IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

KIMBERLE WEEKS,

Appellant,

v. CASE NO. 5D18-3612

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

PAMELA J. KOLLER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0775990
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (fax)
crimappdab@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

STATEMENT OF CASE AND FACTS

Appellant's statement of the case and facts is substantially accurate for the purpose of this appeal, with the following additions and corrections:

Facts Relating to the Lack of Relevance and Bolstering Objections during (now retired) FDLE Special Agent Philip Lindley's Testimony:

The defense stated in opening statement that, "to get her here, law enforcement, who made this arrest, they left something out. They left out the fact that there was a sign on her door. The evidence will show that even though these - this officer knew that that sign was there, he didn't - he ignored it. And, so, now we're here." (T32). The defense cross-examined Lindley regarding his decision to seek a search warrant suggesting he had intentionally omitted certain facts, most of which, as the State pointed out, were included with the warrant. (T93,110-15,116-19). During closing argument, the defense argued that Lindley intentionally omitted certain facts in seeking the warrant, and the State responded to the attack on Lindley during its rebuttal. (T611,630,673).

In overruling the lack of relevance and improper bolstering objections, the trial court directed the State to "focus on what was done here" rather than "the whole history of how one of these is done[,]" after which the State questioned Lindley on how he began this investigation. (T61-62).

Facts Relating to the Motion for Mistrial:

During the State's direct examination of Lindley on the first day of trial, he revealed that he made a public records request for five items from Appellant when he visited the Supervisor of Elections office, but made it clear that Appellant was not

required to give these things to him, explaining to the jury that "[s]he's not obligated to turn anything over to FDLE." (T62). Lindley recalled that Appellant had initially refused, but then she had provided him with three of the five items, "declin[ing] to provide the rest saying that she wanted to talk to counsel." (T62). The defense objected, alleging that was "getting close to the idea of infringing on a person's right to remain silent[,]" but admitted that it did not appear to be the State's intent. (T62-63). The State argued in response that these facts did not involve either the Fifth or Sixth Amendment since Appellant was not in custody or being interrogated, and the case law relied upon by the defense was distinguishable in that it involved post-arrest comments by the prosecutor at trial. (T64-65,73). The State also advised the court it had found no authority disallowing the comment, and contended that even if this comment was improper, it did not vitiate the entire trial as required for a mistrial. (T68-69,71-72). However, in an abundance of caution the prosecutor suggested the court give a curative instruction. (T69,72).

The court found Lindley's answer to be beyond the scope and unresponsive, (T69), and denied the motion for mistrial, finding:

> This not only isn't a custodial or a post-arrest situation, this wasn't even a criminal investigation yet. It was in response to a request for public records. And, so, don't think it attaches in any way, shape, form or fashion. The request at that point is a very reasonable request to be able to speak an attorney. I think that's how the jury would probably consider that, but if you want a curative instruction I certainly will give it.

(T73). The court sustained the objection, since the answer was unresponsive, but found it did not rise to the level of vitiating the entire trial as required for a mistrial.

(T74). The defense advised it wanted a curative instruction, and after the parties discussed what the instruction should say, (T74-76), the trial court instructed the jury that:

> There was an objection made to an answer made by this witness outside the scope of the jury. I have sustained that objection and I have an instruction to give to you. And that is to strike and not consider Mr. Lindley's last statement. He 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 her request to have an attorney as evidence. And that matter is stricken based upon the sustaining of my objection.

(T77). It was never mentioned again by either party.

Facts Relating to the Admission of the Objected-to Recording:

The State's first witness, Lindley, revealed that he obtained a search warrant for the Supervisor of Elections office. (T80). He was present for the execution of the search warrant on October 3, 2014. (T81). One of the items authorized to be seized under the warrant was a cell phone, and a Samsung Galaxy cell phone was seized. (T81-82). The cell phone was seized from the desk in Appellant's office where they read the contents of the search warrant to her. (T83). The phone was put into airplane mode to protect it from being remotely accessed and wiped. (T84). A thumb drive was placed with the cell phone after an image of the hard drive was made while the phone was unlocked.[1] (T84). The phone was then sealed. (T84). After the laboratory had finished processing the phone, Lindley listened to all of the recordings found on the cell phone. (T85). He listened to recordings of the Secretary of State, Virginia Smith,

[1] The FDLE analyst (Hendry) advised he did not analyze the thumb drive since he had already conducted a physical extraction of the phone himself. (T146).

Whitney Anderson, and Gerry Hammond, as well as a recording of Appellant and two other individuals, and, finally, of Shannon Brown. (T85-86). Lindley was able to identify the persons recorded and, once he had, he approached them, played the recording for them, and they were interviewed. (T86).

Christopher Hendry, an analyst with the investigation and forensic science program of the Florida Department of Law Enforcement, was the digital examiner of Appellant's personal cell phone. (T123,129-30). He explained how he extracts data from a cell phone, and how he analyzed this phone. (T127,131-33,143). The Samsung Galaxy Note 3 cell phone he analyzed had a SIM card. (T129). Hendry saved the physical contents of the cell phone onto a Blu-ray DVD or CD. (T133-34). The Blu-ray DVD of the contents contained a fair and accurate depiction of the contents of the cell phone. (T134). Hendry explained that the preliminary extractions involved the entire physical extraction of the phone in its entirety. (T135). The data extraction reflected what was on the device. (T150). As requested, Hendry extracted specific audio recordings and placed them on separate DVD's, for a total of five DVD's. (T136). Hendry had listened to all five DVD's in their entirety and compared each recording with the DVD of the original extraction, and ensured each recording was the same and had not been altered. (T136-40). Hendry testified that the DVD's accurately reflected the audio files contained in the complete download of the cell phone. (T140). When the State moved to introduce the DVD's, the defense objected on the basis of lack of predicate, asserting that other witnesses were needed. (T140). The trial court overruled the objection and admitted the DVD's. (T140-41). Hendry opened the DVD from State's Exhibit Number Two, and explained that it was a voice

recording of Samsung audio voice 48. (T142,144). He explained that the media was extracted, and a report was generated which provided Hendry with information, such as the hash value. (T143). BR report 2014 Samsung file audio voice 48 was modified on April 4 at 7:31:39, and had another date associated with it of April 3, 2014, at 9:31:37. (T142,144-45).

The State published the recording of the Secretary of State's telephone conversation with Appellant. (T161-85). During the conversation, Appellant advised the Secretary of State, Kenneth Detzner, that she wanted to record the conversation, but Mr. Detzner asked Appellant why she would want to record it and, when Appellant began to explain why, he interrupted her and advised Appellant he did not feel comfortable with that. Mr. Detzner stated that if someone wanted to be on the call, that person could get on the call. (T161-62). Mr. Detzner told Appellant that Ron Labasky, as the legal representative, could brief the association's president, so he did not think it was necessary to record the call.[2] (T162). He told Appellant that he was calling her as she requested, and asked Ron Labasky if he was comfortable with briefing their president. (T162). After Mr. Labasky advised he would have to leave early, Mr. Detzner stated that he did not expect this to take that long, said "No[,]" and advised Appellant they would just have an informal conversation. (T162-63). Appellant responded, "Okay." (T163).

They discussed a letter the Secretary had sent to Appellant, and he explained

[2] It was explained that the association they were speaking about was the Association of Supervisors of Elections, and that Ron Labasky was counsel for that association. (T158).

why he had sent the letter. (T163-67). Gary Holland became involved in the conversation, and suggested Appellant get with Mr. Labasky for assistance in working things out. (T166,171). Appellant complained about the interlocal agreements with the City of Palm Coast, that they were unacceptable. (T167-68,171-72). Appellant told the Secretary that he needed to write a letter to the City of Palm Coast, and he advised he would send a letter to the effect that they needed to negotiate. (T168-69). Mr. Detzner further agreed to write both the City and Appellant a letter, but he did not think that would solve the problem. (T173). Mr. Detzner urged Appellant to negotiate with the City, and agreed with Gary Holland that they should get Mr. Labasky involved. (T173,174-75,178,179-80). Appellant took the Secretary to task more than once for sending the previous letter, complaining that it caused her to get a "black mark in the media[,]" and telling him she was "flabbergasted to think that the first letter was even issued." (T169,173,178,179,181,185). She also complained that she had been disrespected and she was not willing to put her reputation on the line for the City. (T176). Mr. Detzner suggested to Mr. Labasky that somebody needed to get the people to the table to negotiate. (T177). Mr. Labasky advised he could speak with Appellant to learn whether there was anything the association could do, since he represented the association. (T177). Before Mr. Labasky left the call, he advised that he would contact the president of the association and fill her in. (T180). Appellant complained that she was "not willing to get beat up in the media anymore about this. I really am not." (T183). Mr. Detzner urged Appellant to negotiate with the City because without compromise on both sides, there would be no resolution. (T184-85).

The State began to publish the complained-of recording, number four, while the Secretary of State was on the stand. (T186.). The defense objected, complaining that the recording had not been authenticated or identified. (T186-87). The prosecutor explained that it was a recording by Appellant of the conversation she had with others after she had published the recording of the Secretary of State. (T187). The prosecutor argued that the context of the recording made it clear that the persons on the recording were discussing the recording of the Secretary of State, and the jury would be able to rely on that to make a decision whether Appellant distributed the Secretary of State's recording to others. (T187). The prosecutor rejected Appellant's argument that the State had to present the testimony of the persons on the recording because the context of the recording makes it clear that they are discussing the Secretary of State recording after listening to it. (T187-88). The State explained that they preferred to go forward with publishing this recording right after the Secretary of State's recording so the jury could hear them together, and for purposes of efficiency so that both recordings would not have to be published again, later on. (T188). The court overruled the objection. (T189).

At the beginning of the conversation found on number four, an unidentified speaker asked Appellant, "Who's that dude?" (T189). Appellant responded, "the Secretary of State." Id. An unidentified speaker asked if "he [was] going to issue a letter?" (T189). Appellant replied, "(Indiscernible) but he said, in the middle of the phone call, that he would." (T89). After Appellant stated that he needed her and he did not know what was going on, an unidentified female speaker added, "that guy probably don't know a damn thing. From when I was listening (indiscernible)."

(T189-90). The unidentified female speaker told Appellant - after Appellant asked if she had been mean - "No. You told it like it was. And he didn't know what to say." (T190). Appellant stated that she did not know "if it's legal to tape after you let them know you're taping it or not. (Indiscernible) tell him I'm taping it or what. I don't know if I did it - whether it's legal or not, but I ain't told nobody." (T190-91). She explained that, "I just brought it home to share with you (indiscernible). And I can have it for my own reference." (T191). After Appellant complained that Gary Holland jumped into the conversation, and called him a "dumb piece of shit[,]" the unidentified female speaker agreed, saying, "That's what they sound like." (T191). Appellant also mentioned Ron Labasky and belittled the suggestion to hire him, complaining about how much that would cost. (T192-93).

At this point, the defense objected contending it was unclear what this tape consisted of because only Appellant's voice had been identified. (T194). Appellant also claimed there was nothing on that recording reflecting that the Secretary of State's tape had been listened to. (T194-95). The State disagreed, arguing that the recording did reflect that the Secretary of State's recording had been listened to, pointing out that it started out with the uncle asking, "who the hell was that guy?" and referring back to the recording, including when Appellant explained that she had brought it home to share with them. (T195-96). The State argued that it was up to the jury to decide whether the Secretary of State's recording had been played for the unidentified speakers. (T195-96). The court advised that it understood, and overruled the objection. (T196).

One of the victims, Virginia Smith, the city clerk and paralegal for Palm Coast,

Florida, was familiar with Appellant's voice and identified Appellant's voice on each of the five recordings that were published to the jury, including the recording objected to by Appellant. (T359-60,383-84, 382-83,384-86).

Facts Relating to Motion to Dismiss:

On January 19, 2016, Appellant filed a motion to dismiss counts 7, 8, and 9 of the indictment on the basis that those charges involved the interception of (and later disclosure of) conversations by persons at a public canvassing board meeting. (R40-51). A hearing was held on March 24, 2016, on the motion to dismiss. (R342-66). The trial court granted this motion on June 24, 2016. (R114-15). On November 15, 2016, Appellant filed another motion to dismiss, this time arguing that counts 1 through 6, and counts 10 through 12 of the indictment should be dismissed because none of the persons had an expectation of privacy under circumstances reasonably justifying an expectation. (R116-35). The State traversed this motion on January 26, 2017, and February 3, 2017. (R207-11,215-20). The trial court's order rendered on March 31, 2017, denied the motion as to grounds 1, 2, 10, 11, and 12 of the indictment and granted the motion as to counts 3, 4, 5, and 6 of the indictment. (R224-34). At the conclusion of the November 17, 2017, hearing on the State's notice regarding similar fact evidence, the defense advised the trial court there were no other motions that needed to be addressed before trial which was tentatively planned for April of 2018. (R537,539-40). A status conference was to be scheduled a month before trial. (R541-42).

On February 21, 2018, the State filed an amended information charging Appellant with nine counts. (R253-54). On March 20, 2018, Appellant filed a motion

to dismiss the amended information based upon the statute's use of the term "any" and the rule of lenity. (R261-64). There is no written order in the record on appeal or reflected in the court docket addressing or referencing the motion to dismiss amended information. (R7,265-328).

Prior to opening statements, the defense renewed its "previous motions to suppress and motions to dismiss." (T6). The judge stated that "this should be a standing order that follows my previous orders." (T6). The judge noted for the record that a "[s]tanding objection is noted on those issues." (T7).

Facts Relating to Jury Instructions:

During the charge conference, the court made it clear that the instructions on the charges would be based upon the language of the statute. (T485).

PUBLIC MEETING: The judge gave both sides the opportunity to argue on behalf of their respective "public meeting" definitions. (T509). The State relied upon the definition for public meeting set forth in section 286.011, or the Sunshine Law. (T509). Appellant relied upon a case from 1971, and argued that a definition of public meeting should reflect that such meetings "are not limited to formal meetings and may include any gathering of the members where the members deal with some matter on which a foreseeable action will be taken." (T510). After each side made their argument, the judge held that she was "not going to allow it from either perspective as it relates to Sunshine Law. That's injecting elements that are not part of this case." (T510). When the defense sought to include a statement that a public meeting can be held over a phone, the State objected and the judge advised as follows:

There's no definition for public meeting. There's not going

> to be any element of public meeting. This statute provides no guidance in that regard and, so, that will be up to the jury. It is -- again, without any indication that is it the law, you can argue that, but you - there's not going to be any legal instruction that that is the law. As I indicated before, this is not an expectation of privacy, so that language is not going to be used.

(T511). The public meeting exception was included in the definition of wire communication given to the jury; specifically, the jury was instructed that a wire communication "does not mean any public communication uttered at a public meeting." (T553,557; R270).

In closing argument, the State argued that Appellant's intent in recording the phone calls was for her own personal gain, rather than any public service. (T567-68,587). The State also argued that just because the person being recorded was a public official did not mean that every conversation they had constituted a public meeting. (T567,570-71,573). The prosecutor also told the jury they would not receive a definition of a public meeting, and they should use their common sense in deciding what that means. (T560-61,653,662). The State contended that a public meeting involved a notice to the public of the meeting taking place, that the meeting is open to the public, and the public can participate in the meeting. (T571,573-74,580,581,584,653).

The defense, on the other hand, argued that because they were public officials conducting business the meetings were public. (T595,619). Appellant argued that the calls were within the scope of the public officials jobs and, therefore, were public meetings. (T596-97). Appellant also argued that because the offices that the calls were made from or received were owned by the public, the calls were public

meetings. (T597,618). Further, that the judge would never instruct the jury that in order for a meeting to be public, there had to be notice, as the State had contended. (T595,616). In addition, that the judge would not instruct them that a public meeting can never be held over the phone. (T602). The defense also told the jury that the judge would never instruct them that the offices are private offices, not public offices. (T597,602). Appellant contended that the calls were public, especially the conference call to the Secretary of State. (T597,613-14,617). The defense also told the jury that it was their job to decide if the calls were not public as they were discussing public issues, and the State had the burden of proof, not the defense. (T597,600-01,602). The defense argued that it was a complete defense to these charges if the recording was made of public people making public pronouncements. (T609-10).

EXHIBIT: The defense then argued for a definition of "exhibit" to be included based upon the definition of oral communication that was being applied to the wire communication charges here. (T511-12). Relying upon McDonough v. Fernandez-Rundle, 862 F.3d 1314, 1319–20 (11th Cir. 2017), the defense argued that the definition of exhibit should be given to the jury, i.e., shown externally or demonstrated. (T512-15). The State objected, explaining that the McDonough case involved unusual facts, i.e., an injunction against the State Attorney's Office. (T515). The prosecutor advised the judge that one of the biggest issues with incorporating oral communication into wire communication is that the oral definition seems to require the victim to express a desire to keep the communication private. Id. For example, if the prosecutor walked over and whispered to another person in the courtroom, the prosecutor would have exhibited a desire that the oral communication

be private. (T515). The State rejected the argument that a person on the phone (i.e., a wire communication) has to affirmatively state they want the conversation to be private as clearly contrary to the intent of the Legislature. (T516). The prosecutor argued that the jury can understood the words, and that any discussion of circumstances justifying expectation would insert the privacy issue, which they had avoided doing the entire trial. (T515-16).

The judge suggested they could inform the jury about an expectation that they would not be recorded or intercepted without mentioning privacy. (T516). The judge pointed out that the definition came from case law, and "aren't words that need to be defined for the public. It's not something specific related to this statute." (T516). The judge disagreed that "circumstances justifying such expectation" needed more to provide any meaning to the jury than the words provided on their own. (T516-17). The judge explained that, "[the expectation that they would not be recorded or intercepted is one that] society's prepared to recognize as reasonable. Well, that's their job. That's what they're going to tell us. They don't need that information." (T517). The judge also found the facts in the McDonough case to be distinguishable, especially since they used the word privacy. (T517). The judge rejected the request, finding that "I'm not going to apply it to the circumstances here, especially given that the additional definition is being provided. So I will not include the exhibit or circumstance justifying such expectation." (T517).

The jury was instructed as part of the definition of "wire communication" that "[a] wire communication means any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under

circumstances justifying such expectation[.]" (T553,557; R270).

During closing, the defense argued that those involved in the conference call never exhibited an expectation that the call would remain private, and the Secretary had admitted he knew everybody could repeat everything that had been said on the call. (T614,615,617). Also, that everything that was discussed during the call was public business. (T615). And, that the State had to prove beyond a reasonable doubt that those who were recorded exhibited an expectation that such communication was not subject to interception. (T615,619,648). The defense focused on the phrase "exhibit an expectation" and provided their definition to the jury. (T648-49).

In rebuttal, the State argued that the victims had an expectation that their calls would not be intercepted because the calls were not made in a place where anyone could overhear what was being said. (T659-60). The prosecutor also told the jury it would be their decision to make whether these calls are those that society believes should be protected and whether the circumstances justify the expectation that the call would not be intercepted. (T660-61). The State disputed the defense's definitions and arguments regarding public meeting and exhibiting an expectation. (T661-62,665).

The defense argued that the State had to prove that these were not public communications uttered at public meetings and that the persons who had been recorded exhibited an expectation that the communication was not subject to interception. (T620-21). The State, in rebuttal, told the jury that the issue was whether it was a wire communication, and that was for them to decide. (T657).

Facts Relating to the Motion for Judgment of Acquittal:

In moving for a judgment of acquittal, Appellant contended that an expert was

required to testify whether a wire communication occurred and the State failed to present a witness to testify regarding who made the recording. (T448-50). The defense complained more than once that the State had eliminated oral and electronic communications and proceeded only on wire communications. (T447,450). Appellant argued that the jury should not be required to have a background in mathematics or engineering in order to understand the definition of a wire communication. (R451). Appellant then addressed each count complaining that the State had not provided any testimony about how the recordings were made or who made them, and whether each person had an expectation that the call would be private since they were public officials. (T452-64).

In response, the State suggested that the jury would be receiving an instruction explaining what a wire communication is and that anybody of reasonable intelligence can understand the definition. (T465). While acknowledging that the term "aural" may not be as common, the State pointed out that the term is defined in the statute as a human voice. (T465). The prosecutor contended that in considering the evidence in a light most favorable to the State, it had been proven that there was a wire intercept in each count in that each person testified they had been communicating on the phone. (T465). The State disputed that simply because an individual was public official or employee, that every conversation they engaged in constituted a public meeting. (T465). Regardless, the State reminded the judge that this issue is for the jury to decide. (T465-66,467). Moreover, the witnesses testified that they believed their calls would be private, and the phone conversations were not a public meeting. (T466). The issue was whether the witnesses expected that their conversations would

be recorded, rather than the content of it. (T466). Some of the factors to consider included was the person in their office, and did the person close the door to their office. (T466). Virginia Smith, Gerry Hammond, and Whitney Anderson all testified that they were in their offices and Ms. Smith had closed her door. (T466-67). Moreover, while public employees do not own their offices, that does not mean public employees' offices are public spaces where anyone can walk into the office (or onto a judge's bench) and take over as a member of the public. (T467). And, even though the call with the Secretary of State was a conference call, because the Secretary of State advised that he did not agree to being recorded, the prosecutor contended, he exhibited an expectation that the call was not subject to interception. (T467-68). The State pointed out that Appellant disregarded the Secretary's express wishes and recorded the call anyway, even discussing the issue later on where she admitted she did not know if it was legal or not to record the call. (T468). Finally, the State argued, there was enough in the recording for a jury to find that Appellant had disclosed the contents of her recording of the call with the Secretary. (T468-69).

In response, the defense contended that just as a conversation over a cordless telephone was an oral communication, so was a call using a cell phone. (T470). And, that the intercepted communications originated in their premises. (T470). The State disagreed, noting that there are multiple cases in federal and state courts referring to wiretaps and wire intercepts in the same manner as phones and cell phones. (T473). Moreover, in Mozo,[3] the case Appellant was relying upon, the police used a scanner

[3] State v. Mozo, 655 So. 2d 1115 (Fla. 1995).

purchased at Radio Shack for the purpose of monitoring cordless phone calls. (T473). Here, on the other hand, the evidence revealed Appellant intercepted a wire communication or aural transfer of the human voice through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception. (T473). The State agreed the defense could make that argument to the jury, but a person with common sense could conclude that a wire intercept occurred here. (T473-74).

The trial judge found the State had presented sufficient evidence to establish the elements of the offenses and denied the motion for judgment of acquittal. (T474-75). The victims and witnesses testified that they were in private offices or cubicles while on the phone with Appellant, they had not consented to their phone conversations being recorded, they did not believe their phone calls to be public meetings, and they did not expect their conversations to be recorded. (T217-21; 240,247,248; 280; 307,327-28; 334-35; 339,342; 361,366,367,382,386-87).

SUMMARY OF ARGUMENTS

POINT ONE: The trial court properly exercised its discretion in overruling the objections to the lead investigator's testimony regarding the inception of the investigation. Alternatively, any error was harmless beyond a reasonable doubt.

POINT TWO: The trial court properly denied the motion for mistrial. The isolated comment, even if improper, when considered in context and, especially, in light of the strong curative instruction, did not vitiate the entire trial.

POINT THREE: The trial court did not abuse its broad discretion in admitting the audio recording obtained from Appellant's personal cell phone that was the basis of count VII.

POINT FOUR: In her third point on appeal, Appellant asserts that trial court erred by denying her motion to dismiss the amended information. The State respectfully disagrees, as the claim raised in the motion is unpreserved for appellate review, and does not constitute fundamental error.

POINT FIVE: Appellant's complaints about the jury instructions are without merit since the terms are not defined in the statute, both the defense and the State were permitted to make their respective positions known regarding what each side contended was a "public meeting" or "exhibiting" while leaving the terms for the jury to decide, and neither "public meeting" nor "exhibiting" is included in the definition of wire communication. Appellant has not shown prejudicial error that would result in a miscarriage of justice.

POINT SIX: The trial court properly denied the motion for judgment of acquittal.

ARGUMENTS

POINT ONE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE TESTIMONY OF THE LEAD INVESTIGATOR ABOUT THE INCEPTION OF THE INVESTIGATION.

Appellant argues in her first point on appeal that the trial court erred in overruling her lack of relevance and improper bolstering objections during the State's direct examination of the lead investigator, and allowing the investigator to testify about the inception of the investigation. The State respectfully disagrees.

A trial court has "wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed." English v. State, 43 So. 3d 871, 872 (Fla. 5th DCA 2010) (citing San Martin v. State, 717 So. 2d 462, 471 (Fla. 1998)). Discretion is abused when the judicial action taken is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the view taken by the trial court. See Rodgers v. State, 934 So. 2d 1207, 1222 (Fla. 2006). Here, the lead investigator's testimony regarding the inception of the investigation was objected to by the defense as not relevant and improper bolstering. The trial court did not abuse its discretion in overruling the objection and advising the prosecutor to focus on what was actually done, rather than the history of the investigation.

In Florida, "any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion." Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988) (quoting Williams v. State, 110 So. 2d 654,

658 (Fla.1959)); see also §§ 90.401-90.402, Fla. Stat. (2018). And, "[i]mproper bolstering occurs when the State placed the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." Spann v. State, 985 So. 2d 1059, 1067 (Fla. 2008) (Internal quotations omitted.). Lindley's testimony regarding the inception of this type of investigation was relevant to explain how such an investigation began, and did not constitute bolstering in that Lindley never testified, for example, that because FDLE management screens information and makes a determination that an investigation is warranted that a defendant such as Appellant must be guilty. See, e.g., Salazar v. State, 991 So. 2d 364, 373-74 (Fla. 2008) (Detective's testimony at guilt phase of capital murder trial, that during his investigation he had been "Just trying to find the truth," did not constitute improper self–bolstering witness testimony; detective did not claim that what he found was the truth, his credibility was not central to State's case, and statement was made in response to State's questioning regarding whether detective conducted a thorough investigation and whether law enforcement authorities rushed to judgment against defendant). And, the testimony did not suggest that Lindley was more credible because he was a law enforcement officer. Compare Johnson v. State, 177 So. 3d 1005 (Fla. 1st DCA 2015) (Improper bolstering by asking the defendant whether a man entrusted to protect two presidents and a vice president had lied on the stand); Spangler v. State, 1 So. 3d 307, 308-09 (Fla. 5th DCA 2009) (Prosecutor's continued questioning of police witnesses over defendant's objections on direct examination in prosecution for possession of cocaine concerning witnesses' interest, bonuses, discipline, and incentives in relation to outcome of

defendant's case, was improper bolstering). Moreover, in overruling the objection, the trial court directed the State to "focus on what was done here" rather than "the whole history of how one of these is done[,]" after which the State questioned Lindley on how he began this investigation. (T61-62).

And, even assuming the testimony did constitute bolstering, the State was properly allowed to briefly do so because the defense had already attacked the credibility of the witness and his investigation. During Appellant's opening statement, the defense attacked the credibility of Lindley, suggesting he had intentionally omitted certain facts in his affidavit and search warrant.[4] Thus, the State was permitted to present this testimony in support of its witness and his investigation, both of which were under attack. See, e.g., Welch v. State, 940 So. 2d 1244, 1245 (Fla. 2d DCA 2006) ("'Generally, a party may not introduce evidence of the good character of a witness to bolster or support the credibility of that witness.' 1 Charles W. Ehrhardt, Florida Evidence § 611.2 at 620 (2006 ed.) 'However, once the credibility of a witness has been attacked, it may be possible to support or rehabilitate the witness.' Id."). In light of the defense's attack of the witness and his investigation during opening statement, this testimony was properly presented in order to support or rehabilitate the witness. Calloway v. State, 210 So. 3d 1160, 1191 (Fla. 2017) ("Defense counsel opened the door to cross-examination regarding Butcher's opinion

[4] The defense stated in opening statement that, "to get her here, law enforcement, who made this arrest, they left something out. They left out the fact that there was a sign on her door. The evidence will show that even though these - this officer knew that that sign was there, he didn't - he ignored it. And, so, now we're here." (T32).

of Nelson's conduct, and the State sought to rehabilitate Nelson's competency. We conclude that the trial court did not abuse its discretion when it allowed this testimony.").

Finally, even assuming the admission of this testimony about the inception of the investigation was error, it was harmless error at worst. An error is held to be harmless where the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986); § 924.051(3), Fla. Stat. (2018); Calloway v. State, 210 So. 3d 1160, 1190 (Fla. 2017) (" Even if we were to conclude that this constituted bolstering, any error in Cooper's testimony would be harmless."); Ponticelli v. State, 593 So. 2d 483, 489 (Fla. 1991) (Improper anticipatory bolstering was harmless error), cert. granted on other grounds, Ponticelli v. Florida, 506 U.S. 802 (1992). During Appellant's opening statement, cross-examination, and closing argument the defense attacked the credibility of Lindley, suggesting he had intentionally omitted certain facts in his affidavit and search warrant.[5] Thus, even assuming the testimony constituted improper anticipatory bolstering, in light of the subsequent attacks on the credibility of the witness and the investigation, along with the fact that the jury listened to the recordings found on

[5] Not only did the defense argue the foregoing in opening statement, they also strenuously cross-examined Lindley regarding his decision to seek a search warrant suggesting he had intentionally omitted certain facts, most of which, as the State pointed out, were included with the warrant. (T93,110-15,116-19). And, during closing argument the defense, again, argued that Lindley intentionally omitted certain facts in seeking the warrant, requiring the State to, again, respond to the attack on the witness during rebuttal. (T611,629-30,633-34,637,672-73).

Appellant's personal cellphone that were the subject of the charges, and that a different witness had actually recovered the recordings that were the subject of the charges, the error was harmless at worst. Appellant is entitled to no relief.

POINT TWO

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR MISTRIAL.

In her second point on appeal, Appellant argues that the trial court erred in denying her motion for mistrial. The State respectfully disagrees.

A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. England v. State, 940 So. 2d 389, 401-402 (Fla. 2006); Snipes v. State, 733 So. 2d 1000, 1005 (Fla. 1999). A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Perez v. State, 919 So. 2d 347 (Fla. 2005), cert. denied, 126 S. Ct. 2359, 165 L. Ed. 2d 285 (2006). Appellant has not satisfied this difficult standard.

During the State's direct examination of Lindley on the first day of trial, he revealed that he made a public records request for five items from Appellant when he visited the Supervisor of Elections office, but made it clear that Appellant was not required to give these things to him, explaining to the jury that "[s]he's not obligated to turn anything over to FDLE." (T62). Lindley recalled that Appellant had initially refused, but then she had provided him with three of the five items, and then "declined to provide the rest saying that she wanted to talk to counsel." (T62). The defense objected, alleging that was "getting close to the idea of infringing on a person's right to remain silent[,]" but admitted that did not appear to be the State's

intent on eliciting that answer from Lindley. (T62-63). The State argued in response that these facts did not involve either the Fifth or Sixth Amendment since Appellant was not in custody or being interrogated, and the case law relied upon by the defense was distinguishable in that it involved post-arrest comments by the prosecutor at trial. The State also advised the court it had found no authority disallowing the comment, and contended that even if this comment was improper, it did not vitiate the entire trial as required for a mistrial. However, in an abundance of caution, the prosecutor suggested the court give a curative instruction.

The court found Lindley's answer to be beyond the scope and unresponsive, and denied the motion for mistrial, finding:

> This not only isn't a custodial or a post-arrest situation, this wasn't even a criminal investigation yet. It was in response to a request for public records. And, so, don't think it attaches in any way, shape, form or fashion. The request at that point is a very reasonable request to be able to speak an attorney. I think that's how the jury would probably consider that, but if you want a curative instruction I certainly will give it.

(T73). The court sustained the objection, since the answer was unresponsive, but found it did not rise to the level of vitiating the entire trial as required for a mistrial. The defense advised it wanted a curative instruction, and after the parties discussed what the instruction should say, the trial court instructed the jury that:

> There was an objection made to an answer made by this witness outside the scope of the jury. I have sustained that objection and I have an instruction to give to you. And that is to strike and not consider Mr. Lindley's last statement. He 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 her request to have an attorney as evidence. And that matter is stricken

based upon the sustaining of my objection.

(T77). It was never mentioned again by either party.

"In Florida, we have adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any 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). Because of this, the supreme court admitted that the court was no longer dealing with clear cut violations. Id. at 1136. However, in light of this very liberal rule, the supreme court also determined that a harmless error analysis would apply to such claims. Id.

It is also well established that in Florida, unlike under federal law, a defendant's pre-arrest, pre-Miranda silence may not be used against a defendant as substantive evidence of the defendant's consciousness of guilt. State v. Horwitz, 191 So. 3d 429, 442 (Fla. 2016). Here, it does not appear that the unsolicited response by the witness was an attempt to make a suggestion as to Appellant's consciousness of guilt, in that Lindley had just explained that he was just beginning his investigation and Appellant was not obligated to turn over anything to him. It was also clear that Appellant was not under arrest or being questioned about the allegations. In light of the isolated nature and context of this comment, as well as the court's strong curative instruction, Appellant's motion for a mistrial was properly denied. See, e g., Smith v. State, 486 So. 2d 685, 686 (Fla. 3d DCA 1986) (Prosecutorial comments on defendant's failure to call a witness, which were responsive to an issue injected into the trial by defense counsel's cross-examination of state witness, constituted harmless error where the jury was instructed to ignore the comment). See also Omelus v. State,

584 So. 2d 563, 565-66 (Fla. 1991) (mistrial properly denied where court gave curative instruction to disregard witness' reference to second murder); Rivera v. State, 745 So. 2d 343, 345 (Fla. 4th DCA 1999) (mistrial not warranted based on brief reference to collateral crime where comment was not deliberately elicited and jury was instructed to disregard it).

In addition, the authority relied upon by Appellant is distinguishable because, critically, unlike herein, in neither of those cases was the jury given a curative instruction, nor was the mention of counsel made prior to the appellant being taken into custody or being questioned about the allegations. Coleman v. State, 58 So. 3d 324 (Fla. 1st DCA 2011) (Error in an investigator's testimonial comment on defendant's reportedly sudden silence during an interview was not harmless at a trial for theft, burglary, and criminal mischief was improper and was not harmless error); Mack v. State, 58 So. 3d 354, 356 (Fla. 1st DCA 2011) ("Although a curative instruction was briefly discussed, none was given." ... Investigating officer's direct examination testimony relating to defendant's silence at the time he was arrested was a constitutional violation and warranted mistrial). And, it is well established that "absent a finding to the contrary, juries are presumed to follow the instructions given to them." Morgan v. State, 212 So. 3d 1104, 1106 (Fla. 1st DCA 2017) (quoting from Johnson v. State, 164 So. 3d 794, 797 (Fla. 1st DCA 2015); see also Richardson v. Marsh, 481 U.S. 200 (1987) (curative instruction removed any taint from the comment concerned because it is an invariable assumption of the law that jurors follow their instructions); U.S. v. Acevedo, 171 F.3d 1421, 1426 (llth Cir. 1998) ("We assume that jurors follow their instructions."). Appellant is entitled to no relief.

POINT THREE

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN ADMITTING THE COMPLAINED-OF RECORDING.

In her third point on appeal, Appellant asserts that trial court reversibly erred by admitting an audio recording obtained from her personal cell phone pursuant to a search warrant. The State disagrees.

As a general rule, "[a] trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion." Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984). An abuse of discretion is found "only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980). "However, a court's discretion is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to *de novo* review." McCray v. State, 919 So. 2d 647, 649 (Fla. 1st DCA 2006). As there was a *prima facie* showing that the recording was what the State claimed it was, Appellant has failed to establish any abuse of discretion.

Appellant's complaint is that the recording was insufficiently authenticated. Section 90.901, Florida Statutes (2018), requires as a condition precedent to admissibility that evidence be identified or authenticated. However, "authentication for the purpose of admission is a relatively low threshold that only requires a *prima facie* showing that the proffered evidence is authentic; the ultimate determination of the authenticity of the evidence is a question for the fact-finder." Mullens v. State,

197 So. 3d 16, 25 (Fla. 2016), cert denied, 137 S.Ct. 672 (2017). The requirement of authenticity is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." § 90.901, Fla. Stat. (2018). There is no definitive list of requirements that must be met to authenticate an audio tape, even though courts "occasionally" suggest these lists. C. Ehrhardt, Florida Evidence § 401.4 n. 2 (2019 ed.). For example, "[e]vidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances. In addition, the evidence may be authenticated either by using extrinsic evidence, or by showing that it meets the requirements for self-authentication." Symonette v. State, 100 So. 3d 180, 183 (Fla. 4th DCA 2012) (quotation marks and citation omitted). "The question for the trial court is not whether the evidence is authentic, but whether evidence exists from which the jury could reasonably conclude that it is authentic." Asencio v. State, 244 So. 3d 294, 297 (Fla. 4th DCA 2018). See also State v. Love, 691 So. 2d 620, 622 (Fla. 5th DCA 1997) ("The State argues that the final decision regarding genuineness is within the province of the jury and that the trial court's responsibility must end with a determination whether the facts support a finding of authenticity. We agree."). Here, there was sufficient evidence from which the judge could determine that a jury could reasonably conclude that the recording was what the proponent, the State, claimed it was.

Lindley obtained a search warrant for the Supervisor of Elections office. He was present for the execution of the search warrant on October 3, 2014. One of the items authorized to be seized under the warrant was a cell phone, and a Samsung

Galaxy cell phone was seized. The cell phone was seized from the desk in Appellant's office where they read the contents of the search warrant to her. The phone was put into airplane mode to protect it from being remotely accessed and wiped. The phone was then sealed. After the laboratory had finished processing the phone, Lindley listened to all of the recordings found on the cell phone. He listened to recordings of the Secretary of State, Virginia Smith, Whitney Anderson, and Gerry Hammond, as well as a recording of Appellant and two other individuals, and, finally, of Shannon Brown. Lindley was able to identify the persons recorded and, once he had, he approached them, played the recording for them, and they were interviewed.

Christopher Hendry, an analyst with the investigation and forensic science program of the Florida Department of Law Enforcement, testified as the digital examiner of the recordings located on Appellant's personal cell phone. He explained how he extracts data from a cell phone, and how he analyzed this phone. Hendry saved the physical contents of the cell phone onto a Blu-ray DVD or CD. He testified that the Blu-ray DVD of the contents contained a fair and accurate depiction of the contents of the cell phone. Hendry explained that the preliminary extractions involved the entire physical extraction of the phone in its entirety. The data extraction reflected what was on the device. As requested, Hendry extracted specific audio recordings and placed them on separate DVD's, for a total of five DVD's. Hendry had listened to all five DVD's in their entirety (including the recording objected-to) and compared each recording with the DVD of the original extraction, and ensured each recording was the same and had not been altered. Hendry testified that the DVD's accurately reflected the audio files contained in the complete download of the cell phone. When

the State moved to introduce the DVD's, the defense objected on the basis of lack of predicate, asserting that other witnesses were needed. The court overruled the objection.

The State began to publish the complained-of recording, number four, while the Secretary of State was on the stand. The defense objected, complaining that the recording had not been authenticated or identified. The prosecutor explained that it was a recording by Appellant of the conversation she had with others after she had published the recording of the Secretary of State. The prosecutor argued that the context of the recording makes it clear that the persons on the recording are discussing the recording of the phone call with the Secretary of State, and the jury would be able to rely on that to make a decision whether Appellant distributed the Secretary of State's recording to others. The prosecutor rejected Appellant's argument that the State had to present the testimony of the persons on the recording because the context of the recording made it clear that they were discussing the Secretary of State's recording after listening to it. The State explained that they preferred to go forward with publishing this recording right after the Secretary of State's recording so the jury could hear them together, and for purposes of efficiency so that both recordings would not have to be published again, later on. The court overruled the objection.

At the beginning of the conversation found on number four, an unidentified speaker asked Appellant, "Who's that dude?" (T189). Appellant responded, "the Secretary of State." Id. An unidentified speaker asked if "he [was] going to issue a letter?" (T189). Appellant replied, "(Indiscernible) but he said, in the middle of the

phone call, that he would." (T89). After Appellant stated that he needed her and he did not know what was going on, an unidentified female speaker added, "that guy probably don't know a damn thing. From when I was listening (indiscernible)." (T189-90). The unidentified female speaker told Appellant after Appellant asked if she had been mean, "No. You told it like it was. And he didn't know what to say." (T190). Appellant stated that she did not know "if it's legal to tape after you let them know you're taping it or not. (Indiscernible) tell him I'm taping it or what. I don't know if I did it - whether it's legal or not, but I ain't told nobody." (T190-91). She explained that, "I just brought it home to share with you (indiscernible). And I can have it for my own reference." (T191). After Appellant complained that Gary Holland jumped in, and called him a "dumb piece of shit[,]" the unidentified female speaker agreed, saying, "That's what they sound like." (T191). Appellant also mentioned Ron Labasky and the suggestion to hire him, and complained about how much that would cost. (T192-93).

At this point, the defense objected contending it was unclear what this tape consisted of because only Appellant's voice had been identified. Appellant also claimed there was nothing on that recording that reflected that the Secretary of State's tape had been listened to. The State disagreed, arguing that the recording did reflect that the Secretary of State's recording had been listened to, pointing out that it started out with the uncle asking, "who the hell was that guy?" and referring back to the recording, including when Appellant explained that she had brought it home to share with them. (T195-96). The State argued that it was up to the jury to decide whether the Secretary of State's recording had been played for the unidentified speakers. The

court advised that it understood, and overruled the objection. Appellant's contention that the admission of the recording of Appellant discussing the Secretary of State's recording with two unidentified speakers was reversible error because it was not properly authenticated is without merit.

Keeping in mind that the "trial court has great latitude in determining whether a proponent of evidence has met the burden of establishing a *prima facie* case of authenticity[,]" Love, 691 So. 2d at 622, Appellant has failed to demonstrate a clear abuse of discretion in the admittance of the audio recording extracted from Appellant's personal cell phone. An expert in forensics analyzed the cell phone and testified that the DVD recording was a fair and accurate representation of the audio file extracted from Appellant's cell phone. Moreover, a review of the conversation revealed Appellant and two unidentified persons referring to Appellant's phone conversation with the Secretary and others. For example, at the beginning of the conversation an unidentified speaker asked Appellant, "Who's that dude?" (T189). Appellant responded, "the Secretary of State." Id. An unidentified speaker asked if "he [was] going to issue a letter?" (T189). Appellant replied, "(Indiscernible) but he said, in the middle of the phone call, that he would." (T89) Later, the unidentified female speaker stated, "*From when I was listening* (indiscernible)." (T189-90) (Emphasis added). The unidentified female speaker also told Appellant after Appellant asked if she had been mean, "*No. You told it like it was*. *And he didn't know what to say*." (T190) (Emphasis added). And, Appellant explained that, "*I just brought it home to share with you* (indiscernible). And I can have it for my own reference." (T191) (Emphasis added). In consideration of the contents of the

recording - especially taken in conjunction with the recording of the Secretary of State's phone conversation with Appellant and the references to the letter that the Secretary agreed to write, that Gary Holland became involved in the conversation, that the suggestion was made several times that she get attorney Ron Labasky involved, and when Appellant had asked if she seemed mean, in that the earlier recording revealed she had taken the Secretary to task numerous times for writing the earlier letter - the trial court correctly concluded that there was *prima facie* evidence from which a jury could reasonably conclude that the recording was what the proponent, the State, claimed it was. Cf. State v. Morgan, 171 So. 3d 210, 214 (Fla. 2d DCA 2015) ("The trial court's order departs from the essential requirements of the law in that it considers the admissibility of the recordings isolated from the dynamics of the pending trial and the complete context in which the State would offer the recordings into evidence. At trial, the recordings could be played for the jury accompanied by the testimony of codefendants and law enforcement officers who might explain to the jury the meaning of what was said on the recordings."). And, as the State pointed out, the issue whether the recording revealed that Appellant disclosed the previous recording of her phone call with the Secretary of State is a jury question once the State presented a *prima facie* case of authenticity. Appellant is entitled to no relief.

POINT FOUR

AS THE RECORD DOES NOT REFLECT ANY RULING ON THE MOTION TO DISMISS THE AMENDED INFORMATION, THIS ISSUE IS WAIVED FOR PURPOSES OF APPELLATE REVIEW; ALTERNATIVELY, THE CLAIM DOES NOT

CONSTITUTE FUNDAMENTAL ERROR.

In her third point on appeal, Appellant asserts that trial court erred by denying her motion to dismiss the amended information. The State respectfully disagrees, as the claim raised in the motion is unpreserved for appellate review, and does not constitute fundamental error.

A review of the record does not reflect that the motion to dismiss the amended information was ever ruled upon. The general rule is that an appellant must obtain a ruling in order to seek redress on appeal. See Rose v. State, 787 So. 2d 786, 797 (Fla. 2001) ("The failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes."); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983) (noting that appellant, having failed to pursue or obtain a ruling on his motion, did not preserve the issue for appeal); Carratelli v. State, 832 So.2d 850, 856 (Fla. 4th DCA 2002) (listing the "plethora of Florida cases" supporting the notion that a party must obtain a ruling from the trial court in order to preserve an issue for appellate review). Appellant appears to be relying upon the fact that prior to the trial she obtained a standing objection to her previously filed motions to dismiss and motion to suppress, yet the record reflects no trial court ruling on the motion to dismiss the amended information, either orally or in writing. As such, the claim is unpreserved for appellate review. Rose, supra. Moreover, Appellant has failed to argue or demonstrate fundamental error. Cf. Brewer v. State, 413 So.2d 1217, 1221 (Fla. 5th DCA 1982) (*en banc*) (finding no fundamental error where the deficiency of the charging document was not a total omission of an essential element of the crime); Wheeler v. State, 87 So. 3d 5, 6 (Fla. 5th DCA 2012) ("the defendant did not

raise a claim of fundamental error relating to this issue in his initial brief; therefore, this court is not required to undertake a fundamental error analysis."). Notwithstanding that the issue was waived and Appellant has not argued fundamental error occurred, Appellant is entitled to no relief.

Appellant contends that the legislature's use of the term "any wire, oral, or electronic communication" reflects the legislature's intent that the allowable unit of prosecution for a violation of section 934.03 should be the number of communications intercepted, and not the number of persons whose wire communication was intercepted. Appellant also argues that the legislature's use of the word "any" creates at least an ambiguity which, based on the rule of lenity, must be resolved in her favor.

Appellant's reliance on the "a/any" test is misplaced in light of the supreme court's opinion in Bautista v. State, 863 So. 2d 1180 (Fla. 2003). In Bautista, the court considered whether the occurrence of multiple deaths in a single DUI-related crash allowed for multiple convictions for DUI manslaughter under section 316.193(3)(c) 3., Florida Statutes (2002). Id. at 1181. Under that statute, a person commits DUI manslaughter if the person, by reason of driving under the influence, "causes or contributes to causing ... the death of any human being." § 316.193(3)(c) 3., Fla. Stat. (2002). The court held that Grappin's "a/any" test did not preclude multiple convictions under section 316.193(3)(c) 3. Bautista, 863 So. 2d at 1188. The court reasoned:

> [The defendant's] argument based on the a/any test succeeds only if we were to apply the test as a simple syntactical rule in isolation from the context in which the

> test arose. However, it would be improper to so isolate this distinction.... [T]he a/any distinction was used in Grappin as one part of a common sense application of well-established rules of statutory interpretation, including reference to the overall statutory scheme and purpose as well as to related cases. Within this context, the a/any test is a valid linguistic tool that is helpful in establishing the Legislature's intended unit of prosecution. However, the a/any test is not an infallible or exclusive indicator of legislative intent. Rather, absent clear legislative intent to the contrary, the a/any test serves as a valuable but nonexclusive means to assist courts in determining the intended unit of prosecution.
>
> ... Grappin and its progeny should not be interpreted to suggest that the intended unit of prosecution is automatically rendered ambiguous whenever a statute uses the word "any." ... The a/any test should not be applied to create an ambiguity where none exists and then to reach a result contrary to clear legislative intent.

Id. at 1187–88 (footnotes omitted).

The reasoning in Bautista applies to this case. As the Florida Supreme Court has explained, section 934.02, Florida Statutes, establishes "a policy decision by the Florida legislature to allow *each party* to a conversation to have an expectation of privacy from interception by another party to the conversation." Shevin v. Sunbeam Television Corp., 351 So. 2d 723, 726–27 (Fla.1977) (Emphasis added). This Court has also recognized that "[t]he purpose of the Act is to protect every person's right to privacy and to prevent the pernicious effect on all citizens who would otherwise feel insecure from intrusion into their private conversations and communications." O'Brien v. O'Brien, 899 So. 2d 1133, 1135 (Fla. 5th DCA 2005).[6] Since the focus

[6] For example, pursuant to section 934.03(2)(d), an interception under this section is lawful when "**all of the parties to the communication** have given prior consent to such interception." (Emphasis added).

of the statute is upon each party's personal expectation that he or she would not be recorded, under section 934.03 the unit of allowable prosecution is determined by the number of persons whose communication was intercepted, and not the number of communications intercepted. See, e.g., Suggs v. State, 72 So. 3d 145 (Fla. 4th DCA 2011). Accordingly, the statute is not ambiguous and the rule of lenity, a canon of last resort, does not apply in this situation. Cf. Bautista, 863 So. 2d at 1185 n. 4 (recognizing that the rule of lenity does not apply where legislative intent to the contrary is clear).

POINT FIVE

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN INSTRUCTING THE JURY.

In her fifth point on appeal, Appellant asserts that the trial court erred by refusing to give her special jury instructions defining two terms that are not defined in Chapter 934 or included in the definition of wire communication. The State respectfully disagrees.

It is well established that a trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. Carpenter v. State, 785 So. 2d 1182, 1199-2000 (Fla. 2001); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). The appellate courts will not reverse a decision regarding an instruction in the absence of a prejudicial error that would result in a miscarriage of justice. Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990); Sheppard v. State, 659 So. 2d 457, 459 (Fla. 5th DCA 1995). Appellant has failed to meet her burden that the judge's refusal to give a

definition of "public meeting" and "exhibiting" constituted an abuse of the judge's broad discretion.

There are no standard jury instructions for the charges brought against Appellant. During the charge conference, the court made it clear that the instructions on the charges would be based upon the language from the statute. Neither "public meeting" nor "exhibit" is defined in the statute.[7] Appellant has failed to demonstrate prejudicial error resulting in a miscarriage of justice in the failure to give the special instructions.

Public Meeting: The judge gave both sides the opportunity to argue on behalf of their respective definitions. The State relied upon the definition for public meeting set forth in section 286.011, Florida Statutes, or the Sunshine Law.[8] Appellant relied

---

[7] Appellant was charged with intercepting wire communications, not an oral communication. (R102-08,253-54). While an exception is carved out in the definition of "oral communication" for "*any public oral communication uttered at a public meeting*[,]" section 934.02(2), Florida Statutes, there is no such exception included within the definition of "wire communication." See § 934.02, Fla. Stat. (2018). Similarly, the definition of "oral communication" is defined as one "uttered by a person *exhibiting the expectation that such communication is not subject to interception under circumstances justifying such expectation*[.]" § 934.02(2), Fla. Stat. (Emphasis added). That language is not found in the definition of "wire communication." However, the trial court allowed the defense to rely upon those exceptions found in the definition of oral communication.

[8] The provision relied upon by the State provides as follows:

> (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as

upon a case from 1971,[9] also involving the Sunshine Law, and argued that a definition of public meeting should reflect that such meetings "are not limited to formal meetings and may include any gathering of the members where the members deal with some matter on which a foreseeable action will be taken." (T510). After each side made their argument, the judge held that she was "not going to allow it from either perspective as it relates to Sunshine Law. That's injecting elements that are not part of this case." (T510). When the defense sought to include in the instructions that a public meeting can be held over a phone, the State objected and the judge advised as follows:

> There's no definition for public meeting. There's not going to be any element of public meeting. This statute provides no guidance in that regard and, so, that will be up to the jury. It is -- again, without any indication that is it the law, you can argue that, but you -there's not going to be any legal instruction that that is the law. As I indicated before, this is not an expectation of privacy, so that language is not going to be used.

(T511). The public meeting exception was included in the definition of wire communication given to the jury; specifically, the jury was instructed that a wire communication "does not mean any public communication uttered at a public

---

> taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

[9] City of Miami Beach v. Berns, 245 So. 2d 38, 41 (Fla. 1971) (The supreme court answered a certified question of great public importance holding that "[w]hen at such meetings officials mentioned in Fla. Stat. s 286.011, F.S.A., transact or agree to transact public business at a future time in a certain manner they violate the government in the sunshine law, regardless of whether the meeting is formal or informal." Further, that "[i]t is the law's intent that any meeting, relating to any matter on which foreseeable action will be taken, occur openly and publicly.").

meeting." (T553,557; R270).

Exhibit: The defense also argued for a definition of "exhibit" to be included based upon the definition of oral communication which was being applied to the wire communication charged herein. Relying upon McDonough v. Fernandez-Rundle, 862 F.3d 1314, 1319–20 (11th Cir. 2017), cert. denied, 138 S. Ct. 2600 (2018), the defense argued that the definition of exhibit should be given to the jury, i.e., "shown externally or demonstrated." The State objected, explaining that the McDonough case involved unusual facts, i.e., an injunction against the State Attorney's Office. The prosecutor advised the judge that one of the biggest issues caused by the incorporation of the definition of oral communication into wire communication is that the oral definition seems to require that the victim express a desire to keep the communication private. For example, if the prosecutor walked over and whispered to another person in the courtroom, the prosecutor would have exhibited a desire that the oral communication be private. The State rejected the argument that a person on the phone (wire communication) has to affirmatively state they want the conversation to be private as contrary to the intent of the Legislature. The prosecutor argued that the jury can understood the words, and that any discussion of circumstances justifying an expectation would insert the privacy issue, which they had avoided addressing throughout the entire trial.

The judge suggested they could inform the jury about an expectation that they would not be recorded or intercepted without mentioning privacy. But, the judge noted, the definition came from case law, and "aren't words that need to be defined for the public. It's not something specific related to this statute." (T516). The judge

disagreed that "circumstances justifying such expectation" needed more to provide any meaning to the jury than the words provided on their own. (T516-17). The judge explained that, "[the expectation that they would not be recorded or intercepted is one that] society's prepared to recognize as reasonable. Well, that's their job. That's what they're going to tell us. They don't need that information." (T517). The judge also found the facts in the McDonough case to be distinguishable, especially since the word privacy was used. The judge rejected the request, finding that "I'm not going to apply it to the circumstances here, especially given that the additional definition is being provided. So I will not include 'the exhibit' or 'circumstance justifying such expectation.'" (T517).

The jury was instructed as part of the definition of "wire communication" that "[a] wire communication means any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation[.]" (R270).

Chapter 943 provides no definition of "public meeting" or "exhibiting" and neither is included in the definition of wire communication - only oral communication. Accordingly, the terms must be understood as phrases of common usage which do not require defining. See Seese v. State, 955 So. 2d 1145, 1149 (Fla. 4th DCA 2007) ("The record demonstrates that the court did instruct the jury that the state was required to prove maliciously beyond a reasonable doubt. Section 784.048 does not contain any special definition of the term maliciously. ...Under these circumstances, the term maliciously in both the statute and its companion Standard Jury Instruction must be understood as a word of common usage having its plain and

ordinary sense.") (citations omitted); see also Russ v. State, 832 So. 2d 901, 911 (Fla. 1st DCA 2002) ("A trial court is under no obligation to define terms in common use and generally understood by the average person."); Rains v. State, 955 So. 2d 39, 41 (Fla. 5th DCA 2007) (holding trial court did not abuse its discretion where jury instruction tracked the language of a statute); Luke v. State, 204 So. 2d 359, 363 (Fla. 4th DCA 1967) ("It seems settled that where the law involved is set forth in a statute it is usual, proper and sufficient ... to charge the jury in the language of such statute." (citing 16 Fla. Jur. Homicide § 160)); cf. Maxwell v. Wainwright, 490 So. 2d 927, 931 (Fla.1986) (noting that argument urging the insufficiency of a jury instruction was without merit where instruction followed language of statute as construed). And, both the defense and the State were permitted wide latitude in making their respective positions known regarding what each side contended was a "public meeting" and what the term "exhibit" meant while letting the jury know the determination was theirs to make. Appellant has not met her burden of showing prejudicial error that resulted in a miscarriage of justice.

POINT SIX

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL.

In her sixth and final claim, Appellant complains that the trial court erred by denying her motion for judgment of acquittal. The State disagrees.

In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). Generally, an appellate court will not reverse a conviction that is

supported by competent, substantial evidence. See Pagan, 830 So. 2d at 803. There is sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt. See Banks v. State, 732 So. 2d 1065 (Fla. 1999). Here, the State presented competent, substantial evidence which, when considered in a light most favorable to the State, established the existence of the elements of the crimes of interception of a wire communication and disclosure of the unlawful interception of a wire communication.

In denying the motion for judgment of acquittal, the judge held:

> To a large extent, the arguments made by the Defense in this motion have previously been addressed by this Court in its order dated March 31st of 2017. [R224-34]. Wherein, I specifically, addressed whether or not a *prima facie* case would be established dealing with the conference call and a distinction there, because of Secretary Detzner's specific request that it not be recorded elevated it.
>
> Interestingly, in that order I cited the Mozo case, which I did not remember, but it also addressed the Cohen Brothers[10] and some other matters. of the legal issues addressed by the motion for JOA, I believe, have been previously addressed by this Court in that order.
>
> As to the aspect of the motion for JOA that addresses that there has been insufficient evidence presented by the State to establish the elements under these counts, I do find that there is a view of the evidence that the jury may take favorable to the State that would be sustainable under the law, as it is the law of the case with the respective orders entered by this Court. Therefore, I will deny the motion for judgment of acquittal.

(T474-75). Appellant contends the trial court erred by denying her motion for

[10] Cohen Brothers, L.L.C., v. ME Corp., 872 So. 2d 321 (Fla. 3d DCA 2004).

judgment of acquittal because the State failed to prove the interceptions were not made at a public meeting, or that each victim, besides the Secretary, exhibited an expectation that the call would not be recorded.

Appellant was charged with violating section 934.03, Florida Statutes. That provision proscribes the following:

> (1) Except as otherwise specifically provided in this chapter, any person who:
>
> (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;
>
> (b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:
>
> 1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
>
> 2. Such device transmits communications by radio or interferes with the transmission of such communication;
>
> (c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> .....
>
> shall be punished as provided in subsection (4).

In enacting chapter 934, it is well established that the legislature intended that each party to a private conversation should enjoy an expectation of privacy in that conversation. Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977). The statute is designed to protect victims of illegal interceptions, not those who perpetrate them. State v. News-Press Pub. Co., 338 So. 2d 1313 (Fla. 2d DCA 1976). The statute bars recordings of conversations without the consent of the other party. Shevin.

The State alleged that the intercepted telephone calls were wire communications - not oral or electronic communications. For purposes of section 934.03, a "wire communication" is defined as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception[.]" § 934.02(1), Fla. Stat. Notably, the definition of "wire communication" in section 934.02 does not include the same qualifying "reasonable expectation of privacy" language or "public meeting" exception language as found in the definition of oral communication. Compare § 934.02(1) with § 934.02(2). The federal act is similarly worded. Compare 18 U.S.C. § 2510(1) with 18 U.S.C. § 2510(2).

Chapter 934 was modeled after the Federal Wiretap Act, 18 U.S.C. section 2510 et seq., as amended by the Electronic Communications Privacy Act of 1986. Florida follows federal courts as to the meaning of provisions after which Chapter 934 was modeled. See O'Brien v. O'Brien, 899 So. 2d 1133, 1135–36 (Fla. 5th DCA 2005). And, federal courts interpreting Chapter 943 have found that telephone calls are wire communications. See, e.g., Brevard Extraditions, Inc. v. Fleetmatics, USA, L.L.C., No. 8:12-cv-2079-T-17MAP, 2013 WL 543117, at *4 (M.D. Fla. Sept. 27,

2013) (The federal district court explained that it understood "the phone call from Defendants' sales representative to Plaintiffs to be a wire communication.") (quoting from Briggs v. American Air Filter Co., 630 F.2d 414, 417 (5th Cir.1980) ("A telephone conversation is a wire communication.")). Thus, a phone call is a wire communication. See Perdue v. State, 78 So. 3d 712, 716 (Fla. 1st DCA 2012) ("the recording that was the subject of the motion to suppress included only the communications that were picked up over the telephone, which clearly meet the definition of 'wire communication' in section 934.02(1).").

The statute at issue here is a general intent statute in that it prohibits the interception of oral communication and makes no mention of a subjective intent "to cause a result in addition to that which is substantially certain to result" from the interception. Hentz v. State, 62 So. 3d 1184, 1191–92 (Fla. 4th DCA 2011). For a conversation to qualify as "oral communication," "the speaker must have an actual subjective expectation of privacy" in his oral communication, and society must be prepared to recognize the expectation as reasonable under the circumstances. State v. Smith, 641 So. 2d 849, 852 (Fla.1994). Here, of course, the intercepted phone calls were wire communications, not oral communications, and wire communications are protected regardless of any expectation of privacy. See, e.g., PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 819 (D.C. N.J. 1993) (Defendant's motion for summary judgment denied as to "beeped" telephone lines - which are wire communications not oral communications - because the definitions of "oral communication" and "wire communication" in both the federal and state acts expressly provides that wire communications, unlike oral communications, are

generally protected regardless of whether the person making or receiving such communications has an expectation of privacy).

It is also clear that a violation of section 934.03 has occurred regardless of whether the recorded words are of a private nature or privileged content. LaPorte v. State, 512 So. 2d 984, 986 (Fla. 2d DCA 1987), rev. denied, 519 So.2d 987 (Fla. 1988). A significant factor used in determining the reasonableness of the defendant's expectation of privacy in a conversation is the location in which the conversation or communication occurs. "Conversations occurring inside an enclosed area or in a secluded area are more likely to be protected under section 934.02(2)." Cinci v. State, 642 So. 2d 572, 573 (Fla. 4th DCA 1994), rev. denied, 651 So. 2d 1192 (Fla.1995); LaPorte v. State, 512 So.2d 984 (Fla. 2d DCA 1987) (reasonable expectation of privacy in conversations women had while changing their clothes in modeling studio).

"Florida law mandates that while a person who engages in a telephone conversation runs the risk that another may later testify as to the contents of that communication, he can at least be assured that the conversation will not be recorded without his consent. It is not for us to question this policy judgment, but simply to apply it." State v. Tsavaris, 394 So. 2d 418, 424 (Fla. 1981), receded from on other grounds, Dean v. State, 478 So. 2d 38, 41-43 (Fla. 1985).

Here, as to each count the victims/witnesses testified that they were in private offices or cubicles while on the phone with Appellant, they had not consented to their phone conversation being recorded, they did not believe their phone calls to be public meetings, and they did not expect their conversations to be recorded. (T217-21;

240,247,248; 280; 307,327-28; 334-35; 339,342; 361,366,367,382,386-87). While participants in a conference call in their office or place of business do not have an absolute right of privacy, Cohen Bros., LLC v. ME Corp., S.A., 872 So. 2d 321, 325 (Fla. 3d DCA 2004), because Secretary Detzner exhibited an expectation that the conference call was not subject to interception, the trial court correctly denied the motion for judgment of acquittal on those counts. Specifically, Secretary Detzner had questioned Appellant, after she asked if she could record the call, why she wanted to record the call, he told her that he was "not comfortable with that," and reminded her that he was calling as a courtesy. (T161-62). When Appellant explained that she was concerned the lawyer would not be present throughout the entire call, Secretary Detzner responded, "Yeah. No. Let's just have an informal conversation." (T162-63). Appellant responded, "Okay." (T163). Ms. Walker, who was the only other person present with Appellant in Appellant's office during the call with the Secretary recalled that Appellant continued to record the call even after the Secretary told Appellant not to record the call. (T229,231).

Appellant relies upon Cohen Bros, but that case does not support Appellant's contention that telephone calls conducted in private offices occupied by public officials or employees of the State are always public meetings, especially since the intercepted calls were wire communications, which are protected regardless of any privacy interest. See Morningstar v. State, 428 So. 2d 220, 221 (Fla. 1982) (rejecting constitutional challenge to wiretapping statute as applied to "expectation of privacy in" a "private office"); Jatar v. Lamaletto, 758 So. 2d 1167, 1169 (Fla. 3d DCA 2000), cause dismissed, 786 So. 2d 1186 (Fla. 2001) (rejecting right to privacy

because "[s]ociety is not prepared to recognize as reasonable an expectation of privacy" in a conversation in someone else's business office seeking extortion); see also PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 819 (D.C. N.J. 1993) (Defendant's motion for summary judgment denied as to "beeped" telephone lines because the definitions of "oral communication" and "wire communication" in both the federal and state acts expressly provides that wire communications, unlike oral communications, are generally protected regardless of whether the person making or receiving such communications has an expectation of privacy).

Appellant also relies upon McDonough, but the circumstances are distinguishable in that McDonough, unlike herein, did not involve the recording of a telephone call but a face-to-face meeting with the chief of police and an officer with internal affairs (i.e., oral versus wire communications); McDonough was allowed to bring a second and uninvited member of the public with him; he placed his cell phone in plain view on the desk between him and the chief; and during the meeting, the internal affairs officer advised McDonough that "we have all of this recorded...." Id. at 1317. Since the facts of McDonough are distinguishable, this case provides no basis for relief for Appellant.

Finally, it is well established that whether section 934.02 has been violated is a question for the jury. See, e.g., State v. Edwards, 645 So. 2d 588, 589 (Fla. 1st DCA 1994) ("Although this language would appear to exclude a situation in which the person being recorded actually suspects and expects that the subject communications will be recorded, ... [w]e agree with the Sells court that the question of whether the statute has been violated must be submitted to a jury."); Dep't of Agric. & Consumer

Services v. Edwards, 654 So. 2d 628, 630–31 (Fla. 1st DCA 1995) ("In Sells, the court reasoned that although the official being recorded fully expected the recording to take place, the question whether section 934.02(3), Florida Statutes, had been violated should be submitted to the jury."). Thus, the trial court correctly left it to the jury to decide whether section 934.02 had been violated under these particular facts.

Based on the foregoing facts and authorities, the trial court correctly denied the motion for judgment of acquittal. Appellant was charged with intercepting and disclosing wire communications, not oral communications, and the definition of "wire communication" in section 934.02 does not include the same qualifying "reasonable expectation of privacy" language or "public meeting" exception language as the definition of oral communication. While the court permitted the defense to argue that the phone calls were public meetings and whether the victims exhibited an expectation that such communication was not subject to interception, neither the qualifying language nor the exception is included in the definition of wire communication. As the State presented competent, substantial evidence which, when considered in a light most favorable to the State, established the existence of the elements of the crimes of interception of a wire communication and disclosure of the unlawful interception of a wire communication, Appellant is entitled to no relief.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully requests this Honorable Court affirm the judgments and sentences in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a true and correct copy of the foregoing with the Florida Courts E-Filing Portal which will email a copy of the filing to the following: counsel for Appellant, Kevin J. Kulik, Esquire, (500 Southwest Third Street, Ft. Lauderdale, Florida 33315) at kevinkulik.law@gmail.com this 29th day of August 2019.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in 14-point Times New Roman as required by rule 9.210(a)(2).

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s Pamela J. Koller
PAMELA J. KOLLER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0568759
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118
(386) 238-4990/(386) 238-4997 (fax)
crimappdab@myfloridalegal.com
pamela.koller@myfloridalegal.com

COUNSEL FOR APPELLEE