IN THE SUPREME COURT OF FLORIDA

DAVID DEVON BLACKMON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC11-903

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Petitioner, David Devon Blackmon, was the defendant in the trial court; this brief will refer to Petitioner as such, Defendant, or by proper name. Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State.

The record on appeal in 1D10-2018 consists of two (2) volumes, which will be referenced "I.18." and "II.18.", followed by any appropriate page number. The record on appeal in 1D10-2021 will be referenced "I.20.", followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as generally supported by the record.

SUMMARY OF ARGUMENT

ISSUE I:

A jury found Petitioner guilty of Dealing in Stolen Property and Petit Theft of the same property. Although Petitioner did not request a special instruction during the trial, on appeal Petitioner complains that he is entitled to a new trial because the jury did not select which charge should remain. The First DCA affirmed the Dealing in Stolen Property conviction, certifying conflict with Kiss v. State, 42 So.3d 810 (Fla. 4th DCA 2010). The issue of whether the jury should have been instructed pursuant to §812.025, Fla. Stat., was not preserved for appeal, and furthermore, although the imposition of both convictions may be fundamental error, the failure of the judge to sua sponte create a jury instruction is not. Special instructions must be in writing and an objection is required. This Court held that it is appropriate for the State to charge and try a defendant for both offenses. However, §812.025, Fla. Stat., is a rare form of statutory double jeopardy which precludes the conviction for both offenses. Since it is analogous to improper dual-convictions for double-jeopardy reasons, the remedy is to vacate the lesser conviction. Petitioner is not entitled to a windfall of a new trial simply because the trial court did not sua sponte give a special instruction which was not requested and was not required. Any other possible result could lead to sandbagging, as a defendant would be guaranteed a new trial if he remains silent. Therefore, this Court should affirm the decision of the First District Court of Appeal in the instant case, approve the decision in Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011) and disapprove

the Fourth District Court of Appeal's decision in Kiss v. State, 42 So.3d 810 (Fla. 4th DCA 2010).

ISSUE II:

Petitioner's claim in Issue II is beyond the scope of the certified conflict and was not ruled upon by the First District Court of Appeal. Consequently, this Court should not address this issue. In this issue, Petitioner claims that the trial court erred by denying his motion for judgment of acquittal. The State presented evidence that stainless steel bars were stolen from W.D. Rogers Mechanical Contractor, and that Petitioner sold them on the morning after the burglary. Petitioner's recent possession of this stolen property was not satisfactorily explained, and so the jury could properly infer Petitioner's knowledge that the property was stolen. Petitioner's hypothesis of innocence, that he found the bars lying on the side of the road, took possession of them, and then sold them to a recycling center is not only unreasonable, but is actually a hypothesis of guilt. Since Florida law makes the appropriation of lost or abandoned property a theft offense, Petitioner's hypothesis was not one of innocence and could not satisfactorily explain his possession of the stolen bars.

ARGUMENT

ISSUE I: WHETHER THE PROPER REMEDY IS TO VACATE THE LESSER OFFENSE WHEN THE JURY FINDS A DEFENDANT GUILTY OF BOTH THEFT AND DEALING IN STOLEN PROPERTY? (RESTATED)

Standard of Review

The decision of a trial court regarding a jury instruction is reviewed for an abuse of the trial court's discretion. Sheppard v. State, 659 So.2d 457, 459 (Fla. 5th DCA 1995). However, if a defendant fails to preserve an issue, the review for fundamental error is de novo. Elliot v. State, 49 So.3d 269 (Fla. 1st DCA 2010).

Consequently, a claim of unpreserved fundamental error concerning jury instructions typically submits to the more favorable *de novo* standard of appellate review a claim that is entitled to significant deference if Petitioner properly preserves the error. As a result, this Court should strictly apply its fundamental error analysis in order to discourage possible "sandbagging" and "gamesmanship" in the future.[1] See Thompson v. State, 949 So.2d 1169, 1179 n.7 (Fla. 1st DCA 2007), citing Black's Law Dictionary 1342 (7th ed. 1999) ("Sandbagging is defined as '[a] trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hope of

[1] The State does not suggest that the Petitioner in the case *sub judice* engaged in "sandbagging" or "gamesmanship". Rather, the State simply notes that a failure to strictly apply fundamental error analysis in the case at bar might encourage such behavior in future cases.

preserving an issue for appeal if the court does not correct the problem.'"); see also J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998), citing Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995) ("[The contemporaneous objection rule] 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.").

Preservation

Petitioner did not request that the jury be instructed to decide whether he was a common thief who intended to use the property for himself or a trafficker in stolen property, pursuant to §812.025, Fla. Stat., and Hall v. State, 826 So.2d 268 (Fla. 2002). Therefore, the issue of whether the trial court erred by not instructing the jury accordingly is not preserved for appellate review. Weaver v. State, 894 So.2d 178, 196 (Fla. 2004). In addition, Petitioner did not object to the trial court's sentence on both the dealing in stolen property charge and the petit theft charge, and so this error is likewise unpreserved for appellate review. While fundamental error is an exception to the requirement that error be preserved for review, only the issue of the dual convictions, as discussed below, amounts to fundamental error.

Merits

A contemporaneous objection is required, as it is in many situations, to preserve an error involving jury instructions. State v. Delva, 575 So.2d 643, 644 (Fla. 1991). While fundamental error is an exception to this rule, any

error in failing to instruct a jury on an element that is not in dispute is not fundamental.[2] Id at 645.

Section 812.025, Florida Statutes, provides:

> Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.

As noted in by Judge Altenbernd in Williams v. State, 66 So.3d 360, 363 (Fla. 2d DCA 2011), this statute presents "a rare, if not unique, form of statutory double jeopardy…"

This Court addressed §812.025, Fla. Stat., in Hall, 826 So.2d 268. In that case, the defendant pleaded *nolo contendere* to dealing in stolen property and grand theft of the same property. Id at 269. The issue in Hall was whether the plea waived his right to challenge the adjudications of guilt for both offenses under §812.025, Fla. Stat. Id. This Court noted that the statute allows the State to try a defendant for both offenses. Id at 271. After discussing the legislative history of the statute, this Court determined that the fact-finder must base its decision to convict on theft or dealing in

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[2] The State does not concede that failing to instruct the jury that they could not find Petitioner guilty of both Dealing in Stolen Property and Petit Theft was error. Rather, the State maintains that even if it were error to fail to instruct the jury, the error cannot be fundamental when the jury instruction was not requested, nor the issue in dispute. Whether it is error at all to fail to instruct a jury on this issue is a question raised by Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011), review granted, 70 So.3d 588 (Fla. 2011).

stolen property on this element; evidence that the defendant is a common thief who intended to use the property for personal use or the use of another results in a conviction for theft, but not dealing, whereas evidence that the defendant stole the property for the purpose of selling it results in a conviction for dealing, but not for theft. Id. Therefore, this Court remanded the case to the trial court to vacate one of the convictions. Id at 272. This Court did not require that the defendant be allowed to withdraw his plea.

As previously mentioned, this Court acknowledged in Hall that it was proper to charge a defendant with both counts. This Court merely precluded a conviction for both counts. Petitioner attempts to take this Court's decision in Hall further, arguing that it was fundamental error for the judge not to sua sponte create a special jury instruction regarding §812.025, Fla. Stat., even though he never requested such an instruction and this Court has never required it. While the State does recognize that it would be error to convict a defendant of both offenses, it is not error to try a defendant for both offenses.

Of particular import is that fundamental error in jury instructions is a very limited exception to the rules of preservation. The Florida Rules of Criminal Procedure recognize the importance of an objection regarding these instructions in Fla. R. Crim. P. 3.390(d), which provides that,

> **Objections.** 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. Opportunity shall be given to make the objection out of the presence of the jury.

Absent special circumstances, the failure to request a special jury instruction in writing may preclude appellate review. Gavlick v. State, 740 So.2d 1212 (Fla. 2d DCA 1999). In addition, this Court has held that it is not even fundamental when the trial court fails to give a jury instruction on an element of the offense when that element is not in dispute.

In Delva, 575 So.2d 643, the defendant was convicted of trafficking in cocaine. At trial, however, the jury was never instructed that the defendant's knowledge that the substance he possessed was cocaine was an element of the crime.[3] Id at 644. Notably, the defendant never requested such an instruction, and the standard instruction at the time of the defendant's trial did not include this element. Id. Moreover, the defendant's knowledge of the illicit nature of the cocaine was not an issue in the trial; rather, as this Court stated,

> 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. Hence, the issue which was raised in *Dominguez* and corrected by the addition to the standard jury instruction was not involved in Delva's case. 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 could not be fundamental error and could only be preserved for appeal by a proper objection.

Id at 645.

In Morton v. State, 459 So.2d 322 (Fla. 3d DCA 1984), review denied, 467

[3] The events of Delva took place prior the enactment of §893.101, Fla. Stat., which made clear that knowledge of the illicit nature of a substance was not an element for crimes in Chapter 893, Florida Statutes.

So.2d 1000 (Fla. 1985), the defendant was tried for three counts of robbery. While the jury was instructed on lesser-included offenses, they were not instructed at all as to what elements constituted robbery. Id at 323. This error was not objected to, and the defendant was found guilty of one robbery and two grand thefts. Id. The defendant's sole defense, however, did not involve a dispute as to whether a robbery had occurred; rather, it involved a claim that the defendant was simply not the one who committed the crime. Id at 324. The court held that since no element of robbery was ever in dispute, no fundamental error occurred. Id.

In the instant case, there was no dispute that the State could try Petitioner for both offenses. Moreover, Petitioner never presented a defense that he was more of a thief or more of a trafficker. Therefore, the failure to create a special jury instruction on this non-issue could not constitute fundamental error.

As in Delva, there is no standard jury instruction on this element, and as in Delva and Morton, there was no objection to a lack of an instruction or request for an adequate instruction made by Petitioner. To hold that failing to instruct on §812.025, Fla. Stat., amounts to fundamental error would engender precisely the strategy that the contemporaneous objection rule is designed to prohibit; specifically, counsel could allow the case to go the jury, knowing a failure to instruct on the element would have no effect on the client's defense. Even if the jury convicted the client, the client would still be guaranteed a second trial, in which he could try his defense all over again; the alleged "fundamental error" would be immaterial and simply be a

vehicle for obtaining a second chance at acquittal. See Davis, 661 So.2d 1193 at 1197. Such is the strategy which Delva and Morton prohibited; even something as important as an instruction on an element of a crime does not amount to fundamental error when the element is not in dispute. Consequently, Petitioner is not entitled to a new trial.

In United States v. Gaddis, 424 U.S. 544, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976), the United States Supreme Court was faced with a situation analogous to the one presented by §812.025, Fla. Stat., and held that the appropriate remedy was to vacate one of the convictions. The United States Supreme Court specifically rejected the remedy of a second trial. The concurrence reasoned that when a jury convicts of both crimes, a conviction on one count "casts absolutely no doubt on the validity of" the other count. The concurrence stated that it may be concluded "with satisfactory certainty" that a jury having convicted for both offenses, if properly instructed would have convicted of robbery. The concurrence observed that a new trial "would result in an expenditure of court resources and the possibility of an acquittal through loss of evidence or other causes of a reliably convicted defendant for no reason." Id at 551-553 (White, J., concurring).[4]

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[4] Gaddis was discussed in a footnote of the law review that was the basis of Florida's Anti-Fencing Act. As the law review noted, "a thief generally cannot be convicted for receiving the fruits of his own theft. Consequently, where a relationship exists between the thief and the receiver, it is sometimes necessary to indict in the alternative, permitting the jury to convict for theft or receipt, but not both", citing Gaddis. G. Robert Blakely & Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for*

In Victory v. State, 422 So.2d 67 (Fla. 2d DCA 1982), approved by Hall, the defendant pleaded to a dealing in stolen property charge in one county when he had previously been convicted of stealing a trailer, the subject of the dealing charge, in another county. The court held that convictions for both dealing and theft of the same stolen property were forbidden by §812.025, Fla. Stat., and so vacated the later dealing in stolen property charge. Id at 68.

In Ridley v. State, 407 So.2d 1000 (Fla. 5th DCA 1981), the defendant was convicted of both dealing in stolen property and theft of the same property. The court, in discussing the appropriate remedy for these improper dual-convictions, analogized to double-jeopardy cases. Id at 1002. The court held that since the jury had found the defendant guilty beyond a reasonable doubt as to both charges, the lesser should be reversed to cure the error resulting from the dual-convictions. Id.

In the instant case, the First District Court of Appeal echoed the reasoning of Ridley. The First District held that the remedy of vacating the lesser,

> …better respects the jury's determination that the state met its burden to prove the greater offense and also avoids the need to speculate what

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Law Reform, 74 Mich. L.Rev. 1512, 1568, n.308 (1976). Gaddis was decided in 1976, the year before the adoption of the Anti-Fencing Act in 1977. Gaddis was basically hot off the presses when the Act was being considered by the Florida Legislature. It is a reasonable assumption that Gaddis was the basis for §812.025, Fla. Stat.

> verdict the jury might have returned had it been required to choose between the greater and lesser offenses.

Blackmon v. State, 58 So.3d 343, 347 (Fla. 1st DCA 2011). Thus, it is not the failure to instruct the jury, and its attendant concern as to which offense the jury would have chose, that is really at issue; rather, it is the prohibition against dual-convictions which is the true error at issue.[5] As such, the only remedy which serves the dual purposes of respecting the jury's verdicts and complying with the statutory prohibition on dual-convictions is the vacate the lesser of the two convictions.

The State acknowledges that many courts have held that a failure to instruct the jury according to §812.025, Fla. Stat., is fundamental error that may be considered on appeal absent an objection from the defendant. However, the State submits that many courts have used loose language when addressing this issue, as the failure to instruct the jury as to §812.025, Fla. Stat., typically arises along with the issue of improper dual-convictions for dealing in stolen property and theft, also in violation of §812.025, Fla. Stat. While the former is not fundamental error, the latter is fundamental error.

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[5] However, even if there was still a concern as to which conviction the jury would pick, the evidence would only allow the jury to pick dealing in stolen property, as noted by the Blackmon court. Id at 347. As discussed below in Issue II, Petitioner's own version of how he came to possess the bars established that he stole the bars, pursuant to §705.102, Fla. Stat. Petitioner's version of events further established that he took the bars for the express purpose of selling them. (II.18 85). Consequently, based on the criteria outlined in Hall, the jury could only have picked dealing in stolen property, as the undisputed evidence from Petitioner was that he took the bars for the purpose of selling them.

In Rhames v. State, 473 So.2d 724 (Fla. 1st DCA 1985), the court held that an error in failing to instruct the jury on §812.025, Fla. Stat., was fundamental because the convictions were precluded by statute. Id at 727. Thus, the remedy was to vacate the lesser of the two offenses. See also Daniels v. State, 422 So.2d 1024 (Fla. 1st DCA 1982); Ebenetter v. State, 419 So.2d 1173 (Fla. 2d DCA 1982); Jones v. State, 453 So.2d 1192 (Fla. 3d DCA 1984); Lennear v. State, 424 So.2d 151 (Fla. 5th DCA 1982). Although the State asserts that these courts are correct that fundamental error did occur, the fundamental error was not the failure to sua sponte create a special instruction; rather, the fundamental error was the improper dual-convictions themselves. The district courts in these cases did apply the correct remedy, which is to vacate the conviction for the lesser.

Petitioner argues that the opinion in Kiss v. State, 42 So.3d 810 (Fla. 4th DCA 2010), should be followed.[6] In Kiss, the Fourth District held that

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[6] The precedential value of the Kiss opinion is questionable. Until Kiss was issued, the law in the Fourth District was that if a person was erroneously convicted of both grand theft and dealing in stolen property in violation of §812.025, Fla. Stat., the remedy was to vacate the conviction for the lesser offense and affirm the conviction for the greater offense. See Blair v. State, 667 So.2d 834, 841 (Fla. 4th DCA 1996); see also Anderson v. State, 2 So.3d 303, 304 (Fla. 4th DCA 2008). There was some language in Aversano v. State, 966 So.2d 493, 497 (Fla. 4th DCA 2007), that vacating the lesser conviction was not an adequate remedy. However, the language was dicta, since that case was reversed and remanded for a new trial based on ineffectiveness of counsel, not based on dual convictions for grand theft and dealing in stolen property. See Bunn v. Bunn, 311 So.2d 387, 389 (Fla. 3d DCA 1975) (noting that remarks in an opinion concerning a rule of law that are not essential to deciding the case are obiter dictum and without precedential value). Since the *Kiss* opinion was not issued after appropriate en banc

the proper remedy for a violation of §812.025, Fla. Stat., is for both convictions to be vacated and the case remanded for a new trial. The Kiss court observed that "if the jury had followed the statute, and was required to choose, it might well have returned a verdict only on the theft charge." Kiss, 42 So.3d at 811 (quoting Anderson v. State, 2 So.3d 303, 304 (Fla. 4th DCA 2008)(Klein, J., specially concurring)(stating that "If the jury had followed the statute, and was required to choose, it might well have returned a verdict only on the theft charge.")). The Kiss opinion misses the crucial distinction outlined above: fundamental error does not lie in a failure to instruct the jury, but in the improper dual-convictions. The question of what a jury would have decided is therefore not properly before an appellate court and the only remaining issue is curing the improper dual-convictions while respecting the verdicts of the jury.

In contrast to Petitioner's position and that of the Kiss opinion is Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011), wherein the Second District held that a new trial was not the proper remedy when a jury was not instructed pursuant to §812.025, Fla. Stat.[7] The Second District found "no need" for a new trial because the "factual determinations of the prior jury

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proceedings, the Fourth District is, at most, split on this issue.

[7] Notably, at issue in Williams was the failure to give an instruction that "tracks the statute", as opposed to an instruction that follows the logic of Hall. As noted in Williams, 66 So.3d 360 at 364, an instruction that tracks the statute provides no guidance to the jury and is impermissibly arbitrary.

appear to be without error." Id at 365. The court noted that other courts have followed the double jeopardy remedy of vacating the lesser offense, and "even if we concluded that we must select the offense with the lesser degree or the lesser penalty, a new trial would not be warranted." Id. In a footnote, the Second District observed that because the statute provides no basis for selection, the court "could arguably flip a coin to make this decision but our act in doing so would only demonstrate the impropriety of the statute." Id at n.8. Williams is pending before this Court. Williams v. State, Case SC11-1543.

The Williams opinion illustrates the central issue presented by improper dual-convictions under §812.025, Fla. Stat. In any case where a defendant has been tried and convicted of theft and dealing in the same stolen property, the jury has made a determination that must be respected; namely, that the defendant is guilty of both offenses. Only because §812.025, Fla. Stat., prohibits both convictions does the issue rise to fundamental error which allows for the vacation of the lesser offense.

While the Kiss opinion criticizes the analogy to double jeopardy made in Ridley, double jeopardy is actually a perfectly good analogy.[8] While the basis for double jeopardy is a constitutional prohibition on dual convictions rather than a statutory prohibition on dual convictions, both have the same

[8] The Kiss court may not have understood that the Fifth District was using double jeopardy as an analogy rather than analyzing the case as a true double jeopardy issue.

result and the same remedy. In both situations, the appellate court is faced with the same legal dilemma and must then decide whether to vacate one of the convictions and if so, which one, or whether to remand for yet another trial. Therefore, the remedy for a violation of a constitutional prohibition of dual convictions is a perfect analogy for the proper remedy for a violation of a statutory prohibition of dual convictions. One naturally flows from the other. The Fifth District's reliance on double jeopardy remedies was correct and the use of the remedy for double jeopardy was therefore apt. Double jeopardy, merger, common law, and §812.025, Fla. Stat., all involve prohibitions on dual convictions and the same remedy applies to all four - vacating the lesser offense. Therefore, this Court should affirm the decision of the First District Court of Appeal in the instant case, approve the decision in Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011) and disapprove the Fourth District Court of Appeal's decision in Kiss v. State, 42 So.3d 810 (Fla. 4th DCA 2010).

ISSUE II: WHETHER THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL? (RESTATED)? (RESTATED)

Jurisdiction

Petitioner's claim is beyond the scope of the certified conflict, and the First District did not rule on the merits of this claim. Therefore, this Court should decline to address this issue. Crocker v. Pleasant, 778 So.2d 978, 990-991 (Fla. 2001)(declining to address issues raised by the parties which were beyond the scope of the certified question and were not discussed in the District Court's opinion); Owens-Corning Fiberglass Corp. v. Ballard, 749 So.2d 483, 490 n.7 (Fla. 1999)("We decline to address Owens-Corning's second issue on appeal, that of forum nonconveniens, as it is beyond the scope of the certified question in this case."); Goodwin v. State, 634 So.2d 157 (Fla. 1994)("We decline to address the other issues raised by the parties, which lie beyond the scope of the certified question.").

Nevertheless, in an abundance of caution, the State will address Petitioner's claim.

Standard of Review.

The denial of a judgment of acquittal is reviewed *de novo*. Jones v. State, 790 So.2d 1194, 1196 (Fla. 1st DCA 2001) (en banc). A judgment of conviction comes to an appellate court clothed with the presumption of correctness and an appellant's claim of insufficiency of the evidence cannot prevail where there is competent, substantial evidence to support the verdict and judgment. Terry v. State, 668 So.2d 954, 964 (Fla. 1996). Competent

evidence is evidence which is probative of the fact or facts to be proven. Brumley v. State, 500 So.2d 233, 234 (Fla. 4th DCA 1986). Evidence is substantial if a reasonable mind might accept it as adequate support for the conclusion reached. Id. Competent substantial evidence, therefore, is such evidence, in character, weight or amount as will legally justify the judicial or official action demanded. Terry, 668 So.2d at 964. Hence, where the State has produced competent evidence to support every element of the crime, a judgment of acquittal is not proper. Gay v. State, 607 So.2d 454, 457 (Fla. 1st DCA 1992).

Generally, on a motion for judgment of acquittal, the trial court should not grant the motion unless, when viewed in a light most favorable to the state, the evidence does not establish a prima facie case of guilt. Dupree v. State, 705 So.2d 90, 93 (Fla. 4th DCA 1998)(en banc). A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). 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. State v. Law, 559 So.2d 187, 189 (Fla. 1989); Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975).

When evidence supports two conflicting theories, the appellate court's duty is to review the record in the light most favorable to the prevailing party. Johnson v. State, 660 So.2d 637, 642 (Fla. 1995). The relevant

question on appeal is, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, whether there is competent, substantial evidence to support the jury's verdict and judgment. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982). An appellate court may not reweigh the evidence, Barwick v. State, 660 So.2d 685, 695 (Fla. 1995), or assess the credibility of a witness. Steele v. State, 561 So.2d 638, 643 (Fla. 1st DCA 1990). The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction. I.R. v. State, 385 So.2d 686, 688 (Fla. 3d DCA 1980).

In Porter v. State, 752 So.2d 673 (Fla. 2d DCA 2000), the Second District Court explained the appropriate standard of appellate review involving proof by circumstantial evidence:

> The accepted standard on review, however, is not whether the evidence failed to exclude every reasonable hypothesis but that of guilt, but whether there was substantial, competent evidence for a jury to so conclude. Rose v. State, 425 So.2d 521 (Fla. 1982); see also Tsavaris v. State, 414 So.2d 1087 (Fla. 2d DCA 1982).

Id. at 678; see State v. Law, 559 So.2d 187, 188 (Fla. 1989) ("The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse."); Thorp v. State, 777 So.2d 385, 389–90 (Fla. 2000) (citing Law, 559 So. 2d at 188). As this Court held in Lord v. State, 667 So.2d 817 (Fla. 1st DCA 1995):

> The state is not required to "rebut conclusively every possible variation" [State v. Allen, 335 So.2d 823, 826 (Fla. 1976)] 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. See Toole v. State, 472 So.2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Id. at 824; see also Lindsey v. State, 793 So.2d 1165 (Fla. 1st DCA 2001)("As the state failed to present evidence from which *the jury* could exclude every reasonable hypotheses of innocence, the trial court erred in denying Appellant's motion for judgment of acquittal") (emphasis added); Helton v. State, 641 So.2d 146, 147 (Fla. 3d DCA 1994)(the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse).

Preservation

This issue was properly preserved by Petitioner making a motion for judgment of acquittal on all three charged offenses. (II.18.50-54). The trial court denied the motion. (II.18.54). Petitioner renewed the motion for judgment of acquittal and the trial court denied it. (II.18.87-92).

Merits

Petitioner contends that the trial court erred by denying Petitioner's motion for judgment of acquittal based on the inference arising from the possession of recently stolen property. The State disagrees and contends that the trial court properly denied Petitioner's motion for judgment of

acquittal.[9]

Considering the evidence in the light most favorable to the State, the elements of dealing in stolen property were proven by a combination of circumstances from which the jury could reasonably infer that Petitioner knowingly sold the stolen steel bars to the recycling company.

Standard Jury Instruction 14.2, provides:

> To prove the crime of Dealing in Stolen Property (Fencing), the State must prove the following two elements beyond a reasonable doubt:
>
> 1. [Petitioner] trafficked in the steel bars.
> 2. [Petitioner] knew or should have known that the steel bars were stolen.
>
> 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.

§812.019(1), Fla. Stat. The State presented sufficient evidence through the testimony of Joseph Workman with W.D. Rogers Mechanical Contractor and Steven Harris with Southern Recycling Pensacola.

As to the first element, there is no question as to Petitioner's identity as the person who sold the steel bars to Mr. Harris at Southern Recycling Pensacola. As to the second element, the State presented evidence through Mr.

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[9] As to the petit theft charge, the issue of whether there was sufficient evidence of theft presented at trial is moot. Pursuant to Section 812.025, the conviction for petit theft should be vacated, as discussed above in Issue I.

Workman's testimony that the steel bars had been taken from the metal yard by someone climbing over the tall metal fence with barbwire on the top and tossing the steel bars over the fence. Second, the State presented evidence that Petitioner sold the bars at the earliest possibility opportunity the morning after they were taken from the metal yard. See Young v. State, 7363 So.2d 85, 86-87 (Fla. 4th DCA 1999). Notably, Petitioner testified that he found the bars near his home on the side of the road, approximately, a quarter of a mile from the victim business. (II.18 83).

Petitioner contends that he presented a reasonable hypothesis of innocence at trial, and the State did not present any other evidence other than the inference by his possession of the steel bars. As noted above, the evidence showed that the steel bars were stolen from the metal yard and that Petitioner sold the bars the following morning at the earliest possible opportunity. See Young v. State, 7363 So.2d 85, 86-87 (Fla. 4th DCA 1999). Finally, Petitioner's explanation is simply not reasonable considering all the other evidence presented. It is unreasonable to believe that a person that went to the trouble of stealing the steel bars would abandon them in the street, approximately a quarter mile away from the location of the burglary.

In addition, Petitioner's purported hypothesis of innocence is unavailing because it is actually a hypothesis of guilt, pursuant to §705.102, Fla. Stat. That statute provides,

> (1) Whenever any person finds any lost or abandoned property, such person shall report the description and location of the property to a law enforcement officer.

> (2) The law enforcement officer taking the report shall ascertain whether the person reporting the property wishes to make a claim to it if the rightful owner cannot be identified or located. If the person does wish to make such claim, he or she shall deposit with the law enforcement agency a reasonable sum sufficient to cover the agency's cost for transportation, storage, and publication of notice. This sum shall be reimbursed to the finder by the rightful owner should he or she identify and reclaim the property.
>
> (3) It is unlawful for any person who finds any lost or abandoned property to appropriate the same to his or her own use or to refuse to deliver the same when required.
>
> (4) **Any person who unlawfully appropriates such lost or abandoned property to his or her own use** or refuses to deliver such property when required **commits theft** as defined in s. 812.014, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Id (emphasis added). Even if Petitioner's version of events were assumed to be reasonable and true, they only establish that he committed theft by violating the requirements of §705.102, Fla. Stat., and taking the bars he found. His subsequent sale of the bars was then, by his own story, a sale of stolen property. Therefore, the State was not required to refute Petitioner's hypothesis, as it was neither reasonable, nor a hypothesis of innocence, but was instead yet more evidence that Petitioner was guilty.[10]

Petitioner's argument, in sum, is that the inference provided by §812.022(2), Fla. Stat., is "insufficient to support a guilty verdict when the

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[10] Given that Petitioner testified he scrapped junk professionally, it is reasonable to assume that Petitioner was familiar with §705.102, Fla. Stat. (II.18 81-82). Since Petitioner did not follow the statute's dictates and report the abandoned property to police, it is yet more evidence that Petitioner's motives were those of a guilty person; while an innocent scrapper would follow the law and report abandoned property to an officer, a burglar who has stolen the property would not.

defendant presents an unrefuted, reasonable and innocent explanation for possessing the property." (IB 26). Indeed, §812.022(2), Fla. Stat., only allows the jury to infer that a person knew property was stolen if there is no satisfactory explanation for that person's possession of the property. The cases upon which Petitioner relies say no more than this.[11] Contrary to Petitioner's argument, they do not lead to the conclusion that the inference itself is insufficient; rather, they stand for the proposition that the inference is unavailable if a defendant's possession of stolen property is satisfactorily explained.

Petitioner has overlooked that his possession of the stolen bars was not satisfactory in that it was neither reasonable nor innocent. As explained above, Petitioner's story, relying upon Petitioner's unbelievably coincidental discovery of the stolen bars, runs counter to common sense. Also as explained above, Petitioner's story is not an innocent explanation in that it establishes he still committed the crime of theft. Since there was no satisfactory explanation for Petitioner's possession of the stolen bars, the inference of §812.022(2), Fla. Stat., applied and was sufficient to send the case to the jury.

As for Petitioner's violation of probation, the State need only prove the allegations by a preponderance of the evidence, a burden of proof far less

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[11] State v. Graham, 238 So.2d 618 (Fla. 1970), was issued before the enactment of § 812.022(2), Fla. Stat., and did not interpret that statutory inference.

than that required for a new criminal charge. Hill v. State, 890 So. 2d 485, 486 (Fla. 5th DCA 2004); See Morris v. State, 727 So.2d 975 (Fla. 5th DCA 1999); See Griffin v. State, 603 So.2d 48 (Fla. 1st DCA 1992)("[P]roof sufficient to support a criminal conviction is not required to support a judge's discretionary order revoking probation. ... [The State] need only show by preponderance of the evidence that the defendant committed the offense charged."). "Trial courts must consider each alleged probation violation on a case by case basis for a determination of whether, under the facts and circumstances, a particular violation is willful and substantial and is supported by the greater weight of the evidence." Carter v. State, 835 So.2d 259, 261 (Fla. 2002). Given that Petitioner's hypothesis afforded him no relief under the more stringent standard of the new criminal charges, it likewise affords him no relief under the less stringent standard of the violation of probation.

The State presented evidence that, when viewed in the light most favorable to the State, was inconsistent with Petitioner's hypothesis of innocence, and this case was properly submitted to the jury. Likewise, the evidence was more than sufficient for Petitioner to be found in violation of his probation. Therefore, the order of the trial court denying Petitioner's Motion for Judgment of Acquittal should be affirmed, as should the order finding Petitioner in violation of his probation.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 58 So.3d 343 should be approved, and the judgments and sentences entered in the trial court for dealing in stolen property and the violation of probation should be affirmed, while the judgment and sentence for petit theft should be vacated.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on December 1, 2011: Gail E. Anderson, Esq., Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, FL 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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