IN THE SUPREME COURT OF FLORIDA

DARRYL WALKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-1555

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, 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 Respondent, the prosecution, or the State. Petitioner, Darryl Walker, 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 two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

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

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certified that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with *Burglary of a Dwelling* pursuant to section 810.02(3), Florida Statutes. The date of the offense: 10 December 2001. (I.11-12). Petitioner was convicted by jury as charged and sentenced as an habitual felony offender to 5 years prison, with 129 days jail credit. (I.51,66-71;II.198).

The First District Court of Appeal affirmed Petitioner's conviction and sentence. In so doing, the First DCA certified as a question of great public importance: Is the Florida Standard Jury Instruction on "Possession of Property Recently Stolen" an impermissible comment on the evidence? Walker v. State, 853 So.2d 498 (Fla. 1st DCA 2003) See, APPENDIX.

Charge Conference

At the charge conference, defense counsel objected to the instruction on proof of possession of property recently stolen, arguing that such constitutes an impermissible comment on the evidence. Defense counsel relied on Weddell v. State, 780 So.2d 324 (Fla. 1st DCA 2001), rev. granted, 796 So.2d 539 (Fla. 2001, rev. dismissed, 813 So.2d 67 (Fla. 2002). The trial court overruled the objection. (II.140-145). The court gave the 2002 standard jury instruction on possession of property recently stolen. (II.183).

Evidence Adduced

David Thompson (victim) testified that on 10 December 2001, he left his home at 11:00 pm to spend the night with his girlfriend. At 6:00 am the next morning, he returned to his home to retrieve his work boots. Upon arriving, he found the front door open, the back window broken, and the house ransacked. Missing were an Hitachi 52" big screen TV and four tire rims. (II.33-43). Officer Matthews of the Jacksonville Sheriff's Office responded to the victim's house at 7:00 am.

During this time, he was notified that the victim's property had possibly been located at Belinda Rawls apartment - less than a mile away. Officer Matthews and Officer Holley proceeded to Ms. Rawls home. (II.58-62).

Belinda Rawls (defendant's girlfriend) testified that Defendant is the father of her youngest daughter. Belinda stated that on 11 December at 3:30 am the Defendant - along with two men nicknamed Jit and Run - came knocking on her door. Jit said they were moving and asked if they could leave some stuff in her apartment. They stored a TV, four tires rims, and a speaker box. These items were left at the same time. They stopped at her house only once for 10 minutes. (II.42-52). Ms. Rawls stated that it is common for the Defendant to lend his car to friends. After they left her house, she did not know whether defendant was with Jit and Run the entire evening. When she and the officers arrived at the defendant's house, his car was not there. Ms. Rawls told officers the items belonged to the Defendant. (II.53-56).

Officer Matthews testified that he and Officer Holley arrived at Ms. Rawls home between 9:00 am and 9:30 am. They told her they were looking for a stolen TV and tires. The TV and tire rims were in plain view from the doorway. Afraid of going to jail for something she didn't do, Ms. Rawls cooperated. Ms. Rawls told Officer Matthews that Defendant told her he was moving and asked if he could store the items. Later that morning, Ms. Rawls took the officers to the Defendant's house

and then to Jit's house. The officers met with Defendant, read him his rights, and asked him about the burglary. Defendant responded that he knew what was going on, but did not go inside the house. He drove the guys around for a while and then they got the stuff. Defendant then offered to take the officers to Jit, whereby Jit was also detained. Defendant was arrested and taken to the police station. (II.62-68). Officer Matthews stated that no other officers witnessed his conversation with Defendant in the field. He added that Ms. Rawls cried on and off during the encounter. (II.69-74).

Officer Holley met up with Officer Matthews at Belinda Rawls home. He observed Ms. Rawls talking with Officer Matthews. She was speaking and cooperating freely. Both he and Officer Matthews questioned Ms. Rawls. Officer Holley was present when the victim identified his property. Officer Holley also assisted Officer Matthews in locating the suspects. He was present at the Defendant's house, but did not hear the discussions between Defendant and Officer Matthews. Defendant was cooperative. Officer Holley then followed Officer Matthews to where Jit was. (II.75-82).

Jennifer Kaytex (evidence technician) testified she did not attempt to collect latent prints off of the TV or tire rims, as their surfaces are not conducive for lifting prints. She did recover latent prints off of three cereal boxes. They were sent to the crime lab. (II.82-89). **Richard Kocik** (latent print examiner) testified that he identified no prints other than a

thumb print of the victim. Defendant's fingerprints were not found at the crime scene. (II.90-97).

Detective Strickland interviewed Defendant at the police station. After being Mirandized, Defendant gave a verbal statement but declined to give a written statement. Defendant stated that Jit and Run came to his home around midnight. He drove Jit and Run around for a while. They got out at a Texaco station where he waited for them. They disappeared and returned 10 minutes later. The brought back a gray box and explained that they opened it and were disappointed to find only playing cards inside. They then removed a large speaker from the trunk of his car to make room for their next run. Defendant drove Jit and Run to another area, where they left and returned with a large TV and rims with tires on them. Defendant never mentioned that he was moving that night. The distance between the victim's house and Ms. Rawls house is .3 miles. Detective Strickland did not believe that Defendant was telling the whole story. (II.104-114).

Defendant testified that on the evening of 10 December he was celebrating his birthday at Belinda's house, along with Jit and Run. The three of them later left. Jit and Run borrowed the Defendant's car, dropping Defendant off at a friend's house. Defendant later met back up with the two at Belinda's house. They were parked in the yard, with a TV in the trunk and tires on the seat. Defendant was upset because the tires were getting his car seat dirty.

Defendant denied knowing the items were stolen. Defendant did not ask where the items were from, and they did not tell him. Defendant said he had no idea what Jit and Run were up to that night and did not know they were going to use his car to commit burglaries. Defendant has lent his car to them in the past. Defendant denied telling Officer Matthews that he drove the guys around and then they got stuff. Defendant denied driving the guys around that night - he did so only earlier in the afternoon. Defendant claimed he took the blame because he was the man and was not going to let Belinda go to jail. (II.125-131).

Defendant testified regarding the gray box with playing cards:

> When I dropped Run and Jit off earlier that day I don't like to go in those apartments, so I drop them off at the store. And like, when he call me to pick them up I told them I'm going to pick them up at the store. When they came back Ron had a gray box with playing cards and that's when he told me he had to move some stuff out of the girl house when he mess with Run and I think they were going through some things but she had to go to work and he wanted to move, he wanted to hold my car to move it later on that day, he didn't want to get it right then.

(II.132). Defendant maintained that he was not with Jit and Ron the entire evening and does not know if they broke into a house that night. Defendant denied committing a burglary. (II.132-133). Defendant is a five time convicted felon. (II.134).

SUMMARY OF ARGUMENT

Appellant challenges the standard jury instruction on the permissible inference arising from the unexplained possession of recently stolen property. Appellant argues that the instruction is an impermissible comment on the evidence. The State disagrees. "Commenting on the evidence" refers to the judge's expressing an opinion on the weight of the evidence and the credibility of witnesses. True comments on evidence were free flowing personal opinions telling jurors which witnesses were credible and what they thought each party had proven. They involved judges who summarized evidence in a way that even rendered an opinion on the defendant's guilt or innocence. The judge even conferred with the jury during deliberations and was the equivalent of an additional juror.

The trial judge in the instant case did not comment on evidence when he gave the standard jury instruction on possession of recently stolen property. The basis for giving the instruction was a statute, not the judges opinion on the evidence. Further, jury instructions are instructions on the law, not opinions on the weight of the evidence. Correct

statements of the law are not the judge's comments on the evidence.

Moreover, the standard jury instruction as issue is a permissive jury instruction, which is never a comment on the weight of the evidence. The trial court is telling the jury that IF a person is in possession of recently stolen property and cannot, by *their* standards, satisfactorily explain that possession, THEN they can (or not) infer knowledge from that possession. They are not required to infer knowledge; rather, they are permitted to infer knowledge.

The judge did not state an opinion regarding the defendant's knowledge. The judge did not express any thoughts about how the defendant's possession of the stolen property or his explanation of that possession demonstrated knowledge. The judge did not distort or add to the evidence nor show partisanship. Rather, the judge merely instructed the jury.

Additionally, Appellant's reliance on Fenelon is misplaced. Fenelon, like the instant case, did not involve a comment on the evidence but rather a permissive instruction that the jury can infer guilt from flight. Further, contrary to Fenelon there IS a valid policy reason for permissive jury instructions. It is valid and good policy for the judge to tell the jury what it can do under the law. That it can, if it chooses, make inferences. As the United States Supreme Court has stated, inferences are a staple of our adversary system of factfinding. Thus, jurors want and need to know what they can and can't do.

Lastly, assuming *arguendo* there was error, the error was harmless. The State could have properly argued the statutory inference even if the trial court had not given the instruction. Moreover, the jury would have inferred the defendant's knowledge regardless of the instruction, given the strength and consistency of the State's case.

ARGUMENT

ISSUE I

DID THE TRIAL COURT REVERSIBLY ERR BY GIVING THE STANDARD JURY INSTRUCTION ON POSSESSION OF PROPERTY RECENTLY STOLEN, WHERE THE DEFENDANT OBJECTED THAT THE INSTRUCTION WAS AN IMPERMISSIBLE COMMENT ON EVIDENCE? (Restated)

Jurisdiction

Jurisdiction vests in this Court pursuant to Art. V, sect. 3(b)(4), Fla. Const., on the basis of certification by the First DCA of a question of great public importance.

Preservation

The issue is preserved. At the charge conference, defense counsel objected to the instruction on proof of possession of recently stolen property, arguing that such constitutes an impermissible comment on the evidence. See Fla. R. Crim. P. 3.390(d)(providing that "no party may raise on appeal the giving or failure to give an instruction unless the party objects

thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.").

Burden of Persuasion

In a direct appeal or collateral proceeding, the party challenging the judgement 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. A trial court's ruling is presumed correct. Applegate v. Barnett, 377 So.2d 1150 (Fla. 1979). The trial court's decision, not its reasoning, is reviewed on appeal and will be affirmed even when based on erroneous reasoning. Caso v. State, 524 So.2d 422, 424 (Fla. 1988). A trial court may be right for the wrong reason. Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985). Thus, 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 WOBA, 731 So.2d 638 (Fla. 1999); Kirby v. State, 765 So.2d 723 (Fla. 1st DCA 1999).

Standard of Review

The question of whether a jury instruction is a correct statement of the law is a pure question of law reviewed *de novo*. Once it is determined that the jury instruction is an accurate statement of the law, it is within the trial court's *discretion* whether or not to give an instruction. United States v. Nolan,

223 F.3d 1311, 1313 (11th Cir. 2000)(reviewing *de novo* whether the jury instructions misstated the law but reviewing for *abuse of discretion* a refusal to give a requested jury instruction); United States v. Beers, 189 F.3d 1297, 1300 (10th Cir. 1999)(reviewing a district court's decision whether or not to give a particular instruction for an *abuse of discretion* but conducting *de novo* review to determine whether the instruction correctly stated the law); Goldschmidt v. Holman, 571 So.2d 422, 425 (Fla. 1987)("Decisions regarding jury instructions are within the sound discretion of the trial court and should not be disturbed on appeal absent prejudicial error. Prejudicial error requiring a reversal of judgement or a new trial occurs only where the error complained of has resulted in a miscarriage of justice.").

Presumption of Correctness

This Court held in Kearse v. State, 662 So.2d 677, 682 (Fla. 1995):

> The standard jury instructions should be used to the extent applicable in the judgement of the trial court. However, the trial court still has the responsibility to properly and correctly ... charge the jury in each case, and the judge's decision regarding the charge to the jury has historically had the presumption of correctness on appeal.

(citations omitted). See also Carpenter v. State, 785 So.2d 1182 (Fla. 2001)(trial courts have wide discretion in instructing juries, and decisions regarding instructions are reviewed with a presumption of correctness).

MERITS

Appellant challenges the standard jury instruction on the permissible inference arising from the unexplained possession of recently stolen property. Appellant argues that the instruction is an impermissible comment on the evidence. The State respectfully disagrees.

The State's argument is four-fold. First, the State will set forth the history of judicial comment. At common law, and to this day in federal courts, judges were permitted to sum up evidence and to comment on the weight of the evidence and credibility of witnesses. However, Florida has a statute expressly prohibiting judicial comment. Two, the State will define what is true judicial comment on the weight of the evidence. True comments on evidence were free flowing personal opinions telling jurors which witnesses were credible and what they thought each party had proven. Three, the State will set forth why the instruction at issue is not a comment on evidence. Rather it is an instruction on the law, a correct statement of the law, and a permissive instruction that tells the jury they "can" infer knowledge, but are not required to. Fourth, the State will establish why Fenelon does not apply.

CHALLENGED INSTRUCTION

The standard jury instruction provides:

> Proof of possession of recently stolen property, 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.

Fla. Std. Jury Instr. (Crim.) *Theft and Dealing in Stolen Property*. The basis for giving the instruction rests in § 812.022(2), Florida Statutes, which 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.

I. **HISTORY OF JUDICIAL COMMENT**

1. **Allowed at Common Law & Federal Law**

At common law, and to this day in federal courts, judges were permitted to sum up evidence and to comment on the weight of the evidence and credibility of witnesses. Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV 195 (2000)(giving an example of a true comment on the evidence; explaining that the practice of judicial comments on the evidence has deep roots in our legal traditions and was widely employed in early America where a jury often would discuss with the judge their doubts about the facts and the weight of different pieces of evidence; and noting that many commentators have expressed great concern over the curtailment of the judge's power to give such advice). See also, C. EHRHARDT, FLORIDA EVIDENCE, § 106.1 AT 41 (2003 Edition)(noting that the federal rules of evidence do not prohibit such comments and that, at common law, a judge was permitted to comment on the evidence.).

At common law, judges routinely exercised the powers of summary and comment. Quercia v. United States, 289 U.S. 466, 469 (1933)("Herein [the judge] is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact, which is a great advantage and light to laymen")(quoting HALE, HISTORY OF THE COMMON LAW 291, 292 (1739)); 1 WEINSTEIN'S EVIDENCE, P.107, at 107-2 (Congress recognized federal practice permitting a judge to sum up and comment on the evidence as long standing and derived from English courts; it did not intend to alter that practice when drawing up Federal Rules of Evidence[1]).

Federal district court judges, who follow the common law practice, have an authority not granted to most state court judges. Quercia v. United States, 289 U.S. 466, 499

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[1]Because the authority of a judge to comment on the weight of the evidence and the credibility of witnesses was highly controversial, Congress, in enacting the Federal Rules of Evidence, deleted Supreme Court Rule 105. S.REP.NO. 1277, 93d Cong., 2nd Sess. 24, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7051, 7078-79.

Rule 105 provides:

After the close of the evidence and arguments of counsel, the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of witnesses, if he also instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses and that they are not bound by the judge's summation or comment.

(1933)(essential prerogatives of trial judge as secured by common law are maintained in federal courts); Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979)(federal judge is common law judge with authority historically exercised by judges in common-law process); Anderson v. Wardon, 696 F.2d 296, 299 (4th Cir. 1982)(en banc)(federal trial judges freer than state judges to comment on the evidence).

Supporters of the prerogative to comment on the evidence hail it as an aid to the jury, which must render a verdict on complicated facts after being subjected to the arguments of opposing counsel. Patton v. United States, 281 U.S. 276, 288 (1930)(trial by jury includes superintendence by judge with power to instruct jury in law and advise them as to facts); United States v. Bloom, 237 F.2d 158, 163 (2nd Cir. 1956)(strongly approving rule that enables trial judge to assist jury in arriving at intelligent verdict and enhances reputation of federal courts). To the opponents of judicial comment, the practice is dangerous because it threatens the jury's independence. United States v. Porter, 441 F.2d 1204, 1215 & n.6 (8th Cir), cert. denied, 404 U.S. 911 (1971)(composite jury far more intelligent than most judges and lawyers give it credit for and is able to ignore prejudicial comment).

Judicial comment has been criticized as undemocratic as well as inappropriate in an adversary system. 1 WEINSTEIN's EVIDENCE, p.107, at 107-13 (judicial comment held contrary to democratic traditions because it deprives parties of trial by

jury); Duncan v. Louisiana, 391 U.S. 145, 156 (1968)(jury trial by peers is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").

Hostility to the English judges who administered colonial courts led several states, beginning with North Carolina in 1796, to restrict judicial comment in local state courts. Tennessee followed North Carolina's example by incorporating the bar against comment in its state constitution. 1 WEINSTEIN'S EVIDENCE, P.107 [1], at 107-12 to 107-13 & n.25.

2. **Some States allow judicial comment**

Some states allow judicial comments on the evidence. Cal. Const. Art. VI, § 10 (providing that the court may make such comment on the evidence and the testimony and credibility of any witness, as, in its opinion, is necessary for the proper determination of the cause); People v. Rodriguez, 726 P.2d 113, 134-139 (1986)(holding judge's comment on a witness' testimony to a deadlocked jury was within court's constitutional power and while a trial court's comments should be accurate, temperate, and fair, they need not be neutral, bland, or colorless summaries).

3. **Florida statute prohibiting judicial comment since 1877**

Florida has had statutes prohibiting judges from commenting on the facts of a case since March 2, 1877. See, Chapter 2096, § 1, Acts 1877, providing: "[u]pon the trial of all common law and criminal cases ..., it shall be the duty of the Judge

presiding on such trial to charge the jury only upon the law of the case."; Revised Statutes of 1892 § 1088 *Charge to the jury in civil case section*, the duty of judge to charge jury statute, providing: "the judge presiding on such trial shall charge the jury only upon the law of the case"; Compiled General Laws of Florida of 1927 § 4363 (2696) *Charge to jury in civil and criminal case section*, the judge to charge jury on law of case statute, providing "the judge presiding on such trial shall charge the jury only upon the law of the case...". See also, Keigans v. State, 41 So. 886, 890 (Fla. 1906)(giving legislative history of statute prohibiting judges from commenting on the evidence and limiting comments to the law).

4. **Florida's Current Statute**

Section 90.106 (Summing up and comment by judge), Florida statues, provides:

> A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

See Garner v. State, 9 So. 835, 843 (Fla. 1891)(noting the statutory basis for the rule in Florida prohibiting comments by the judge)[2]; Keigans v. State, 41 So. 886 (Fla. 1906)(reversing a murder conviction where the judge commented on the defendant's testimony regarding the interest the defendant "necessarily must

[2]While the Law Revision Counsel Notes in statutes annotated aver that this statute is a codification of *Seward v. State*, 59 So.2d 529 (Fla. 1952), this is not correct. The basis of this statute is a prior statute, not case law.

have in the result of the trial" and noting that while other states permit such comments they do not have a statute limiting the presiding judge to charges "only upon the law of the case" as Florida does.).

5. **Statute Prohibiting Judicial Comment - Not A Constitutional Gag**

While Florida has a statute forbidding judicial comments, it is not a constitutional issue. Quercia v. United States, 289 U.S. 466 (1933)(noting that, in a jury trial, a federal judge, as trial judges did at common law, may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are for their determination). The Quercia court, while setting forth the proper factors for analyzing claims of improper judicial comment, did not invoke any provision of the Bill of Rights or the principle of "fundamental fairness"; instead, it described the role of a federal trial judge.

Comments by the judge do not violate the right to a jury trial or due process. The authority is discretionary and even permits the judge to give his view on the ultimate issue of guilt or innocence. See United States v. Murdock, 290 U.S. 389, 394 (1933)(power of judge to express opinion on defendant's guilt exists but should be exercised only in exceptional cases). A judge commenting on a defendant's guilt is not a constitutional issue. Davis v. Craven, 485 F.2d 1138, 1140 (9th Cir. 1973)(en banc)(declining to constitutionalize *Murdock*).

Indeed, in a criminal case, while "ill advised" it is not even *per se* reversible error for a trial judge to express his personal opinion of the defendant's guilt. United States v. Fuller, 162 F.3d 256 (4th Circ. 1998)(holding that the judge's statement that: "from my own personal view I do not credit and accept the defendant's testimony that he had no intent to violate the federal drug laws" rather "I believe he was acting illegally as a drug dealer"; but emphasizing that jury was not required to accept the judge's view; rather, it was "entirely up to you and you alone to make your determination of what the evidences establishes" was not *per se error* because the undisputed facts amounted to the commission of the crime, but disapproving the practice, citing *Murdock*).

II. **JUDICIAL COMMENT DEFINED**

"Commenting on the evidence" refers to the judge's expressing an opinion on the weight of the evidence and the credibility of witnesses. True comments on evidence were free flowing personal opinions telling jurors which witnesses were credible and what they thought each party had proven. They involved judges who summarized evidence in a way that even rendered an opinion on the defendant's guilt or innocence. The judge even conferred with the jury during deliberations and was the equivalent of an additional juror.

The leading case on judicial comment, Quercia v. United States, 289 U.S. 466, 469-70 (1933), explains that the trial

judge "is not limited to instructions of an abstract sort" and "may express his opinion upon the facts," provided he maintains his judicial demeanor and "makes it clear to the jury that all matters of fact are submitted to their determinations." The authority is discretionary and even permits the judge to give his view on the ultimate issue of guilt or innocence. See United States v. Murdock, 290 U.S. 389, 394 (1933)(power of judge to express opinion on defendant's guilt exists but should be exercised only in exceptional cases); accord United States v. Woods, 252 F.2d 334, 336 (2nd Cir. 1958)(judge's opinion on defendant's guilt reversible error notwithstanding instruction to jury that it was just his opinion).

Quercia is also one of the best known statements by the Supreme Court on the *proper* role of a trial judge in a criminal proceeding. Lower courts have applied Quercia both to judicial comment cases and to cases involving other sorts of intervention by the trial judge. The factors identified by the Quercia court for analyzing claims of improper judicial comment include: whether the judge assumed the role of a witness by either distorting or adding to the evidence; whether the judge was one-sided or partisan; whether the judge undercut either the accused's privilege to testify or to call witnesses on his own behalf or the jury's ability to find the facts and determine credibility; whether the judge's conduct was coercive, in that it influenced the verdict; and whether the impropriety was cured

by the judge's subsequent instructions to the jury. Quercia at 472.

An example of true judicial comment can be seen in Davis v. United States, 227 F.2d 568 (10th Cir. 1955), wherein the judge gave the jury the following instruction:

> I feel also it is my duty to state to you that a lot of people don't realize what a heinous crime it is to fool with drugs and defendant might not realize it when he did, but it is a crime. I think you should consider the fact within your knowledge of the ease or the difficulty of proving a transaction of the crime charged.
>
> I feel obligated to say to you that under this evidence, I am of the opinion, beyond a reasonable doubt, that the defendant did commit the act as charged, and I say that so that in the event you come to the same conclusion, you will know that I am of the same opinion, and at the time I say, I don't take away from you at all your sole right as the judges of the facts, and if you don't agree with me it is your duty to follow your own conscience, and if you did, I am inclined to believe it would put a reasonable doubt in my mind, but I feel from my experience I have a duty in this kind of a case to so express an opinion and I have done it, and at the same time I caution you to use your own judgement and not put any greater weight on it than it should have. If you have a reasonable doubt as to the guilt of this defendant, it would be your duty to acquit him.

Id. at 569. Noting that the judge's power to comment on the evidence "should be exercised cautiously and only in exceptional cases" and that the crucial facts were disputed, The court remanded for a new trial. Id. at 570.

The United States Supreme Court reached a similar conclusion in McBride v. United States, 3114 F.2d 75, 76 (10th Cir. 1963). There, the judge concluded his instructions to the jury with an assessment of the evidence:

> At this point I should like to say, as the third member or thirteenth member of the jury, that this is a rather simple case.
>
> The facts are clear in my mind that this little corporation was organized but for one purpose, and that is to use the mails and to defraud people, little people, out of money.
>
> ... I can't help but believe that [the accused's defense of good faith is not true] ...
>
> Now I don't know. He says that he did it in good faith and that he was employed and that he worked as an employee, that he reported these things in order that somebody might, the company might make these loans. I can't help but believe that the accused here knew well when he started out that he was going to make a commission and whether or not he ever saw those poor people or not made little or no difference to him.
>
> My views are that it's pretty serious business when we permit the people to use our mails and take advantage of our people.
>
> Now what I have said to you is simply my views and you must disregard it. I have nothing to say except that I can make the remarks as I have; but you must disregard what I have said about this case.
>
> You are the sole jurors of this case. You must pass upon this evidence yourself, so I am asking you to disregard what I have said to you with reference to my views. Disregard it completely. Do not consider anything I have said to you.

Interpreting these comments as "a statement of the court that the accused was guilty," the court remanded for a new trial. Id. at 77.

III. **INSTANT CASE: NOT A COMMENT ON EVIDENCE**

In the case at bar, the trial judge did not comment on the evidence by giving the standard jury instruction on possession of property recently stolen. The basis for giving the instruction was a statute, not the judges opinion on the evidence. The judge did not state an opinion regarding the defendant's knowledge. The judge did not express any thoughts about *how* the defendant's possession of the stolen property or his explanation of that possession demonstrated knowledge. The judge did not distort or add to the evidence nor show partisanship. Rather, the judge merely instructed the jury.

1. **Jury Instructions are Instruction on the Law, NOT Comments on the Weight of the Evidence**

A jury instruction is a statement of the law, not a comment on the facts of the case. Jury instructions serve the important function of informing the jury about its factfinding role, of instructing them on the law, and of informing the jury about its role in applying the law to the facts to determine the ultimate question of the defendant's guilt or innocence. United States v. Fuller, 162 F.3d 256 (4th Cir. 1998).

In contrast, a comment on the evidence, as the statute explains, involves summing up the evidence like a prosecutor does or commenting to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

Courts sometimes confuse erroneous jury instructions with the concept of comments on the evidence.[3]

In short, comments on the evidence occur when a judge comments upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. Jury instructions are guidance on the law, not comments on the facts or testimony. The instruction at issue merely informs the jury of permissible factors, such as possession and the explanation for that possession, to consider in determining whether the defendant is guilty.

2. **Permissive Jury Instructions - NEVER a Comment on Evidence**

A permissive jury instruction can NEVER be a comment on the evidence. This is because a permissive jury instruction starts with an "if ... then ..." formula. A permissive instruction tells the jury that, as a matter of law, it "can" find both inferences. It can find that the evidence supports the

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See e.g., Baldwin v. State, 46 Fla. 115, 35 So. 220 (1903)(finding that two requested instructions invade the province of the jury, single out and emphasize specific parts of the testimony to be considered without reference to the other parts, and are arguments to be addressed to the jury by counsel, rather than the law of the case to be given by the court); Whitfield v. State, 452 So.2d 548 (Fla. 1984)(holding that a jury instruction stating that the jury could infer guilty from the defendant's refusal to submit to fingerprinting constitutes an impermissible comment on the evidence); Fecske v. State, 757 So.2d 548 (Fla. 4th DCA) rev. denied, 776 So.2d 275 (Fla. 2000)(holding a special jury instruction that lack of affirmative medical treatment did not relieve defendant of criminal responsibility for victim's death was an improper comment on evidence).

inference, or it can find that the evidence does not support the inference.

The jury instruction at issue is a permissive jury instruction. It provides that IF a person is in possession of recently stolen property, and IF the person cannot satisfactorily explain the possession, THEN this gives rise to an inference that the person knew or should have known of the property's stolen nature. The trial court is telling the jury that if a person is in possession of recently stolen property and cannot, by the jury's standards, satisfactorily explain that possession, THEN they can or cannot infer knowledge from that possession. They are not required to infer knowledge; Rather, they are permitted to infer knowledge.

The court is NOT telling the jury what weight it should give to the evidence or how much credibility to ascribe each witness. The court is not telling the jury what weight it should give to the evidence of possession, nor how much credibility to ascribe to the defendant's explanation of that possession.

If a permissive jury instruction is commenting on the evidence, then all jury instructions are improper comments on the evidence. C. Ehrhardt, FLORIDA EVIDENCE, § 106.1, at 41 n.1 (2003) (noting the contradiction in Florida case law where sometimes a jury instruction is viewed as a comment on evidence but at other times, "seemingly similar instructions are determined not to be a comment on the evidence").

Indeed, the United States Supreme Court aptly explained the validity of permissive inferences in Ulster County v. Allen, 442 U.S. 140 (1979):

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime - that is, an "ultimate" or "elemental" fact - from the existence of one or more "evidentiary" or "basic" facts.

Id. at 156. The Supreme Court then defined a permissive inference as one "which allows - **but does not require** - the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant." In comparison, a mandatory presumption "tells the trier of fact that he or they must find the elemental fact upon proof of the basic fact." Id. at 157. See also Tatum v. State, 28 Fla. L. Weekly D2380 (Fla. 2nd DCA Oct. 15, 2003)(relying on Ulster).

3. **Instruction Is equivalent to Judge Responding to Jury Query**

The essence of the permissive jury instruction at issue is highlighted by the following scenario. Assume the jury sent out a written question asking whether they could infer knowledge if there was evidence of the defendant's possession of recently stolen property and if the defendant had not satisfactorily explained the possession. What could the trial judge do?

The court can only answer one way. The court would necessarily instruct the jury, as a matter of law, that it "can" infer knowledge from this evidence. Or, the judge can refuse to answer the question. However, the judge cannot answer "no." The judge cannot tell the jury that it cannot infer knowledge from this evidence. Accordingly, the standard jury instruction on the permissible inference arising from the unexplained possession of recently stolen property IS NOT a comment on the evidence. It is simply an instruction on an inference which the jury is free to accept or reject. It is also a correct statement of the law.

In Perriman v. State, 731 So.2d 1243, 1246 (Fla. 1999), this Court held that "the giving of additional instructions in response to a jury query is within the trial court's discretion." Jury questions are measured by the yardstick of "clarity, for jurors must understand fully the law that they are expected to apply." Id.

To that end, judges are not "constrained to give only those instructions that are contained in the Standard Jury Instructions." Carpenter v. State, 785 So.2d 1182 (Fla. 2001). Thus, if "appropriate, the court may ... clarify a point of law with a brief, clear response." Perriman at 1247. "What is important is that sufficient instructions ... be given as adequate guidance to enable a jury to arrive at a verdict based upon the law as applied to the evidence before it." State v. Bryan, 287 So.2d 73, 75 (Fla. 1973).

In sum, a judge can tell the jury that, as a matter of law, they may infer knowledge from the unexplained possession of recently stolen property. Whether the instruction is prompted by a jury query, a request for a special instruction, or via the standard jury instruction at issue, the validity of such instruction remains. Thereby, such instruction is not a comment on evidence.

4. **Correct Statements of Law - NOT Comments on Evidence**

In Kearse v. State, 662 So.2d 677 (Fla. 1995), this Court held that a special jury instruction defining premeditation was not a comment on evidence. The trial court gave a special instruction on premeditation:

> Among the ways that premeditation may be inferred is from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted.

Kearse contended that this instruction constituted an impermissible comment on the evidence. This Court rejected that contention, reasoning that although the added language is not part of the standard jury instruction, it is an accurate statement of the law regarding premeditation and thus not error. Id. at 681.

In the instant case, as in Kearse, the jury instruction is an accurate statement of the law. This Court has repeatedly said that a jury may infer knowledge from the unexplained possession of recently stolen property. See, Consalvo v. State, 697 So.2d 805, 815 n.3 (Fla. 1996)(“jury instructions referring to the inference arising from the unexplained possession of stolen

property have been specifically approved by this Court."); Edwards v. State, 381 So.2d 696 (Fla. 1980)(upholding the statutory inference created by section 812.022(2), Florida Statutes (1977)); Tatum v. State, 28 Fla. L. Weekly D2380 (Fla. 2nd DCA Oct. 15, 2003)(acknowledging judge's authority to give special instruction that tracked language of section 812.022(4), Fla. Stat., which allowed jury to infer defendant's knowledge as to whether the property was stolen, but reversing because no factual predicate existed for the giving of the instruction).

Further, it can't be error for the trial judge to instruct the jury to consider the same factors that this Court would consider when determining if sufficient evidence on the element of knowledge existed.

5. **Basis for Giving Instruction: Statute and NOT Judge's Opinion**

The State stresses that the instruction at issue does not arise from the trial court's decision to comment on the weight of the evidence. Rather, the instruction arises from the theft statute. The statute expressly provides that one can infer knowledge from the unexplained possession of recently stolen property.

IN SUM, true comments on the evidence involve judges who give their personal opinion on the weight to be given the evidence and the credibility to be given the witnesses. The standard jury instruction on possession of property recently stolen in no

way suggests judicial favor toward one outcome or another, does not direct the jury to give any particular weight to evidence of possession or knowledge, and is not a comment upon credibility. It is a permissive inference that the jury is free to accept or reject. It is also a correct statement of the law. Thus, the trial court did not err in giving the instruction.

IV. **FENELON**

Petitioner relies upon Fenelon v. State, 594 So.2d 292 (Fla. 1992). The issue in Fenelon was whether it was error to instruct the jury that it could consider flight as a circumstance inferring guilt. The instruction stated: "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 a series of circumstances from which guilt may be inferred." Id. at 293, n.2. The court did not rule on the issue. Rather, it held that giving the flight instruction, even if erroneous, was harmless.

Fenelon further held that henceforth the jury instruction on flight shall not be given, noting that the jury instruction has long been eliminated from the Florida Standard Jury Instructions in Criminal 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 court also noted the difficulty in determining when to give the flight instruction: “Confusion over the application of the flight instruction is reflected by the many and varied circumstances under which the instruction has been given.” Id. at 294. The court cited cases defining flight where a person flees the scene of a crime; leaves the jurisdiction; runs from police or resists arrest; escapes custody; and gives a false name. The court thus concluded:

> In sum, we are troubled by the inconsistencies among the cases as well as with the lack of a meaningful standard for assessing what type of evidence merits the instruction. Indeed, at oral argument, neither party could articulate specific guidelines that trial courts should use to determine when the instruction should be given. We are thus persuaded that the better policy in future cases where evidence of flight has been properly admitted is to reserve comment to counsel, rather than to the court.

Id. at 295.

Appellant argues the Fenelon holding to be that any instruction wherein the judge informs the jury that proof of one fact may constitute evidence tending to prove another is, *ipso facto*, a comment upon evidence. The State disagrees. Fenelon does not stand for this proposition nor should it be construed to have eliminated the standard jury instruction at issue, which has been approved since Fenelon.

1. **“Judicial Comment” Language Dicta**

The Fenelon remark that "we can think of no valid policy reason why a trial judge should be permitted to comment on the evidence"

was merely *dicta* and not the Court's holding. In addition, the Court's further holding that the flight instruction shall not be given did not rest on the basis of it being a comment on evidence. It rested upon the fact that the instruction was difficult to apply in practice and other jurisdictions had discouraged use of a flight instruction. At least one case, Anderson v. State, 703 So. 2d 1105 (Fla. 5th DCA 1998, has held that a flight instruction is not a comment on evidence.

2. **Flight Instruction - NOT a Comment on Evidence**

The flight instruction, like the instruction on possession of recently stolen property, is a permissive jury instruction - not a comment on the weight of the evidence. It instructs the jury that flight is one of a series of circumstances from which they are *permitted* to infer guilt.

Further, it is a correct statement of law. Indeed, Fenelon itself holds, as a matter of law, that the parties can argue flight as evidence of guilt: "the better policy in future cases where evidence of flight has been properly admitted is to reserve comment to counsel, rather than to the court." Id. at 295.

In Illinois V. Wardlow, 528 U.S. 119 (2000) the Supreme Court considered flight, among other circumstances, in finding that

officers were justified in suspecting that Wardlow was involved in criminal activity. The court stated: “Headlong flight - wherever it occurs - is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.

... Thus, the determination of reasonable suspicion must be based on commonsense judgements and *inferences* about human behavior.” (Emphasis added) Id. at 124-125.

The State contends that if a judge can consider flight as a fact in determining the existence of probable cause (a lesser “guilty”) then there is no reason why a judge cannot tell the jury it can consider the same in determining guilt beyond a reasonable doubt. If the judge can infer guilt from flight, then so can the jury. There can be no error.

3. **There IS a valid policy reason for the instruction**

Contrary to the Fenelon court’s statement that there is no valid policy reason for the flight instruction, the State submits that there is a valid policy reason. It is valid and good policy for the judge to tell the jury what it can do under the law. That it can, if it chooses, infer guilt from flight. Jurors want and need to know what they can and can’t do.

4. **Fenelon Distinguishable**

First, Fenelon deals with a flight instruction. It does not address the instruction at issue or any related instruction involving burglary and theft. Second, the flight instruction

permits an inference of guilt. The instruction at issue permits an inference on the element of knowledge.

Third, the flight instruction states that "the **rule** is" that the jury may infer guilt from flight. A word like "rule" may be loaded when considering the risk of a jury inferring that the judge is directing a certain outcome. There is no such language in the instruction on possession of recently stolen property.

Fourth, the flight instruction had been excised from the standard criminal instructions. Further, it did not rest upon statute and was completely within the province of the courts. Thus, the instruction did not rest on any authority and was subject to debate on its appropriateness. In contrast, the instruction on possession of recently stolen property has a statutory basis in § 812.022, Florida Statutes.

Fifth, the Fenelon holding was grounded on the impracticality of the flight instruction. In contrast there are no such practical problems with the instruction on possession of recently stolen property, and the rules are well set out and understood. As this Court 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.

5. **Post Fenelon Approval of Instruction on recently stolen property**

Post-Fenelon, this Court has approved the instruction on possession of property recently stolen. See, Standard Jury Instructions in Criminal Cases No. 92-1, 603 So. 2d 1175 (Fla. 1992); Consalvo v. State, 697 So.2d 805 (Fla. 1996)("jury instructions referring to the inference arising from the unexplained possession of stolen property have been specifically approved by this Court."); Tatum v. State, 28 Fla. L. Weekly D2380 (Fla. 2nd DCA Oct. 15, 2003)(acknowledging judge's discretion to instruction jury that it may infer knowledge from the unexplained possession of recently stolen possession).

HARMLESS ERROR

The harmless error test places the burden on the State, as beneficiary of the error, to prove beyond a reasonable doubt

that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Goodwin v. State, 751 So.2d 537 (Fla. 1999); § 59.041 and 924.33, Florida Statutes.

The trial court giving a standard jury instruction, even if found error, is harmless. Quintana v. State, 452 So.2d 98, 101 n.2 (Fla. 2nd DCA 1984)(stating that judicial comments, which either directly or indirectly, convey to the jury the judge's view of the case or the evidence, may simply be harmless).

First, the State would have been able to argue the statutory inference even if the trial court had not given the instruction. It was undisputed that the property was stolen; the only issue was who stole it. See, Consalvo v. State, 697 So. 2d 805, 815 (Fla. 1996)("The presumption applies ... where the property is undisputably stolen and the question is who stole it.")

Second, Appellant alleges he was prejudiced in that the evidence presented was "conflicting and ambiguous" and thus the instruction could have impacted the jury. (IB.21). However, the State's case was such that, regardless of the jury instruction, it would have returned a guilty verdict.

Three witnesses testified to consistent events. The victim testified that the burglary and theft took place between 11:00 pm and 6:00 am. Defendant's girlfriend placed the Defendant in possession of the stolen property at 3:30 am. The only items placed in her house were the exact two items stolen, along with

a speaker box which Defendant admitted came out of the trunk of his car. The items were all left at the same time. The girlfriend told officers the items belonged to Defendant. Additionally, Officer Matthews testified that Defendant responded that he knew what was going on, but did not go inside the house. According to Detective Strickland, Defendant similarly responded that he drove the car that night, and that he, Jit and Run removed a large speaker from the trunk of his car to make room for their next run.

Moreover, Defendant, in his own words, “took the blame” at the time. Only later at trial did he claim he did so to protect his girlfriend. The State contends that the jury would have inferred the defendant’s knowledge regardless of the fact that the judge told them they could do so.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, and the decision of the District Court of Appeal affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **M.J. Lord**, **Ass't. Public Defender**, Leon County Courthouse, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301 by MAIL on November 19, 2003.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

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IN THE SUPREME COURT OF FLORIDA

DARRYL WALKER,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. SC03-1555

APPENDIX

Walker v. State, 853 So.2d 498 (Fla. 1st DCA 2003)