IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

DANTE MARTIN,

Appellant,

v. CASE NO. 5D15-284

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Appellee objects to and rejects Martin's statement of the case and facts. Appellee provides the following in support of the rulings of the trial judge and the affirmance of the convictions and sentences in this case.

As to points 1 and 3:

1. Prior to trial Martin filed a motion and amended motion to declare the hazing statute unconstitutional. (V 1, R 129; V 2, R 271). The trial judge denied the amended motion. (V 2, R 360; V 3, R 455;V 2, T 15). Martin filed a motion for reconsideration which was also denied. (V 3, R 364; V 7, R 1080-1082, 1108).

The facts of this case, based upon the evidence introduced at trial, are that Martin initiated the actions which led to the hazings of Ms. Sanchez and Mr. Hollis and the hazing and death of Mr. Champion. (V 4, T 411, 412, 416, 417, 421-422, 424, 442; V 5, T 593, 596-597, 641-642). There were 15-20 people on the bus. (V 4, T 418, 425). Mr. Champion was the third and final victim to try to reach the back of the bus. (V 4, T 417, 420, 425-429; V 5, T 597-599). There was testimony that Mr. Champion was pulled back to the front of the bus after he fell in order to keep him from reaching the back of the bus; he was also held to keep from reaching the back. (V 4, T 433; V 6, T 735, 736-737). Mr. Champion was repeatedly kicked, punched, jumped on, and hit with a strap. (V 4, T 433, 434; V 5, T 651, 652, 653; V

6, T 734, 735). When Mr. Champion made it to the back of the bus, he looked "tired and he got beat." (V 5, T 604). After Mr. Champion reached the back of the bus, everyone left the bus except for Mr. Champion. (V 5, T 657). Mr. Champion was panicking and said he could not see and could not breathe. (V 5, T 658). Mr. Champion said "oh, God and oh, God" and passed out. (V 5, T 658). Mr. Champion threw up red Gatorade. (V 6, T 739, 796). When the first responders arrived Mr. Champion was cold to the touch, not breathing and had no heartbeat. (V 6, T 796). Mr. Champion died due to massive hemorrhage into his soft tissue caused by repeated blows. (V 7, T 836-838).

2. The evidence at trial established Martin advised that the crossing would occur that night. (V 4, T 411,412; V 5, T 641-642). When the three victims arrived at the bus in the dark, Martin was the one telling them what to do and in fact participated in the initial part of the hazing. (V 4, T 416, 417, 421-422, 424, 442; V 5, T 587, 593, 596-597).

3. The first two victims, Ms. Sanchez and Mr. Hollis, were punched kicked, hit with drumsticks and drum mallets and pulled to keep them from moving. (V 4, T 419, 422, 423-424, 426, 428; V 5, T 595, 597, 598, 599). After reaching the back of the bus, Mr. Hollis was in pain, his adrenaline was racing, his heartbeat was pretty fast and he was nauseous. (V 4, T 430).

Ms. Sanchez testified that she was hit 100 times, but it was hard to estimate. (V 5, T 599). The hitting hurt initially, but after the first minute Ms. Sanchez did not feel it as much because "your body goes into shock after so much beating[.]" (V 5, T 600). When she got to the back of the bus, Ms. Sanchez laid down because she was tired, hurt and she was in and out of consciousness; her clothing had been ripped off. (V 5, T 601, 602).

4. The crossing was done in the dark after Dr. James left the bus. (V 4, T 418; V 6, T 761, 762). Dr. White was not told because he would not approve and the crossing was prohibited by the school. (V 5, T 643).

As to point 2:

Martin filed a motion to dismiss the manslaughter charge. (V 2, R 345). A hearing was held on the motion. (V7, R 1069, 1108). The motion was denied. (V 3, 454).

As to point 3:

1. Prior to trial, Martin filed a motion in limine seeking to exclude the testimony of the medical examiner as to the cause and manner of death and the state of Mr. Champion's body after the victim's body was released for bone harvesting of the victim's leg bones. (V 1, R 173). A hearing was held on the motion. (V 7, R 1094). Martin requested that the trial judge read the medical examiner's deposition.

(V 7, R 1096). During the hearing the trial judge stated:

> . . . I haven't read the medical examiner's deposition. If the medical examiner says, I looked at the body and it was in this condition. Then it went away for bone harvesting, and it came back in another condition, but it is my opinion, that the bone harvesting had nothing to do with the marks that I now see on the victim. In particular, marks that were on his head, face, arms, whatever. I mean - - so there could be a range of hypothetical fact situations that I'm just not prepared to rule - - issue a iron clad ruling on this, yes or no.
>
> So I think I have to read the medical examiner's [deposition.]

(V 7, R 1099). When Martin stated that they did not know where the body went and what procedures were preformed, the trial judge responded:

> Well, but if the medical examiner testified that bone harvesting would not have caused these marks that I see on the victim now, and the marks were not apparent earlier, because this type of hemorrhaging normally takes a certain amount of time to manifest, that might establish the absence of tampering.

(V 7, R 1100). According to the prosecutor, that is what the medical examiner testified to at her deposition. (V 7, R 1100). The trial judge reserved ruling on the motion in limine. (V 3, R 455; V 7, R 1101).

There is nothing in the record on appeal to indicate that Martin requested any further ruling on his motion in limine prior to trial. Immediately prior to the testimony of the medical examiner Martin stated that he "would like to renew our previous motions regarding the chain of custody and the testifying of this, the

testimony of this witness[.]" (V 7, T 821). The motions were denied. (V 7, T 821).

2. The medical examiner testified at length in her deposition about the procurement and specifically testified that when Mr. Champion's body was received back the only changes to his body were in the lower extremities. (Confidential record, Dr. Irrgang's deposition, pp. 7, 8-10, 18, 25-28, 30). Additionally, she testified at trial that there was some discoloration of Mr. Champion's skin on her initial external examination. (V 7, T 825). The medical examiner noticed not only the discoloration, but also some unevenness of the skin surface which suggested swelling upon the return of Mr. Champion's body. (V 7, T 827). Also, when Mr. Champion's body was first received the only information the medical examiner received was that Mr. Champion collapsed on a bus after performing in a marching band. (V 7, T 823-824, 843, 844).

3. During the trial, one of the autopsy photographs was a duplicate and was withdrawn by the State. (V 7, T 828). Martin objected to the photograph which became State's Exhibit 9 because it was not necessary for the medical examiner to explain what she did. (V 7, T 829). The trial judge overruled the objection and found that

> [t]his photograph is necessary to show the extent of the injuries to [the victim] and to allow the witness to opine the cause of death and to explain the toxic - - I'm sorry, I lost the word - - the nature of the

> condition, the stress on the individual's blood cells and it's not duplicative . . .

(V 7, T 829). The photographs were admitted into evidence. (V 7, T 825, 830). Martin then stated "just for purposes of those photographs, based on the Court's two rulings, we don't have an objection based on the Court's ruling to the State introducing those other than - - other than the objections that we've already made." (V 7, T 829). The medical examiner testified as to State's Exhibit 9, explained what it and the other photographs showed, and testified as to the cause and manner of Mr. Champion's death. (V 7, T 823-839).

4. Prior to trial, a hearing was held on the motion in limine. (V 7, R 1118-1125). The State announced that it had reduced the number of photographs and was seeking to admit eight photographs. (V 7, R 1120, 1122). Martin made no stipulations as to the cause or the manner of death. (V 7, R 1121). The prosecutor argued that the photographs were relevant to the testimony of the medical examiner. (V 7, R 1121, 1122). The trial judge ruled that:

> . . . [T]he motion to preclude the autopsy photos at this time is denied. There is no - - there are no stipulations between the State and the defendants about cause and manner of death. And until I see what is obvious by the testimony, this motion is premature. Now if - - when the trial is under way, the Defense wants to raise this again, you may certainly do so.

(V 7, R 1125).

As to point 4:

Both Martin and the State requested the trial judge give a special instruction on conspiracy. (V 7, T 881, 882). Martin objected to the instruction provided by the State and requested that his instruction, based upon federal law, be given. (V 7, T 883, 888-892). The trial judge took the instructions under advisement, found that Martin's instruction was not a correct statement of Florida law and because of Martin's objection to the State's instruction, the trial judge crafted her own instruction. (V 7, T 892-893, 914, 915). After review of that instruction, the trial judge stated: "Your objection to Mr. Ashton's version of the conspiracy instruction I think is preserved and you would raise an objection, again, for the record?" (V 7, T 922). Martin stated "[w]e do." (V 7, T 922). Martin had no further objections and set forth no basis for his objection to the instruction crafted by the trial judge. (V 7, T 922). The trial judge's instruction defined conspiracy, explained the legal consequence of a conspiracy and specifically instructed the jury that before they could apply conspiracy to Martin's case the State had to prove a Martin was part of a conspiracy beyond a reasonable doubt. (V 3, R 487-488).

As to point 5:

1. During the charge conference, it was announced that they were at the hazing instruction. (V 7, T 879). The only objection made was to the inclusion of the

conspiracy instruction at the bottom of the page containing the end of the hazing instruction. (V 7, T 880). The trial judge indicated that it would be repaginated and that each instruction would start on a new page. (V 7, T 880). Martin then moved on to the conspiracy instruction. (V 7, T 880). The trial judge asked if he was "satisfied with the hazing instruction now[]" and Martin responded that he was. (V 7, T 880). Later during, as well as prior to, the charge conference, Martin announced he did not have an objection to the State's hazing instruction. (V 6, T 774; V 7, T 893). No objection was made to the hazing after the jury was instructed. (V 8, T 1045-1047).

During the charge conference, the objections and discussion concerned the conspiracy instruction, not the hazing instruction. (V 7, T 885-891). Additionally, the morning after the charge conference the jury instructions were again discussed and no objection was made to the hazing instruction and no request was made concerning any written instruction provided by Martin. (V 7, T 913-938).

2. The only written requested instruction on hazing contained in the record on appeal is the one submitted by the State. (V 3, R 461).

3. In the motion for new trial filed by Martin, the only claim concerning the jury instructions concerned the conspiracy instruction. (V 5, R 675, 746).

4. The trial judge instructed the jury on hazing. (V 3, R 481-482, 483, 485).

5. The trial judge found the term "competition" is such a term that is commonly used and generally understood by the average person. (V 7, T 905, 916-917). Martin argued at length in his closing that the crossing of the bus was a competition and also defined competition as "[t]he act or process of trying to get or win something, such as a prize or a higher level of success that someone else is also trying to get or win." (V 8, T 969-980, 999, 1009). While the trial judge ruled that Martin could not read the definition of competition out of the dictionary during closing, Martin nonetheless provided the jury with such definition. (V 7, T 905, 916-917; V 8, T 1009).

As to point 6:

During rebuttal closing argument, the prosecutor stated the following:

> The rest of the time was talking about why people cross. If you look at this and the hazing instruction over there that contains all the elements, there's nothing there that says why people cross matters. It's just not there. In fact, quite the contrary. It says the consent of the victim - - yeah, it is not a defense to the charge of hazing that the consent of the victim was obtained. It doesn't matter why. Yet we spent almost an hour hearing about why people cross. I don't care why people cross.
>
> Counsel said in his closing argument that I had told you that he was forced to cross. I never said that. I don't believe it. I don't care why Robert Champion crossed. I don't care why Keon Hollis crossed. I don't care why Lissette - - I don't care why any of them crossed. The problem is that the crossing has to stop.

During this hour-long discussion of - -

(V 8, T 1011-1012). Martin then objected and a bench conference was held. (V 8, T 1012). Martin claimed that the prosecutor's argument was asking the jury to send a message. (V 8, T 1012). Martin moved for a mistrial, asked that the prosecutor be admonished and asked that the jury be instructed to disregard the comment. (V 8, T 1012). The trial judge reserved ruling on the motion for mistrial. (V 8, T 1013). The prosecutor agreed to the trial judge instructing the jury to disregard the comment. (V 8, T 1013-1014). The jury was instructed:

> Members of the jury, you will disregard Mr. Ashton's last statement to you, which was contained in his closing argument.

(V 8, T 1014). After the jury reached its verdict, Martin again discussed the complained of comment and a memorandum which was submitted to the trial judge. (V 8, T 1053). The court reporter was ordered to transcribe the closing argument. (V 8, T 1054). The trial judge informed Martin he could set the motion for a hearing. (V 8, T 1054). It does not appear from the record that a hearing was held and on December 18, 2014, the motion for mistrial was denied. (V 5, R 826).

SUMMARY OF ARGUMENTS

Point 1: The hazing statute is not unconstitutional. It is neither overbroad nor vague. Martin is entitled to no relief.

Point 2: The motion to dismiss was properly denied. A plain reading of the statutes indicates that Martin was properly charged with both manslaughter and felony hazing, as was the legislative intent. Martin is entitled to no relief.

Point 3: The trial judge did not abuse her discretion in ruling that the testimony of the medical examiner and the autopsy photographs were admissible. Any error was harmless. Martin is entitled to no relief.

Point 4: This issue has not been preserved for appellate review and fundamental error did not occur. After considering the facts of the case and the relevant case law, the trial judge crafted an instruction which was a proper statement of the law and which was not misleading or confusing. Martin is entitled to no relief.

Point 5: Any issue as to the hazing jury instruction was not preserved for appellate review, as no objection was made to the instruction and the argument made on appeal was not made below. Fundamental error did not occur. Additionally, the trial judge did not abuse her discretion by refusing to instruct on the definition of "competition" or in refusing to allow Martin to read the definition from a dictionary during closing argument. Martin is entitled to no relief.

Point 6: The motion for mistrial was properly denied. The closing argument was not improper. Additionally, the jury was given an instruction to disregard the complained of comment. Any error was harmless. Martin is entitled to no relief.

ARGUMENTS

POINT 1

THE HAZING STATUTE IS CONSTITUTIONAL.

Martin argues that the trial judge erred in denying his amended motion to declare the hazing statute unconstitutional because it is both overbroad and vague. Appellee asserts the motion was properly denied. The hazing statute is neither overbroad nor vague. Martin is entitled to no relief.

Prior to trial Martin filed a motion and amended motion to declare the hazing statute unconstitutional. (V 1, R 129; V 2, R 271). The trial judge denied the amended motion. (V 2, R 360; V 3, R 455;V 2, T 15). Martin filed a motion for reconsideration which was also denied. (V 3, R 364; V 7, R 1080-1082, 1108).

The facts of this case, based upon the evidence introduced at trial, are that Martin initiated the actions which led to the hazings of Ms. Sanchez and Mr. Hollis and the hazing and death of Mr. Champion. (V 4, T 411, 412, 416, 417, 421-422, 424, 442; V 5, T 593, 596-597, 641-642). Mr. Champion was the third and final victim to try to reach the back of the bus. (V 4, T 417, 420, 425-429; V 5, T 597-599). There was testimony that Mr. Champion was pulled back to the front of the bus after he fell in order to keep him from reaching the back of the bus; he was also held to keep from reaching the back. (V 4, T 433; V 6, T 735, 736-737). Mr. Champion

was repeatedly kicked, punched, jumped on, and hit with a strap. (V 4, T 433, 434; V 5, T 651, 652, 653; V 6, T 734, 735). After Mr. Champion reached the back of the bus, everyone left the bus except for Mr. Champion. (V 5, T 657). Mr. Champion was panicking and said he could not see and could not breathe. (V 5, T 658). Mr. Champion said "oh, God and oh, God" and passed out. (V 5, T 658). Mr. Champion threw up red Gatorade. (V 6, T 739, 796). When the first responders arrived Mr. Champion was cold to the touch, not breathing and had no heartbeat. (V 6, T 796).

Section 1006.63 of the Florida Statutes, the hazing statute, provides:

> (1) As used in this section, "hazing" means any action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student for purposes including, but not limited to, initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution. "Hazing" includes, but is not limited to, pressuring or coercing the student into violating state or federal law, any brutality of a physical nature, such as whipping, beating, branding, exposure to the elements, forced consumption of any food, liquor, drug, or other substance, or other forced physical activity that could adversely affect the physical health or safety of the student, and also includes any activity that would subject the student to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or other forced activity that could adversely affect the mental health or dignity of the student. Hazing does not include customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective.
>
> (2) A person commits hazing, a third degree felony, punishable as provided in s. 775.082 or s. 775.083, when he or she intentionally or recklessly commits any act of hazing as defined in subsection (1) upon

another person who is a member of or an applicant to any type of student organization and the hazing results in serious bodily injury or death of such other person.

(3) A person commits hazing, a first degree misdemeanor, punishable as provided in s. 775.082 or s. 775.083, when he or she intentionally or recklessly commits any act of hazing as defined in subsection (1) upon another person who is a member of or an applicant to any type of student organization and the hazing creates a substantial risk of physical injury or death to such other person.

(4) As a condition of any sentence imposed pursuant to subsection (2) or subsection (3), the court shall order the defendant to attend and complete a 4-hour hazing education course and may also impose a condition of drug or alcohol probation.

(5) It is not a defense to a charge of hazing that:

(a) The consent of the victim had been obtained;

(b) The conduct or activity that resulted in the death or injury of a person was not part of an official organizational event or was not otherwise sanctioned or approved by the organization; or

(c) The conduct or activity that resulted in death or injury of the person was not done as a condition of membership to an organization.

(6) This section shall not be construed to preclude prosecution for a more general offense resulting from the same criminal transaction or episode.

Section 1006.63(1)-(6), Fla. Stat. (2011).

Appellee asserts that the hazing statute, section 1006.63, is not unconstitutional, as it is neither overbroad nor vague.

> The procedure for analyzing [] a challenge to the facial validity of a statute is set forth by the United States Supreme Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982):
>
> > In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.
> >
> > *Id.*, 455 U.S. at 494-95, 102 S.Ct. at 1191.

Bouters v. State, 659 So. 2d 235, 237 (Fla. 1995). *See also Morton v. State*, 988 So. 2d 698 (Fla. 1st DCA 2008). "It is well established that, where reasonably possible, a statute will be interpreted in a manner that resolves all doubts in favor of its constitutionality." *State v. Fuchs*, 769 So. 2d 1006, 1008 (Fla. 2000) (citations omitted).

Martin claims the statute is overbroad. However, Martin fails to identify what constitutionally protected conduct the hazing statute substantially reaches. A review of the hazing statute indicates that the conduct described is criminal and is unprotected by the First Amendment. "While the First Amendment confers on each

citizen a powerful right to express oneself, it gives the [citizen] no boon to jeopardize the health, safety, and rights of others." *Bouters*, at 237 (citation and quotations omitted).

Additionally, the charges against Martin were not "based entirely on his role as the 'President of Bus C.'" As set forth above, the evidence at trial established Martin advised that the crossing would occur that night. (V 4, T 411,412; V 5, T 641-642). When the three victims arrived at the bus in the dark, Martin was the one telling them what to do and in fact participated in the initial part of the hazing. (V 4, T 416, 417, 421-422, 424, 442; V 5, T 587, 593, 596-597). Section 1006.63 is not overbroad and does not reach a substantial amount of constitutionally protected conduct.

As to Martin's claim that the statute is vague, this centers on the alleged failure of the statute to define the terms "brutality" and "competition." "The Legislature's failure to define a critical term does not by itself render a statute unconstitutionally vague." *Morton*, at 702. A review of the statute indicates that the word "brutality" cannot be viewed in isolation. The statute in fact sets forth "any brutality of a physical nature." The statute then goes on to define "any brutality of a physical nature" with examples "such as whipping, beating, branding, exposure to the elements, forced consumption of any food, liquor, drug, or other substance, or other

forced physical activity that could adversely affect the physical health or safety of the student, and also includes any activity that would subject the student to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or other forced activity that could adversely affect the mental health or dignity of the student." Section 1006.63(1), Fla. Stat. (2011). Thus, the term brutality as used in the hazing statute is not vague.

The term "competition" is included in the portion of the hazing definition setting forth what is not hazing. While it is not defined in the statute, appellee asserts that reading the exception as a whole it is clear what the meaning of "competition" is. Additionally, a dictionary definition can be considered "to ascertain its meaning in everyday usage." *Morton*, at 702. According to the online Merriam-Webster dictionary, the simple definition of "competition" is:

> : the act or process of trying to get or win something (such as a prize or a higher level of success) that someone else is also trying to get or win
>
> : the act or process of competing
>
> : actions that are done by people, companies, etc., that are competing against each other[.]

www.merriam-webster.com/dictionary/competition.

The facts of this case establish that all three of the victims were brutality beaten

in their attempts to cross the bus. There were 15-20 people on the bus. (V 4, T 418, 425). Mr. Champion was the third and final victim to try to reach the back of the bus. (V 4, T 417, 420, 425-429; V 5, T 597-599). The first two victims, Ms. Sanchez and Mr. Hollis, were punched kicked, hit with drumsticks and drum mallets and pulled to keep them from moving. (V 4, T 419, 422, 423-424, 426, 428; V 5, T 595, 597, 598, 599).

After reaching the back of the bus, Mr. Hollis was in pain, his adrenaline was racing, his heartbeat was pretty fast and he was nauseous. (V 4, T 430). Ms. Sanchez testified that she was hit 100 times, but it was hard to estimate. (V 5, T 599). The hitting hurt initially, but after the first minute Ms. Sanchez did not feel it as much because "your body goes into shock after so much beating[.]" (V 5, T 600). When she got to the back of the bus, Ms. Sanchez laid down because she was tired, hurt and she was in and out of consciousness; her clothing had been ripped off. (V 5, T 601, 602).

There was testimony that while he was crossing the bus Mr. Champion was pulled back to the front of the bus after he fell in order to keep him from reaching the back of the bus; he was also held to keep from reaching the back. (V 4, T 433; V 6, T 735, 736-737). Mr. Champion was repeatedly kicked, punched, jumped on, and hit with a strap. (V 4, T 433, 434; V 5, T 651, 652, 653; V 6, T 734, 735). When Mr.

Champion made it to the back of the bus, he looked "tired and he got beat." (V 5, T 604). Mr. Champion died due to massive hemorrhage into his soft tissue caused by repeated blows. (V 7, T 836-838).

Based on the facts of this case, a person of ordinary intelligence would reasonably expect to incur criminal sanctions under the hazing statute. This was not a competition. This was done in secret, in the dark after Dr. James left the bus. (V 4, T 418; V 6, T 761, 762). Dr. White was not told because he would not approve and the crossing was prohibited by the school. (V 5, T 643). The statute gave Martin fair notice that the conduct was forbidden. The hazing statute is not vague as applied to the facts of this case and thus is not vague in all applications. *Morton*, at 702.

POINT 2

THE TRIAL JUDGE PROPERLY DENIED THE MOTION TO DISMISS THE MANSLAUGHTER CHARGE.

Martin argues on appeal that the trial judge erred in denying his motion to dismiss the manslaughter charge. (V 2, R 345; V 3, 454; V7, R 1069, 1108). Appellee asserts that the motion was properly denied. According to Martin, because he was charged with the specific crime of felony hazing in violation of section 1006.63(2) of the Florida Statutes he could not be charged with the general crime of manslaughter. The ruling on a motion to dismiss a charge or charges is a question of

law that is reviewed *de novo*. *Sexton v. State*, 898 So. 2d 1187 (Fla. 1st DCA 2005); *State v. Pasko*, 815 So. 2d 680 (Fla. 2nd DCA 2002), *rev. denied*, 835 So. 2d 268 (Fla. 2002). Appellee asserts that the motion to dismiss was properly denied. Martin is entitled to no relief.

Appellee asserts that a plain reading of the statutes indicates that Martin was properly charged with both manslaughter and felony hazing. Section 1006.63(6) of the Florida Statutes specifically sets forth that "[t]his section shall not be construed to preclude prosecution for a more general offense resulting from the same criminal transaction or episode." *See also* section 775.021(4)(b), Fla. Stat. (2011) ("The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent."). Thus, while Martin wants this to be an issue of statutory construction, it is not. Rather, the issue is whether the State has the discretion to charge a person who violates two separate criminal statutes, section 1006.63 and section 782.07 of the Florida Statutes, with two separate crimes where the victim dies.

The decision to charge and prosecute criminal offenses is an executive responsibility over which the state attorney has complete discretion. *Valdes v. State,* 728 So. 2d 736 (Fla. 1999). The judiciary cannot interfere with this discretionary

executive function. *State v. Bloom*, 497 So. 2d 2 (Fla. 1986). In *State v. Cogswell*, 521 So. 2d 1081 (Fla. 1988), the Florida Supreme Court discussed prosecutorial discretion in charging a defendant:

> It is not unusual for a course of criminal conduct to violate laws that overlap yet vary in their penalties. Multiple sentences are even allowed for conduct arising from the same incident. Traditionally, the legislature has left to the prosecutor's discretion which violations to prosecute and hence which range of penalties to visit upon the offender.

Cogswell at 1082 (quoting *Fayerweather v. State*, 332 So. 2d 21, 22 (Fla. 1976)). *See also United States v. Batchelder*, 442 U.S. 114, 125 (1979) ("There is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of the two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements."). As set forth above sections, 1006.63(6) and 775.021(4)(b) establish that the prosecutor had the discretion to charge Martin with both manslaughter and felony hazing.

Appellee acknowledges that pursuant to *Adams v. Culver*, 111 So. 2d 665 (Fla. 1959), a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. However, as set forth above, the rules of statutory construction need not be applied in this case because section 1006.63(6) is clear and unambiguous. Section 1006.63(6) specifically provides that "[t]his section **shall not be construed to preclude**

prosecution for a more general offense resulting from the same criminal transaction or episode." (Emphasis added).

> . . . While *Adams* does require that, in the absence of textual guidance to the contrary, statutory language defining a general, more serious crime be construed to exclude conduct made criminal by a more specific statute that prescribes less serious punishment, the *Adams* decision rests on canons of statutory construction, not on any doctrinally independent constraint on prosecutorial discretion. The decision in *Adams*, concerns how criminal statutes are to be construed, and does not purport to curtail the discretion to prosecute fully offenses a statute duly proscribes.

State v. Croy, 813 So. 2d 993, 994 (Fla. 1st DCA 2002) (citations omitted). Because the language of section 1006.63(6) is clear, *Adams* is inapplicable.

Finally, before rules of statutory construction are applied to defeat the express language of a statute, there must be a hopeless inconsistency between two competing statutes. *State v. Parsons*, 569 So. 2d 437, 438 (Fla. 1990). "In other words, it is improper to resort to the canons of statutory construction when the texts of different statutes are plain and unambiguous." *Limbaugh v. State*, 887 So.2d 387, 397 (Fla. 4th DCA 2004). There is no inconsistency if both statutes can be enforced without doing any violence to the language of the other. *Parsons*, *supra*. As set forth above, both section 782.07 and section 1006.63(3) can be enforced without doing violence to the language of either statute. The intent of the legislature is clear, Martin could properly

be charged with both manslaughter and felony hazing.[1] The motion to dismiss was properly denied. Martin is entitled to no relief.

POINT 3

THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION IN RULING THAT THE TESTIMONY OF THE MEDICAL EXAMINER AND THE AUTOPSY PHOTOGRAPHS WERE ADMISSIBLE.

Martin argues on appeal that the trial judge erred in denying his motions in limine concerning the testimony of the medical examiner and the autopsy photographs. Appellee asserts that the trial judge did not abuse her discretion in ruling that the testimony and the photographs were admissible. Additionally, any error was harmless. Martin is entitled to no relief.

> A trial court's rulings as to the [admission or exclusion of] evidence should be reviewed under the abuse of discretion standard. Under the abuse of discretion standard, "[d]iscretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'"

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[1]Martin was not punished twice for hazing and was not punished twice for one death. *See Lawrence v. State*, 801 So. 2d 293 (Fla. 2nd DCA 2001) ("In this case, although the offense of leaving the scene of an accident involving death requires a showing that the defendant was involved in an accident resulting in death, it does not require a showing that the defendant actually caused the death. Section 316.027(1)(b), Fla. Stat. (1997). Ms. Lawrence was only charged with one offense that included an element of causation, the DUI manslaughter charge. Thus, Ms. Lawrence was appropriately punished once for having caused one death.").

Frances v. State, 970 So. 2d 806, 813 (Fla. 2007) (citations omitted). *See also Floyd v. State*, 850 So. 2d 383, 399 (Fla. 2002) ("[A]bsent an abuse of discretion a reviewing court should not second-guess a trial judge's decision regarding the admissibility of evidence.").

As to the testimony of the medical examiner and Martin's chain of custody argument, the trial judge did not abuse her discretion by reserving ruling on the motion in limine and denying the motion immediately prior to the medical examiner's testimony.

Prior to trial, Martin filed a motion in limine seeking to exclude the testimony of the medical examiner as to the cause and manner of death and the state of Mr. Champion's body after the victim's body was released for bone harvesting of the victim's leg bones. (V 1, R 173). A hearing was held on the motion. (V 7, R 1094). Martin requested that the trial judge read the medical examiner's deposition. (V 7, R 1096). During the hearing the trial judge stated:

> . . . I haven't read the medical examiner's deposition. If the medical examiner says, I looked at the body and it was in this condition. Then it went away for bone harvesting, and it came back in another condition, but it is my opinion, that the bone harvesting had nothing to do with the marks that I now see on the victim. In particular, marks that were on his head, face, arms, whatever. I mean - - so there could be a range of hypothetical fact situations that I'm just not prepared to rule - - issue a iron clad ruling on this, yes or no.

So I think I have to read the medical examiner's [deposition.]

(V 7, R 1099). When Martin stated that they did not know where the body went and what procedures were preformed, the trial judge responded:

> Well, but if the medical examiner testified that bone harvesting would not have caused these marks that I see on the victim now, and the marks were not apparent earlier, because this type of hemorrhaging normally takes a certain amount of time to manifest, that might establish the absence of tampering.

(V 7, R 1100). According to the prosecutor, that is what the medical examiner testified to at her deposition. (V 7, R 1100). The trial judge reserved ruling on the motion in limine. (V 3, R 455; V 7, R 1101).

There is nothing in the record on appeal to indicate that Martin requested any further ruling on his motion in limine prior to trial. Immediately prior to the testimony of the medical examiner Martin stated that he "would like to renew our previous motions regarding the chain of custody and the testifying of this, the testimony of this witness[.]" (V 7, T 821).

Martin argues on appeal that the trial judge erred in denying the motion in limine because he established probable tampering because Mr. Champion's body was removed, pursuant to section 765.547 of the Florida Statutes, prior to the medical examiner performing the autopsy. This is not a case where physical evidence was lost or misplaced or found after the fact. That Mr. Champion's body was released for

bone procurement does not render the autopsy results or findings inadmissible. Rather, such evidence goes only to the weight of the evidence. Martin was free to cross examine the medical examiner as to specifics surrounding the removal of Mr. Champion's body for bone procurement. Martin was free to argue at length that the injuries seen and testified to by the medical examiner were not the result of the beating Mr. Champion sustained on the bus, but rather were inflicted upon Mr. Champion's body after he died. Such arguments go only to the weight the jury should give such evidence. The testimony of the medical examiner was properly admitted.

Should this court determine that this is an admissibility issue, the motion in limine was properly denied.

> Relevant physical evidence can be admitted "unless there is an indication of probable tampering." Once a party produces evidence of tampering, "the proponent of the evidence is required to establish a proper chain of custody or submit other evidence that tampering did not occur."

Taylor v. State, 855 So. 2d 1, 25 (Fla. 2003) (citations omitted). "A bare allegation by a defendant that a chain of custody has been broken is not sufficient to render relevant physical evidence inadmissible." *Floyd*, 850 So. 2d at 399.

Appellee asserts that Martin failed to establish any probable tampering in this case. While Martin was able to show that the bones in Mr. Champion's legs were removed, he presented no evidence that the upper portion of Mr. Champion's body

was in any way altered or tampered with. In fact, the medical examiner testified at length in her deposition about the procurement and specifically testified that when Mr. Champion's body was received back the only changes to his body were in the lower extremities. (Confidential record, Dr. Irrgang's deposition, pp. 7, 8-10, 18, 25-28, 30). Additionally, she testified at trial that there was some discoloration of Mr. Champion's skin on her initial external examination. (V 7, T 825). Also, when Mr. Champion's body was first received the only information the medical examiner received was that Mr. Champion collapsed on a bus after performing in a marching band. (V 7, T 823-824, 843, 844). While the medical examiner noticed not only the discoloration but also some unevenness of the skin surface which suggested swelling upon the return of Mr. Champion's body, (V 7, T 827), such changes did not give rise to an indication of probable tampering. Martin may have established that there was a chance that tampering may have or could have occurred, Martin did not establish probable tampering. There was no evidence presented that the injuries the medical examiner discovered during the autopsy could have been inflicted post-mortem. Martin failed to establish that probable tampering occurred. Additionally, the deposition testimony and the testimony at trial established that no tampering occurred. The motion in limine was properly denied.

As to the autopsy photographs, the trial judge did not abuse her discretion by

ruling that the photographs were admissible prior to trial and did not abuse her discretion by ruling that State's Exhibit 9 was admissible. Martin is entitled to no relief.

During the trial, one of the photographs was a duplicate and was withdrawn by the State. (V 7, T 828). Martin objected to the photograph which became State's Exhibit 9 because it was not necessary for the medical examiner to explain what she did. (V 7, T 829). The trial judge overruled the objection and found that

> [t]his photograph is necessary to show the extent of the injuries to [the victim] and to allow the witness to opine the cause of death and to explain the toxic - - I'm sorry, I lost the word - - the nature of the condition, the stress on the individual's blood cells and it's not duplicative . . .

(V 7, T 829). Martin then stated "just for purposes of those photographs, based on the Court's two rulings, we don't have an objection based on the Court's ruling to the State introducing those other than - - other than the objections that we've already made." (V 7, T 829).

As to exhibit 9, the trial judge did not abuse her discretion in admitting the autopsy photograph. The Florida Supreme Court has held that

> . . . photographs are admissible if they are probative to an issue in dispute and they are not so shocking as to defeat their value. Admission of photographs is a matter for the discretion of the trial court, and this Court has held it will not disturb such rulings absent a clear abuse of discretion. The test for admissibility of . . . photographs is relevancy

rather than necessity.

Bowles v. State, 979 So. 2d 182, 194 (Fla. 2008) (citations and quotations omitted). The admission of autopsy photographs has been upheld "when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds." *Douglas v. State*, 878 So. 2d 1246, 1255 (Fla. 2004). *See also Brooks v. State*, 787 So.2d 765, 781 (Fla. 2001) (five autopsy photographs were relevant to the medical examiner's determination as to the manner of the victim's death).

> However, even where photographs are relevant, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." In making this determination, the trial court should "scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point."

Douglas, *supra* (citations omitted).

The trial judge did not abuse her discretion in admitting State's exhibit 9. The trial judge specifically found that the photograph was necessary to show the extent of the injuries, the cause of death, the nature of the condition, and the stress on Mr. Champion's blood cells. Also, as found by the trial judge the photograph was not a duplicate of any other photograph admitted. The photograph was relevant to show the full extent of the hemorrhage suffered by Mr. Champion and helped to explain the testimony of the medical examiner. (V 7, T 835). The photograph was probative of

the medical examiner's opinion of the cause and manner of death. The test for admissibility of photographs is relevancy, not necessity. The complained of photograph was relevant and properly admitted.

As to the denial of the motion in limine, the trial judge did not abuse her discretion in denying the motion. Prior to trial, a hearing was held on the motion in limine. (V 7, R 1118-1125). The State announced that it had reduced the number of photographs and was seeking to admit eight photographs. (V 7, R 1120, 1122). Martin made no stipulations as to the cause or the manner of death. (V 7, R 1121). The prosecutor argued that the photographs were relevant to the testimony of the medical examiner. (V 7, R 1121, 1122). The trial judge ruled that:

> . . . [T]he motion to preclude the autopsy photos at this time is denied. There is no - - there are no stipulations between the State and the defendants about cause and manner of death. And until I see what is obvious by the testimony, this motion is premature. Now if - - when the trial is under way, the Defense wants to raise this again, you may certainly do so.

(V 7, R 1125).

The argument above as to State's exhibit 9 is equally applicable to the motion in limine. The seven autopsy photographs which were admitted into evidence were relevant and admissible. (V 7, T 825, 830). The photographs were relevant to show the state of Mr. Champion's body after the beating he received and the full extent of

the hemorrhage suffered by Mr. Champion. The photographs helped to explain the testimony of the medical examiner, were probative of the medical examiner's opinion of the cause and manner of death, and were relevant to the medical examiner's testimony. (V 7, T 823-839). The fact that the medical examiner could have, and did, described what she observed during the autopsy does not render the photographs inadmissible. As set forth above, the test for admissibility of photographs is relevancy, not necessity. If the test was one of necessity as argued by Martin, then autopsy photographs would never be admissible because the medical examiner could simply testify to what he or she observed. The autopsy photographs in this case were relevant and properly admitted.

Martin also appears to argue that the autopsy photographs were not relevant to the crimes charged. Martin cites to no case law which precludes the use of autopsy photographs during a trial for manslaughter or hazing resulting in death.[2] Much like a murder trial, there was a deceased victim. Mr. Champion died in this case after enduring a severe beating. An autopsy was conducted to determine why and how Mr. Champion died. The testimony of the medical examiner and the autopsy photographs

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[2] Appellee was able to find four cases were a defendant was charged with manslaughter and autopsy photographs were admitted at trial. *See Servis v. State*, 855 So.2d 1190 (Fla. 5th DCA 2003); *Copertino v. State*, 726 So.2d 330 (Fla. 4th DCA 1999); *Prevatt v. State*, 866 So.2d 729 (Fla. 5th DCA 2004); *Rainey v. State*, 938 So.2d 632 (Fla. 5th DCA 2006).

were relevant to Mr. Champion's death. The trial judge did not abuse her discretion by denying the motion in limine.

Finally, appellee asserts that any error in admitting the testimony of the medical examiner and the autopsy photographs was harmless in this case. Where there is no reasonable possibility that the error contributed to the conviction, the error is harmless. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). The jury was presented with evidence from eyewitnesses as to the beating sustained by Mr. Champion. Martin initiated the actions which led to the hazings and the death of Mr. Champion. (V 4, T 411, 412, 416, 417, 421, 422, 424, 442; V 5, T 596, 641-642,). There were 15-20 people on the bus. (V 4, T 418, 425). Mr. Champion was the third and final victim to try to reach the back of the bus. (V 4, T 417, 420, 425-429; V 5, T 597-599). There was testimony that Mr. Champion was pulled back to the front of the bus after he fell in order to keep him from reaching the back of the bus; he was also held to keep from reaching the back. (V 4, T 433; V 6, T 735, 736-737). Mr. Champion was repeatedly kicked, punched, jumped on, and hit with a strap. (V 4, T 433, 434; V 5, T 651, 652, 653; V 6, T 734, 735). After Mr. Champion reached the back of the bus, everyone left the bus except for Mr. Champion. (V 5, T 657). Mr. Champion was panicking and said he could not see and could not breathe. (V 5, T 658). Mr. Champion said "oh, God and oh, God" and passed out. (V 5, T 658). Mr.

Champion threw up red Gatorade. (V 6, T 739, 796). When the first responders arrived Mr. Champion was cold to the touch, not breathing and had no heartbeat. (V 6, T 796). Regardless of the testimony of the medical examiner, the jury was presented with overwhelming evidence establishing that not only the hazing occurred, but that Mr. Champion died from the beating he sustained during the hazing. Any error in the denial of the motions in limine in this case was harmless.

POINT 4

THIS ISSUE HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW AND FUNDAMENTAL ERROR DID NOT OCCUR.

Martin argues on appeal that the trial judge erred by refusing to give his special requested instruction on uncharged conspiracy. Appellee asserts that this issue has not been preserved for appellate review and fundamental error did not occur. After considering the facts of the case and the relevant case law, the trial judge crafted an instruction which was a proper statement of the law and which was not misleading or confusing. Martin is entitled to no relief.

Prior to addressing the merits of this claim, appellee asserts that the argument made on appeal has not been preserved for appellate review. Both Martin and the State requested the trial judge give a special instruction on conspiracy. (V 7, T 881, 882). Martin objected to the instruction provided by the State and requested that his

instruction, based upon federal law, be given. (V 7, T 883, 888-892). The trial judge took the instructions under advisement, found that Martin's instruction was not a correct statement of Florida law and because of Martin's objection to the State's instruction the trial judge crafted her own instruction. (V 7, T 892-893, 914, 915). After review of that instruction, the trial judge stated: "Your objection to Mr. Ashton's version of the conspiracy instruction I think is preserved and you would raise an objection, again, for the record?" (V 7, T 922). Martin stated "[w]e do." (V 7, T 922). Martin had no further objections and set forth no basis for his objection to the instruction crafted by the trial judge. (V 7, T 922). As such, appellee asserts that this issue has not been preserved for appellate review. *See Butler v. State*, 842 So. 2d 817, 830-831 (Fla. 2003) (no objection to the instruction and failure to object indicated defendant's agreement with the trial judge's version of the instructions); Fla.R.Crim.P. 3.390(d) ("No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.").

Because this claim is not preserved, Martin must establish that fundamental error occurred. *See Jaimes*, *infra.* Martin does not claim that fundamental error occurred. Even had he made such a claim, Martin is entitled to no relief. "In order

to be entitled to a special jury instruction, [a defendant] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." *Stephens v. State*, 787 So. 2d 747, 756 (Fla. 2001) (footnotes omitted). "A trial court's ruling on whether or not to give a specially requested jury instruction is reviewed under an 'abuse of discretion' standard. A judgment will not be reversed for failure to give a particular jury charge where, overall, the instructions given are clear, comprehensive, and correct." *Shearer v. State*, 754 So. 2d 192, 194 (Fla. 1st DCA 2000) (citation omitted). "The responsibility of the lawyers and the trial judge is to properly instruct the jury on the applicable law so that the jury can decide the issue with the proper legal guidance." *Brown v. State*, 36 So. 3d 826, 829 (Fla. 5th DCA 2010). Finally, the failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards. *Stephens*, at 755; *Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006).

The trial judge did not abuse her discretion by crafting her own instruction on conspiracy. Contrary to Martin's claim, the instruction given "contain[ed] a definition of conspiracy, an explanation of the legal consequences of proving a conspiracy in the case, and the admonition that it is for the jury to determine whether

a conspiracy has been established beyond a reasonable doubt." *Boyd v. State*, 389 So. 2d 642, 647 (Fla. 2nd DCA 1980). The trial judge's instruction conformed to the requirements of *Boyd*, *supra*. (V 3, R 487-488). The instruction given in this case was proper and fundamental error did not occur. Martin is entitled to no relief.

POINT 5

THIS ISSUE HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW; FUNDAMENTAL ERROR DID NOT OCCUR AS THE JURY WAS PROPERLY INSTRUCTED ON HAZING; THE TRIAL JUDGE COMMITTED NO ERROR IN FAILING DEFINE THE TERM "COMPETITION" IN THE INSTRUCTIONS AND IN FAILING TO ALLOW MARTIN TO READ FROM THE DICTIONARY DURING CLOSING ARGUMENT.

Martin argues on appeal that the trial judge erred in refusing to give his requested jury instruction on hazing and for failing to instruct on and for failing to allow him to read the dictionary definition of "competition" to the jury during closing argument. Any issue as to the hazing jury instruction was not preserved for appellate review, as no objection was made to the instruction and the argument made on appeal was not made below. Fundamental error did not occur. Additionally, the trial judge did not abuse her discretion by refusing to instruct on the definition of "competition" or in refusing to allow Martin to read the definition from a dictionary during closing argument. Martin is entitled to no relief.

Prior to addressing the merits of this claim, appellee asserts that this issue has

not been preserved for appellate review. During the charge conference, it was announced that they were at the hazing instruction. (V 7, T 879). The only objection made was to the inclusion of the conspiracy instruction at the bottom of the page containing the end of the hazing instruction. (V 7, T 880). The trial judge indicated that it would be repaginated and that each instruction would start on a new page. (V 7, T 880). Martin then moved on to the conspiracy instruction. (V 7, T 880). The trial judge asked if he was "satisfied with the hazing instruction now[]" and Martin responded that he was. (V 7, T 880). Later during, as well as prior to, the charge conference, Martin announced he did not have an objection to the State's hazing instruction. (V 6, T 774; V 7, T 893). Appellee is unable to find any other objection to the hazing instruction in the record.

Martin references pages 885-891 and 914 in his initial brief. *See* Initial Brief, p.4. A review of pages 885-891 and 914 indicate that the objections and discussion concerned the conspiracy instruction, not the hazing instruction. (V 7, T 885-891). Additionally, the morning after the charge conference the jury instructions were again discussed and no objection was made to the hazing instruction and no request was made concerning any written hazing instruction provided by Martin. (V 7, T 913-938). Furthermore, while Martin quotes the instruction he claims to have submitted to the trial judge, Martin fails to cite to where that written instruction is contained

within the record on appeal. *See* Initial Brief, pp. 41-43. Appellee has been unable to locate that written instruction in the record on appeal.[3] Additionally, in the motion for new trial filed by Martin, the only claim concerning the jury instructions concerned the conspiracy instruction. (V 5, R 675, 746).

This issue has not been preserved for appellate review. No objection was made to the hazing instruction.

> As a general matter, instructions to a jury are subject to the contemporaneous objection rule. Pursuant to Florida Rule of Criminal Procedure 3.390(d), "No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection." Absent such an objection at trial, an unpreserved error may be reviewed on appeal only if it rises to the level of fundamental error. . . .
>
> In defining the scope of the fundamental error doctrine, we have explained that a fundamental error is one that goes to the foundation of the case or goes to the merits of the cause of action. To justify not imposing the contemporaneous objection rule, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. In other words, the doctrine of fundamental error applies when an error has affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law.

Jaimes v. State, 51 So. 3d 445, 448 (Fla. 2010) (quotations omitted; citations and parenthetical omitted; footnote omitted).

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[3]The only requested written instruction contained in the record on appeal appears to be the one filed by the State. (V 3, R 461).

No objection was made to the hazing instruction prior to or during the charge conference or after the jury was instructed; in fact, Martin agreed to the instruction. (V 6, T 774; V 7, T 880, 893; V 8, T 1045-1047). Thus, appellee asserts that the instant issue has not been preserved for appellate review. *See Butler*, 842 So. 2d at 830-831 (no objection to the instruction and failure to object indicated defendant's agreement with the trial judge's version of the instructions).

Also, the argument made on appeal was not made below and is barred from appellate review. Where the argument made on appeal was not made below in support of giving the special requested instruction, such argument has not been preserved for appellate review. *Hutchinson v. State*, 882 So. 2d 943, 950 (Fla. 2004), *abrogated on other grounds*, *Deparvine v. State*, 995 So. 2d 351 (Fla. 2008).

As to the merits, Martin does not claim that fundamental error occurred. Even had he made such a claim, it would be without merit. As set forth under point 4, "[i]n order to be entitled to a special jury instruction, [a defendant] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." *Stephens*, 787 So. 2d at 756 (footnotes omitted). "A trial court's ruling on whether or not to give a specially requested jury instruction is reviewed under an 'abuse of discretion' standard. A

judgment will not be reversed for failure to give a particular jury charge where, overall, the instructions given are clear, comprehensive, and correct." *Shearer*, 754 So. 2d at 194 (citation omitted); *see also Card v. State*, 803 So.2d 613, 624 (Fla.2001) ("The decision on whether to give a particular jury instruction is within the trial court's discretion, and, absent 'prejudicial error,' such decisions should not be disturbed on appeal." (Citation omitted)). "The responsibility of the lawyers and the trial judge is to properly instruct the jury on the applicable law so that the jury can decide the issue with the proper legal guidance." *Brown*, 36 So. 3d at 829. Where there is no standard jury instruction, the trial judge does not abuse his or her discretion by crafting an instruction which tracks the language of the applicable statute. *Bayer v. State*, 788 So.2d 310 (Fla. 5th DCA 2001), *rev. denied*, 816 So.2d 125 (Fla. 2002); *Rains v. State*, 955 So. 2d 39 (Fla. 5th DCA 2007). *See also Driggers v. State*, 38 Fla. 7, 20 So. 758, 760 (1896) (no error where trial court gave instruction that quoted the statutory definition of justifiable homicide); *Location 100, Inc. v. Gould S.E.L. Computer Sys., Inc.*, 517 So. 2d 700, 705-706 (Fla. 4th DCA 1987) (trial court committed no error in giving instruction consisting of statutory definition, even though definition was created for a different context, where interpretation of the subject contract was a question of fact for the jury), *called into doubt on other grounds*, *Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002); *Luke v.*

State, 204 So. 2d 359, 363 (Fla. 4th DCA 1967) ("It seems settled that where the law involved is set forth in a statute it is usual, proper and sufficient ... to charge the jury in the language of such statute." (citing 16 Fla. Jur. Homicide § 160)); *Brown v. State*, 11 So.3d 428, 433 (Fla. 2nd DCA 2009) ("We note that '[r]eading a statute to the jury as an instruction is not necessarily erroneous.'" (quoting *Ruskin v. Travelers Ins. Co.*, 125 So. 2d 766, 769 (Fla. 2nd DCA 1960)). Finally,

> "[a] defendant is entitled to an instruction as to any valid defense supported by evidence or testimony in the case." The jury and not the trial judge determines whether the evidence supports the defendant's contention. Nevertheless, "[w]hile a defendant is entitled to have the jury instructed on his theory of defense, the failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards."

Coday, at 994 (citations and quotations omitted); *Stephens*, at 755.

Fundamental error did not occur in this case. The trial judge committed no error in instructing the jury on hazing. The instruction given tracked the language of the statute. (V 3, R 481-482, 483, 485). The instruction set forth the elements the State was required to prove beyond a reasonable doubt. The instruction given defined both what was and was not hazing. This included the instruction that "[h]azing does not include customary athletic events or other similar contests or competitions or any activity or conduct that furthers a legal and legitimate objective." (V 3, R 481-482, 483, 485). The instruction given by the trial judge was not confusing or misleading.

The trial judge committed no error in giving an instruction which tracked the language of the hazing statute, section 1006.63. The jury was properly instructed and fundamental error did not occur.

Furthermore, the trial judge did not abuse her discretion in refusing to instruct the jury as to the definition of the term "competition" or in failing to allow Martin to read the definition from a dictionary during closing argument. "A trial court is under no obligation to define terms in common use and generally understood by the average person." *Russ v. State*, 832 So. 2d 901, 911 (Fla. 1st DCA 2002). Given the sports-centric nature of our society, the term "competition" is such a term that is commonly used and generally understood by the average person, as found by the trial judge. (V 7, T 905, 916-917). There is nothing confusing or misleading about that term. Additionally, Martin argued at length in his closing that the crossing of the bus was a competition and also defined[4] competition as "[t]he act or process of trying to get or win something, such as a prize or a higher level of success that someone else is also trying to get or win." (V 8, T 969-980, 999, 1009). While the trial judge ruled that Martin could not read the definition of competition out of the dictionary during closing, Martin nonetheless provided the jury with such definition. (V 7, T 905, 916-

[4]Because of this, any error was harmless in this case. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

917; V 8, T 1009). The trial judge did not abuse her discretion by denying the request to define the term "competition" in the jury instruction and refusing to allow Martin to read directly from the dictionary. Martin is entitled to no relief.

POINT 6

THE MOTION FOR MISTRIAL WAS PROPERLY DENIED.

Finally, Martin argues on appeal that the trial judge erred in denying his motion for mistrial made during closing argument. The basis of the motion for mistrial was that the prosecutor was asking the jury to send a message. Appellee asserts that the motion for mistrial was properly denied. The closing argument was not improper. Additionally, the jury was given an instruction to disregard the complained of comment. Furthermore, any error was harmless. Martin is entitled to no relief.

> The primary purpose of closing argument is to give the parties an opportunity to summarize the evidence and explain how the facts derived therefrom should be applied to the law as instructed by the trial court. The courts generally allow wide latitude in closing arguments by permitting counsel to advance all legitimate arguments and draw logical inferences from the evidence.
>
> The standard of review appellate courts generally apply when considering errors in a trial court's decision overruling objections to improper comments made during closing arguments is abuse of discretion. Thus, the trial court has discretion in controlling the comments made during closing argument and appellate courts will generally not interfere with the wide latitude afforded litigants in presenting their closing arguments unless an abuse of discretion is shown.

* * *

> In order to determine whether improper remarks constitute reversible error, they should be reviewed within the context of the closing argument as a whole and considered cumulatively within the context of the entire record. Thus while an improper comment may in one case constitute reversible error, it may not be viewed as reversible error in another case when considered in the context of the entire record.

McArthur v. State, 801 So. 2d 1037, 1039-1040 (Fla. 5th DCA 2001) (footnotes and citations omitted). "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Wade v. State*, 41 So. 3d 857, 868 (Fla. 2010) (quotations and citation omitted).

As to the ruling on a motion for mistrial, the Florida Supreme Court has stated:

> We have repeatedly held that this Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. "A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial." Stated differently, "[a] motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable.... [D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." Thus, "[i]n order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise."

Salazar v. State, 991 So. 2d 364, 371-372 (Fla. 2008) (citations omitted).

During rebuttal closing argument, the prosecutor stated the following:

> The rest of the time was talking about why people cross. If you look at this and the hazing instruction over there that contains all the elements, there's nothing there that says why people cross matters. It's just not there. In fact, quite the contrary. It says the consent of the victim - - yeah, it is not a defense to the charge of hazing that the consent of the victim was obtained. It doesn't matter why. Yet we spent almost an hour hearing about why people cross. I don't care why people cross.
>
> Counsel said in his closing argument that I had told you that he was forced to cross. I never said that. I don't believe it. I don't care why Robert Champion crossed. I don't care why Keon Hollis crossed. I don't care why Lissette - - I don't care why any of them crossed. The problem is that the crossing has to stop.
>
> During this hour-long discussion of - -

(V 8, T 1011-1012). Martin then objected and a bench conference was held. (V 8, T 1012). Martin claimed that the prosecutor's argument was asking the jury to send a message. (V 8, T 1012). Martin moved for a mistrial, asked that the prosecutor be admonished and asked that the jury be instructed to disregard the comment. (V 8, T 1012). The trial judge reserved ruling on the motion for mistrial. (V 8, T 1013). The prosecutor agreed to the trial judge instructing the jury to disregard the comment. (V 8, T 1013-1014). The jury was instructed:

> Members of the jury, you will disregard Mr. Ashton's last statement to you, which was contained in his closing argument.

(V 8, T 1014). After the jury reached its verdict, Martin again discussed the complained of comment and a memorandum which was submitted to the trial judge. (V 8, T 1053). The court reporter was ordered to transcribe the closing argument. (V 8, T 1054). The trial judge informed Martin he could set the motion for a hearing. (V 8, T 1054). It does not appear from the record that a hearing was held and on December 18, 2014, the motion for mistrial was denied. (V 5, R 826).

The trial judge did not abuse her discretion in denying the motion for mistral. The complained of comment did not vitiate Martin's entire trial. Martin was not found guilty due to the single isolated comment, but on the evidence presented in this case. Additionally, the prosecutor did not ask the jury to send a message to the community or to Martin himself. The prosecutor did not ask the jury to convict Martin for any reason other than because the evidence established that he was guilty. In fact, in making the statement the prosecutor did not ask the jury to do anything. The complained of statement was just that, a statement that hazing, or crossing, had to stop. Appellee asserts that the complained of statement was not improper and did not "deprive [Martin] of a fair and impartial trial, materially contribute to the conviction, [was not] so harmful or fundamentally tainted as to require a new trial, or [] so inflammatory that [it] might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Salazar*, at 372.

The cases relied upon by Martin are factually distinct. In *Fletcher v. State*, 168 So. 3d 186, 209 (Fla. 2015), the prosecutor asked the jury three different times during closing argument to "send the message" to the defendant that his behavior was not acceptable and that it's not okay to kill people. *Id.* The prosecutor then told the jury to send that message and find the defendant guilty. *Id*. While the Court found the statements to be improper, the Court found that fundamental error did not occur. *Id*.

In *Campbell v. State*, 679 So. 2d 720, 724-725 (Fla. 1996), the Court found that the prosecutor's comment that the death penalty is a message sent to certain members of society was improper. In *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985), while finding no reversible error, the Court found that complained of comment was an appeal to the jury to consider the message its verdict would send to the community. In *Hines v. State*, 425 So. 2d 589, 591 (Fla. 3rd DCA 1982), and *Bouchard v. State*, 556 So. 2d 1215 (Fla. 2nd DCA 1990), the prosecutors asked the jury to send a message to the community. Contrary to the actions of the prosecutors in the above cases, the complained of comment made by prosecutor in this case did not ask the jury to send a message to anyone. Even if the complained of comment is susceptible to such interpretation, the comment was not as strong or as severe as the comments in the above cases.

Finally, any error in denying the motion for mistrial was harmless. Where there

is no reasonable possibility that the error contributed to the conviction, the error is harmless. *DiGuilio*, *supra*. "Improper prosecutorial comment is subject to a harmless error analysis, and will give rise to reversal of a conviction only if the comment is so prejudicial that it vitiates the entire trial." *Taylor v. State*, 640 So. 2d 1127, 1133 (Fla. 4th DCA 1994); *see also Johnson v. State*, 801 So. 2d 141, 143 (Fla. 4th DCA 2001); *Spencer v. State*, 842 So. 2d 52, 55-56 (Fla. 2003) (". . . even erroneous comments do not require an automatic reversal, but instead 'should be evaluated according to the harmless error rule.'"). The complained of comment was a single isolated comment. Martin does not claim any other improper comments were made during closing argument. Additionally, the trial judge gave a curative instruction. Finally, a review of the record on appeal in this case establishes that the evidence against Martin was overwhelming and that the single complained of comment did not vitiate Martin's trial. Martin was found guilty based on the evidence presented in this case, not the single complained of comment. Any error was harmless and Martin is entitled to no relief.

CONCLUSION

Based on the arguments and authorities presented herein, appellee requests this honorable court affirm the judgment and sentence in all respects.

Respectfully submitted,

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DESIGNATION OF E-MAIL ADDRESS

Bonnie Jean Parrish, attorney for appellee, hereby designates the following e-mail address for the purpose of service of all documents to be served in this case pursuant to Fla.R.Jud.Admin. 2.516:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by email to Frances M. Martinez, counsel for Martin, 2917 W. Kennedy Boulevard, Suite 100, Tampa, FL 33609, at

fmartinez@escobarlaw.com, this 17th day of February, 2016.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is 14-point, Times New Roman.

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