IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

CASE NO.: 4D11-2628

DALIA DIPPOLITO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLANT'S REPLY BRIEF

BROWNSTONE, P.A.
MICHAEL M. BROWNLEE, ESQ.
Florida Bar No. 68332
400 North New York Avenue
Suite 215
Winter Park, Florida 32789
407.388.1900 (O)
Email: Michael@brownstonelaw.com
Counsel for Ms. Dippolito

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COMMENT ON THE STATE'S STATEMENT OF THE CASE AND FACTS REGARDING THE ADMISSIBILITY OF THE ALLEGED POISONING

The State insinuates the record is unclear regarding whether Ms. Dippolito's alleged attempt to poison her husband's iced tea was admissible as a prior bad act. There is no ambiguity on this issue. It was ruled inadmissible in a written order prior to trial.

The alleged poisoning attempt was "established" solely through hearsay deposition testimony provided by Mr. Shihadeh. (R. Vol. 4 at 617). The State is correct that the trial court originally ruled that testimony regarding the alleged poisoning was admissible. (R. Vol. 4 at 617); (AB at 4-5). After that ruling, however, Ms. Dippolito filed a motion in limine requesting reconsideration of the issue, and for an order precluding testimony regarding the alleged poisoning[1]. (R. Vol. 3 at 578-581); (AB at 5).

The State fails to mention that the trial court granted Ms. Dippolito's motion in limine and reversed its prior ruling. In a written order, the trial court explained that after reviewing Ms. Dippolito's motion in limine, "the Court recedes from its prior order as it concerns evidence of alleged poisoning." (R. Vol. 4 at 620). The trial court's ruling was crystal clear that any evidence regarding the alleged poisoning was inadmissible: "There shall be no evidence referred to in opening

[1] In Ms. Dippolito's motion in limine, she argued that Mr. Shihadeh's testimony about the purported poisoning attempt was not credible, wholly unsubstantiated, and that the "testimony is so prejudicial that it runs the risk of vitiating the entire trial" and "would invit[e] a mistrial." (R. Vol. 3 at 580).

statement or during the State's case in chief about any allegation of the Defendant attempting to poison her husband's iced tea." (R. Vol. 4 at 621). The State's failure to mention the trial court's ruling is a critical omission.

To wit, in her Initial Brief, Ms. Dippolito argued that the trial court erred when it denied her multiple requests to conduct individual voir dire of jurors exposed to pretrial publicity surrounding the case. She argued the trial court compounded that error by denying her motion to strike the entire jury panel, and for mistrial, after Juror Baer discussed, in the presence of the entire jury pool, an article which described the alleged poisoning attempt, because that information was inadmissible.

The State responds that no error occurred because the jurors were never exposed to inadmissible evidence. (AB at 24). Instead of acknowledging that evidence about the alleged poisoning was indeed inadmissible, and addressing Ms. Dippolito's argument directly, the State suggests Ms. Dippolito moved to strike the entire panel and for mistrial not because the poisoning allegations were inadmissible, but "since the State agreed it would not pursue the poisoning allegation." (AB at 7). The poisoning evidence was inadmissible. The State's decision not to admit as much and answer Ms. Dippolito's argument directly should be deemed a concession of error.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED MS. DIPPOLITO'S UNOPPOSED REQUESTS TO FOLLOW THE "PREFERRED APPROACH" OF CONDUCTING INDIVIDUAL VOIR DIRE AND COMPOUNDED THAT ERROR BY FAILING TO STRIKE THE ENTIRE PANEL AFTER JUROR BAER DISCUSSED INADMISSIBLE INFORMATION DURING VOIR DIRE.

The State does not dispute that the Florida Supreme Court has repeatedly stated that in cases featuring extensive pretrial publicity, the "preferred approach for Florida trial courts is to conduct individual and sequestered voir dire of prospective jurors." *Bolin v. State*, 736 So. 2d 1160, 1165 (Fla. 1999). (IB at 26-27). The State also does not dispute Ms. Dippolito's claim that her numerous requests to conduct sequestered voir dire were unopposed. It is against this backdrop the State's responsive arguments must be assessed.

The State's first argument is that Ms. Dippolito's reliance on *Bolin* is "misplaced." (AB at 23). The State's efforts to distinguish this case from *Bolin* are not only unpersuasive, they highlight why *Bolin* compels reversal. According to the State, *Bolin* instructs:

> Trial courts must ascertain whether prospective jurors possess information which is not admissible in the trial in which they will serve as jurors and which is so prejudicial to the defendant that the jurors' knowledge of the information creates doubt as to whether the jurors can decide the case based solely upon the evidence that will be admitted at trial.

(AB at 24). It is indisputable that the record establishes that the trial court never ascertained what information the jurors possessed. Rather, the trial court believed

that assessing this information was unnecessary after it applied exactly the same litmus test *Bolin* rejected.

In *Bolin*, and in this case, after numerous prospective jurors indicated they had been exposed to pretrial publicity, the defense renewed its pretrial request to conduct individual and sequestered voir dire. The *Bolin* trial court denied the request, but issued a questionnaire to the prospective jurors regarding their knowledge of the defendant and the case. Ultimately, it dismissed seventeen potential jurors because "as a result of the knowledge" obtained from pretrial publicity, "they would not be able to serve with an open mind and render…an impartial decision based on only the law and the evidence." *Bolin*, 736 So.2d at 1164. During voir dire, five of the remaining jurors indicated they had been exposed to pretrial publicity. Because the trial court denied individual voir dire, it was impossible for the defense to ascertain exactly what information the five jurors possessed without tainting the entire pool. *Id*. at 1165.

The Florida Supreme Court reversed for a new trial and held:

> [S]imply asking members of the jury venire to indicate by a show of hands whether the publicity would impair their ability to render an impartial decision did not adequately protect the defendant's constitutional rights.
>
> The preferred approach in such cases…is to conduct individual examination of the jurors. Individual voir dire allows the trial court to probe the effect of any adverse publicity on the juror and insulates the jurors from one another's prejudicial comments.

Id. (emphasis added) (internal citations omitted).

The trial court in this case used precisely the litmus test rejected in *Bolin*. After numerous potential jurors acknowledged exposure to pretrial publicity during voir dire, the following exchange ensued at a bench conference.

> DEFENSE COUNSEL: I don't want to ask them anything specific in front of each other, to run the risk of tainting this jury. Would it be possible, Judge, to somehow talk to these people individually?
>
> THE COURT: Denied…Maybe I wasn't clear…My litmus paper test was, how strong their feelings are with regard to their ability to set aside their experiences. And my understanding of the panel, all of them, was that no one held any strongly held opinions on the merits of the case, as it related in the paper, that they couldn't be open minded about setting that aside and hearing the evidence presented in this case. So I don't see anything different from this morning. But maybe you did and I missed it. What's on your mind?
>
> DEFENSE COUNSEL: The problem is, what I have a fear – I think I have the right to ask them what they've heard about the case.
>
> THE COURT: You can.
>
> DEFENSE COUNSEL: I have a fear that if I do that, and I do that collectively…that I'm going to run the risk of paneling – of killing this whole panel.
>
> THE COURT: You know, I don't think it's necessary for you to say, hey, tell me everything you heard about this case. I don't think that's – that's a question that needs to be asked.
>
> <u>I think the question is, has anybody heard anything that caused them to form an opinion about this case that prevents them from being able to resolve the case on the merits and the evidence today. I don't think you need to go into, what did you hear?</u>

(T. Tr. at 421-423) (emphasis added).

The trial court denied Ms. Dippolito's requests to conduct individual voir dire without assessing the nature of the information the jurors possessed. The first time that information was elucidated was during voir dire, when the jurors explained, in the presence of the entire panel, the details of what they gleaned from the press, some of which pertained to inadmissible matters. Based on the State's own recitation of *Bolin*'s holding, the trial court abused its discretion by denying Ms. Dippolito's repeated requests for individual voir dire.

This trial court compounded this error when it denied Ms. Dippolito's request to strike the entire panel and for a mistrial. The State argues the denials were proper because the panel was not exposed to inadmissible information. As explained *supra* at pages 1-2, that is simply not true. Even worse, not only did Juror Baer comment on inadmissible information, he was an attorney.

When asked whether he could render a fair verdict in light of his comments about the alleged poisoning, Juror Baer responded: "I will try very hard to be a fair juror. I'm a human being though and I can't totally scrub my mind. But I would try to make any judgment based only [on] what I hear in the courtroom under oath." (Tr. T. at 446). This is not a fleeting reference to inadmissible information by a potential juror. This is an attorney testifying that inadmissible information was compelling enough that he could only promise to "try" to be fair. The jury pool was tainted at this point. It is worth mentioning that Juror Baer was seated directly in front of Juror Frederick, and two seats to the left of Juror Kniffin, both

of whom were ultimately seated on the jury panel. (R. Vol. 5 at 838). The trial court should have granted Ms. Dippolito's request to strike the entire panel, or for a mistrial[2].

The trial court's denial of Ms. Dippolito's unopposed requests to conduct individual voir dire left her with a Hobson's choice: either ask nothing about the details of the prospective jurors' knowledge of the case through pretrial publicity and risk empanelling a jury that is aware of prejudicial and inadmissible information, or inquire, and risk tainting the entire pool. Either option results in an infringement on Ms. Dippolito's constitutional rights. Individual voir dire is the "preferred approach" in cases with extensive pretrial publicity because collective voir dire entails a serious risk of tainting the entire jury pool. Because that risk was realized in this case, Ms. Dippolito should be granted a new trial.

II. MS. DIPPOLITO DID NOT WAIVE HER CONFRONTATION CLAUSE ARGUMENT REGARDING MR. SHIHADEH'S PERPETUATED TESTIMONY.

The State posits Ms. Dippolito waived her Confrontation Clause argument regarding Mr. Shihadeh's testimony. First, the State argues waiver because Ms. Dippolito did not object to use of the deposition testimony at trial. As Ms.

---

[2] Taking the position that the best defense is a good offense, the State argues that Ms. Dippolito invited any error on this issue because the trial court warned defense counsel not to ask prospective jurors about the specific details they learned from the pretrial publicity, but should only ask whether they "heard anything that caused them to form an opinion about the case" (AB at 6, 29). Based on *Bolin*, this argument holds no weight because this approach has been specifically repudiated by the Florida Supreme Court.

Dippolito made clear in her Motion for New Trial, she consistently worked with Mr. Shihadeh and his attorney to secure his live testimony at trial, even offering to pay his travel costs from the Middle East. (R. Vol. 5 at 894). Based on the State's representation that Mr. Shihadeh was indeed out of the country, Ms. Dippolito did not object to using his deposition in lieu of live trial testimony.

The first indication Ms. Dippolito had that Mr. Shihadeh could have been present for direct examination at trial was when the State revealed, after the close of its case-in-chief, that Mr. Shihadeh had been arrested for DUI in Boca Raton during the trial. *Id*. At that point, Ms. Dippolito began to have serious concerns that, contrary to the State's previous representations, it had not exercised its due diligence in ascertaining Mr. Shihadeh's whereabouts before his deposition testimony was introduced at trial, and may have even known he was available to testify. *Id*.

Ms. Dippolito immediately requested information from the State regarding its knowledge of Mr. Shihadeh's whereabouts when his deposition testimony was presented. The State's responses were evasive and seemed overly defensive. *Id*. at 892. As a result, Ms. Dippolito launched a private investigation which conclusively established that Mr. Shihadeh was, in fact, in Florida and able to testify when his deposition testimony was played at trial. She then moved for a new trial and requested an evidentiary hearing to discover whether the State had

been forthright in providing information for the purpose of carrying its burden to show that Mr. Shihadeh was indeed unavailable[3]. *Id*. at 897.

These facts do not indicate waiver. A defendant's failure to object cannot constitute waiver of a fundamental constitutional right unless the waiver is knowing, voluntary and intelligent. *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997). The State's representation that Mr. Shihadeh was out of the country was the basis for Ms. Dippolito's acquiescence to use of the taped deposition testimony. In her Motion for New Trial, she argued as much: "Any agreement made by the defense was based on representations made by the State." (R. Vol. 5 at 897).

The State conceded after trial and on the record that Mr. Shihadeh was within the jurisdiction of the trial court and available to testify when his deposition was played for the jury. (R. Vol. 43 at 3654). Mr. Shihadeh was under subpoena, and the State had a duty to at least attempt to enforce the subpoena, despite any agreement. If the State concealed information regarding its due diligence in determining whether Mr. Shihadeh was available to testify, or actually knew he was available, Ms. Dippolito's purported waiver was not voluntary, knowing, or intelligent. Plus, given Ms. Dippolito's strenuous efforts to secure Mr. Shihadeh's

---

[3] At the very least, the trial court should have granted an evidentiary hearing to determine whether Ms. Dippolito's suspicions were valid. If Ms. Dippolito was able to show in an evidentiary hearing that the State misrepresented its knowledge of Mr. Shihadeh's whereabouts during trial, or the extent of its due diligence to obtain such knowledge, Ms. Dippolito would have had a viable *Brady* claim.

appearance at trial, her failure to object to use of the deposition testimony should not be construed as a waiver.

The State also claims Ms. Dippolito waived this argument because she did not call Mr. Shihadeh to the stand or move for a mistrial once it became apparent he was able to testify. (AB at 33). Ms. Dippolito's decision not to call Mr. Shihadeh after his deposition testimony had already been played does not constitute waiver. At that point, the bell was rung. Four days elapsed between presentation of his taped testimony to the jury and the moment Mr. Shihadeh's availability was called into question. Issuance of a curative instruction or striking the testimony once direct examination by the State was complete would have been insufficient to unring the bell.

Ms. Dippolito's failure to move for a mistrial when it appeared Mr. Shihadeh could have testified after the State closed its case-in-chief does not constitute waiver. As explained above, grounds for a mistrial were not known until after the trial was complete. As Ms. Dippolito's Motion for New Trial makes clear, the State's representations regarding Mr. Shihadeh's availability induced her agreement to use of the taped deposition testimony at trial. Because she had no reason to suspect that the State's representations were untrue until after the trial, her failure to contemporaneously object or move for a mistrial do not amount to waiver.

III. THE PRIOR BAD ACT EVIDENCE WAS INADMISSIBLE BECAUSE IT WAS NOT RELEVANT TO MS. DIPPOLITO'S INTENT OR MOTIVE REGARDING THE CHARGED CRIME AND WAS NOT NECESSARY TO ESTABLISH THE CONTEXT OUT OF WHICH THE CRIME AROSE.

The State argues the prior bad act evidence was admissible because it: (1) "was relevant to show Appellant's intent to have her husband eliminated, either by having his probation revoked or by having him killed" (AB at 35); (2) "establishes the context of Appellant's attempts to eliminate her husband" (AB at 39) and; (3) "established Appellant's motive that she wanted to have her husband eliminated and she took numerous steps to have him imprisoned or removed" (AB at 39).

Ms. Dippolito was on trial for solicitation of first degree murder. She was not on trial for her alleged "attempts" to eliminate her husband. She was not on trial for her alleged "numerous attempts to have [her husband] imprisoned." The prior bad act evidence was not relevant to her intent or motive regarding the charged crime.

Likewise, the prior bad act evidence was not necessary to establish the context out of which the charged crime arose. The test for determining whether prior bad act evidence is "inextricably intertwined" with the underlying crime is whether the State "would be unreasonably hampered without the [prior bad act] evidence in explaining how the charged crime came to light." *McCall v. State*, 941 So. 2d 1280, 1283 (Fla. 4th DCA 2006). The State made this precise argument in support of its Motion to Introduce Evidence of Prior Bad Acts. (R. Vol. 2 at 228).

On appeal, however, the State executes an about-face, repeatedly arguing that all the errors asserted by Ms. Dippolito are harmless, "in light of the video evidence of Appellant committing the crime." (AB at 29, 33, 42, 49). The State's argument at trial was that it needed the prior bad act evidence to prove its case. Now the State is arguing that it only needed the video evidence to secure a guilty verdict. These arguments are mutually exclusive and the State cannot have it both ways.

IV. THE STATE'S FAILURE TO RESPOND TO MS. DIPPOLITO'S ARGUMENT THAT FOUR OF THE PRIOR BAD ACTS WERE UNSUPPORTED BY CLEAR AND CONVINCING EVIDENCE SHOULD BE DEEMED A CONCESSION OF ERROR.

Ms. Dippolito dedicated a considerable portion of her Initial Brief to explaining that at least four of the prior bad acts introduced by the State were not supported by clear and convincing evidence. (IB at 39-43). In its Answer Brief, the State makes no effort to explain how those four prior bad acts were, in fact, supported by clear and convincing evidence. The State's failure to respond should be deemed an implicit concession of error.

V. THE STATE'S COMMENTS DURING CLOSING WARRANT A NEW TRIAL.

Only a few points in the Answer Brief on this issue are worth addressing. First, the State's attempt to distinguish this case from *Ramos v. State*, 579 So. 2d 360 (Fla. 4th DCA 1991) is bizarre. The State argues this case is unlike *Ramos* because the prosecutor here did not "put forth her personal beliefs as to the truthfulness of the witnesses, but rather that Shihadeh's testimony was consistent

and truthful, and Mike Dippolito's testimony was honest." (AB at 44) (emphasis added). This sentence is internally inconsistent and proves Ms. Dippolito's point. The prosecutor stated that Mr. Shihadeh was truthful and Mr. Dippolito was honest. Those are improper statements under *Ramos*.

More importantly, Ms. Dippolito's strongest point in support of her claim that the prosecutor's closing warrants a new trial was her argument that that the prosecutor infringed on her right not to testify. The State acknowledges that: (1) the prosecutor pointed directly at Ms. Dippolito and said "where's the testimony" (AB at 46); (2) Ms. Dippolito immediately moved for a mistrial and no curative instruction was given (AB at 46) and; (3) the governing standard on this point is whether the comment is "fairly susceptible" to being interpreted as a reference to a defendant's failure to testify. (AB at 49).

Notwithstanding these concessions, the State does not attempt to explain how pointing at Ms. Dippolito and saying "where's the testimony" is not susceptible to interpretation as a comment on her decision not to testify. Instead, the State answers Ms. Dippolito's argument with a single sentence: "there was no comment on Appellant's failure to testify, as the comment rather reflected to [sic] response to the defense theory and the videos [sic] evidence." The State's "argument" is belied by the record. First, the prosecutor said "where is the evidence?" If the prosecutor had stopped there, the State would have a point. Her very next statement, however, uttered while pointing directly at Ms. Dippolito,

was: "Where is the testimony? Where is it?" (T. Tr. at 3464). It is hard to imagine a clearer example of an impermissible comment on a defendant's right not to testify.

VI. THE ERRORS RAISED BY MS. DIPPOLITO ARE NOT HARMLESS.

The State's chorus line is that all the errors asserted by Ms. Dippolito are harmless "in light of the video evidence of Appellant committing the crime." (AB at 29, 33, 42, 49). This Court's recent holding in *Bryant v. State*, 2013 WL 5925304 (Fla. 4th DCA 2013), disposes of the State's argument. Even in cases where the evidence against the defendant is overwhelming, "the test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." *Bryant*, 2013 WL at 3 (emphasis added) (internal citations omitted). The State does not attempt to argue that there is no reasonable probability that the errors raised by Ms. Dippolito did not contribute to her conviction. Because the State does not, and cannot, make this showing, reversal for a new trial is warranted.

CONCLUSION

Based on the foregoing, Ms. Dippolito respectfully requests that this Court vacate her conviction and sentence and remand for a new trial.

DATED this 14th day of November, 2013.

Respectfully submitted,

/s/Michael M Brownlee
Michael M. Brownlee, Esquire
Florida Bar No. 68332
BROWNSTONE, P.A.
400 North New York Ave.,
Suite 215
Winter Park, Florida 32789
Telephone: (407) 388-1900
Facsimile: (407) 622-1511
Counsel for Ms. Dippolito

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished to the Court and all counsel of record via email on November 14, 2013.

/s/Michael M. Brownlee
Michael M. Brownlee, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Date: November 14, 2013

/s/Michael M. Brownlee
Michael M. Brownlee, Esquire