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

DANTE MARTIN,
Appellant,
v.

STATE OF FLORIDA,
Appellee.
_____/

Case No.: 5D15-284

L.T. No.: 48-2012-CF-5695

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The trial court erred in denying the amended motion to declare section 1006.63, Florida Statutes unconstitutional.

In its Answer Brief, the State argues that Mr. Martin fails to identify what constitutionally protected conduct the hazing statute substantially reaches. However, in his amended motion to declare section 1006.63, Florida Statutes unconstitutional, Mr. Martin thoroughly discussed numerous instances of protected conduct – freedom of expression and association – that the hazing statute reaches. For example, he identified the following collegiate competitions: 1) the University of Alaska Anchorage "Polar Bear Plunge" where participants jump in to sub-freezing waters; 2) the Alpha Psi rodeo; 3) the University of South Florida "Fireman's Challenge"; 4) the University of Florida Tough Mudder competition; and 5) the University of Central Florida "Warrior Dash." [R. 281 - 85] In each of these events, college students participated in grueling physical activity for the sake of camaraderie and personal satisfaction. Each of these events – wherein the participants engage in constitutionally protected conduct – could be punishable under a literal reading of the hazing statute.

Likewise, Mr. Martin identified his own constitutionally protected conduct that the hazing statute substantially reached. Keon Hollis testified that Mr. Martin

slapped him with an open hand prior to Mr. Hollis' "crossing" the bus. [T. 442] Mr. Martin argued that an open hand slap is a form of tradition in fraternal, military and religious organizations. [R. 285]

The State claims that the statute is not overbroad as to Mr. Martin because he "advised that the crossing would occur that night" and was "the one telling them what to do." Preciously illustrating Mr. Martin's point, neither of those actions are criminal. Likewise, both of these actions – constituting a person arranging for another to participate in a voluntary competition – are constitutionally protected acts of expression and speech. Despite this, the hazing statute substantially reaches the conduct.

As to Mr. Martin's claim that the term "brutality" is vague as used in the hazing statute, the State argues that, because the statute gives examples of brutal behavior, it is not vague.

A government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Bouters v. State*, 659 So. 2d 235, 238 (Fla. 1995). The use of examples does not cure a statute's vagueness. *See State, Dep't of Fin. Servs. v. Peter R. Brown Const., Inc.*, 108 So. 3d 723, 728 (Fla. 1st DCA 2013)(finding that a statute was still vague despite providing

examples of proscribed conduct where no qualifying language was available as a standard to determine what items were covered and what items were not covered).

"Brutality" is not defined in the statute. However, it is generally defined as "savage physical violence; great cruelty." The list of examples provided in the statute is not dispositive as the determination of whether an act is "savage" or "cruel" is prone to subjectivity.

As to the vagueness of the undefined term "competition," the State argues that the term is not vague because its meaning can be ascertained from its everyday usage. Referring to the Merriam-Webster dictionary, the State defines a "competition" as "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." However, this argument is misplaced. The term "competition" is vague because its inclusion suggestions that something that could otherwise include all of the apparent traits of hazing identified by the statute, including those of a "brutal" nature, are exempt from the hazing statute if it is a "competition." That alone makes it almost impossible to determine what either "competition" or "hazing" is, if they can both apparently involve the alleged evils that the statute seeks to avoid, and yet one is lawful and the other is not.

The Florida Supreme Court has made clear that, when there is doubt about a

statute in a vagueness challenge, the doubt should be resolved "in favor of the citizen and against the state." *Brown v. State*, 629 So. 2d 841, 843 (Fla. 1994). In this case, there is sufficient doubt about the statute, requiring the doubt to be resolved in favor of Mr. Martin.

Finally, the State fails to address Mr. Martin's argument that, in summarily denying the motion, the trial court deprived Mr. Martin of the opportunity to introduce expert testimony. The expert testimony was relevant to provide the trier of fact the tools necessary to determine an important question of material fact – the grammatical meaning of the statute.

For these reasons, and the reasons outlined in the Initial Brief, the trial court erred in denying the amended motion to declare Section 1006.63, Florida Statutes unconstitutional.

II. The trial court erred in denying the motion to dismiss count 1 manslaughter.

In its Answer Brief, the State improperly frames the issue as one of prosecutory discretion. Section 1006.63(6) does not authorize prosecution under a more general statutory provision where that statutory provision carries a heavier penalty. Instead, a special statute controls where it carries a smaller penalty than a general statute.

special statutes control over general statutes where the "criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provision." *Adams v. Culver*, 111 So. 2d 665, 667 (Fla. 1959).

Mr. Martin was convicted of both manslaughter and hazing resulting in death. In drafting the self proclaimed toughest anti-hazing statute in the country, the Legislature passed a bill punishing felony hazing as a third degree felony. To allow additional prosecution for a crime carrying a heavier penalty would counteract the Legislature's intent.

Florida courts have repeatedly held that the legislature does not intend to punish a single homicide under two different statutes. *See Houser v. State*, 474 So.2d 1193, 1196 (Fla.1985)(A defendant may not be sentenced for both DWI manslaughter and vehicular homicide for effecting a single death); *Rodriguez v. State*, 875 So. 2d 642 (Fla. 2DCA 2004)(defendant could not be convicted of third-degree murder and DUI manslaughter where convictions were based on single death); *Colon v. State*, 53 So.3d 376 (Fla. 5th DCA 2011)(defendant could not be convicted of both leaving the scene of an accident with death and vehicular homicide against same victim).

The State's reliance on *Lawrence v. State*, 801 So.2d 293 (Fla. 2d DCA 2001) for the proposition that Mr. Martin is not being punished twice for one

death is entirely misplaced. In *Lawrence*, the appellant's offenses "arose from two separate acts that occurred sequentially. She first operated her vehicle while intoxicated and caused a death. Thereafter, she left the scene of the accident when she knew or should have known of the death." 801 So.2d at 295. In this case, on the other hand, the offenses of manslaughter and hazing resulting in death arose from only one act.

Because manslaughter carries a heavier penalty than hazing resulting in death, the trial court erred in denying the motion to dismiss count 1 manslaughter.

III. The trial court erred in admitting testimony and photographs of the autopsy.

It appears the State is arguing that Mr. Martin did not preserve this claim for appeal because, after the trial court reserved ruling on his motion in limine, "there is nothing in the record on appeal to indicate that Martin requested any further ruling. . . ."

It is not uncommon for a trial judge to reserve ruling on a motion until the issue can be considered in the context of the evidence presented at trial. In that event, the party making the motion in limine is not required to get a "further ruling." Instead, the party has to renew the objection at trial to preserve the issue for review. 2 Fla. Prac., Appellate Practice § 27:2 (2015 ed.)

As to the admissibility of the evidence, Appellant relies on the arguments in his Initial Brief.

IV. The trial court erred in denying Mr. Martin's proposed jury instruction on uncharged conspiracy.

The State argues that this issue was not preserved for appeal. The State argues that Mr. Martin objected only to the State's proposed instruction and that, because the trial court crafted it's own instruction, the objection was not preserved.

In order to preserve an issue for appeal, the "objection must be specific enough to inform the judge or judicial officer of the alleged error and to preserve the issue for intelligent review of appeal." Philip J. Padovano, *Florida Appellate Practice* § 8.4 (2011 ed.). In other words, an objection must state the reasons on which it is based and specifically identify the alleged error. *See Woods v. State*, 733 So. 2d 980 (Fla. 1999); *Terry v. State*, 668 So. 2d 954 (Fla. 1996). Clearly, such is established in this case.

Mr. Martin argued that the jury instruction did not apprise the jury of (1) what a conspiracy is, and (2) that it must find that the conspiracy was established by the evidence. [T. 914; 889 - 92] Counsel objected to any instruction that was not modeled after the federal instruction and outlined the basis for his objection. The trial court made its denial clear. The objection was preserved. *See State v.*

Heathcoat, 442 So.2d 955, 957 (Fla.1983) (holding defendant did not waive objection to court's ruling refusing to give intoxication jury instruction by failing to renew objection where judge had made it clear he would not give the instruction and further objection would have been pointless); *Carpenter v. State*, 785 So. 2d 1182 (Fla. 2001)(defendant preserved for review his objections to first-degree felony murder instruction, even though defense counsel did not renew objection when jury was instructed; counsel objected during charge conference and specifically advised trial court of basis for objection).

As to the merits, Appellant relies on the arguments in his Initial Brief.

V. The trial court erred in instructing the jury on hazing.

Appellant relies on the arguments in his Initial Brief.

VI. The trial court erred in denying the motion for mistrial.

Appellant relies on the arguments in his Initial Brief.

CONCLUSION

Section 1006.63 is unconstitutionally overbroad and vague and, as such, this Court must remand with instructions that Appellant be discharged of counts 2, 3, and 4.

This Court must further remand with instructions that Mr. Martin be discharged of count 1 because the hazing statute, a special statute, is controlling over a more

general statute, in this case, manslaughter.

In the alternative, this Court must reverse and remand for a new trial because the trial court erred in admitting testimony and photographs of the autopsy which were obtained after a break in the chain of custody and which were prejudicially gruesome.

A new trial is further warranted because the trial court improperly instructed the jury on the law pertaining to uncharged conspiracies and to hazing.

Finally, Mr. Martin is also entitled to a new trial because of the prosecutor's improper comment during closing argument.

CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney and the Office of the Attorney General, this 8th day of APRIL, 2016.

I FURTHER CERTIFY that the foregoing Initial Brief of Appellant satisfies the font requirements of Florida Rules of Appellate Procedure 9.100(*l*) and 9.210(a)(2).

Respectfully submitted,

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