IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FIFTH DISTRICT

STATE OF FLORIDA,

Appellant,

v. Case No. 5D18-0929

MITCHELL AARON NEEDELMAN,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

STATEMENT OF CASE AND FACTS

Mitchell Aaron Needelman, hereinafter Appellee, was charged, in pertinent part, by multiple count information as follows:

> COUNT 1: IN THE COUNTY OF BREVARD, STATE OF FLORIDA, on or between March 16, 2012 and January 7, 2013, MITCHELL NEEDELMAN, being a public servant, to wit: CLERK OF THE COURT IN AND FOR BREVARD COUNTY, FLORIDA, did unlawfully and corruptly request, solicit, accept, or agree to accept for himself or another, a pecuniary or other benefit not authorized by law, to wit: MONEY FROM BLUEWARE INC, BLUEGEM LLC, ROSEWARE LLC, with the intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of the public servant, to wit: ENTERING CONTRACT(S) INVOLVING BLUEWARE INC, BLUEGEM LLC, ROSEWARE LLC, contrary to Sections 838.015(1) and 838.015(3), Florida Statutes,
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> COUNT 2: IN THE COUNTY OF BREVARD, STATE OF FLORIDA, on or between March 16, 2012 and January 7, 2013, WILLIAM MATTHEW DUPREE, ROSE HARR, did knowingly and unlawfully aid, abet, counsel, hire, or otherwise procure a public servant to wit: MITCHELL NEEDELMAN CLERK OF THE COURT IN AND FOR BREVARD COUNTY, FLORIDA, to unlawfully and corruptly request, solicit, accept, or agree to accept for himself or another, a pecuniary or other benefit not authorized by law, to wit: MONEY FROM BLUEWARE INC, BLUEGEM LLC, ROSEWARE LLC, with the intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of the public servant, to wit: ENTERING CONTRACT(S) INVOLVING BLUEWARE INC, BLUEGEM LLC, ROSEWARE LLC, contrary to Sections 777.011, 838.015(1), and 838.015(3), Florida Statutes,
>
> COUNT 4: IN THE COUNTY OF BREVARD, STATE OF FLORIDA, on or between March 16, 2012 and May 23, 2012, MITCHELL NEEDELMAN, being a public servant, to wit: CLERK OF THE COURT IN AND FOR BREVARD COUNTY, FLORIDA, did unlawfully with corrupt intent influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other

> public entity, for the procurement of commodities or services, to wit: INVITATION TO NEGOTIATE (ITN) WITH BREVARD COUNTY CLERK OF COURT FOR SCANNING SERVICES, by disclosure of material information concerning a bid or other aspects of the competitive bidding process when such information is not publically disclosed, contrary to Sections 838.22(1)(a) and 838.22(5), Florida Statutes,
>
> COUNT 7: IN THE COUNTY OF BREVARD, STATE OF FLORIDA, on or between March 16, 2012 and January 7, 2013, MITCHELL NEEDELMAN, being a public servant, to wit: CLERK OF THE COURT IN AND FOR BREVARD COUNTY, FLORIDA, did unlawfully with corrupt intent conceal, cover up, destroy, mutilate, or alter official record(s) or official document(s) or cause another person to perform such an act, to obtain a benefit for MITCHELL NEEDELMAN, WILLIAM MATTHEW DUPREE, ROSE HARR, BLUEWARE INC, BLUEGEM LLC, ROSEWARE LLC, or to harm another, contrary to Sections 838.022(1)(b)and 838.022(3), Florida Statute[.]

(R54-57).

Jury selection was conducted on October 16, 2017, and October 17, 2017. (R632). The trial commenced on October 18, 2017, and concluded on October 31, 2017. (R1325).

During the State's opening statement, the State explained the evidence it expected to present establishing Appellee's guilt as to all four counts. Specifically, as to the bribery counts, that in order to help fund his reelection campaign, Appellee, who was the clerk of the court at the time, took bribes by devising a plan to award contracts from the clerk of court's office to BlueWare, a company out of Michigan with connections to Appellee's former business affiliate and a lobbyist, Matt Dupree, in order to take kickbacks. (R1226-28). In return for being awarded the clerk of the court's contract for scanning and digitalizing documents at the clerk's office, BlueWare was required to pay by agreeing to kickbacks. (R1230-31). The president of BlueWare, Rose Harr, when advised of the requirement, told her COO, Nick

Geaney, to "pay the man." (R1231).

In March of 2012, a political mailing was needed for Appellee's reelection campaign according to Matt Dupree, so an IT audit was created and the invoice paid by Appellee giving BlueWare $10,000 for their audit - based upon a single day's walk-through of the clerk's records department and speaking with the clerk of court's IT personnel. (R1233). Nine thousand nine hundred and ninety dollars was deposited by BlueWare and then BlueWare immediately wired the money to Matt Dupree. (R1233-34). Mailers and fliers were then paid for and produced on Appellee's reelection campaign's behalf. (R1234). Another contract, again for IT consultation, in the amount of $100,000 was entered into with BlueWare. (R1236). According to Nick Geaney, BlueWare was originally going to bill the clerk's office for $70,000, but was advised that Matt Dupree needed $30,000 for Appellee's campaign, and the invoice was increased to $100,000. (R1237). Appellee paid BlueWare $100,000 - $30,000 of which was then kicked back to Matt Dupree. (R1237). Typically, on high expenditure items such as one such as this, the chief deputy clerk would be involved, but Laurie Rice was never asked to sign off on this invoice. (R1238). Subsequently, an addendum to the IT consultancy contract was created, requiring an additional $100,000-plus to be paid. (R1238-39). Prior to the contract being signed with BlueWare, Appellee provided BlueWare with $500,000 as a guarantee payment. (R1243). At a political forum that night after the $500,000 was given to BlueWare, Appellee denied any connection between Matt Dupree and BlueWare, or that Matt Dupree was acting as a lobbyist for BlueWare. (R1245). In fact, Matt Dupree was receiving $5,000 a month from BlueWare to represent them. (R1245). Appellee also claimed that he learned of BlueWare in a newspaper advertisement, and did not mention the January of 2012 initial meeting where Appellee was introduced by Matt

Dupree to BlueWare. (R1246). The prosecutor explained to the jury that Appellee and his (bribery) coconspirators were being charged for the money that was being kicked back. (R1248).

As far as the evidence of bidding tampering, the State explained that Appellee provided BlueWare, and only BlueWare, with access to the clerk's record center and IT systems. (R1229). When Appellee began receiving criticism about that at political forums and debates by his opponent, he decided to create a bid process in order to make it appear legitimate. (R1235). Matt Dupree obtained a sample invitation to negotiate, (ITN), and forwarded it to staff at the clerk's office, who then consulted with BlueWare and then BlueWare, essentially, drafted the ITN. (R1235-36). In so doing, BlueWare included items in the contract that only they could fulfill. (R1235). The IT director and other directors at the clerk's office were unaware of the existence of an ITN. (R1236). And, the window for vendors to respond to the multi-million dollar contract bidding process was very short - only a week. (R1240). Many vendors requested additional time and, ultimately Mike McDaniel, an employee with the clerk's office who was the contact person for the contract, extended the response date for a total of ten days. (R1240). Several vendors had questions and asked to review the content that was going to be scanned and digitalized, but such requests were denied. (R1241). The State explained that the bid tampering charges arose from the fact that BlueWare had already been permitted access to the clerk's records and IT systems, while any other vendors were denied that same access for purposes of providing a bid for the multi-million dollar scanning and digitalization contract with the clerk of the court. (R1241). The prosecutor explained that the bid tampering charge arose from "when the Defendant puts it out to a bid and has the company that's going to be awarded the contract writing it[.]" Ultimately, BlueWare was not

doing the contracted-for work, so after Appellee was defeated at the polls, he executed a promissory note with Hewlett Packard for 6.1 million dollars to pay the contract in full. (R1248-49). The clerk of court was now obligated to pay Hewlett Packard over $100,000 a month to ensure that BlueWare was fully funded. (R1249).

The State explained that the official misconduct charge arose from Appellee's concealment of public records. (R1241). Specifically, because public records requests were being made by Appellee's opponent during the campaign, Appellee instructed his employees to use their personal emails. (R1241-42). Appellee also asked Mike McDaniel to destroy any records he had regarding the contract, and Mike McDaniel began sending any questions from other vendors interested in the ITN to McDaniel's personal email account, and then sending those questions from his personal email address on to BlueWare to answer back. (R1242). The answers provided by BlueWare were intentionally vague, and were sent to Mike McDaniel's personal email address, and Mike McDaniel would then publicly provide an answer to the vendors. (R1242-43). Two companies who were in the business of scanning and digitization did enter bids, both at much less cost to taxpayers, but Appellee awarded the contract to BlueWare for 8.5 million dollars. (R1243,1244).

In closing, the prosecutor told the jury that:

> We are gonna ask that you find him guilty of bribery for the money that's being kicked back, we are gonna ask that you find him guilty of conspiring to commit bribery with those three other individuals, Rose Harr, Matt Dupree and Nick Geaney to do the bribery, to do the kickbacks, and that he did tamper with the bid when he put that out to the public and had other legitimate vendors who were interested who were never going to be able to win that because it was already predestined and planned for BlueWare to win, and that when he asked everyone to conduct the business via his personal email address and their personal email address and then to destroy emails, then he committed official misconduct.

(R1250-51).

In moving for a judgment of acquittal, Appellee first addressed the evidence relating to the official misconduct charge, arguing that the only testimony produced at trial was from Mike McDaniel that Appellee told him to delete emails on his private email account, and that was insufficient to establish that charge. (R1291-93). As to the bid tampering charge, Appellee argued that he was not bound by the statute regarding competitive bidding because he was a constitutional officer and none of the witnesses testified that the bidding process was illegal. (R1293-97). Appellee concluded by challenging the evidence related to the bribery and conspiracy to commit bribery charges. (R1297-1304). The State argued in response that the testimony of Nick Geaney established a *prima facie* case of bribery and conspiracy to commit bribery. (R1304-05). As far as the bid tampering charge, the State suggested Appellee was relying upon an affirmative defense, and argued that because Appellee decided to use an ITN, and not sole source the contract, he was bound by section 838.014, Florida Statutes. (R1305-06). Finally, the State advised the court that the official misconduct charge related to Appellee telling Mike McDaniel to use his private email account to communicate with BlueWare regarding the ITN to work outside the scope of public records in order to create an illegal enterprise to award the contract. (R1306-07). The defense countered that the State did not argue Appellee could not use whatever methodology he wanted to in the bidding process, and it was not unlawful. (R1308).

The court inquired whether there was any case law regarding whether the bid tampering statute applied to constitutional officers, but neither attorney had been able to find anything on point. (R1308-1314). The State argued that section 838.22 answered the court's question, in that it uses the term "public servant." (R1314). In

that same chapter, section 838.14 defined the term "public servant" to include constitutional officers. (R1314). Section 833.22 provides that when using a competitive bidding process, a public servant must comply with the statute. (R1314-15). Thus, when Appellee decided to use an ITN, which is a competitive solicitation for bids, he had to abide by the statute. (R1315). The State also reminded the court that during the motion to dismiss, the court was provided with Attorney General's Opinions, and one of those opinions advised that a constitutional officer can use competitive bidding, but it must be done fairly under section 838.22. (R1316-17). Therefore, Appellee was not exempt. (R1317).

The court denied the motion for judgment of acquittal explaining:

> As to the motion for directed judgment of acquittal as to Count Seven, [official misconduct], there was testimony by Mike McDaniel basically that Mr. Needleman told him to delete work emails from his home email to be safe, that Mr. Needleman told him to delete emails before August 18th, 2012 and before he got any communications from Florida Department of Law Enforcement.
>
> As a result of that directive, he deleted all emails relating to BlueWare and BlueGem and all work emails. ... So, the Court denies the motion for directed -- judgment of acquittal as to Count Seven.
>
> As to Counts One and Three, [bribery and conspiracy to commit bribery], Court denies the motion for directed judgment of acquittal. The issue of Nick Geaney's credibility while certainly called into question, in looking at the evidence presented, the Court looks at it in the light most favorable to the State, and certainly his testimony, when paired with - which is corroborated in other regards by documentation and of financial transactions and other evidence is sufficient to allow the case to go to the jury when considered in the context of the mid March meeting at Mr. Needelman's house while the propositions are put forth regarding the actions to be taken in Mr. Needleman's presence and he is aware of those transactions and other conduct by Mr. Needelman then in conjunction with the subsequent contract for containment, the subsequent contracts and particularly the scanning contracts.

> As to Count Four, [bid tampering], the Court is gonna deny the motion for directed judgment of acquittal. While any constitutional officer, including Mr. Needelman, was not required to comply with any particular means of procuring contracts, could have done a sole source or RFPs or ITN's or other means, and I don't think that's questioned at all.
>
> The Court and under 838.0142, an ITN is -- a bid is defined to include an ITN. The Court finds that if that process was elected, that the process had to be conducted in a manner that comported with the -- fair manner that comported with the statutory requirements, and the Court therefore denies the motion for directed judgment of acquittal as to all counts.

(R1317-18).

During closing argument, the State separately addressed the bribery charges, the bid tampering charge, and the official misconduct charge. (R 1336-71;1336-55;1356-64,1366-68;1364-66). The prosecutor argued that the conspiracy began with Rose Harr telling Nick Geaney to "pay the man" in order to obtain the scanning and digitalization contract. (R1343-44). In relation to the bid tampering charge, the State agreed that a constitutional officer like Appellee did not have to use a competitive bidding process, but that once Appellee elected to do so, he was required to follow the law. (R1356). The State advised that "when a public servant puts out a competitive bid.... [t]here is an obligation to be fair to the bidders, to give everyone a fair shake, to not disclose some information to one bidder that you don't disclose to the other bidders. And so that is why the Defendant has been charged and why we will be asking you to find the Defendant guilty on the bid tampering[.]" (R1357).

At the start of the defense's closing argument, counsel told the jury that they would be instructed that they had to decide whether the State had proved each and every element of the separate charges beyond a reasonable doubt "because you have to look at each charge separately." (R1373). The defense primarily challenged the State's evidence relating to the bribery and conspiracy to commit bribery and the

credibility of the State's witnesses - especially Nick Geaney - but, also, separately addressed the bid tampering and official misconduct charges. (R1372-1424,1437-39,1442-45,1447; 1424-35,1436-37,1445-46). The defense advised the jury that, "[t]he bid rigging thing stands kind of alone from the others because...you heard testimony from three people...constitutional officers are... exempt from any kind of statutory...competitive bidding requirements." (R1424-25,1426-33). Further, that Appellee knew he was exempt. (R1426-27). The defense argued that under the First Amendment, citizens are permitted to make independent expenditures on behalf of a candidate. (R1440-42). The defense contended that Appellee did not intentionally fail to comply with anything as to the bid tampering charge. (R1427-35). And, that the use of private emails was because Appellee was paranoid that the clerk's system had been compromised, and had nothing to do with any wrongdoing. (R1431,1446).

On rebuttal, the State addressed the official misconduct and bid tampering charge, (R1457-60,1476-77), and the bribery charges, including responding to the attacks on Nick Geaney's credibility. (R1461-75,1478-79).

The jury was instructed before rendering their verdicts that

> A separate crime is charged in each count of the information and, although they have been tried together, each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crime charged.

(R122,1502). Appellee was convicted as charged on October 31, 2017, of one count each of bribery, conspiracy to commit bribery, bid tampering, and official misconduct. (R126-29,1508-10).

On November 1, 2017, Appellee filed an emergency motion to interview the jury. (R193-95). In it, Appellee alleged that a member of the jury, Mr. Rivera, had advised counsel for Appellee that the jurors had talked about the case prior to their

deliberations. Id. An amended and verified motion was also filed on November 1, 2017. (R197-201,217-19). A motion for new trial based upon juror misconduct was filed by Appellee on November 9, 2017, relying upon the accusations of Mr. Rivera of premature deliberation. (R220-21).

A hearing was held on November 17, 2017, upon the motion to interview the jury. (R1513-47). Mr. Rivera testified at the hearing, claiming that the jurors had discussed the witnesses and testimony as well as Appellee's guilt or innocence prior to the jury's deliberations. (R1517,1523-41). He also alleged that one of the jurors had researched the penalty Appellee was facing, because Mr. Rivera was worried Appellee could receive 50 years like Nick Geaney had been facing. (R1534,1539,1540-41). This juror clarified for Mr. Rivera that Appellee could only receive five years, not fifty. (R1534). Juror Rivera also claimed another juror fell asleep twice. (R1537). After he testified, the State had no objection to the jurors being interviewed. (R1542).

The interviews of the jurors were conducted on December 7, 2017. (R1549). All of the jurors other than Mr. Rivera, including the two alternates, were interviewed by the trial court and counsel, and all seven recalled the judge's instruction not to speak about the trial with anyone, which they had abided by. (R1560,1577-78,1595,1616-17,1640,1649,1661,1674-75). None of the jurors who were asked advised that were aware they could face contempt proceedings for juror misconduct, although one juror voiced some concern about there being ramifications. (R1566,1585,1599,1600).

The first juror questioned, Andrea Simpkins, denied that they had discussed the case as alleged by Mr. Rivera. (R1555-57,1562-65). Ms. Simpkins advised that Mr. Rivera was emotionally unprepared to render a verdict. (R1560). Ms. Simpkins did recall that Mr. Rivera announced when they retired to deliberate that he had flushed

his notes down the toilet, which she thought was very strange since she personally had 47 pages of notes. (R1557-58). The toilet backed up as a result and the bailiff was contacted to get it fixed. (R1557). She also recalled Mr. Rivera "got emotionally involved regarding the possible sentencing," and they had reassured him that sentencing was not the jury's job - that the jury's job was to review the evidence and determine a verdict based on that. (R1560). Ms. Simpkins did not remember hearing about any juror falling asleep, only that she overheard Mr. Rivera talking about how he was having difficulty staying awake because he was seated in the corner. (R1565-66). She also had no knowledge of another juror researching the potential penalties facing Appellee. (R1567-68).

Debra Dillie was the second juror questioned. (R1569). Ms. Dillie denied that the jurors had discussed the case as Mr. Rivera alleged. (R1570-71,1577,1581-82). She remembered that one of the jurors, she thought it was Lisa (Mausner), let them know that there would be six jurors and two alternates. (R1571). Ms. Dillie did not recall any juror researching the potential penalty faced by Appellee. (R1572,1579). Ms. Dillie advised that they had been amazed at how diverse the jury was yet everyone got along very well. (R1573). She was told later that Mr. Rivera had flushed his notes down the toilet. (R1574). She was angry and hurt by Mr. Rivera's accusations because she had found the entire process to be very positive. (R1581). The jurors had looked at all of the evidence, and if anyone had any doubts they were encouraged to voice their doubts so they could discuss the issue. (R1581). Rendering a guilty verdict was done with a heavy heart because it was serious and they knew it. (R1581). Ms. Dillie agreed that she might have closed her eyes during the trial, but she did not fall asleep. (R1583).

Michael Laurencelle had also served on Appellee's jury. (R1587-88). Mr.

Laurencelle denied that the jurors had discussed the substance of the evidence or the testimony prior to deliberations as alleged by Mr. Rivera. (R1587,1595,1600-01,1602). He also denied ever receiving any information from an outside source about the case. (R1588). Mr. Laurencelle did recall that during their deliberations Mr. Rivera voiced some concern about the impact of the verdict on Appellee's sentence, but the other jurors told Mr. Rivera that the verdict had to be based upon the facts and not the potential penalty. (R1589-90,1597). He denied there had been any discussion about the penalty prior to deliberations; however, he did recall one of the female jurors advising Mr. Rivera that she believed Appellee would not be serving 50 years, that he could receive a commuted sentence and would probably receive five to ten years. (R1590,1597-98). As far as any recollection that the juror indicated where her information came from, he did not recall any mentioning of the fact that she looked it up. (R1598). Mr. Laurencelle also recalled the panel's surprise at how well the jurors got along. (R1590). After learning of Mr. Rivera's allegations about juror misconduct, Mr. Laurencelle recalled being frustrated, and found the accusations to be almost slanderous. (R1594). When asked about Mr. Rivera's motivation for making the allegations, Mr. Laurencelle believed Mr. Rivera had a change of heart or felt guilty about his verdict. (R1594). He did remember a discussion about the number of jurors, believing there should be a bigger panel, but not that one of the jurors (Lisa Mausner) had researched the issue online. (R1596-97). As far as whether a juror fell asleep, Mr. Laurencelle did recall a conversation about one of the potential jurors falling asleep, but never one of the selected jurors. (R1601). He knew nothing about why the toilet would no longer flush. (R1603-04).

The fourth juror to testify, Nicole Pulido, similarly denied that the jurors engaged in any discussions about the case prior to deliberations as alleged by Mr.

Rivera. (R1605,1609-10,1617-19). She recalled that one of the jurors was very emotional and was having difficulty making any decisions. (R1605-06). Ms. Pulido also recalled a discussion about the number of jurors and alternates, but they had agreed that to look anything up was not a good idea. (R1606-07). Someone, she believed Lisa (Mausner), had learned that there were two alternates. (R1608-09). Ms. Pulido explained that they did wonder who the alternates were since they had become invested in the case. (R1607-08). Upon learning of the allegations of juror misconduct, she was really frustrated because the process was a lot harder than she had thought it would be and the accusations were coming from the one juror who was given the opportunity to not participate in the deliberations if he thought he was unable. (R1613). Yet, when they retired to deliberate, Mr. Rivera wanted to be the foreperson but because the other jurors had observed him sleeping and not taking many notes, the other jurors did not select him. (R1614,1623). According to Ms. Pulido, Mr. Rivera seemed a little taken aback about being rejected as foreperson, and he told the panel that he had served before and he was interested in being the foreperson. (R1614). She did not believe Mr. Rivera was paying attention as much as the rest of the panel and was not as invested. (R1614). In fact, she found it odd that Mr. Rivera wanted to the foreperson after she had observed him with his eyes closed several times and not appear to be paying attention to the trial. (R1621-22,1624-25). Ms. Pulido recalled that they were shocked when Mr. Rivera told them he had flushed his notes down the toilet, advising them that he got rid of them because there were things that he wrote down that he did not want anybody to read. (R1615). They had to advise one of the bailiffs when the toilet would not work. (R1615-16). As far as any discussion about the possible penalty, Ms. Pulido did recall them wondering what the term would be, but they concluded that their verdict had to be based upon the

evidence and not the penalty. (R1620).

Like the others, Lisa Mausner denied that prior to deliberations there had been any discussion about the evidence, a particular witness's testimony, or a witness's credibility - just their personalities. (R1627-28,1646-53). She had heard some talk about a juror sleeping, but she did not personally observe that. (R1630-31). Specifically, she had heard that Mr. Rivera was fighting nodding off, but she could not see him from where she was seated. (R1632). She admitted that after she was selected, she had researched online and learned that there are only eight jurors, not twelve. (R1634). Ms. Mausner advised that there might have been a discussion about why there were only eight of them, rather than twelve. (R1634). And, that before the trial began, after she learned it was about bribery, she had researched the penalties for bribery. (R1634). Ms. Mausner believed she had conducted the research on bribery before hearing about the other charges because she was curious what the range was. (R1634-35). She was not certain if she had even been selected as a juror. (R1635). Ms. Mausner believed that she had not yet been questioned, and had conducted her research that afternoon or that night on her phone while at home. (R1636,1644). She had not researched all four counts - only the bribery charge. (R1636). Ms. Mausner did not tell any of the other jurors until during deliberations when Mr. Rivera wanted to know how much time Appellee was looking at, and no one knew. (R1637). They explained to Mr. Rivera that the sentence was up to the judge. (R1637). Ms. Mausner then let them know that she had looked up the penalties for bribery along with the definition and any sentence would be up to the judge and the pre-sentence investigation. (R1637). She explained that she was a paralegal in a law office and that was how she knew about pre-sentence investigations. (R1646). Ms. Mausner advised that her research revealed bribery was punishable by five to ten years in prison,

although it might not even have been Florida's penalties. (R1643). She did not recall if she told Mr. Rivera what she had found out about the potential penalty, and, at most, she told the others that the penalty for bribery was five to ten years. (R1637-38,1645). She knew she was not supposed to conduct any research, but she had looked up the definition of bribery and the penalties. (R1644). She was angry when she heard Mr. Rivera's allegations because they had been very diligent about considering each count and the evidence relating to each count and the foreperson had made sure that everybody was on board before moving onto the next count. (R1639-40). Ms. Mausner had heard about the toilet issue, but was unaware of the cause. (R1653-54). Ms. Mausner was directed not to delete anything from her phone or computer. (R1655).

Brian Williams had served as an alternate juror. (R1656). He never heard any discussions about the evidence or witness testimony during trial, or any violations of the court's directions. (R1657). He recalled discussions about personalities, especially Nick Geaney, because Mr. Geaney's demeanor was kind of comical, but nothing was said about the substance of his testimony. (R1657-58,1664-65). Mr. Williams also did not observe any juror sleeping, recall any discussion about the number of jurors in Florida, or the possible penalty for bribery. (R1659,1661,1663). He advised that the jurors all got along. (R1659). He had no worries about the juror misconduct allegations because he had a clear conscience. (R1662). As far as his comments to the press after he was discharged, Mr. Williams admitted he had been "pissed off" after investing the time in the case and not being able to follow it through to the end. (R1664).

The second alternate, Christina Coady, did not remember any discussions during trial about the evidence or witnesses' testimony or Appellee's guilt or

innocence. (R1666-67,1671). She advised there may have been some facial reactions, but they did not discuss anything - they did a good job. (R1667). For example, they were surprised about Nick Geaney's demeanor was on the witness stand, that Mike McDaniel took so long to answer, and Merrily Longacre could not seem to recall much. (R1668-70). However, she could not specifically recall any comments about any of those witnesses. (R1670). Ms. Coady did not receive any information from an outside source about the people involved or the evidence in the case. (R1671). She did not recall Lisa (Mausner) discussing the penalties Appellee might face, or about the offense of bribery, or having conducted any type of research. (R1679,1683). She recalled that Lisa (Mausner) believed she was probably only an alternate because of her politics. (R1681). However, she did remember Lisa (Mausner) sharing with them that there would be two alternates. (R1681).

Ms. Coady told the judge that she did not agree with Mr. Rivera's allegations. (R1672-73). To the contrary, she believed they were a very good jury, but Mr. Rivera is a very emotional person and that fueled his actions after trial. (R1673). As far as her comments to the press after she was discharged, she recalled being asked about Nick Geaney's testimony, and she told the reporter that she did not take his testimony into consideration. (R1676). However, she did not find what was said in the article accurately reported what she had said. (R1676). She had not spoken for anyone else - just on behalf of herself. (R1676-77).

The defense moved to have an expert examine Ms. Mausner's phone and computer, or whatever device she used to conduct the internet research, and for a subpoena duces tecum for Ms. Mausner's electronic devices. (R1655,1684-86). The State opposed Appellee's request arguing that Ms. Mausner's testimony did not rise to the level required to allow such an invasion of her privacy. (R1686-89). The court

reserved on the motion, requesting memoranda of law. (R1692). Both sides submitted memoranda of law on the issue of whether an examination of Ms. Mausner's electronic devices should be permitted. (R244-70;271-85).

A final hearing was held January 12, 2018, on the motion to inspect and the motions for new trial. (R1697). Appellee argued for a new trial based upon juror misconduct. Specifically, that Ms. Mausner had been instructed not to conduct any research, yet she admitted to researching the penalties for bribery and sharing that information with other members of the jury. (R1702). She also investigated the number of jurors, including the number of alternates. (R1702). Appellee argued that it was well established that when unauthorized materials are brought into jury deliberations, prejudice is presumed and the State must demonstrate there was no reasonable possibility that misconduct contributed to the verdict. (R1702-03). The standard that was adopted in Florida was essentially the harmless error standard from State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). (R1703). Further, that there is a distinction made between factual information and legal information. (R1703). Where the outside information is factual, there is a harmless error standard, but with the introduction of outside legal information, there is almost a presumption of harm, because the only law applicable is the law given by the judge. (R1703-04). Here, the juror had researched the definition of bribery and shared that information with the jury, a term that was crucial to this case. (R1704). After setting forth additional authority and distinguishing the State's case law, (R1705-12), Appellee argued that he was entitled to a new trial. (R1712). In response to a question from the court, counsel for Appellee explained that a court may only consider whether the information that was introduced into the jury room created a reasonable possibility that it contributed to the verdict. (R1713-14). The court recalled that the jurors spoke

about Ms. Mausner mentioning the penalty for bribery, but not the definition. (R1714-15). The defense disagreed. (R1715). Appellee advised that even if only one juror was compromised, a new trial was required. (R1716-17). While acknowledging that comments about a witness's demeanor is not sufficient to require a new trial, when the introduction of the outside information was also considered, then a new trial is necessary. (R1717-18).

The State argued in response that there was no testimony that the jurors relied upon the outside information to reach their verdicts. (R1723). The State contended the jury was not tainted by Ms. Mausner's research, especially the information regarding the number of jurors. (R1724). As far as her research on bribery, the State noted that the bribery information related to only two of the four counts and should the court grant Appellee a new trial, it should only be on the two bribery counts. (R1724-25). The State reviewed the testimony of the jurors that there had been no premature deliberations and they had abided by their oath. (R1725-27). Nor was there evidence that the jury disregarded the definition of bribery provided by the court with any definition obtained from an outside source, that Ms. Mausner shared the definition of bribery with the jury, or that the jurors agreed to disregard their oath. (R1726-30). After reminding the court that two of the counts had nothing to do with the research conducted by Ms. Mausner, the State argued that the motion for new trial based upon juror misconduct should be denied. (R1730-31).

In rebuttal, Appellee argued that the court is not to consider the mental impressions of the jurors. (R1731-32). The judge pointed out that she had not made that inquiry, but that some testimony may have inadvertently included that information. (R1732). Appellee reiterated that the court could not consider that testimony, i.e., whether they relied upon the outside information in rendering their

verdict. (R1733). The defense argued that the court's inquiry was to focus only on whether information from an outside source was introduced into the jury room and whether the information was relevant to the case. (R1734).

The judge indicated she was taking the motion under advisement, so that she could review the CD's as well as her notes and prepare a written order. (R1737).

On March 12, 2018, the trial court rendered an order vacating Appellee's judgment and granting him a new trial based upon juror misconduct. (R621). First, the trial court found there had been no credible evidence of premature deliberations. (R622). Second, regarding the jurors' verbal or emotional reactions to certain testimony, the court found such reactions are not deliberations, and, while improper, were not prejudicial. (R622-23). Third, the court also found Mr. Rivera's allegations that Ms. Mausner referred to Nick Geaney as a scum bag and that Appellee was a lobbyist were uncorroborated and, thus, not credible. (R623). The court noted that even if such comments had been made, they did not constitute premature deliberation. Id. Fourth, while any research on the number of jurors and alternates and that Appellee would be entitled to a pre-sentence investigation were improper, there was no reasonable possibility that the research had any effect on the verdict. (R623). Fifth, and finally, the court found Ms. Mausner's research regarding the possible penalty that Appellee would face for bribery was improper. (R623-24). The court also found Ms. Mausner to be evasive about whether she had conveyed that knowledge to other jurors, but that Mr. Laurencelle had corroborated Mr. Rivera's testimony that Ms. Mausner had advised the jury of the potential penalty. (R623-24). The court found this to be juror misconduct, and held that the State had not established that there was no reasonable possibility that the juror misconduct effected the verdict. (R624). Specifically, the trial court found that "[t]he definition of bribery was the central issue

in two of the charged counts and any possibility that a juror or the jurors collectively relied upon an incorrect definition of that term must be deemed to be prejudicial." (R624). The trial judge explained that the research into the definition of bribery and its penalties was prejudicial because the trial court is supposed to be the only source of information about the applicable law. (R624). By permitting a jury to conduct its own research, the jurors may use that definition rather than the trial court's explanation of the applicable law. (R624). The court found that "the possibility of prejudice to the Defendant from a juror or jurors potentially relying on an incorrect definition of the key term at trial cannot be overcome." (R624-25). The court held Appellee was entitled to a new trial on all four counts. (R625).

This timely appeal followed.

SUMMARY OF ARGUMENT

The trial court erred by setting aside the convictions for bid tampering and official misconduct. The juror misconduct related to the charges of bribery and conspiracy to commit bribery, i.e., the definition and potential penalties for bribery, only, and not to the convictions for bid tampering and official misconduct. Appellee's convictions should be reinstated for bid tampering and official misconduct.

ARGUMENT

ISSUE ON APPEAL

THE TRIAL COURT ERRED BY SETTING ASIDE THE CONVICTIONS FOR BID TAMPERING AND OFFICIAL MISCONDUCT.

The trial court erred by setting aside Appellee's convictions for bid tampering and official misconduct. It is well established that the standard of review of a trial court's order granting or denying a motion for new trial on the ground of juror misconduct is that of abuse of discretion. See State v. Hamilton, 574 So.2d 124, 126 (Fla.1991).

After the hearing at which the jurors were questioned by the trial court and the lawyers, the trial court granted the motion and reversed the cause for a new trial on all four counts. The State is not challenging the trial court's order relating to the bribery and conspiracy to commit bribery; only as to the convictions for bid tampering and official misconduct.

It is well established that a defendant has a right "to have the jury deliberate free from distractions and outside influences." Livingston v. State, 458 So. 2d 235, 237 (Fla. 1984). Upon making the determination of the precise quality of the jury breach, if any, the [trial] court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant." Hamilton, 574 So. 2d at 129 (quoting United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975)). In Hamilton, the Florida Supreme Court adopted the harmless error test and held that where unauthorized materials are introduced into the jury room, "'defendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the [unauthorized] books affected the verdict.'" Id. at 129 (quoting Paz v. United States, 462 F.2d 740, 745 (5th Cir.1972)). The State has the burden of showing that

the error was harmless. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986). The trial court is not permitted to inquire into a juror's thought process to determine whether the error is harmless. Rather, the trial court's inquiry "must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room." Hamilton, 574 So. 2d at 129 (quoting United States v. Howard, 506 F.2d 865, 869 (5th Cir.1975)).

Appellee was tried by a jury upon four counts: bribery, conspiracy to commit bribery, bid tampering, and official misconduct. Juror Lisa Mausner admitted she had been instructed not to conduct independent research, but upon hearing about the bribery charge, she had researched the elements and penalties for bribery on her cell phone prior to being selected for the jury. During deliberations, Mr. Rivera had become upset about the potential penalty faced by Appellee, and after reminding Mr. Rivera that the sentence was the judge's job and that the jury's job was to render a verdict based upon the evidence, Ms. Mausner advised Mr. Rivera that Appellee was looking at five to ten years for bribery. One other juror, Mr. Laurencelle, recalled hearing Ms. Mausner advise Mr. Rivera that the bribery charge was subject to a five to ten year sentence - but did not recall hearing Ms. Mausner mention she had researched the penalty issue. The State argued that should the trial court find juror misconduct on Ms. Mausner's part, only the bribery and conspiracy to commit bribery convictions should be reversed for a new trial (not the bid tampering and official misconduct convictions). The court reversed all four convictions for a new trial. Because the unauthorized information that was introduced in the jury room dealt solely with the penalty (and elements) for bribery, the trial court erred in reversing all four convictions since the State established harmless error beyond a reasonable doubt as to the bid tampering and official misconduct convictions. See DiGuilio, 491 So. 2d at 1139.

The elements of bid tampering are found in section 838.22, Florida Statutes. Subsection 838.22(1)(a), which Appellee was convicted of violating, provides that "[i]t is unlawful for a public servant ... to knowingly and intentionally influence or attempt to influence the competitive solicitation undertaken by any governmental entity for the procurement of commodities or services, by ... [d]isclosing ... material information concerning a vendor's response, any evaluation results, or other aspects of the competitive solicitation when such information is not publicly disclosed." A violation of this subsection commits a felony of the second degree. § 832.55(5), Fla. Stat. (2012).

Official misconduct is found in section 838.022, Florida Statutes. In order to establish the commission of an offense under section 838.022, the State must establish that: (1) The defendant was a public servant; (2) while a public servant, the defendant concealed, covered up, destroyed, mutilated, or altered an official record or official document or caused another person to perform such an act; and (3) the defendant did so with corrupt intent to obtain a benefit or to cause harm to another. In re Standard Jury Instr. in Crim. Cases - Report No.2012-06, 123 So. 3d 54, 55 (Fla. 2013). Official misconduct is a third degree felony. § 838.022(3), Fla. Stat. (2012).

The trial court offered no explanation for setting aside all four convictions, despite the State's argument that should the trial court find juror misconduct that only the bribery charges should be reversed. Instead, the court simply held that "the possibility of prejudice to the Defendant from a juror or jurors relying on an incorrect definition of the key term at trial cannot be overcome." (R624-25). However, neither the term "bribery" nor its elements are included in the elements of bid tampering or official misconduct charges or are alleged in the information regarding the bid tampering and official misconduct charges. And, the evidence of the first two counts

focused on Appellee's actions in procuring kickbacks from BlueWare, while the bid tampering and official misconduct focused on the coverup. That is, after being challenged about the BlueWare contract by his political opponent, Appellee decided to utilize a competitive bidding procedure that allowed BlueWare much greater access and time to prepare its ITN than any other potential vendors. Further, that Appellee committed official misconduct by requesting his employee, McDaniel, delete his emails relating to the scanning and digitalization contract and use his personal email, rather than his work email, in order to avoid revealing BlueWare's involvement during the competitive bidding process. And, as the trial court even acknowledged, "[t]he definition of bribery was the central issue *in two of the charged counts* and any possibility that a juror or the jurors collectively relied upon an incorrect definition of that term must be deemed to be prejudicial." (R624) (Emphasis added).

As revealed during the juror interviews, in addition to Ms. Mausner, two other jurors, Mr. Rivera and Mr. Laurencelle, recalled hearing about the possible penalty for bribery (from Ms. Mausner) during deliberations. The majority of the jurors recalled Mr. Rivera being reminded that sentencing was the judge's job, while their job was to render a verdict according to the evidence. Moreover, prior to deliberations, the jurors were instructed that they were to consider the evidence as to each charge separately, and it is assumed that jurors follow their instructions. Collier v. State, 259 So. 2d 765, 766 (Fla. 1st DCA 1972) (holding that it "must be presumed that the jury followed the court's instructions and found appellant guilty only after being satisfied beyond a reasonable doubt that he had committed the crime as charged."); Hand v. State, 188 So. 2d 364, 367 (Fla. 1st DCA 1966) (holding that "it must be presumed" that the jury will follow the trial court's instructions, and that the jurors "lived up to their solemn obligation as citizen-jurors in the absence of any

indication to the contrary."), quashed on other grounds, 199 So. 2d 100 (Fla. 1967). See also Silvestri v. State, 332 So. 2d 351, 354 (Fla. 4th DCA) (holding that "we are required conclusively to presume-and we could not even receive juror's affidavits to the contrary-that the jury acted properly as to matters which necessarily inhered in its verdicts.") (citations omitted), approved, 340 So. 2d 928 (Fla. 1976). Since there is no reasonable possibility that the introduction of the potential penalties for bribery into the jury room contributed to the verdicts for bid tampering and official misconduct, the convictions for those two charges should be reinstated. See, e.g., Dubose v. State, 210 So. 3d 641, 652 (Fla. 2017) ("Whether or not it could be considered to be improper discussion and not a matter inhering in the verdict [i.e., educating the other jurors on the meaning of a teardrop tattoo], there is no reasonable probability that this breach was prejudicial during the penalty phase of his trial. See id. Dubose had already been convicted of murder and during the penalty phase, the jury was informed that Dubose had a prior violent felony. In addition, through the testimony of Dubose's own witness, the jury learned that Dubose had been incarcerated awaiting the trial of this case."); Boyd v. Allen, 592 F.3d 1274, 1305 (11th Cir. 2010) ("We consider the totality of the circumstances surrounding the introduction of the extrinsic evidence to the jury. These include: (1) the nature of the extrinsic evidence; (2) the manner in which the information reached the jury; (3) the factual findings in the trial court and the manner of the court's inquiry into the juror issues; and (4) the strength of the government's case.") (citations omitted).

The trial court relied upon Grissinger v. Griffin, 186 So. 2d 58 (Fla. 4th DCA 1966), and Tapanes v. State, 43 So. 3d 159 (Fla. 4th DCA 2010), but those cases are distinguishable from the instant circumstances. For example, in Grissinger, the jury was provided with a copy of a dictionary while it was deliberating on the issue of

contributory negligence, giving the jury access to definitions of any number of legal terms they were considering. Grissinger, 186 So. 2d at 59; see also Hamilton, 574 So. 2d at 127 (In discussing the Grissinger case, the supreme court noted that it was significant that the trial involved questions of negligence, proximate cause, and contributory negligence, and that "in considering the meaning of these legal terms, the jury might have relied on common dictionary definitions that were contrary to the law of Florida."). Here, we know a juror researched the penalty for and elements of bribery - and only bribery.

In Tapanes, the jury had only one count before it, i.e., first degree murder. Tapanes, 43 So. 3d at 160. In that case, the jury looked up the term "prudent," a term from the jury instructions[1] that was also used during closing argument as to that one count in a case where the defendant was claiming self-defense. Id. at 161. Here, the juror limited her research to the elements of and penalties for bribery - external information that was potentially prejudicial to the bribery and conspiracy to commit bribery counts, only. And, the case law relied upon by Appellee involved the introduction of outside sources that potentially affected all of the charges or the only charge before the jury. See Keen v. State, 639 So. 2d 597, 599 (Fla. 1994) (presence of magazine article concerning tactics of defense attorneys in jury room required reversal of defendant's murder conviction); Smith v. State, 95 So. 2d 525, 527-528 (Fla. 1957) (reversal of murder conviction required where jury provided with dictionary for use during deliberations); Powell v. State, 102 So. 652, 654-655 (Fla.

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[1] Prudent was a term used in the self-defense instruction prior to passage of the Stand Your Ground Law. See, e.g., Hunter v. State, 687 So. 2d 277, 278 (Fla. 5th DCA 1997) ("To justify homicide in self-defense, one must demonstrate a real necessity for taking a life and a situation causing a reasonably *prudent* person to believe that danger is imminent.") (Emphasis added).

1924) (affidavits from jurors indicating that they had consulted law books before they arrived at verdict in order to ascertain the penalties allowed by law for the various degrees of homicide vitiated the trial); Greenfield v. State, 739 So. 2d 1197, 1197 (Fla. 2d DCA 1999) (providing jury with a dictionary to look up a word that appeared in the jury instructions during deliberations required a new trial); Duchainey v. State, 736 So. 2d 38, 39 (Fla. 4th DCA 1999) (jury's use of dictionary and thesaurus to research words related to legal issues in case involving drug charges would warrant a new trial where highlighted and underlined words were specific to charges against defendant and applicable to jury instructions); Hollywood Corp. Circle Assoc. v. Amato, 604 So. 2d 888, 891 (Fla. 4th DCA 1992) (new trial required where juror did independent research of Florida law and shared findings with other jurors, drove by the crash scene, and brought a Police Regulations Handbook into the jury room). Unlike the authority relied upon by the trial court and Appellee, here, any potential prejudice attached to the bribery charges alone - and not the separate and distinct convictions for bid tampering and official misconduct. The trial court abused its discretion by setting aside the convictions for bid tampering and official misconduct because the State established harmless error beyond a reasonable doubt as to the bid tampering and official misconduct convictions. See DiGuilio, 491 So. 2d at 1139; see also Williamson v. State, 894 So. 2d 996, 999 (Fla. 5th DCA 2005) (Error committed when certified copy of judgment and sentence for defendant's prior sexual batteries was delivered to jury room for deliberations even though copy had not been admitted into evidence was harmless, in trial for sexual battery, burglary, and kidnapping, assuming that jury examined judgment and sentence; jury had already heard from witnesses regarding defendant's prior crimes that resulted in judgment and sentence, and evidence of defendant's guilt in current case was overwhelming, including

positive identification of defendant by victim and fingerprint and DNA evidence).

Based on the foregoing facts and authorities, the trial court erroneously set aside the convictions for bid tampering and official misconduct. The trial court's order granting a new trial based upon juror misconduct should be reversed in part, and Appellee's convictions for bid tampering and official misconduct reinstated. See, e.g., State v. Anderson, 215 So. 3d 181, 185 (Fla. 5th DCA 2017) ("Accordingly, because Grounds Three and Eight of Anderson's rule 3.850 motion factually relate only to his aggravated battery convictions, we reverse that portion of the postconviction court's order vacating Anderson's convictions for fleeing and eluding and resisting without violence.").

CONCLUSION

Based on the arguments and authorities presented herein, Appellant respectfully prays this Court reverse in part the trial court's order granting a new trial based upon juror misconduct setting aside the convictions for bid tampering and official misconduct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief has been furnished via email to counsel for Appellee, William R. Ponall, Esquire, (253 North Orlando Ave., Suite 201, Maitland, FL), at bponall@PonallLaw.com, and Lisabeth Fryer, Esquire, (250 International Pkway, Suite 134, Lake Mary, FL) at lisabeth@lisabethfryer.com this 20th day of August 2018.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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