IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

KIMBERLE WEEKS,	)	
	)	
***Appellant*,**	)	
v.	)	
	)	**CASE NO. 5D18-3612**
STATE OF FLORIDA,	)	**L.T. NO. 2015-CF-387**
	)	
***Appellee*.**	)	
_____	)	

INITIAL BRIEF OF APPELLANT

_____

On Appeal from the Circuit Court of the Seventh Judicial Circuit, in and For Flagler County, Florida

_____

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PRELIMINARY STATEMENT

This is a direct criminal appeal of a final criminal Judgment and Sentence. Appellant, Kimberle Weeks ("Ms. Weeks"), was Defendant, and the State of Florida, Plaintiff, in the Circuit Court of the Seventh Judicial Circuit, in and for Flagler County.

The Record on Appeal is comprised of 329 pages, and is referenced using the letter "R," followed by relevant page numbers, and together encased in parentheses.

The Trial Transcript is composed of 704 pages, and is referenced utilizing the letter "T," followed by relevant page numbers, and together encased in parentheses.

STATEMENT OF THE CASE AND FACTS

The State charged Ms. Weeks, then the Flagler County Supervisor of Elections, with multiple counts of Intercepting Oral Communications, contrary to § 934.03(1)(a), Fla. Stat., and Disclosing Oral Communication, under § 934.03(1)(c), (d) (R 15-17).

On Ms. Weeks's motion (R 34-39), one count (pertaining to Shannon Brown), and another count (later dismissed), were severed (R 112-13). On her later motions (R 40-65, 116-206, 212-14), seven other counts were dismissed (R 114-15, 224-34).

The trial court denied a defense motion to suppress a search warrant (R 66-92), holding "the omitted fact that a sign was posted on the front of the Supervisor of Elections Office stating 'NOTICE! THESE PREMISES MAY BE SUBJECT TO AUDIO AND VIDEO MONITORING AND RECORDINGS AT ANY TIME' " did not merit suppression, as "the sign's omission from the affidavit cannot rise to the level of deliberate falsehood or reckless disregard for the truth" (R 221-223). The judge made credibility determinations on the applicant's hearing testimony (id.).

On February 21, 2018, the State filed a (superseding) Information, charging Ms. Weeks with Interception of Oral Communications, contrary to § 934.03(1)(a), Fla. Stat. (Counts I-VI, VIII and IX), and Disclosure of Oral Communications, contrary to § 934.03(1)(c), (d) (Count VII) (R 253-254). Count II of the Information (the count pertaining to Shannon Brown) was again severed for trial (R 112-113).

Ms. Weeks filed a Motion to Dismiss four (4) counts of the Information, noting it charged four (4) separate counts with respect to each of the four (4) persons recorded during the same single incident, and charged two (2) separate counts as to each of the two (2) persons recorded during another single incident (R 261-264). Ms. Weeks argued the use of the term "any" in the offenses charged, § 934.02(1)(a), Fla. Stat. (prohibiting interception of "*any* wire, oral, or electronic communication") (emphasis added), left ambiguous the Legislature's intended unit of prosecution, requiring multiple counts for each single act of audio recording be dismissed (id.).

After the jury was selected and sworn, Ms. Weeks renewed her motions to suppress and to dismiss, and the trial court noted those standing objections (T 6-7).

The State called its first witness, Phillip Lindley (T 55), retired investigator for Florida Department of Law Enforcement ("FDLE"), and an attorney (T 56, 88), who began by testifying that "huge volumes of allegations come into FDLE. There is a screening process where a basic preliminary set of data is brought in –" (T 61). Ms. Weeks objected to that testimony as irrelevant and bolstering, which the trial court overruled (T 61), and Mr. Lindley was allowed to further testify that "We are to screen the allegation, bring it into management. Management and the counsel's office determines whether or not FDLE will open an official investigation" (T 61).

Mr. Lindley testified he received an email from the State Attorney attaching a newspaper article, went to interview Ms. Weeks in her office, and requested she provide documents mentioned in the newspaper article, going on to testify that "initially, she declined on everything. She gave me some of the items and declined to provide the rest, saying that she wanted to talk to counsel" (T 62). Ms. Weeks's defense counsel objected, requesting a side-bar to note Mr. Lindley had testified that Ms. Weeks had invoked her Sixth Amendment right to counsel and exercised her right to remain silent under the Fifth, moving the trial court for a mistrial (T 62-66), later arguing it at a recess (T 67-74). The trial court denied the motion for mistrial, sustained the objection as the answer was "unresponsive and beyond the scope of the question," and suggested a curative instruction "to disregard the answer" (T 74).

The defense requested a curative instruction that "the invocation of a person's right to remain silent or counsel is constitutionally permissible, and should never be held against any individual," to which the State objected (T 75). Instead of the requested instruction explaining the rights to silence and to counsel, the trial court instructed jurors that Mr. Lindley had "made a statement that Ms. Weeks had requested to have an attorney, and that was appropriate and reasonable under the circumstances and you are not to consider the request to have an attorney as evidence" (T 77). No curative instruction was given as to Ms. Weeks's right to remain silent.

Mr. Lindley testified that when he was at Ms. Weeks's Supervisor of Elections Office, he did not notice any signs stating monitoring or recording were occurring (T 78-79). He obtained a search warrant, supervised its execution (T 80-81), seized a Samsung Galaxy® cell phone from Ms. Weeks's office (T 81-83), and searched it, finding recordings of a conference call with officials, Ken Detzner, Virginia Smith, Whitney Anderson and Gerry Hammond, a conversation between Ms. Weeks and two other individual officials, and a conversation with Shannon Brown (T 85-86). Mr. Lindley learned the identities of the individuals and interviewed them (T 86).

On cross-examination, Mr. Lindley testified he obtained a search warrant for an audio recording of an alleged conversation between Canvassing Board Attorney, Al Hadeed, and Flagler County Commissioner/Canvassing Board Member Ericksen at a public meeting (T 91-92). When the defense asked whether that conversation had occurred inside of the Supervisor of Elections Office, the State objected (T 93), argument ensued, and the trial court sustained the State's objection (T 93-110).

Mr. Lindley testified that when he went to the Supervisor of Elections Office, he noticed the conference rooms were all glass, so that one could see through all the conference rooms (T 110-111), and that, though he later noticed it, he did not notice, at the time he went to the Supervisor of Elections Office, a sign on the door stating:

"These premises may be subject to video and audio recording at any time" (T 113). Lindley omitted the fact the conference rooms were all glass, and the existence of the audio/video recording warning sign from his search warrant affidavit (T 113-14).

On the State's redirect examination, the trial court overruled defense counsel's hearsay objection to the State's reading aloud for the jury from a newspaper article's headline title: "Lawyers, no expectation of privacy at public meeting?" (T 117-118).

The State called Christopher Hendry, FDLE Senior Crime Laboratory Analyst (T 122-123), qualified as an expert in forensic evidence and analysis (T 128), who was assigned to analyze Ms. Weeks's computers, hard drives, thumb drives, and Samsung Galaxy Note 3® cell phone, which also contained a SIM card (T 128-129). He extracted data from Ms. Weeks's cell phone onto a Blue-Ray DVD, admitted into evidence (T 131-135), along with other evidence on five DVDs (T 137-141). Lindley "drilled-down" into Ms. Weeks's cell phone to extract audio files (T 143).

The State called appointed Florida Secretary of State, Ken Detzner (T 150), who testified he is Florida's chief elections officer, and that, though not an attorney, he is responsible for providing uniformity in interpretation of the law (T 152-53). His office is open to the public, and visitors register upon a sign-in sheet (T 155). Mr. Detzner testified that "It's the people's office, but I get to use it" (T 156).

On April 3, 2014, Mr. Detzner was in a conference office meeting room on a conference call with Assistant Division Director of Elections, Gary Holland, and Department of State General Counsel, Drew Atkinson (T 157). On the line were Ms. Weeks, Flagler Supervisor of Elections, and Ron Labasky, General Counsel for the Association of Supervisors of Elections (T 158). Ms. Weeks had requested the conference call on a political dispute with the City of Palm Coast about Ms. Weeks's responsibilities in two elections. In Mr. Detzner's opinion, the conference call was not a public meeting (T 159), and stated that he had not authorized the conference call's recording (T 159-160). The recording, published to the jury (T 161-185), showed Detzner declined to authorize recording the conference call about a letter he had written concerning Ms. Weeks, which was later released to the media (T 203).

The State then began to publish an audio recording of unidentified persons in which Ms. Weeks appeared to call the Secretary of State a "son of a bitch" (T 186). Seconds into its publication, the defense objected to the recording as irrelevant and unauthenticated (T 186-187). When the trial court asked the State if there was some reason the recording was necessary for Mr. Detzner's testimony, the State replied, "There's no reason why – it actually goes toward him and I'm going to ask him if he consented to the distribution of his –," upon which the trial court overruled the

defense objection, stating that: "That was the hook I was looking for" (T 188-189). The audio recording was then restarted and published to the jury, repeating the previous derogatory references to the Secretary of State, as well as Ms. Weeks's seeming to call him an "ignorant bastard," "lying bastard," and "dumb piece of shit" (T 189-94), and the defense repeated its objection, noting nothing on the recording showed that Detzner's conference call had been heard by any others, and moving to strike the recording and give a curative instruction (T 194-95). The State countered that the unidentified voice's question, "who the hell is that?" was "clear evidence" of the recorded conference call's distribution (T 195-96). The trial court then overruled Ms. Weeks's counsel's second objection (T 196). Mr. Detzner testified that he did not authorize distribution of the recorded conference call (T 198).

On cross, Mr. Detzner testified the conference call had been broadcast over a speakerphone (T 199); that the entire call was "discussing public business" (T 200); that apart from the Supervisor of Elections attorney, all parties were public officials (T 200-201); that all public business must be conducted in public (T 201-202); and that both Detzner's and Weeks's offices are "actually the people's offices" (T 204).

On redirect, Detzner identified voices on the first recording (T 209), but no voice on the second (vulgar) recording, except for Ms. Weeks's, was ever identified.

The State then called Assistant Division Director of Elections, Gary Holland (T 213), who testified that he participated in the conference call on the first recording (T 216-221). On cross, Mr. Holland agreed everything discussed on that conference call could be disclosed to the public (T 224), including his own statements (T 226).

The State then called Darlene Walker (T 228), who testified concerning the first recording (the conference call), and identified Ms. Week's voice (T 228-331). On cross, Ms. Walker testified she had worked at the Supervisor of Elections Office, which had a "large sign" on the front door stating in effect, "if you enter the office you would be taped.…[T]he elections office tapes everyone who comes in" (T 232).

The State then called Whitney Anderson (T 236), who testified that on September 19, 2014, she was as a Consumer Analyst for the Florida Attorney General's Office, taking calls concerning consumer complaints, when Ms. Weeks left an audio message on her voice mail, which Ms. Anderson returned (T 236-237). Ms. Anderson testified she did not know that her call was being recorded during the recording of her telephone call which was published to the jury (T 247-263), and from which she identified only her own voice (T 263). Although Ms. Anderson had made the call solely in her capacity as employee of the Attorney General's Office, although the call pertained to Ms. Weeks's report of ethics violations (T 267), and

although she had redirected the call to the Governor's Office (T 268-269), the State elicited Anderson's testimony that the conversation was "just between us" (T 264).

The State then put on Andrew Atkinson by telephone conference (T 276-278). The State did not request Mr. Atkinson's consent to record this conference call, and Mr. Atkinson took no action exhibiting an expectation that the call would not be recorded (id.). Mr. Atkinson, an attorney, testified that on April 3, 2014, he was General Counsel for the Florida Department of State (T 278), and testified he participated in the conference call on the first recording (T 280). Mr. Atkinson's testimony was ultimately discontinued due to "technical difficulties" (T 280-287).

The State then called Gerry Hammond (T 288), a former Opinions Attorney for the Florida Attorney General's Office, who "rendered opinions to public officials on questions that related to their official duties" (T 289). When the State sought to elicit Ms. Hammond's opinion on what constituted a "public meeting," the defense objected to any such legal opinion, and the objection was argued outside the presence of the jury (T 292-304). The trial court essentially sustained the defense objection, also indicating, "I don't think that … it's appropriate for any witness to testify as to what a meaning of a word or phrase in a statute is for purposes of the jury" (T 303). Ms. Hammond identified the CD containing a recording of a telephone conversation (T 308), in which Ms. Weeks, in her capacity as Supervisor of Elections, requested

Ms. Hammond's opinions related to possible ethics violations, which was published to the jury (T 308-327). Hammond identified only her own voice on the recording (T 327), and stated she did not consent to recording (T 328). While Ms. Hammond participated in the call in her capacity as employee of the Attorney General's Office, and although the call pertained to Ms. Weeks's report of ethics violations, the State elicited Ms. Hammond's testimony that the conversation had been "private" (T 327). On cross, Ms. Hammond conceded she had taken the call in a public building open to the public (T 330), and that, in her position, she never gives legal advice (T 333).

The State then called Ron Labasky, General Counsel for the Association of Supervisors of Elections (T 337), who engaged in the April 3, 2014 conference call memorialized in the first audio recording, to which he did not consent (T 338-343). Labasky understood the conference was broadcast over speakerphone, to which anyone could be listening (T 345); that he was speaking on behalf of the Association of Supervisors of Elections (T 346); that all other parties to the conference call were public officials (T 346); that he was "more of a listener…than a principal" (T 351); that the other parties could repeat anything Labasky might have said (T 351-352); that the conference with the Secretary of State involved Ms. Weeks's complaints about public matters; and that nothing in the call's content was confidential (T 352).

The State then called City of Palm Coast City Clerk, Virginia Smith (T 357), who testified she had a telephone conversation with Ms. Weeks on April 7, 2014, and identified a CD which contained a recorded telephone conversation (T 360-361). Ms. Smith had called the Supervisor of Elections Office for an interlocal agreement to conduct Palm Coast elections, and asked that Ms. Weeks return her call (T 365). Ms. Smith was in the City Manager's conference room when she received a call from Ms. Weeks (T 366), the recording of which was published to the jury (T 367-382). After Ms. Smith identified her own voice, as well as Ms. Weeks's, the State suddenly re-published to the jury, for a third time, the portion of the second recording in which Ms. Weeks appeared to refer to the Secretary of State using vulgarities (T 383).

On cross-examination, Ms. Smith testified she was the Palm Coast City Clerk; that Ms. Weeks was the Flagler County Supervisor of Elections; that the interlocal agreement Ms. Smith sought concerned elections of public officials; that the call was between the Palm Coast City Clerk's Office and the Flagler County Supervisor of Elections Office; that there had been a dispute between the public offices concerning the proposed interlocal agreement, which would be presented to the City Council at a public meeting; and that everything Ms. Smith had stated to Ms. Weeks was stated in her official capacity as a representative of the City of Palm Coast (T 387-391).

When the State elicited Ms. Smith's testimony that "[a] city council meeting is open to the public and must comply with sunshine laws, which is open to the public. The phone conversations --," the defense objected, because the witness's "legal understandings are not admissible," and the trial court sustained the objection, instructing jurors not to consider the last answer given by Ms. Smith (T 393-395). The State then elicited Smith's testimony that "It was not a public meeting" (T 395). The trial court overruled a defense objection concerning this statutory defense (id.).

The State had current Flagler County Supervisor of Elections, Katie Lenhart, identify the telephone number for the Supervisor of Elections Office (T 396 397).

The State then put on Ms. Shannon Brown (the subject of the severed count) by telephone conference (T 421). The State did not request Ms. Brown's consent to record this conference call, and Ms. Brown took no action exhibiting an expectation that the call would not be recorded (id.). Ms. Brown testified that Ms. Weeks had invited her to the front yard of the Weeks's home to discuss Brown's ex-husband, who was dating Ms. Weeks's daughter (T 422). The State published to the jury two portions of an audio recording authorities had seized from Ms. Weeks's cell phone (T 425-442), which Ms. Brown said she did not consent to being recorded (T 443).

The State rested, and Ms. Weeks's defense moved for judgment of acquittal (T 446-73), arguing for entry of judgment of acquittal, in part, because in each count:

> [Ms. Weeks was] a public official. She's calling another public official to discuss public policy. Everything about the phone call had to do with public issues. These people have testified that they have private offices, but as we now know, they do not. They are all owned by the public. They don't pay rent. Whoever the next clerk is, is going to get the same office.… The disclosure case is slightly different, but the disclosure case does require an illegal recording, so if the Court eliminates the … [counts] for the illegal recording, the disclosure case would fall as well.
>
> * * *
>
> The only other thing that they allege is that Secretary Detzner exhibits an expectation that such communication is not subject to interception. Even if the Court finds that the State made a prima facie case of that, they -- that's not the only element. They also have to prove -- they had to prove, A, that it's by a person exhibiting an expectation that it's not subject to interception. That's Detzner. Under circumstances justifying such an expectation. There are no such circumstances in this case justifying that. It's a conference call with public officials. And he also fails the second test. It's a public oral communication uttered at a public meeting. Everybody in the call is speaking in the context of their employment.
>
> * * *
>
> In the Attorney General's office, you know, she's basically reading a script. I mean, she said they're told exactly what to do. And, then, she does this over and over again every day. I would submit that she's acting as an employee of the Attorney General's office. This is a public agency.
>
> * * *
>
> [T]hese people can object to being recorded, but … did not.

(T 454-455, 458-459, 462). But the trial court eventually denied Ms. Weeks's motion for judgment of acquittal (T 474-475), and the defense rested (T 477).

Ms. Weeks requested "exhibiting" (as in "*exhibiting* an expectation that such communication is not subject to interception under circumstances justifying such expectation," § 934.02(2)), be stated as an element of the offense in jury instructions, arguing the State had the burden of proving each person was actually "exhibiting" such an expectation, and because excluding "exhibiting" as an element would shift that burden instead to Ms. Weeks, but the trial court denied that request (T 490-504), and also denied her request for a jury instruction *defining* the term "public meeting" (as in "oral communication…does not mean any public oral communication uttered at a *public meeting*" § 934.02(2)), and *defining* the term "exhibiting" (T 409-418).

The State then drafted a makeshift seven-count Information for the jury (T 531-532), and the trial court read the jury instructions (T 552-563; R 268-279).

The State began its closing argument by stating "[i]t is not legal to record a telephone conversation with somebody else, anyone without their consent" (T 564), The trial court overruled the defense objection (id.). The State argued Gary Holland "also told you for public meetings there has to be a notice to the public" (id.), and the trial court overruled a defense objection, stating, "I'll ask the jury to rely on the instruction given by the Court on the law and not on the attorneys' comments" (id.), though "public meeting" was not defined in jury instructions (T 552-63; R 268-79).

Also, in closing, the State published--for the fourth time--the unauthenticated recording wherein Ms. Weeks referenced the Secretary of State to an unknown person as a "son of a bitch," "ignorant bastard," and "lying bastard" (T 587-589), which it repeated yet again (along with "piece of shit") in the State's rebuttal closing (T 652).

The State displayed for jurors a definition of the term "wire communication" that specifically *omitted* the caveat that it "does not mean any communication uttered at a public meeting" (T 658; *see also* T 661), to argue "the legislative intent" (id.).

The jury retired and sent back a note asking for the unauthenticated recording of Ms. Weeks's profanities about the Secretary of State (T 684, 687), which was re-published to the jury for a fifth time (T 687-92). Thirty-two minutes after retiring again, the jury returned guilty verdicts on all of the counts (T 693-94; R 280-281).

Judgment was entered on seven counts May 18, 2018 (R 293-294, 285, 287). Ms. Weeks entered into an agreement with the State in which she pleaded no contest to the severed count (pertaining to Shannon Brown) in exchange for thirty (30) days' incarceration in the county jail and eighteen (18) months' probation (R 323-326). Judgment and Sentence were also entered as to that severed count (R 327-328).

Ms. Weeks filed timely Notice of Appeal June 1, 2018 (R 314; 316).

This Initial Brief follows.

SUMMARY OF ARGUMENT

I. The trial court reversibly erred in admitting testimony the investigation was sanctioned by FDLE Management's screening process, bolstering the State's case, and in allowing the State's closing argument vouching for the investigator's credibility.

II. The trial court reversibly erred in denying the defense motion for mistrial when the investigator commented on the defendant's exercise of her right to silence, and in declining the defense request for a curative instruction on her right to silence.

III. The trial court erred in repeatedly admitting an unauthenticated audio recording in which the defendant appeared to call the Secretary of State vulgar names.

IV. The trial court erred in denying the motion to dismiss multiple counts for each party to each wire interception, despite the statute's prohibition against "any" interception, rather than interception of "a" party's communication, requiring lenity.

V. The trial court erred in denying jury instructions defining the terms "public meeting," and "exhibiting" an expectation of privacy, leaving jurors to interpret the law, and depriving the defendant of these statutory theories of defense.

VI. The trial court erred in denying the motion for judgment of acquittal as there was no reasonable expectation that public business communications were not subject to interception, rendering the evidence insufficient to support a jury verdict.

ARGUMENT

Point I

THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING TESTIMONY THE INVESTIGATION RESULTED FROM FDLE MANAGEMENT'S "SCREENING PROCESS," BOLSTERING THE STATE'S CASE WITH AN UNDUE AIR OF AUTHORITY

Standard of Review

"[A] court's discretion [in admitting evidence] is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to *de novo* review." *Bearden v. State*, 161 So. 3d 1257, 1263 (Fla. 2015).

Reversible Error

From the start, FDLE investigator Phillip Lindley testified "huge volumes of allegations come into FDLE. There is a screening process where a basic preliminary set of data is brought in --" (T 61). The trial court overruled defense objections to that testimony as irrelevant and bolstering (id.), further allowing Lindley's testimony, "We are to screen the allegation, bring it into management. Management and the counsel's office determine whether or not FDLE will open an official investigation" (id.), bolstering the State's case with an air of authority by claiming it had proceeded against Ms. Weeks only after a "screening process" outside the evidence at trial. First, as the defense then noted, Mr. Lindley's testimony was irrelevant. *Keen v. State*,

775 So. 2d 263, 274 (Fla. 2000) ("[T]his Court clearly instructed in *Baird,* reaffirmed in *Conley,* and confirmed in *Wilding* that an alleged sequence of events leading to an investigation and an arrest is not a material issue in this type of case. Therefore, there is no relevancy for such testimony to prove or establish such a nonissue."). But more perniciously, Lindley's testimony about FDLE *Management's* out-of-court "screening process" bolstered his testimony, lending the State's case undue authority.

The State, in closing, further bolstered the credibility of Lindley's testimony: "And do you think Phil Lindley was dishonest with you when he said he didn't see that sign? I mean, this is a guy who's been a law enforcement officer for a while" (T 673). *See, e.g., Johnson v. State*, 177 So. 3d 1005, 1008 (Fla. 1st DCA 2015) ("The State may not bolster a witness's credibility by implying that he is less likely to lie because he is a government employee"); *Bowles v. State,* 381 So. 2d 326, 328 (Fla. 5th DCA 1980) (noting error could not be held harmless as "[p]olice officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions as officers of the law, and the prosecutor in his final argument asked the jury to do just that.").

Mr. Lindley's testimony FDLE *Management* saw merit in proceeding against Ms. Weeks from among the "huge volumes of allegations [that] come into FDLE,"

only after a "screening process" wherein FDLE's "Management and the counsel's office determine whether or not FDLE will open an official investigation" (T 61), unjustly bolstered the State's case with irrelevant testimony, rendering the trial unfair, and requiring remand for a new trial prohibiting such unfairly prejudicial testimony.

Point II

THE TRIAL COURT REVERSIBLY ERRED IN DENYING MOTION FOR MISTRIAL AS INVESTIGATOR COMMENTED ON DEFENDANT'S EXERCISE OF HER RIGHT TO SILENCE

Standard of Review

A ruling on motion for mistrial is reviewed for abuse of discretion as to whether a mistrial should have been granted to ensure a fair trial. *E.g., Robbins v. State*, 891 So. 2d 1102, 1107 (Fla. 5th DCA 2004) ("[B]ecause of the improper comment on Robbins' right of silence, Robbins was denied a fair trial. Accordingly, the trial court *abused its discretion* in denying Robbins' motion for mistrial") (emphasis added).

Reversible Error

Mr. Lindley testified he questioned Ms. Weeks and "initially, she declined on everything. She gave me some of the items and declined to provide the rest, saying that she wanted to talk to counsel" (T 62). The defense objected that Mr. Lindley had testified that Ms. Weeks invoked her Sixth Amendment right to counsel and her right to remain silent under the Fifth Amendment, moving for a mistrial (T 62-74).

The trial court denied a mistrial, sustaining the objection as the answer was "unresponsive and beyond the scope of the question" (T 74). The defense requested an instruction that "the invocation of a person's right to remain silent or counsel is constitutionally permissible and should never be held against any individual," to which the State objected (T 75). The trial court solely instructed the jury on the right to counsel, noting Lindley had "made a statement that Ms. Weeks had requested to have an attorney, and that was appropriate and reasonable under the circumstances and you are not to consider the request to have an attorney as evidence" (T 77). The trial court gave absolutely no curative instruction concerning the right to silence.

The Fifth Amendment to the United States Constitution provides no person "shall be ... compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In order "[t]o give effect to this clause, it is well-settled that 'courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the [defendant's] right of silence.'" *Morris v. State,* 988 So. 2d 120, 122 (Fla. 5th DCA 2008) (citations, internal quotes omitted).

"[A]ny comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (citing *State v. Kinchen,* 490 So. 2d 21 (Fla. 1985); *David v. State,*

369 So. 2d 943 (Fla. 1979)). "The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." *DiGuilio,* 491 So. 2d at 1135. "If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." *Id.* 491 So. 2d at 1139. *See also State v. Horwitz*, 191 So. 3d 429 (Fla. 2016) ("defendant's privilege against self-incrimination guaranteed under article I, section 9 of the Florida Constitution is violated when his or her pre-arrest, pre-*Miranda* silence is used against the defendant at trial," and permitting use of a non-testifying defendant's pre-arrest, pre-*Miranda* silence as evidence of guilt was not harmless beyond a reasonable doubt).

In *Coleman v. State*, 58 So. 3d 324 (Fla. 1st DCA 2011), for example, the defendant was accused of thefts. At trial, an investigator testified he had questioned Coleman as part of his investigation, and that she ended the interview. The defense objected and moved for a mistrial, arguing the investigator had improperly commented upon Coleman's exercise of her right to remain silent. The trial court denied Coleman's motion for mistrial. As the appellate court could not find that the comment did not contribute to the verdict, it reversed and remanded for a new trial.

Also, in *Mack v. State*, 58 So. 3d 354 (Fla. 1st DCA 2011), the state questioned the investigator whether the defendant said anything else to him, and the investigator

replied, “He said he'd rather talk to his attorney, and he didn't want to talk anymore.” The trial court denied the defense request for a mistrial, and the appellate court reversed, holding: “Comments on a defendant's request for an attorney have been considered a comment on the exercise of the right to remain silent.” *Id*. at 356.

Mr. Lindley’s testimony Ms. Weeks refused to speak before seeing an attorney was fairly susceptible of being construed as a comment on her right to remain silent, was not properly cured, and cannot be said not to have contributed to the verdict. Reversal for a new trial prohibiting such unfairly prejudicial testimony is appropriate.

Point III

THE TRIAL COURT REVERSIBLY ERRED IN REPEATEDLY ADMITTING AN UNAUTHENTICATED AUDIO RECORDING IN WHICH DEFENDANT APPEARS TO MAKE PROFANE COMMENTS ABOUT THE FLORIDA SECRETARY OF STATE

Standard of Review

“[A] court's discretion [in admitting evidence] is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to *de novo* review.” *Bearden v. State*, 161 So. 3d 1257, 1263 (Fla. 2015).

Reversible Error

Five times, the State was allowed to publish to the trial jury an unauthenticated audio recording of Ms. Weeks appearing to call the Secretary of State vulgar names

(T 186-187, 189-196, 383; 587-589, 687-692), and the State repeated the vulgarities for a sixth time in its closing (T 652). Indeed, when jurors asked to rehear solely this recording, a juror stated: "We'd like to hear at the beginning of the tape. There's conversation going on about the conversation with the Secretary of State" (T 689).

Section 90.901, Fla. Stat., of the Florida Evidence Code, however, sets forth the authentication requirement for any admissibility of the subject audio recording:

> Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

§ 90.901, Fla. Stat.

Here, the trial court improperly allowed the State to introduce, five times, an audio claiming to depict Ms. Weeks vulgarly insulting a State official over defense objections to the audio's lack of authentication. As the Third District recently noted:

> Audio recordings may be played for the jury "if the audible parts are relevant, authenticated, and otherwise properly admissible." *Odom v. State*, 403 So.2d 936, 940 (Fla. 1981). The audio can be authenticated and admitted if the party speaking on the recording testifies that the audio is an accurate representation of the conversation. *McCoy v. State*, 853 So. 2d 396, 403 (Fla. 2003) ("Nothing more than this confirmation, by a participant in the conversation, that the tape fairly and accurately memorialized the discussion at issue is required to properly authenticate the recording.").

T.M. v. State, 3D18-894, 2019 WL 1781100, at *1 (Fla. 3d DCA Apr. 24, 2019).

Ms. Weeks's objections to this prejudicial evidence bearing on her character[1] were overruled, despite the State's failure to identify other participants to the conversation, or establish "that the tape fairly and accurately memorialized the discussion at issue." *Id*. Indeed, as the defense further noted, "there was no testimony about who made the recordings, how the recordings ended up on the phone" (T 452).

The trial court's admission of such evidence was reversible error. *See, e.g., D.D.B. v. State*, 109 So. 3d 1184 (Fla. 2nd DCA 2013) (audio recording, allegedly of juvenile's 911 calls, was not properly authenticated, and was, thus, inadmissible in delinquency proceeding against juvenile for offense of misuse of 911 emergency system because, whereas the identification of juvenile's voice on the recording by State's witness was helpful to the State's case, authentication also required other predicate evidence, including that the recording was of a phone call received and handled by the 911 system on the relevant date, which state failed to provide); *Santana v. State*, 191 So. 3d 946 (Fla. 4th DCA 2016) (the State failed to adequately authenticate audio recordings of telephone calls between defendant and confidential

[1] As in *Davis v. State,* 718 So. 2d 874, 877 (Fla. 5th DCA 1998), the tape "lobbed the proverbial skunk into the jury box, … depriv[ing] the defendant of a fair trial." *Id. See also McDuffie v. State*, 970 So. 2d 312, 328 (Fla. 2007) ("The vulgar portion of the voice mail only showed [defendant] was extremely irate … On the other hand, those details tended to prove quite effectively several irrelevant, highly prejudicial facts--that [the defendant] was vicious, nasty, and of questionable moral character.").

informant setting up a drug sale, and trial court's error in admitting the inadequately authenticated recordings into evidence was not harmless beyond reasonable doubt).

The audio recording here--which the State, as its proponent, claimed to be a recorded conversation of Ms. Weeks making vulgar comments about the Florida Secretary of State, after (also according to the State) having played another recording for an unidentified individual--was never authenticated so as to satisfy § 90.901's condition precedent. The State made no showing of who participated in the audio with Ms. Weeks; the circumstances it was recorded under; when it was recorded; the purpose for its recording; or how the recording ended up on Ms. Weeks's cell phone. Repeatedly admitting this unauthenticated recording--played for the jury five times over Ms. Weeks's objection, then repeated to jurors in the State's closing argument --became a central feature of the trial, vitiating its fairness, and requiring a new one.

Point IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS MULTIPLE COUNTS FOR EACH PARTY TO EACH WIRE INTERCEPTION, DESPITE THE STATUTE'S PROHIBITION AGAINST "ANY" INTERCEPTION, RATHER THAN INTERCEPTION OF "A" PARTY'S COMMUNICATION

Standard of Review

Florida courts hold "[j]udicial interpretations of statutes are pure questions of law subject to *de novo* review." *Johnson v. State,* 78 So. 3d 1305, 1310 (Fla. 2012).

Reversible Error

Ms. Weeks moved to dismiss counts of the Amended Information, as it charged 4 separate counts with respect to each of the 4 persons recorded during the same single incident on April 3, 2014; and charged 2 separate counts with respect to each of the 2 persons recorded during another single incident September 18, 2014 (R 261-264). Ms. Weeks argued the use of the term "any" in the offenses charged, § 934.02(1)(a), Fla. Stat. (prohibiting interception of "*any* wire, oral, or electronic communication"), left ambiguous the legislature's intended unit of prosecution (id.).

To determine the "unit of prosecution" that may result in conviction(s), courts use the rules of statutory construction, applying the rule of lenity if the intended unit is ambiguous. *McKnight v. State*, 906 So. 2d 368, 371 (Fla. 5th DCA 2005). "It is a common sense approach, guided by the statutory language, context, similar enactments, and case law." *Guetzloe v. State*, 980 So. 2d 1145, 1147 (Fla. 5th DCA 2008).

In evaluating statutory language, "the a/any test is a valid linguistic tool that is helpful in establishing the Legislature's intended unit of prosecution." *Bautista v. State*, 863 So. 2d 1180, 1188 (Fla. 2003). "When the article 'a' is used by the [l]egislature in the text of the statute, the intent of the legislature is clear that each discrete act constitutes an allowable unit of prosecution." *McKnight v. State*, at 371.

On the other hand, the "[u]se of the adjective 'any' indicates an ambiguity that may require application of the rule of lenity." *Id*. at 372. *Compare, e.g., Grappin v. State*, 450 So. 2d 480, 482 (Fla. 1984) (holding term "a firearm" in theft statute indicates one prosecution for each firearm stolen), *with State v. Watts*, 462 So. 2d 813, 814 (Fla. 1985) (holding term "any firearm or weapon" in prison contraband statute is ambiguous, applying rule of lenity to allow only one prosecution for the possession of two prison-made knives), *and Wallace v. State*, 724 So. 2d 1176, 1180 (Fla. 1998) (applying *Grappin* and *Watts* to hold the term "any officer" in a violent arrest statute ambiguous, allowing only one unit of prosecution for violently resisting any arrest, even if multiple officers are involved). *See also Guetzloe v. State*, 980 So. 2d 1145, 1148 (Fla. 5th DCA 2008) (statute providing that "[a]ny person who fails to include the disclaimer prescribed in this section in *any* electioneering communication that is required to contain such disclaimer commits a misdemeanor of the first degree … indicates an ambiguity as to the intended units of prosecution, and any doubt as to legislative intent must be resolved by application of the rule of lenity.").

The statute here, § 934.03(1)(a), Fla. Stat., prohibits conduct in which one:

> (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept *any* wire, oral, or electronic communication;

§ 934.03(1)(a), Fla. Stat. (emphasis added).

The "any" before "wire…communication" does not indicate a clear intent to make the unit of prosecution the interception of each person participating in one call. Instead, the use of "any" in § 934.03(1)(a) renders the statute ambiguous, requiring application of the rule of lenity. As "any" recording equals one unit of prosecution, multiple convictions for each alleged recording event should not be allowed to stand.

Thus, each of the counts pertaining to the conference call on April 3, 2014, (including Kenneth Detzner, Andrew Atkinson, Ronald Labasky, and Gary Holland) should be merged into one count for a single violation of § 934.03(1)(a), Fla. Stat., and each of the counts pertaining to the wire communication on September 18, 2014 (including Gerry Hammond and Whitney Anderson) should merge into a single count.

Point V

THE TRIAL COURT REVERSIBLY ERRED IN DENYING SPECIAL JURY INSTRUCTIONS DEFINING THE TERMS "PUBLIC MEETING" OR "EXHIBITING" AN EXPECTATION THE COMMUNICATION WOULD NOT BE INTERCEPTED, LEAVING JURORS TO INTERPRET THE APPLICABLE LAW AND DEPRIVING DEFENDANT OF THEORIES OF DEFENSE

Standard of Review

Requests for special jury instructions are reviewed for abuse of discretion. *Talley v. State*, 260 So. 3d 562 (Fla. 3rd DCA 2019). "Where an instruction is confusing or misleading, prejudicial error occurs where the jury might reasonably have

been misled and the instruction caused them to arrive at a conclusion that it otherwise would not have reached." *Brown v. State*, 11 So. 3d 428, 432 (Fla. 2nd DCA 2009).

Reversible Error

Ms. Weeks requested "exhibiting" be stated as an element of the offenses in jury instructions, as the State had the burden of proving each person was actually "exhibiting an expectation that such communication is not subject to interception," § 934.02(2), and because excluding "exhibiting" as an element would shift that burden, instead, to Ms. Weeks; but the trial court denied that request (T 490-504). The trial court also denied her request for jury instructions *defining* "exhibiting" (T 409-418), and *defining* "public meeting" (as in "oral communication … does not mean any public oral communication uttered at a *public meeting*" § 934.02(2)).

The State argued in closing, "It is not legal to record a telephone conversation with somebody else, anyone without their consent" (T 564), and the trial court overruled the defense objection (id.). The State then argued that "Gary Holland … also told you for public meetings there has to be a notice to the public" (id.), and the judge overruled the defense objection, telling jurors: "I'll ask the jury to rely on the instruction given by the Court on the law and not on the attorneys' comments" (id.). But the jury instructions *did not define* "public meeting" (T 552-563; R 268-579), and, over objection, the City Clerk testified, "It was not a public meeting" (T 395).

The jury was thus left to its own devices to determine what, as a matter of law, constituted a "public meeting"--*i.e.*, whether it meant a public meeting as defined in Florida's Sunshine Act, or a meeting of public officials discussing public business. Leaving jurors with the notion that only a formally-noticed public meeting under the Florida Sunshine Act met § 934.02(2)'s "public meeting" exception greatly lessened the State's burden of proof as to each element of the offenses *here* actually charged. The jury was also left to decide, as a matter of law, what conduct by another party to a communication constituted "exhibiting" an expectation it would not be recorded --or whether any affirmative act at all is required for that party to be "exhibiting"-- further lessening the State's burden of proof of each element of the offenses charged because "'[e]xhibit' means 'to show externally,' 'to display' and 'to demonstrate.'" *See McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1319-1320 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2600 (2018) (Florida Security of Communications Act did not apply to a person recording a meeting with police department officials because officials did not "exhibit" reasonable expectation of privacy *by stating or suggesting* meeting was confidential or private, or by prohibiting note-taking or recording, and Florida follows open-government policy, so meetings of public officials discussing matters of public interest would be subject to Florida public records disclosure laws).

"A defendant who requests a special jury instruction must demonstrate that (1) the special instruction is supported by the evidence; (2) the standard instruction does not adequately cover the theory of defense; and (3) the special instruction is a correct statement of the law and not misleading or confusing." *Peterson v. State*, 24 So. 3d 686, 689 (Fla. 2nd DCA 2009). The requested instructions were supported by evidence of a meeting on public business and of what the parties "exhibited":

> Section 934.02 does not apply to the recording of all oral communications. It is expressly limited to communications "uttered by a person exhibiting an expectation that such communication is not subject to interception." ... "Exhibit" means "to show externally," "to display" and "to demonstrate." *See* Webster's II New Riverside University Dictionary (3rd ed. 1994). ... The Florida Legislature's choice of this verb is telling: it required the expectations of privacy needed to trigger application of the statute must be exhibited; in other words, they must be "shown externally" or "demonstrated." The Legislature did not want expectations of privacy to count that remained unexpressed. Consequently, the Legislature imposed a simple requirement that the expectation be "exhibited."
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> * * *
>
> Based on this open-government premise, the facts that all attendees of the meeting were either public employees acting in furtherance of their public duties, or members of the public discussing a matter of public interest, undermines any objective expectation of privacy.

McDonough v. Fernandez-Rundle, 862 F.3d 1314, 1319, 1320 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2600 (2018).

Standard instructions did not cover defense theories it was a statutorily excluded "public meeting," or that only one count involved "exhibiting" expectation of privacy.

> "[T]he use of standard jury instructions does not relieve the trial court of its obligation to determine whether the standard instructions accurately and adequately state the law applicable to a given case. *Brown v. State,* 11 So. 3d 428, 432 (Fla. 2d DCA 2009). Indeed, the discretion of a trial court in such matters has been characterized as "fairly narrow" because a defendant is entitled to have the jury instructed on his theory of defense if any evidence supports that theory, so long as the theory is valid under Florida law. *Chavers v. State,* 901 So. 2d 409, 410 (Fla. 1st DCA 2005) (quoting in part *Goode v. State,* 856 So. 2d 1101, 1104 (Fla. 1st DCA 2003)).

Peterson v. State, 24 So. 3d at 690.

The trial court's refusal of the request to instruct jurors that an *affirmative act* by a party was required to "exhibit" an expectation of confidentiality was tantamount to directing a verdict for the State, as was its refusal to define "public meeting," which was a complete defense to all of the counts. Refusing to define "exhibiting" was harmful as to all of the counts, because Detzner, who alone had engaged in an affirmative act "exhibiting" an expectation that the public's business could somehow be confidential, had no such right. Refusal to give the defense's requested definition of "public meeting" was harmful on all counts as it is a complete statutory defense to otherwise illegal conduct. As the trial court improperly denied an instruction defining "exhibiting," all counts should be reversed. As it improperly denied an instruction defining "public meeting," reversal for a new trial is proper on all counts.

Point VI

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS THERE WAS NO EXPECTATION PUBLIC BUSINESS COMMUNICATIONS WERE NOT SUBJECT TO INTERCEPTION, RENDERING THE EVIDENCE INSUFFICIENT TO SUPPORT A JURY VERDICT

Standard of Review

A trial court's denial of a defendant's motion for judgment of acquittal is subject to *de novo* review. *Delgado v. State*, 71 So. 3d 54, 65 (Fla. 2011).

Reversible Error

At the close of the State's case, the defense moved for judgment of acquittal:

> [Ms. Weeks was] a public official. She's calling another public official to discuss public policy. Everything about the phone call had to do with public issues. These people have testified that they have private offices, but as we now know, they do not. They are all owned by the public. They don't pay rent. Whoever the next clerk is, is going to get the same office.… The disclosure case is slightly different, but the disclosure case does require an illegal recording, so if the Court eliminates the … [counts] for the illegal recording, the disclosure case would fall as well.
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> * * *
>
> The only other thing that they allege is that Secretary Detzner exhibits an expectation that such communication is not subject to interception. Even if the Court finds that the State made a prima facie case of that, they -- that's not the only element. They also have to prove -- they had to prove, A, that it's by a person exhibiting an expectation that it's not subject to interception. That's Detzner. Under circumstances justifying such an expectation. There are no such circumstances in this case justifying that. It's a conference call with public officials. And he also fails the second test. It's a public oral communication uttered at a public meeting. Everybody in the call is speaking in the context of their employment.

* * *

> In the Attorney General's office, you know, she's basically reading a script. I mean, she said they're told exactly what to do. And, then, she does this over and over again every day. I would submit that she's acting as an employee of the Attorney General's office. This is a public agency.
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> * * *
>
> [T]hese people can object to being recorded, but … did not.

(T 454-55, 458-59, 462). The trial court denied the motion for judgment of acquittal (T 474-75). But the State bears the burden of proof beyond reasonable doubt as to each element of the offense charged. *Ballard v. State,* 923 So. 2d 475, 485 (Fla. 2006). In order to prove that Ms. Weeks committed an *illegal* wire interception, the State had the burden of proving: (a) that the charged interception did not occur with respect to a "public meeting," and (b) that each party to a charged communication actively "exhibited" an expectation that the communication would not be recorded. *See McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1319-1320 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2600 (2018) (Florida Security of Communications Act did not apply to person recording meeting with police department officials because officials did not "exhibit" reasonable expectation of privacy *by stating or suggesting* that meeting was confidential or private, or by prohibiting note taking or recording; Florida follows open-government policy, so meetings of public officials discussing matters of public interest are subject to the Florida public records disclosure laws).

McDonough, supra, is of particular interest, given Florida's rules of statutory construction, as the statute at issue here was patterned after the Federal Wiretap Act.[2]

Moreover, the Third District has held that even a private-sector business conference call is not private under the Florida Security of Communications Act. *Cohen Brothers, LLC v. ME Corp., S.A.*, 872 So. 2d 321, 324-26 (Fla. 3rd DCA 2004) ("Society does not recognize an absolute right of privacy in a party's office or place of business. … Similarly, we don't believe that society would recognize, as reasonable, that such an expectation of privacy exists in a conference call, specifically where the call is held to conduct the business of the company.").

Perhaps the most compelling case for Ms. Weeks's lack of liability was made, inadvertently, by the State. At trial, when the State called Andrew Atkinson for a telephone conference (T 276-278), without requesting his consent to record the call, he took no action "exhibiting" an expectation the call would not be recorded (id.).

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[2] *See O'Brien v. O'Brien*, 899 So. 2d 1133, 1135-36 (Fla. 5th DCA 2005) ("[I]n light of the fact that the Act was modeled after the Federal Wiretap Act, we advert to decisions by the federal courts that have addressed this issue for guidance"); *and id.* at 1136 n.3 (quoting *Jackson v. State,* 636 So. 2d 1372, 1374 (Fla. 2nd DCA 1994) ("We also examine its interpretation by the federal courts under Florida's established rule of statutory construction 'which recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation.'") (quoting *O'Loughlin v. Pinchback,* 579 So. 2d 788, 791 (Fla. 1st DCA 1991)), *approved,* 650 So. 2d 24 (Fla. 1995)).

The State also called Shannon Brown (the subject of the severed count) by telephone conference (T 421), without requesting consent to record the call, and Ms. Brown took no action "exhibiting" an expectation that the call would not be recorded (id.). These telephone conferences--recorded and transcribed absent any stated consent--were no more or less illegal interceptions than the recordings of meetings of public officials discussing public business recorded in any of the charged communications, as any need for consent was obviated by the fact it proceeded before public officials.

Where the State obtains a conviction, this Court bears the responsibility for ensuring record evidence exists to support it. *Ballard v. State,* 923 So. 2d at 482. "Although the jury is the trier of fact, a conviction of guilt must be reversed on appeal if it is not supported by competent substantial evidence." *Ballard,* 923 So. 2d at 482. Ms. Weeks asserts there was no competent substantial evidence (a) the interception was not one made of a "public meeting," or (b) that each party to the communications beyond Mr. Detzner "exhibited" an expectation the conference would not be recorded, rendering evidence adduced at trial "not adequate to sustain a verdict of guilt." *Id.* The failure to produce legally sufficient evidence exonerates and requires dismissal.

As the evidence is insufficient to support Ms. Weeks's criminal convictions of the offenses charged, this case should be reversed and remanded for her discharge.

CONCLUSION

Points I, II, III and V legally support reversal and remand for a new trial, Point IV supports vacating four counts, and Point VI supports Appellant's discharge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy hereof was filed using the Florida Courts E-Filing Portal, which will furnish a copy to Office of the Attorney General at crimappdab@myfloridalegal.com, and to Assistant Attorney General Pamela Koller at pamela.koller@myfloridalegal.com, this 28th day of June, 2019.

CERTIFICATE OF FONT COMPLIANCE

Counsel certifies this brief is prepared with Times New Roman 14-point font.

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