IN THE COUNTY COURT OF THE 18th JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO.: 2022-MM-1796-A

BENJAMIN RICHARD PARIS,
Defendant.
_____/

MOTION FOR NEW TRIAL
PURSUANT TO FLA. R. CRIM. P. 3.600

THE DEFENDANT, Benjamin Richard Paris, by and through his undersigned attorney, respectfully moves this honorable Court to enter an order granting the defendant a new trial, setting aside his conviction, and vacating his sentence for the reasons set forth below:

1. The defendant, Benjamin Paris, was charged with the offense of Making One Contribution Through or in the Name of Another under sections 106.08(5)(a), and 106.08(7)(a).

2. A trial on the charge was held on August 29th & 31st, and September 1st, of 2022.

3. The jury returned a verdict of guilty and the defendant was sentenced.

4. The defendant now files this motion for a new trial.

5. The grounds for the motion are:

   a. The court erred in deciding matters in this trial including but not limited to permitting certain testimony, allowing the State's improper closing, which thus allowed misconduct, and not granting the defendant's motion for judgment of acquittal;

b. The court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the defendant; and

c. Because the defendant did not receive a fair and impartial trial.

CLOSING ARGUMENTS

6. On September 1st, 2022, the parties gave their closing arguments. The State's rebuttal argument was improper, and thus was misconduct.

7. The State stated "how did this information get on this paper, magic...," (referring to the contributor report). The defendant objected to shifting the burden of proof. Referring to "magic" implies that the defendant had a burden to explain what was on the paper and how it got on the paper. The State could have conceded that they do not know how this information got on this document but cannot sarcastically state that it was magic. This denigrates the defense while also shifting the burden for the defendant to explain how the information got on the document.

In Bell v. State, 108 So.3d 639, 648-49, (Fla. 2013), the Florida Supreme Court held that the prosecutor cannot imply that the defendant had a burden of proof or of producing any evidence. The specific statement from the prosecutor in Bell was "if you are looking for a reason not to believe [the victim] there isn't one. Because there is no evidence that she would have made this up at this particular time under these particular circumstances." The Court explained that this statement "highlighted Bell's failure to present any evidence..." and "thereby implied that Bell had a burden of proof regarding the witnesses credibility." Id. The Court further expressed that "the prosecutor did not correct any false impression by reminding the jury that the State at all times retains the burden of proof." Id.

Here the prosecutor stated: "How did it get on here? Magic?" This statement implied that the defendant had a burden to prove how the information got on the document. The prosecutor did not correct this burden shifting. This statement by the prosecutor highlighted Paris' failure to present any evidence on how the information was placed on the document and thereby implied Paris had the burden of proof regarding how the information was placed on the document. And, just like in Bell, the State did not correct this false impression by reminding the jury that the State at all times retains the burden of proof.

And, while shifting the burden of proof, the use of the term magic denigrated the defendant's defense. In Redish v. State, 525 So.2d 928, 931, (Fla. 1st DCA 1988), the First DCA found that the prosecutions reference to "cheap tricks" was beyond the bounds of proper closing argument. The use of the word "magic" here, is beyond the bounds of proper closing argument.

8. The State went on to state "and this matters...the reason this matters is because..." and the defendant objected stating that this was improper argument, that the State was not permitted to impose upon the jury it's opinion of why this case mattered. This objection was overruled.

In Pacifico v. State, 642 So.2d 1178, 1184 (Fla. 1st DCA 1994), the First DCA expressed that "because a jury can be expected to attach considerable significance to a prosecutor's expressions of personal beliefs, it is inappropriate for a prosecutor to express his or her personal belief about any matter at issue." (Citing Singletary v. State, 483 So.2d 8, 10 (Fla. 2d DCA 1985). The First DCA's opinion in Pacifico explains how the prosecutor stating this improper opinion correlates to arguing facts not in evidence.

In other words, the prosecutor's opinion of why "this matters" is not in evidence and thus is the improper sharing of the prosecutor's opinion with the jury. And in fact, the State conceded that its argument was improper when it asserted at the bench that it was just like the defendant's improper argument.

Even if this Court were to believe the defendant made the incorrect objection, which the defendant is not conceding, the Fifth DCA has explained "that trial courts have a duty, even without hearing an objection, to bring a swift and sure end to prosecutorial misconduct in closing argument..." Rodriguez v. State, 210 So.3d 750 (Fla. 5th DCA 2017) (**Emphasis added.**). Thus, even if the court believes the defendant raised the wrong objection it was incumbent upon the court to end the prosecutorial misconduct.

9. With this objection being overruled the prosecutor continued... the citizens get to elect those who make choices on policies on our behalf in elections. We all know the pledge of allegiance. I pledge allegiance to the flag of the United States of America to the republic for which it stands...This goes to the integrity of elections and it is so incredibly important because voting is sacred and sanctified. Transparency in campaign finance is a fundamental tenant in our elections. We need to know where the money is coming from so everyone is playing on an even playing field. Just $200.00; that's where faith and confidence in our system erodes. Without faith and confidence in our elections we don't have our democratic republic. (*Paraprhased*).

This argument is improper because it asks the jury to convict the defendant not for a violation of the alleged crime but to protect our democracy. It is "appealing to the jury's sympathy, emotions and sense of community conscience or civic responsibility." See Sampson v. State, 213 So.3d 1090, 1097, (Fla. 3d. DCA 2017). Mentioning the

pledge of allegiance to protect our democratic republic is not only appealing to a sense of community conscience or civic responsibility, but also "impermissibly inflames the passions and prejudices of the jury with elements of emotion and fear;" fear that if we do not convict we may very well lose our democracy and that we have pledged otherwise. Cruz v. State, 320 So.3d 695, 720 (Fla. 2021), see also Campbell v. State, 679 So.2d 720, 724 (Fla. 1996)(The prosecution should not "make an obvious appeal to the emotions and fears of the jurors." And in this case the appeal was to the emotion and fear of losing our democracy.). "There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty; impartiality." Redish at 930 citing United States v. Young, 470 U.S. 1, 5-6 (1985).

This line of argument is also asking the jury to convict the defendant for a reason other than a violation of the law, for some public policy, to send a message to those who are involved in elections. In Servis v. State, 855 So.2d 1190, 1194 (Fla. 5th DCA 2003), the Fifth DCA exclaimed: Statements like here are "improper because counsel is not permitted to suggest that evidence which was not presented at trial provides additional grounds for finding the defendant guilty." Here, the State states, more than suggest, that our democracy is at stake if this behavior is allowed. There was no evidence admitted that our democracy is at stake. This is providing an additional ground to find the defendant guilty, all while appealing to the jury sense of civic duty.

It is worth noting that the Fifth DCA has held "when properly preserved comments are combined with the unobjected-to acts of prosecutorial overreaching, 'the integrity of the judicial process has been compromised and the resulting convictions and

sentences irreparably tainted.'" Brinson v. State, 153 So.3d 972, 980 (Fla. 5th DCA 2015).

In Ruiz v. State, 743 So.2d 1, 2 (Fla. 1999), the Florida Supreme Court explained:

> A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion or non-record evidence....An attorney "may not suggest that evidence which was not presented at trial provides additional grounds for finding the defendant guilty."

That is exactly what occurred here. The State asked the jury, after suggesting its allegiance to our democracy, to consider evidence that allowing this crime would irreparably harm our democracy over and above asking the jury to convict the defendant for a violation of the law alleged. In this day and age, where election integrity is the hot topic, and considering the rhetoric surrounding it, the prosecutor's plea or suggestion of allegiance to our republic in addition to a violation of the law is highly inflammatory and designed to appeal to the jury's emotions and sense of civic duty. This line of argument compromises the integrity of the judicial process, and thus, the resulting conviction and sentence is irreparably tainted. Thus, this Court should order a new trial.

10. Exasperating this issue, is the fact that the defendant filed a Motion in Limine which was granted to the extent that the State could not introduce or comment on, including in closing argument, an effect on an election. The State violated this Court's order with the above statements made during closing argument. And for this reason, as well, the above reasons, this Court should enter an order granting the defendant a new trial.

INVESTIGATOR COPE'S TESTIMONY

11. The admission of two lines of questioning of Investigator Troy Cope elicited by the State over the Defendant's objection was in error. The two lines of questioning are: 1. A question regarding when the crime is committed; i.e., that the crime is not committed until the report is filed; and 2. Questions that start with based on your investigation did you determine …., an example of which is based on your investigation did you determine Eric Foglesong held himself out as person who assist with campaigns.

12. Addressing the first question to Investigator Cope, at what point is the crime committed, the defendant objected to this line of questioning and the response therein stating it was an improper opinion that led to the witness instructing the jury on the law.

13. In Gamble v. State, 644 So.2d 1376, 1377-1378, (Fla. 5th DCA 1994), the Fifth DCA held that even expert testimony can invade the province of the jury. The Fifth DCA went on to hold that a witness, expert or otherwise, should not be permitted to act as the judge and instruct the jury to find that a particular fact meets the definition of the law. Specifically, in Gamble, the court found that the agent's testimony "that the amount of drugs found in Gamble's possession was inconsistent with personal use, and was, therefore, intended for sale", invaded the province of the jury and the judge. Id, see also Spry v. State, 946 So.2d 630 (Fla. 2d. DCA 2007)(Even an expert witness cannot provide an opinion that invades the province of the jury, i.e., that a specific fact is evidence of violation of the charge); and see Hunt v. State, 284 So.3d 1092 (Fla. 4th DCA 2019)("A police officer's testimony or comments suggesting a defendant's guilt invades the province of the jury to decide guilt or evidence"); see also Scott v. Barfield, 202 So.2d 591, HN 10, (Fla. 4th DCA 1967); and also Floyd v. State, 569 So.2d 1225, 1231-32, (Fla.

1990)("Generally, a lay witness may not testify in terms of an inference or opinion, because it usurps the function of the jury.). And see Nardone v. State, 798 So.2d 870, 872 (Fla. 4th DCA 2001)("When facts are within the ordinary experience of jurors, conclusions to be drawn therefrom are to be left to those jurors.")

14. Here, the question to Investigator Cope asking when the crime occurs, i.e., on the date of the filing improperly invades the province of the jury whose role is to make this finding, and invades the province of the court who is responsible for instructing the jury on the law. Thus, the objection should have been sustained, and because it was not a new trial should be granted.

15. As to the second line of questioning, asking the investigator for conclusions based on his investigation without testifying to the underlying evidence that led to the conclusion over the defendant's objection was in error. The defendant objected to lack of foundation and that it may well be hearsay, but that without the foundation laid the defendant could not make proper objections. The objection was overruled.

16. In Carter v. State, 951 So.2d 939, 943 (Fla. 4th DCA 2007), the Fourth DCA explained that a lack of foundation objection along with a hearsay objection is sufficient to preserve the issue for review of "the failure of the proponent of the evidence to lay a proper predicate." Here, a proper predicate for how Investigator Cope's conclusion was reached was grounds for the proper objection of lack of foundation, and prohibited the defendant from making proper objections such as hearsay. In other words, this testimony is conclusory without basis.

17. Due to these two errors on the admission of testimony the defendant should be granted a new trial. Also, combined with the closing argument issue above the

cumulative effect should lead to the defendant being granted a new trial.

JESTINE IANNOTTI'S TESTIMONY

18. The state elicited testimony from Jestine Iannotti that Eric Foglesong completed and filed the campaign contributor report. The basis for how she came to this conclusion was not elicited. Thus, the testimony should not have been allowed as it lacked a foundation on how Ms. Iannotti reached this conclusion. This testimony should not have been allowed under the same reasoning paragraph 15 above, the testimony was conclusory without a basis.

19. The admission of this testimony allowed the State of Florida to establish that Eric Foglesong, who was shown to be involved in all the communications at issue in the trial, completed and filed the campaign contribution report at issue. Without this testimony, who completed and filed the campaign report at issue would not have been established. Without this evidence, the motion or judgment of acquittal under the basis of insufficient evidence under the circumstantial evidence standard is even stronger and should have been granted. As a result of the evidence being admitted wrongfully, the defendant should be granted a new trial.

20. Further, the cumulative effect of all of the above resulted in Mr. Paris not receiving a fair and impartial trial. Thus, he should be granted a new trial.

JURY INSTRUCTIONS

21. There is no standard instruction for the offense charged here, making a donation in another's name.

22. The State requested and the Court gave the following instruction:

> To prove the crime of Making One Contribution Through or in the Name of Another in Any Election, the State must prove the following element

beyond a reasonable doubt:

> Benjamin Richard Paris, as a principal or active participant, did knowingly and willfully make one contribution by or through the name of another, directly or indirectly, in any election.

23. The defendant requested that the words in any election above read in the District Nine Election as stated in the information. The defendant also made this request noting it went to his theory of defense, the defense that the State did not prove that Mr. Paris made the donation in another's name for the District Nine Election. That, Mr. Paris, could have provided the name for a different election based on the evidence and lack of evidence presented, and that was what he was charged with.

24. In Brown v. State, 11 So.3d 428, 433 (Fla. 2d DCA 2009) the Second DCA explained: "'[A] charge taken from a **statute** must be justified by the evidence; it must be pertinent to the case; it must be confined to the issues in the case; and it must **not** mislead the jurors." (Emphaiss added). The giving of an instruction-even one taken directly from a **statute**-that violates these basic safeguards may result in reversible error. In this case, our task is to determine whether the special instruction based directly on section 794.011(2) had the potential to mislead the jurors or was otherwise improper."

25. Here, the court essentially read from the Statute. Although this is not necessarily erroneous the fact that the jury instruction was not "confined to the issues in the case" is. The Florida Supreme Court has explained that "the .... instruction must constitute the Court's complete law of the case insofar as the material elements of the crime charged is concerned, [and...] the Court [must] fully and properly instruct the jury on the essential elements required to be proven under the issues presented by the information before conviction could legally be obtained. Gerds v. State, 64 So. 2d 915,

916 (Fla. 1953).

26. The jury instruction must "advise or inform the jury" of the "element of the offense charged in the **indictment, [information]**." Finch v. State, 116 Fla. 437 (Fla. 1934). In Reyes v. State, 34 Fla. 181, 184 (Fla. 1894), the Florida Supreme Court explained that the eleventh section of the bill of rights of the Florida Constitution "provides that every person accused of a crime 'shall be heard to demand the nature and cause of the accusation against him." "The indictment [information] should state the circumstances which constitute the definition of the offense." Id. No judgment can be entered upon a verdict that does not abide by the circumstances of the case. Id.

27. "It is well-settled in Florida that a criminal defendant is entitled to have the jury instructed on the law applicable to his theory of defense if the theory is legally valid and there is any evidence in the record to support it." Cliff Berry v. State, 116 So.3d 394, 407 (Fla. 2012). The defendant requested that the jury instruction track the information, i.e, that the jury instruction state specifically in the district nine campaign. The defense was that the State did not prove that the request to use Steven Smith's name for a campaign was proof that Mr. Paris meant to use Steve Smith's name in the district nine election specifically. By not giving this instruction the jury was allowed to consider if the request to use the name in any election is a violation of the law, without the name being used in that specific election. In other words, the jury could have convicted the defendant for assisting Eric Foglesong by providing Eric Foglesong a name to be used for a donation to be used in another election, aside from the district nine election, despite that being the specific charge in the information. "[T]he use of a standard instruction does not relieve the trial court of its duty to ensure that the instruction accurately and adequately conveys

the law applicable to the circumstances of the case. Id. The defendant's request for the instruction to be specific is supported by the evidence or lack of evidence in the case; the broad instruction did not cover the defendant's theory of defense; and the specific instruction requested was a correct statement of the law and not misleading or confusing. Id. (Sets the standard for a requested defense instruction.). Another way to look at this is because the State was permitted to ask the jury to convict for any assistance in giving another name for any contribution in any election, venue may not have been proper. The defendant raised lack of venue in his motion for judgment of acquittal. The state responded because the internet was used in the district nine election in the Ianotti campaign and that district nine included Seminole County, that venue had been established. However, the broad jury instruction allowed the jury to consider that the intent of giving the name was for any contribution in any election regardless of the jurisdiction for where such assertion occurred or by how it occurred, meaning if the internet was actually used at all for the specific or any campaign which the jury found the defendant guilty.

28. Because the jury instruction requested by the defendant should have been given and was not, a new trial should be ordered.

MOTION FOR JUDGMENT OF ACQUITTAL

29. The defendant moved for judgment of acquittal on several grounds. The defendant does not address all the grounds argued trial here, but reserves the right to amend this motion to add the additional grounds, and to appeal the grounds not addressed in this motion.

30. The defendant is charged with a violation of sections 106.08(5)(a) and

106.08(7)(a) by acting as a principal.

31. Subsection (7)(a) states:

> Any person who knowingly and willfully makes or accepts no more than one contribution in violation of subsection (1) or subsection (5), or any person who knowingly and willfully fails or refuses to return any contribution as required in subsection (3), commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. If any corporation, partnership, or other business entity or any political party, affiliated party committee, political committee, or electioneering communications organization is convicted of knowingly and willfully violating any provision punishable under this paragraph, it shall be fined not less than $1,000 and not more than $10,000. If it is a domestic entity, it may be ordered dissolved by a court of competent jurisdiction; if it is a foreign or nonresident business entity, its right to do business in this state may be forfeited. Any officer, partner, agent, attorney, or other representative of a corporation, partnership, or other business entity, or of a political party, affiliated party committee, political committee, electioneering communications organization, or organization exempt from taxation under s. 527 or s. 501(c)(4) of the Internal Revenue Code,[1] ***who aids, abets, advises, or participates in a violation of any provision punishable*** under this paragraph commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

32. The defendant moved for judgment of acquittal arguing that an individual cannot be convicted of being a principal to making a donation in another's name in an election because it is not a crime. The defendant made this argument because section 106.08 sets forth specifically when a person can be convicted of aiding, abetting, advising or participating in a violation of section 106.08, Florida Statutes, in subsection (7). In Adams v. Culver, 111 So.2d 665 (Fla. 1959), the Florida Supreme Court held that "[i]t is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." The specific statute here is section 106.08,

Florida Statutes, which covers the particular subject of making a contribution in the name of another. The general statute is the statute governing principals is section 777.011, Florida Statutes.

Section 777.011, the general statute states that one who aids, abets, counsels, hires, or otherwise procures such offense to be committed ... is a principal in the first degree. The statute covering the particular subject matter is section 106.08(7)(a), which states: "Any officer, partner, agent, attorney, or other representative of a corporation, partnership, or other business entity, or of a political party, affiliated party committee, political committee, electioneering communications organization, or organization exempt from taxation under s. 527 or s. 501(c)(4) of the Internal Revenue Code,[1] ***who aids, abets, advises, or participates in a violation of any provision punishable*** under this paragraph..." Absent from this specific statute as to the subject matter is that an individual, who is not acting as an officer, partner, agent, attorney or representative of a corporation, etc...who aids, abets, advises or participates in any provision punishable under this paragraph commits any crime.

In Adams, the Florida Supreme Court stated: "It has been said that this rule 'is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provision.'" (Citations omitted). Because this is a criminal statute, the specific provision, section 106.08, is the applicable provision. And because section 106.08 sets forth specifically when a person is aiding, abetting, advising or participating is a violation of the section it is only to when specified that a violation of the section can be found. This doctrine in the application of the law and its interpretation is known as inclusio unus est exlusio alterius. "Under this

doctrine, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." Gay v. Singletary, 700 So.2d 1220, 1222 (Fla. 1997).

Here, because section 106.08 expressly describes the particular situation when aiding, abetting, counseling or participating should apply and inference must be drawn that where the aiding and abetting language is not included by specific reference such a violation was intended to be omitted or excluded. Thus, because the language regarding aiding and abetting was not included when addressing individuals in section 106.08, it must be inferred that an individual who aids and abets is not in violation of the law. Benjamin Paris is named as an individual, not as an officer or other party listed in section 106.08, and the state has not proven that Benjamin is anything other than an individual. Thus, because Mr. Paris is nothing more than an individual, and the legislature specifically excluded individuals who allegedly aid or abet in a violation of section 106.08, Mr. Paris cannot be found guilty for such an allegation. Thus, this court should order a new trial, and grant the defendant's Motion for Judgment of Acquittal.

33. Additionally, the defendant's Motion for Judgment of Acquittal on the grounds that the State did not present sufficient evidence of the specific charge Mr. Paris was prosecuted for; i.e., the State did not present sufficient proof that Mr. Paris aided Mr. Foglesong, or anyone, with giving the name Steve Smith in the **District 9 campaign/general election**. The State may have proved that Benjamin Paris sought to use Steve Smith's name for a contribution, but it did not prove Benjamin Paris that Benjamin Paris sought to use Steve Smith's name specifically for the District 9

campaign/general election.

To prove that a person is a principal to a crime the State must prove that the defendant had a conscious intent that the criminal act be done. See Fla. Standard Criminal Jury Instruction, 3.5(a), and the jury instruction given in this case. Here, the criminal act alleged was that Mr. Paris aided, did some act, said some word, that assisted someone "in the 2020 General Election for Florida State Senate District 9." Thus, to be convicted as a principal, the State had to show that Mr. Paris obtained permission to use Steve Smith's name and intended it be used specifically for the 2020 General Election for Florida State Senate District 9. At best, the State proved that Benjamin Paris secured Steve Smith's name to be used in an election, just not this specific election, the specific election for District 9, for which he was accussed.

Certainly, the evidence that should not have been admitted but was, as explained above, would illuminate this lack of proof, this lack of proof of the specific charge of assisting in giving a name for the 2020 General Election for Florida State Senate District 9. However, even considering this evidence, along with all the other evidence in this case the state still has not proven that Mr. Paris intended the specific criminal act he was charged with be done, the specific act of using the name of another for the **2020 General Election for State Senate District 9**. And thus, this Court should order a new trial and grant the defendant's motion for judgment of acquittal.

NOT A FAIR AND IMPARTIAL TRIAL

34. Everything above, or any formulation thereof, shows that the defendant did not receive a fair and impartial trial, and thus Mr. Paris should be granted a new trial.

THUS, THE DEFENDANT, Benjamin Richard Paris, by and through his

undersigned attorney, respectfully moves this honorable Court to enter an order granting the defendant a new trial, setting aside his conviction, and vacating his sentence for the reasons set forth above.

Respectfully submitted this 11th day of September, 2022.

MATTHEWS R. BARK, ESQUIRE
Florida Bar NO. 0034743

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic Delivery to the Office of the State Attorney, SemMisd&Traffic@sa18.org, 101 Eslinger Way, Sanford, Florida 32773, this 11th day of September 2022.

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