IN THE SUPREME COURT OF FLORIDA

CHARLIE WALLACE,
Petitioner,

v.

Case No. 90,287
(DCA Case No. 95-2415)

STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Prosecution and Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used:

R = Record on Appeal

T = Trial Transcript

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal subject to any additions or clarifications which might occur in the argument portion of this brief which are necessary to resolve the legal issue presented upon appeal.

SUMMARY OF ARGUMENT

The argument that section 843.01, Florida Statutes (1993), is ambiguous and thus must be construed in Petitioner's favor was not preserved for appeal and therefore should not be considered by this Honorable Court. Alternatively, the statute in question is not ambiguous, and therefore the State had the discretion to charge Petitioner with two counts of resisting an officer with violence. The rule of lenity is not applicable to the instant offenses since section 843.01, Florida Statutes (1995), is not ambiguous. This Court should not exercise its discretionary jurisdiction to consider this case.

ARGUMENT

NO FUNDAMENTAL ERROR OCCURRED WHEN PETITIONER WAS FOUND GUILTY OF TWO COUNTS OF RESISTING AN OFFICER WITH VIOLENCE SINCE BOTH COUNTS OCCURRED AGAINST DIFFERENT POLICE OFFICERS DURING AN ATTEMPT TO ARREST PETITIONER.

Petitioner alleges that the issue on appeal is the allowable unit of prosecution under section 843.01, Florida Statutes (1995), and not double jeopardy. According to Petitioner, section 843.01 is ambiguous since it refers to "any" police officer instead of "a" police officer, and therefore, the statute should be construed in Petitioner's favor.

Respondent maintains that Petitioner failed to raise this issue with the trial court below, and thus has not preserved the issue for appeal. Below, Petitioner argued that there was one ongoing incident, and that there was no temporal break during the incident. (T 98-99) Petitioner also argued below that it would be unjust to allow the State to charge him with a battery for every single time Petitioner touched the officers during the incident. (T 99-101) Petitioner conceded that he did not raise this argument below, but alleged that the issue was one of fundamental concern.

A specific legal ground on which the claim is based must first be presented to the trial court in order to preserve the issue for

appeal. Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990); Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 471, habeas corpus denied 618 So. 2d 730; Tillman v. State, 471 So. 2d 32 (Fla. 1985). The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Smith v. State, 521 So. 2d 106 (Fla. 1988). Since Petitioner failed to argue the issue of the construction of the statute below, Petitioner is precluded from making this argument on appeal. This issue is not one of fundamental error. Petitioner did not raise the issue of the facial constitutionality of the statute below. Therefore, the issue was not preserved.

Respondent also contends that the statute governing the crime of resisting arrest with violence, section 843.01, Florida Statutes (1995), is not ambiguous. That statute allows for the conviction of a defendant who violently resists arrest by any officer. It is Respondent's contention that the unit of prosecution[1] in this case is each officer whom the suspect resists. Since there were multiple

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[1]A unit of prosecution has been defined as being the minimum amount of activity for which criminal liability attaches. U.S. v. Allender, 62 F.3d 909 (C.A. 7 (Ind.) 1995).

acts of violence committed against two police officers during the criminal episode, the State could lawfully charge Petitioner with two counts of resisting arrest with violence.

The Fourth District Court of Appeal issued an opinion in the instant case, affirming the Petitioner's conviction and sentence, and certifying conflict with the First District Court of Appeal's conclusion in Pierce v. State, 681 So. 2d 873 (Fla. 1st DCA 1996), which relied on this Honorable Court's decisions in State v. Watts, 462 So. 2d 813 (Fla. 1985), and Grappin v. State, 450 So. 2d 480 (Fla. 1984).

In Grappin, this Court held that section 812.014(2)(b), Florida Statutes, allowed multiple convictions where Grappin was convicted for stealing five firearms during a single burglary. This Court found:

> that the use of the article 'a' in reference to 'a firearm' in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution.

Grappin v. State, 450 So. 2d at 482 (Fla. 1984).

In State v. Watts, 462 So. 2d 813 (Fla. 1985), this Court considered whether section 944.47, Florida Statutes, allowed separate convictions for possession of two handmade knives in prison. This Court held:

> In Grappin, we held that the unlawful taking of two or more firearms during the same criminal episode is subject to separate prosecution and punishment under the theft statute as to each firearm taken. . . We reasoned that Grappin may be charged in a five-count information with five thefts because the article 'a' prefaced firearm. We noted that the use of the article 'a' in reference to 'firearm' in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution. [Citations omitted.] We specifically contrasted the article 'a' with the article 'any' by pointing out that federal courts have held that the term 'any firearm' is ambiguous with respect to the unit of prosecution and must be treated as a single offense with multiple convictions and punishments being precluded.

State v. Watts, 462 So. 2d at 813-814.

The Fourth District Court of Appeal determined that Grappin and Watts were distinguishable from the case *sub judice*.

> In short, the differences in result in Grappin and Watts center around both the nature of the crime charged and the precise statutory text. In Grappin, the crime was stealing, while in Watts the crime was possession of contraband. To us, there is a fundamental difference between the act of stealing five separate items of property, and the act of possessing contraband which consists of two separate items. Each item of property stolen is logically a separate crime of theft; each item stolen represents a discrete act. The essence of the crime of theft is the taking and asportation of any single item of property. Possession of contraband, on the other hand, does not involve any taking and asportation.

> Its essence is in the having, whether (unless the legislature explicitly states otherwise) the contraband consists of a single unit of proscribed material or in multiple items.
>
> The crime of resisting an officer with violence is like theft, in that the statutory unit of prosecution is violence done to a single officer. The word "any" modifies who may be classified as an officer within the coverage of the statute, not the number of charges that can [be] brought from an incident of resistance. Section 843.01 prohibits offering or doing violence "to the person of such officer." [e.s.] The legislature's omission of the plural, "officers" [with an *s*] in the statutory phrase just quoted eliminates any theoretical doubt or ambiguity in the use of the article *any*. The text of section 843.01 thus undeniably demonstrates that the intended prosecutoral unit is any individual officer who is resisted.

Wallace v. State, 22 Fla. L. Weekly D604 (Fla. 4th DCA March 5, 1997). The Fourth District compared the resisting arrest with violence statute with the statutes of assault and battery, concluding that resistance with violence by a suspect against each officer is a separate act, just as is each person who is battered by a suspect. To hold otherwise would give violent suspects "no incentive to refrain from battering additional officers after they have committed an act of violence on the first officer." Wallace v. State, 22 Fla. L. Weekly at D605.

The Fourth District Court held that one must consider the

legislative history of similar criminal statutes, and applied the general rules of construction of criminal statutes, citing section 775.021, Florida Statutes (1995). Section 775.021 provides for a general statement of the Florida Legislature's intent, and is applicable in the consideration of section 843.01. Section 775.021, Florida Statutes (1995), states in part:

> (2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.
>
> * * *
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
> 1. Offenses which require identical elements of proof.
> 2. Offenses which are degrees of the same offense as provided by statute.
> 3. Offenses which are lesser offenses the

> statutory elements of which are subsumed by the greater offense.

Although subparagraph (4)(a) was in effect at the time that this Honorable Court determined Grappin (1984) and Watts (1985), subparagraph (4)(b) was not adopted until 1988. It is subparagraph (4)(b) which the Fourth District referred to in its consideration of legislative history.

The Florida Legislature overruled Carawan v. State, 515 So. 2d 161 (Fla. 1987), by adopting the present subparagraph (4)(b) of section 775.021. The Fourth District cited to this Court's explanation found in State v. Smith, 547 So. 2d 613, 616 (Fla. 1989):

> "It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in Carawan. More specifically:
> (1) The legislature rejects the distinction we drew between act or acts. Multiple punishment shall be imposed for separate offenses even if only one act is involved.
> (2) The legislature does not intend that (renumbered) subsection 775.021(4)(a) be treated merely as an 'aid' in determining whether the legislature intended multiple punishment. Subsection 775.021(4)(b) is the specific, clear, and precise statement of legislative intent referred to in Carawan as the controlling polestar. Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, all

> criminal offenses containing unique statutory elements shall be separately punished.
> (3) Section 775.021(4)(a) should be strictly applied without judicial gloss.
> (4) By its terms and by listing the only three instances where multiple punishment shall not be imposed, subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test shall be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity." [c.o., f.o.]

Wallace v. State, 22 Fla. L. Weekly at D606, citing State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). The result of the Fourth District Court's analysis was that it was necessary to consider the effect of the 1988 legislation when construing the constitutionality of section 843.01. Section 775.021(4)(b) states that it is the Legislature's intent that the rule of lenity is not to be applied where there are multiple offenses committed during one criminal episode or transaction.

The rule of lenity should be used only as an aid for resolving an ambiguity in a statute; it should not be used to beget one. Callanan v. U.S., 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961). The nature of the ambiguity must be "grievous," Chapman v. United

States, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), and may not depend upon an "implausible interpretation of a statute." Taylor v. United States, 495 U.S. 575, 596, 110 S.Ct. 2143, 2157, 109 L.Ed.2d 607 (1990).

> The mere possibility of articulating a narrower construction . . . does not by itself make the rule of lenity applicable. Instead the venerable rule is reserved for cases where, 'after seiz[ing] everything from which aid can be derived,' the Court is 'left with an ambiguous statute.'

Smith v. United States, ___U.S. ___, 113 S.Ct. 2050, 2059, 124 L.Ed. 138 (1993) (quoting United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805). The rule of lenity "is not an inexorable command to override common sense and evident statutory purpose." United States v. James, 986 F.2d 441, 444 (11th Cir. 1993)(quoting United States v. Hill, 863 F.2d 1575, 1582-83 (11th Cir. 1989). The construction of a statute which would lead to absurd or unreasonable results or which would render the statute purposeless should be avoided. State v. Webb, 398 So. 2d 820 (Fla. 1981). Respondent maintains that to interpret section 843.01 in the manner in which Petitioner suggests would lead to disastrous results for law enforcement officers, who often use this statute as a tool to deter suspects from becoming violent during an arrest.

In its opinion, the Fourth District Court of Appeal applied the analysis it used in Lifred v. State, 643 So. 2d 94 (Fla. 4th DCA 1994). In Lifred, the defendant was convicted of attempted murder with a firearm against one victim, and aggravated battery with a firearm against another victim, both convictions arising from a single incident. The Fourth began its analysis with the application of section 775.021(4):

> "We start with the proposition that pursuant to section 775.021(4), Florida Statutes (1989), a trial court has discretion to impose separate sentences, either concurrently or consecutively, for each separate criminal offense arising out of a single criminal transaction or episode." 643 So. 2d at 95. In concluding that section 775.021 permitted separate sentences with separate mandatory minimum periods, we stated:
> "However, in the case of multiple discharges of a firearm at multiple victims, there are, by definition, separate violations of each victim's rights."
> "An analysis barring imposition of stacked mandatory mimimums, merely because the crimes against multiple victims are not separated by time and place, can lead to distinctions not fostering any stated legislative policy regarding restrictions on eligibility for parole. For example, we cannot see how a criminal who shoots three victims in the course of an armed robbery while the victims remain in the same location should be punished less severely than a criminal who shoots one victim three times at three separate locations." 643 So. 2d at 97.
> "We do not believe that the legislature, in enacting section 775.087(2), intended to

> restrict the sentence that a trial court may impose on a defendant such as Lifred to a mandatory mimimum of three years for each victim he injured or attempted to kill, rather than two mandatory mimimums of three years as ordered in this case." 643 So. 2d at 98.

The Fourth found the Lifred case to be similar to the one at bar. In Lifred, each of the persons whom the defendant attacked was a separate victim. In the case at bar, Petitioner punched each of the officers and then wrestled both of the officers onto the ground. The fact that each of the separate punches and the wrestling occurred within just seconds of the other in the same area does not bar this case from the Florida Legislature's determination of separateness in convictions and sentences.

> In the context of section 843.01, there is no ambiguity in the use of *any* to define who may be a victim of the resistance. Under this statute, *any* does not define the "allowable unit of prosecution" -- merely the class of officers to whom the statute's protection is intended. An attack against different members of the class may properly lead to separate convictions and punishment.

Wallace v. State, 22 Fla. L. Weekly at D606.

When interpreting the Legislature's meaning of a statute, the Court may look to the title of the statute as a direct statement by the legislature of its intent in enacting a statute. Certain Lands v. City of Alachua, 518 So. 2d 386 (Fla. 1st DCA 1987). See also

State, Dept. Of Envir. v. SCM Glidco Org., 606 So. 2d 722 (Fla. 1st DCA 1992); Long v. State, 622 So. 2d 536 (Fla. 1st DCA 1993). But see Beyel Bros. Crane & Rigging v. Ace Transp., 664 So. 2d 62 (Fla. 4th DCA 1995). Section 843.01 is entitled "Resisting officer with violence to **his** person." The title of the statute itself indicates that the legislature intended each officer to be a unit of prosecution, and thus Petitioner was properly charged with two counts of resisting arrest with violence.

Respondent maintains that this case is similar to Coleman v. State, 569 So. 2d 870 (Fla. 2d DCA 1990). In that case, the issue was whether the defendant, in violently resisting three police officers from effectuating one arrest, engaged in a single criminal act or a transaction comprising three distinct acts. The Coleman court discussed the "a" versus "any" debate in reference to double jeopardy, and held that "[b]ecause the statute at issue proscribes the act of resisting *any* officer by doing violence to the *person* of such officer and not the act of resisting arrest, we find that Coleman committed three separate acts of resisting an officer with violence, although involving the same transaction, which are punishable separately consistent with *Carawan*." Coleman v. State, 569 So. 2d at 872.

What occurred here was a single criminal episode made up of

numerous acts of violence against two police officers during an attempt to arrest Petitioner. Deputy Sheriff Loudermilk saw Petitioner commit a battery on Geraldine Melbourne and attempted to arrest Petitioner for that battery. (T 36-39) Petitioner came at Loudermilk with a rake when Loudermilk approached Petitioner. (T 41-42, 77) Petitioner held the rake in a threatening manner, as if ready to strike at the officer. (T 39-40, 77) Once Loudermilk took out his baton, Petitioner dropped the rake and put up his fists, as if ready to fight. (T 42) Deputy Eisenhut then arrived. (T 45) Eisenhut grabbed Petitioner's arm. (T 80) Petitioner pushed Eisenhut away from him. (T 81) Petitioner then punched Eisenhut in the face. (T 45-46, 59, 81, 93) Petitioner kept swinging punches and kicking the deputies "quite a bit". (T 45, 82-83, 84-85) Petitioner was fighting with both officers. (T 45) Eisenhut was knocked to the ground by Petitioner, and Petitioner was trying to hit Eisenhut while the deputy was on the ground. (T 47, 83, 94, 97) Petitioner grabbed Loudermilk in a bear hug and picked the deputy off the ground. (T 47, 60, 84) Then Petitioner dumped Loudermilk onto the ground. (T 47) Petitioner continued to swing and kick at Eisenhut after Eisenhut stood up. (T 47) At one point, Petitioner kicked Loudermilk in the leg, spun Loudermilk around and continued punching the deputy. (T 47) Petitioner

continued to fight, and eventually stopped when he realized that his hand was bleeding. (T 50, 85-86)

Section 843.01, Florida Statutes (1995), is not ambiguous on its face. The statute, when read in *pari materia* with section 775.021(4)(a),[2] clearly allows a defendant to be convicted of two charges of resisting arrest with violence when there are two or more officers who are involved in the arrest. Since the legislative intent is clear from the face of the statute, the rule of lenity is not applicable.

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[2]See Section 1.04, Fla. Stat. (1995)(statutory construction of statutes).

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests that this Honorable Court not exercise its discretionary jurisdiction in this case, and to affirm the Fourth District Court of Appeal's decision below.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of this Merits Brief has been furnished by Courier to: David McPherrin, Assistant Public Defender, Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on July 3, 1997.

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IN THE SUPREME COURT OF FLORIDA

CHARLIE WALLACE,
Petitioner,

v.

Case No. 90,287
(DCA Case No. 95-2415)

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

trict. Case No. 95-3542. Dec. 18, 1996. Rehearing and Stay of Mandate Denied Jan. 3, 1997. Appeal from the Circuit Court for St. Lucie County, C. Pfeiffer Trowbridge, Judge. Counsel: Richard L. Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee; and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

(KLEIN, Judge.) Appellant was convicted of aggravated battery with a firearm and shooting a deadly missile, but argues that he is entitled to a new total because he was not present at the bench conference when peremptory challenges to jurors were exercised. We agree and reverse.

In *Coney v. State,* 653 So.2d 1009 (Fla.), *cert. denied* __ U.S. __, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), the court construed Florida Rule of Criminal Procedure 3.180(a)(4) to mean that a defendant has "a right to be physically present at the immediate site where pretrial juror challenges are exercised." *Id.* at 1013. The court then qualified its pronouncement:

> Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. (Citations omitted). Again, the court must certify the defendant's approval of the strikes through proper inquiry.

Id. at 1013.

The state acknowledges that the defendant was not present at the bench conference when peremptory strikes were made, and that the trial court made no inquiry, as required by *Coney* for there to have been a waiver or ratification, but argues that the mere failure to object can constitute ratification. We cannot agree, because if that were the rule it would make the above quoted language meaningless. *See Mejia v. State,* 675 So.2d 996 (Fla. 1st DCA 1996), and cases cited therein.[1]

The state also argues that the error is harmless under *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986). We disagree. If defendant had participated in the exercising of peremptory strikes, it may have resulted in different jurors deciding his guilt or innocence. We cannot, under those circumstances, conclude beyond a reasonable doubt that the error did not affect the verdict. We find the remaining issues to be without merit. (STEVENSON and SHAHOOD, JJ., concur.)

[1]The dissenting opinion in *Mejia* argues that the defendant's absence is not fundamental error and requires an objection, relying on *Gibson v. State,* 661 So.2d 288 (Fla.1995). The supreme court's file in *Gibson,* however, shows that the trial in *Gibson* occurred before the supreme court decided *Coney.* Since the *Coney* rule was prospective only, it would not have applied in *Gibson.* We are aware that the court cited Coney in *Gibson*; however, it was for the proposition that the error was harmless. In *Coney* the court concluded defendant's absence from the bench conference was harmless because the conference only included discussion of challenges for cause, not peremptory challenges. The court reasoned that challenges for cause only involve legal issues, and that a defendant has no constitutional right to be present at a bench conference involving "purely legal matters." *Coffey* at 1013 (citing *Hardwick v. Dugger,* 648 So.2d 100, 105 (Fla. 1994)). It appears that the court also found defendant's absence harmless in *Gibson* because the conference only involved challenges for cause.

* * *

Criminal law—Sentencing—Error to impose three-year minimum mandatory sentence for possession of a firearm where defendant participated in crimes with two accomplices, evidence at trial did not conclusively establish that defendant was in actual possession of a firearm, and jury did not make a specific finding that defendant was in possession of a firearm

GORDON REDD, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-3577. Dec. 18, 1996. Appeal from the Circuit Court for Palm Beach County, James T. Carlisle, Judge. Counsel: Sara Blumberg of Sara Blumberg, P.A., Boynton Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant, Gordon Redd, appeals his conviction and sentence for attempted second degree murder with a firearm, robbery with a firearm, burglary of an occupied structure with a firearm, false imprisonment with a firearm, and aggravated assault with a firearm. We affirm Appellant's conviction and sentence, but vacate that portion of the sentence imposing a three-year minimum mandatory sentence for possession of a firearm.

Section 775.087(2), Florida Statutes (1993), provides that any person convicted of murder, robbery, burglary, or aggravated battery, who had in his or her possession a firearm, must be sentenced to a minimum three-year prison term. However, even though sufficient evidence exists to uphold a conviction, this does not mean that an enhanced sentence may be imposed under section 775.087 merely on the basis of the finding of guilt. *Hough v. State,* 448 So.2d 628, 629 (Fla. 5th DCA 1984). Where the defendant participated in the crime with others, the three-year mandatory penalty under section 775.087(2) cannot be imposed in the absence of a jury finding that the defendant was in actual possession of the firearm. *Leonard v. State,* 660 So.2d 1172 (Fla. 4th DCA 1995); *see State v. Overfelt,* 457 So.2d 1385, 1387 (Fla.1984); *Rivas v. State,* 591 So.2d 649 (Fla. 4th DCA 1991).

In the instant case, Appellant committed the crimes with two accomplices. The evidence at trial did not conclusively establish that Appellant was in actual possession of a firearm. Thus, since the jury did not make a specific finding that Appellant was in possession of a firearm, the three-year mandatory minimum sentence must be set aside. *Leonard,* 660 So.2d at 1172; *Rivas,* 591 So.2d at 649. Accordingly, we remand to the trial court with directions to delete the three-year prison term from Appellant's sentence. *Leonard,* 660 So.2d at 1172.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED. (GUNTHER, C.J., and WARNER and KLEIN, JJ., concur.)

* * *

Criminal law—Resisting officer with violence—No error in entering two convictions for resisting officer with violence where defendant attempted to punch first officer on scene of altercation, and pulled away from and punched second officer attempting to handcuff him—Use of word "any" in statute making it a felony to resist, obstruct or oppose any officer modifies who may be classified as an officer within coverage of statute, not the number of charges that may be brought from an incident of resistance—Intended unit of prosecution is any individual officer who is resisted—Mere fact that each of separate punches and wrestling occurred within seconds of the other on same plot of ground does not remove them from legislature's clear command of separateness in convictions and punishments—Conflict certified—Prosecutorial vindictiveness—No presumption of prosecutorial vindictiveness arose from filing of additional charges after defendant refused to plead guilty to initially charged crime—No prejudice to defendant when state amended the information where defendant was out on bail and trial was continued for twelve days to allow him to interview and depose new witnesses

CHARLIE WALLACE, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 95-2415. Opinion filed March 5, 1997. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County, Charles E. Smith, Judge, L.T. Case No. 94-1262. Counsel: Richard Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, West Palm Beach, for appellee.

(FARMER, J.) Both of the issues raised on appeal engage our present attention. Although we affirm the conviction, we write to explain why we have concluded that we are unable to follow precedent from another court of appeal.

The defendant was initially charged with battery on a law enforcement officer, aggravated assault on a law enforcement officer, and aggravated battery. Following jury selection, defendant was granted a continuance to locate witnesses. After the continuance was granted, the State amended the information to add two counts of battery on a law enforcement officer and two

counts of resisting an officer with violence.

The trial court denied a defense motion to dismiss the additional counts on grounds of prosecutorial vindictiveness, and the case thus proceeded to trial on the amended information. At the conclusion of the state's case, the trial court reserved ruling on defendant's motion for a judgment of acquittal on all counts. The State then proceeded to nolle prosse the two counts of battery on a law enforcement officer. The remaining charges were submitted to the jury, and the defendant was found guilty on all six.

Defendant was raking his mother's yard when an altercation ensued. He struck his sister, who then called police. The first officer on the scene saw defendant run across his mother's yard to his sister and strike her several times with a rake until it broke. The officer told defendant to drop the rake and that he was under arrest. Defendant then approached the first officer, threatening to strike him with the rake. When the officer pulled his baton and ordered defendant to drop the rake, defendant attempted to punch the first officer.

At that point, a second officer arrived on the scene, as the first officer was instructing defendant to lie on the ground, and the second officer attempted to handcuff him. Defendant pulled away from the second officer and punched him in the face. The defendant became very violent and punched and kicked both officers as they sprayed him in an effort to quell him. He then knocked the second officer to the ground and grabbed the first officer in a bear hug and dropped him to the ground as well. Defendant continued to fight until he noticed that his hand was bleeding, at which point he gave up and ceased resisting.

Defendant complains on appeal of his conviction and sentence on each of two separate counts of resisting an officer with violence. He contends that the statute proscribing resistance with violence, section 843.01,[1] does not set forth the allowable unit of prosecution with sufficient clarity, citing *Pierce v. State*, 681 So. 2d 873 (Fla. 1st DCA 1996). *Pierce* reversed two of three convictions for resisting, holding that section 843.01 does not clearly define the allowable unit of prosecution. The first district found an ambiguity in the use of *any* to modify the class of officers to whom the statute applies.[2] The court relied on *State v. Watts*, 462 So. 2d 813 (Fla. 1985). *Watts*, in turn, simply followed the court's earlier decision in *Grappin v. State*, 450 So. 2d 480 (Fla. 1984).

In *Grappin* the court considered whether section 812.014(2)(b) unambiguously permitted five separate convictions for stealing five firearms during a single burglary. In this statute, the legislature has defined the crime of second degree grand theft by describing the property stolen.[3] The court held that the statute permitted multiple convictions, saying:

> "[w]e find that the use of the article 'a' in reference to 'a firearm' in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution."

450 So. 2d at 482.

In *Watts* the court considered whether section 944.47 permitted separate convictions for possession of two handmade knives in prison. Section 944.47 proscribes the possession of specified things by prison inmates, one of which is defined as "*any* firearm or weapon of any kind." [c.s.] *Watts* held that the defendant could not be convicted of more than one offense for the possession of two knives, explaining:

> "In *Grappin*, we held that the unlawful taking of two or more firearms during the same criminal episode is subject to separate prosecution and punishment under the theft statute as to each firearm taken. . . . We reasoned that Grappin may be charged in a five-count information with five thefts because the article 'a' prefaced firearm. We noted that the use of the article 'a' in reference to 'firearm' in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution. [c.o.] We specifically contrasted the article 'a' with the article 'any' by pointing out that federal courts have held that the term 'any firearm' is ambiguous with respect to the unit of prosecution and must be treated as a single offense with multiple convictions and punishments being precluded."

462 So. 2d at 813-814.

In short, the differences in result in *Grappin* and *Watts* center around both the nature of the crime charged and the precise statutory text. In *Grappin*, the crime was stealing, while in *Watts* the crime was possession of contraband. To us, there is fundamental difference between the act of stealing five separate items of property, and the act of possessing contraband which consists of two separate items. Each item of property stolen is logically a separate crime of theft; each item stolen represents a discrete act. The essence of the crime of theft is the taking and asportation of any single item of property. Possession of contraband, on the other hand, does not involve any taking and asportation. Its essence is in the having, whether (unless the legislature explicitly states otherwise) the contraband consists of a single unit of proscribed material or in multiple items.

The crime of resisting an officer with violence is like theft, in that the statutory unit of prosecution is violence done to a single officer. The word "any" modifies who may be classified as an officer within the coverage of the statute, not the number of charges that can brought from an incident of resistance. Section 843.01 prohibits offering or doing violence "to the person of *such officer*." [e.s.] The legislature's omission of the plural, "officers" [with an *s*] in the statutory phrase just quoted eliminates any theoretical doubt or ambiguity in the use of the article *any*. The text of section 843.01 thus undeniably demonstrates that the intended prosecutoral unit is any individual officer who is resisted.

In this sense, the statute resembles its juristic cousins, assault and battery. Just as each person battered constitutes a separate crime, so too each officer resisted in the performance of his duties with violence is a separate act. Indeed to hold otherwise simply because the two separate acts of violence occurred during a spree of violent resistance of peace officers is to give violent persons no incentive to refrain from battering additional officers after they have committed an act of violence on the first officer. After Butch and Sundance have shot the first member of the posse chasing them, they would have no reason not to shoot them all. That hardly seems a result the legislature intended, let alone a result suggested in the text they chose for section 843.01.

In this instance, our logic is entirely vindicated by history—that is, "legislative history." This particular history does not relate, however, to reports or speeches in committee or on the floor of either chamber about the statute under which Wallace was convicted. Rather, it deals instead with the legislature's quite explicit statement of textual meaning in its general rules of construction of criminal statutes.[4] We address the history of that statement of intent.

Section 775.021 contains a general statement of legislative intent, the following provisions of which are applicable to our reading of section 843.01:

> "(2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.
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> . . .
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> "(4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
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> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
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> 1. Offenses which require identical elements of proof.

2. Offenses which are degrees of the same offense as provided by statute.

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense."

Subparagraph (4)(a) was in effect at the time of both the *Grappin* (1984) and *Watts* (1985) decisions. But subparagraph (4)(b) was not adopted until 1988. It is the adoption of subparagraph (4)(b) to which we refer in our consideration of history.

In *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), the supreme court held that the legislature had not made clear in section 775.021 whether it intended for separate punishments for the crimes of attempted manslaughter, aggravated battery, and shooting into an occupied building, arising from a single incident or episode. In 1988, the legislature "overruled" *Carawan* by adopting what is now subparagraph (4)(b) of section 775.021. As the supreme court itself explained in the year following the enactment:

"It is readily apparent that the legislature does not agree with our interpretation of legislative intent and the rules of construction set forth in *Carawan*. More specifically:

(1) The legislature rejects the distinction we drew between act or acts. Multiple punishment shall be imposed for separate offenses even if only one act is involved.

(2) The legislature does not intend that (renumbered) subsection 775.021(4)(a) be treated merely as an 'aid' in determining whether the legislature intended multiple punishment. Subsection 775.021(4)(b) is the specific, clear, and precise statement of legislative intent referred to in *Carawan* as the controlling polestar. Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, all criminal offenses containing unique statutory elements shall be separately punished.

(3) Section 775.021(4)(a) should be strictly applied without judicial gloss.

(4) By its terms and by listing the only three instances where multiple punishment shall not be imposed, subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test shall be used for determining whether offenses are the same or separate. Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity." [c.o., f.o.]

State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). There can be no doubt under this holding that section 775.021(4)(b) makes it dangerous to read decisions like *Grappin* and *Watts*. It is necessary to consider the effect of the 1988 legislation.

We see parallels between our analysis in this case and our analysis in *Lifred v. State*, 643 So. 2d 94 (Fla. 4th DCA 1994). In that case, the convictions included attempted murder with a firearm against one victim, and aggravated battery with a firearm against another victim, both arising from a single incident. We began the analysis with our understanding of section 775.021(4), saying:

"We start with the proposition that pursuant to section 775.021(4), Florida Statutes (1989), a trial court has discretion to impose separate sentences, either concurrently or consecutively, for each separate criminal offense arising out of a single criminal transaction or episode."

643 So. 2d at 95. In concluding that section 775.021 permitted separate sentences with separate mandatory minimum periods, we stated:

"However, in the case of multiple discharges of a firearm at multiple victims, there are, by definition, separate violations of each victim's rights.

"An analysis barring imposition of stacked mandatory minimums, merely because the crimes against multiple victims are not separated by time and place, can lead to distinctions not fostering any stated legislative policy regarding restrictions on eligibility for parole. For example, we cannot see how a criminal who shoots three victims in the course of an armed robbery while the victims remain in the same location should be punished less severely than a criminal who shoots one victim three times at three separate locations."

643 So. 2d at 97. We then added:

"We do not believe that the legislature, in enacting section 775.087(2), intended to restrict the sentence that a trial court may impose on a defendant such as Lifred to a mandatory minimum of three years for each victim he injured or attempted to kill, rather than two mandatory minimums of three years as ordered in this case."

643 So. 2d at 98.

As in *Lifred*, each one of these officers was a separate "victim". There is no meaningful distinction in the fact that the charges here are resisting an officer with violence. He punched each one of the officers and wrestled both to the ground. The mere fact that each of the separate punches and the wrestling occurred within seconds of the other on the same plot of ground does not remove them from the legislature's rather clear command of separateness in convictions and punishments. In the context of section 843.01, there is no ambiguity in the use of *any* to define who may be a victim of the resistance. Under this statute, *any* does not define the "allowable unit of prosecution"—merely the class of officers to whom the statute's protection is intended. An attack against different members of the class may properly lead to separate convictions and punishment.

It is obvious that we disagree with first district's contrary conclusion in *Pierce*. Accordingly, we certify conflict.

Defendant also argues that the State's filing of an amended information, after he turned down a plea offer and after his motion for continuance was granted, to include four additional counts from the same episode, raised a presumption of prosecutorial vindictiveness. It is apparent from our reading of the transcript that the trial judge accepted the prosecutor's statement that he offered to allow defendant to plead "straight-up" to the then existing charges, failing which he would amend the information to add all charges that conceivably arose from the event.

There is no presumption of prosecutorial vindictiveness when additional charges are filed, even at the beginning of trial, after a defendant's refusal to plead guilty to the initially charged crimes. *State v. Phillips*, 642 So. 2d 18 (Fla. 2d DCA 1994), *rev denied*, 561 So. 2d 1195 (Fla. 1995); *Rosser v.* State, 658 So. 2d 175 (Fla. 3d DCA 1995); *State v. Huffman*, 636 So. 2d 842 (Fla. 5th DCA 1994). The record indicates that there was no prejudice to the defendant when the state amended the information, because defendant was out on bail and the trial was continued for twelve days to allow him to interview and depose new witnesses.

AFFIRMED. (STEVENSON and GROSS, JJ., concur.)

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[1]*See* § 843.01, Fla. Stat. (1995), which states (omitting nonpertinent parts):

"Whoever knowingly and willfully resists, obstructs, or opposes *any* officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . . ." [e.s.]

[2]The OED defines *any* as:

"An indeterminate derivative of *one*, or rather its weakened adj. form *a, an*, in which the idea of unity (or, in plural, *partitivity*) is subordinated to that of indifference as to the particular one or ones that may be selected."

THE COMPACT OXFORD ENGLISH DICTIONARY (2d ed.) 60.

[3]"It is grand theft of the second degree . . . if the property stolen is . . . *a* firearm." [e.s.]

[4]*See* § 775.021(6), Fla. Stat. (1995).

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