IN THE SUPREME COURT OF FLORIDA

BOBBY SCOTT,

Petitioner,

v. Case No. 94,701

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Defense counsel never submitted a written proposed instruction. At the charge conference, the trial court initially described how he was going to charge the jury as to the charged offense (T 310). The court then stated that he would indicate to the jury that there was an instruction explaining possession (exclusive, joint and constructive), but that he would give it following the lesser included offense because it was applicable to both the charged and lesser included offense (T 310-11). When discussing the instruction on the lesser included offense of possession, defense counsel stated:

> I think in this particular case we would have to have something about, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed under the Chicone case, Supreme Court opinion.
>
> If -- well,--

(T 311-12). The trial court then inquired if she was asking for more than the *Medlin* instruction, and she stated that she was, and said:

> While the existing jury instructions--I'm reading from the Chicone case, while the existing jury instructions of possession and so forth are adequate, requiring knowledge of the presence of the substance, which it talks about in the standard jury instructions, we

> agree that if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed.
>
> And then in the jury instructions they cite to the case of *State v. Medlin,* 273 So. 2d 394, Florida 1973. And the Supreme Court in the Chicone case, Chicone, C-H-I-C-O-N-E, versus State decided October 24th, 1996, they also cite that case but want to do away with some of the confusion that has existed in the cases, in the *Medlin* case and some of the other cases coming thereafter.

(T 312). The trial court asked defense counsel if she objected to the *Medlin* instruction, and she said that she did not (T 313). The trial court then asked her if she had a requested instruction, and defense counsel stated:

> Well, what the Supreme Court says--let's see. It says here, Defendant had knowledge of the presence of the substance. And the Court goes on to simply say that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed.
>
> Let me see if I can get some of these--simply says he was convicted of possession of cocaine.
>
> *Medlin* is the case most cited for the proposition that guilty knowledge is not an element of the simple possession crime. We held the State established a prima facie case and sufficient proof that the

> defendant was aware of the nature of the drug to get the case to the jury. That's a far cry from holding that guilty knowledge is necessary.

(T 314). The trial court again asked if she had a substitute for the old *Medlin* instruction, and defense counsel was never heard from again on the subject. The trial court then stated:

> Okay. In the absence of a suggested new *Medlin* type instruction, I'm going to give the one I've been giving, and that will follow the explanation of possession.

(T 315).

The charged offense in this case was introduction or possession of contraband in a correctional facility, in violation of section 944.47, Florida Statutes (R 2). As to the charged offense, the jury was instructed as follows:

> Before you can find the defendant guilty of the crime of possession of contraband in a correctional facility, the State must prove the following two elements beyond a reasonable doubt; number one, that the defendant knowingly possessed contraband in a correctional facility, number two, that the defendant did not do so through regular channels as duly authorized by the officer in charge of the facility.
>
> The Court now instructs you that for the purpose of this offense contraband means any controlled substance, and cannabis is a controlled substance.

(T 357).

SUMMARY OF ARGUMENT

The issue presented in the certified question and raised by petitioner is not cognizable because there was no written or even oral request for a specific jury instruction below. Even if the claim is cognizable, the jury was properly instructed regarding the offense of introduction or possession of contraband in a correctional facility. Error, if any, was harmless.

ARGUMENT

THE JURY INSTRUCTION CLAIM WAS NOT PROPERLY PRESERVED BELOW; THE JURY WAS PROPERLY INSTRUCTED AND IF ERROR OCCURRED, IT WAS HARMLESS AT WORST.

Petitioner contends that the decision of the Fifth District Court of Appeal in *Scott v. State,* 23 Fla. L. Weekly D2715 (Fla. 5th DCA December 11, 1998), incorrectly applied and interpreted *Chicone v. State,* 684 So.2d 736 (Fla. 1996), and that the questions certified by the district court should be answered in the negative. Respondent first contends that this court need not even address the certified questions because any claim of instructional error was waived below by petitioner's failure to submit a proposed jury instruction.

Jury instructions are subject to the contemporaneous objection rule, and absent an objection at trial, can be raised on appeal only if fundamental error occurred. *Archer v. State,* 673 So.2d 17 (Fla. 1996). Failing to instruct on an element of the crime over which there is no dispute is not fundamental error and there must be an objection to preserve the issue for appeal. *State v. Delva,* 575 So.2d 643 (Fla. 1991). Further, when a jury instruction is requested that is not part of the standard jury instructions, the requested instruction must be submitted in writing to the trial court if the issue is to be preserved for appellate review. *See, Watkins v. State,* 519 So.2d 760 (Fla. 1st DCA 1988); Fla. R. Crim. P. 3.390(c).

The record demonstrates that neither a written nor oral instruction was ever presented to the trial court. While counsel discussed *Chicone* and discussed the jury instructions, a specific instruction was never requested. The trial court asked on several occasions if petitioner wanted more than the standard instruction and if petitioner had a requested instruction. Finally, the trial court ruled:

> Okay. In the absence of a suggested new *Medlin* type instruction, I'm going to give the one I've been giving, and that will follow the explanation of possession.

(T 315). Petitioner made no further statements.

Respondent contends that this was a clear waiver of any jury instruction issue. The trial court was receptive to a proposed instruction, and determined that **in the absence of a suggested instruction**, he would give the standard instruction. The trial court cannot be faulted for giving a defendant every opportunity to cure an alleged instructional defect then proceeding with the standard instructions when that opportunity is not taken. Respondent contends that it is not the duty of the trial court to formulate a specific instruction for a defendant.

Respondent further contends that the jury was properly instructed in this case. The charged offense was possession of contraband in a correctional facility. The jury was instructed that in order to convict, the state had to prove that the defendant

knowingly possessed contraband in a correctional facility, and that the defendant did not do so through regular channels as duly authorized by the officer in charge of the facility. The jury was further instructed that for the purpose of this offense contraband means any controlled substance, and cannabis is a controlled substance. These instructions on the charged offense clearly require the state to prove guilty knowledge, i.e., the defendant knowingly possessed cannabis.

Thus, the only issue in this case is whether the trial court erred in failing to give an instruction (that was never requested) that related to a lesser included offense. Respondent submits it was not, and even if it was error, it was harmless at worst. In terms of harmless error, respondent would first point out that in convicting on the greater offense, the jury found guilty knowledge, as it was instructed it must. Thus, there is no chance that petitioner was convicted based on any lack of proof or mistake of law regarding guilty knowledge.

In *Chicone, supra,* this Court quashed the decision of the district court because it had held that the state did not have to prove that a defendant new of the illicit nature of the items he possessed. As to the jury instruction issue, this Court only stated that the existing jury instructions are adequate in requiring "knowledge of the presence of the substance", but if specifically requested by a defendant, the trial court should

expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed. *Id.* at 745-46. Respondent contends that based on this language, the district court properly determined that implicit in the right to have the jury instructed on this more specific issue is the requirement that there be something before the jury that responds to the presumption or inference that the defendant is aware of the illicit nature of the substance created by the proof of the possession of the substance. *Scott, supra.*

As the district court stated, in *State v. Medlin,* 273 So.2d 394 (Fla. 1973), this court held that proof that the defendant committed the prohibited act (delivery of a controlled substance) raised a rebuttable presumption that the defendant was aware of the nature of the drug delivered, and *Chicone* did not expressly overrule this proposition. This presumption must remain valid, because without the jury being able to infer that a defendant was aware of the illicit nature of the substance from the fact that he **knowingly** possessed the illicit substance, the state would rarely be able to independently prove that the defendant knew the illicit nature of the substance in a simple possession case. Respondent further contends that such presumption is also permissible based on the circumstances under which the illicit substance is knowingly possessed. Here, the illicit substance was in petitioner's eyeglasses case in his locker in his prison cell. Once the jury

determined that petitioner knowingly possessed the cannabis, it certainly had to be free to infer that he knew of its illicit nature. This is precisely the way in which intent is proved through circumstantial evidence.

In terms of this presumption, the district court holding does not, as petitioner contends, require the defendant to assert lack of knowledge as an affirmative defense. Rather, as the district court stated, a defendant's obligation when claiming he did not know the illicit nature of the substance is not unlike a person found in possession of recently stolen property explaining why he did not know the property was recently stolen. *Scott, supra.* Likewise, it is not unlike a defendant in any case explaining away the state's circumstantial evidence of his intent. It logically follows that if it is not the theory of defense that a defendant did not know the illicit nature of the substance, then there should be no requirement that the jury be instructed on it. One claiming no knowledge should not be entitled to an instruction on guilty knowledge; the two theories are mutually exclusive.

Even if this Court finds that the claim has been preserved and that the instruction should have been given in this case, respondent contends that the district court correctly determined that any error in failing to give the *Chicone* instruction can be harmless. Under very similar circumstances, this Court has found that failure to instruct on knowledge of the substance was not

fundamental error. *Delva, supra.* There, like here, there was no suggestion that the defendant was arguing that while he knew of the existence of the package he did not know what it contained. Respondent thus contends that if such instructional error is not fundamental, it can certainly be harmless. *See, Ryals v. State,* 716 So.2d 313 (Fla. 4th DCA 1998) (failure to instruct on knowledge element was harmless error).

Respondent further contends that if such error occurred in this case, it was clearly harmless. As the district court found, there was no factual basis to create an issue as to whether Scott knew of the illicit nature of the substance. *Scott, supra.* Rather, petitioner simply claimed that the cannabis was not his and he did not know it was there. Further, as stated, the jury convicted petitioner of the charged offense, where it had been instructed that the state had to prove he knowingly possessed cannabis, so there is a jury finding of guilty knowledge. Reversal is not warranted in this case.

CONCLUSION

Based on the foregoing arguments and authorities, requests this court find that the jury instruction issue was waived, or alternatively, approve the decision of the Fifth District Court of Appeal and answer the certified questions in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Respondent on the Merits has been furnished by delivery to Susan A. Fagan via the mailbox of the Office of the Public Defender at the Fifth District Court of Appeal, this 4 day of March, 1999.

Kellie A. Nielan
Of Counsel

IN THE SUPREME COURT OF FLORIDA

BOBBY SCOTT,

Petitioner,

v. Case No. 94,701

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

APPENDIX

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The evidence, which was consistent with the jury's verdict, showed that Baker entered the 13-year-old victim's home through a window, at night. Although the young victim denied she helped him gain entry to the house, he testified she had handed him a chair from the living room so that he could climb into the window. He further testified she took him to her bedroom for the purpose of engaging in sex.

The victim shared a bedroom with a cousin, a sister and two infants. While the victim and Baker were engaging in sexual activities, one of the children in the room partially awoke. The victim became nervous and she escorted Baker to the front door of the house and let him out.

When the victim told her mother about an "attack" on her, her mother told her she had just had a bad dream. When the mother found wetness on the victim's bed, she took her daughter to a rape crisis center, but would not permit an internal examination. DNA tests on semen found on the bed clothes established that the semen could have come from Baker. Baker admitted having oral sex with the victim, but stressed it was consensual.

The reasons given by the trial judge for departing upwards from the presumptive sentence were: 1) the victim was physically attacked in the presence of one or more members of her family; 2) Baker is not amenable to rehabilitation or supervision due to an escalating pattern of criminal conduct as described in section 921.001(a); and 3) Baker induced a minor to participate in any of the offenses pending before the court for disposition.

The first reason given for departure tracks the ground provided for in section 921.006(3)(m). The statute does not define what is meant by an "attack," but the count for which Baker was convicted does not contain as an element an assault or attack on a victim. The amended information charged that Baker:

> Did...commit an act defined as sexual battery under section 794.011(1)(h), Florida Statutes, upon A.M., a child under sixteen (16) years of age, to wit: thirteen (13) years of age, by oral, anal or vaginal penetration by or union with the sexual organ of another....

The criminal statute under which Baker was charged on that count was section 800.04(3). Under this crime, it is the age of the victim that is critical—not the offensive nature of the activity. *See Lifka v. State,* 530 So.2d 371 (Fla. 1st DCA 1988). Thus the basis for finding that the victim was "attacked" in this case is unclear.

Further, it is also unclear that the victim was "attacked" *in the presence of her family members.* Both the victim and Baker testified that while they were together in the victim's bedroom, the other children were sleeping. One child partially stirred and made a noise, but there was no evidence any of them were aware of the sexual activities which were occurring in the room. It was to keep them from being aware of those activities that the victim broke off the encounter and had Baker leave.

Section 921.0016(3)(m) seeks to punish a defendant for inflicting additional trauma to family members who witness a crime. *Davis v. State,* 489 So.2 754, 757 (Fla. 1st DCA 1986), *quashed other grounds,* 517 So.2d 670 (Fla. 1987). If a family member sleeps through a crime perpetrated against another family member, it is difficult to explain how the non-victim member suffered any additional trauma. At a minimum, the non-victim family member must be able to see or sense that a crime is taking place. *Brinson v. State,* 574 So.2d 298 (Fla. 5th DCA 1991).

The second ground for departure in this case rests on section 921.0016(3)(j). In this case it rests on the theory that Baker induced the victim to have sex with him and to participate in their sexual activities. However, that is the whole, sum and substance of the elements of the crime for which Baker was convicted. He had sex with a minor under the age of 16, for which the giving of consent is no defense. The jury clearly found he used no force in accomplishing the sexual encounter by having acquitted him of that count. To enhance a sentence because the underaged victim consented to have sex, merely duplicates the statutory elements of the crime for which Baker was convicted. Inducing the minor to consent should not provide an independent basis to depart upwards.

The third ground for the departure sentence is more difficult. It rests on section 921.001(8), and an escalating pattern of criminal conduct. Baker had previously been convicted of a lengthy series of misdemeanor criminal offenses, during the prior 7 years, starting in 1990, not including unscorable juvenile offenses. The trial judge recited a long list of criminal offenses committed by Baker as an adult: four suspended driver's license convictions (1991 and 1992); resisting arrest without violence (1992); battery (1992); suspended driver's license conviction (1993); disorderly conduct (1993); obstruction of justice, resisting arrest (Nov 1993); domestic violence (1994); misdemeanor possession of cannabis and resisting arrest without violence (1994); battery and assault (1994); reckless driving (1994); reckless driving (1995); uttering a worthless check (1995); six additional worthless check convictions (Oct. 1995); two suspended driver's license convictions (1996); and resisting arrest without violence (1996).

The trial judge concluded that this persistent commission of minor crimes when coupled with the current felony for which Baker was convicted in this case, constitutes an "escalating pattern" of criminal conduct and provides a basis for departing upwards from the guidelines sentence. § 921.001(8). We respectfully disagree. All of the crimes Baker had committed in the past were misdemeanors. He had never been sentenced to state prison. Further, the rate at which Baker had committed the prior misdemeanors appears relatively unchanged—averaging 5 or 6 per year. The current crime for which he was convicted in this case, although a felony, was also non-violent.

To constitute an escalating pattern of criminal offenses, the pattern should demonstrate a progression from nonviolent to violent crimes or a progression of increasing violent crimes, or a pattern of increasingly serious criminal activity. *Glenn v. State,* 623 So.2d 596 (Fla. 5th DCA 1993). As stated above, most of Baker's offences, including the current felony, were not violent. Thus the first two possible escalating patterns are not applicable.

The state argues that an escalating pattern can be found because Baker has progressed from misdemeanor offenses to a felony. However, as the Florida Supreme Court explained in *State v. Darrisaw,* 660 So.2d 269 (Fla. 1995), there is no escalating pattern if the crimes are neither temporally related nor similar in nature. Here there is no similarity between the prior offenses and the crime for which Baker is being sentenced and the rate at which Baker has been committing minor offenses has not increased. *See Johnson v. State,* 689 So.2d 1111 (Fla. 2d DCA 1997).

Accordingly, we reverse the departure sentence and remand for resentencing within the guidelines.

REVERSED and REMANDED. (DAUKSCH and HARRIS, JJ., concur.)

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[1] § 800.04(3), Fla. Stat. (1995).

[2] The presumptive sentence under the guidelines for this offense was 96.5 months or 8 years.

[3] *Lloyd v. State,* 633 So.2d 1205 (Fla. 5th DCA 1994).

[4] § 810.02(1) and (2)(b), Fla. Stat. (1995).

[5] § 794.011(3), Fla. Stat. (1995).

* * *

Criminal law—Possession of contraband in correctional facility—Evidence sufficient to support finding that defendant possessed cannabis secreted in eyeglass case found in his locker—Jury instructions—Any error in failing to instruct jury that it had to find that defendant had knowledge of illicit nature of substance in order to convict was harmless where defendant's position at trial was that he was unaware that the cannabis was concealed within his eyeglass case, not that he did not know the nature of the concealed substance—Questions certified: 1) Does illegal possession of a controlled substance raise a rebuttable presumption (or inference) that the defendant had knowledge of its illicit nature? 2) If so, if defendant fails to raise the issue that he was unaware of the illicit nature of the substance, is he nevertheless entitled to a *Chicone* instruction? 3) Can failure to give requested instruction be harmless error?

BOBBY SCOTT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2333. Opinion filed December 11, 1998. Appeal from the Circuit Court for Putnam County, Stephen L. Boyles, Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach,

for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Maximillian J. Changus, Assistant Attorney General, Daytona Beach, for Appellee.

ON REHEARING EN BANC

[Original Opinion at 23 Fla. L. Weekly D1954b]

(HARRIS, J.) We grant rehearing *en banc* and substitute the following opinion.

Scott appeals his conviction and sentence for possession of contraband in a correctional facility. We affirm his conviction but reverse for re-sentencing.

A random search of Scott's locker located in his cell revealed cannabis hidden inside his eyeglass case. He contends his conviction should be set aside because there was insufficient evidence to establish his exclusive possession of the cannabis or that he had knowledge that the cannabis was in his locker. We believe that there was sufficient evidence that Scott "possessed" the cannabis secreted in his eyeglass case found in his locker.

Scott also contends the court erred in not giving his requested instruction that in order to convict, the jury must find that Scott had knowledge of the illicit nature of the substance. While we agree that such instruction *may be* required by *Chicone*[1], we find that such error, if error there was, was harmless. Scott's position at trial was that he was unaware that the cannabis was concealed within his eyeglass case located within his locker and not that he did not know the substance thus concealed was cannabis. In his testimony, Scott claimed that someone broke into his locker, stole some jewelry, and planted the illegal substance in his eyeglass case.

In his motion for rehearing, Scott urges that we misapprehended the *Chicone* holding which made knowledge of the illicit nature of the item possessed an "element" of the offense as opposed to an affirmative defense. In other words, Scott contends that the burden was on the State to prove that Scott knew the substance was cannabis even if he did not raise the issue and thus his requested instruction concerning his knowledge of the illicit nature of the substance was required by *Chicone*. But in *Chicone*, possession was not challenged; the only issue presented for jury determination was whether the defendant was aware of the illicit nature of the thing possessed. Thus the supreme court has not yet decided whether a special instruction concerning defendant's knowledge is required if he challenges only his possession of the substance.

Chicone does not hold that knowledge of the illicit nature of the substance is an independent element of the charge for which a special instruction must always by given. Instead, the *Chicone* court recognized the authority of the legislature to determine the elements of a crime and adopted the view that since the legislature did not indicate otherwise, scienter (knowing the illicit nature of the substance) was implicit in the concept of possession (how can one knowingly possess an illegal drug unless one knows the substance possessed is an illegal drug?). For this reason, the court held that the standard jury instruction on possession is adequate *unless* the defendant requests a more specific instruction regarding knowledge of the illicit nature of the substance. However, we urge, implicit in the right to have the jury instructed on this more specific issue is the requirement that there be something before the jury that responds to the presumption or inference that the defendant is aware of the illicit nature of the substance created by the proof of possession of the substance.

An argument that, "I didn't possess the substance but had I possessed the substance, I would not have known it was cannabis" is every bit as inconsistent as the argument: "I didn't deal in cocaine but if I did, I was entrapped." *See Walker v. State*, 701 So. 2d 1258 (Fla. 5th DCA 1997). The jury would understand that to argue the alternative position, one must concede the former. In our case, Scott recognized this dilemma and chose not to argue the alternative position that he was unaware of the nature of the substance to the jury. Although this was sound defense strategy, since Scott chose to argue only that he did not possess the substance, was it reversible error not to instruct on a position he chose not to support, by way of explanation, to the jury?

And the State did prove, as it must prove all elements of an offense, that Scott knew the illicit nature of the substance by the operation of an unanswered presumption (or inference) raised by proof that he possessed the substance.

In *State v. Medlin*, 273 So. 2d 394 (Fla. 1973), the supreme court held that proof that the defendant committed the prohibited act (delivery of a controlled substance) raised a rebuttable presumption that the defendant was aware of the nature of the drug delivered. Although *Chicone* places the burden of proof on the State to prove knowledge of the illicit nature of the contraband, it does not, at least expressly, overrule the *Medlin* presumption. Therefore, it appears that the defendant has the burden of going forward with an explanation as to why he was unaware of the illicit nature of the substance (man, I don't know what cannabis looks like) in order to overcome this presumption. In this regard, the defendant's obligation seems not unlike one found in possession of recently stolen property who must explain why he did not know the property was stolen. Section 812.022(2), Florida Statutes (1997); *Currington v. State*, 711 So. 2d 218 (Fla. 5th DCA 1998); *J.J. v. State*, 463 So. 2d 1168 (Fla. 3d DCA 1984). Scott's testimony that someone planted the cannabis in his locker, not believed by the jury, does not negate his knowledge of the illicit nature of the substance presumed by the jury's determination that he knowingly possessed the cannabis.

Even if under *Chicone* the court should have given the requested instruction, its failure to do so, when the presumption of Scott's knowledge of the illicit nature of the contraband was not explained during trial, is harmless error. In this case, unlike *Chicone,* there was no factual basis to create an issue as to whether Scott knew of the illicit nature of the substance in order to warrant the requested instruction.[2]

Because of *Chicone*, we certify the following questions as being of great public importance:

> DOES THE ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE RAISE A REBUTTABLE PRESUMPTION (OR INFERENCE) THAT THE DEFENDANT HAD KNOWLEDGE OF ITS ILLICIT NATURE? IF SO, IF THE DEFENDANT FAILS TO RAISE THE ISSUE THAT HE WAS UNAWARE OF THE ILLICIT NATURE OF THE SUBSTANCE, IS HE NEVERTHELESS ENTITLED TO A *CHICONE* INSTRUCTION? CAN THE FAILURE TO GIVE THE REQUESTED INSTRUCTION BE HARMLESS ERROR?

The State concedes error in the score sheet and we remand for its correction and for re-sentencing.

AFFIRMED in part; REVERSED in part; and REMANDED for re-sentencing. (GRIFFIN, C.J., SHARP, W., and PETERSON, JJ., concur. GOSHORN, J., concurs in result. DAUKSCH, J., dissents in part; concurs in part, with opinion in which COBB, THOMPSON, and ANTOON, JJ., concur.)

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[1]*Chicone v. State*, 684 So. 2d 736 (Fla. 1996).

[2]While we agree with the result of *Leaks v. State*, 23 Fla. L. Weekly D1997 (Fla. 2d DCA Aug. 26, 1998), we have some concern with the opinion's use of the term "Leaks' defense" in relation to Leaks' position that he did not possess the cocaine. This may imply that the State has no requirement to prove the defendant's knowledge of the illicit nature of the substance even though *Chicone* has made such knowledge a portion of an element of the charge and not an affirmative defense. However, in *Leaks* as in our case, the *Medlin* presumption, unexplained, supplied the necessary proof. Thus, in *Leaks* and in this case the only issue is whether the requirement to give an instruction (if it is a requirement) concerning the defendant's knowledge of the illicit nature of the substance is subject to the harmless error rule.

(DAUKSCH, J., dissents in part; concurs in part.) I respectfully dissent.

Chicone has held that knowledge is an element of the offense of possession. Not to instruct the jury on an element of the offense cannot be harmless error, in my opinion. *See, Williams v. State*, 366 So. 2d 817 (Fla. 3d DCA), *cert. denied*, 375 So. 2d 912 (Fla. 1979); *Gerds v. State*, 64 So. 2d 915 (Fla 1953) (failure to correctly and intelligently instruct a jury as to each element of the offense which the state is required to prove cannot be treated with impunity under

the guise of harmless error).

I concur with the majority decision to certify the question. (COBB, THOMPSON and ANTOON, JJ., concur.)

* * *

Criminal law—Search and seizure—Arrest of defendant for resisting officer without violence after defendant provided false name to officer was invalid where there was no testimony that officer was impeded in any way by false information, information was corrected before it did any harm, and defendant was not legally detained—Error to deny motion to suppress contraband found in defendant's purse

DEBRA SUE BURDESS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-298. Opinion filed December 11, 1998. Appeal from the Circuit Court for Osceola County, Anthony H. Johnson, Judge. Counsel: James B. Gibson, Public Defender, and Leonard R. Ross, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Mary G. Jolley, Assistant Attorney General, Daytona Beach, for Appellee.

(ORFINGER, M., Senior Judge.) Reserving her right to appeal the dispositive motion to suppress, appellant entered a plea of no contest to possession of cocaine and drug paraphernalia, following which adjudication of guilt was withheld and she was placed on drug offender probation. She contends that her arrest was unlawful resulting in an illegal search. We agree and reverse.

The arresting officer was given a tip that a suspect in some recent thefts was staying at a certain motel. When he arrived there he saw appellant, whose description matched that of the suspect, and who ran when she saw him. He testified that when he approached appellant he had no reason to detain her, and when he asked if he could have a minute of her time, she agreed but was free to leave at any time. When asked, she first gave her name as Debbie Diane Thomas, but when a passerby recognized her as Debbie Burdess, she admitted to the officer that her name was Debbie Burdess and gave her correct date of birth. The officer testified that no more than three minutes elapsed between the time he first approached her and the time he learned her correct name, but he arrested her for resisting an officer without violence, pursuant to section 843.02, Florida Statutes (1997). A search of her purse then revealed the contraband.

There was no testimony that the officer was impeded in any way by the giving of the original false information. No reports were prepared based on it, nor was any action taken in reliance on it. The information was corrected before it did any harm, and appellant was not being legally detained. *See Steele v. State*, 537 So. 2d 711 (Fla. 5th DCA 1989);[1] *C.T. v. State*, 481 So. 2d 9 (Fla. 1st DCA 1985); *P.P. v. State*, 466 So. 2d 1140 (Fla. 3d DCA 1985). *Cf. Caines v. State*, 500 So. 2d 728 (Fla. 2d DCA 1987) (giving of false name resulted in filing of information against and court appearance of wrong person).

REVERSED. (DAUKSCH and COBB, JJ., concur.)

[1]*Steele* has been interpreted to hold that a person is not obligated to give his or her correct identity to an officer unless that person is legally detained. *See D.G. v. State*, 661 So. 2d 75, 76 (Fla. 2d DCA 1995). *See also, Robinson v. State*, 550 So. 2d 1186 (Fla. 5th DCA 1989).

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Criminal law—Judges—Disqualification—Trial court correctly determined that unsigned motion to disqualify was legally insufficient

WILBUR GAINES, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-190. Opinion filed December 11, 1998. Appeal from the Circuit Court for Brevard County, Tonya Rainwater, Judge. Counsel: James B. Gibson, Public Defender, and Rebecca M. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) A jury found Wilbur Gaines guilty of armed burglary, petit theft, possession of less than 20 grams of cannabis, and obstructing or opposing an officer without violence. Mr. Gaines appeals his sentences arguing that the trial court erroneously denied his motion to disqualify the trial judge. We affirm.

The trial court correctly determined that Mr. Gaines' motion to disqualify the trial judge was legally insufficient. Rule 2.160(c), Florida Rules of Judicial Administration provides that motions to disqualify trial judges "shall be sworn to by the party by signing the motion under oath or by a separate affidavit." Mr. Gaines' failure to sign the motion rendered it insufficient.

AFFIRMED. (DAUKSCH and GOSHORN, JJ., concur.)

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Criminal law—Robbery with firearm—Defendant's contention that trial court impermissibly acted as prosecutor by asking clerk of store which was robbed to identify the defendant as the robber and his contention that this questioning was part of a pattern exhibited by court which suggested to the jury that the court believed in the defendant's guilt were not preserved for review by objection—Judge's conduct did not rise to level of fundamental error—Even if error occurred, it was harmless in light of overwhelming evidence of guilt

EVERETT LEON NICHOLS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2444. Opinion Filed December 11, 1998. Appeal from the Circuit Court for Citrus County, J. Michael Blackstone, Judge. Counsel: James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Appellee.

(GRIFFIN, C.J.) Everett Leon Nichols ("defendant") timely appeals his conviction for robbery with a firearm. We affirm.

On October 4, 1996, the clerk of a convenience store in Crystal River, Florida was robbed at gunpoint. The robber walked away from the scene on foot, carrying a bag full of money. The robber was followed at a distance by a customer of the store, who had come on the scene only after the robbery had occurred. The customer ultimately flagged down police and identified defendant as the robber. Defendant was arrested for the robbery and was identified as the robber later that same night by the store clerk. He also confessed to the crime shortly after his arrest. The money taken during the robbery was found in a bag in the woods.

Defendant was charged by information with robbery with a firearm.[1] He was tried before a jury on June 26, 1997. At trial, the store clerk testified on direct that he had positively identified defendant as the robber on the night of the robbery. He stated:

> Q. Later that evening, did you have an opportunity to identify the defendant in this case?
>
> A. Yes, I did.
>
> Q. Were you able to do that?
>
> A. Yes, I identified him.
>
> Q. And you made sure that was the same person that had robbed you?
>
> A. Yes.

Before the store clerk stepped down from the stand, the court called the prosecutor to the bench and asked whether she wanted to have the clerk identify the defendant. She responded cryptically, "I can't." The court then asked the clerk to point out the person who had robbed him, whereupon the clerk positively identified the defendant. No objection of any kind was made to the question posed by the court, nor to the answer given by the clerk.

Defendant was convicted of robbery with a firearm, but was acquitted of the two remaining charges on appeal. Defendant contends on appeal that the trial court reversibly erred by asking the store clerk, Cormier, to identify the defendant as the robber. He asserts that in asking this question the trial court impermissibly acted as prosecutor. He also contends that this was part of a pattern exhibited by the court which suggested to the jury that the court believed in the defendant's guilt.

These arguments have not been preserved for review, since defense counsel failed to object to questioning by the court. This does not rise to the level of fundamental error; thus, in the absence of a timely objection, the issue cannot be a basis for reversal. *See, e.g., Mack v. State*, 270 So. 2d 382 (Fla. 3d DCA 1972). Although a trial judge is not permitted to enter into the proceedings and become a participant, since this calls into question his neutrality, *see*