Bennett H. Brummer, Public Defender, and Maria E. Lauredo, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Wendy Benner–León, Assistant Attorney General, for appellee.

Before NESBITT, GODERICH and SHEVIN, JJ.

PER CURIAM.

We affirm the defendant's convictions for resisting arrest with violence and battery on a law enforcement officer. We must also affirm the defendant's sentence as a habitual violent felony offender since the defendant failed to preserve this issue for appellate review. *See* § 924.051(3), Fla. Stat. (1997); *Speights v. State,* 711 So.2d 167 (Fla. 1st DCA 1998); *Pryor v. State,* 704 So.2d 217 (Fla. 3d DCA 1998); *Middleton v. State,* 689 So.2d 304 (Fla. 1st DCA 1997). However, our affirmance is without prejudice to the defendant to seek postconviction relief. *See State v. Mancino,* 714 So.2d 429 (Fla.1998); *Young v. State,* 716 So.2d 280 (Fla. 2d DCA 1998); *Hicks v. State,* 711 So.2d 1366 (Fla. 3d DCA 1998); *Ellis v. State,* 703 So.2d 1186 (Fla. 3d DCA 1997).

Affirmed.

Jose G. WILLIAMS, Appellant,

v.

The STATE of Florida, Appellee.

No. 97–2490.

District Court of Appeal of Florida, Third District.

Aug. 26, 1998.

Defendant was convicted in the Circuit Court, Dade County, Roberto J. Pineiro, J., of burglary of an unoccupied structure, resisting an officer without violence, and petit theft. He appealed. The District Court of Appeal, Goderich, J., held that testimony of arresting officer that defendant had been arrested for an uncharged burglary, warranted mistrial.

Reversed and remanded.

Nesbitt, J., dissented.

Criminal Law ⚿867

Testimony of arresting officer, that defendant had been arrested for an uncharged burglary, warranted mistrial in trial for burglary of an unoccupied structure, resisting an officer without violence, and petit theft.

Robbins, Tunkey, Ross, Amsel, Raben & Waxman and Benjamin S. Waxman, Miami, for appellant.

Robert A. Butterworth, Attorney General, and Wendy Benner–Leon, Assistant Attorney General, for appellee.

Before NESBITT, GODERICH and SHEVIN, JJ.

GODERICH, Judge.

The defendant, Jose G. Williams, appeals his convictions for burglary of an unoccupied structure, resisting an officer without violence, and petit theft. We reverse and remand for a new trial.

On August 8, 1996, at approximately 2:14 a.m., Officer David A. Williams, Jr., was driving home in his police cruiser when he noticed a man, later identified as the defendant, walking away from a closed business carrying several cases of Coca–Cola cans. Officer Williams turned his car around and headed toward the business. He then noticed that the suspect had put down the cans and was walking away. Officer Williams gestured for the man to approach, but he fled from the area and Officer Williams and other police officers gave chase. The pursuit was unsuccessful, but, during the chase, Officer Williams, who grew up in the area, got close

enough to observe the suspect whom he recognized as the defendant.

Three months later, in November 1996, Officer Williams heard on the radio that there was a subject in custody for a burglary in the same area where the Coca–Cola incident took place. He drove to where the defendant was being detained, identified the defendant as the suspect he had seen on August 8, 1996, carrying the Coca–Cola cans, and arrested him. The defendant was charged with burglary of an unoccupied structure, resisting an officer without violence, and petit theft for the Coca–Cola incident.

During the trial, the State called only two witnesses, Officer Williams and the owner of the business. The two witnesses' trial testimony covers only 50 pages of the transcript. During direct examination, the prosecutor questioned Officer Williams as to his subsequent contact with the defendant which resulted in the defendant's arrest. Officer Williams testified that he arrested the defendant while the defendant was being detained by other police officers for a burglary in the same area where the Coca–Cola incident took place. The record demonstrates that although defense counsel's numerous objections to Officer Williams' testimony were sustained, the prosecutor continued to pursue this line of questioning. Further, after the trial court sustained each of defense counsel's objections, defense counsel would then state "I have a motion." On each occasion, the trial court denied the motion without giving defense counsel an opportunity to elaborate as to the motion she was seeking or the grounds on which she was basing the motion.

The jury found the defendant guilty as charged, and he was sentenced. This appeal followed.

The defendant contends that the trial court abused its discretion by denying his repeated motions for mistrial where the State introduced testimony that he had been arrested for an uncharged burglary. In response, the State contends that the issue was not properly preserved for appellate review, and, even if it was preserved, the trial court properly denied the motion for mistrial because the defendant received a fair trial. We agree with the position taken by the defendant.

The present case is controlled by this Court's decision in *Smart v. State*, 596 So.2d 786 (Fla. 3d DCA 1992), which is factually similar. In reversing and remanding for a new trial, this Court held:

> First, the statements by the prosecutor and the arresting officer's testimony regarding the defendant's past contacts with the arresting officer, were solely relevant to establish the defendant's bad character, and were therefore inadmissible. *See Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); *State v. Lee*, 531 So.2d 133 (Fla.1988); *Gonzalez v. State*, 559 So.2d 748 (Fla. 3d DCA 1990); *Harris v. State*, 427 So.2d 234 (Fla. 3d DCA 1983). Second, under the facts of this case, the defense counsel's failure to request a curative instruction was not fatal. The record demonstrates that at one point the defense counsel attempted to make a motion, but the trial court denied the motion without giving the defense counsel an opportunity to state the motion for the record. Additionally, when taking into consideration that throughout the defendant's trial, which lasted less than two and one half hours, there were approximately eighteen statements made by the prosecutor and the arresting officer, which clearly implied that the defendant had either been arrested before or that the arresting officer has had numerous contacts with the defendant in the past, we find that a curative instruction would not have been sufficient to dissipate the prejudicial effects of this error. *Post v. State*, 315 So.2d 230 (Fla. 2d DCA 1975). As stated in *Post*, "[t]he die was cast—the damage was done." *Post*, 315 So.2d at 232. Third, we do not find that the complained of error was harmless. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

Finally, the defendant also argues that the evidence was legally insufficient to support the defendant's conviction for resisting arrest without violence. We find that this issue lacks merit. However, since we have ruled in the defendant's favor as to the Williams

rule issue, we reverse and remand for a new trial as to all counts.

Reversed and remanded.

SHEVIN, J., concurs.

NESBITT, J., dissents.

Perry ARCHIBALD, Appellant,

v.

STATE of Florida, Appellee.

No. 97–1149.

District Court of Appeal of Florida, Fourth District.

Aug. 26, 1998.

Defendant was convicted in the Circuit Court, Broward County, Robert S. Zack, J., of two misdemeanors, and he appealed. The District Court of Appeal, Warner, J., held that, since defendant had served his sentence, no relief was possible on his claim that his sentences for misdemeanor convictions were illegal because they exceeded the statutory maximum, and thus, the issue was moot.

So ordered.

1. Criminal Law ⇨1039

Issue was not preserved for appeal, where defendant failed to object at trial to trial court supplying the jury with a written copy of one instruction, but failing to supply written copies of the remaining instructions.

2. Criminal Law ⇨1134(3)

Since defendant had served his sentence, no relief was possible on his claim that his sentences for misdemeanor convictions were illegal because they exceeded the statutory maximum, and thus, the issue was moot.

Richard L. Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, West Palm Beach, for appellee.

WARNER, Judge.

[1] Appellant claims that per se reversible error occurred when, in responding to a jury question during deliberations, the trial court supplied the jury with a written copy of one instruction but failed to supply written copies of the remaining instructions. However, since appellant failed to object, the issue is not preserved for appeal. *See Serrano v. State,* 639 So.2d 68, 69 (Fla. 3d DCA 1994); *see also State v. Delva,* 575 So.2d 643, 644 (Fla.1991)(jury instruction errors subject to contemporaneous objection rule and are not reviewable absent objection); *Rojas v. State,* 552 So.2d 914, 915 (Fla.1989)(objection required to preserve error in reinstruction for appeal); *Bohannon v. State,* 546 So.2d 1081, 1082 (Fla. 3d DCA 1989) (specific objection required to preserve reinstruction issue for appellate review).

[2] As to appellant's sentences, the state concedes that the sentences on appellant's two misdemeanor convictions were illegal as exceeding the statutory maximum. However, because appellant has served his sentence, no relief is possible. The second issue is therefore moot.

GLICKSTEIN and SHAHOOD, JJ., concur.