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

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

KIMBERLE WEEKS,

Appellant,

v. Case No. 5D18-3612

STATE OF FLORIDA,

Appellee.

_________________________________/

Opinion filed March 27, 2020

Appeal from the Circuit Court
for Flagler County,
Margaret W. Hudson, Judge.

Kevin J. Kulik, Fort Lauderdale, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Kimberle Weeks appeals her convictions for seven counts of unlawfully intercepting wire communications and one count of disclosing an unlawfully intercepted wire communication. We conclude that double jeopardy principles preclude convictions on four counts of unlawful interception of wire communications, but otherwise we affirm.[1]

---

[1] Weeks also argued for reversal based on: (1) improper "bolstering" of testimony, (2) the denial of her motion for mistrial after an isolated, unresponsive comment on her

Section 934.03(1)(a), Florida Statutes (2014), makes it a crime for any person to intercept "any wire, oral, or electronic communication." The proper analysis of this statute's application in the instant case requires a review of certain statutory definitions. "Intercept" means "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." § 934.02(3), Fla. Stat. (2014). "Wire communication" is defined in section 934.02(1) to mean "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 . . . ."[2] "'Aural transfer' means a transfer containing the human voice at any point between and including the point of origin and the point of reception." § 934.02(18), Fla. Stat. (2014).

Here, the State's evidence established that, without the knowledge or consent of the other participants, Weeks recorded three separate phone conversations. One phone

---

exercise of her right to remain silent, (3) the admission of a particular audio recording over her authenticity objection, (4) the denial of her requested special jury instructions, and (5) the denial of her motion for judgment of acquittal based on the alleged insufficiency of the evidence. We agree with Weeks that there was improper bolstering during the testimony of Philip Lindley, a retired Florida Department of Law Enforcement investigator, but find that the admission of such testimony was harmless. We reject, without further discussion, the other arguments.

[2] During the trial below, the parties sometimes intermingled the definitions of "wire communication" and "oral communication." "Oral communication" is defined in section 934.02(2) to mean "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." § 934.02(2), Fla. Stat. (2014). Notably, the definition of "wire communication" does not include the same qualifying "reasonable expectation of privacy" language as the definition of oral communication. *Brevard Extraditions, Inc. v. Fleetmatics, USA, LLC*, No. 8:12-CV-2079-T-17MAP, 2013 WL 5437117, at *4 (M.D. Fla. Sept. 27, 2013). Nor does the definition of "wire communication" expressly include the exception for a public communication uttered at a public meeting.

conversation was a conference call with four other individuals, a second phone conversation involved two other individuals, and a third call was a phone call with a single individual. The State's evidence was sufficient to show that on these three occasions, Weeks intercepted wire communications in violation of section 934.03(1)(a), Florida Statutes (2014). *See, e.g.*, *Briggs v. Am. Air Filter Co.,* 630 F.2d 414, 417 (5th Cir. 1980) (concluding that "[a] telephone conversation is a wire communication" under same definition of wire communication in federal wiretap statute); *Perdue v. State*, 78 So. 3d 712, 716 (Fla. 1st DCA 2012) ("[T]he recording . . . included only the communications that were picked up over the telephone, which clearly meet the definition of 'wire communication' in section 934.02(1).").[3]

Weeks argues that because there were only three recorded telephone calls, double jeopardy principles preclude her from being convicted of more than three counts of unlawfully intercepting wire communications. In response, the State argues that because Weeks unlawfully intercepted communications of seven different individuals, she can be convicted on seven counts. We reject the State's argument.

In cases involving multiple violations of the same statute, courts apply the "allowable unit of prosecution" standard to determine whether a double jeopardy violation has occurred. *McKnight v. State*, 906 So. 2d 368, 371 (Fla. 5th DCA 2005) (citing *Sanabria v. United States*, 437 U.S. 54 (1978)).

> The "allowable unit of prosecution" standard recognizes that the Double Jeopardy Clauses are offended if multiple punishments are imposed for the same offense. The Legislature defines whether offenses are the same by prescribing the "allowable unit of prosecution," which is the aspect of criminal activity that the Legislature intended to

[3] The State's evidence also established that Weeks intentionally disclosed the contents of one of the unlawfully recorded telephone conversations to third persons in violation of section 934.03(1)(c), Florida Statutes (2014).

> punish. *See United States v. Chipps*, 410 F.3d 438 (8th Cir. 2005). In other words, it is a distinguishable discrete act that is a separate violation of the statute.

McKnight, 906 So. 2d at 371.

"A court's determination of the meaning of a statute begins with the language of the statute." *Halifax Hosp. Med. Ctr. v. State*, 278 So. 3d 545, 547 (Fla. 2019) (citing *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018)). "If that language is clear, the statute is given its plain meaning, and the court does not 'look behind the statute's plain language for legislative intent or resort to rules of statutory construction.'" *Id.* (quoting *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008)). Section 934.03(1)(a) states, in pertinent part, that any person who "[i]ntentionally intercepts . . . any wire . . . communication . . . shall be punished." The statutory definition of "wire communication" references "any aural transfer" made through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection. § 934.02(1), Fla. Stat. (2014). "Aural transfer" is defined as "*a* transfer containing *the* human voice." § 934.02(18), Fla. Stat. (2014) (emphasis added). Significantly, these definitions make no reference to the number of people participating in a wire communication. Thus, we find no statutory support for the State's argument that the allowable unit of prosecution is determined by the number of individuals whose voices were unlawfully recorded on a single telephone call.[4] On remand, the trial court shall enter judgment and sentence against Weeks on only three counts of unlawfully intercepting wire communications in addition to the one count of disclosing unlawfully intercepted wire communication.

---

[4] Neither party addressed the issue of whether the allowable unit of prosecution should be determined by the number of telephones utilized during a conference call given that the statutory definitions of both "wire communication" and "aural transfer" reference a "point of origin" and a "point of reception." Because that issue was not briefed by either party, we decline to address it.

AFFIRMED, in part; REVERSED, in part; and REMANDED.

EVANDER, C.J., WALLIS and TRAVER, JJ., concur.