IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

CASE NO: 2015 CF 000387

STATE OF FLORIDA,

v.

KIMBERLE WEEKS,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO DISMISS COUNTS, I, II, III, IV, V, VI, X, XI and XII OF THE INDICTMENT

THIS MATTER came before the Court on February 3, 2017 for a hearing upon Defendant's Motion to Dismiss filed, pursuant to Fla.R.Crim.P. 3.190(b), 3.190(c)(3) and 3.190(c)(4) (Docket #127). For purposes of this Motion, Defendant adopts all of the state's facts and, therefore, because there are no disputed facts, the Motion is not to be denied based upon the State's traverse. Instead, the court must analyze whether the substance of the indictment warrants dismissal due to a legal defense pursuant to Fla.R.Crim.P. 3.190(b) or whether the undisputed facts establish a *prima facie* case of guilt against Defendant pursuant to Fla. R. Crim.P. 3.190(c)(4). *See,* State v. Taylor, 16 So. 3d 997,999 (Fla. 5th DCA 2009)(motion to dismiss is the functional equivalent of a Motion for Summary Judgment in the civil context). The Court reviewed and considered the Motion, heard argument of counsel and considered the case law submitted by counsel, and was otherwise fully advised in the premises.

LEGAL ANALYSIS

Defendant is charged with eight counts of Interception of Oral Communication and one count of Disclosure of Oral Communication pursuant to Florida Statute §934.03. The statutory definition of oral communication is:

> ...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...."

Fla. Stat. §934.02(2).

Defendant argues that the expectation of non-interception referenced in the above statute contemplates a *reasonable* expectation of privacy. State v. Inciarrano, 473 So.2d 1272, 1275 (Fla. 1985); Rojas v. State, 845 So. 2d 1014 (Fla. 5th DCA 2014)(*per curiam*). A reasonable expectation of privacy is to be determined upon a given set of circumstances. State v. Inciarrano, 473 So. 2d at 1275. In Inciarrano, the Florida Supreme Court recognized that not every oral communication is free from interception without the prior consent of all parties to the communication. Id. What constitutes a reasonable expectation of privacy depends upon one's actual subjective expectation of privacy as well as whether society is prepared to recognize that expectation as reasonable. Id.

In Inciarrano, the Florida Supreme Court recognized that not every oral communication is free from interception without the prior consent of all parties to the communication. Id. The court indicated a business office is a quasi-public setting in which the person making the utterances would usually have a justifiable expectation that a conversation would remain private. Id.; *see also* Horning-Keating v. State, 777 So.2d 438(Fla. 5th DCA 2001)(secretly recorded tapes from a public telephone booth, in which there is a reasonable expectation of privacy, to a law office should be suppressed); LaPorte v. State, 512 So.2d 984 (Fla.2d DCA 1987), *rev. denied* 519 So.2d 987 (Fla. 1988)(no suppression of surreptitious video and audio recording of women changing clothes in a dressing room at the defendant's photo studio where expectation of privacy was reasonable); *but see* State v. Caraballo, 198 So. 3d 819 (Fla. 2d DCA 2016)(no reasonable expectation of privacy where admissions of grand theft made to employer when business was open to public and sign at the front of the store indicated the business was under video and audio surveillance); Dep't of Agric. &

Consumer Serv. v. Edwards, 654 So.2d 628 (Fla. 1st DCA 1995)(no reasonable expectation of privacy where recording made in supervisor's office, with 5 supervisors present for a disciplinary interview of employee); Avrich v. State, 936 So.2d 739(Fla. 3d DCA 2006)(reasonable expectation of privacy in one's home does not extend to a business office located within one's home); Cohen Brothers, LLC v. ME Corp., S.A., 872 So.3d 321 (Fla. 3d DCA 2004)(in dicta, the court surmised that society would not recognize a reasonable expectation of privacy on a business conference call).

However, even if the one whose communication was recorded would have a subjective expectation of privacy, that expectation must be one society would recognize as reasonable. State v. Inciarrano, *supra*, 473 So.2d at 1276-76. Inciarrano may have had a subjective expectation of privacy when he went to the victim's office, but that expectation, under the circumstances of intent to do the victim harm, was not justified. Id. at 1275-76; *see also* LaPorte, *supra*, 512 So.2d at 986; Jatar v. Lamaletto, 758 So.2d 1167 (Fla. 3d DCA 2000)(society is not prepared to recognize a reasonable expectation of privacy where a person goes to another's office to extort). Nevertheless, subsequent to Inciarrano, the Florida Supreme Court found that the nature of a defendant's activities – whether innocent or criminal - does not determine the privacy expectation of communications. In McDade v. State, 154 So. 3d 292 (Fla. 2014), that Court ruled a surreptitious recording by a minor in the privacy of her sexual abuser's home must be suppressed. The Court indicated that there was no exception in Chapter 934 for criminal activity. Id. at 299; *cf.* Belle v. State, 177 So. 3d 285, 287-88 (Fla. 2d DCA 2015)(A recording not intentionally or surreptitiously made should not be suppressed).

In analyzing the above cases, it appears that the majority of the respective courts, whether stated or not, focused more on the people involved in the circumstances and not the places where the communications were made. *See, e.g.*, Katz v. U.S., 389 U.S. 347, 351 (1967)(the Fourth

Amendment protects people and not places); State v. Brandin, 669 So.2d 280, 282 (Fla. 1st DCA 1996)(oral communication that a person seeks to preserve as private, even in an area accessible to the public, may be protected). Although the Fourth Amendment is not the focus of the motion at hand, the Florida Supreme Court has interpreted the analysis of an oral communication to be substantially the same as that used in a Fourth Amendment right to privacy analysis. Mozo v. State, 632 So.2d 623, 631 (Fla. 4th DCA 1994), *approved* 655 So.2d 1115 (Fla. 1995). As such, this court will focus on each person's circumstances, including the location, surrounding the communication which took place as that is the most appropriate manner of determining whether any person had a reasonable expectation of privacy in their respective communications recorded by Defendant. *See* McDade v. State, *supra*, 154 So. 3d at 298; State v. Inciarrano, *supra*, 473 So.2d at 1274; *see also* Abdo v. State, 144 so.3d 594, 596 (Fla. 2d DCA 2014). If so, the State has alleged a *prima facie* case of guilt and, if not, Defendant has a defense that the State has not, nor cannot, allege a *prima facie* case of guilt for which any such count should be dismissed.

COUNT I

On April 7, 2014, Defendant made and recorded a telephone call to Virginia Smith at the City of Palm Coast business office during normal hours of operation. The phone call was initially answered by an administrative assistant and then forwarded to Ms. Smith. The conversation involved negotiations of an inter-local agreement, a discussion of public business matters between the Defendant and Ms. Smith.

A conversation conducted in one's business office, a quasi-public setting, would usually allow the person making the utterances to have a justifiable expectation that a conversation would remain private. State v. Inciarrano, *supra,* 473 So.2d at 1275; *but see* Avrich v. State, *supra*, 936 So.2d at 742. The conversation occurred only between Defendant and Ms. Brown and the

conversation was not conducted on a conference call. Cohen Brothers, LLC, *supra,* 872 So.2d at 324-25; Dep't of Agric. & Consumer Serv. v. Edwards, *supra,* 654 So.2d at 632-33.

A motion to dismiss should only be granted where the most favorable construction to the State could not establish a *prima facie* case of guilt. Bist v. State, 35 So.3d [redacted] 2010). As such, giving the most favorable construction of the undisputed facts to the State, a *prima facie* case of guilt has been established as to Count I. The question on whether the statute has been violated in this instance must be submitted to the jury. Therefore, the Motion to Dismiss is DENIED as to Count I of the indictment.

COUNT II

On May 6, 2014 Shannon Brown went to Defendant's home. The two engaged in a conversation outdoors on the front lawn of Defendant's home. Defendant recorded the conversation. Others were present or passed by the two women in the yard, but no one else participated in the conversation. The conversation was of a personal, and not business, nature.

Ms. Brown did have a subjectively reasonable expectation of privacy in the private matters being discussed with Defendant. Although the conversation took place in the open area of Defendant's front yard, the yard is part of a private residence and not a purely public area. *Compare* State v. Brandin, *supra,* 669 So.2d at 282 *with* Stevenson v. State, 667 So.2d 410, 412 (Fla. 1st DCA 1996). Defendant and Ms. Brown stood in the yard where others could and did see the two, but the manner of the communication suggests it was to be a private communication that would be paused when others came near. Furthermore, society would recognize an expectation of privacy as reasonable under such circumstances.

The State has alleged a *prima facie* case of guilt as to Count II. The Motion to Dismiss is DENIED as to Count II of the indictment.

COUNT III

On July 11, 2014, Sergeant Coomans of the Holly Hill Police Department returned Defendant's call from his police car. That return phone call was made on a police department issued phone. Defendant put the call on speaker so that her daughter and husband could hear and participate in the conversation, as well as recorded the conversation. The matter discussed was a domestic incident that involved police involvement in Holly Hill.

The conversation involved police business and discussed a matter of public record. Dep't of Agric. & Consumer Serv. v. Edwards, *supra,* 654 So.2d at 632-33. Furthermore, the conversation was a conference type call since it was conducted on speaker phone. *See*, Cohen Brothers, LLC, *supra*, 872 So.2d at 324-25. Under those circumstances, Sergeant Coomans did not have a reasonable expectation of privacy and Defendant has a legal defense to Count III. Therefore, the statute is inapplicable and the undisputed facts do not establish a *prima facie* case of guilt in this situation. As such, the Motion to Dismiss is GRANTED as to Count III of the Indictment.

COUNT IV

During a Canvassing Board Meeting on August 20, 2014, Defendant stated she would not be recoding the canvassing board meetings. Despite that statement, Defendant was actually recording the meeting. Defendant continued recording a conversation between Judge Melissa Moore-Stens and Pierre Tristam, an online news website reporter and author, after that meeting. Their conversation took place in the Canvassing Board Room within the Supervisor of Elections Office. That conversation was recorded by Defendant's cell phone that was visible on a table in that room. The Canvassing Board Room is surrounded by glass. At the front door entrance to the Supervisor of Elections Office, a sign is posted that states "NOTICE! THESE PREMISES MAY BE SUBJECT TO AUDIO AND VIDEO MONITORING AND RECORDINGS AT ANY TIME."

Under these circumstances, neither Judge Moore-Stens nor Mr. Tristam had a reasonable expectation of privacy in their conversation. Business matters relating to the Canvassing Board were being discussed in a quasi-public place for potential reporting by a member of the media. Inciarrano, *supra*, 473 So.2d at 1274; Dep't of Agric. & Consumer Serv. v. Edwards, *supra,* 654 So.2d at 632-33. In addition, the recording was not made in a surreptitious manner as Defendant's cell phone was in full view on a table in the Canvassing Board Room.[1] *See* McDade v. State, 154 So. 3d at 298; Belle v. State, *supra*, 177 So. 3d at 287-88. Finally, relied upon to a lesser extent than the reasons stated above[2], the conversation took place in a building where notice, although not of an overt nature in this setting, had been given that audio and video monitoring may be occurring. State v. Caraballo, *supra*, 198 So. 3d at 822.

Based upon the lack of a reasonable expectation of privacy, Defendant has a legal defense to Count IV. Therefore, the statute is inapplicable and the undisputed facts and favorable construction to the State do not establish a *prima facie* case of guilt in this situation. As such, the Motion to Dismiss is GRANTED as to Count IV of the Indictment.

COUNT V

On August 25, 2014, Defendant again recorded a Canvassing Board Meeting despite stating she would not be recording that meeting. Following that meeting, the Canvassing Board members went into the adjacent tabulation room to continue the business of counting ballots; however, the door to that adjoining room was propped open. Defendant continued the recording in the Canvassing Board Meeting Room that captured a conversation between County Commissioner Charles Ericksen, who was also an alternate Canvassing Board member, and Albert Hadeed, Flagler

---

1 Court recognizes that this element, taken to its extreme, leads to a modern day paranoia of Big Brother watching (or listening) anytime a cell phone is seen out in the open. However, since the majority of the population uses cell phone technology and is aware of its capabilities, it appears that this trade-off to a sense of privacy is inevitable.

2 The Notice provided on the front entrance of the Supervisor of Elections Office was intended more to deter voter fraud than give wholesale authority to any officer or employee of that office to record conversations for their own purposes.

County Attorney and Canvassing Board Attorney who had remained in that meeting room. Their conversation was recorded by Defendant's cell phone that was visible on a table in the Canvassing Board Meeting Room. Again, the Canvassing Board Room is within the Supervisor of Elections Office and is surrounded by glass. At the front door entrance to the Supervisor of Elections Office, a sign is posted that states "NOTICE! THESE PREMISES MAY BE SUBJECT TO AUDIO AND VIDEO MONITORING AND RECORDINGS AT ANY TIME."

The conversation revolved around Mr. Hadeed informing Mr. Eriksen that another county commissioner's actions at a prior Canvassing Board meeting constituted a third degree felony. Although this matter was sensitive, Mr. Hadeed did not have a reasonable expectation of privacy to maintain the conversation as confidential. He did not seek to excuse himself and Mr. Eriksen, or exclude another latecomer to the conversation, from the quasi-public place or suggest that Mr. Eriksen keep the matter confidential. In fact, Mr. Eriksen did "not really" believe the conversation was confidential and actually believed he had previously been recorded. Furthermore, the conversation was not one of legal advice by Mr. Hadeed to Mr. Eriksen to carry any additional cloak of confidentiality. *See, e.g.,* Gennusa v. Shoar, 879 F. Supp.2d 1337, 1346-48 (M.D. Fla. 2012); Horning-Keating v. State, *supra*, 777 So.2d at 443-47.

The conversation took place in a quasi-public place with other Canvassing Board members nearby. The recording was not made by a hidden recording device. Therefore, based upon the same analysis as to Count IV above, Mr. Hadeed and Mr. Eriksen did not have a reasonable expectation of privacy. Therefore, the statute is inapplicable and Defendant has a legal defense to Count V. The most favorable construction to the State of the undisputed facts does not establish a *prima facie* case of guilt in this situation. As such, the Motion to Dismiss is GRANTED as to Count V of the Indictment.

COUNT VI

Defendant intentionally disclosed the recorded conversation between Mr. Hadeed and Mr. Eriksen addressed in Count V at a Special Canvassing Board Meeting on September 12, 2014. Based upon the same analysis above for Count V, the disclosure component of the statute is also inapplicable as to an oral communication made without a reasonable expectation of privacy. As such, Defendant has a legal defense to Count VI and even the most favorable construction to the State of the undisputed facts does not establish a *prima facie* case of guilt in this situation. The Motion to Dismiss is GRANTED as to Count VI of the Indictment.

COUNT X

On April 3, 2014, Defendant recorded a conversation between herself and Flagler County Supervisor of Elections employee Darlene Walker from the supervisor of Elections Office in Flagler County Government Services Building to the Secretary of State's Office in Leon County. Assistant Director of Division of Elections Gary Holland, Secretary of State Kenneth Detzner, General Counsel of the Department of the State J. Andrew Atkinson, and General Counsel of the Supervisors' Association Ronald Labasky were present on that phone call. At the beginning of the conversation, Defendant stated she was going to record the call; Secretary of State Detzner objected. Although Secretary of State Detzner did not further inquire of Defendant whether she was actually recording, he "exhibit[ed] an expectation that such communication not [be] subject to interception...." Fla. Stat. §934.02(2).

The recorded conversation was of a conference call among several individuals, dealing with election business matters. *See*, Cohen Brothers, LLC, *supra*, 872 So.2d at 324-25; Dep't of Agric. & Consumer Serv. v. Edwards, *supra*, 654 So.2d at 632-33. However, Secretary of State Detzner's

objection to the recording elevated the expectation of privacy for the conference call from the usual business call setting. *See*, State v. Sells, 582 So.2d 1244, 1245 (Fla. 4th DCA 1991).

Therefore, the State has alleged a *prima facie* case sufficient to withstand a Motion to Dismiss as to Count X. The Motion to Dismiss is DENIED as to Count X of the indictment.

COUNT XI

On April 4, 2014, Defendant disclosed the recording discussed above in Count X to her aunt and uncle. Based upon the analysis of Count X, the State has alleged a *prima facie* case sufficient to withstand a Motion to Dismiss this count as well. The Motion to Dismiss is DENIED as to Count XI of the indictment.

COUNT XII

On September 18, 2014, Defendant recorded her conversations with Whitney Anderson, Consumer Service Analyst of the Attorney General's Office, and Gerry Hammond, Assistant Attorney General. Ms. Anderson returned a call made by Defendant to the Attorney General's Office in Tallahassee, Florida. After briefly speaking with Defendant, Ms. Anderson directed the phone call to Assistant Attorney General Gerry Hammond.

The undisputed facts do not include the subject matter of this conversation. A conversation conducted in one's business office, a quasi-public setting, would usually allow the person making the utterances to have a justifiable expectation that a conversation would remain private. State v. Inciarrano, *supra,* 473 So.2d at 1275; *but see* Avrich v. State, *supra*, 936 So.2d at 742. The conversation did not involve more than the Defendant and the respective speaker at any given time nor were the conversations conducted on a conference call. Cohen Brothers, LLC, 872 So.2d at 324-25; Dep't of Agric. & Consumer Serv. v. Edwards, 654 So.2d at 632-33.

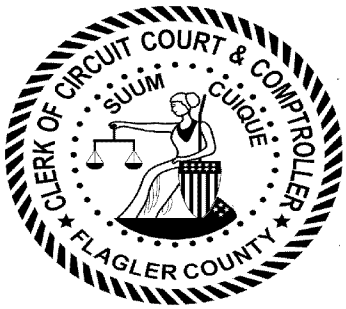
As such, given the most favorable construction to the State of the undisputed facts, a *prima facie* case of guilt has been established as to Count XII. The factual content of the conversation needs to be considered by a jury to determine whether the statute has been violated. Therefore, the Motion to Dismiss is DENIED as to Count XII of the indictment.

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that

1. Defendant's Motion to Dismiss is **DENIED** as to Counts I, II, X, XI and XII of the Indictment.
2. Defendant's Motion to dismiss is **GRANTED** as to Counts III, IV, V and VI of the Indictment.

DONE AND ORDERED in Chambers, in Bunnell, Flagler County, Florida, this 31st day of March, 2017.



3/31/2017 1:35 PM 2015 CF
e-Signed 3/31/2017 1:35 PM 2015 CF
000387

Margaret W. Hudson
MARGARET W. HUDSON
CIRCUIT JUDGE

cc: Kendell K. Ali, Esq. and Dean Bartzokis, Esq., Attorneys for Defendant, 217 E. Ivanhoe Blvd., North, Orlando, FL 32804
Jason Lewis, Assistant State Attorney, 1769 East Moody Blvd., Bldg. 1, 3rd Floor, Bunnell, FL 32110