IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D22-3323

JAMES HODGES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR OKEECHOBEE COUNTY

****

INITIAL BRIEF FOR APPELLANT

PAUL MORRIS
Law Offices of Paul Morris, P.A.
Office in the Park
7385 S.W. 87th Avenue
Suite 400
Miami, FL 33173
Fla. Bar No. 193769
786-870-4300
PaulAppeal@gmail.com
Paul@PaulMorrisLaw.com

Counsel for Appellant

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PREFACE

Following a trial by jury, James Hodges ("Hodges") was found guilty of first-degree premeditated murder and related charges. (R. 1511). Hodges seeks a new trial for the reasons stated in Points I, II, III, IV, and VI. In Point V, Hodges seeks reversal and discharge on the charge of tampering with evidence.

R. 1-1618 designates the record on appeal filed March 3, 2023.

R. 1619-1727 designates the supplemental record filed April 11, 2023.

T. 1-1192 designates the transcript of proceedings filed March 3, 2023.

STATEMENT OF THE CASE AND FACTS

On Friday, May 17, 2019, at approximately 7:30 a.m., law enforcement responded to a report of a vehicle partially submerged in a canal near a Circle-K store off Cemetery Road in Okeechobee, Florida. Inside the vehicle, a black Infiniti SUV, was the victim, later identified as Paul Murphy ("Murphy"). (R. 59; T. 386-92, 439-40). The autopsy revealed injuries from .45 and .22 caliber projectiles fired from different weapons. Death was caused by the larger .45 caliber projectile. (T. 405-417). The autopsy also revealed the presence of marijuana in an amount consistent with Murphy having recently consumed the marijuana and being under its influence at the time of death. (T. 416-17, 420-21).

Cherish Murphy ("Cherish"), the victim's wife, testified for the State. On the date in question, Murphy told her he was meeting Hodges to collect a debt and would be fishing afterward with a friend. (T. 423-24). Cherish received a call from the friend that Murphy did not arrive as expected and could not be reached on his cell phone. Cherish sent text messages to Hodges' cell phone commencing around 11:00 p.m. inquiring about Murphy. (T. 426-28).

Hodges responded at 4:30 a.m. by calling Cherish. He stated that he was waking up and getting ready for work. Hodges told her that he saw Murphy briefly when he dropped off something and left. (T. 425-29, 441).

At 9:32 a.m., Cherish texted Hodges again, this time asking for his address and stating she wanted to retrace Murphy's route. Hodges supplied his address. Hodges also volunteered directions to his house and added that Mrs. Hodges would be at their house if Cherish needed any additional assistance. (T. 429-30).

Cherish telephoned her brother-in-law who told her to wait for him. Instead, Cherish drove alone to Hodges' house where she observed buckets which she claimed Murphy used for his tools as a painter even though the buckets had no markings and were empty. (T. 423-24, 431-44, 464). Cherish

reported to the police that Murphy was missing. (T. 433). Eventually, law enforcement informed her of Murphy's death. (T. 433-34).

Consistent with the State's theory that Hodges was solely responsible for the homicide, the prosecutor concluded his direct examination of Cherish as follows:

> Q [Prosecutor]: Finally, I'm gonna ask this cause I know it's gonna be implied, did you kill your husband?
> A [Cherish Murphy]: Absolutely not.
>
> Q: Did you have anything to do with your husband being killed?
> A: I would've [sic], no.
>
> Q: Did you in somehow, ya' know agree or work with the defendant Mr. Hodges to kill your husband?
> A: No.

(T. 437).

The lead detective assigned the homicide investigation was Ted Van Deman with the Okeechobee Sheriff's Office. Van Deman testified that Cherish was a suspect from the outset of the investigation and remained a suspect in the homicide even at the time of Hodges' trial (T. 510-12, 830, 836-37) and therefore had not been eliminated as the perpetrator. Among the reasons for suspecting Cherish were the following:

- Cherish was the first to put the spotlight on Hodges as a suspect. (T. 840);
- Cherish claimed that Hodges owed $5,000 to Murphy who went to

Hodges' residence on the night in question to collect, thereby supplying a motive for the murder. (T. 842-44).

● Cherish stated that a tractor on Hodges' property was stolen and that he previously offered the tractor for repayment of his debt. However, the investigation established that the tractor was not stolen but belonged to Hodges' employer and was on loan to Hodges which the employer confirmed. (T. 846-47, 1018);

● Cherish owned a .45 caliber gun. During the murder investigation, Van Deman asked her for the gun to test whether it was used in the homicide. Cherish refused to provide the gun, claiming she was acting on the advice of counsel who told her that Okeechobee was a corrupt county. (T. 457, 462, 830-31). As noted, the cause of death was a .45 caliber projectile;

● Cherish was the named beneficiary of a life insurance policy taken out on Muphy's life 13 months before his murder. Prior thereto, the two were together for 15 years without any insurance. (T. 454-455, 837);

● The couple's combined reported taxable income was approximately $30,000, but their income was reported as $100,000 on the life insurance application so that Murphy's life could be insured for $750,000. An even higher amount of coverage was sought but denied because Murphy tested positive for marijuana in the insurance application process. (T. 454-67);

●Cherish testified in a deposition that Murphy was not involved in any illegal activities. However, she later admitted that Murphy was in the business of selling marijuana. But Cherish denied knowing that Murphy sold marijuana to Hodges. (T. 458, 464-65, 475-76);

●Cherish told Van Deman that Hodges' debt to Murphy was a couple thousand dollars, but she later increased the amount to $5,000. (T. 460-62, 845-46);

● Cherish and her retained criminal defense attorney tried to pressure law enforcement to sign off on her not being a target of the homicide investigation so that they could collect her insurance proceeds. (T. 853-54); and

● On October 29, 2020, the life insurance company issued a check payable to Cherish in the amount of $802,421.40. She paid her criminal defense lawyer one-third of that amount as a fee. (T. 462).

Despite the suspicion harbored against Cherish, the prosecution and law enforcement remained steadfast that the evidence established Cherish had nothing to do with the shooting and that Hodges acted alone. The prosecutor's direct examination of Van Deman on this point was as follows:

> Q. Did you determine through your investigation as the lead detective any physical evidence of any kind that showed that

> Cherish Murphy was present, was here, was involved in any way in this case?
> A. No, we did not.
>
> Q. Now, again, with regard to all of the witnesses you interviewed, you can't tell us what they said, did you determine anything through your interview of all of the witnesses that she was present, here, or involved in any way?
> A. No.

(T. 832).

Shortly after midnight on Saturday, May 18, 2019, a search warrant was executed at Hodges' home. Van Deman was present. Pellet or BB guns were found in Hodges' garage. However, neither was introduced into evidence by the State or even seized from the garage because "there was nothing to suggest a BB gun, or a pellet gun was used in this case." (T. 908, 916-17. (T. 801-02).

The search also yielded: a cartridge casing consistent with a .22 caliber (T. 695, 704); a box of jacketed hollow points .45 caliber ammunition with 41 live rounds and 9 rounds missing consistent with one round collected from the backyard; a 45. caliber auto Winchester round found in a Jeep parked in the backyard. (T. 695-97, 702-05). However, no fingerprint analysis was performed on the cartridge casings (T. 761); the box of bullets was covered with dust and tested for fingerprints and no fingerprints of Hodges were found on the box (T. 762); and no DNA testing was conducted on the cartridge

casings of the live round of ammunition. (T. 763). In fact, the State adduced no evidence connecting to Hodges any firearm suspected of being used in the homicide.

Hodges was handcuffed behind his back and transported to the sheriff's office. (T. 654-55). Hodges was placed in a chair and handcuffed behind his back where he was passed out for hours before Van Deman awakened him for interrogation. (T. 512).

A video of the interview (State's Ex. 142) was played for the jury. (T. 515-19). Hodges confirmed he was impaired, stating he had consumed marijuana and many beers. (T. 519, 565, 567-68, 653-54). Hodges waived his rights. (T. 518). The interrogation, which was recessed at 5:30 a.m. and resumed at 11:30 p.m. (T. 829), yielded the following in relevant part.

Hodges stated that he was employed by Interlachen Corporation, a heavy equipment company. His employer was Steve Rathburn. Hodges resided in his house with his wife and son. Hodges' wife worked as a contractor. (T. 523-526, 628-29). Rathburn would pick up Hodges for work each weekday around 4:30 to 5:00 a.m. The workday generally ended at 3:30 p.m. (T. 530-32).

Hodges worked all day Thursday, May 16, 2019, and returned home from work later than usual at approximately 5:30 p.m. (T. 532). Hodges grilled

pork tenderloin and ate dinner at the house. His wife was at her sister's house with a friend. Hodges took the remaining pork tenderloin to them somewhere between 10:00 and 11:00 p.m., stayed for approximately 40 minutes, and returned home. (T. 536-38). The next day was a regular workday. (T. 535).

Hodges volunteered there had been a fender bender with his neighbor, Harris, on the neighbor's property. However, rather than disclose that the accident was caused by his marijuana supplier, Murphy, Hodges said the driver was his friend, Mike Glassburn. (T. 540-41, 569, 655). Glassburn came by and while "buzzed", lit some firecrackers, backed into the neighbor's carport, tapped the neighbor's car, and damaged a pole. (T. 540-41, 569). Hodges' son exited the house to see what happened. (T. 570).

Van Deman informed Hodges that a search warrant was executed at his house and that the house reeked of marijuana. (T. 547). Hodges admitted that he smoked marijuana. The detective asked for his source. Hodges said he did not want to get his friend in trouble. (T. 548). The detective said there would be no problem. Hodges said his friend's name was Paul whom he had last seen a week before when he delivered marijuana. (T. 549-50). Hodges described Paul as a very close friend and a "hippie" type supplier of marijuana who would deliver the marijuana to a drop-off spot past Cemetery

Road near the Circle-K. (T. 552-53).

The detective asked about a tractor in the back of Hodges' property. Hodges explained that he borrowed the tractor from his employer to clear and repair a road at the house. (T. 526-27). The detective asked whether the tractor was stolen. Hodges said no, the tractor was purchased and owned by Rathburn. (T. 556).

The detective asked whether Hodges or his friends had guns. Hodges responded that he once owned guns and that nearly all his friends did. In response to whether his friends would display the guns, Hodges stated that one friend had a bad habit of throwing loose cartridges into the back of his truck and leaving the tailgate down. (T. 557-563).

Finally, the detective asked whether Hodges knew why he was being interrogated. Hodges said no and asked for the reason. Van Deman asked him to identify a picture of Murphy. Hodges said, "[T]hat's my buddy, Paul." (T. 573). Hodges also identified Murphy's wife as Trish who had texted him that Murphy failed to come home as expected and asked whether Murphy made it to Hodges' neighborhood. Because Murphy had left marijuana at the drop-off site, Hodges merely answered that Murphy had been nearby. (T. 575-77). Cherish asked for Hodges' address so she could drive the route. Hodges supplied his address. (T. 599). Hodges recommended that she notify

the police even though Murphy was a drug dealer. (T. 577). Hodges stated that at the time, he owed Murphy $100 to $200 which he left at the drop-off site. (T. 580-82).

The detective asked whether Hodges owed thousands of dollars to Murphy. Hodges said he did not, explaining that would mean he was dealing in large quantities rather than the ounces for personal use he bought from Murphy, and that the search of his house would have yielded large amounts of marijuana if that had been the case. (T. 583-84).

Hodges asked, “What’s going on?” The detective showed Hodges a photograph of Murphy after the homicide. Hodges responded: “Oh, my God, Paul. That’s a family man, dude. He’s got babies .... Oh, my gosh, poor Cherish.... All right, well, you can put it away.” (T. 584).

The detective confronted Hodges with the accusation (from Cherish) that on the night of the homicide, Murphy came to Hodges’ house to collect the debt. Hodges stated: “So, you all think I done killed my friend? *** Well, I didn’t ... and that’s screwed up, man.” (T. 587).

Van Deman asked whether Hodges would be willing to take a polygraph. Hodges answered that he would. (T. 619, 659). Van Deman testified that he did not seek a polygraph examination (T. 660) but acknowledged that despite the inadmissibility in court of their results,

polygraph examinations are a useful investigative law enforcement tool. (T. 666). The interrogation concluded.

Mike Harris, who lived across the street from Hodges, testified that as he exited his shower at around 9:30 p.m. on Thursday, May 16, 2019, he heard three “popping” sounds. He looked from his balcony, saw something was going on, put on clothes, went downstairs, and exited his house. Harris observed a dark vehicle next to his antique Impala which was parked under a canopy. The driver’s door was so close to the Impala that entry into the vehicle on the driver's side was not possible. The vehicle hit a tree and dented one of the canopy’s poles. Pieces of glass and a lens found on Harris’ property were later matched to the vehicle in the canal. (T. 503, 505).

Harris saw Hodges at the front of both cars and asked what happened. (T. 477-94). Hodges said, "A guy was drunk." (T. 487). Harris did not see a body inside the vehicle or any bullet holes even though he was five feet or fewer from the vehicle. (T. 490, 502-03).

Harris went back into his house to retrieve his phone to take pictures. When he came back outside, the vehicle was across the road. Harris then observed minor damage to his Impala. (T. 489, 494). Harris re-entered his house and when he came out, the vehicle was gone. Harris estimated the

entire incident lasted around 10 minutes, meaning that the vehicle was gone at approximately 9:40 p.m. (T. 492, 497, 504). At a subsequent time, Hodges said he would reimburse Harris for any damage. (T. 487).

Glassburn testified that he was not at Hodges' house on May 16 or 17, 2019, did not shoot fireworks, and did not get too drunk to drive his car home on that date or back into the neighbor's property. (T. 507-08).

The buckets pointed out by Cherish were tested for fingerprints. No fingerprints of Hodges were found on the buckets. No DNA testing was conducted on the buckets. (T. 764). Swabs of suspected blood drops were collected from Hodges' driveway, tested, and matched Murphy's DNA. (T. 706, 812). Video recordings dated May 16-17, 2019, were seized from Hodges' home security system, and played for the jury. (T. 858-72). Hodges was observed picking up items from his driveway, but the items could not be identified. (T. 915). The surveillance system was apparently off from approximately 9:00 p.m. to 10:30 p.m. on May 16. (T. 862). Shorts identified as belonging to Hodges yielded no blood from Murphy. (T. 813).

The jury found Hodges guilty as charged of first-degree murder with a firearm and tampering with evidence. (R. 1066-67). Following a bifurcated hearing, the jury also found Hodges guilty of possession of a firearm or ammunition by a convicted felon. (R. 1068).

SUMMARY OF THE ARGUMENTS

I.

Giving a principals instruction is error when there is no evidence that the defendant had a conscious intent that the crime be committed and did some act or said some word which was intended to and in fact did incite or assist a third party to commit the crime charged. Such an error is not harmless beyond a reasonable doubt when it can mislead the jury in a way that a defendant's right to a fair trial is prejudiced.

Over Hodges' objection, the trial court instructed the jury on principals. The trial court erred because the prosecution's evidence was that Hodges acted alone, and there was no evidence he assisted any other person in the commission of the crimes charged.

The error was not harmless beyond a reasonable doubt, not only because the instruction could have confused the jury, but also because the record establishes that the instruction did confuse the jury, as evidenced by their questions to the trial court during deliberations.

II.

Over Hodges objections, the trial court admitted into evidence a demonstrative State's exhibit which placed Hodges' cell phone at the exact location where the victim and his vehicle were found submerged in a

waterway. However, the location data used to create the exhibit could only establish that Hodges' cell phone and the victim's body were within a circle with a radius of 3,280 yards, which circle also included Hodges' residence.

The trial court reversibly erred because the exhibit was substantially misleading on key issues in the case, and the exhibit's prejudicial value was far outweighed by any probative value.

III.

While Hodges' counsel was out of Florida the week before jury selection was to commence, the prosecutor conveyed to counsel a new plea offer and imposed a one-day deadline for Hodges to accept or reject. Hodges and his counsel discussed the plea negotiations along with defense strategies in telephone calls. At the time, Hodges was incarcerated in the Okeechobee County Jail.

Just prior to the commencement of trial, Hodges' counsel was told by the prosecutor that he listened to recordings of the calls. Hodges moved to disqualify the prosecutor. In response, the prosecutor acknowledged that he listened to the telephone calls in their entirety, but argued there was no attorney-client privilege because the calls were recorded.

Following an evidentiary hearing, the trial court denied the motion to disqualify. The trial court erred because: the State failed to prove that Hodges

knew the calls were recorded; the use of the recorded telephone line was necessary because the telephone system for private calls was not working; Hodges did not intend his calls with counsel to be disclosed to the prosecutor; and the prosecutor had no reason to listen to the calls once it was clear they were attorney-client trial strategy discussions, other than to gain an unfair tactical advantage at trial.

IV.

The prosecutor told the jurors that the trial judge had sentencing discretion if they found Hodges guilty of first-degree murder. In truth, a judge has no such discretion. The sentence is mandatory life imprisonment upon return of a verdict of guilt as to first-degree murder.

The trial court erred in refusing to allow defense counsel to correct the prosecutor's misrepresentation to the jurors, particularly where the prosecutor's express motive was to "ease the minds" of the jurors in returning such a verdict.

V.

Hodges' conviction for tampering with evidence was fundamentally erroneous. The tampering statute required the State to prove that Hodges had knowledge of an impending investigation and destroyed evidence to impair its availability for the investigation. But Hodges had no knowledge of

any impending investigation at the time he committed the alleged acts of tampering. In fact, the acts were committed before any investigation had even begun. Not until after the acts were committed did Hodges learn of any investigation, thereby rendering the tampering statute inapplicable.

VI.

The cumulative effect of the trial errors denied Hodges his right to a fair trial.

I.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON PRINCIPALS OVER HODGES' OBJECTION WHERE THERE WAS NO EVIDENCE TO SUPPORT AN AIDING AND ABETTING THEORY OF HODGES' GUILT AND WHERE THE INSTRUCTION WAS CAPABLE OF CONFUSING OR MISLEADING THE JURY SO AS TO PREJUDICE HODGES' RIGHT TO A FAIR TRIAL.

The Jury was Instructed on Principals as Requested by the State over Hodges' Objection that the Instruction was Not Supported by the Evidence.

The State prosecuted Hodges based on evidence that he acted alone in shooting Murphy, as the prosecutor explained in his opening statement to the jury (T. 367, 373) and maintained throughout the trial.

The defense relied in part on evidence implicating Cherish Murphy, the victim's wife, which included her ownership of a .45 caliber firearm, testimony that the victim's death was likely caused by a .45 caliber projectile, Cherish's refusal to turn her firearm over to law enforcement for ballistics analysis, and Cherish's financial motive as the named beneficiary of a substantial insurance policy taken out on the victim's life 13 months prior to the homicide.

Notably, neither the State nor the defense presented any evidence whatsoever that Hodges aided and abetted Cherish or anyone else in the commission of the homicide. **Each side contended that the shooter acted alone.**

Nevertheless, at the charge conference, the State requested a

principals instruction. Hodges objected that the principals instruction was not supported by the record. The trial court overruled Hodges' objection (T. 1050) and the jury was instructed as follows:

> If the defendant helped another person or persons commit or attempt to commit a crime the defendant is a principal and must be treated as if he had done all of the things the other person or persons did if: 1, the defendant had a conscious intent that the criminal act be done and 2, the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit or attempt to commit the crime. To be a principal the defendant does not have to be present when the crime is committed or attempted.

(T. 1125) (typographical errors corrected).

In his rebuttal closing argument to the jury, the prosecutor addressed the issue of principals for the very first time. The prosecutor argued to the jury that it seemed "likely" that someone "probably helped" Hodges by, for example, driving him to and from where the victim was found. However, the prosecutor also acknowledged there was no evidence identifying any such person. (T. 1112-13).

Verdict Form and Verdict

The verdict form read as follows:

VERDICT

WE, the Jury, find James Wade Hodges, as to:

Count 1: First Degree Murder With A Firearm
(Check Only One)

( ) Guilty of First Degree Murder
( ) Guilty of Second Degree Murder
( ) Guilty of Manslaughter
( ) Not Guilty

If you found the defendant guilty of any of the charges above, you must then answer the following questions. We the jury further find beyond a reasonable doubt the following:

1) During the commission of the offense, did the defendant actually possess a firearm?
_Yes _No

2) During the commission of the offense, did the defendant personally discharge a firearm?
_Yes __No

3) During the commission of the offense and as a result of the discharge of the firearm, was death caused to Paul Murphy?
__ Yes __ No

Count 2: Tampering With Evidence
(Check Only One)

( ) Guilty of Tampering With Evidence
( ) Not Guilty

(R. 1066-67).

The three numbered special interrogatories concerning a firearm were included on the verdict for possible sentencing enhancement.

During deliberations, the jury sent the following two questions to the trial judge:

> Can we charge [sic] with first degree without answering yes to number 2?
>
> Is the firearm referenced in number 3 the same firearm in number 1?

(T. 1139).

The trial judge sent the following written answer to the jury's questions: "Please answer all questions to the best of your ability." (T. 1142). Thereafter, the jury found Hodges guilty of first-degree murder and checked "Yes" next to each of the three firearm sentencing enhancement interrogatories. (R. 1066-67). Following the verdict, the bifurcated charge of possession of a firearm by a convicted felon was presented to the jury which returned a verdict of guilty. (R. 1068).

Standards of Review

A trial court's decision to give or withhold a jury instruction is reviewed for an abuse of discretion. *Calkins v. State*, 170 So. 3d 888, 889 (Fla. 4th DCA 2015). However, the trial court's discretion on a jury instruction issue "is strictly limited by case law." *Newman v. State*, 976 So. 2d 76, 78 (Fla. 4th

DCA 2008).

Although the trial court has broad discretion in instructing the jury, a trial court errs when it gives an instruction that has no factual basis in the record. *Masaka v. State*, 4 So. 3d 1274, 1284 (Fla. 2d DCA 2009) (citation omitted). Whether a trial court abuses its discretion in the giving of a principals jury instruction is dependent on whether the evidence supports the principals theory as a matter of law. *See Hanks v. State*, 43 So. 3d 917, 917-18 (Fla. 2d DCA 2010) (citing *Masaka*, 4 So. 3d at 1284).

Because "[j]ury instructions requested by the State 'must relate to issues concerning evidence received at trial,' " the trial court errs when it "instruct[s] the jury on principals where there is no evidence to support an aiding and abetting theory of guilt because the jury may be confused by the instruction." *Senser v. State*, 243 So. 3d 1003, 1010-11 (Fla. 4th DCA 2018) (quoting *Lewis v. State*, 693 So. 2d 1055, 1057 (Fla. 4th DCA 1997)); *see also Masaka*, 4 So. 3d at 1284 ('[G]iving the principals instruction is error when there is no evidence that the defendant had a conscious intent that the crime be committed and did some act or said some word which was intended to and in fact did incite [or assist] a third party to commit the crime with which the defendant is charged."); *Montgomery v. State*, 291 So. 3d 170, 174-178 (Fla. 2d DCA 2020) (same). Nor can the principals instruction be justified by

acts a defendant committed after the fact. *Id*. at 178.

"Such an error is not harmless when it is capable of misleading the jury in such a way that the defendant's right to a fair trial is prejudiced." *Banks v. State*, 219 So. 3d 19, 32 (Fla. 2017) (quoting *McGriff v. State*, 12 So. 3d 894, 895 (Fla. 1st DCA 2009)).

Law of Principals

In *Peart v. State*, 359 So. 3d 751 (Fla. 4th DCA 2023), this Court explained:

> Case law provides that "[g]iving the ['P]rincipals[']] instruction is error when there is no evidence that the defendant had a conscious intent that the crime be committed and did some act or said some word which was intended to and in fact did incite a third party to commit the crime with which the defendant is charged." *Hanks v. State*, 43 So. 3d 917, 918 (Fla. 2d DCA 2010) (citation omitted).

Id. at 762; *see also Lewis*, 693 So. 2d at 1057 ("[I]t is generally error to instruct the jury on principals where there is no evidence to support an aiding and abetting theory of guilt because the jury may be confused by the instruction.").

The Trial Court Erred in Instructing the Jury On Principals Where There was No Evidence that Hodges Aided and Abetted Another in the Commission of the Homicide

The State charged and tried Hodges as having acted alone in shooting the victim. The State presented no evidence that Hodges aided and abetted another in the shooting. Neither did the defense.

Because there was "no evidence that [Hodges] had a conscious intent that the crime be committed and did some act or said some word which was intended to and in fact did incite a third party to commit the crime," *Peart, supra*, the giving of the principals instruction constituted error because the instruction may have confused the jury. *Lewis, supra*. The erroneous giving of the principals instruction resulted in reversal in *Hanks*, *Masaka*, *Senser*, *Montgomery*, and *McGriff*.

Hodges' case is even more compelling for reversal than in those opinions due to the jury's confusion evident from its two questions. The first question asked: "Can we charge [sic] with first degree without answering yes to [special interrogatory question] number 2?" In other words, the jury wanted to know whether it could find Hodges guilty of first-degree murder with a firearm and at the same time not answer "yes" to whether Hodges discharged a firearm during the commission of the murder.

The jury's second question asked: "Is the firearm referenced in [special interrogatory] number 3 the same firearm in [special interrogatory] number 1?" Special interrogatory number 1 asked whether Hodges possessed "*a* firearm" when the offense was committed. Special interrogatory question number 3 asked whether death was caused to the victim as a result of the discharge of "*the* firearm" during the commission of the offense.

The jurors' questions show they were considering multiple perpetrators with multiple firearms. But again, the prosecution's theory and evidence were that Hodges acted alone. Nor did the defense present any evidence of multiple participants, or any evidence of solicitation, encouragement, or other assistance by Hodges to anyone else's commission of the homicide. Yet, the jury could have believed that Cherish fired the fatal shot but found Hodges guilty as her aider and abettor upon application of the principals instruction. Under the unique circumstances of this case and given the jurors' confusion as evidenced from their questions, the giving of the principals instruction requires reversal of the murder conviction. *Peart, supra*; *Senser, supra*.

The erroneous principals instruction also infected Hodges' conviction for possession of a firearm by a convicted felon by allowing the jury to base guilt on a theory of assisting another in the possession of the murder weapon

in the absence of supporting evidence. Accordingly, the error in giving the instruction requires reversal of the firearm possession conviction as well.

Shavers v. State, 86 So. 3d 1218 (Fla. 2d DCA 2012) is instructive. Shavers was indicted for first-degree premeditated murder while discharging a firearm (count one) and first-degree robbery while discharging a firearm (count two). The State's key witness was David Peterson who testified that he witnessed Shavers rob and shoot the victim with a pistol. According to Peterson, Shavers was the sole robber and shooter.

Shavers' defense was that Labronx Bailey, one of Peterson's childhood friends, was the person who robbed and shot the victim. In support of this defense, Shavers' counsel impeached Peterson's account with prior inconsistent statements and witness testimony. Over Shavers' objection, the trial court gave a principals instruction. For purposes of the sentencing enhancement statute, the verdict form provided options for the jury to indicate whether Shavers discharged a firearm and inflicted death, discharged a firearm, possessed but did not discharge a firearm, or did not possess a firearm during the offenses. The jury found Shavers guilty "as charged" of first-degree murder on count one but found that he did not possess a firearm. On count two, the jury found Shavers guilty of the lesser-included offense of grand theft.

On appeal, Shavers argued that the evidence did not support the principals instruction. The Second District agreed:

> [W]e note that the principals instruction given over Shavers' objection was not supported by the evidence. As we discussed previously, **the State's theory was that Shavers shot the victim in the course of a robbery while witness Peterson looked on. Although there was evidence that Shavers attempted to solicit others to aid and abet his robbing the victim, there was no evidence that anyone agreed to act in concert with Shavers to commit the robbery. Shavers' defense was that Bailey shot the victim while Peterson looked on. However, there was no evidence that, even if Bailey did shoot the victim, Shavers aided or abetted him. Accordingly, the evidence did not support the principals instruction**. *Cf. Lovette v. State*, 654 So.2d 604, 606 (Fla. 2d DCA 1995) (holding that trial court erred in giving a principals instruction "because there was no evidence that Mr. Lovette acted in concert with anyone in committing the theft or the burglary" and "[t]he only evidence of any concerted effort would have been with respect to dealing in stolen property" after the crimes occurred); *McGriff v. State*, 12 So.3d 894, 895 (Fla. 1st DCA 2009) (holding that principals instruction was improper where "there was no evidence offered that Appellant worked in conjunction with anyone else to commit the crimes" even though the testimony established that he was standing in a group when the shooting occurred).
>
> Reversed and remanded.

Id. at 1224 (emphasis added).

The same reversible error occurred here. As in *Shavers*: the principal instruction was given over Hodges' objection; the instruction was not supported by the evidence; the State's theory was that the defendant acted alone in shooting the victim; there was no evidence that the defendant aided

and abetted anyone else; and the State presented no evidence that anyone agreed to act in concert with the defendant.

Here, the jury's questions during deliberations about the special verdict form support reversal just as the special verdict form provided grounds for reversal in *Shavers* in view of the improper principals instruction. In *Shavers*, the jury found the defendant guilty of murder, but also found that Shavers did not possess a firearm, suggesting that another person possessed the firearm and did the actual shooting. *Id*. at 1223. Similarly here, the confusion of the jurors as evidenced by their questions about a different firearm used for the first degree murder charge suggested one or more jurors believed that another person did the actual shooting, but applying the principals instruction, held Hodges equally responsible for the murder and subject to firearm sentencing enhancement.

The Error Was Not Harmless Beyond a Reasonable Doubt

The State bears the burden of proving that the error in giving the principals instruction was harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129, 1138–39 (Fla. 1986).

In *Hanks*, the court held that the evidence did not support a jury instruction on principals and found that giving of the principals instruction could not be deemed harmless based on the following reasoning: "The error

in the giving of the principals instruction was not harmless because the verdict does not reveal whether the jury relied on the principals theory to convict Hanks." *Id*. at 918.

It matters not that the jurors answered the firearms sentencing enhancement interrogatories in the affirmative. The harmlessness test "is not whether a particular jury was actually misled, but instead the inquiry is whether the jury might reasonably have been misled." *Rodriguez v. State*, 172 So. 3d 540, 545 (Fla. 5th DCA 2015) (quoting *McKenzie v. State*, 830 So. 2d 234, 236-37 (Fla. 4th DCA 2002)).

The jury could have easily believed that principal instruction required them to find Hodges possessed and discharged the firearm even if another, such as Cherish, committed those acts, s*ee Freeny v. State*, 621 So. 2d 505 (Fla. 5th DCA 1993) (striking mandatory minimum for actual possession, even though the jury made a specific finding of actual possession, where the defendant might have been convicted as a principal), particularly where, as noted, the jurors' questions strongly suggested such a belief as did the jurors' findings in *Shavers, supra*.

At the very least, reversal is required because the evidence in this case is disputed and the impact the improper instruction on principals had on the jury's consideration of the questions on the verdict form is too difficult to

determine. *See Stickney v. State*, 237 So. 3d 1022, 1026 (Fla. 4th DCA 2018) ("Moreover, given the disputed evidence in this case and the difficulty in determining how the improper instruction might have affected the jury's consideration of appellant's self-defense claim, we cannot conclude that this error was harmless beyond a reasonable doubt.").

II.

THE TRIAL COURT ERRED IN OVERRULING HODGES' OBJECTIONS TO THE PROSECUTOR'S DEMONSTRATIVE EXHIBIT WHICH MISREPRESENTED LOCATION DATA BY DEPICTING HODGES' CELL PHONE AS LOCATED EXACTLY WHERE THE VICTIM'S BODY WAS FOUND AND WHERE THE PREJUDICIAL VALUE OF THE EXHIBIT FAR OUTWEIGHED ANY PROBATIVE VALUE.

Introduction

Over Hodges' pretrial and renewed trial objections, the trial court admitted into evidence a demonstrative State's exhibit which placed Hodges' cell phone at the exact location where the victim and his vehicle were found submerged in a waterway. However, the location data used to create the exhibit could only establish that Hodges' cell phone and the victim's body were within a circle with a radius of 3,000 meters (or 3,280 yards), which circle also included Hodges' residence.

The trial court reversibly erred because the exhibit was substantially misleading on key issues in the case, and the exhibit's prejudicial value was

far outweighed by any probative value.

Background Facts

A pretrial hearing was held on Hodges' motion to exclude a demonstrative exhibit created by prosecution witness Kelly Andriano. Andriano worked for the Florida Department of Law Enforcement as a senior crime intelligence analyst and Cyber Electronic Surveillance Support Team. Andriano was presented by the prosecution to the jury as an expert in examining and working cell site tower coverage, GPS latitutude/longitude coordinates, WiFi locations, and various location issues regarding cell phones. (R. 1657-59).

Andriano prepared a report (R. 1464-1489) which was admitted at trial as State's Exhibit 186 over Hodges' objections. (T. 926; R. 1490). The challenged demonstrative exhibit, which Andriano created (or "mapped") (T. 963), appears in the record on appeal at R. 1479 and page 16 of her report. The color copy of the exhibit is included at the end of this point on appeal. Andriano created the exhibit based on records provided by Google. (R. 1661).

The exhibit depicts a red circle containing three different graphic symbols identified as "Residence Location," "Location of Victim," and "Google Location." Residence Location depicts Hodges' residence in the

lower left portion of the circle. Location of Victim is depicted by a blue square containing a small "i" and appears in the center of the red circle. Google Location is a square with a yellow pin drop containing four bars and representing Hodges' cell phone. (R. 1479). The date and time of the location is noted as May 16, 2019, at 11:12 p.m. (R. 1479, 1687-88). In the color copy of the exhibit appearing at the end of this argument, the word "cell" is added in brackets just after that word is cut off.

In creating the exhibit, Andriano overlapped Hodges' cell phone with the Location of Victim so that the two appear in the same place at the center of the circle. (R. 1630, 1639-40). However, Andriano acknowledged that Hodges' cell phone could have been *anywhere* within the red circle (R. 1669) which had a radius of 3,000 meters. (R. 1693; T. 938). Accordingly, Andriano conceded that she could not state that Hodges' cell phone was any more likely to be at the center of the circle, where Andriano placed it, than at the perimeter of the circle, and likewise acknowledged that Hodges' cell phone was just as likely in his house as where Andriano placed it where the victim was found. (R. 1687-88; T. 1668-69). Moreover, and as the trial court acknowledged (T. 883), there was only a 68% chance that Hodges' cell phone was even within the circle at all.

Hodges argued that the exhibit was impermissibly misleading by

depicting Hodges' cell phone immediately next to the body (R. 1642-43) and that the exhibit's prejudice outweighed any probative value. (R. 1713-14). The prosecutor argued that Hodges' objection went to the weight rather than the admissibility of the exhibit. (R. 1705-06).

The trial court denied Hodges' motion to exclude, remarking that the issue was one of weight rather than admissibility. (R. 1711, 1717). The challenged demonstrative exhibit was admitted at trial by the trial judge over Hodges' objections (R. 926) and along with the other trial exhibits, sent to the jury upon commencement of its deliberations. (R. 1134).

Standard of Review and Applicable Law

The use of a demonstrative aid at trial is reviewed for an abuse of discretion. *Lowe v. State*, 259 So. 3d 23, 29 (Fla. 2018). "The purpose of a demonstrative exhibit is to aid the jury's understanding." *Johnson v. State*, 351 So. 2d 252, 254 (Fla. 1st DCA 2022). "Demonstrative exhibits can be used when they are relevant and provide a reasonably accurate reproduction of the objects and incident involved." *Id*. Although a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion, that 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." *Bankston v. State*, 339 So. 3d 252, 254 (Fla. 4th DCA 2021) (internal

quotation marks and citation omitted).

Application of the Law to the Facts

The challenged exhibit was not a reasonably accurate reproduction of the incident involved. Rather, the exhibit was entirely misleading and highly prejudicial. There was no eyewitness to the entry into the waterway of the victim and his vehicle. In an apparent attempt to provide "evidence" to the jury to make up for this void in the State's case, the prosecutor offered Andriano as an expert in cell phone location data along with the challenged diagram wherein she placed Hodges' cell phone at the same location as the submerged victim and vehicle.

Hodges' objections to the exhibit were well taken and should have been sustained because the data provided to Andriano did not support her creative diagram. Rather, the data only established that on the day and date in question, Hodges' residence, his cell phone, and the victim's body and vehicle were located within a circle with a radius of 3,000 meters. Consequently, Hodges' cell phone was just as likely in his residence or anywhere on the perimeter of the circle as where Andriano placed it. But the exhibit, with its misleading placement of the cell phone practically on top of the victim, was allowed to go to the jury. The exhibit carried even more weight because the prosecutor presented Andriano as an expert in location data

and a law enforcement employee.

The significance of the admission of the exhibit to the determination of Hodges' guilt was not lost on the prosecutor. In his closing argument to the jury, quoted below, the prosecutor relied on the exhibit to fill in a gap in the State's theory of how events unfolded. The prosecutor's reference to "video" in the quoted passage is to recorded video surveillance from Hodges' home security camera system. The relevant part of the prosecutor's closing argument chronology of events as proposed to the jury was the following:

> [Prosecutor]: At 10:50 he [Hodges]carries a covered rifle to the backyard and returns with an ammo box. Defendant leaves to dump the body. Let's look at that timeline.
>
> You see the video at 10:59, the truck is backing out from beside the house out of view and you see it go down the driveway.
>
> At 11:06 he gets on that, what we all know now is the Wi-fi at the Circle-K right there at Cemetery Road to your right, the left would be the entrance to Basswood.
>
> ***11:12 Google places him right near the body dump site.***

(T. 1064) (emphasis added). The prosecutor's 11:12 p.m. "Google" argument linking Hodges' cell phone to the body and vehicle is a direct reference to Andriano's exhibit. Thus, the challenged exhibit played a key role in the prosecutor's theory of Hodges' guilt.

This Court's opinion in *Williams v. State*, 300 So. 3d 202 (Fla. 4th DCA 2020) is instructive. In *Williams*, this Court reversed the defendant's

conviction of attempted first-degree murder and remanded for a new trial based on the prosecutor's improper use of demonstrative aids consisting of a hooded sweatshirt and glasses. This Court reasoned that the sweatshirt and glasses did not provide the jury with a relevant comparison to the shooter as it appeared in a video. Rather, the demonstrative aids only served to mislead the jury. Additionally, this Court ordered a new trial despite the trial court's instruction to the jury that the demonstrative aids were not evidence and were not the same as those used in the crime, explaining that by permitting the prosecutor to use the demonstrative aids, the trial court ran the risk of misleading the jury on identification which was a key issue in the case.

Here, the trial court did not even give such an instruction. But even if it had, reversal would still be warranted based on the same reasoning as *Williams*, namely, by allowing the prosecutor to submit the exhibit to the jury and rely on it for conviction in closing argument, the trial court ran the same prohibited risk as in *Williams* of misleading the jury on key issues in the case. In such cases, the State cannot meet its burden of proving the error was harmless beyond a reasonable doubt. *State v. DiGiulio*, *supra*.

Demonstrative evidence, like any evidence offered at trial, should be excluded "if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, or misleading the jury." Section 90.403, Fla. Stat. ("Exclusion on grounds of prejudice or confusion.—Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."); *see also Pierce v. State*, 718 So. 2d 806, 809 (Fla. 4th DCA 1997) (noting that to admit a demonstrative exhibit illustrating an expert's opinion, "the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value."); *see also Medina v. State*, 748 So. 2d 360, 361 (Fla. 4th DCA 2000) (" ' Demonstrative aids and exhibits may be used during trial as an aid to the jury understanding a material fact or issue. The demonstrative evidence must be an accurate and reasonable reproduction of the object involved. The evidence is subject to a section 90.403 balancing. Usually, demonstrative evidence is not admitted as an exhibit and taken to the jury room. (footnotes omitted).' " (quoting Ehrhardt, *Florida Evidence* § 401.1 (1999 Ed.)).

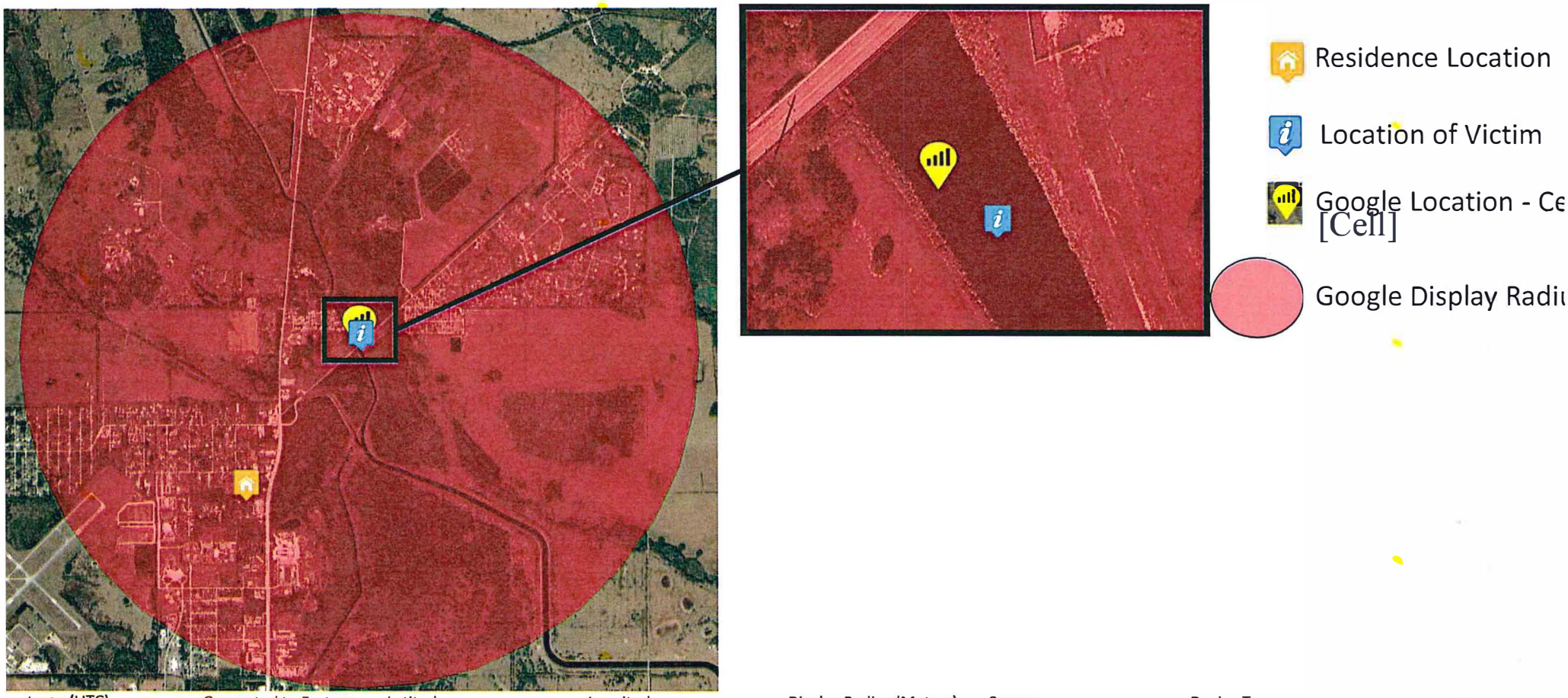
As noted, Hodges also objected to the exhibit because its prejudicial value outweighed any probative value. The trial judge erroneously remarked that Hodges' objections went to the weight of the exhibit rather than its admissibility. But the trial court was mistaken, as the above-cited statutory

and decisional authorities make clear.

The undisputed underlying data of the exhibit was flatly contradicted by what it purported to establish. Hodges' objections were therefore erroneously overruled. *See also Song v. Jenkins*, No. 5D23-24, 2023 WL 2717691 at *3-4 (Fla. 5th DCA March 31, 2023) (trial court reversibly erred in overruling objection to introduction of diagram purporting to show the path of vehicles leading to crash at issue where diagram was not to scale and demonstrably inaccurate in its depiction of events when compared to undisputed evidence established by a dash cam video).

Hodges is entitled to reversal and remand for a new trial not only on the murder charge, but also on the charge of tampering with evidence because, as noted in Point V, the prosecutor argued that tampering included the act of dumping the body and vehicle in the canal, and the firearm possession charge because the obvious implication from the exhibit was that Hodges was the murderer.

jimbohodges2004@gmail.com – Google Locations 05/16/19 23:12 (EDT)



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III.

HODGES WAS DENIED HIS FLORIDA AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE PROSECUTOR VIOLATED HODGES' ATTORNEY-CLIENT PRIVILEGE BY LISTENING TO RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN HODGES AND HIS ATTORNEY DISCUSSING PLEA NEGOTIATIONS AND TRIAL STRATEGY, AND WHERE THE TRIAL JUDGE DENIED HODGES' MOTION FOR DISQUALIFICATION OF THE PROSECUTOR.

Background Facts

On October 10, 2022, immediately prior to the commencement of jury selection, Hodges' trial counsel, Robert Watson, orally moved for the disqualification of the Office of the State Attorney and requested a hearing. Mr. Watson explained that while he was out of Florida the previous week, the prosecutor conveyed a new plea offer and imposed a one-day deadline for Hodges to accept or reject. Hodges and Mr. Watson discussed the plea negotiations along with defense strategies in telephone calls. At the time, Hodges was incarcerated in the Okeechobee County Jail. Just prior to the commencement of trial, Mr. Watson was told by the prosecutor that he listened to recordings of the calls. (T. 14-20).

The prosecutor acknowledged that he listened to the telephone calls in their entirety, but opposed his disqualification contending that because the calls were recorded, there was no attorney-client privilege. (T. 24-25).

The trial judge scheduled an evidentiary hearing to commence after jury selection but before the jury was sworn. At the commencement of the hearing held October 11, 2022, the trial judge informed the parties that he had listened to the recordings of the telephone calls between defense counsel and Hodges as the parties requested of the judge prior to the hearing. (T. 322-23). The discs containing the recordings were marked as a court exhibit and later included in the record on appeal by the clerk of the lower tribunal. (T. 326; R. 47: "Court Exhibit #1- Silver DVD-R Labeled 01/05/2023 Jail Calls Enclosed W/In Yellow CD Case").

Mr. Watson moved that the discs be placed under seal so that in the event of an adverse ruling, appeal and reversal, the recordings would not be made public and available to other potential new prosecutors. The prosecutor objected, arguing that the trial court should reserve ruling because the State's position was that the recordings were public record. (T. 324-25). The trial court reserved ruling and the evidentiary hearing commenced. (T. 326).

Mr. Watson testified that years earlier in the case (which was filed in 2019), there was a plea offer. On Tuesday, October 4, 2022, a new plea offer with a reduced sentence was offered by the prosecutor who set a deadline of Wednesday, October 5, 2022, at the close of business, for acceptance or

rejection. At the time, the prosecutor knew Mr. Watson was out of the State. To discuss the matter, Hodges called Mr. Watson's cell phone directly on what is known as the HomeWav app. (T. 326-27, 329). The HomeWav telephone system was set up in July 2022 so that inmates and their counsel could conduct attorney-client privileged calls. (T. 338).

When Hodges placed his first call to discuss the plea offer through HomeWav, the app failed and would not allow him to answer Hodges' calls. Hodges kept trying. Mr. Watson repeatedly reset his password before, during and after the attempted calls, but Hodges' calls still would not go through. (T. 332). Mr. Watson introduced into evidence his e-mail communications with HomeWav showing: he established and paid for his account in September 2022 (R. 1532); his account was approved in October 2022 (R. 1533); and he attempted several times to reset his password on October 4, 2022 when the app refused to allow him to answer Hodges' calls (R. 1534-38).

The first and most important of the recorded calls appears on the discs admitted as Court Exhibit 1 with the file name Voice_41107204. The call to Mr. Watson's law office is twelve minutes and forty-seven minutes in length. At the outset of the call, Hodges explained to Lori Rhoden, counsel's legal assistant who answered the call, how he was trying to reach counsel directly on the HomeWav app but could not. Rhoden immediately connected Hodges

to Mr. Watson who explained to Hodges that the app malfunctioned. At that point, 40 seconds into the call and for the balance of the conversation, Hodges and Watson engaged in a detailed discussion of the pending plea bargain offer, the prosecutor's imminent deadline to accept or reject, the prosecution's evidence, and the trial strategy of the defense. (*Id*.; T. 327-28). Eventually, Hodges rejected the plea offer and the case was set for trial by jury.

Prior to trial, the prosecutor informed Mr. Watson only that there were jail calls from Hodges and that they were recorded. The prosecutor did not volunteer that he had listened to the calls. Mr. Watson did not learn until October 10, 2022, the day of jury selection, that the prosecutor listened to the calls, whereupon Mr. Watson moved for disqualification. (T. 331).

Rhoden testified that when she received the calls from Hodges, she patched Hodges through to Mr. Watson. At the outset of the calls, she heard a recorded message stating that the calls were on a recorded line. (T. 335-36).

Sarah Davis, the canteen clerk and manager of the inmate phone and tablet system for the Okeechobee County Sheriff's Office, testified that a new telephone system went live at the jail on July 5, 2022. (T. 338). The new system was supposed to play a recorded message the inmate would hear

upon placing a call, and a different recorded message for the recipient. (T. 337-38). However, neither message appears on the recordings of the calls at issue. (T. 338).

Davis obtained from the telephone provider recorded samples of the messages which were played in court. The sample inmate introductory message stated: “This call may be recorded and monitored.” (T. 339). The sample message for the recipient of the call stated: “You have a call from Adams inmate one, an inmate of Adams County. This call is being monitored and recorded. If you are an attorney or require this call to be confidential, please hang up now and contact Adams County for account approval. Press one to accept.” (Court Exhibit 1, “Visitor Message”; T. 340-41). Because Hodges was housed in Okeechobee County, Davis stated that the message for the recipient of Hodges’ call should have stated “Okeechobee County” rather than “Adams County.” (T. 341).

Davis acknowledged that there was no written or audio evidence or any other record to prove that an introductory recorded message for the inmate was attached to any of the calls placed by Hodges to Mr. Watson to advise the inmate that the call was recorded. (T. 342).

The trial court denied the motion for disqualification, finding that even though it was necessary for Mr. Watson to communicate with Hodges given

the new plea offer, the jail calls would not be deemed confidential. The judge also noted there was a lack of evidence of specific or actual prejudice, and that from discovery, the attorneys would understand the parties' theories. (T. 345-46). The judge also denied Mr. Watson's motion to seal the recordings, finding that they were "public records." (T. 346).

Standard of Review

This Court's review of a claim of attorney-client privilege is de novo. *United Servs. Auto. Ass'n v. Roth*, 859 So. 2d 1270, 1270 (Fla. 4th DCA 2003).

Attorney-Client Privilege

In *Nelson v. State*, 347 So. 3d 86, 88-89 (Fla. 3d DCA 2021), the Third District explained the following relevant long-standing principles governing the attorney-client privilege:

> Codified in section 90.502, Florida Statutes (2021), **"[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.**" *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). **"It is therefore not only an interest long recognized by society but also one traditionally deemed worthy of maximum legal protection."** ***Am. Tobacco Co. v. State*, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997)** (quoting *Haines v. Liggett Grp. Inc*., 975 F.2d 81, 90 (3d Cir. 1992)). **The privilege developed to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."** *Upjohn Co*., 449 U.S. at 389, 101 S.Ct. 677. To that end, the attorney must "know all that

relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

"The burden of establishing the attorney-client privilege rests on the party claiming it." *Southern Bell Tel.& Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994). Here, **the State concedes the communications are protected by attorney-client privilege, but contends the privilege was waived**. Attorney-client privilege, as with any privilege, may be waived expressly or, on occasion, impliedly. Regardless of whether express or implied, **the burden of establishing a prima facie case of waiver rests upon the party asserting it**. *See MapleWood Partners, L.P. v. Indian Harbor Ins. Co*., 295 F.R.D. 550, 584 (S.D. Fla. 2013); *see also Am. Tobacco Co*., 697 So. 2d at 1254.

In the instant case, the State asserted that Saiz waived the privilege by disclosing the protected communication to the prosecutor. **Attorney-client privilege belongs solely to the client, not the attorney**. *Neu v. Miami Herald Publ'g. Co*., 462 So. 2d 821, 825 (Fla. 1985). Hence, the attorney may not terminate the privilege unilaterally. *Owners Ins. Co. v. Armour*, 303 So. 3d 263, 268 (Fla. 2d DCA 2020). In accord with these principles, **waiver must be demonstrated by evidence that the client, by conduct or words, relinquished the right to invoke confidentiality with respect to the information in question, and thus, consented to disclosure**. *See Savino v. Luciano*, 92 So. 2d 817, 819 (Fla. 1957); *see also* § 90.507, Fla. Stat. (2021).

Nelson, 347 So. 3d at 88-89 (emphasis added); *see also RC/PB, Inc. v. Ritz-Carlton Hotel Co., LLC*, 132 So. 3d 325 (Fla. 4th DCA 2014).

Section 90.502(1)(c), Florida Statutes, provides:

> A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:
>
> 1. Those to whom disclosure is in furtherance of the

rendition of legal services to the client.

2. Those reasonably necessary for the transmission of the communication.

There is no factual dispute that Hodges and Mr. Watson discussed legal defense strategy as attorney and client. Additionally, prior to trial, the prosecutor informed the trial court of Hodges' theory of defense (T. 353) which undoubtedly was aided by having listened to the attorney-client telephone calls. Because the recordings are included in the appellate record, this Court is in the same position to review the recordings as the trial court. *See State v. Monroe*, 280 So. 3d 499, 503 (Fla. 2d DCA 2019). The recordings were not transcribed.

The State Failed to Meet Its Burden of Proving that Hodges Waived the Attorney-Client Privilege

At the evidentiary hearing held on the motion for disqualification, the State did not dispute that: the nature of the recorded conversations between Hodges and defense counsel that were listened to by the prosecutor were of the type protected by the attorney-client privilege; Hodges attempted to use the HomeWav system to communicate with counsel but the system did not function; Hodges was forced to use another telephone line at the jail to communicate with counsel about the pending plea offer within the one-day deadline imposed by the prosecutor; and the prosecutor knew defense

counsel was out of town when the plea offer was conveyed with the one-day deadline imposed by the prosecutor.

The prosecutor opposed the motion to disqualify solely on the contention that Hodges waived the attorney-client privilege by using the recorded jail line, citing *McWatters v. State*, 36 So. 3d 613 (Fla. 2010). The trial judge agreed. However, *McWatters* is distinguishable.

In *McWatters*, the record established that "[b]efore every call, McWatters was warned that his calls were subject to monitoring and recording." *Id*. at 636. Additionally, the trial court found, and the Supreme Court agreed, that there was no evidence that the substance of the calls provided any benefit to the prosecution. Upon those facts, the Supreme Court of Florida found no error in the trial court's denial of the defendant's motion to disqualify the State Attorney's Office for having listened to phone calls between the defendant and his counsel while the defendant was an inmate at the Martin County Jail.

Here, the recordings of the calls admitted into evidence contain no warning to alert Hodges that his conversations with counsel were being recorded. The State's evidence on the issue was simply testimony as to what the telephone system where Hodges was detained in Okeechobee was supposed to play, along with a sample recording from the telephone system

vendor that should play for an inmate such as Hodges.

As the party asserting waiver of the attorney-client privilege, the State bore the burden of established such waiver by presenting evidence sufficient to prove that Hodges relinquished his right to invoke confidentiality with respect to the information in question, and thus, consented to disclosure. *See Nelson, supra* (cases collected). The State's evidence fell far short of the mark of establishing waiver pursuant to *McWatters*.

McWatters is also distinguishable because in that case, there was no evidence that the substance of the calls provided any benefit to the prosecutor, whereas here, Hodges and his counsel discussed their strategy for the upcoming jury trial in detail. Disqualification of a state attorney is appropriate to prevent the defendant from suffering prejudice that he otherwise would not bear. *Farina v. State*, 680 So. 2d 392, 395 (Fla. 1996); *Meggs v. McClure*, 538 So. 2d 518, 519 (Fla. 1st DCA 1989). However, that "specific or actual prejudice will not be required where the appearance of impropriety is strong." *Huggins v. State*, 889 So. 2d 743, 768 n. 13 (Fla. 2004); s*ee also State v. Bain*, 292 Neb. 398, 404, 417 (Neb. 2016) (observing that "[f]or the majority of courts, a defendant's confidential trial strategy in the possession of a prosecutor or investigating officer is presumptively prejudicial" and noting the defendant's argument that it would be impossible

for a court to determine whether prosecutors had planned their strategies, gathered evidence, and prepped witnesses from their knowledge of defense strategies). In this case, the prosecutor offered no evidence to rebut the presumption.

The record fails to prove that Hodges was warned the calls were recorded. The record establishes benefits gained by the prosecutor in learning the trial strategy of the defense just prior to trial by listening to attorney-client calls. Because the record fails to establish that Hodges voluntarily waived his attorney-client privilege, the trial court reversibly erred in denying the motion for disqualification based on *McWatters*. The State gained an unfair competitive advantage sufficient to deny Hodges a fair trial. The due process right to a fair trial in a criminal trial assumes a level playing field which Hodges was denied.

Even if the State had proved Hodges was warned or should have known that his calls were subject to recording, the unique undisputed facts of this case nevertheless militate against a finding that Hodges waived his attorney-client privilege.

Contrary to the prosecutor's argument with which the trial judge agreed, there is no "automatic" privilege waiver when an inmate and his counsel conduct an attorney-client call on a line the client knows is recorded. Rather,

the determination whether a defendant waives his attorney-client privilege by placing such a call to his counsel depends on the circumstances surrounding the conversation, as both this Court and the trial judge Court recognized in *State v. Martinez*, 4 So. 3d 712 (Fla. 4th DCA 2009).

In *Martinez*, while at trial, the defendant's counsel learned that a prosecutor in the case listened to two telephone conversations between counsel and Martinez that were recorded on the automated system at the county jail. During the calls, counsel discussed several subjects including: "the testimony of several witnesses who had already been called at trial; witnesses who could be called, some of whom might be helpful to the defense; counsel's perceptions of how the trial was going; counsel's strategy for dealing with certain witnesses; counsel's plan for closing argument; and other issues regarding trial planning." *Id*. at 713.

Martinez' counsel moved to dismiss the charges for prosecutorial misconduct. Following an evidentiary hearing, the trial court found "no waiver of the attorney-client privilege based on the circumstances in this case." *Id*. Although the trial court denied the motion to dismiss the charges, the trial court ordered the lesser sanction of disqualification of the State Attorney's Office. The state petitioned this Court for certiorari review.

This Court dismissed the State's petition finding that the trial court did

not depart from the essential requirements of law in ruling there was no waiver of the attorney-client privilege based on the circumstances of the case and that the lack of an express finding of actual prejudice was not a violation of a clearly established principle of law resulting in a miscarriage of justice.

Although the nature of the circumstances upon which the trial court based its finding of no waiver of the privilege is not disclosed in this Court's opinion, the aspect of *Martinez* relevant to Hodges' case is the finding by the trial court in *Martinez* that there can be circumstances militating against finding a waiver of the attorney-client privilege even where an inmate calls his counsel on a recorded county jail telephone, and this Court's holding that such a finding did not constitute a departure from the essential requirements of law.

In the case at bar, Hodges' attempts to reach his counsel through the app providing for attorney-client calls showed his clear intent to maintain the privilege and not to disclose the conversations to the prosecution. But due to exigent circumstances, Hodges was required to use the only other available means of discussing the new plea agreement and meeting the prosecutor's one-day deadline for acceptance or rejection.

Communications between a client and lawyer are confidential if they are "not intended to be disclosed to third persons other than...[t]hose to

whom disclosure is in furtherance of the rendition of legal services to the client" or "[t]hose reasonably necessary for the transmission of the communication." *Id*. § 90.502(1)(c); *Cunningham v. Appel,* 831 So. 2d 214, 215 (Fla. 5th DCA 2002) (interpreting Section 90.502 and explaining that "[a] communication between an attorney and client is deemed confidential if it is not intended to be disclosed to third persons, other than those to whom disclosure is necessary in furtherance of rendition of legal services").

Here, both elements for confidentiality are met: first, nothing in the record establishes that Hodges intended his conversations with counsel to be disclosed to the prosecutor; second, use of the recorded line was "reasonably necessary for the transmission of the communication" because Hodges had no choice given that he attempted to use the HomeWav app but it would not function. "In Florida, waiver of the attorney-client privilege is not favored" and is not established where "the record does not show a clear, intentional waiver of the privilege." *Markel Am. Ins. v. Baker*, 152 So. 3d 86, 92 (Fla. 5th DCA 2014). Section 90.507 codifies this precept by providing that "*voluntary* disclosure" by the holder of the privilege will waive the privilege. But here, the record shows that Hodges' use of the recorded line was not voluntary. Rather, he had no choice but to use the recorded line.

Consequently, under the unique facts of this case, Hodges did not waive the attorney-client privilege.

Relief Requested

Hodges requests a new trial on all charges and remand with directions that the trial court: disqualify the Office of the State Attorney that prosecuted the case; and fashion whatever remedies are available to prevent or minimize the new prosecution team's use of information protected by the attorney-client privilege.

IV.

WHERE THE PROSECUTOR MISREPRESENTED TO THE JURORS THAT IF THEY FOUND HODGES GUILTY OF FIRST-DEGREE MURDER, THE APPROPRIATE SENTENCE WOULD BE DETERMINED BY THE JUDGE, WHEREAS IN TRUTH THE TRIAL JUDGE COULD ONLY IMPOSE A MANDATORY SENTENCE OF LIFE IMPRISONMENT, THE TRIAL COURT ERRED IN REFUSING DEFENSE COUNSEL'S REQUEST TO CORRECT THE PROSECUTOR'S MISREPRESENTATION.

Background Facts

During jury selection and in the presence of each of the jurors who ultimately served on Hodges' jury, the prosecutor stated that "to ease your mind" the State was not seeking the death penalty in its first-degree murder case against Hodges and that the judge would determine the sentence if the jury returned a guilty verdict. The relevant transcript excerpt follows:

PROSECUTOR: I'm gonna cover one other thing and I'm gonna start asking you some questions. Ah, **when people hear first degree murder, Florida has the death penalty. Okay, the death penalty is not sought, we don't seek the death penalty in all first-degree murder cases, it's only in a limited number and type of cases. So, to, *to ease your mind* of that point the State of Florida, we are not seeking the death penalty in this case. So, the death penalty is not an option.**

Um, **if at the end and I'll discuss this more, but at the end you return a verdict of guilty for first degree murder or there'll be certain lesser charges, then there would be a separate hearing and the Judge would hear evidence again from both the sides and then *the Judge would determine the appropriate sentence under the law, but it would not be the death penalty.*** All right, is everyone okay with that? Anyone have any issues with that? Okay.

MR. WATSON [Counsel for Hodges]: May we approach, Judge? (Bench conference).

MR. WATSON: This isn't a point in the trial where I would normally want to put something on the record.

THE COURT: Okay.

MR. WATSON: But the only sentence the Court can impose is life. We used to get a penalty instruction back in the day when I first started practicing, so the jury was told what the potential penalties were --

THE COURT: Right.

MR. WATSON: -- but it's misleading for them to think that you would have some discretion in what the sentence would be and I **think that opens the door to me being able to say *that if he's convicted of first degree the only sentence is life* at**

some point during closing I think, I think it opens the door to that cause --

THE COURT: Um hum.

MR. WATSON: -- *he had said that there's gonna be a hearing and the Judge is gonna decide, that's not true, the Legislature have decided you have no discretion* --

THE COURT: Um hum.

MR. WATSON: If there's a conviction, so I'm just putting that on the record -

THE COURT: Um hum.

MR. WATSON: I, I wouldn't, I probably wanna say that in closing, but we'll.

MR. ALBRIGHT: And I disagree, the case law is clear, it's inappropriate to tell the jury that and, ah, my question was worded or my statement was worded very specifically, depending on what verdict they find --

THE COURT: Um hum.

MR. ALBRIGHT: -- guilty as charged or guilty of lessers --

THE COURT: Or lessers.

MR. ALBRIGHT: -- you would determine the appropriate sentence under the law.

THE COURT: Right, well, I agree.

MR. WATSON: Okay.

THE COURT: So, yes sir.

MR. WATSON: The record, the record's there, I mean.

THE COURT: Yeah, okay.

MR. WATSON: Thank you.
(End bench conference).

(T. 107-108) (emphasis added).

Applicable Law

Prior to its amendment in 1984, Fla. R. Crim. P. 3.390 provided that upon the request of the State or the defendant, the trial judge should include the maximum and minimum sentences for the crimes charged in its jury instructions. ." *Broughton v. State*, 790 So. 2d 1118, 1119 at n.1 (Fla. 2d DCA 2001). Rule 3.390(a) as amended now provides: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial."

As explained by this Court in *Legette v. State*, 718 So.2d 878, 881 (Fla. 4th DCA 1998), the policy behind the rule's amendment was to ensure "that the jury should decide a case in accordance with the law and the evidence and disregard the consequences of its verdict." "[T]he penalty is irrelevant to

the jury's sole responsibility of determining a defendant's guilt or innocence." *Id.* (quoting *In Re Amendment to Rules of Criminal Procedure 3.390(a),* 416 So. 2d 1126, 1126-27 (Fla. 1982) (Alderman, J., dissenting)). Accordingly, "except in death penalty case, it is improper to inform the jury of the possible penalties for the defendant's crime." *Brandon v. State*, 727 So. 2d 1010, 1010 (Fla. 5th DCA1999); *see also Knight v. State*, 919 So. 2d 628 (Fla. 3d DCA 2006) (holding trial court's comments during voir dire in prosecution for burglary and theft that case did not involve "life in prison or anywhere near life in prison" violated rule 3.390).

The prohibition against injecting sentencing matters into jury deliberations applies not only to the trial judge, but also to the prosecutor and defense counsel. *Legette*, 718 So. 2d at 880.

Standard of Review

"Where the [prosecutorial] comments were improper and the defense objected, but the trial court erroneously overruled defense counsel's objection, [courts] apply the harmless error standard of review." *Cardona v. State*, 185 So. 3d 514, 520 (Fla. 2016) (citing *Snelgrove v. State*, 921 So. 2d 560, 568 (Fla. 2005); *Doorbal v. State*, 837 So. 2d 940, 956-57 (Fla. 2003)). This standard "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not

contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d at 1135 (citation omitted). "The harmless error rule is 'concerned with the due process right to a fair trial' and 'preserves the accused's constitutional right to a fair trial.' " *Johnson v. State*, 53 So. 3d 1003, 1007 (Fla. 2011) (quoting *DiGuilio*, 491 So. 2d at 1135-36).

Application of the Law to the Facts

The prosecutor improperly injected sentencing considerations into how the jurors should decide the case against Hodges, commencing with the prosecutor's statement to the jury that "to ease your mind" the State was not seeking the death penalty in its first-degree murder case against Hodges, and adding that if the jury returned a "verdict of guilty for first degree murder or there'll be certain lesser charges, then there would be a separate hearing and the Judge would hear evidence again from both the sides and then the Judge would determine the appropriate sentence under the law, but it would not be the death penalty."

The prosecutor's comments not only violated the prohibition against injecting sentencing considerations into the jury's decision-making, the prosecutor *misrepresented* that the judge would have the discretion to impose the "appropriate sentence" if the jury found Hodges guilty of first-

degree murder whereas in truth, the sentence would be mandatory life imprisonment as required by Section 775.082(1), Fla. Stat. By expressly "easing the minds of the jurors" the prosecutor improperly made it easier for the jurors to find Hodges guilty of murder as charged, which they did, based on sentencing considerations.

Moreover, as explained in the previous point on appeal, the jurors' questions during deliberations showed their concern over whether the defendant could be found vicariously guilty, thereby rendering the prosecutor's improper comments even more inappropriately prejudicial to Hodges by misleading the jurors into believing that the judge could take their concern into consideration when sentencing Hodges for first-degree murder. Had the jurors been told the truth, they would have been more likely to return a verdict of not guilty, or guilty of a lesser included offense. But with the misrepresentation, the prosecutor made it easier, as his express motive for the remark admitted, for the jury to find Hodges guilty of first-degree murder, thinking that the judge would consider mitigating circumstances, such as the guilt of Cherish.

In denying defense counsel's request to correct the prosecutor's misrepresentation, the trial judge stated his agreement with the prosecutor's argument that he made no misrepresentation to the jurors. Rather, the

prosecutor contended, he told the jury that the sentence would "depend[] on what verdict they find … guilty as charged or guilty of lessers … you would determine the appropriate sentence under the law." But as the record shows, that is not what the prosecutor said.

And even if the prosecutor's "interpretation" of his own statements about sentencing was possible, one or more jurors could have reached the different but reasonable interpretation that the trial judge had sentencing discretion in the event of a verdict of guilt as to first-degree murder, which results in the prohibited injection of sentencing consequences into the jury's deliberations.

The prosecution cannot meet its burden, as the beneficiary of the error, to prove beyond a reasonable doubt that its misrepresentation did not contribute to the first-degree murder guilty verdict or, alternatively stated, prove there is no reasonable possibility that the error contributed to Hodges' conviction. *DiGuilio*, 491 So. 2d at 1135; *see also Owens v. State*, 261 So. 3d 585 (Fla. 4th DCA 2018) (holding that the prosecutor's prejudicial misstatement of the law could not be deemed harmless under *DiGuilio*); *Proffitt v. State*, 978 So. 2d 228 (Fla. 4th DCA 2008) (same).

Reversal for a new trial on all charges is warranted upon application of the *DiGuilio* standard, which preserves Hodges' constitutional right to a fair trial. *Johnson*, 53 So. 3d at 1007.

V.

HODGES' CONVICTION FOR TAMPERING WITH EVIDENCE IS FUNDAMENTALLY ERRONEOUS BECAUSE THE FACTS PROVEN BY THE STATE DO NOT CONSTITUTE THE OFFENSE AS A MATTER OF LAW.

Count 3 of the indictment charged Hodges with tampering with evidence in violation of Section 918.13(1), Fla. Stat. (R. 98) (emphasis supplied). In his closing argument to the jury, the prosecutor contended that the following acts committed by Hodges constituted tampering:

> Now, we also have a separate charge called tampering with evidence and I mean there's so much here you can pick anyone you want. He turns off the video system. He obviously got rid of the firearms afterwards. He's out there searching his driveway with a flashlight in the middle of the night. He's picking up what we assume are bullet casings in his driveway. He's out raking the yards and obviously he dumps the Infinit[i] and the body.

(T. 1077). The jury found Hodges guilty of tampering as charged.

In *Costanzo v. State*, 152 So. 3d 737 (Fla. 4th DCA 2014), this Court explained:

> Section 918.13, Florida Statutes (2013), provides in pertinent part:
>
> > (1) No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted

> prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:
>
> (a) Alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation....
>
> **To establish a violation of the statute, "the State must prove a defendant 'had knowledge of an impending investigation and destroyed evidence in order to impair its availability for the investigation**.' " *State v. Major*, 30 So. 3d 608, 609 (Fla. 4th DCA 2010) (quoting *C.K. v. State*, 753 So. 2d 617, 618 (Fla. 4th DCA 2000)).

Costanzo, 152 So. 3d at 738 (emphasis added); *see also A.F. v. State*, 850 So. 2d 667, 668 (Fla. 4th DCA 2003) ("To prove this offense, the state must show that the defendant had knowledge of the impending investigation and destroyed or concealed evidence, impairing its availability for the investigation.").

Additionally, the State must prove that the defendant had the "necessary specific intent to tamper with or conceal the evidence." *Id*. at 739. Moreover, merely removing evidence from a crime scene, without more, cannot support a conviction for tampering with evidence. *See Pender v. State*, No. 5D23-53, 2023 WL 3903239 (Fla. 5th DCA June 9, 2023).

Here, the record is completely devoid of the essential element of knowledge. Hodges was not shown to have committed any of the acts

knowing that a trial, proceeding, or investigation was pending or about to be instituted. The acts complained of took place before Hodges gained any such knowledge. Not until Hodges' interrogation, when Detective Van Deman advised him of the discovery of the homicide and ensuing investigation, did Hodges have the required knowledge.

Although Hodges did not make this argument in his motion for judgment of acquittal (T. 1157-58), the issue is nevertheless reviewable as constituting fundamental error because the prosecution's evidence failed to establish that the charged crime, tampering with evidence, took place. See *Graham v. State*, 338 So. 3d 1, 3 (Fla. 4th DCA 2022). The standard of review is de novo. *Nabeack v. State,* No. 4D22-2480, 2023 WL 4216424 at *1 (Fla. 4th DCA June 28, 2023) ("We have de novo review of a fundamental error claim"). Here, the State's evidence is entirely devoid of the required knowledge and specific intent. Nor can the acts of removal of evidence from a crime scene, without more, satisfy the requirements of the statute.

VI.

THE CUMULATIVE EFFECT OF THE ERRORS AT HODGES' TRIAL DEPRIVED HIM OF A FAIR TRIAL.

The Florida Supreme Court has explained that

> [w]here multiple errors are discovered, it is appropriate to review the cumulative effect of those

> errors because even with competent, substantial evidence to support a verdict, "and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation."

Smith v. State, 320 So. 3d 20, 33 (Fla. 2021) (quoting *McDuffie v. State*, 970 So. 2d 312, 328 (Fla. 2007)).

In such a case, it matters not that there was competent substantial evidence to support the verdict. *See Wicklow v. State*, 43 So. 3d 85 (Fla. 4th DCA 2010). Rather, if there is a reasonable possibility that the combined effect of the errors improperly contributed to the conviction, reversal and remand for a new trial is required. *Id*.

Hodges requests a new trial on all charges because a reasonable possibility exists that the several errors committed at his trial and raised in this brief as grounds for reversal contributed to his convictions and thereby denied him a fair trial.

CONCLUSION

For each of the points raised in this brief, Hodges requests the following relief: Point I, reversal and remand for a new trial on the charges of murder and possession of a firearm; Points II, III, IV, and VI, reversal and remand for a new trial on all charges; and Point V, reversal and discharge on the charge of tampering with evidence.

Respectfully submitted,

s/ *Paul Morris*
PAUL MORRIS
Law Offices of Paul Morris
7385 S.W. 87th Avenue
Suite 400
Miami, FL 33173
PaulAppeal@gmail.com
Paul@PaulMorrisLaw.com
(786) 870-4300
Florida Bar No. 193769
Counsel for Appellant James Hodges

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 25, 2023, the foregoing brief was emailed to those in the service list.

s/ Paul Morris
PAUL MORRIS

Service list:

Office of the Attorney General
1515 N. Flagler Street
West Palm Beach, FL 33401
crimappwpb@myfloridalegal.com

CERTIFICATE OF COMPLIANCE

This brief complies with the font (Arial 14 point) and word count requirements of Fla. R. App. P. 9.210.

s/ *Paul Morris*