IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL
CIRCUIT IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 21-CF-4602

Plaintiff,

vs.

OREN MILLER,

Defendant.
_____/

**MOTION FOR NEW TRIAL AND
MEMORANDUM OF LAW IN SUPPORT THEREOF**

The Defendant, Oren Miller ("Miller") moves this Court for an Order granting a new trial pursuant to Rule 3.580, Florida Rules of Criminal Procedure, in that the verdict is contrary to the manifest weight of the evidence or is insufficient to support a guilty verdict and is based upon charges not contained in the Information upon which the trial took place, and any alleged misstatements made by Miller were not material and not intended to mislead the State. The substantial grounds of law and fact to be argued are as follows:

I. Insufficient Evidence

The Information upon which this case went to trial charged Miller with:

> OREN MILLER on or about October 6, 2021, did unlawfully and feloniously commit perjury in an official proceeding, to-wit: a criminal investigation by the Office of the State Attorney, by making a false oath or written affidavit before a person duly authorized to administer oaths, to-wit: Russel J. Suess, Chief Investigator of the Office of the State Attorney, in that OREN MILLER did willfully, corruptly and falsely swear under oath to certain material facts, to-wit: he

> stated there were no telephone conversations between him and Sumter County Commissioner Gary Search after January 2021, that OREN MILLER knew to be false and untrue, in violation of Florida Statute 837.02(1)

The evidence was insufficient as a matter of law to support a conviction for this charge and the evidence submitted by the State of charges unrelated to this charge unduly prejudiced Miller.

The basis of the alleged perjury is a simple statement that on October 6, 2021, "he stated there were no telephone conversations between him and Sumter County Commissioner Gary Search after January 2021."

The charge does not allege that these calls were about any topic whatsoever – just that there were calls after that date and thus, Miller's statement was false.

The only actual statements by Miller are contained as follows:

Page 20, Line 4:

> 4 MR. MILLER: We got elected in November, the
> 5 phone calls probably stopped in January or
> 6 February when we all realized that could be an
> 7 issue.
> 8 MR. GLADSON: Got it.
> 9 MR. MILLER: So I can't give you the exact
> 10 date they stopped, but it was somewhere in there.

Notwithstanding the fact that Miller made this statement (i.e., probably), on page 23 at Line 7, Mr. Gladson queries:

> 7 MR. GLADSON: Right, I'm talking about the
> 8 calls, though, the calls stopped you said in

9 January anyway.
10 MR. MILLER: Yeah

Then, at line 14, by Mr. Suess:

14 Q (By Mr. Suess) Of more concern, sir, is
15 that I asked you I think a specific question: Do
16 you have phone conversations with Mr. Search?
17 A Yes.
18 Q Okay.
19 A I did.
20 Q After January?
21 A No.[1]

There is nothing in these questions or these answers that suggest the topic of any of these conversations. Mr. Miller is solely charged with saying phone calls stopped sometime in January. Thus, the subject of the phone calls is irrelevant except possibly as to motive.

As to motivation, any concerns about potential violations of the Sunshine Laws make no sense. Mr. Miller was elected in November 2020. He admitted calls through January 2021 which, if in fact there were violations of the Sunshine Law, he already admitted them. Therefore, he could not have intended to mislead the State in its investigation into alleged violations of the Sunshine Laws.

In a criminal case, "the trial court needs to act as a 'gate keeper' find evidence inadmissible when it would have a 'prejudicial' effect." McLean v.

[1]Importantly, as to this entire inquiry, the State never predicated its questions on "phone calls on any matter or issue."

State, 934 So. 2d 1248, 1256 (Fla. 2006). When the danger of unfair prejudice "substantially outweighs" the probative value, the trial court should exclude the evidence. Fla. Stat. §90.503 (2008).

Even if a trial court finds that the collateral crime evidence is admissible under §90.404(2), Fla. Stat., the court must also take a second step and weigh the danger of unfair prejudice against the probative value of the evidence.

Collateral crime evidence becomes an impermissible "feature" of a trial where collateral act evidence "overwhelms" evidence of the charge crime and becomes "an impermissible attack on defendant's character or propensity to commit crimes." Samuels v. State, 11 So. 3d 413, 418 (Fla. 4th DCA 2009).

In the instant case, there is nothing in the Information that has anything to do with the subject or topics involved in any phone calls. It is simply that Mr. Miller made phone calls after January after he said that he did not about any topic in the world. While the State may be allowed to present evidence of a motive, that evidence cannot be so overwhelmingly prejudicial and outside the scope of the charging document as to violate the rights of Mr. Miller.

Thus, either the "sufficiency of the evidence" or the "weight of the evidence" were insufficient to justify a finding of guilty against Miller. Sufficiency of the evidence was raised by Miller in his Motion for Directed Verdict of Acquittal. Weight of the evidence is raised on a Motion for New Trial. The "sufficiency of the evidence" standard determines whether the evidence

presented was legally adequate to permit a verdict and is typically utilized to decide a motion for directed verdict.

As stated in Tibbs v. State, 397 So. 2s 1120 (Fla. 1981), "In criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove a defendant's guilt beyond a reasonable doubt." Tibbs at 1123. The "weight of the evidence" standard determines whether a greater amount of credible evidence supports one side of an issue or the other. State v. Hart, 632 So. 2d 134, 135 (Fla. 4th DCA 1994).

II. Evidence Beyond the Scope of the Charges in the Information

The charge outlined in the Information simply has nothing to do with the content of the alleged conversation. Mr. Miller is entitled to have the charge against him proven substantially as it is alleged in the indictment or information and he cannot be prosecuted for one offence and then sentenced for another. Zwick v. State, 737 So. 2d 759, 760 (Fla. 5th DCA 1999). "Where an offence may be committed in various ways, the evidence must establish it has been committed in the manner charged in the indictment" or information. Deleon v. State, 68 So. 3d 391, 292 (Fla. 2d DCA 2011).

Thus, when a State limits a charging document to a specified factual theory, the evidence should not go outside of that factual theory. Trahan v. State, 913 So. 2d 729, 730 (Fla. 5th DCA 2005).

III. Any Alleged Statements Were Not Material

The undisputed evidence reflects that Oren Miller was elected as a county commissioner in November 2020. Any obligations relative to the Sunshine Law and communications with other county commissioners would have been triggered as of that date (see testimony of Suess, Ford and Search). The undisputed testimony is that Miller and Search had communications that were not telephone communications, during which time, had he wished to discuss county business, they could do so although it would have arguably been a violation of the Sunshine Laws.

The fact that Miller testified that the calls "probably stopped in January," "I don't know," "March or April," et cetera, are not material to the investigation of any violations of the Sunshine Law.

"Materiality" is not an element of the crime of perjury, but is a threshold issue the Court must determine as a matter of law prior to trial. State v. Ellis, 723 So. 2d 187 (Fla. 1998). To be material, statements must be germaine to the inquiry and have a bearing on the determination in the underlying case. State v. Diaz, 785 So. 2d 744 (Fla. 3d DCA 2001).

In this case, as is noted above, Miller has already indicated that he had telephone calls with Search between November and the end of January. Thus, whether he had calls after January is not material to any Sunshine Law violation and thus, is immaterial.

As noted in the examination and testimony of Suess, the questions asked

of Miller were not asked with the appropriate specificity necessary to result in an equally specific statement of fact by Miller. Argyros v. State, 718 So. 2d 222 (Fla. 2d DCA 1998). "Precise questioning is an imperative as a predicate to the offence of perjury." Argyros at 222. In the instant case, Miller's first response was that the calls "probably" ended in January or February. The questioner then followed that up later in the examination by saying, "you said they ended in January" to which Miller replied, "yeah." There was no attempt to be specific. Were these calls about government related business, or were they simply personal or social calls? The questioning of Miller relative to the charge of perjury simply lacks the necessary specificity to show any intent by Miller to mislead the State's inquiry into its investigation of any Sunshine Law violations.

CONCLUSION

The Motion for Directed Verdict of Acquittal, the Motion for Judgment of Acquittal Notwithstanding the Verdict, and this Motion for New Trial should be granted, and Miller should be determined to be not guilty and/or this Court should order a new trial limiting the scope of the alleged Sunshine Law violations to merely a basic intent or motive formula.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing Plea has been furnished by e-service to the OFFICE OF THE STATE ATTORNEY, Marion County Judicial

Center, 110 N.W. 1st Avenue, Suite 5000, Ocala, FL 34475, Ocala, Florida 34470, this 28 day of November, 2022.

BLANCHARD, MERRIAM, ADEL,
KIRKLAND & GREEN, P.A.

By:_____

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