IN THE SUPREME COURT OF FLORIDA

RICHARD BRYANT WEDDELL,

Petitioner,

v.

STATE OF FLORIDA,

Petitioner.

CASE NO. SC01-751

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Petitioner, Richard Bryant Weddell, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of nine volumes, none of which has a number. References will be to "R." or "S.R." for the record and supplemental record or to "T, __" for the trial transcript. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number. An appendix, with proper index, is affixed hereto.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts, subject to the following additions and clarifications.

1. James Ward, the Eastern Shipbuilding Group supervisor, testified that the Glennco Insulation workers were working "about a hundred foot, hundred five foot, something like that" from the site where Diep Nguyen was working. T, 35. The Initial Brief characterizes his testimony as saying that Glennco was situated 500 feet from Nguyen's location. IB at 5.

2. Diep Nguyen, the Eastern Shipbuilding Group employee whose DeWalt 7-inch grinding tool was stolen, testified that he left

the tool where he was working, which was "about a hundred, hundred five feet away" from where Glennco employees were working. T, 44, 47. The Initial Brief characterizes his testimony as saying that Glennco was situated 500 feet from his location. IB at 6.

SUMMARY OF ARGUMENT

ISSUE I: The trial court did not err in denying petitioner's motion for judgment of acquittal made at the close of the State's case in chief. The State had adduced competent substantial evidence that appellant sold a recently stolen grinding machine at a pawn shop.

ISSUE II: The trial court did not err in denying petitioner's motion for judgment of acquittal made at the close of all the evidence. Rather than satisfactorily explaining his possession of the grinding machine, petitioner's account made the State's case stronger, rather than weaker.

ISSUE III: The standard jury instruction concerning possession of recently stolen property is not an impermissible comment upon evidence. Petitioner has cited no Florida case in which giving a standard jury instruction in the proper instance was commentary on the evidence.

Fenelon v. State, 594 So. 2d 292 (Fla. 1992) did not so hold and its holding should not be extended to reach such a result, which would be unfair to the state and to the trial judge. The instruction in question and other similar instructions have been approved by this Court since Fenelon was decided.

The Court should, therefore, answer the certified question in the negative.

In any event, any error would be harmless.

ISSUE IV: It was not error to give the standard jury instruction on possession of recently stolen property, since that

instruction does not place the burden of persuasion on the accused nor does it create a mandatory presumption.

ISSUE V: The prosecutor's argument that the defendant stole the grinder is a fair comment on the evidence presented and is an inference permitted by statute, and thus was not error at all, let alone fundamental error. The argument concerning the alleged comment upon silence is not cognizable because such claims cannot constitute fundamental error.

ISSUE VI: The trial court did not err in permitting the State to substitute photographs of the grinder for the machine itself into the record. Having the actual machine to hold and examine would not aid an appellate court in its deliberations, inasmuch as appellate courts decide legal, rather than factual, issues.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY DENYING THE Petitioner'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF? (Restated)

A. PRESERVATION

Petitioner made a motion for judgment of acquittal based upon the argument he presents here; therefore, this issue is preserved for appellate review.

B. STATEMENT OF THE ISSUE

The State acknowledges that petitioner has stated the issue in neutral terms and has reflected a standard of review in his statement.

C. STANDARD OF REVIEW

The standard of review for a motion for judgment of acquittal is surprisingly difficult to pin down, owing in no small part to the direct intra-district conflict of decisions by the court below. Petitioner confuses the issue somewhat by asserting that a motion for judgment of acquittal is reviewed under the "competent substantial evidence test," but phrasing his statement of the issue in terms that suggest the standard is, in fact, a question of law.

Confusion, however, is understandable, inasmuch as Florida courts have developed the habit of using the term "competent substantial evidence" in two different contexts, one as a standard of appellate review and one as a quantum of evidence.

A standard of review is deference that an appellate court pays to the trial court's ruling. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 468 (1988); Timothy P. O'Neill & Susan L. Body, *Taking Standards of Appellate Review Seriously: A Proposal to Amend Rule 341*, 83 Aalborg 512, 516 (Oct. 1995). There are three main standards of review: *de novo*, or as a matter of law; the competent substantial evidence test, generally reserved for questions of fact; and, for all other issues, abuse of discretion. PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.1 (2d ed. 1997). The competent substantial evidence test is the most deferential, the *de novo* standard is the least.

The problem is that "competent substantial evidence" is both a standard of review for factual determinations and a legal test for granting judgment of acquittals. Thus, when attempting to state the standard of review for an appellate court reviewing a trial court's order on a judgment of acquittal, confusion can result.

Federal courts avoid this problem by using the term "clearly erroneous" in place of "competent substantial evidence" when discussing standards of review and Florida courts have also used this term on occasion. Copeland v. State, 717 So.2d 83, 85 (Fla. 1st DCA 1998)(using term "clearly erroneous"); Melbourne v. State, 679 So.2d 759 (Fla. 1996)(using term "clearly erroneous"); Lags v. State, 640 So.2d 151, 153 (Fla. 2d DCA 1994); Mountie v. State, 679 So.2d 25 (Fla. 4th DCA 1996); Towner v. State, 713 So.2d 1030 (Fla. 5th DCA 1998).

The phrase "competent, substantial evidence," in the context of a judgment of acquittal, is the legal test, not a standard of review. Whether there is competent and substantial evidence is the question the appellate court asks itself, not the amount of deference it accords to the trial court's answer. Using a same phrase both as an appellate standard of review and as a legal test for whether judgement of acquittal is proper enhances the danger of confusion on the part of bench and bar, as this case demonstrates.

Numerous authorities, including Judge Padovano, believe that the standard is *de novo*. PHILLIP PADOVANO, *Standards of Review in Criminal Cases* 13. In State v. Williams, 742 So. 2d 509, 511 (Fla. 1st DCA 1999) this court unequivocally stated: "We have de novo review of the record to determine whether sufficient evidence supports the jury's verdict." Other panels of this court, however, have asserted just as authoritatively that the standard is abuse of discretion. Whetstone v. State, 778 So. 2d 338, 341 (Fla. 1st DCA 2000), Cox v. State, 764 So. 2d 711, 712 (Fla. 1st DCA 2000), and Lee v. State, 745 So. 2d 1036, 1037 (Fla. 1st DCA 1999) all state unequivocally that the standard of review of a trial court's denial of a motion for judgment of acquittal is whether the trial court abused its discretion.

Obviously, both these lines of cases cannot be right. The State submits that the standard of review could best be described as limited *de novo*. A trial court's discretion in granting a judgment of acquittal is greatly circumscribed. It must consider

all the evidence, and inferences that could be drawn from that evidence, in the light most favorable to the State and, if there is evidence supporting each element of the offense, the court should deny the motion. See, e.g., Whetstone, 778 So. 2d at 341.

Since the appellate court stands in the same position, its discretion is somewhat circumscribed, as well. "Trial and appellate courts are equally capable of making the legal judgment whether the evidence is legally sufficient to allow the state's case to go to the jury and support a verdict." State v, Smyly, 646 So. 2d 238, 241 (Fla. 4th DCA 1994) (footnote omitted). Inasmuch as both courts are equally situated, it follows that they also are legally bound by the same constrictions.

The State urges this Court to clarify the standard for appellate review of a trial court's order on a motion for judgment of acquittal. If it *is* abuse of discretion it makes a considerable difference. Abuse of discretion means that the appellate court will overturn the judge's order only if it is "arbitrary, fanciful, or unreasonable." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

D. BURDEN OF PERSUASION

Petitioner bears the burden of demonstrating prejudicial error. According to statute:

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

§924.051(7), Fla. Stat. (2000); see also, Savage v. State, 156 So. 2d 566, 568 (Fla. 1st DCA 1963) (Judgments are presumed correct and appellants carry the burden to demonstrate harmful error arising from actions of the trial judge.)

The trial court's decision, not its reasoning, is reviewed on appeal. Caso v. State, 524 So. 2d 422, 424 (Fla. 1988), cert. denied, 488 U.S. 870 (1988)(holding that a trial court's decision will be affirmed even where based on erroneous reasoning). A trial court may be "right for the wrong reason." Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999).

E. THE TRIAL COURT'S RULING

The trial court denied the motion for judgment of acquittal at the close of the State's case in chief. T, 67.

F. THE APPELLATE COURT'S DECISION

The court below affirmed the judgment and conviction, but did not address this issue. Weddell v. State, 780 So. 2d 324 (Fla. 1st DCA 2001). (App. A).

G. MERITS

Petitioner argues that the trial court erred by denying the motion for judgment of acquittal made at the close of the State's case in chief. The State respectfully disagrees. There was competent, substantial evidence going to each element of the

charge of dealing in stolen property, and this evidence rebutted any reasonable hypothesis of innocence. Therefore, the trial court did not err in denying the motion for judgment of acquittal.

In requesting a motion for judgment of acquittal, an appellant admits all facts in evidence and all reasonable inferences therefrom. Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); Anderson v. State, 504 So.2d 1270, 1271 (Fla. 1st DCA 1986). A "judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment." Terry v. State, 668 So.2d 954, 964 (Fla. 1996). In ruling on a motion for a judgment of acquittal, the trial court is required to consider all evidence and inferences in the light most favorable to the State. Thomas v. State, 589 So.2d 392 (Fla. 1st DCA 1991); Thompson v. State, 588 So.2d 687 (Fla. 1st DCA 1991).

Petitioner alleges that the State's evidence is deficient on the issue of his intent and knowledge regarding the use of a hoax bomb during the robberies. A motion for judgment of acquittal is generally not appropriate when intent is at issue. As the court in Brewer v State, 413 So.2d 1217 (Fla. 5th DCA 1982), rev. denied, 426 So.2d 25 (Fla. 1983) stated:

> Although the State must prove intent just as any other element of a crime, *Uber v. State*, 382 So.2d

> 1321 (Fla. 1st DCA 1980), a defendant's mental intent is hardly ever subject to direct proof. Instead, the State must establish the defendant's intent (and a jury must reasonably attribute such intent) based on the surrounding circumstances in the case. Keeping in mind the test to be applied to a motion for judgement of acquittal, a trial court should rarely, if ever, grant a motion for judgment of acquittal based on the State's failure to prove mental intent.

Id. at 1219-20. See also State v. Hurley, 676 So.2d 1010, 1011 (Fla. 2d DCA 1996).

In its case in chief the State introduced the following evidence:

On July 20, 1998, Eastern Shipbuilding Group put into service an electric-powered grinding tool, a DeWalt 7-inch model. T, 25.

Sometime thereafter, the tool was checked out to a worker named Diep Nguyen, who worked with it for one day, grinding seams on the bow of a ship that was being manufactured. T, 43-44. Mr. Nguyen put the grinder down at the end of his shift, placing it beneath the wood block holding the bow of the ship, and when he reported to work the next day, it was gone. T, 44-45. It was left approximately 100 to 105 feet from where a subcontractor called Glennco Construction was working. T, 44.

At 1 p.m., August 3, 1998, Petitioner went to work at Eastern Shipbuilding as an employee of Glennco, beginning a 10-hour shift that ended at 11:30 p.m. that night. T, 50-51. At 9:15 a.m. August 5, 1998, Petitioner sold the Eastern Shipbuilding grinder that Diep Nguyen had checked out to a pawn shop for $75.00. T, 17-18. Petitioner told the pawn shop clerk that he had had the

grinder for "awhile." T, 56. Petitioner stopped working on the Glennco project at Eastern Shipbuilding on August 6. T, 51.

On September 21, 1998, Mr. Nguyen found the grinder in the pawn shop. T, 46. The Eastern Shipbuilding identification numbers had been ground off of it. T, 46.

Thus, at the close of the State's case in chief the State had shown that Petitioner had sold the stolen grinder to a pawn shop. Thus, it had made a prima facie case for dealing in stolen property, which has two elements: (1) buying or selling property (2) that one knows or should know is stolen.

Petitioner's argument is built around the testimony of Mr. Nguyen, which he characterizes as being that he checked the grinder out on the very day it went into service or the day after, i.e., July 20 or 21. Since it went missing the next day, and since Petitioner could not have come into contact with it until August 3, at the earliest, and since when it was found there was nothing that identified it as the property of Eastern Shipbuilding, he posits that there is insufficient evidence that he knew it was stolen. That is, there was ample time for someone else to have stolen the grinder, removed any identifying marks, and then sold it to him.

First, Petitioner's contention is based on the somewhat vague testimony Mr. Nguyen gave on cross examination regarding the date that he checked out the grinder. Mr. Nguyen was far from positive about the date, however:

Q – When you found this grinder in the pawn shop that was several months after it went missing; wasn't it?

A – Yes, sir.

Q – And you don't remember exactly when you checked it out?

A – No.

Q – But you found it September 21. When do you mean by several months, two or more months?

A – Yeah, something like that. I don't know.

Q – More than one month?

A – I know it is more than two, two at least.

T, 47.

Obviously, it could not have been much more than two months; the grinder went into service on July 20, 1998 and was recovered on September 21, 1998. Given the uncertainty of Mr. Nguyen's testimony, it is impossible to say with certainty what date he checked the tool out.

Moreover, it does not matter insofar as whether there was evidence rebutting the reasonable hypothesis of innocence. Mr. Nguyen could have taken the grinder the first day it was available and it could have been stolen by another that night and then acquired by Mr. Weddell with the full knowledge that it was stolen. It also *could* be otherwise, but there nevertheless is considerable circumstantial evidence from which the jury could infer that Petitioner knew the grinder was stolen property.

In moving for a judgment of acquittal, the defendant admits the facts adduced in evidence and every conclusion favorable to

the State that can be fairly and reasonably inferred from those facts. Spinkellink v. State, 313 So.2d 666, 670 (Fla.1975). There are several inferences at work here.

First, the law permits the jury to draw an inference from the stipulated fact that Petitioner sold a stolen DeWalt 7-inch grinder to a pawn shop. Section 812.022(2), Florida Statutes, states: "Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen."

Moreover, the State established that Petitioner was working approximately 100 feet from the place where Mr. Nguyen left the grinder, and that Mr. Nguyen quit work at about 6:30 p.m., in the middle of Petitioner's 1 p.m.-11:30 p.m. shift. T, 45, 51. Thus, he was in a position to have seen Mr. Nguyen leave the grinder behind or even to come upon it by accident.

There also is the fact that Mr. Weddell pawned the grinder at 9:15 a.m. on August 5, 1998 (T, 55) after having worked until 11:30 p.m. on August 4, 1998, installing insulation on exhaust pipes from a ship under construction (T, 35, 53). This work apparently took place in a "prefab" building and a lean-to. (T, 34-35, 44 53. One can draw an inference that a person who puts in a 10-hour shift of manual labor in Panama City in August, quits work at 11:30 p.m., and then by 9:15 the next morning is at a pawn shop, is suspiciously eager to sell.

Moreover, the grinder was practically new, and yet Petitioner accepted less than half its original price ($75 compared with the $158 that Eastern paid for it), which also suggests that Petitioner knew he was dealing in stolen property. Section 812.022(3), Florida Statutes, states: "Proof of the purchase or sale of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property knew or should have known that the property had been stolen." While there was no testimony about the fair market value and while the jury was not instructed on this point, the fact remains that there was a substantial difference in the price of the grinder as new, and what Petitioner sold it for.

The State met its burden in this case. As this court has noted:

> in a circumstantial evidence case the state is not required to rebut conclusively every possible variation of events that could be inferred from the evidence, but is required only to introduce competent evidence that is inconsistent with the defendant's theory of events; once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.)

Rewis v. State, 740 So. 2d 1251, 1252 (Fla. 1st DCA 1999) (citing State v. Law, 559 So. 2d 187 (Fla. 1989). Thus, the trial court did not err in denying the motion for judgment of acquittal after the close of the State's case in chief.

ISSUE II

DID THE TRIAL COURT ERR BY DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE? (Restated)

A. PRESERVATION

Petitioner moved for a judgment of acquittal at the close of all the evidence and made the same arguments as he presents here; thus, he preserved this issue for appellate review. T. I, 93

B. STATEMENT OF THE ISSUE

The State acknowledges that petitioner stated the issue in neutral terms, reflecting a standard of review.

C. STANDARD OF REVIEW

The standard of appellate review for a judgment of acquittal made at the close of all the evidence is the same as for a motion made at the close of the State's case in chief. As set out above, the State submits that the standard should be a tightly circumscribed *de novo* review.

D. BURDEN OF PERSUASION

The State relies upon is argument under Issue I-D.

E. THE TRIAL COURT'S RULING

The trial court ruled that the defendant's case in chief had not entitled him to a judgment of acquittal. T, 92-93.

F. THE APPELLATE COURT'S DECISION

The court below affirmed the judgment and conviction, but did not address this issue. Weddell v. State, 780 So. 2d 324 (Fla. 1st DCA 2001). (App. A).

G. MERITS

In his second issue, Petitioner argues that the trial court erred in denying the motion for judgment of acquittal after he had presented his case. The State respectfully disagrees. The defendant's case presented factual disputes for the jury to decide, but did not refute the evidence that the State had adduced in its case in chief. Indeed, it buttressed the State's case, rather than tending to disprove it. The defendant testified that he bought the grinder for $50 the day before he sold it, and he produced what purported to be a receipt for that sale. A close examination shows how this testimony made his case weaker.

1. His testimony established that he had told the pawn shop clerk a falsehood. She testified that he told her he had owned the grinder "awhile," whereas his testimony was that he bought it one day and sold it the next, or the day after that at the latest. Thus, there was now evidence that he was trying to mislead the pawn shop clerk, which tends to show that he knew the grinder was stolen (if he did not, in fact, steal it himself).

2. His testimony was that bought a nearly new $158 grinder for $50 from a stranger. Buying goods at far below their original price is evidence that he knew the goods were stolen.

3. He said he arrived for work approximately one hour earlier than scheduled, at noon, in Panama City, in August, after having worked 10 hours the day before.

4. He chose the area outside Eastern Shipbuilding's main gate to while away the time before work.

5. A stranger approached him and asked him if he wanted to buy a grinding tool at what apparently was such an attractive price he did not dicker. There is no evidence that petitioner could have made use of such a thing in his work (Mr. Nguyen, a welder, used the machine to grind down seams; petitioner was an insulation installer), so he must have recognized that he could resell it at a profit. Yet the price did not make him think it was stolen.

6. He took pains to get a receipt from this man, but did not get an address, driver's license number, or telephone number, so that he could get in touch with him later, should the need arise, thus casting doubt about his testimony and his truthfulness and honesty. He likewise admitted that he did not actually produce this receipt until March of 1999, some seven months after the alleged transaction.

In his brief petitioner argues that the fact that the receipt had the serial number written on it proves that it was not fabricated because "it is highly unlikely that he would have been able to remember the manufacturer's serial number so as to include it on the receipt." IB at 22. This assertion ignores the fact that the same serial number was written on the pawn ticket, a copy of which, it is logical to assume, was given to petitioner via discovery. S.R. 84, 85.

The form of the receipt is itself somewhat suspect; it resembles a generic order slip. Petitioner did not explain how he happened to have such an item with him as he went to work as a day laborer installing insulation at a shipyard.

Petitioner called a handwriting expert to prove that he did not write the receipt, but did sign it. Such evidence proves little, inasmuch as an accomplice could have written the receipt, but the fact that he would go to such trouble suggests that he knew the receipt was not, in and of itself, especially credible.

In sum, the petitioner's case, far from weakening the prosecution, actually provided substantial support for the State's allegations. The exonerating evidence not only was not reasonable on its face it provided sufficient evidence of guilt. Cf. Dudley v. State, 511 So. 2d 1052 (Fla. 3d DCA 1977).

The rule on circumstantial evidence does not change when a defendant raises his hypothesis of innocence by his own testimony. As this Court has said:

> The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict.

Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). In State v. Law, 559 So. 2d 187, 189 (Fla. 1989), this Court stated the trial judge's task in deciding a motion for acquittal in a circumstantial evidence case:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer

> guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Courts are not bound to grant acquittals to defendants simply because they explain how they came to possess stolen property. As noted in Smith v. State, 742 So. 2d 352, 354 (Fla. 5th DCA 1999):

> Possession of recently stolen property gives rise to two separate inferences:
>
> First, that the person in possession of the property stole it; and second, the person knew or should have known that the property was stolen. § 812.022(2), Fla. Stat. *T.S.R. [v. State*, 596 So.2d 766 (Fla. 5th DCA 1992)]; *Scobee v. State*, 488 So.2d 595 (Fla. 1st DCA 1986). The statutory presumption, standing alone, is sufficient to sustain the conviction. *T.S.R.* However, the possession must be unexplained or the explanation given must be unsatisfactory. *N.C. v. State*, 478 So.2d 1142 (Fla. 1st DCA 1985).
>
> The reasonableness of the defendant's explanation is generally a question of fact for the jury. *Boone v. State*, 711 So. 2d 594, 596 (Fla. 1st DCA 1998); *Coleman v. State*, 466 So. 2d 395, 397 (Fla. 2d DCA 1985). But where a reasonable explanation for possession of recently stolen property is totally unrefuted, and there is no other evidence of guilt, the court must grant a directed verdict for the defendant. *Coleman* at 397. The initial determination that the explanation is reasonable or credible is left to the judge. If, however, the explanation is only arguably reasonable, or if there is any evidence which places it in doubt, it should be left to the jury to determine the defendant's guilt, and an instruction on the inference of possession of recently stolen property is proper.

Anderson v. State, 703 So. 2d 1105 (Fla. 5th DCA 1997).

(Footnote omitted)

As noted above, the State had ample evidence to refute the explanation the defendant provided. The grinder disappeared from an area not far from where petitioner was working. Petitioner admitted buying a nearly new grinder for less than one-third the purchase price. Petitioner sold the grinder under circumstances that suggest someone selling stolen goods.

Petitioner relies upon cases that state the general proposition, as set out in Smith, that a reasonable explanation of how one came to posses recently stolen property may, in the proper instance, defeat the inference of knowledge and overcome a particularly weak prosecution case. His reliance upon Jackson v. State, 736 So. 2d 77 (Fla. 4th DCA 1999) and R.D.S. v. State, 446 So. 2d 1181 (Fla. 3d DCA 1986) is misplaced, however. In each of those cases, the defendant had merely purchased a stolen vehicle (Cadillac car in Jackson, moped in R.D.S.). There was no evidence in either case of the defendant getting an exceptional bargain on his vehicle, nor did either defendant immediately re-sell his purchase and, unlike here, no suspicious behavior.

Essentially, petitioner suggests that the trial court must accept his explanation. That proposition has repeatedly been rejected. See, e.g., Ridley v. State, 407 So. 2d 1000, 1001 (Fla. 5th DCA 1981).

ISSUE III

DID THE TRIAL COURT REVERSIBLY ERR BY READING THE STANDARD JURY INSTRUCTION ON PROOF OF PROPERTY RECENTLY STOLEN, WHERE THE DEFENDANT CLAIMED THE INSTRUCTION WAS AN IMPERMISSIBLE COMMENT UPON EVIDENCE? (Restated)

A. PRESERVATION

Petitioner raised the same arguments below as here and, therefore, preserved this issue for appellate review.

B. STATEMENT OF THE ISSUE

Effective January 1, 2001, Florida Rule of Appellate Procedure 9.210(b)(5) requires that arguments on each issue include the applicable appellate standard of review for the claimed trial court error. Statements of the issue should be concise, accurate, and scrupulously fair. They should incorporate applicable appellate standards of review, including preservation or non-preservation of the issue and argument in the trial court, and be neutrally cast to present only the appellate question to be resolved. The state declines to accept petitioner's statement of the issues here because it does not meet these professional criteria by suggesting that the standard of review is *de novo*.[1]

C. STANDARD OF REVIEW

On appeal, the trial court's ruling on a jury instruction is presumed correct. "The trial court has a duty to determine the

[1] Fla. R. App. P. 9.210(b)(5); Kneale v. Kneale, 67 So. 2d 233 (Fla. 1953); U.S. Sup. Ct. R. 24(1)(a), Robert Stern, APPELLATE PRACTICE IN THE UNITED STATES, § 10.9 (2d ed 1989) and Frank E. Cooper, *Stating Issues in Appellate Practice,* 49 A.B.A.J. 180 (1963).

applicable substantive law and instruct the jury on that law, and the trial court's decision on these matters has historically enjoyed a presumption of correctness on appeal. . . ." Shimek v. State, 610 So.2d 632, 638 (Fla. 1st DCA 1992).

A trial court is afforded discretion in determining whether to use a standard jury instruction; thus, to prevail, petitioner must establish that the trial court abused its discretion. Williams v. State, 591 So. 2d 319, 320 (Fla. 3d DCA 1991); see also, Sheppard v. State, 659 So. 2d 457 (Fla. 5th DCA 1995)("Trial judges have wide discretion in decisions regarding jury instructions, and the appellate courts will not reverse a decision regarding an instruction in the absence of a prejudicial error that would result in a miscarriage of justice"); Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1987)(error must have "resulted in a miscarriage of justice.")

D. BURDEN OF PERSUASION

The State relies upon its argument set forth under Issue I-D.

E. THE TRIAL COURT'S RULING

The trial judge rejected petitioner's argument regarding the instruction on possession of recently stolen property. T, 96.

F. THE APPELLATE COURT'S RULING, OPINION, CERTIFIED QUESTION

The court below affirmed petitioner's conviction and commented only upon this issue. Weddell v. State, 780 So. 2d 324 (Fla. 1st DCA 2001). (App. A) The Court noted: "Paraphrasing the opinion in *Fenelon v. State*, 594 So. 2d 292, 294 (Fla. 1992), we can think of no valid policy reason why a trial judge should be permitted

to comment on evidence of possession of recently stolen property as opposed to any other evidence adduced at trial." Id. It certified the following question as being of great public importance: "IS THE FLORIDA STANDARD JURY INSTRUCTION ON 'POSSESSION OF PROPERTY RECENTLY STOLEN' AN IMPERMISSIBLE COMMENT ON THE EVIDENCE?" Id.

G. MERITS

This Court should answer the certified question in the negative. Petitioner argues that the standard jury instruction given in theft and dealing in stolen property cases is an impermissible comment upon the evidence that invades the province of the jury. The State respectfully disagrees. First, standard instructions should be entitled to a presumption of correctness, as apparently they have been. Petitioner has cited no case in which a standard jury instruction was deemed to have constituted judicial commentary on the evidence.

Moreover, the standard instruction in no way suggests judicial favor toward one outcome or another, does not emphasize that evidence to the jury, and is not a comment upon credibility. If it is a comment upon the evidence, then, it would be deemed so only because the jury might misunderstand it.

Petitioner's argument is based upon Fenelon v. State, 594 So. 2d 292 (Fla. 1992) (App. B), wherein this Court eliminated the "flight" instruction from Florida's criminal jurisprudence for all future cases. The Court commented:

> In reconsidering the flight instruction, we can think of no valid policy reason why a trial judge

> should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial. Indeed, the instruction has long been eliminated from the Florida Standard Jury Instructions in Criminal Cases, apparently in an effort to eliminate "[l]anguage which might be construed as a comment on the evidence."

Id. (citation omitted).

The question this case presents is whether the Court meant that any instruction wherein the trial judge informs the jurors that proof of one fact may constitute evidence tending to prove another is, *ipso facto*, a comment upon the evidence. The State submits that it is not. Moreover, the State submits that Fenelon does not stand for so broad a proposition and should not be construed to have eliminated a standard jury instruction that has been approved since that decision was issued.

1. The "Comment" Language in Fenelon Was Dicta.

The comment quoted above may, indeed, seem to suggest that any time a trial court instructs the jury as to an inference the court has commented upon the evidence. A closer examination of Fenelon, however, shows that this comment was merely *obiter dicta* and not the Court's holding.

The Court's actual reasoning was that the flight instruction has been disapproved in other jurisdictions (594 So. 2d at 294), that there were problems "deciding when 'leaving' or 'fleeing' actually indicates consciousness of guilt," (id.) "there is much disagreement as to what kind and what quantum of evidence will support an instruction on flight," among the various courts, id. at 295. Thus, what the Court relied upon was not the fact that

the instruction might be seen as commentary upon the evidence but, rather, that the flight instruction had lived out its usefulness and was troublesome in practice.

At least one case, Anderson v. State, 703 So. 2d 1105 (Fla. 5th DCA 1998, that the instruction here is not a comment on evidence. No court has ever held that Fenelon stood for the proposition petitioner champions, though individual judges have expressed differing opinions. See Washburn v. State, 683 So. 2d 533, 534 (Fla. 4th DCA 1996), Pariente, J., dissenting).

2. Fenelon Should Be Limited to its Facts.

The issue in Fenelon was not the instruction in question here or any of its close kin involving robbery and theft. Fenelon involved a flight instruction, which, in that particular case, read, in pertinent part: "And the rule is when a suspected person in any manner endeavors to escape or by threatened prosecution attempts by flight or concealment such may be then one of series of circumstances [from] which guilt may be inferred." 594 So. 2d at 293, n. 1. There are several differences between this instruction and what was given in this case.

First, the flight instruction permitted the jury to infer guilt. The instruction in this case permitted the jury to infer knowledge that the property was stolen: "I further charge you that proof of possession of property recently stolen gives rise to an inference that the person in possession of the property knew or should have known the property was stolen." III, 118-119. This may be a small difference – knowledge that the property is

stolen is an element – but it is significant when the question is what a jury may make of what the judge says.

Second, the flight instruction in Fenelon said "the **rule** is" that the jury may infer guilt from flight. There is no such language in the instruction on proof of possession of recently stolen property. Considering the nature of the purported "commentary" on the evidence – i.e., that the jury might infer from the judge's instruction that the judge favors a certain outcome or is asking the jurors to find the defendant guilty – a word like "rule" is loaded.

Third, the flight instruction had been excised from the standard criminal instructions, as the Fenelon court noted. Thus, it had no particular authority – and, indeed, as the Fenelon opinion noted, was subject to considerable debate.

Fourth, related closely to the third point, this Court has, post-Fenelon, approved the very instruction that petitioner complains of now. Standard Jury Instructions in Criminal Cases No. 92-1, 603 So. 2d 1175 (Fla. 1992).[2] Twelve other times, the Court has considered other standard jury instructions, and has not revisited this issue as regards the theft statute, the burglary statute or the instructions based on the presumption of impairment language from section 316.193, which applies in DUI prosecutions. (App. D). Clearly, the Court and the Committee on

[2] The instruction is set out under theft in the instructions, but is applicable in cases where all the State charges is dealing in stolen property (which is a statutory subset of theft, as section 812.014 makes clear.

Standard Jury Instructions in Criminal Cases have not, over nearly a decade, been concerned with this issue.

Tellingly, this Court has not hesitated to strike an instruction *sua sponte*. On its own motion this Court struck down a jury instruction that inconsistent exculpatory statements can be used to show consciousness of guilt. In Re Instructions in Criminal Cases, 652 So. 2d 814 (Fla. 1995). Thus, this Court has not previously showed any antagonism toward this instruction.

Fifth, the instruction has a statutory basis in section 812.022, Florida Statutes; the flight instruction was not part of a statute, and, therefore, completely the province of the courts to determine.

Finally, as noted above, there were other good reasons why the Fenelon court put a stop to the practice of giving the flight instruction. While this Court did make the remark that the flight instruction was a judicial comment upon evidence, the Fenelon holding was grounded on practicalities, rather than on abstractions, as set out above.

In contrast there are no such practical problems with the instruction on possession of recently stolen property, and the rules are rather well set out and understood. As this Court has explained in Consalvo v. State, 697 So. 2d 805, 815 (Fla. 1996):

> As with all jury instructions, there must be an appropriate factual basis in the record in order to give this instruction. *See, e.g.*, *Griffin v. State*, 370 So.2d 860, 861 (Fla. 1st DCA 1979) (holding that in prosecution for burglary it was reversible error to give instruction regarding possession of stolen property when evidence did not disclose that defendant was ever in possession of the property).

> This means two things. First, it must be shown that the defendant, when arrested, either failed to explain or gave an incredible or unbelievable explanation for his possession of the property. *Id.* Second, the instruction applies only where the property is undisputedly stolen and the question is who stole it. *See Jones v. State*, 495 So.2d 856, 857 (Fla. 4th DCA 1986). "[W]here there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken ... the question should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from ... the testimony." *Curington v. State*, 80 Fla. 494, 497, 86 So. 344, 345 (1920). It is improper to give this instruction when its only possible effect is to allow the jury to presume that a defendant is guilty because he was in possession of the property. This goes against the presumption of innocence inherent in our criminal justice system. *Jones*, 495 So.2d at 856.

For the above reasons, the State submits that this Court should limit Fenelon to its facts.

3. Fenelon Should not Apply to Standard Jury Instructions Given in the Proper Instance.

In the alternative, the State submits that Fenelon's reasoning should only be applied when a trial court gives a non-standard instruction. (There is no need to extend Fenelon to situations when a standard jury instruction is not warranted by the facts.)

In other words, the Court should hold that a trial judge who gives a jury instruction submitted by one of the parties or concocted by the court itself, is at risk of improperly commenting upon the evidence, whereas a judge who gives the standard instruction with the proper factual predicate has not erred. Indeed, case law shows that this is a *de facto* rule. For example in Feckse v. State, 757 So. 2d 548 (Fla. 4th DCA) rev. denied 776 So. 2d 276 (Fla. 2000) the trial court's

instruction was considered commentary upon the evidence. The judge gave a special instruction that effectively eliminated causation as an element in a DUI manslaughter case and, thus, "essentially directed a verdict on [the defense of lack of affirmative medical treatment by the victim] in favor of the state." 757 So. 2d at 549-50.

Similarly, in State v. Jones, 656 So. 2d 489 (Fla. 4th DCA 1995), the trial judge departed from the standard pretrial jury instruction on reasonable doubt and told jurors that the prosecution "does not, I repeat, stress, emphasize, the State does not have to convince you the jury to an absolute certainty of the Defendant's guilt. You do not have to be one hundred percent certain of the Defendant's guilt in order to find the Defendant guilty." 656 So. 2d at 490. This deviation from the law was found to be impermissible.

This Court has expressed the danger in giving non-standard instructions, especially in criminal cases. In Kelley v. State, 486 So. 2d 578, 584 (Fla. 1986), this Court considered a trial court's non-standard "dynamite" charge to a deadlocked jury and, while ultimately affirming the verdict, noted:

> As we have before recognized, the standard jury instructions should be utilized whenever appropriate, for a trial judge walks a fine line indeed upon deciding to depart. Instructions given to a jury at the extremely sensitive point it has reached a deadlock must be carefully scrutinized, and the risk is too great that an imprudent instruction may lay to waste the conscientious conduct of an otherwise entirely fair trial.

(Citations omitted.) A corollary is that a judge who does give the standard instruction is on safe ground, or should be.

Again, this appears to be the *de facto* rule. To reiterate: Petitioner has pointed to no case in which a proper application of the standard jury instruction was found to be an impermissible comment upon the evidence. What petitioner actually is urging – as his citations to Long v. State, 32 So. 870 (Fla. 1902) and Gunn v. State, 83 So. 511 (Fla. 1919) demonstrate this point – is that the instruction should not have been given in his particular case. Long and Gunn can stand for nothing more than the proposition that unless the possession is wholly explained away, then the jury instruction may be given. This is so because this Court has repeatedly approved the instruction, and expressly found that it did not violate due process in Edwards v. State, 381 So. 2d 696, 697 (Fla. 1980):

> Edwards asserts that the inference created by this provision violates his rights to due process and against self-incrimination. The inference arising from the unexplained possession of stolen property, and jury instructions referring to it, have been specifically approved by both Florida and federal courts. *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); *State v. Young*, 217 So. 2d 567 (Fla. 1968); *Griffin v. State*, 370 So. 2d 860 (Fla. 1st DCA 1979) (reversed on other grounds). Since there is a rational connection between the fact proven (the defendant possessed stolen goods) and the fact presumed (the defendant knew the goods were stolen), the inference created by section 812.022(2) does not violate Edwards' due process rights.

Were it the law, as petitioner argues was established by Long and Gunn that the trial court may never instruct the jury that it may infer knowledge or constructive knowledge from a defendant's

possession of recently stolen property, then this Court's decision in Consalvo, 697 So. 2d 815, that the jury instruction was properly given, would not have been necessary – or even proper. As Consalvo makes clear, however, there are instances in which it is permissible to give the standard instruction.

This case was one of those. The State – as well as petitioner himself – presented evidence that cast doubts about his innocent explanation: the fact that he told the pawn shop clerk that he had owned the grinder "a while,"[3] the fact that the grinder went missing from a place nearby to where petitioner was working, petitioner's own implausible explanation of how he happened to buy the tool, and his somewhat suspect receipt. This was an issue for the jury (as argued under Issues I and II).

4. It Would Be Unfair to the State and to the Trial Court – and Would Have a Negative Impact on the Administration of Justice – Reverse a Conviction Where a Standard Jury Instruction Was Properly Given.

The State submits that the prosecutor and the judge were not unreasonable in submitting and using the standard jury instruction, inasmuch as it: was among the standards approved by this Court, has been upheld against challenges through the years, has been governed by a body of case law that speaks to when it should be given, and correctly states the law, as established by

[3] Below, petitioner argued that "a while" is not a precise measure of time, and that a few hours could be construed as a while. Ownership of personal property, however, is not typically measured in hours; thus, while 24 hours it would be "a while" to have, say, a pebble in one's shoe, it is not the terminology one would use in speaking of a large grinding tool.

statute in section 812.022, Florida Statutes. To do as petitioner urges and hold that a standard jury instruction, given in the proper instance, was reversible error would be unfair to the trial court and to the State. Such a holding also would have an impact on similar instructions that are given in burglary prosecutions. Fla. Std. Jury. Instr. (Crim) at 196, 212 (App. C).

For the foregoing reasons, the Court should answer the certified question in the negative.

5. Any Error Would Be Harmless.

In any event, the trial court's giving a court-approved jury instruction would be harmless, even if it were found to be error. Such was the result in Fenelon. Here the State had a strong circumstantial case against petitioner. It was certain that the grinder was stolen and certain that petitioner had sold it, by his own account, a day or so after having received it. Thus, the State would have been able to argue the statutory inference even if the trial court had declined to give the instruction, just as the prosecution may, under Fenelon, argue that flight shows consciousness of guilt. 594 So. 2d at 295. See also Jones v. State, 495 So. 2d 856, 857 (Fla. 4th DCA 1986) ("The presumption applies . . . where the property is undisputably stolen and the question is who stole it.") For the strength of the State's case, see Issues I and II.

ISSUE IV

DID THE TRIAL COURT FUNDAMENTALLY ERR BY GIVING THE STANDARD JURY INSTRUCTION ON PROOF OF POSSESSION OF PROPERTY RECENTLY STOLEN? (Restated)

A. PRESERVATION

With commendable candor, petitioner concedes that the argument raised herein was not made below and, not being preserved for appellate review pursuant to section 924.051(3), Florida Statutes, must be presented in the context of fundamental error. Fundamental error is "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Archer v. State, 673 So.2d 17, 20 (Fla.1996)(quoting State v. Delva, 575 So.2d 643, 644-45 (Fla.1991)), cert. denied, 117 S.Ct. 197 (1996).

B. STATEMENT OF THE ISSUE

The State acknowledges that petitioner's statement of the issue is neutrally cast and that it reflects, by use of the phrase "fundamental error" that the issue was not preserved. It does not acknowledge that the standard of review, i.e., what must be shown to demonstrate that there is any error at all, is abuse of discretion.

C. STANDARD OF REVIEW

As argued under Issue III-C, the standard of review is abuse of discretion.

D. BURDEN OF PERSUASION

The State relies upon its argument under Issue I-D.

E. THE TRIAL COURT'S RULING

The trial court was not afforded an opportunity to address this issue; as set out in Issue III, the trial court did reject another argument addressed to the standard jury instruction.

F. THE APPELLATE COURT'S RULING

The court below affirmed petitioner's conviction and did not comment upon this issue. 780 So. 2d at 324.(App. A)

G. MERITS

In his fourth issue petitioner argues that the standard jury instruction regarding possession of recently stolen property is unconstitutional and that, therefore, the trial court committed fundamental error by giving it. The State respectfully disagrees. It was not error to give the standard jury instruction on possession of recently stolen property, since that instruction does not place the burden of persuasion on the accused nor does it create a mandatory presumption.

The jury instruction of which petitioner complains has been approved by the supreme court, is neutrally balanced, and merely recapitulates the law. By its own terms the standard jury instruction is not a presumption that shifts the burden of proof but, rather, an inference that the jury is free to reject or accept.

State v. Young, 217 So.2d 567 (Fla. 1968), cert. denied, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969) settled the issue that the standard jury instruction on proof of recently stolen property is not a presumption. Thus, it was not error,

fundamental or otherwise, for the trial court to give the jury the instruction regarding the inference that arises when, as here, a defendant is in possession of recently stolen property. Petitioner's argument is that the jury instruction on possession of recently stolen property is not what it purports to be. That is, it is not an inference, it is a mandatory rebuttable presumption, in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 69 (1979).

It is settled that if a jury instruction merely raises a permissive inference it passes constitutional muster. The instruction here meets that test, as this Court noted in Boone v. State, 711 So. 2d 594, 595 (Fla. 1st DCA 1998): "The instruction allows the prosecution to show by inference the accused's knowledge of the stolen nature of the property and the accused's intent . . . ." Thus, this Court has held that the instruction does not shift the burden of persuasion to the accused and that it is an inference.

A simple examination of the instruction itself shows that it is not mandatory. First of all, an inference is, by its nature, not a presumption. As the Supreme Court of the United States noted in Francis v. Franklin, 471 U.S. 307, 314-15, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985):

> A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. Such inferences do not necessarily implicate the concerns of *Sandstrom*. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and

> common sense justify in light of the proven facts before the jury.

(Citations omitted). In Edwards v. State, 381 So. 2d 696, 697 (Fla. 1980), the Florida supreme court noted that the logical link that later was discussed in Francis is present in the recently stolen property instruction. "Since there is a rational connection between the fact proven (the defendant possessed stolen goods) and the fact presumed (the defendant knew the goods were stolen), the inference created by section 812.022(2) does not violate Edwards' due process rights."

Second, the instruction informs the jury that a satisfactory explanation removes the inference. Thus, there is nothing mandatory about the instruction, which applies only in certain factual situations and which has been held to pass constitutional muster, as appellant acknowledges, in Edwards and in State v. Young, 217 So. 2d 567 (Fla. 1968).

Petitioner argues that this Court should disagree with the decision in Edwards because the court misconstrued Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973) and ignored Sandstrom. IB at 24. The Barnes decision, however, was correctly applied in Edwards, has never been overruled by the Supreme Court, and was deemed to be in a separate line of cases from those in which Sandstrom belongs. Sandstrom, 442 U.S. at 519, 99 S.Ct. at 2457, n.9. Barnes, in contrast to Francis and Sandstrom, considered precisely the type of instruction involved here: possession of recently stolen property. The jury was instructed in that case:

> Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.
>
> However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

412 U.S. at 840, 93 S.Ct. at 2360, n. 3. The Supreme Court held that this instruction was a permissive inference and "that it satisfies the requirements of due process." 412 U.S. at 845, 93 S.Ct. at 2363.

Petitioner argues that the Florida instruction requires the jury to draw an inference. In fact, the instruction by its terms has no such effect. The instruction says that unexplained possession of stolen property "gives rise to" an inference that the defendant knew or should have known the property was stolen. In other words, the instruction merely points out to the jurors that possession of recently stolen goods is relevant to, but not necessarily dispositive of, the question of whether the defendant knowingly trafficked in stolen property.

In sum, no case of the United States Supreme Court has directly or by implication overruled the longstanding decision that the jury instruction here is constitutional. The appellant's point therefore is without merit.

ISSUE V

DID THE PROSECUTOR'S CLOSING ARGUMENT CONSTITUTE FUNDAMENTAL ERROR?(Restated)

A. PRESERVATION

As acknowledged in the Initial Brief, this issue was not preserved for appellate review by a contemporaneous objection to the comments about which petitioner now complains.

B. STATEMENT OF THE ISSUE

The State acknowledges that the petitioner's statement of the issue is neutrally cast and that it reflects the fact that the issue was not preserved.

C. STANDARD OF REVIEW

"The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.' Cobb [v. State), 376 So.2d [230) at 232 [(Fla. 1979.)]" State v. Murray, 443 So. 2d 955, 956 (Fla. 1984)

D. BURDEN OF PERSUASION

The State relies upon its argument under Issue I-D.

E. THE TRIAL COURT'S RULING

Inasmuch as trial counsel did not object, there was no trial court ruling.

F. THE APPELLATE COURT'S RULING

The Court below affirmed appellant's conviction, but did not address this issue. Weddell v. State, 780 So. 2d 324. (App. A).

G. MERITS

In his fifth issue appellant argues that the prosecutor's closing argument was impermissible and constituted fundamental

error, excusing trial counsel's failure to object. The State respectfully disagrees. The prosecutor's argument that the defendant stole the grinder is a fair comment on the evidence presented and is an inference permitted by statute, and thus was not error at all, let alone fundamental error. The argument concerning the alleged comment upon silence is not cognizable because such claims cannot constitute fundamental error.

Petitioner argues that the prosecutor committed fundamental error twice in his closing argument. First, he attacks the following argument:

> I submit to you that the evidence before you is the defendant stole [the grinder]. He went out there to work that night. Diep Nguyen left it in front of the bow. Glennco Insulation was working 105 feet away. The defendant was there. He took it one of the two nights when he first started working there and he turned around and sold it to The Trading Post. That's how he knew it was stolen. I submit to you that's how the state has proven the second element.

T, 104-105. As he did in the first two issues, appellant relies on the testimony of Diep Nguyen to assert that it was impossible for appellant to have stolen the grinder. As above, therefore, the State submits that Mr. Nguyen's testimony did not conclusively establish any particular date for the disappearance of his grinder. To repeat his testimony:

> Q – When you found this grinder in the pawn shop that was several months after it went missing; wasn't it?
>
> A – Yes, sir.
>
> Q – And you don't remember exactly when you checked it out?
>
> A – No.

Q – But you found it September 21. When do you mean by several months, two or more months?

A – Yeah, something like that. I don't know.

Q – More than one month?

A – I know it is more than two, two at least.

T, 47.

The notion that it was at least a month between the disappearance of the grinder and its being found at the pawn shop was suggested by defense counsel, not Mr. Nguyen. It also is unlikely that it had literally been at least two months, since barely two months had elapsed from the time the grinder went into service until the time it was recovered. Thus, it is entirely likely that Mr. Nguyen was incorrect in his estimate, and that he took the grinder out not on July 20 or July 21 but, rather, on August 3.

Additionally, the fact that the defendant possesses recently stolen property permits more than the inference sanctioned by section 812.022(2), Florida Statutes. As this Court noted in Scobee v. State, 488 So. 2d 595, 598 (Fla. 1st DCA 1986):

> There are two similar, yet separate and distinct, inferences that can be made from proof of possession of recently stolen property: (1) an inference that the possessor stole the property, as in *Walton v. State*, 404 So.2d 776 (Fla. 1st DCA 1981), and *Griffin v. State*, 370 So.2d 860 (Fla. 1st DCA 1979); and (2) an inference that the possessor knew or should have known the property was stolen.

Thus, the prosecutor could suggest to the jury that it was appellant who stole the grinder.

Moreover, even if this were deemed to be error, it would not constitute fundamental error, i.e., error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Archer v. State, 673 So. 2d 17, 20 (Fla. 1996)(*quoting* State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)), *cert. denied*, 117 S.Ct. 197 (1996). Given that the State could prove the charge of dealing in stolen property even if appellant did not actually steal the grinder, and considering the evidence against appellant – his admission that he sold a stolen grinder, his inconsistent statements (telling the clerk at the pawn shop he had had the grinder "a while," alleging at trial he had possessed it less than 24 hours when he sold it), and his admitted haste in disposing of it – this comment is not fundamental error.

The second comment involves the receipt that appellant offered into evidence and that purported to show that he had purchased the grinder from one Jack Ward for $50. On cross examination, the prosecutor asked appellant, not unreasonably, when he first produced the receipt, and received the answer that it was in March of 1999 (some seven months after the alleged purchase). T, 79. Then, in his closing, the prosecutor argued that the receipt was concocted by appellant in order to provide a defense for himself. T, 112-113. This, petitioner argues, was an improper comment upon his right to remain silent.

The prosecutor's remarks were completely proper. The prosecutor was fair commentary on the defense, pointing out a weakness therein, and was not commenting upon petitioner's failure to testify or failure to give police an explanation upon his arrest. Thus, it is not susceptible of being construed as a comment on petitioner's right to remain silent. See Ruddock v. State,763 So. 2d 1103(Fla. 4th DCA 1999).

In any event, the failure to object and to move for a mistrial is fatal, because "an improper comment on a defendant's right to remain silent is not fundamental error which may be raised on appeal without an objection at trial . . . ." Guiterrez v. State, 731 So. 2d 94, 95 (Fla. 4th DCA 1999); see, also State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985), Woodard v. State, 579 So. 2d 875, 877 (Fla. 1st DCA 1991).

ISSUE VI

DID THE TRIAL COURT ERR BY NOT INCLUDING THE GRINDER ITSELF IN THE RECORD ON APPEAL? (Restated)

A. PRESERVATION

It appears that this exceedingly minor issue was not preserved for appeal by a contemporaneous objection below. The Supplemental Record shows that the State moved to substitute photographs of the grinder for the actual machine itself, apparently after trial. Defendant's Statement of Proceedings, which were filed March 30, 2000 and approved by the trial judge on June 20, 2000, show that there was no objection by the defendant. S.R. 110, 113.

Thus, the issue was not properly presented to the trial court for resolution, has not been shown to be fundamental error, and is thus not reviewable on appeal pursuant to well settled authority. §924.051(3), Fla. Stat; Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996); State v. Barber, 301 So.2d 7 (Fla. 1974).

In an abundance of caution, however, the State will address the merits.

B. STATEMENT OF THE ISSUE

The State acknowledges that petitioner's statement of the issue is neutrally cast and that it reflects the fact that the issue was not preserved below.

C. STANDARD OF REVIEW

The standard of review as to what exhibits may be represented in the record on appeal by photographs is abuse of discretion, inasmuch as there is no requirement in statute or rule that originals be provided.

D. BURDEN OF PERSUASION

The State relies upon the argument set for under Issue I-D.

E. THE TRIAL COURT'S RULING

The trial court approved the State's unopposed motion to substitute photographs of the grinder for the tool itself.

F. THE APPELLATE COURT'S RULING

The court below affirmed petitioner's judgment and sentence but did not address this specific issue. Weddell v. State, 780 So. 2d at 324. (App. A)[4]

G. MERITS

In his final issue, petitioner claims it was error for the trial court not to include the grinder in the record on appeal, apparently so that this Court could examine the area where Eastern Shipbuilding Group had engraved its own identification

[4] The state objects to the practice of bringing cases before this Court on a certified question or specific issue over which there is jurisdiction and then arguing multiple issues over which there is no independent jurisdiction and which are not worthy of consideration by this Court. This is particularly true when, as here, the district court did not deign to even address the questions. It is true that this Court has jurisdiction to consider all issues when jurisdiction over one issue exists –in practice it seldom does– but the increasing incidence of this undesirable practice does not bode well for the judicial system or for this Court. See issues I-II and IV-VI above.

number. The State respectfully disagrees. The trial court did not err in permitting the State to substitute photographs of the grinder for the machine itself into the record. Having the actual machine to hold and examine would not aid an appellate court in its deliberations, inasmuch as appellate courts decide legal, rather than factual, issues.

Petitioner apparently feels as though the justices of this Court are incapable of looking at the photos of the grinder (S.R. 95) and the detailed enlargements of the identification number (S.R. 88) and extrapolating those images to get a reasonable idea of what the actual machine looks like. Thus, he says, without the actual machine to have and hold and, presumably, scrutinize, a fair outcome here is impossible. Even if that were so, that is, even if one could not get from the photographs the fact that the hand-held machine is relatively large and the engraved numbers were relatively small, those facts are irrelevant to any issue presented by this appeal.

First, whomever stole the machine apparently ground the numbers off, and the company re-engraved them prior to trial. T, 30, 46. Petitioner testified he did not see any identification beyond the manufacturer's serial number. T, 77. Second, there appears to be no actual issue regarding the size of the grinder itself, such as there might be if there were some question about concealment. Third, if the jury was inclined to believe that petitioner himself stole the grinder, and concocted the story about purchasing it, the appearance issue is moot.

The only reference to the grinder itself apparently involved the grinding marks where the original Eastern Shipbuilding Group identification number had been removed. It is these marks that, petitioner argues, the Court *must see for itself.* It is obvious, however, that the grind marks would, by necessity, have to be relatively small, inasmuch as the Eastern Shipbuilding Group number was also small. In any event, the pawn shop clerk testified that she did not see any grinding marks on the machine when she bought it from the defendant, so the jury heard testimony from which it could conclude that the marks were either easy to miss, were not such that they would alert an ordinary person to the fact that the grinder was stolen, or were ground off by the defendant after he stole it.

Petitioner cannot demonstrate that this purported error was fundamental – that is, without this Court examining the grinder itself, justice cannot be done.

Moreover, consider the posture in which this issue is before the Court – not that error influenced the jury or the trial court but, rather, that it influenced either the appellate court or this body itself. Thus, the error would be harmless beyond a reasonable doubt unless the justices of this Court are willing to admit that their powers of observation, imagination and reasoning are so limited to concrete matters that they could not under any circumstances imagine, from the photographs provided in evidence, the actual size of the identification numbers.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 780 So. 2d 324 should be approved, and the judgment and sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Richard Summa, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by mail on July 31, 2001.

Respectfully submitted and served,

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[AGO# L01-1-5990]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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[C:\Supreme Court\02-28-02\01-751_ans.wpd --- 2/28/02,11:46 am]

IN THE SUPREME COURT OF FLORIDA

RICHARD BRYANT WEDDELL,

Petitioner,

v.

STATE OF FLORIDA,

Petitioner.

CASE NO. SC01-751

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