as verbal acts, they were hearsay, and were thus improperly admitted. This Court went on to state "the State simply cannot point to any purpose for the admissions of these statements **other than for the truth of the matter asserted therein, i.e.,** that Goodman had stated that Banks was part of the deal." Banks, 790 So. 2d at 1098 (emphasis added). This Court determined that the statements were not only inadmissible hearsay, but that even had they been admitted as a nonhearsay verbal act, they could not subsequently be used for the truth of the matter asserted. Id. at 1099. That is because those statements did not fall under any exception to the hearsay rule. Id. For example, once those statements were excluded from the State's case, the State could not have presented sufficient evidence of Bank's participation in the

conspiracy by a preponderance of the evidence so that the statements could be admitted under the coconspirator exception.

The facts of the case at bar are different. Unlike in Banks, the verbal act statements in the case at bar were properly used to show that they were made, not for the truth of their contents, to satisfy the State's burden to show the existence of the conspiracy and Petitioner's participation in it by a preponderance of the evidence. Once the State jumped that hurdle, the statements then satisfied the coconspirator exception to the hearsay rule and were properly admitted.

While the statement in Banks could arguably have been admitted as a coconspirator hearsay statement, based on the facts of that case the State could not have shown Banks' participation in the conspiracy by other independent evidence. The State could only have shown Banks' participation in the conspiracy by relying on the truth of the matter asserted in the statements. Therefore, in Banks, the State had neither sufficient independent evidence nor competent verbal act evidence of Banks' participation in the conspiracy to support admission of the statements as coconspirator hearsay. Clearly, the issue presented in the case at bar was never considered by this Court in Banks. As a result, the decision of the Fourth District in Arguelles is not in conflict with this Court's decision in Banks and the State suggests that jurisdiction has been improvidently granted.

**C. Any Error Was Harmless.**

Finally, there is no reasonable probability that the admission of the coconspirator hearsay statements affected the outcome of the trial. The State

presented competent substantial evidence that showed that Petitioner intended for the crime to occur, and that he participated in it. For instance, the State presented evidence that the telephone number called by Gajate was registered to a user with the same last name as Petitioner. When Gajate left the meeting, he went to an address in Miami and picked up Petitioner. The address of the house matched the subscriber information for the number that Gajate had called during the meeting and matched the address given by Petitioner when he was booked. Petitioner accompanied Gajate and Green to the meeting place at the time the transaction was set to occur. Petitioner handed the grocery bag to Gajate. When he did that, the top of the cereal box was open and the money was visible. Petitioner waited in the car with Green while Gajate consummated the transaction. While they were waiting, Petitioner and Green drove around the parking lot for seven minutes, passing up numerous empty parking places. When Petitioner was arrested, without anyone mentioning drugs, he said "why am I being arrested, I don't have anything to do with drugs." Petitioner had \$3,000 in cash in his pocket. While the men were in the holding cell, Petitioner asked Green why he didn't leave and said that they should have run. Petitioner also asked Green how much time he thought they get for conspiracy. Thus, even if there was error, it was harmless.

## **II. THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT II, CONSPIRACY TO TRAFFIC IN COCAINE.**

Next, Petitioner argues that the trial court erred in denying his motion for judgment of acquittal as to Count II, conspiracy to traffic in cocaine. Specifically, Petitioner claims that the evidence presented by the State shows nothing more than his mere presence.<sup>1</sup>

This Court enunciated the standard of review to be used for the denial of a motion for judgment of acquittal in Lynch v. State, 293 So.2d 44 (Fla.1974), as follows:

A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge.

Id. at 45.

Here, the record contains more than sufficient evidence to support the trial court's denial of Petitioner's motion for judgment of acquittal as to the charge of conspiracy to traffic in cocaine. Generally, in order to prove the crime of conspiracy,

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<sup>1</sup>As Petitioner properly concedes, this point, and the claim raised in Issue III, are not governed by the asserted conflict with Banks.

the State must prove both an agreement and an intention to commit an offense. See Pino v. State, 573 So. 2d 151, 152 (Fla. 3d DCA 1991); LaPolla v. State, 504 So. 2d 1353, 1357 (Fla. 4th DCA 1987). Moreover, direct proof of the agreement is unnecessary to establish a conspiracy; the jury may consider and infer from the surrounding circumstances, including the defendant's presence at the scene, that a common purpose to commit a crime existed and that the defendant was a part thereof. See Wilder v. State, 587 So. 2d 543, 546 (Fla. 1st DCA 1991) ("While presence at the scene of a crime is not sufficient to establish a conspiracy, presence is a factor that may be considered in determining whether a conspiracy existed."); Gonzalez v. State, 571 So. 2d 1346, 1348 (Fla. 3d DCA 1990) (the jury is free to consider surrounding circumstances and defendant's presence at the place of the sale to determine defendant's guilt), rev. denied, 584 So. 2d 998 (Fla. 1991).

Here, the jury could have reasonably concluded that Petitioner conspired with Codefendant Gajate to purchase cocaine. During the meeting with Harold Gomez, Gajate received a page and told Gomez that "my buddy" just called (T. 332). When Gajate returned the call, Gomez heard him say that everything was ready for the transaction, for him to be ready and to call the "black dude" so he could go up to his house and not take a long ride (T. 332). The subscriber of the number that Codefendant Gajate called had the same last name as Petitioner (T. 374, 364, 389). Codefendant Gajate then proceeded to drive down to Miami to pick up Petitioner (T. 374, 389). Petitioner's address matched the address for the subscriber of the telephone (T. 374, 389). At approximately 3:00 p.m. that day, the prearranged time for

the meeting, Petitioner, Codefendant Green and Codefendant Gajate traveled to the Don Pan restaurant with the money in the car (T. 285). Codefendant Gajate identified Petitioner as "his friend" (T. 335). Codefendant Gajate told Gomez that Petitioner and Codefendant Green had to come with him because they didn't allow him to bring the money himself (T. 336). When Codefendant Gajate went back to the car, Petitioner handed Gajate a grocery bag containing a cereal box which contained the money (T. 337). The top of the cereal box was open (T. 338). While Codefendant Gajate was completing the drug transaction, Petitioner drove around the parking lot in Gajate's car for about seven minutes (T. 289, 312). When he was arrested, Petitioner stated that he had nothing to do with drugs, even though the officers had not mentioned anything about a drug arrest (T. 292). While in custody, Petitioner made statements about what sentence the defendants could get for conspiracy and that they should have run (T. 428-29).

Petitioner contends that all the State can show is his mere presence at the scene and mistakenly relies on Pennington v. State, 526 So. 2d 87 (Fla. 4th DCA 1987), affirmed, 534 So. 2d 393 (Fla. 1998); Voto v. State, 509 So. 2d 1291 (Fla. 4th DCA 1987); Mickenberg v. State, 640 So. 2d 1210 (Fla. 2d DCA 1994); and Jimenez v. State, 535 So. 2d 343 (Fla. 2d DCA 1988). In Pennington and Voto, each defendant's involvement in the enterprise appeared to be minimal, at best, evincing no prearrangement with the other defendants. Mickenberg does not deal with the issue of mere presence, but whether the defendant entered into an agreement with the other coconspirators. In Jimenez, the defendant was acquitted of an accompanying drug

trafficking charge, thereby discrediting much, if not all of the evidence against him.

Therefore, based on the testimony adduced at trial, the transaction established the conspiracy. The evidence showed not only Petitioner's participation in the substantive crime (discussed more fully below), but also Petitioner's participation in the underlying agreement. The trial court did not err in denying Petitioner's motion for judgment of acquittal.

### **III. THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT I, TRAFFICKING IN COCAINE.**

Finally, Petitioner claims that the trial court erred in denying his motion for judgment of acquittal as to Count I, trafficking in cocaine. Specifically, Petitioner argues that the evidence presented below was insufficient to support a conviction under either theory advanced by the State: that Petitioner trafficked in cocaine by (1) purchase or (2) possession.

The cocaine trafficking statute prohibits one from "knowingly" being "in actual or constructive possession" of a certain quantity of cocaine. See § 893.135(1)(b)1., Fla. Stat. (1997). Where a defendant is not in actual possession of cocaine, the State must establish constructive possession. Constructive possession exists where a defendant does not have physical possession of contraband but (1) knows it is within his presence, (2) has the ability to maintain control over it, and (3) knows of the illicit nature of the contraband. See Brown v. State, 428 So. 2d 250, 252 (Fla.), cert. denied, 463 U.S. 1209 (1983); Dupree v. State, 705 So. 2d 90, 94 (Fla. 4th DCA 1998).

If the area in which contraband is found is within the defendant's exclusive possession, then his "guilty knowledge of the presence of the contraband, together with his ability to maintain control over it, may be inferred." Wale v. State, 397 So. 2d 738, 739-40 (Fla. 4th DCA 1981). However, if contraband is found in a place that is in joint, rather than exclusive, possession of a defendant, then knowledge of the contraband's presence and the ability to control it will not be inferred from the

accused's ownership of the premises or presence near the contraband, but must be established by independent proof. See Brown v. State, 428 So. 2d at 252; Williams v. State, 724 So. 2d 1214, 1215 (Fla. 4th DCA 1998). Such proof may consist of evidence of actual knowledge of the contraband's presence, evidence of incriminating statements or actions, or other circumstances from which a jury might lawfully infer the defendant's actual knowledge of the presence of contraband. See Dupree v. State, 705 So. 2d at 94. When there is joint possession of the location where contraband is found, a defendant's proximity to the contraband, without more, is not sufficient to establish constructive possession. See Dupree v. State, 705 So. 2d at 94; Moffatt v. State, 583 So. 2d 779, 781 (Fla. 1st DCA 1991); McClain v. State, 559 So. 2d 425, 426 (Fla. 4th DCA 1990); Agee v. State, 522 So. 2d 1044, 1046 (Fla. 2d DCA 1988).

Petitioner relies on a number of cases which hold that mere proximity to a controlled substance is insufficient to sustain a conviction for constructive possession of the substance where the defendant is not in exclusive possession of the area in which the substance is found. See, e.g., Ras v. State, 610 So.2d 24 (Fla. 2d DCA 1992). However, this is not a case in which the evidence shows no more than that Petitioner and others were simultaneously found in proximity to illegal drugs. Instead, in this case, this factor appeared simultaneously and in conjunction with additional evidence which created a question for the jury as to whether Petitioner operated as a principal in the transaction.

To sustain a conviction as a principal for a crime committed by another, the state must prove that the defendant "intend[ed] that the crime be committed and [did]

some act to assist the other person in actually committing the crime." Staten v. State, 519 So. 2d 622 (Fla. 1988). As stated in Arroyo v. State, 705 So. 2d 54, 56 (Fla. 4th DCA 1997),

If the defendant helped another person or persons commit a crime, the defendant is a principal and must be treated as if she had done all the things the other person did if (1) the defendant had a conscious intent that the criminal act be done and (2) the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person . . . to actually commit the crime.

(quoting Fla. Std. Jury Instr. (Crim.) 3.01, p. 32a).

Proof of mental intent is seldom accomplished by direct evidence; consequently, the absence of direct proof on the question of the defendant's mental intent should rarely, if ever, result in a judgment of acquittal. See King v. State, 545 So. 2d 375, 377 (Fla. 4th DCA), rev. denied, 551 So. 2d 462 (Fla. 1989); Brewer v. State, 413 So. 2d 1217 (Fla. 5th DCA 1982), rev. denied, 426 So. 2d 25 (Fla. 1983). Here, as required to prove Petitioner's role as principal, the State presented direct and circumstantial evidence as to Petitioner's conscious intent that the crime of trafficking in cocaine by constructive possession or purchase be committed.

On the morning of October 20, 1997, Codefendant Gajate had a telephone conversation with Harold Gomez in which he told Gomez that he had someone who wanted to buy one kilo and if it was good, the customer would buy another nine (T. 327). When Gajate met with Gomez in person at 1:00, he told Gomez that the person who was going to do the deal had the money (T. 330). Gajate said he hadn't seen the money, but his friend had it (T. 330). Gajate used the term "my buddy" to describe

his friend (T. 331). During the meeting, Gajate received a page and told Gomez that "my buddy" just called (T. 332). When Gajate returned the call, Gomez heard his say that everything was ready for the transaction, for him to be ready and to call the black dude so he could go up to his house and not take a long ride (T. 332). At approximately 3:00 p.m. that day, Petitioner, Codefendant Green and Codefendant Gajate traveled to the Don Pan restaurant with the money in the car (T. 285). Codefendant Gajate identified Petitioner as "his friend" (T. 335). Codefendant Gajate told Gomez that Petitioner and Codefendant Green had to come with him because they didn't allow him to bring the money himself (T. 336). When Codefendant Gajate went back to the car, Petitioner handed Gajate a grocery bag containing a cereal box which contained the money (T. 337). The top of the cereal box was open (T. 338). While Codefendant Gajate was completing the drug transaction, Petitioner drove around the parking lot in Gajate's car for about seven minutes (T. 289, 312). Later, when Petitioner was taken out of the car by officers, he said "why am I being arrested, I don't have anything to do with drugs" even though none of the officers had said anything about an arrest for drugs (T. 292).

The evidence of intent, viewed in the light most favorable to the State, established a "prima facie inconsistency" between the defense and the State theories; the former being that Petitioner was merely along for the ride and had no idea what was transpiring between Codefendant Gajate and Harold Gomez; the latter that Petitioner knew what was transpiring. The resolution of the inconsistency between the state and defense theories was properly a question for the jury. See King, supra.

The State further established Petitioner's active encouragement and participation in the planning and steps leading to the commission of the crime of trafficking in cocaine, either by constructive possession or by purchase, thus satisfying the second prong required to prove Petitioner's guilt as a principal to trafficking in cocaine, by proof that Petitioner provided the funds for the transaction, proof that Petitioner paged Codefendant Gajate and when Gajate received the page, referred to Petitioner as "my buddy," proof that Gajate called Petitioner on Gomez's cell phone and told Petitioner that everything was ready for the transaction, proof that Petitioner handed the funds to Codefendant Gajate so Gajate could complete the transaction; and proof that Codefendant Gajate exchanged the money for the kilo of cocaine.

Therefore the trial court properly denied Petitioner's motion for judgment of acquittal as to the theory that Petitioner committed trafficking in cocaine, as a principal, by constructive possession or by purchase.

## **Conclusion**

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court affirm the decision of the Fourth District Court of Appeal in Arguelles v. State, 791 So. 2d 500 (Fla. 4th DCA 2001).

Respectfully submitted,

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**Certificate Of Service**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Steven H. Malone, Esquire, Assistant Public Defender, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida, 33401, this \_\_\_\_ day of March, 2001.

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HEIDI L. BETTENDORF  
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**Certificate Of Type Size And Style**

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

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