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

****

REPLY BRIEF FOR APPELLANT

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I.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON PRINCIPALS.

According to the prosecutor's evidence, Hodges killed the victim. The prosecutor presented no evidence that Hodges incited another to kill the victim. The defense was that Hodges did not kill the victim, someone else committed the homicide. The defense presented no argument or evidence that Hodges incited someone else to kill the victim. Therefore, the giving of the principals instruction was error.

On appeal, the State argues that the principals instruction was warranted by the following:

> The evidence showed that other persons were around, or were alleged to have been around, at the time of the shooting and tampering, indicating that Appellant may have acted in concert with others.

Ans. Brf. at 11. However, there is no authority supporting the State's arguments that the principals instruction is proper simply upon a showing that at the time of the crime charged against the defendant, others were "alleged to have been around" or because the alleged presence of others "indicates" that the defendant "may have acted in concert with others."

Rather, the prerequisites for the principals instruction were explained by this Court in *Peart v. State*, 359 So. 3d 751 (Fla. 4th DCA 2023) as follows:

> 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."** "**Mere presence at the scene of an offense is not sufficient to support a ['P]rincipals[']** instruction."

Peart, 359 So. 3d at 762 (citations omitted). Thus, to support the principals instruction, the State must show evidence that Hodges incited some other person (who was not merely present) to commit the homicide. But the record is devoid of any evidence of such incitement by Hodges.

Instead, the State merely lists Mikey Glassburn, Hodges' son, Hodges' wife, Hodges' employer, or the victim's wife, Cherish, as possible "others." However, the record shows that the State's arguments lack merit as to each of the named individuals:

As for Glassburn coming over to the house, backing into the neighbor's car, and throwing firecrackers, the prosecutor put Glassburn on the witness stand to deny having committed any of those acts, and there is no evidence that Hodges incited Glassburn to commit the homicide;

As for Hodges' son being "around that night", as noted, mere presence does not support a principal instruction. *Peart, supra*. Again, there is no evidence that Hodges incited his son;

As for accusing Hodges' wife and son of tampering with evidence by carrying buckets that looked like those used by the victim to carry marijuana, no such theory was presented to the jury. Again the record lacks any evidence that either the wife or son was incited by Hodges to commit the homicide;

As for Hodges' employer appearing on surveillance video the next morning, there is no evidence that Hodges incited his employer to commit the homicide. Furthermore, what the employer might have done the next day is not only unacceptably speculative, but at best would constitute accessory after the fact, which is materially different from principal liability. *See Peart*, 359 So. 3d at 763 (citing § 777.03(1)(c), Fla. Stat. (2019)); and

As to Cherish, the prosecutor disavowed her involvement by putting her on the witness stand to testify to the jury that she had nothing to do with the homicide. (T. 437).

As for any defense suggestion that Cherish might have had something to do with the homicide, no evidence was presented by the defense, nor any argument made by the defense, that Hodges incited her to commit the homicide. Rather, Hodges' defense was that he did not commit the homicide and that Cherish was a suspect with a motive to commit the homicide, and the State's theory was that Hodges was the shooter. Neither side presented

evidence, or even argued, that Hodges was a principal to Cherish's commission of the homicide.

The State's theory on appeal that a principals instruction was warranted based on the mere suggestion of Cherish's involvement in the homicide, where the State's theory of prosecution was that Hodges was the shooter, shows that the State continues to misunderstand the application of the principals instruction as in *Peart* where this Court explained:

> [A]lthough the state's answer brief has attempted to show how the defendant could have been a principal if the co-defendant had been the shooter, the state's trial counsel never actually argued to the jury that the co-defendant had been the shooter. Instead, the record shows that, during the state's initial closing argument, after the state quoted the "Principals" instruction to the jury, the state's only sentence attempting to apply that instruction to the evidence was "So, here, it's that **[the co-defendant] did something, told [the defendant] something that made [the defendant] do this.**" (emphases added).
>
> Thus, the state did not attempt to show that the co-defendant was the shooter, with the defendant being the principal who "had a conscious intent that the criminal act be done" and "did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise [the co-defendant] to actually commit or attempt to commit the crime." Rather, the state attempted to show that the defendant was the shooter, with the co-defendant being the principal who "had a *765 conscious intent that the criminal act be done" and "did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise [the defendant] to actually commit or attempt to commit the crime."
>
> **We can only surmise that the state's trial counsel, in proposing the "Principals" instruction, simply may have**

> **misunderstood the instruction's lack of application to the direct evidence of guilt which the state presented in this case, as summarized above.**

Peart, 359 So. 3d at 764-65 (emphasis added).

Here, one can only surmise that the prosecutor in proposing the principals instruction similarly misunderstood the instruction's lack of application to the direct evidence of guilt which the prosecutor relied on in seeking Hodges' murder conviction.

The State relies heavily on *Banks v. State*, 219 So. 3d 19 (Fla. 2017). Ans. Brf. at 13. In *Banks*, the defendant argued that his appellate counsel ineffectively failed to challenge a principals instruction on direct appeal. Ans. Brf. at 14. The Supreme Court disagreed based on following facts that materially distinguish *Banks* from Hodges' case:

> [T]he State presented evidence of a print in blood at the crime scene from an unidentified individual, which supports that another individual was with Banks at the crime scene at the time of the murder. Moreover, the State presented surveillance video of Banks driving the victim's vehicle with an unidentified individual sitting in the passenger's seat. Banks himself stated that another man he named as "Bo" was present with him at the victim's home the night of the murder and was with him in her vehicle when he drove to the ATM and attempted to use the victim's ATM card."

Id. at 32.

Here, by contrast, there is no print in blood or similar evidence placing someone else at the scene and whom Hodges assisted in the homicide, or

any statement by Hodges naming someone whom Hodges aided and abetted. To the contrary, Hodges denied his involvement, and no evidence was presented against any of the others named in the prosecutor's closing rebuttal argument who all denied involvement.

The State also relies on *Lewis v. State*, 693 So. 2d 1055 (Fla. 4th DCA 1997). The majority in *Lewis* found no abuse of discretion in the giving of the principals instruction. Notably, the dissenting opinion observed: "There is absolutely not a single piece of evidence that any other person was actively involved or assisted defendant in carrying out the crime, or alone carried out defendant's plan, or the like." *Lewis*, 693 So. 2d at 1060 (Farmer, J., dissenting) (internal quotation marks omitted).

In any event, the majority in *Lewis* found that even if the giving of the principals instruction was error, there was no "undue confusion", *id*. at 1058 n.4, which is not the case here in view of the jury questions. *See* Initial Brief of Appellant at 23-4, 27.

The remaining cases cited by the State are all distinguishable: *Willoughby v. State*, 296 So. 3d 574 (Fla. 5th DCA 2020) (no evidence of jury confusion arising from the principals instruction); *Senser v. State*, 243 So. 3d 1003 (Fla. 4th DCA 2018) (evidence supported the principals instruction: "Further, when counsel cross-examined the medical examiner, he asked the

medical examiner if it was "possible that [the Victim's neck] wound could be consistent with one person holding his hands or arms behind his back preventing him from putting his hands up to defend himself while the other individual slashed his throat". The medical examiner answered that it was "one scenario." Accordingly, since the defense presented that there may have been another individual involved, there was evidence supporting the instruction."); *Alvarez v. State*, 15 So. 3d 738 (Fla. 4th DCA 2009) (defense agreed that more than one person was present when the homicides were committed and the evidence against another person, Jose Aranda, showed that both he and defendant Alvarez obtained the murder weapon on which fingerprints of both Aranda and Alvarez were found after the homicides).

The State's fallback position is that even if the trial court erred in charging the jury on principals, the error was harmless. Of course, on appeal, the State must prove harmlessness beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129, 1138–39 (Fla. 1986). The State fails to meet its heavy burden for the reasons stated in the Initial Brief of Appellant at 27-9. Notably, the State ignores the jury questions which defeat any suggestion of harmless error by raising the possibility of juror confusion arising from the principals instruction.

II.

THE TRIAL COURT ERRED IN OVERRULING HODGES' OBJECTIONS TO THE PROSECUTOR'S EXPERT'S PREJUDICIALLY INACCURATE DEMONSTRATIVE EXHIBIT.

In its answer to Hodges' Point II on appeal, the State defends the admission into evidence of its expert's exhibit which, without any supporting evidence, depicted Hodges' cellphone directly on top of the victim:

> Appellant argues that the demonstrative exhibit, specifically the one at page 1479 of the record, is not an accurate reproduction of the incident involved (IB. 33). ***The State never asserted that it was [accurate].*** Rather, it submitted the demonstrative exhibit as an accurate depiction of the data provided to it by Google.

Ans. Brf. at 22 (emphasis added).

In other words, according to the State, it does not matter that the exhibit inaccurately misrepresented Hodges' cell phone directly on top of the victim, if the exhibit otherwise accurately depicted data supplied by Google. But the exhibit misrepresented Google's data and therefore the State's argument is without merit.

First, it *does* matter whether the exhibit was an inaccurate representation of the incident. *See Williams v. State*, 300 So. 3d 202 (Fla. 4th DCA 2020); *see also Johnson v. State*, 351 So. 2d 252 (Fla. 1st DCA 2022). That the prosecutor "never asserted that it was" accurate but nevertheless used the exhibit to gain a conviction subverts the true role of a

prosecutor:

> Under our law, the prosecutor has a duty to be fair, honorable and just. As put by Justice Sutherland, the prosecuting attorney "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). We discussed the prosecutor's role in *Martin v. State*, 411 So. 2d 987, 990 (Fla. 4th DCA 1982), and said that
>
> > it is the duty of a prosecutor to seek justice, not merely to convict. We recognize that the tensions of the adversary process and the heat of trial can test an attorney to the limit. Nonetheless, it is imperative that prosecuting attorneys be ever mindful of their awesome power and concomitant responsibility. The tactics and trial strategy of the prosecutor must reflect a scrupulous adherence to the highest standards of professional conduct.
>
> *See also Harris v. State*, 414 So. 2d 557 (Fla. 3d DCA 1982).

Boatwright v. State, 452 So. 2d 666, 667-68 (Fla. 4th DCA 1984).

Second, notwithstanding the State's assertion to the contrary, the exhibit most certainly does *not* accurately depict the data provided by Google for the simple, obvious, indisputable reason that Google's data never placed Hodges' cellphone directly on top of the victim as the exhibit depicts. The record establishes that the data provided by Google did nothing more than allow the State to represent to the jury that Hodges' cell phone could have been anywhere within the red circle depicted in the exhibit which had a radius of 3,000 meters. (R. 1693, 1669; T. 938).

The authorities cited by the State on appeal are distinguishable. In *Alcegaire v. State*, 326 So. 3d 656 (Fla. 2021), the exhibit at issue was a map of two addresses at issue. The objection to the exhibit was *not* to the accuracy of the map, but that the map constituted new evidence improperly offered by the prosecutor during closing rebuttal argument.

In *Johnson v. State*, 351 So. 3d 252 (Fla. 1st DCA 2022), the court held that the exhibit at issue did not, contrary to the defendant's characterization, attempt to recreate the scene of the stabbing incident and misrepresent that the victim's multiple stabbing wounds took place simultaneously. Rather, the medical examiner used the exhibit's animation to assist his explanation and the jury's understanding of the location of the various wounds on the victim's body, not how the stabbing took place at the scene of the murder.

In *Walker v. State*, 82 So. 3d 115 (Fla. 4th DCA 2011), the court held that a firearm used by the State as a demonstrative aid was similar enough to the weapon that the witness had testified was used in the crimes, that such a demonstrative aid was relevant to the issues in the case, and that prior to allowing the State to use the demonstrative aid, the trial court thoroughly explained to the jury that a firearm was not obtained in the case, that no firearm was ever recovered in any manner, and that the specific firearm being shown to the witness was not in any way related to the case.

In none of the cases relied on by the State did the demonstrative exhibit constitute an affirmative prejudicial misrepresentation, much less as to such a critical disputed issue as the location of Hodges and/or his cell phone at the time of the murder and/or the submerging of the victim and vehicle in the canal.

Nor is the error harmless beyond a reasonable doubt, as asserted by the State. As explained in the Initial Brief of Appellant at 34-35, the exhibit played a key role in the prosecutor's theory of guilt when he argued to the jury that "Google places him right near the body dump site."

Finally, contrary to the State's assertion that the error was not preserved as to the prejudicial aspect of the exhibit outweighing any probative value due to the inaccuracy of the depiction of the location of the cell phone and victim (Ans Brf. at 21), not only was the exhibit's inadmissibility fairly and extensively argued (T. 1627-1655, 1696-1718), the trial judge articulated the prejudice-v.-probative-value objection for the record:

> THE COURT: The issue really, though, is whether it's admissible evidence. And then what you're suggesting is the prejudicial value outweighs the probative value of --
> MR. WATSON [Counsel for Hodges]: -- the way it's being presented.
> THE COURT: Right.

(T. 1714).

III.

THE PROSECUTOR SHOULD HAVE BEEN DISQUALIFIED FOR VIOLATING HODGES' ATTORNEY-CLIENT PRIVILEGE BY LISTENING TO RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN HODGES AND HIS ATTORNEY DISCUSSING PLEA NEGOTIATIONS.

The State argues that it met its burden of showing Hodges waived his attorney-client privilege because "defense counsel conceded that he assumed that the conversation was being recorded" and defense counsel's assistant also stated that she heard a notice that the call was being recorded. Ans. Brf. at 29-30.

The State's argument fails because only Hodges could waive his privilege; neither defense counsel nor his employees could waive the privilege for Hodges because 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). An attorney may not unilaterally terminate the client's privilege. *Owners Ins. Co. v. Armour*, 303 So. 3d 263, 268 (Fla. 2d DCA 2020).

To meet its burden of showing that Hodges waived his privilege, the State was required to prove that Hodges was notified that the call was recorded. The State merely presented testimony from a prison canteen clerk who also managed the inmate phone and tablet system. The clerk testified that the system is supposed to play such a notification when the inmate places a call. But no evidence was presented by the State that such a

notification was played for Hodges at the outset of the calls at issue. *See* Ini. Brf. at 41-42, 46-47.

Moreover, there was no "voluntary disclosure" by Hodges that would result in a waiver of the attorney-client privilege pursuant to § 90.507 because Hodges was forced to use the recorded line. *See* Ini. Brf. at 51-52. On appeal, the State does not dispute that Hodges was so forced. Rather, citing the first attorney-client call, the State argues that the call was voluntary because Hodges "told his attorney that he did not want to take a plea before any discussion of what his case would be like." Ans. Brf. at 31.

But the recording of the call is to the contrary. After Hodges initially stated he did not want to enter the plea agreement, Hodges was still weighing whether to settle the case thereafter. For example, in call 411889413 at time stamp 2:00, Hodges asked the legal assistant to reach out to defense counsel to negotiate a better settlement. The assistant conferenced in defense counsel and at 3:45 through 5:00, the two discussed seeking a better plea agreement.

Finally, the State argues Hodges was not prejudiced by the prosecutor listening to the defense strategy and Hodges' and counsel's evaluations of the State's evidence, claiming that the prosecutor was "already aware" of everything Hodges and defense counsel discussed. But the calls show

otherwise. For example, among the defense theories discussed was whether evidence was planted to implicate Hodges. *See* call 41107204 at time stamp 9:22. The prosecutor had no previous knowledge of that defense theory, as well as other matters discussed in the attorney-client calls. Furthermore, Hodges was prejudiced. *See Nunez v. State*, 665 So. 2d 301 (Fla. 4th DCA 1995) (holding that where prosecutor overheard defense counsel and the defendant confidentially discussing their insanity defense, the defendant "has been irreparably harmed and has suffered actual prejudice" thereby warranting disqualification of the prosecutor.). Moreover, "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 of prejudice.

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.

The State disputes Hodges' reading of the prosecutor's comments to the jury. Here are the comments at issue:

> PROSECUTOR: [W]hen 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.

(T. 107) (emphasis added).

A reasonable juror could conclude that the prosecutor represented that if the jury found Hodges guilty of first-degree murder (or a lesser charge), the judge would determine the appropriate sentence. Such a conclusion would be wrong because the judge has no such discretion upon conviction for first-degree murder. Thus, jurors would be more inclined, and their minds would

be more at “ease” (as the prosecutor put it), to find Hodges guilty of first-degree murder wrongfully believing that the judge could consider the guilt of someone else, such as Cherish Murphy, in affording Hodges leniency in sentencing.

Accordingly, Hodges’ counsel objected to the prosecutor’s misrepresentation and asked for the opportunity to respond with the truth, which the judge denied, thereby preserving the issue for review (contrary to the State’s argument, *see* Ans. Brf. at 34).

On appeal, the State argues that the prosecutor’s above-quoted comment referred only to the trial judge’s sentencing discretion as to lesser charges, not first-degree murder. *See* Ans. Brf. at 35 (“The prosecutor did not say that the trial court would have discretion in sentencing Appellant on first-degree murder. He made that statement with regard to possible lesser included offenses.”). The State is mistaken because the prosecutor’s comment clearly included first-degree murder.

Should the Court agree with Hodges’ reading of the prosecutor’s statements to the jury, Hodges should be afforded a new trial for the reasons stated in the Initial Brief of Appellant at 52-60.

V.

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

The State fails to point to any evidence that Hodges had the requisite knowledge of an impending homicide investigation and destroyed or concealed evidence, thereby impairing its availability for the investigation, as required to support the conviction for tampering with evidence or had the requisite specific intent to tamper with or conceal evidence. *See A.F. v. State*, 850 So. 2d 667, 668 (Fla. 4th DCA 2003); *Costanzo v. State*, 152 So. 3d 737 (Fla. 4th DCA 2014); *Pender v. State*, 362 So. 3d 290 (Fla. 5th DCA 2023). The State merely regurgitates the events that *preceded* Hodges' interrogation where he was first advised of the investigation. Consequently, Hodges' conviction of tampering with evidence constitutes fundamental error for the reasons explained in the Initial Brief of Appellant at 60-62. Nothing in the memorandum-fact-devoid opinion in *Sanchez v. State*, 154 So. 3d 441 (Fla. 3d DCA 2014), the only decision cited by the State in its argument on the merits, supports affirmance.

VI.

THE DOCTRINE OF CUMULATIVE ERROR WARRANTS REVERSAL.

Hodges rests on his initial brief.

CONCLUSION

For each of the points raised, 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,

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I HEREBY CERTIFY that on September 26, 2023, the foregoing reply brief was emailed to those in the service list.

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

s/ *Paul Morris*