IN THE SUPREME COURT OF FLORIDA

RICHARD B. WEDDELL,

Petitioner,

v. **CASE NO. SC01-751**

STATE OF FLORIDA,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

Petitioner was the defendant in the circuit court for Bay County, where he was convicted of one count of dealing in stolen property. Petitioner was the Appellant in the First District Court of Appeal. He will be referred to in this brief as Petitioner or as Mr. Weddell.

The record consists of three volumes and seven consecutively paginated supplemental volumes. Citations to the record will appear as "R," followed by the appropriate volume and page number, e.g., (R.I,1). Citations to the supplemental record will appear as "SR," followed by the appropriate volume and page number, e.g., (SR.IX,110).

STATEMENT OF THE CASE AND FACTS

Nothing added.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF THE STATE'S CASE?

STANDARD OF REVIEW

The trial court's ruling on a motion for judgment of acquittal adjudicates an issue of law. The trial court's ruling is therefore reviewed *de novo* by the appellate court. Jones v. State, 2001 WL 871441 (Fla. 1st DCA Aug. 3, 2001)(citing Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), and State v. Lynch, 293 So. 2d 44, 45 (Fla. 1974)).

MERITS

The respondent asserts that proof that petitioner sold a stolen grinder to a pawn shop, without more, establishes a "prima facie" case of dealing in stolen property. (AB,12). The respondent is obviously incorrect. See e.g., Jackson v. State, 736 So. 2d 77

(Fla. 4th DCA 1999); Dellechiaie v. State, 734 So. 2d 423 (Fla. 2d DCA 1998); R.D.S. v. State, 446 So. 2d 1181 (Fla. 3d DCA 1984).

On a separate matter, the state forthrightly concedes that the testimony of Mr. Nguyen was "somewhat vague" regarding the date that he checked out the grinder. (AB,12).

> 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.

(AB,12).

> Given the uncertainty of Mr. Nguyen's testimony, it is impossible to say with certainty what date he checked the tool out.

(AB,13).

Respondent also conceded that the grinder could have been stolen on or about July 20, 1998, by someone other than appellant (AB,13), but argues that even if this were so, the jury could still infer that appellant knew the grinder was stolen. If, as the state concedes, the grinder could have been stolen on or about July 20, 1998, it is not a "reasonable inference" that the grinder was stolen on August 3, 1998. Rather, it is mere speculation on the part of the state. The state relies on this speculative conclusion not because the evidence supports it, but because the prosecution fails without it. A criminal conviction may not be based upon speculation. Specifically, the respondent seriously underestimates

the significance of the state's failure of proof regarding the date of the theft.

On this issue, the respondent ignores the theory of prosecution in the proceedings below. The respondent argued, at trial, that petitioner knew the grinder was stolen because he stole it. (R.II,104-105; 114). Now, the respondent concedes that petitioner may not have stolen the grinder since it is uncontroverted that petitioner did not begin working at the shipyard until August 3, 1998, and may not have had the opportunity to steal the grinder.

The fact that respondent may not have stolen the grinder must be taken in conjunction with all factors favorable to him. First, even the testimony elicited from by respondent's witness, Brie Hanson, demonstrated that the grinder was "obviously used". This is contrary to the state's unsupported assertion that the grinder was "practically new." (AB,15). Under such a circumstance, the sales price of $75.00 was not so low so as to suggest to a reasonable person that the grinder was stolen.

Most significantly, it is undisputed that the original manufacturer's serial number was <u>not</u> removed, altered or defaced in any way when petitioner pawned the grinder. Under such a circumstance, and pursuant to instructive decisional authority, the totality of these circumstances compel a finding that the state's

proof was legally insufficient on the disputed element of knowledge. Petitioner's position is even stronger than that of the defendant in Jackson v. State, 736 So. 2d 77 (Fla. 4th DCA 1999). In Jackson, the defendant was found in possession of a stolen automobile within four days of the theft. The vehicle identification numbers (VIN) had been altered. The defendant argued that the VIN numbers could have been altered within 20 hours of the theft. The alteration of the VIN numbers was deemed insufficient or too inconspicious to place a reasonable person on notice of the probable stolen nature of the vehicle.

In the present case, petitioner's position is even stronger than that of the defendant in Jackson. This is true because the manufacturer's serial number installed on the grinder was not removed, altered or defaced in any way. It is also noteworthy that removal of the grinder's serial number would have been a simple task for someone with a guilty mind or purpose. James Ward, the shipbuilding foreman, testified that the manufacturer affixes the serial numbers with "stuck on tape" or plastic. This serial number usually gets "tore off" after the tool is placed in service, which is why Eastern Shipbuilding engraves its initials on the tools.

Even the respondent's witness, Brie Hanson, conceded that there was nothing about the appearance of the grinder to suggest that it was stolen. Now, the respondent concedes that:

> [T]he pawn shop clerk testified that she did not see any grinding marks on the machine when she bought it from appellant, 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.

(AB,37). First, respondent conceded that petitioner may not have stolen the grinder. Next, respondent conceded that appellant may not have been alerted to the fact that the grinder was stolen by the appearance of the tool. Taken together, these concessions should be viewed as a tacit admission that respondent failed to prove that appellant knew the grinder to be stolen.

Even if petitioner was aware of the scratch marks, the fact that the shipyard's "personalized" inscription of E.S.G. had been scratched out is not legally sufficient evidence of guilt because a stranger to the tool would have no way of knowing what had been there before, and therefore would not know the significance of the scratches. In addition, appellant's production of personal identification when pawning the grinder is a significant factor supporting a claim of lack of guilty knowledge. See Valdez v. State, 492 So. 2d 750 (Fla. 3d DCA 1986).

Respondent notes that petitioner told Brie Hanson that he had owned the grinder for "a while" when he pawned it on August 5, 1998. (AB,11). The term "while" is defined as "a period or space

of time." Webster's New World Dictionary, Second College Edition, (1984 ed.). The term "while" describes neither a short nor a long period of time. When people wish to be specific they generally say "a short while" or "a long while." The term "a while" is so vague and inconsequential that it cannot be regarded as an "inconsistency" sufficient to create a question of fact for the jury. It certainly may not be said that petitioner "lied" when he stated that he had owned the grinder for "a while." Petitioner's statement may not be regarded as a lack of candor on his part. Moreover, it is certainly understandable that a seller of used property would not want to be specific as to the age of the property. The seller, understandably, would be vague so as to underestimate the age of the property and to encourage the buyer to pay more for the item.

The state also argues that appellant got such a great deal on the grinder that the price paid should have suggested knowledge that the grinder was stolen. In this regard, the state relies upon a "standard" jury instruction stating that proof of purchase of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the purchaser knew or should have known that the property was stolen. (AB,15).

The state's reliance on this instruction is misplaced for a number of reasons. First, this jury instruction was not given in the proceedings below. Second, it may presumed that this instruction was not given because it is not supported by the facts of the case. The original price ($158) is irrelevant to this analysis because the grinder was not new and the statute references the fair market price. The only arguable evidence of fair market value was the $75 paid for the grinder by the pawn shop. Appellant paid $50.00 for the grinder. The difference of $25.00 is not an amount "substantially below the fair market value" which probably explains why the state did not request this instruction at trial. Third, this jury instruction was found (correctly, in petitioner's view) to be an improper judicial comment on the weight of the evidence in Barfield v. State, 613 So. 2d 507 (Fla. 1st DCA 1993). The matter of sales price, therefore, can not be considered incriminating in the present case.

Under the totality of the circumstances presented, the state failed to produce competent, substantial evidence to support a finding that appellant knew the grinder was stolen. The state's evidence was insufficient as a matter of law. Jackson v. State.

ISSUE II

WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING APPELLANT'S MOTION FOR

JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF ALL THE EVIDENCE?

STANDARD OF REVIEW

The trial court's ruling on a motion for judgment of acquittal adjudicates an issue of law. The trial court's ruling is therefore reviewed *de novo* by the appellate court. Jones v. State, 2001 WL 871441 (Fla. 1st DCA Aug. 3, 2001)(citing Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), and State v. Lynch, 293 So. 2d 44, 45 (Fla. 1974)).

MERITS

If petitioner "misled" the pawn shop clerk by informing her that he had owned the grinder for "awhile", then the evidence is equally susceptible to the inference that he "misled" her in order to suggest that the grinder was newer than it actually was in an attempt to negotiate a better price for the obviously used tool. Evidence which is equally susceptible to inferences of guilt and innocence is legally insufficient to support a finding of guilt beyond a reasonable doubt. Werner v. State, 590 So. 2d 431 (Fla. 4th DCA 1991); Grover v. State, 581 So. 2d 1379 (Fla. 4th DCA 1991); Arant v. State, 256 So. 2d 515 (Fla. 1st DCA 1972).

In addition, petitioner's testimony explaining that he innocently purchased the grinder from a third party and his production of a receipt therefor was not only reasonable, but was

consistent with and unrefuted by the state's evidence. The state's evidence must therefore be deemed legally insufficient to sustain the conviction notwithstanding the statutory presumption of section 822.022(2), Florida Statutes. See e.g., Dellechiaie v. State, 734 So. 2d 423 (Fla. 2d DCA 1998).

ISSUE III

WHETHER THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN INSTRUCTING THE JURY ON THE INFERENCE ARISING FROM UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY BECAUSE THE INSTRUCTION CONSTITUTES AN IMPERMISSIBLE COMMENT ON THE EVIDENCE?

Respondent boldly asserts, without citation of authority, that "standard jury instructions should be entitled to a presumption of correctness, as apparently they have been." (AB,24). Respondent is just as fallible as it is bold, for the rule is otherwise.

In promulgating jury instructions for criminal cases, this court stated:

> The Court generally approves the theory and technique of charging juries in criminal cases as recommended by the Committee and embodied in its proposed instructions. The Court will, accordingly, authorize the publication and use of such instructions, *but without prejudice to the rights of any litigant objecting to the use of one or more of such approved forms of instructions*.

In the matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 240 So. 2d 472 (Fla. 1970)(e.s.).

Accordingly, Florida Rule of Criminal Procedure 3.985 provides, in pertinent part:

> The forms of Florida Standard Jury Instructions in Criminal Cases... may be used by the trial judges of this state in charging the jury in every criminal case to the extent that the forms are applicable, *unless the trial judge shall determine that an applicable form of instruction is erroneous or inadequate, in which event the judge shall modify or amend the form or give such other instruction as the trial judge shall determine to be necessary to instruct the jury accurately and sufficiently on the circumstances of the case.*

(Fla. R. Crim. P. 3.985). Under these authorities, the trial court is obligated to review *de novo* a litigant's objections to the use of the standard jury instructions. If the standard jury instructions were accorded a "presumption of correctness", such would constitute "prejudice to the rights of a litigant" prohibited by In the matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 240 So. 2d 472 (Fla. 1970). See also, Fella v. State, 754 So. 2d 165 (Fla. 5th DCA 2000)(citing Florida Rule of Criminal Procedure 3.985); Radillo v. State, 582 So. 2d 634, 638 n.5 (Fla. 3d DCA 1991); Marr v. State, 470 So. 2d 703, 707 (Fla. 1st DCA 1985); Harvey v. State, 448 So. 2d 578, 580 (Fla. 5th DCA 1984); Willcox v. State, 258 So. 2d 298, 299 (Fla. 2d DCA 1972).

> Unfortunately, trial attorneys and trial judges often fail to recognize that instructions promulgated by a Supreme Court Committee on Standard Jury Instructions, whether criminal or civil, are merely the work product of a conscientious committee and not immutable postulates from Olympus. Committees, after all, sometimes construct camels rather than race horses.

Harvey v. State, 448 So. 2d 578, 580 (Fla. 5th DCA 1984). The standard jury instruction employed by the trial court, and objected to by petitioner, is not entitled to a presumption of correctness.

Respondent also claims that "Petitioner has cited no case in which a standard jury instruction was deemed to have constituted judicial commentary on the evidence." (AB,24). "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." (AB,31). Respondent has apparently overlooked petitioner's reliance on Barfield v. State, 613 So. 2d 507 (Fla. 1st DCA 1993). Barfield v. State specifically held that the standard jury instruction regarding the inference arising from the sale of recently stolen property at a price substantially below fair market value constituted an impermissible comment on the evidence like the flight instruction in Fenelon v. State, 594 So. 2d 292 (Fla. 1992).

Next, Petitioner addresses respondent's argument that the standard jury instruction here at issue "has a statutory basis"

making it distinguishable from Fenelon. (AB,28). First, petitioner disagrees with respondent's assertion that the purpose of section 812.022(2), Florida Statutes, was to set forth jury instructions to be given in criminal cases. Respondent offers no authority in support of the view that the legislature intended by enactment of the statute to prescribe jury instructions to be given in criminal cases. Second, assuming arguendo that the legislature intended to set forth a jury instruction, the fact that the instruction has a statutory origin is of no moment. The proscription against judicial comment on the weight of the evidence stems from constitutional due process considerations for the defendant's right to an impartial tribunal. If a contested jury instruction stems from statute, that merely begs the questions whether the statute is constitutional. This is a question for the courts to determine; it is not the prerogative of the legislature. Finally, and most importantly, this Court has already ruled that the jury instruction here at issue constitutes an improper comment by the trial court as to the weight of the evidence. Gunn v. State, Fla. 83 So. 511 (Fla. 1919); Long v. State, 44 Fla. 134, 32 So. 870 (1902). Gunn and Long are still good law. This court has neither overruled nor receded from the rule expressed therein. The rule should be maintained now and in the future.

ISSUE IV

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN INSTRUCTING THE JURY THAT POSSESSION OF RECENTLY STOLEN PROPERTY GIVES RISE TO AN INFERENCE THAT THE PERSON IN POSSESSION KNEW THE PROPERTY WAS STOLEN?

Nothing added.

ISSUE V

WHETHER THE PROSECUTOR COMMITTED FUNDAMENTAL ERROR BY IMPROPERLY ARGUING FACTS NOT IN EVIDENCE, i.e., THAT PETITIONER ACTUALLY STOLE THE GRINDER, AND BY IMPROPERLY COMMENTING ON PETITIONER'S RIGHT TO REMAIN SILENT, i.e., ARGUING THAT PETITIONER FAILED TO PRODUCE THE RECEIPT FOR PURCHASE OF THE GRINDER UNTIL SIX OR SEVEN MONTHS AFTER IT WAS STOLEN?

Nothing added.

ISSUE VI

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY EXCLUDING THE GRINDER FROM THE RECORD ON APPEAL, THEREBY THWARTING EFFECTIVE APPELLATE REVIEW OF THE SUFFICIENCY OF THE EVIDENCE?

Petitioner objects to the state's frivolous "footnote 4" at page 45 of its answer brief. In this footnote, the state objects to the fact that petitioner raises and argues numerous issues not ruled upon by the district court. The state's objection is frivolous because, as the state itself observed, this court possesses jurisdiction to consider all the issues presented in the case. In addition, this footnote represents an unwarranted attack upon the professionalism of the undersigned by characterizing his

actions as an "undesirable practice." The practice may very well be "undesirable" from the state's point of view, but it is actually required by the legal code of ethics. The undersigned must zealously pursue petitioner's interests. Aside from being required by the rules of professionalism, the raising of all issues may be required by legal rules pertaining to the preservation of issues for federal review. Since appellant's right to raise all issues is so clearly established, the state's attempt to discourage the practice must stem from some ulterior motive which, if revealed, would reflect negatively upon the character or the professionalism of the respondent's agents, or the state's own misgivings as to the strength of its position on the merits.

CONCLUSION

Based upon the argument and authority presented in ISSUE I or ISSUE II, Petitioner requests that the court reverse his conviction and remand with directions that he be discharged. Based upon the argument and authority presented in either ISSUE III, IV, V, or VI, or the cumulative effect thereof, Petitioner requests that the court reverse his conviction and remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Thomas H. Duffy, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level,

Tallahassee, Florida, 32301, and by U. S. Mail to appellant, Richard B. Weddell, #714698, N.F.R.C.-M/U, P.O. Box 628, Lake Butler, Florida, 32054, on this ____ day of August, 2001.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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