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

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

APPELLANT'S REPLY BRIEF

_____

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

_____

KEVIN J. KULIK, ESQUIRE
Florida Bar Number 475841
500 Southwest Third Street
Fort Lauderdale, Florida 33315
Telephone (954) 761-9411
Facsimile (954) 767-4750
kevinkulik.law@gmail.com

Attorney for Appellant

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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

The State's spin that this point is "about the inception of the investigation" (AB 19), instead of about testimony, "huge volumes of allegations come into FDLE. There is a screening process" (T 61), and *post-objection* testimony that "Management and the counsel's office determine whether or not FDLE will open an official investigation" (id.), *itself* reveals *why* it was a serious error to allow this testimony: For the same reason the State now seeks to veil it, the judge was bound to exclude it. But because the judge ruled, "I'll allow it," Lindley continued his tale, which was not relevant "evidence tending to prove or disprove a material fact," § 90.401, Fla. Stat., but imbued rank gossip from a local newspaper with the imprimatur of government.

After the judge said, "try to focus on what was done here," Lindley testified that "management determines" (id.). While the State urges "*the testimony* did not suggest that Lindley was more credible because he was a law enforcement officer" (AB 20), the offending credibility-bolstering *argument* occurred in *closing argument* (T 673).[1]

[1] *See, e.g., Lazzaro v. State*, 257 So. 3d 543 (Fla. 5th DCA 2018) (trial court abused discretion in permitting State to improperly bolster witness's credibility in closing).

The State's grasp at *Calloway v. State*, 210 So. 3d 1160 (Fla. 2017), for a notion that the defense *opening statement* "opened the door" to bolstering through Lindley (AB 21-22), lacks merit: "Comments made by defense counsel during opening statement do not 'open the door' for rebuttal testimony by state witnesses on matters that have not been placed in issue by the evidence." *Burns v. State,* 609 So. 2d 600, 605 (Fla. 1992); *see also Jackson v. State*, 107 So. 3d 328, 340 (Fla. 2012) (same). As the State's harmless error argument relies on the false idea *opening statement* can open the door to bolstering, or that jurors heard *some* evidence, its argument fails.

"The harmless error test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test, but the focus is on the effect of the error on the trier-of-fact." *State v. DiGuilio,* 491 So. 2d 1129, 1135 (Fla. 1986). As the State's argument lacks analysis of the *effect* invoking FDLE management's determination that the investigation was valid and the credibility-bolstering closing *had on the jury*, the State fails its burden "as the beneficiary of the error, to prove beyond a reasonable doubt that the error … did not contribute to the verdict," *id.*, particularly in light of the *effect* testimony about Ms. Weeks's refusal to speak to authorities (Point II), and dirty talk about public officials (Point III), *had on the jury*.

Point II

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

The State takes some literary license in recasting the facts to appear that Lindley's attempt to question Ms. Weeks was a "public records request" (AB 23). But he made a public records request only *after* she declined to speak or give papers.[2] Ms. Weeks objected based on her rights to counsel and silence, moving for mistrial. The State argued "The Fifth Amendment doesn't even attach. She's not in custody" (T 62-66). The defense then requested a curative instruction that: "[T]he invocation of a person's *right to remain silent* or counsel is constitutionally permissible and should never be held against any individual." The State objected, and the trial court stated it "isn't a custodial or a post-arrest situation," instructing jurors the request for an attorney was appropriate and reasonable and they should not consider the request for an attorney as evidence (T 73-77). No curative instruction was given on silence.

The trial court's idea that only silence in a "custodial or a post-arrest situation" is protected (T 73-74) was an error of law. In fact, a "defendant's privilege against

[2] At trial, Lindley testified "we came on in, identified ourselves … asked to speak with Ms. Weeks … asked for five items … [a]nd 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." *After this*, Lindley asked to make a public records request (T 62).

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," *State v. Horwitz*, 191 So. 3d 429, 442 (Fla. 2016), and "anything 'fairly susceptible of being interpreted by the jury as a comment on [defendant's] failure to testify' is 'a serious error.'" *Id.*, at 445 (use of non-testifying defendant's pre-arrest, pre-*Miranda* silence as evidence of guilt was not harmless).

"Generally, the standard of review for a ruling on a motion for mistrial is abuse of discretion. … However, where the ruling is based on an error of law … a *de novo* standard applies." *M.B. v. S.P.*, 124 So. 3d 358, 365 (Fla. 2d DCA 2013); *see also Schwartz v. Wal-Mart Stores, Inc.*, 155 So. 3d 471, 473 (Fla. 5th DCA 2015) (on motion for new trial). Because the trial court's error here was an error of Florida law as to comments upon a non-testifying defendant's pre-arrest, pre-*Miranda* silence, the trial court was in no better position to evaluate the error than this Court, which should review the ruling *de novo*, find error under *Horwitz* and Art. I, § 9, Fla. Const., and reverse, though even under an abuse of discretion standard, serious error ensued.

The State's idea it is an "unsolicited response by the witness" (AB 25) is trite. Regardless of its *motive* in asking "Did you have an opportunity to talk to Ms. Weeks on that day when you stopped in? … Did you ask her for the items referenced in the news article?" (T 62), *while knowing full well she had exercised her right to silence*,

jurors heard testimony on her silence without curative instruction. *Williams v. State*, 377 So. 2d 255 (Fla. 2d DCA 1979) (reversing denial of mistrial as witness comment on silence not elicited by State was "nonetheless made in the presence of the jury.").

The State's quip that "the court's strong curative instruction" obviated mistrial (AB 25) lacks any basis in the record. There was no curative instruction *on silence*.

As "any comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such," *DiGuilio*, 491 So. 2d at 1135, Lindley's comment that Ms. Weeks declined to speak or provide papers without counsel was a comment on her right to silence, and the trial court's refusal to give the requested curative instruction on silence left the violation uncorrected in the minds of the jury.

Moreover, instead of ruling on the *comment-on-silence* objection truly posed, the judge sustained as "*unresponsive and beyond the scope of the question*" (T 74).

As in *Gadison v. State*, 158 So. 3d 615 (Fla. 5th DCA 2013), the "harmless error doctrine is inapplicable here because the trial court denied the motion for mistrial without ruling on an objection to the underlying error." *Id.* at 617 n.1. Here, instead of ruling on the objection the comment could be construed by jurors as a comment on exercise of the right to silence, the judge ruled on *other* grounds, denied a mistrial, and denied the requested curative instruction on silence (T 73-77).

The harmless error test does not apply. Even if it did, the State fails its burden due to testimony FDLE *management* determined to target Ms. Weeks (Point I), admission of vulgar audio coloring her "vicious, nasty, and of questionable moral character," *McDuffie v. State*, 970 So. 2d 312, 328 (Fla. 2007) (Point III), and as a person who found a need--protected by the Constitution, but unelucidated to jurors--not to speak.

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

The State's reliance on *Asencio v. State*, 244 So. 3d 294 (Fla. 4th DCA 2018) is misplaced because in that case a records custodian testified about how the jail calls were *actually recorded*, and the court noted: "[T]he authentication should be made by the technician who operated the recording device or a person with knowledge of the conversation that was recorded." *Id.*, 244 So. 3d at 297 (quoting *Santana v. State*, 191 So. 3d 946, 948 (Fla. 4th DCA 2016)). But here, neither a person who recorded, nor with knowledge of the conversation, testified to authenticate the audio recording. In *Santana, supra*--quoted in *Asencio*--an informant recorded his own phone calls with a defendant about a drug deal, though the agent did not monitor the phone calls. The informant provided the audio recordings to the agent only after the transaction.

At trial, as here, though the agent could not testify the tape was a true representation of what was said, it was admitted into evidence over objection that the tapes had not been authenticated. *Id.*, at 948. The result in *Santana* and here should be the same:

> [A]uthentication should be made by the technician who operated the recording device or a person with knowledge of the conversation that was recorded. *See* Charles W. Ehrhardt, *Florida Evidence* § 401.4 (2015 ed.). Here, no such authentication evidence was introduced. Although the State did introduce testimony supporting the identity of the speakers on the recording, it did not introduce evidence that the recording was a fair and accurate representation of the conversation that occurred. The confidential informant did not testify, the law enforcement officials who testified were not participants in or listening to the conversations as they occurred, and the State did not ask Appellant whether the recordings were accurate despite the fact that Appellant testified on his own behalf. The introduction of the recordings without this foundation was an abuse of discretion.
>
> The State alternatively argues that this error was harmless. It is noteworthy that the jury in this case requested to listen to one of the recordings again during their deliberations. The recorded conversations between Appellant and the confidential informant that were played for the jury could very well have contributed to the jury's determination … Thus, the state has not met its burden of "prov[ing] beyond a reasonable doubt that the error complained of did not contribute to the verdict."

Santana v. State, 191 So. 3d 946, 948 (Fla. 4th DCA 2016) (quoting *DiGuilio*).

In *Symonette v. State*, 100 So. 3d 180 (Fla. 4th DCA 2012), cited by the State, text messages taken by search warrant were authenticated. Notably, a co-defendant testified she exchanged the texts with the defendant as she sat next to him in a car. The texts were authenticated *because* she testified that she texted the defendant,

identified the texts between the two, and discussed the context of the texts at trial. Thus, in *Symonette*--as in all the State's cases--a *participant* authenticated evidence.

The State's reliance on *State v. Love*, 691 So. 2d 620 (Fla. 5th DCA 1997), is flawed for the same reason. In *Love*, the sworn live testimony of a letter's *recipient* and sworn deposition of the letter's alleged *author* formed a basis for authentication. *Love* held the testimony formed a *prima facie* basis for authentication because, there, unlike here, *participants* to the communication themselves testified to its authenticity.

Here, the agents' activities or the audio's content (AB 28-32), have no bearing on authentication, as neither was a "technician who operated the recording device or a person with knowledge of the conversation that was recorded." *Santana*, at 948.

The State does not argue harmlessness, as it played the audio 5 times to jurors (T 186-187, 189-196, 383; 587-589, 687-692), and repeated vulgar parts in closing (T 652), making it a central feature of the trial. In deliberations, jurors requested to play back solely this one audio (T 689), rendering the error far from harmless. *Banks v. State*, 790 So. 2d 1094, 1099 (Fla. 2001) (rejecting notion error was harmless where improperly admitted evidence against defendant was used in State's argument and jury requested repeat of erroneously admitted evidence during deliberations). *See also Santana v. State*, 191 So. 3d at 948 (error was not harmless where jurors requested to listen to an improperly admitted audio recording during deliberations).

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

The *Grappin/Watts* "a/any" test is apt the first time on appeal. *Francis v. State*, 41 So. 3d 975 (Fla. 5th DCA 2010); *Bell v. State*, 122 So. 3d 958 (Fla. 2d DCA 2013); *Suggs v. State*, 72 So. 3d 145 (Fla. 4th DCA 2011). Also, *Bautista v. State*, 863 So. 2d 1180 (Fla. 2003) did not end the "a/any" test; it remains a tool for divining legislative intent. *id.* at 1188. The State's citation to § 934.03(2)(d) (noting conditions where interception is "*lawful*") fails to rebut the "a/any" analysis in the Initial Brief.

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

At trial, the State argued, "[t]his whole case is coming down to what is a public meeting…there has to be some definition of that, judge…I guarantee you if we don't define it, Judge, when they go out, they're going to come back" (T 300-02)--but now argues that no definition was necessary. On appeal, the State argues, "the terms must

be understood as phrases of common usage which do not require defining" (AB 41). But at trial, the State relied on a definition for "public meeting" *in § 286.011* (T 301). Though, in its common and plain meaning and usage, the adjective "public" means "1. Of, concerning, or affecting the community or the people: the public good," [3] the State had the City Clerk testify, over objection, that, "It was not a public meeting" (T 395) because a public meeting "must comply with Sunshine Laws" (T 393); and had Holland testify over objection that, "It was not a public meeting" (T 217), despite the judge's *later* aside, "I don't think … 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).

By overruling the defense objections to these lay witnesses' testimony stating *legal conclusions* about the Sunshine *Law*'s effect on the facts, and by refusing to instruct the jury to define "public meeting" by its common meaning, the judge either (a) induced a virtual verdict for the State, or (b) left jurors confused whether to apply the Sunshine Law's definition or its common meaning. But "[w]here 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).

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The lack of instruction that "public meeting" be given its common meaning allowed jurors to be misled by lay opinions on the legal term--as illegal interception "does not mean any public oral communication uttered at a public meeting." § 934.02(2).

> The Sunshine Law was enacted to protect the public from "closed door" politics. *See Wood v. Marston,* 442 So. 2d 934, 938 (Fla. 1983). As a result, the law "must be broadly construed to effect its remedial and protective purpose." *Id.* "The breadth of such right is virtually unfettered." *Lorei v. Smith,* 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985). … [V]iolation of the Sunshine Law can occur where a state agency meets and violates the "statute's spirit, intent, and purpose." Thus, although the statute does not explicitly provide for the video recording of public meetings, the refusal to allow such recording certainly violates the "statute's spirit, intent, and purpose." *Id*.

Pinellas Cnty. Sch. Bd. v. Suncam, Inc., 829 So. 2d 989, 990-91 (Fla. 2d DCA 2002); *Brown v. Denton*, 152 So. 3d 8 (Fla. 1st DCA 2014) (following *Suncam* and holding "exemptions should be narrowly construed"); *City of St. Petersburg v. Wright*, 241 So. 3d 903, 905 (Fla. 2d DCA 2018) (The law "prevent[s] at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.").

Even if § 934.02(2)'s "public meeting" refers to the Sunshine Law, its liberal construction, *Suncam*, and narrow exemption, *Brown*, made these "public meetings." But because the jurors had heard lay testimony, over multiple defense objections, that the conversations contained in the State's accusations did not legally qualify as "public meetings," the jury was reasonably either confused or misled. *Brown, supra*.

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

The State's idea its trial tactic made any "expectation of privacy" irrelevant,[4] or that one's "exhibiting" such a *subjective* expectation ends the analysis, are flawed:

> [T]o be protected under section 934.03 the speaker must have an actual subjective expectation of *privacy*, *along with a societal recognition that the expectation is reasonable*.

State v. Smith, 641 So. 2d 849, 852 (Fla. 1994) (emphasis added).

"Florida courts have consistently held that the constitutional protections of a reasonable expectation of privacy do not extend to an individual's place of business," *Avrich v. State*, 936 So. 2d 739, 742 (Fla. 3d DCA 2006), and reject 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." *Cohen Bros., LLC v. ME Corp., S.A.*, 872 So. 2d 321, 325 (Fla. 3d DCA 2004). The defendant in *Avrich* was convicted of threatening, harassing calls, without disclosing his identity, to a

[4] Its alleged 11th-hour "amendment" of "wire, oral, or electronic communication" (R 15-17, 253-54) to just "wire" (AB 45), arguing "wire communications are protected regardless of any expectation of privacy" (AB 46), was thwarted by jury instructions (T 553), but inspired the judge to errantly shun the term "privacy" throughout (T 5-6).

location where another person had a reasonable expectation of privacy, contrary to § 365.16(1)(a), Fla. Stat. The victim, who ran a comic book business from his home and kept a separate line for business, testified the calls occurred on his business line:

> [D]efendant contends that his convictions…must be reversed for insufficient evidence because the State failed to prove that the victim enjoyed a reasonable expectation of privacy on his business telephone line. We agree. Florida courts have consistently held that the constitutional protections of a reasonable expectation of privacy do not extend to an individual's place of business. …
>
> [D]efendant made telephone calls to the victim's business telephone line, located in the victim's home where he conducted his business. Although the victim may enjoy a reasonable expectation of privacy in his home, that expectation is not extended to his business.

Avrich v. State, 936 So. 2d at 742 (citations omitted).

While the statute in *Avrich* read, "the person receiving the call *has* a reasonable expectation of privacy," § 365.16(1)(a), the statute here required they be "*exhibiting* an expectation that such communication is not subject to interception under circumstances justifying such expectation." § 934.02(2). Whereas "has" in *Averich*'s statute meant to possess, "exhibiting" requires action. *McDonough*, 862 F.3d at 1319.[5] As one "has" an expectation before "exhibiting" it, in *Averich* the State only had to prove a person *had* such an expectation; here the State had to prove it was *exhibited*.

[5] Bids to distinguish *McDonough v. Fernandez-Rundle*, 862 F.3d 1314 (11th Cir. 2017) (AB 49), fail to lessen it as the sole persuasive authority on *the Florida Legislature's* intent in selecting the term "exhibiting" in § 934.02(2) and policy of open government.

The only party "exhibiting" a *subjective* expectation of privacy on the 5-way speakerphone conference discussing public business was Secretary of State Detzner, who testified "It's the people's office, but I get to use it" (T 155-58, 199-202, 204-05). But because a "reasonable expectation of privacy do[es] not extend to an individual's place of business," *Avrich*, 936 So. 2d at 742, and courts reject any idea "society would recognize, as reasonable, that such an expectation of privacy exists in a conference call," *Cohen Bros.*, 872 So. 2d at 325, Mr. Detzner's *subjective* expectation lacked "societal recognition that the expectation is reasonable." *Smith,* 641 So. 2d at 852.[6]

Also, § 934.02(2) *exempts* "oral communication *uttered at a public meeting,*" which, as undefined, should be given its "ordinary and plain meaning," without resort to rules of statutory construction, so an ordinary person will know what it forbids. But limiting "public meetings" to the Sunshine Law definition *broadens* the statute.[7]

---

[6] The judge's rejection of the term "privacy" as to the phone calls (T 5-7), delegating *to jurors* to decide whether any expectation of privacy was one society is prepared to recognize (T 517) ("[T]hat's their job. That's what they're going to tell us"), is contradicted by Florida law. *See e.g.*, *Averich*; *Cohen Bros.* (deciding *on appeal* whether society was prepared to recognize an expectation of privacy in phone calls).

[7] *See, e.g., Perkins v. State*, 576 So. 2d 1310, 1313 (Fla. 1991) *See also id.,* at 1312 ("One of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter. This principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. … Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.").

In sum, ordinary persons of common intelligence might reasonably surmise a conference concerning public business, among public officials, in public buildings, on public time, is a "public meeting" exempted from § 934.03(1)(a) by 934.02(2). As these circumstances fell within the common meaning of "public meeting," and because § 934.02(2) provides the conduct § 934.03(1)(a) prohibits "does not mean any public oral communication uttered at a public meeting," the facts proven by the State here are insufficient, as a matter of law, to establish the commission of a crime.

Indeed, because no societally recognized "reasonable expectation of privacy" was implicated by the speakerphone conference concerning the public's business, any act exhibiting an *unwarranted subjective* expectation fails this essential element.

Rather than committing a crime, Ms. Weeks arguably had a right to record public officials on public property,[8] and a statutory duty to maintain such records.[9] As insufficient evidence supports Ms. Weeks's conviction she should be discharged.

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[8] *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.").

[9] § 119.011(12), Fla. Stat. (" 'Public records' means all…sound recordings…or other material, regardless of the physical form, characteristics or means of transmission, made or received pursuant to law or ordinance *or in connection with the transaction of official business by any agency*"); § 119.01(1) ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. *Providing access to public records is a duty of each agency*.").

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, pamela.koller@myfloridalegal.com, this 9th day of September 2019.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

KEVIN J. KULIK, ESQUIRE
Florida Bar Number 475841
500 Southwest Third Street
Fort Lauderdale, Florida 33315
Telephone (954) 761-9411
Facsimile (954) 767-4750

By: /s/ *Kevin J. Kulik*
Florida Bar Number 475841

Attorney for Appellant