IN THE SUPREME COURT OF FLORIDA

JORGE GARCIA,

Petitioner,

v. **FSC No. SC03-1677**
Lower Ct. No. 2D02-874

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ARGUE TO THE JURY FACTS NOT IN EVIDENCE CONCERNING MR. GARCIA'S KNOWLEDGE THAT THE TAPED BALL CONTAINED METHAMPHETAMINE?

(As stated by Petitioner)

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

The instant case is before this Court on certified conflict regarding whether it was fundamental error to fail to instruct the jury on the element of knowledge of the illicit nature of the substance (Chicone instruction). Petitioner's Initial Brief raised four issues before this Court. **However, Issue II of the brief is the only issue for which the Second District Court of Appeal certified conflict to this Court.** For purposes of clarity, and for the convenience of this Court, Respondent will keep the Issues in the Order designated by Petitioner.

STATEMENT OF THE CASE

Petitioner was charged with trafficking in methamphetamine (Count I), driving under the influence (Count II), and obstructing or resisting an officer without violence (Count III). (V. 1: R. 22). The jury returned a guilty verdict to the lesser included possession of methamphetamine (Count I), guilty as charged for driving under the influence (Count II), and not guilty of obstructing or resisting without violence (Count III).

The Second District Court of Appeal affirmed the sentence. The court denied Petitioner's claim that the trial court erred

when it denied his motion for judgment of acquittal. The opinion further denied Petitioner's claim of error with regard to the trial court giving an erroneous jury instruction. The District Court determined that the jury instruction omitted an essential element of the crime, "knowledge of the illicit nature of the substance." However, the District Court determined this did not amount to fundamental error. Garcia v. State, 854 So. 2d 758 (Fla. 2d DCA 2003). The Second District certified conflict with Goodman v. State, 839 So. 2d 902 (Fla. 1st DCA 2003)(failure to instruct the jury on the element of knowledge of the illicit nature of the substance constitutes fundamental error).

STATEMENT OF THE FACTS

On June 9, 2001, Deputy Sheriff Joseph Irizarry observed Petitioner Garcia driving a truck which passed through a flashing yellow light without slowing down. The deputy saw Garcia's vehicle go off the road while making a right-hand turn and then weave off the roadway onto the grassy shoulder three times. Deputy Irizarry followed Garcia for approximately a quarter of a mile and decided to stop Garcia's vehicle.

Deputy Irizarry approached the driver's window of the vehicle, smelled alcohol, observed that Garcia's eyes were bloodshot, and that Garcia's speech was slurred. Garcia was alone in the truck. Deputy Irizarry conducted field sobriety

tests and arrested Garcia for driving under the influence. Garcia v. State, 854 So. 2d 758, 759 (Fla. 2d DCA 2003).

Deputies Wilkins and Banner arrived at the scene and searched Garcia's truck incident to his arrest. Deputy Wilkins found an item which looked like a softball wrapped in black electrical tape underneath the passenger's seat of Garcia's truck. Garcia told the deputies at the scene that he did not know what the item was, that he had not seen it before, and had not known that it was in the truck. He also stated that his truck had recently been stolen, and some friends had been in his truck earlier that night. Subsequent tests determined that the item was a mixture containing methamphetamine and a cutting agent. Id.

At trial Garcia testified that he had been at a party that night from about 7:00 P.M. until 2:00 A.M. His truck was used at the party for playing CDs. Garcia also used the truck on two occasions during the party to take friends to buy beer. He testified that he did not put the tape covered item in the truck, know it was there, or know what it contained. Id.

Garcia further testified that on Wednesday May 31 his truck was stolen from a repair shop. The truck was recovered the following Monday in dirty condition and contained items that did not belong to Garcia. After recovering the truck, he returned

it to the shop for the installation of a stereo. When he later picked up the truck, it was clean. Id.

Roberta Case, a crime scene technician from the Polk County Sheriff's Office testified Garcia's vehicle was stolen on or about June 2nd. The vehicle was recovered and processed for prints and evidence. (V. 2: T. 158). The car's interior was looked through thoroughly, and no softball sized ball of black tape was recovered. (V. 2: T. 163).

Deputy Joseph Irizarry testified he pulled over Garcia's vehicle.(V. 2: T. 31). Petitioner was the driver, his eyes were bloodshot, and he smelled of alcohol. (V. 2: T. 33). Petitioner was asked to get out of the vehicle, and he was unsteady when he went to the rear of the vehicle. (V. 2: T. 37). The officer then conducted field sobriety tests. (V. 2: T. 40-41).

Garcia was placed under arrest and placed in the police cruiser. The truck was then searched incident to arrest by backup deputies. (V. 2: T. 48). Deputy Wilkins assisted in the search of the vehicle. Wilkins found the contraband in Garcia's truck. Deputy Wilkins gave the contraband to Deputy Bunner. (V. 2: T. 49). It looked like a softball wrapped in black electrical tape. (V. 2: T. 50).

Deputy Irizarry identified the State's Exhibit L, which was the white, rock like substance that was discovered underneath

the passenger seat of the vehicle. (V. 2: T. 52). At the scene, Garcia told police that he did not know how the drugs got there. His truck had been stolen a few weeks earlier. He also had some friends in the vehicle earlier. (V. 2: T. 84).

Anne Person, from the FDLE crime laboratory testified she did a lab analysis of the contents from Exhibit L, which was sealed. (V. 2: T. 89). The substance tested positive for methamphetamine. (V. 2: T. 93). The substance contained 220 grams of a mixture containing methamphetamine. (V. 2: T. 96).

Deputy Robert Wilkins searched the suspect vehicle. He searched the passenger side of the vehicle and found an item under the left hand side of the passenger seat, towards the front. (V. 2: T. 106). The item was loose, under the seat. It was a black ball, which he showed to Deputy Irizarry. (V. 2: T. 107). Irizarry then unwrapped the black tape. (V. 2: T. 109). The vehicle was very clean and well kept, other than this item. (V. 2: T. 110).

Deputy Steven Bunner testified he observed Deputy Wilkins search the passenger side of the truck. Wilkins removed a wad of black tape and showed it to Bunner. (V. 2: T. 133). Bunner grabbed it and looked at it. The ball was hard. Bunner asked Irizarry to question Garcia about the item. Bunner then unraveled the black wad of tape. (V. 2: T. 135). Bunner then

identified Exhibit L as what was inside the tape and then the blue saran wrap. (V. 2: T. 137).

At the jury charge conference, the defense objected to the standard instruction which permitted the jury to infer or assume knowledge of the presence of methamphetamine based on exclusive possession of the container of the drug. The trial court overruled the objection and gave the standard instructions on trafficking. (V. 3: T. 243-246). The trial court further gave the standard instruction on the lesser included possession, without objection. (V. 3: T. 246). The Second District opinion held as follows:

> The trial court did give an instruction concerning the trafficking charge against Garcia which included the guilty knowledge element. The court specifically instructed the jury that the defendant's knowledge "that the substance was methamphetamine or a mixture containing methamphetamine" was a material element of the offense of trafficking. The trial court then gave an instruction concerning actual and constructive possession, which included this statement concerning nonexclusive constructive possession:
>
> If a thing is in a place over which the person does not have control, in order to establish constructive possession, the State must prove the person has control over the thing, knowledge of the thing which was in the person's presence, and the knowledge of the illicit nature of the thing.
>
> After giving the instruction regarding the elements of the trafficking offense and the

> requirements for establishing possession, the trial court proceeded to give an instruction on the elements of the simple possession offense. That instruction omitted any reference to the requirement that the defendant have knowledge of the illicit nature of the substance. After giving the instruction on the elements of possession, the trial court did, however, state that the prior instruction regarding the "definition of possession . . . applies to the lesser charge as it did to the greater charge."
>
> During the course of its deliberations, the jury submitted the following question to the court: "What is the difference between trafficking and possession of methamphetamine?" In response to the jury's inquiry, the trial court read the jury the instruction it had previously given concerning the elements of the possession offense and the trafficking offense. The court did not, however, repeat the instruction it had previously given concerning the meaning of actual and constructive possession.

Garcia, 854 So. 2d at 764.

The Second District found no reversible error since knowledge of the illicit nature of the substance was not in dispute. The Second District certified conflict with Goodman v. State, 839 So. 2d 902 (Fla. 1st DCA 2003) which found the failure to instruct the jury on the element of knowledge of the illicit nature of the substance constitutes fundamental error. (ISSUE II of Initial Brief).

SUMMARY OF THE ARGUMENT

The trial court properly denied the motion for judgment of acquittal. The state demonstrated that Appellant had exclusive possession of the vehicle in which the drugs were found. Therefore, knowledge of the contraband can be inferred.

The trial court's failure to instruct the jury on the element of knowledge of the illicit nature of the substance did not constitute fundamental error since this element was not disputed. The court gave the standard instruction on possession, and Appellant did not preserve this issue for appeal.

It is reversible error to deny a defense request for a Chicone instruction when it is requested, regardless of the defense theory. However, when such an instruction is not requested, it is fundamental error only when the knowledge of the illicit nature of the substance is in dispute. In actual and exclusive constructive possession cases, Delva mandates that the defense make the trial court aware of its desire for such instruction. Therefore, when the defense does not request a Chicone instruction in an actual or an exclusive constructive possession case, there is no fundamental error.

Moreover, the trial court did not commit reversible error in instructing that knowledge of the contents of the taped ball

could be inferred by Petitioner's exclusive possession. Furthermore, the prosecutor's closing comments do not constitute reversible error.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT SUFFICIENT EVIDENCE EXISTED TO SUSTAIN A DRUG POSSESSION CHARGE?
(As restated by Respondent)

Petitioner argues that there is insufficient evidence to support the denial of his motion for judgment of acquittal regarding the possession of methamphetamine as a lesser included of the trafficking count. The State strongly disagrees.

The state presented sufficient evidence to sustain Appellant's conviction. In Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974), the Florida Supreme Court stated: "The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law."

Further, "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." State v. Law, 559 So. 2d 187, 189 (Fla. 1989). "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." State v. Rudolph, 595 So. 2d 297 (Fla. 5th DCA 1992).

In the instant case, Petitioner's motion for judgment of acquittal was denied by the trial court. There is substantial competent evidence to establish the elements of the charged trafficking and lesser possession count. There was sufficient evidence to present the case for a determination of guilt. Garcia was convicted of the lesser included possession of methamphetamine (for the trafficking charge). (V. 1: R. 50).

Exclusive possession is properly determined by the jury. Jordan v. State, 548 So. 2d 737 (Fla. 4th DCA 1989). When a motorist is in exclusive possession of a vehicle, his knowledge of the contraband contained therein may be inferred. Cordero v. State, 589 So. 2d 407 (Fla. 5th DCA 1991); Parker v. State, 641 So. 2d 483 (Fla. 5th DCA 1994).

The instant case is similar to that of Parker, supra. The court in Parker held that it was for the jury to accept or reject the defense claim that his nephew had possession of the vehicle earlier and had left the cocaine in the car without his knowledge. Just as in Parker, the jury in the instant case rejected Petitioner’s defense. See Demps v. State, 795 So. 2d 141 (Fla. 5th DCA 2001, rev.denied, 821 So. 2d 294 (Fla.

2002)(jury can properly conclude that defendant who is "driver and sole occupant of a vehicle" is in possession of cocaine found even when "there is testimony that others have occupied the vehicle earlier in the day).

Knowledge of contraband found within an automobile is generally inferred or presumed from one's exclusive possession thereof unless and until proven otherwise. State v. Paleveda, 745 So.2d 1026 (Fla. 2d DCA 1999)(holding that trial court erred in dismissing cocaine possession charge where undisputed facts showed that defendant was "in exclusive control and possession of an automobile in which cocaine was found next to the driver's seat," thus establishing a "prima facie case of actual possession of cocaine"). See also Maryland v. Pringle, 540 U.S. ___ , 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003)(officer had probable cause to believe defendant committed crime of possession of cocaine either solely or jointly since it was reasonable for officer to infer that any or all of the occupants of car had knowledge of, and exercised dominion and control over cocaine).

The presumption of knowledge of contraband found in the automobile is based on the premise that “persons who lay claim to a valuable possession such as illegal drugs are quite unlikely to place that valued possession in a motorized

conveyance which is under the exclusive dominion and control of another and which may speedily bear it away to a place from which it cannot be recovered." Garcia, supra. Therefore, the presumption of knowledge of a person in exclusive possession and control of the vehicle is reasonable. Moreover, there is no due process violation since such presumption may be rebutted by the defense.

Constructive possession of drugs based on exclusive possession of an automobile is sufficient to raise a presumption that the defendant had knowledge of the illicit nature of the drugs. "The presumption of knowledge of the illicit nature of the substance is predicated on the common sense proposition that ordinarily individuals who possess a substance will know what the substance is, along with the basic legal principle that individuals are charged with knowledge of what the law requires or prohibits". See State v. Medlin, 273 So. 2d 394, 397 (Fla. 1973)(holding that where defendant was charged with unlawful delivery of barbiturate or central nervous system stimulant without a valid prescription the "State was not required to prove knowledge or intent since both were presumed from the doing of the prohibited act"); State v. Williamson, 813 So. 2d 61, 65 (Fla. 2002)(stating that Medlin presumption is "still applicable to both actual and exclusive constructive possession

cases").

Here, the Second District properly applied the Medlin presumption to Petitioner's case. This presumption can be overcome by evidence which shows lack of guilty knowledge. See Williamson, 813 So. 2d at 64 (stating that Medlin presumption "may not be sufficient" to sustain a conviction "when there is other evidence which tends to negate the presumption"). Here, the jury rejected Garcia's claim that other individuals had an opportunity to place the drugs in his vehicle. Such is the province of the finder of fact. Parker, supra.

In Lee v. State, 835 So. 2d 1177, 1180 (Fla. 4th DCA 2002) the court determined the defendant's presence, as driver and sole occupant of the vehicle at the time of his arrest was sufficient to show he exclusively possessed the vehicle, creating an inference of his dominion and control and guilty knowledge of the marijuana found in his vehicle. Such is the case here where the jury clearly rejected Petitioner's defense that others had put the drugs in his truck. See also Johnson v. State, 689 So. 2d 1124 (Fla. 4th DCA 1997), rev'd on other grounds, 712 So. 2d 380 (Fla. 1998). In Johnson, the Fourth District found there was sufficient evidence of constructive possession proved by the sole occupancy of the vehicle where the cocaine was found under the spare tire located in the trunk.

This Court quashed Johnson on double jeopardy grounds and did not discuss the sufficiency issue.

In Hampton v. State, 680 So. 2d 581 (Fla. 3d DCA 1996), the trial court properly denied the motion for judgment of acquittal where the drugs were found under the driver's seat of the defendant's car. The defense claimed the state failed to present sufficient evidence for the jury to find knowledge of the presence of cocaine. However, the defendant's girlfriend testified the drugs in the car were not hers, and she did not see a man who borrowed the car put any drugs in there. The judgment of acquittal was properly denied.

Petitioner claims the state failed to establish his ownership of the vehicle. However, such ownership was never in dispute. In fact, it was relied upon as a potential defense in opening statements. Defense counsel argued that about one week prior to the arrest, Garcia brought his vehicle in to have a stereo installed. The vehicle was stolen and eventually found abandoned. Police notified Garcia. (V. 2: T. 21-22). The defense used this occurrence to raise the possibility that the drugs were placed by someone who stole the car previously. However, Roberta Case, a crime scene technician from the Polk County Sheriff's Office testified Garcia's vehicle was stolen on or about June 2nd. The vehicle was recovered and processed for

prints and evidence. (V. 2: T. 158). The car's interior was looked through thoroughly, and no softball sized ball of black tape was recovered. (V. 2: T. 163).

Deputy Joseph Irizarry testified Garcia was the driver and sole occupant of a vehicle he stopped. Garcia was placed under arrest and placed in the police cruiser. The officer then searched the truck incident to arrest as backup deputies arrived. (V. 2: T. 48). Deputy Wilkins assisted in the search of the vehicle and found the contraband in Garcia's truck. Deputy Wilkins gave the contraband to Deputy Bunner. (V. 2: T. 49). It looked like a softball wrapped in black electrical tape. (V. 2: T. 50).

The substance was discovered underneath the passenger seat of Garcia's vehicle. (V. 2: T. 52). At the scene, Garcia told police that he did not know how the drugs got there. His truck had been stolen a few weeks earlier. He also had some friends in the vehicle earlier. (V. 2: T. 84).

Deputy Robert Wilkins searched the passenger side of the vehicle. He found an item under the left hand side of the passenger seat, towards the front. (V. 2: T. 106). The item was loose, under the seat. It was a black ball, which he showed to Deputy Irizarry. (V. 2: T. 107). Irizarry then unwrapped the black tape. (V. 2: T. 109). The vehicle was very clean and well

kept, other than this item. (V. 2: T. 110).

Deputy Steven Bunner testified he observed Deputy Wilkins search the passenger side of the truck. Wilkins removed a wad of black tape and showed it to Bunner. (V. 2: T. 133). Bunner grabbed it and looked at it. The ball was hard. Bunner unraveled the black wad of tape. (V. 2: T. 135).

Here, the state established that Garcia was the sole occupant of the vehicle in which the contraband was found. See also Chicone v. State, 684 So. 2d 736 (Fla. 1986) (defendant must have knowledge of illicit nature of substance possessed). In the instant case, the drugs were found in a place that the Garcia had control over. It is the trier of fact who makes the determination whether or not Garcia knew of the drug's presence. Gartell v. State, 626 So. 2d 1364 (Fla. 1993).

In State v. Odom, 862 So. 2d 56 (Fla. 2d DCA 2003), the Second District reversed a trial court's granting of judgment of acquittal for possession of cocaine after a jury finding of guilt. Odom was the driver and sole occupant of an automobile in which cocaine was found in a closed black film cannister lodged between the driver's seat and the console. Odom's defense brought forth through cross-examination was based on his claim that the car was a rental vehicle which he shared with his sister. The jury rejected this defense theory.

The issue of whether Petitioner was in constructive possession of the contraband was a question for the trier of fact. It only becomes an issue for judgment of acquittal where there is no evidence of dominion and control. Such is not the case here. Garcia's dominion and control can be inferred from his having exclusive possession of the vehicle, and being its sole occupant.

See Davis v. State, 350 So.2d 834 (Fla. 2d DCA), rev. denied, 355 So.2d 517 (Fla. 1977)(fact that defendant had possession of trunk key and attempted to conceal it were sufficiently incriminating circumstances from which jury could infer that defendant knew marijuana was in trunk of his automobile and that it was in his constructive possession).

Therefore, the question became whether, based on the circumstances and events and the inconsistencies of the defense's version of events, the Petitioner knew that the methamphetamine was in the car. Such a factual determination is properly determined by the jury.

In the instant case, the trier of fact was able to weigh the evidence, observe the witnesses and evaluate their credibility. "Once competent, substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses." Taylor v. State,

583 So. 2d 323 (Fla. 1991). A determination by the trier of fact when supported by substantial evidence, will not be reversed on appeal. Law, supra.

ISSUE II

WHETHER THE DISTRICT COURT ERRED IN RULING THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING THE ESSENTIAL ELEMENT OF GUILTY KNOWLEDGE WAS NOT FUNDAMENTAL ERROR?
(As restated by Respondent)

The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. James v. State, 695 So. 2d 1229, 1236 (Fla. 1997) (noting that a trial court has wide discretion in instructing the jury). Absent a clear showing that Petitioner's rights have been meaningfully prejudiced by the jury instruction, appellate courts are reluctant to find grounds for reversal. Lacy v. State, 387 So. 2d 561 (Fla. 4th DCA 1980).

Garcia claims the trial court committed fundamental error in failing to instruct the jury it must find the defendant knew of the illicit nature of the contents of the taped ball. However the jury was instructed with regard to the requisite knowledge of the illicit nature of the substance as to the charged trafficking count. The jury was instructed that they must find Garcia knew the substance was methamphetamine. (V. 3. T. 300). The defense then did not object to the standard instruction that was given with regard to the lesser included possession. This instruction did not contain a Chicone instruction. Therefore, this issue is not preserved for appeal.

In order to preserve an issue for appellate review regarding jury instructions, the defense must make a request for a specific jury instruction which is denied by the court, or object after the jury has been instructed. Chicone v. State, 684 So. 2d 736, 746 (Fla. 1996). Watson v. State, 651 So. 2d 1159 (Fla. 1994); see also, Fla. R. Crim. P. 3.390(d)("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."). Absent a timely objection at trial, an issue concerning jury instructions can be raised on appeal only if fundamental error occurred. Jordan v. State, 707 So. 2d 816 (Fla. 5th DCA), approved on other grounds, 720 So. 2d 1077(Fla. 1998); State v. Delva, 575 So.2d 643 (Fla. 1991). Since the Petitioner failed to request the specific instruction for the lesser included possession count, he is barred from raising this claim for the first time on appeal. See King v. State, 800 So. 2d 734 (Fla. 5th DCA 2001)(the preservation of error requirement "more precisely frames the issue, arguments, and factual record and thereby facilitates appellate review, and it "prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the

first decision is adverse to the client"). See also, J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998). Moreover, since the jury charge conference and jury instructions occurred after the parties have rested, the defense is not forced to put forth a case in order to have such instruction.

Pursuant to Chicone, supra, guilty knowledge is an element of possession of a controlled substance. Here, the jury was instructed on the guilty knowledge element for the trafficking count. The trial court then gave an instruction concerning actual and constructive possession, which included this statement concerning nonexclusive constructive possession:

> If a thing is in a place over which the person does not have control, in order to establish constructive possession, the State must prove the person has control over the thing, knowledge of the thing which was in the person's presence, and the knowledge of the illicit nature of the thing.

Garcia, 854 So. 2d at 765. However, no such instruction regarding guilty knowledge of the illicit nature of the substance was requested or given on the lesser included possession for which Petitioner was ultimately convicted. The possession instruction omitted any reference to the requirement that the defendant have knowledge of the illicit nature of the substance.

The Second District determined Garcia did not preserve this

issue for appeal. This Court in Chicone stated that “the existing jury instructions are adequate in requiring 'knowledge of the presence of the substance' " but that the "trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed" **when "specifically requested by a defendant**." Chicone, 684 So. 2d at 745-46. (Emphasis added). Therefore, there was no preserved error, and the Second District next determined whether such failure to instruct the jury constituted fundamental error.

In State v. Delva, 575 So. 2d 643 (Fla. 1991), this Court addressed when an unpreserved error in failing to give proper instructions concerning the elements of the crime will constitute fundamental error. This Court held that “the failure to give a proper instruction concerning a particular element of the crime charged is a fundamental error only if the element was disputed at trial: "Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error, and there must be an objection to preserve the issue for appeal." Id. at 645.

The facts in Delva are similar to the instant case. In Delva, a package of cocaine was discovered under the front seat of the car Delva was driving. The defense theory was that he

did not know the package of cocaine was in the car. Delva presented testimony that the car was jointly owned by himself and his fiancee, and the two of them as well as his brother all drove the car. He further presented testimony that his brother drove the car on the day of the arrest. "There was no suggestion that Delva was arguing that while he knew of the existence of the package he did not know what it contained." Id. Because knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element of the crime was not fundamental error. Id. The Second District accordingly held:

> The parallels between Delva and the case under review are striking. Like the defendant in Delva, Garcia's "defense was that he did not know the package of [illegal drugs] was even in his [vehicle]." Delva, 575 So. 2d at 645. Like the defendant in Delva, Garcia sought to show that others had access to his vehicle and could have placed the drugs there. And in the instant case, just as in Delva, "there was no suggestion that [the defendant] was arguing that while he knew of the existence of the package [of drugs] he did not know what it contained." Id. at 645. Although Garcia did assert that he did not know what was in the softball-shaped item found in his vehicle, that assertion was nothing more than a statement of the logical implication of his defense based on lack of knowledge that the item existed. As in Delva, the theory of defense advanced by Garcia was not affected by the absence of a guilty knowledge instruction. Therefore, just as there was no fundamental error in Delva, there is no

fundamental error here.

Garcia, 854 So. 2d at 767.

In Scott v. State, 808 So. 2d 166 (Fla. 2002) and Chicone, this Court indicated that "Medlin[1] stands for the proposition that evidence of actual, personal possession is enough to sustain a conviction. In other words, knowledge can be inferred from the fact of personal possession." Scott, 808 So. 2d at 171; Chicone, 684 So. 2d at 739.

In Scott, supra, this Court further held that the "requirement that an instruction must be given [on each element of the crime] does not depend on the defense espoused." The holding in Scott makes clear that "a defendant who requests an instruction concerning an element of the offense charged against him is entitled to have a proper instruction given to the jury with respect to that element of the crime, even if the defendant's theory of defense is not predicated on that particular element. Moreover, the failure to give such a requested instruction is not subject to harmless error analysis. However, Scott does not address the question of fundamental error. Since the defendant in Scott requested a guilty knowledge instruction, this Court did not reach the issue of

[1]"[T]he State was not required to prove knowledge or intent since both were presumed from the doing of the prohibited act." State v. Medlin, 273 So. 2d 394, 397 (Fla. 1973).

fundamental error.

This Court further held in Scott that the Medlin presumption of knowledge applies to cases of actual possession. "Medlin stands for the proposition that evidence of actual, personal possession is enough to sustain a conviction." Scott, 808 So. 2d at 171. In a footnote, this Court further held that the Medlin inference may be applicable to cases of exclusive constructive possession, depending on the particular facts of each case. Scott, 808 So. 2d at 175. The instant case is such an instance where the state proved Garcia was in exclusive constructive possession of the vehicle and the item inside of the vehicle. Therefore, the State is entitled to its Medlin presumption, and the knowledge of the illicit nature of the substance is not in dispute.

In McMillon v. State, 813 So. 2d 56 (Fla. 2002), this Court reiterated that knowledge of the illicit nature of a substance is an element of the possession charge. The trial court's failure to grant the defense request for a Chicone instruction was harmful error.

McMillon and Scott hold that it is reversible error to deny a defense request for a Chicone instruction when it is requested, regardless of the defense theory. However, these cases do not address when a failure to instruct on an element of

a crime is fundamental error. Delva addresses such a situation. When an instruction is not requested, this Court's holding in Delva controls.

Therefore, when an element is in dispute, it is fundamental error to fail to give a Chicone instruction. However, when the defense does not request such instruction, and knowledge of the illicit nature of the substance is not in dispute, Delva mandates that the defense make the trial court aware of its desire for such instruction. Therefore, when the defense does not request a Chicone instruction in an actual possession or exclusive constructive possession case, there is no fundamental error.

The Second District opinion points to language in Scott which indicates that a defense theory that the defendant was without knowledge of the presence of drugs "encompasses the argument that he was unaware of the illicit nature of the substance," Scott, 808 So. 2d at 171. The Second District indicated such a determination seems inconsistent with the holding of Delva which holds that the defendant's claim that he was unaware of the existence of the drugs does not place the guilty knowledge element at issue. Garcia, 854 So. 2d at 768. In Lee v. State, 835 So. 2d 1177, 1181(Fla. 4th DCA 2002), the Fourth District similarly notes possible conflict between the

holding of Delva and Scott.

However, in Davis v. State, 839 So. 2d 734, 735 (Fla. 4th DCA), rev.denied, 848 So. 2d 1153(Fla. 2003), the Fourth District resolved any possible conflict between Delva and Scott due to the fact that the error in Scott was preserved. Similarly in the instant case, there was no preserved error with regard to the jury instruction. See Reed v. State, 837 So. 2d 366, 370 (Fla. 2002) (applying Delva's "distinction regarding fundamental error between a disputed element of a crime and an element of a crime about which there is no dispute," and stating that while "all fundamental error is harmful error . . . not all harmful error is fundamental").

In Mathis v. State, 859 So. 2d 1265 (Fla. 4th DCA 2003), the Fourth District held that failure to give the Chicone instruction amounts to fundamental error only where guilty knowledge is an issue in the case. Davis, supra; Rhinehart v. State, 840 So. 2d 456 (Fla. 4th DCA), rev.denied, 848 So. 2d 1155(Fla. 2003)(failure to give Chicone instruction was not fundamental error where appellant did not present any evidence or argue that he did not know the illicit nature of the substance he delivered). Since Mathis's knowledge of the illicit nature of the substance was not at issue, the failure of the trial court to include the Chicone instruction did not

amount to fundamental error.

In Davis, 839 So. 2d at 736, the Fourth District held that the failure to give a guilty knowledge instruction was not fundamental error where "the only position taken by the defendant was that he was not the person who sold the cocaine to the informant. The Fourth District pointed out that like Delva, there was no suggestion that the defendant was arguing that while he knew of the existence of the package he did not know what it contained. Delva, 575 So. 2d at 645. The Fourth District determined a mistaken identity defense does not put all elements of the crime into dispute as to make the failure to give a Chicone instruction fundamental error. To require otherwise would conflict with Delva. Davis, supra.

In Lee, supra, the Fourth District again held the failure to give guilty knowledge instruction was not fundamental error in a drug possession case. Lee was driving alone in a vehicle when arrested, and marijuana was later found on the driver's side floor. In Starling v. State, 842 So. 2d 992, 993 (Fla. 1st DCA 2003) the First District held that the failure to give a guilty knowledge instruction was not fundamental error where "the only issue raised during trial was that the defendant was not the person who sold the cocaine. Similarly in Ozell v. State, 837 So. 2d 559, 560 (Fla. 3d DCA), rev.denied, 847 So. 2d

978(Fla. 2003) the Third District held there was no fundamental error in a sale of cocaine case where the defense contended both that (1) "the police officers were mistaken in their identification of the defendant" and that (2) there was a reasonable doubt concerning the defendant's guilt because officers "could not actually see" object which the alleged perpetrator handed to the individual who subsequently dropped a ziplock baggie containing cocaine.

In Johnson v. State, 833 So. 2d 252, 253 (Fla. 4th DCA 2002) the Fourth District determined the failure to give a guilty knowledge instruction was fundamental error in a case where the defendant said "that he had no knowledge of the contents of the vehicle" in which illegal drugs were found, but where "both sides acknowledged that the issues were whether the defendant had control of the drugs and whether he had knowledge of the illegality of the substances. Johnson involved a defendant who was driving with a passenger. Drugs were found on both the driver's and passenger sides of the floor of the car. Therefore, there was no exclusive possession, and the error was fundamental.

Blunt v. State, 831 So. 2d 770 (Fla. 4th DCA 2002) similarly held the failure to give a guilty knowledge instruction was fundamental error where the defendant denied knowledge of the

existence of a pill bottle and the crack cocaine. However, the facts of Blunt indicate the defendant would walk to a garbage dumpster across the parking lot each time a person approached. Blunt would then pick up a pill bottle located on the ground next to the dumpster, remove an item, place the pill bottle back and walk back to the person. The material inside the pill bottle contained crack cocaine. However, there was no exclusive constructive possession in Blunt, since the drugs were located in a public place, next to a dumpster. Such a situation is distinguishable from the instant case where Garcia was the sole occupant of the vehicle, and the state was entitled to a Medlin presumption instruction.

Goodman v. State, 839 So. 2d 902 (Fla. 1st DCA 2003), is in apparent conflict with Garcia. Goodman was a constructive possession case where Goodman denied knowledge that the cannabis was present. The First District held that this placed in dispute the essential element of knowledge of the illicit nature of the substance, as well as that of knowledge of the presence of the substance. The failure to instruct on knowledge of the illicit nature of the substance was fundamental error. The Goodman opinion contains very few facts. Moreover, the First District neglected to cite to Delva. Instead it cites Scott in support of its holding that failure to give a guilty knowledge

instruction was fundamental error in a case where the defendant "denied knowledge that the cannabis was present," and thus "placed in dispute the essential element of knowledge of the illicit nature of the substance." Goodman, 839 So. 2d at 903.

Although McMillon indicates that both a Chicone instruction and a Medlin instruction should be given in actual possession cases, it appears that this requirement is based on the fact that a Chicone instruction was requested. In the instant case, Garcia never requested the Chicone instruction with regard to the lesser possession count. Therefore, Garcia waived this issue for appeal. In any event, even if this Court finds that the instruction was error, it does not constitute fundamental error in this case. “An error is fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.” J.B. v. State, 705 So. 2d (Fla. 1998).

A careful analysis of the claimed error in the jury instruction, in this case, does not support a finding of fundamental error. The instructions read to the jury were sufficiently complete to properly apprise the jury of the law that should be considered in reaching a verdict. Smith v. State, 772 So. 2d 625 (Fla. 4th DCA 2000). In McMillon, Justice Wells in his dissenting opinion held, as follows:

> [U]nder the facts of this case, any error in failing to give the instruction was harmless. Moreover, this decision clarifies that the majority has converted Chicone error into per se reversible error. This could only be the situation if the Chicone decision is considered to have written an element into the crime. Writing of elements into crimes is for the Legislature, not this Court.

McMillon, 813 So. 2d at 59.

Here, the trial court did not commit fundamental error. See Section 893.101(Fla. Stat 2002) (Chapter 2002 258 clarifies legislative intent in light of Chicone v. State. The legislature finds that knowledge of the illicit nature of controlled substance is not an element of offense. Lack of knowledge is an affirmative offense. The possession of controlled substance shall give rise to a permissive presumption that possessor knew of illicit nature of the substance). See also Lee, 835 So. 2d at 1181(in light of the legislative clarification of Chicone, the Fourth District did not certify a question to the Florida Supreme Court, notwithstanding that the statute is inapplicable to offenses committed prior to effective date of legislation). But see Norman v. State, 826 So. 2d 440 (Fla. 1st DCA 2002)(Section 893.101(1) does not apply retroactively).

There is sufficient evidence to convict Garcia of the instant crime. Any error complained of did not amount to

harmful or fundamental error. Any error did not contribute to the verdict, and there is no reasonable possibility that the error contributed to the conviction. Accordingly any error should be considered harmless, especially in light of the conviction on the lesser possession charge, as well as the jury having been given the Chicone instruction on the trafficking count. State v. DiGuilio, 491 So. 2d 1192 (Fla. 1986).

In light of this Court's holdings in Chicone and Scott, as well as the continued viability of Delva[2], there is no fundamental error where the State properly receives a Medlin instruction, and the defense fails to request a Chicone instruction.

[2] See Reed v. State, 837 So. 2d 366, 369 (Fla. 2002).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE PRESUMPTION OF KNOWLEDGE OF THE PRESENCE OF THE CONTROLLED SUBSTANCE FROM THE EXCLUSIVE POSSESSION OF IT?
(As stated by Petitioner)

Petitioner further claims the trial court erred by instructing the jury that knowledge of the contents could be inferred from his exclusive possession of the truck. (V. 3. T. 244). Such instruction was proper, and there is no reversible error. The trial court gave the standard jury instruction and committed no error. See Parker, supra.

Constructive possession of drugs based on exclusive possession of an automobile is sufficient to raise a presumption that the defendant had knowledge of the illicit nature of the drugs. “The presumption of knowledge of the illicit nature of the substance is predicated on the common sense proposition that ordinarily individuals who possess a substance will know what the substance is, along with the basic legal principle that individuals are charged with knowledge of what the law requires or prohibits”. See State v. Medlin, 273 So. 2d 394, 397 (Fla. 1973) (holding that where defendant was charged with unlawful delivery of barbiturate or central nervous system stimulant without a valid prescription the "State was not required to prove knowledge or intent since both were presumed from the

doing of the prohibited act"); State v. Williamson, 813 So. 2d 61, 65 (Fla. 2002) (stating that Medlin presumption is "still applicable to both actual and exclusive constructive possession cases"). See also, Maryland v. Pringle, supra.

Moreover, the possession instruction as it relates to the trafficking left the ultimate issue to the jury. The instruction as to the element of possession as it relates to the trafficking count states, “If a person has ...exclusive possession...knowledge of its presence may be inferred or assumed. If a person does not have exclusive possession...knowledge of its presence may not be inferred or assumed.” (V. 3: T. 301). When the court instructed on the lesser included possession, he instructed the jury to apply the same definition of possession, both constructive and actual, to the lesser charge as it did the greater charge. (V. 3: T. 303).

If specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed. However, since a specific instruction was not requested, the existing jury instructions are adequate in requiring "knowledge of the presence of the substance." Chicone, 684 So. 2d at 746; McMillon v. State, 813 So. 2d 56 (Fla. 2002)(In actual possession cases, when the

Chicone instruction is requested and given, the State is also entitled to a Medlin instruction. Giving both instructions preserves the State's obligation to prove every element of its case without diminishing the importance of the presumption that logically flows from a defendant's actual possession of a controlled substance).

Accordingly, the trial court's instruction on the permissive inference in an exclusive constructive possession case was proper. Moreover, any error should be considered harmless, especially in light of the conviction on the lesser possession charge, as well as the jury having been given the Chicone instruction on the trafficking count. DiGuilio, supra.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ARGUE TO THE JURY FACTS NOT IN EVIDENCE CONCERNING MR. GARCIA'S KNOWLEDGE THAT THE TAPED BALL CONTAINED METHAMPHETAMINE?
(As stated by Petitioner)

A determination as to whether substantial justice warrants the granting of a mistrial is within the sound discretion of the trial court. Sireci v. State, 587 So. 2d 450 (Fla. 1991). A mistrial is appropriate only when the error committed is so prejudicial as to "vitiate the entire trial." King v. State, 623 So. 2d 486 (Fla. 1993).

Here, Petitioner claims the prosecutor committed reversible error during closing argument. The state argued Garcia knew of the methamphetamine. The prosecutor properly argued that his knowledge could be inferred because the evidence showed he put it there. (V. 3: T. 256, 258). Such comments were fair based upon the evidence presented. The value of the drugs was an element the jury was allowed to consider in determining if someone other that Garcia might have left it in his truck. Such comments were proper in light of Garcia's testimony, including his claim that he had no knowledge of the contents of the taped ball, and his claim that the vehicle had been stolen earlier, and friends had recently been in his vehicle.

Further, there was no reversible error where the prosecutor

stated that the defendant was a fruit picker who owned this Ford truck. The court instructed the jury to rely upon their own recollection and disregard comments regarding evidence that was not presented. (V. 3: T. 294).

Here, the prosecutor did not err in making such comments to the jury. In Parker, supra, the prosecutor's comments in closing argument were not improper. The prosecutor's comment regarding the defendant's failure to more vehemently deny his guilt and comment on his failure to produce a witness the defense claimed could have placed the drugs in the vehicle were proper comments in closing. The defense in the instant case raised the possibility that the drugs were placed in the vehicle by someone other that Petitioner.

The comment was minor and insignificant when viewed in context with the entire record. Sireci, supra. Further, the comment did not "materially contribute to this conviction," was not "so harmful or fundamentally tainted so as to require a new trial," and was not so inflammatory that it "might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise." Blair v. State, 406 So. 2d 1103, 1107 (Fla. 1981).

There is sufficient evidence to convict Petitioner of the instant crime. Any error complained of did not contribute to

the verdict, and there is no reasonable possibility that the error contributed to the conviction. Accordingly any error should be considered harmless. DiGuilio, supra.

CONCLUSION

In light of the foregoing facts, arguments, and citation of authority, Respondent respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court, and the opinion of the Second District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Carol J.Y. Wilson, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000 – Drawer PD, Bartow, FL 33831 this 10th day of February 2004.

_____

JOHN M. KLAWIKOFSKY

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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JOHN M. KLAWIKOFSKY