

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

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

DAVID SMITH, II,

Appellant,

v.

Case No. 5D17-1228

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed December 14, 2018

Appeal from the Circuit Court
for Orange County,
Mark S. Blechman, Judge.

Paula C. Coffman, Orlando, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Lori N. Hagan, Assistant
Attorney General, Daytona Beach, for
Appellee.

GROSSHANS, J.

After trial, David Smith, II was convicted of first-degree murder. On appeal, Smith argues that the trial court erred by admitting a recorded telephone conversation in violation of the Florida wiretap statute. See Ch. 934, Fla. Stat. (2016). We conclude that

the evidence was improperly admitted, but it constituted harmless error beyond a reasonable doubt.¹ As a result, we affirm the conviction and sentence.

I. BACKGROUND INFORMATION

The State charged Smith with the first-degree murder of a twenty-month-old child who was in his care on the afternoon that she died.

During trial, the State sought to introduce a recording of a phone conversation between Smith and the child's mother ("Mother") that occurred on the day of the child's death. Mother recorded this conversation using an app on her cell phone. Smith objected to the admission of the recording, arguing that Florida's wiretap statute prohibited its admission. Finding that Smith had no expectation of privacy, the trial court overruled Smith's objection, admitted the recording into evidence, and allowed the State to publish it to the jury.

Although Mother's statements could be understood, Smith's words on the recording were completely unintelligible. As reflected in the trial transcript, the conversation was as follows:

[Mother:] What you doing?
[Smith:] (Unintelligible.)
[Mother:] What?
[Smith:] (Unintelligible.)
[Mother:] Yes.
[Smith:] (Unintelligible.)
[Mother:] What?
[Smith:] (Unintelligible.)
[Mother:] Yeah. Pick her up.
[Smith:] (Unintelligible.)
[Mother:] Yo.

¹ Smith also challenges the denial of his request for a special circumstantial evidence instruction. We conclude that the trial court did not abuse its discretion in declining to give the requested instruction. See *Jackson v. State*, 25 So. 3d 518, 531 (Fla. 2009).

[Smith:] (Unintelligible.)
[Mother:] What is she doing?
[Smith:] (Unintelligible.)
[Mother:] She's still not waking up?
[Smith:] (Unintelligible.)
[Mother:] She's still not waking up?
[Smith:] (Unintelligible.)
[Mother:] Put her in a cold shower, then.
[Smith:] (Unintelligible.)
[Mother:] Yeah?
[Smith:] (Unintelligible.)
[Mother:] Okay. Well, call 911. I'm on my way.
[Smith:] (Unintelligible.)

The State later introduced into evidence, with no objection from Smith, a video recording of a police interview with him in which he stated the following:

[Detective:] You also know about her phone and the phone app; right?
[Smith:] Yeah.
[Detective:] It records every phone call?
[Smith:] Yeah.

After deliberations, the jury found Smith guilty of first-degree murder as charged.

II. Admissibility Under the Wiretap Statute

Whether the Florida wiretap statute applies to a particular recording involves a matter of law and, therefore, is subject to de novo review. See *McDade v. State*, 154 So. 3d 292, 296–97 (Fla. 2014).

Section 934.03(1), Florida Statutes (2016), generally prohibits the intentional interception of oral communications, which is defined as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 934.02(2). When a protected oral communication has been intercepted, without consent and in violation of

the wiretap statute, no part of the interception may be received into evidence in any court proceeding, including a criminal trial. See *id.* § 934.06.

Here, Mother recorded her conversation with Smith. The record does not demonstrate that Smith gave Mother permission to record the conversation or that he had reason to know that she would record the call. Accordingly, Mother recorded the conversation in violation of the Florida wiretap statute. Thus, we hold that the trial court erred in admitting this recording.

The State's argument to the contrary does not persuade us. On appeal, the State contends that Smith admitted in the police interview that he knew Mother recorded phone conversations, and therefore, had implicitly consented to the recording. However, the dialogue relied on by the State does not indicate when Smith learned of Mother's practice to record all cell phone conversations. Moreover, no other evidence eliminates the ambiguity. Thus, the record does not support the State's argument.

III. Harmless Error Analysis

We next consider whether admission of the recording was harmless error. See *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). As the Florida Supreme Court explained, the harmless error test "places the burden on the [S]tate, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Id.* Application of this test "requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury

verdict.” *Id.* Based on our examination of the entire record, we conclude that the admission of the recording constituted harmless error.

A. Impermissible Evidence

The recording was used primarily by the State to corroborate Mother’s extensive testimony regarding the content of the conversation. No intelligible statements of Smith were discernible in the recording, only the sound of his voice. Nor, during the recording, did Mother accuse Smith of any wrongdoing. In fact, the recording actually supported Smith’s theory of innocence. The defense attorney used this recording both in cross examination and in his closing argument to accuse Mother of being the perpetrator of the crime and support Smith’s theory of defense.

B. Permissible Evidence

The forensic evidence in this case was extensive and compelling. Three different medical professionals testified as to the child’s injuries, which included a blow to the left side of her head that could have, on its own, been lethal; tremendous blunt force impact to her torso that lacerated her liver and injured other organs; and recent injuries to her genital area. The medical professionals also testified that none of the injuries were consistent with a minor accident or fall and all of the injuries were acute at the time of her death, including a large visible hematoma on the side of the child’s head. The jury was provided with numerous autopsy photos depicting fresh bleeding across the brain, a torn liver, and broken ribs. A medical expert testified to the seriousness of these injuries and the immediate impact they would have had on the child’s ability to function normally, sit upright, ride in a car, maintain consciousness, or be carried without exhibiting extreme pain.

Three lay witnesses testified that they did not notice anything abnormal about the child at the time Mother left for work, including two of Smith's relatives who observed the child after Mother's departure. They testified that the child was sitting upright in the back seat of the vehicle, her eyes were open, she seemed responsive, and she did not exhibit any signs of pain or discomfort. One of the witnesses saw Smith carry the child over his shoulder into the motel room where he was living. Surveillance video was also admitted that showed the conscious child walking to the car and later entering the motel room alone with Smith. Prior to the admission of the recording, Mother testified about the content of the phone conversation she had with Smith, noting that he sounded hysterical and indicated that he could not wake the child.

The jury also heard from numerous other witnesses, including emergency personnel and law enforcement who testified that when they arrived on the scene the child was already cold and stiff, the room smelled strongly of chlorine, and the bedsheets had been removed. The child's blood was found on items in the motel room, but no blood was found in the vehicle in which the child was a passenger earlier that afternoon. The only explanation that Smith initially gave to detectives for the child's injuries was that he put the child in the shower and left momentarily, only to return and find her unconscious. He also testified that she had accidentally been hit by a door the day before.

For the reasons given above, we conclude that there is no reasonable possibility that the admission of the recording contributed to the jury's verdict and, therefore, its admission constituted a harmless error. Accordingly, we affirm the conviction and sentence in this matter.

AFFIRMED.

COHEN, C.J. concurs and concurs specially.
HARRIS, J., dissents with opinion.

COHEN, C.J., concurring, and concurring specially.

I agree with Judges Grosshans and Harris that the trial court erred in admitting the phone call.² When the State attempted to admit the recorded phone call into evidence, Smith objected based on section 934.06, Florida Statutes (2016). The State's argument for admission of the recording was as follows:

STATE: [I]t's a balancing test whether or not there's a reasonable expectation of privacy. There's not a blanket black-or-white switch. And he's making these statements in front of another person. You can hear, when he puts the baby up to the phone, her breathing. So I would argue that he had —has waived any reasonable expectation of privacy because he's making these statements in front of another person.

COURT: The other person being the 20-month-old infant?

STATE: Who's verbal and can talk.

Contrary to the State's assertion, Smith did have a reasonable expectation of privacy in the cell phone conversation. Cf. Hentz v. State, 62 So. 3d 1184, 1191 (Fla. 4th DCA 2011) (finding that defendant had a reasonable expectation of privacy in the cell phone call he received while he was in his home; accordingly, a recording of defendant's conversation violated chapter 934). The argument that a phone call made in the presence of a toddler, and in this case, a toddler who was unresponsive, is unpersuasive and should have been rejected by the trial court.

² At trial, the State did not argue that Smith consented to the recording of the phone call because he knew the mother's cellphone recorded all phone calls. Had the State raised this argument below, perhaps the record would have been clearer as to when Smith became aware of the app on the mother's phone which was capable of recording conversations, albeit illegally. I agree that the record does not establish either that Smith was aware of the app at the time of the phone call at issue or that he was aware that the app was being utilized to record the pertinent phone call.

My divergence from Judge Harris's dissent is in his conclusion that the State failed to meet its burden of harmless error. Judge Harris has properly set out the required analysis. However, I cannot agree that the admission of an inaudible tape impacted the jury's verdict. That the mother was initially a suspect and was arrested does not change my view. We do not know whether she was charged as a principal, nor whether the forensic exams had been completed. We do know that she was never charged with any crime related to the death of her child. I agree with Judge Grosshans that the physical and forensic evidence established not only that Smith was responsible for the child's injuries, but also that the mother was not.

I am troubled by the State's introduction of a detective's questioning of Smith as set out in Judge Harris's dissent. The State first argued that the tape was inaudible and then presented the detective's testimony relating substantive statements allegedly made by Smith during the phone call. However, that testimony came into evidence without objection, and any error does not rise to a fundamental level. E.g., Johnson v. State, 43 Fla. L. Weekly D1172 (Fla. 5th DCA May 25, 2018) (finding unobjected-to testimony did not constitute fundamental error).

While I agree with the majority that the trial court erred in admitting the recorded telephone call between the Mother and Smith, I cannot agree that the error was harmless beyond a reasonable doubt. I dissent.

Our supreme court has held that the exclusionary rule in section 934.06, Florida Statutes (2016), is statutorily mandated. State v. Garcia, 547 So. 2d 628, 630 (Fla. 1989) (“Chapter 934 . . . unequivocally expresses the Legislature’s desire to suppress evidence obtained in violation of that chapter.”). Because it is a statutory mandate, the Court held that exceptions such as good faith do not apply to permit the introduction of illegally intercepted communications. The prohibition of the statute is absolute. See Atkins v. State, 930 So. 2d 678, 682 (Fla. 4th DCA 2006).

The admission of the illegally recorded call in this case was clearly error. Even though the recording itself was innocuous, containing, as the majority points out, no discernible intelligible statements made by Smith, the harm comes not from the contents of the recording but rather from what admission of the recording allowed the State to do. For example, the State played for the jury a recorded interview between Smith and the lead homicide detective in the case. In this recording, the detective told Smith that he too listened to the recorded conversation, and even though Smith still did not recall or could not make out what he said, the detective said, “I’ll tell you what you said.” The detective then told Smith about statements that the detective believes Smith made in that unintelligible conversation, which were consistent with those that the Mother attributed to Smith.

Under these facts, there is undoubtedly a risk that a jury could conclude that a seasoned homicide detective is better trained and experienced than they are to discern statements made in an otherwise unintelligible recording and that a jury might very well defer to the detective's interpretation. This alone creates a reasonable possibility that the error contributed to the conviction. Contrary to the concurring opinion, a finding that the recording impacted the jury's verdict is not required—only that there is a possibility that it could have.

The inherent harm in allowing the detective to use the recording to corroborate the Mother's version of events was noted by our supreme court when it took the "opportunity to caution trial courts to guard against allowing the jury to hear prior consistent statements which are not properly admissible. Particular care must be taken to avoid such testimony by law enforcement officers." Rodriguez v. State, 609 So. 2d 493, 500 (Fla. 1992). "When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave. Under the circumstances, the error in admitting [the evidence] cannot be considered harmless." Perez v. State, 371 So. 2d 714, 717 (Fla. 2d DCA 1979).

Because it was error to admit the recorded conversation, it then became incumbent upon the State, as the beneficiary of that error, to prove "that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Under this analysis, it is not the role of the appellate court to determine whether the evidence of guilt is sufficient or even overwhelming based on the properly admitted evidence. Id. at 1136. The "harmless error analysis must not become a device

whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence.” Id. That is precisely the analysis undertaken and relied upon in the majority opinion. Therefore, I disagree with the majority’s conclusion that admission of the illegally obtained recording was harmless in light of the “extensive and compelling” evidence of guilt.

Properly applied, the harmless error test does not focus on the strength of the State’s case, but on the effect of the error on the jury. See Johnson v. State, 53 So. 3d 1003, 1007 (Fla. 2010).

So even in instances where the State has produced overwhelming evidence of guilt, and we do not think we would characterize the permissible evidence considered by the jury in the instant case as overwhelming, the State may still fail to meet its burden if we determine that there was a reasonable possibility that the error affected the verdict. Johnson; Ventura v. State, 29 So. 3d 1086, 1089 (Fla. 2010) (holding that the lower court applied the wrong harmless error analysis when it concluded that the detective’s comments on defendant’s silence were “harmless beyond a reasonable doubt given the overwhelming evidence of guilt” (citation omitted)); DiGuilio, 491 So. 2d at 1139 (cautioning that the harmless error test is not “an overwhelming evidence test”); see also Cooper v. State, 43 So. 3d 42, 43 (Fla. 2010) (explaining that the harmless error test “is not a strong evidence test. Rather, the test is ‘whether there is a reasonable possibility that the error affected the verdict.’” (quoting DiGuilio, 491 So. 2d at 1139)).

Horne v. State, 127 So. 3d 898, 905 (Fla. 5th DCA 2013). A review of the entire record in this case shows that, in addition to the evidence which incriminated Smith, there was also evidence that the Mother could have been the one who committed the crime. In fact, there was enough evidence implicating the Mother that the homicide detective in this case initially obtained and served an arrest warrant on the Mother, charging her with the death

of the child. A critical component of Smith's defense was that the Mother must have been the one to inflict the fatal injuries on her child; thus, the respective credibility of the Mother and Smith was at the heart of this case.

By allowing the admission of this illegally recorded telephone conversation—a conversation where not one intelligible comment was attributed to Smith—the trial court in essence allowed the Mother to tell the jury her version of what Smith said. At one point, the State even asked her if, even though Smith's statements were unintelligible, "did he say the things [on that recording] that you told us he said?" The Mother answered in the affirmative. The one-sided conversation, consistent with the Mother's trial testimony, was admitted and played to corroborate her version of events. A witness's prior consistent statement may not be used to bolster her trial testimony, Lamb v. State, 357 So. 2d 437, 438 (Fla. 2d DCA 1978), because it puts a "cloak of credibility" on the witness's testimony. Brown v. State, 344 So. 2d 641, 643 (Fla. 2d DCA 1977). Further, while the Mother could have testified similarly had the recording been excluded, the playing of the recording and repeated references to it throughout the trial created a reasonable doubt that the jury's verdict could have been affected by the impermissible evidence.

Perhaps the error in admitting the recorded conversation could have been harmless had the State merely made a passing reference to the recording. To the contrary, however, the recording came up in the State's opening, extensively during the direct examination of both the Mother and the detective, and repeatedly in the State's closing. At one point, the State even argued about all the other things Smith could have said in the recorded call but chose not to. This allowed the jury to hear not only conflicting and one-side accounts of what Smith allegedly said, but also comments about what he

could have said, all from a completely unintelligible conversation between Smith and the only other person ever considered to be a suspect, someone who clearly had motive to point blame at Smith.

Admitting this recording opened the door for the State's witnesses and the prosecutor to tell the jury what they believe Smith said (or did not say) in the conversation. It was a focal point of the State's case throughout the trial and was used repeatedly to improperly corroborate the Mother's version of events. As credibility was unquestionably an issue in this case, I can find no circumstance where the admission of the illegally obtained recording could be considered harmless. I would reverse.