IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D17-0734

SAINTAMEN EDWARDS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

APPEAL FROM CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY

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STATEMENT OF THE CASE

On September 24, 2015, the Appellant, Saintamen Edwards, a police officer, was charged by Information with two counts of official misconduct both of which were alleged to have occurred on July 8, 2013 (Counts One and Two). Both counts alleged that Ms. Edwards altered a police offense incident report. Count Three alleged that she used a two-way communications device to further official misconduct. Count Four alleged the she used the personal identification information of her husband, Clyde Edwards, without his consent. (R17-22). Counts Three and Four were *nolle prossed* prior to the trial. (T5-6).

Ms. Edwards proceeded to a jury trial before the Honorable Martin Zilber. She was convicted of both counts of official misconduct. (R211-13). Ms. Edwards was then sentenced to four years of probation with a condition of 500 hours of community service. (R238-44,248). The trial judge ordered bail on appeal and stayed the sentence pending appellate review. (R245-46).

Ms. Edwards timely filed a notice of appeal and this appeal ensued. (R249-50).

STATEMENT OF THE FACTS

The State's Case

Jose Raij

Mr. Raij owned a Miami store called "1973 by Mr. R's Sports" which sold sports apparel and footwear. (T365,4077). He hired Clyde Edwards to manage the store. (T367,477). Mr. Edwards is married to the Appellant, Saintamen Edwards.

Mr. Raij testified that, on July 8, 2013, he received a phone call from a woman who identified herself as Officer Diann Mich. (T367-68,475,476). She said there was a problem with Clyde Edwards. (T476). She told Mr. Raij to fire Mr. Edwards and warned that he could get violent. (T479,480).

Mr. Raij further testified that the woman said she had two reports regarding Mr. Edwards that she would share with him. (T480). Mr. Raij received an email later that day from ICD-ADMLanier@mdpd.com addressed to him. (T390-92,480-481). The email provided:

> *Mr. Raij, attached are two reports I am able to release to you at this time. As we discussed, please do not discuss the open case with the suspect. I will forward you the complete file in a couple of days. Thank you, Diann.*

(T394;R102-03). Two Offense Incident Reports were attached to the email. (T394,395).

The narrative portion of the first offense incident report, which was admitted as State Exhibit 4, provided:

> *C1 advised he gave Z#1 money to purchase of pair of athletic shoes on listed date. C#1 advised the*

> *shoes he received were fake. When C#1 attempted to get his money back, he was told by Z#1 he gave him the shoes that he purchased and there was nothing he can do.*

(R107-08;T396). "C#1" was listed as Jose Figueroa. (R108;T397). "Z#1" was identified as Clyde Edwards. (R108;T397).

The narrative portion of the other Offense Incident Report, which was admitted as State Exhibit 3, provided:

> *V#1 came into the police station and advised he gave S#1 $500 for the purchase of two pair of Jordan sneakers. V#1 advised when he received the shoes he noticed they were defective and questioned S#1 as to the authenticity. S#1 stated those were the shoes he paid for and hung up--hung up the phone. V#1 attempted to contact S#1 via phone and continued to get no answer, at which point he left a voicemail advising he would go to the store located on Miami Beach to return the sneakers and get his money back. S#1 then advised the victim he would be forcefully removed from the store by police if he came. Victim was given case card.* (R104-06;T398).

Clyde Edwards was listed as the suspect, "S#1". (R105;T398-399).

Mr. Raij testified that the reports concerned him because his store did not sell fakes as it bought from Nike directly, and he therefore was worried about Mr. Edwards' honesty and the reputation of his business. (T397,399,400).

Mr. Raij testified that he received three or four phone calls and a voicemail message from the woman who identified herself as Officer Mich. (T402,405,480). He further testified that, if the reports had been true, he would have fired Mr. Edwards. (T407,484). However, Mr. Raij never fired Mr. Edwards. (T406,481).

Mr. Raij recalled having met Saintamen Edwards at least once. (T389,408-09). He did not recognize her voice as being the one on any of the calls he received from the woman who said that she was Officer Mich. (T409,484).

Diann Michnowicz

In 2013, Ms. Michnowicz was the Administrative Officer for the Miami-Dade County Police Department Intracoastal District Station located at 15665 Biscayne Boulevard in Miami. (T447). During that time, Ms. Michnowicz's hours were 7 a.m. to 3 p.m. (T447-48).

Ms. Michnowicz testified that Saintamen Edwards was the Station Control Officer ("SCO") in 2013. (T448). As SCO, Ms. Edwards handled the functioning of the facility and building. (T448). Her hours were 6 a.m. to 2 p.m. (T456). Ms. Michnowicz further testified that she did not create the above-described Offense Incident Report (hereinafter "OIR") admitted as State Exhibit 4 which was emailed to Mr Raij. (T450,452). She explained that there is a blank template for OIRs and officers can hand-write them or fill them in on the computer. (T451).

Ms. Michnowicz further explained that the name on the bottom of State Exhibit 4, "D. Jennings," signified the officer who wrote the report. (T452). Ms. Michnowicz did not know D. Jennings. (T452).

Ms. Michnowicz testified that she also did not write the other previously described OIR, which was emailed to Mr. Raij,

State Exhibit 3. (T452). "W. Caruthers, badge number 7807" is listed on the bottom of State Exhibit 3. (T452). She was aware that Mr. Caruthers worked at some point at the Intracoastal District Station. (T453).

Ms. Michnowicz spoke with Ms. Edwards a couple of times a week during the years they worked together. (T454). Ms. Michnowicz testified that an officer from the Professional Compliance Bureau played a voicemail recording for her in which a woman identified herself as Ms. Michnowicz. (T455). Ms. Michnowicz testified that it was not her on the recording. (T456). Ms. Michnowicz claimed that she recognized the voice as Ms. Edwards. (T456,469).

Ms. Michnowicz testified that Ms. Edwards, as well as their supervisors, had access to Ms. Michnowicz's office. (T458). However, she did not think that Ms. Edwards ever used her computer. (T465). The MDPD has a computer network. (T458-59).

Ms. Michnowicz recalled that both Ms. Edwards and Officer Sonya King interviewed for the position of SCO when it became open. (T459). Officer King had seniority over Ms. Edwards. (T463). However, Ms. Edwards was awarded the SCO position. (T460). When the allegations arose and Ms. Edwards was removed as SCO, Officer King got the position. (T460,463).

Freya Arocha

Ms. Arocha is the police communications coordinator for the MDPD. (T486,490-91). Ms. Arocha testified that the MDPD uses a

software program called Computer Aided Dispatch ("CAD") to enter the information taken by call takers and to assign calls to road personnel. (T488). One of Ms. Arocha's main functions is to maintain, configure, and test CAD to make sure it is working correctly. (T489). CAD records are kept for approximately 18 months, and then all of the information entered into CAD is stored on a server in a warehouse. (T491,492).

Ms. Arocha testified that CAD gives an incident number for every call or incident created in the system. (T496). "PD" stands for Police Department. (T496). Ms. Arocha testified that the next 6 numbers are the date the report was created. (T496). After the dash, the numbers noted are the actual incident number. (T497).

Ms. Arocha testified that the CAD admitted as State Exhibit 6 (R109-10) was for an incident requested by an officer over the radio to the dispatcher. (T498). The report was created by the dispatcher immediately, who put in the comments "found property." (T498). The report number for the incident is LPD120927368864.

Ms. Arocha testified that the report number for State Exhibit 4, one of the OIRs emailed to Mr. Raij, was the same number as for State Exhibit 6, LPD12092736884. (T499). They both have the same incident location. (T499-500). Ms. Arocha testified that the words "found property" were not on State Exhibit 4. (T500).

Ms. Arocha testified that the incident number noted for a

CAD admitted as State Exhibit 7 was PD130421259263. (T500). In this CAD, the call came from a Homestead Police Department operator. (T501). The report noted that a suspicious incident occurred in Miami at 202 Avenue Southwest 326 Street, and that the complainant's name was Milton Campos. (T502). The report number for this CAD, issued at 12:50 a.m. on April 21, 2013, was LPD130421146512. (T502).

Ms. Arocha further testified that the OIR admitted as State Exhibit 3 (which was emailed to Mr. Raij) was PD130417146512. (T503). It is not the same report as State Exhibit 7. (T503). The last 6 digits are the same, but the date is different. (T503).

July Wilbur

In July 2013, Ms. Wilbur worked in the MDPD Crime Analysis Unit at the Intracoastal District Station. (T519). Her duties included reviewing reports, ensuring they were compliant with the state and the FDLE, and conducting analytical studies from those reports for uniform patrol. (T519).

Ms. Wilbur testified that, in July 2013, OIRs were normally handwritten out by the officers although there were some that were typed up on a digital version of a blank OIR template. (T520,522-23). According to Ms. Wilbur, when an officer responds to a call, he or she obtains a case number and information that must be documented in the OIR. (T520-21). A specific case number is assigned to the report to associate that incident to that

report. (T521). In the report, the officer should document the day, the location, the time, the individuals involved, and a synopsis of what occurred. (T521).

Ms. Wilbur testified that she received State Exhibits 1 through 4 on July 9, 2013 from a detective who came to her in response to a telephone call received from a civilian. (T523,524). Ms. Arocha testified that State Exhibit 1 (R101) was an email sent from icsadminlanier@mdpd.com, which she recognized as coming from a copier on the administrative section on the second floor of the station. (T524). This copier has the capability of scanning, copying, faxing, and sending out emails. (T525). The copier does not require a passcode. (T558). Upon seeing the email, Ms. Wilbur asked to see a log of emails sent from that particular copier. (T525,526). The log, State Exhibit 8 (R113-17), provided that an email was sent from the copy machine on July 8, 2013 at 4:09 p.m. to "Joe." (T527).

Ms. Wilbur checked the case number for the OIR admitted as State Exhibit 3 that was sent to Mr. Raij. (T528-29,528-30,541). She found another report under the same case number which was authorized by Ms. Edwards but the information on it was completely different. (T528). Ms. Wilbur testified that she found information omitted in the OIR admitted as State Exhibit 3, such as the supervisor's signature. (T528-29,559). State Exhibit 3 provided that it was authored by D. Jennings, who was not employed at the Intracoastal District Station when Ms. Wilbur

reviewed it. (T532). She concluded that the OIR admitted as State's Exhibit 3 was not valid. (T529).

Ms. Wilbur explained that an OIR authorized by Ms. Edwards and admitted as State Exhibit 9, (R118-19), is a legitimate "found property" report while State Exhibit 3 is an offense information report. (T531,539).

Upon Ms. Wilbur's review of State Exhibit 4 that was sent to Mr. Raij, she found that a significant amount of information had been omitted. (T532). There was no supervisor signature, no ID, and no case assignment. (T533,558,560). The case number was not valid. (T533). The series of the last six numbers were too high for the date associated with the report, as the department had not yet gotten to that case number. (T534). State Exhibit 4 was a duplicate of a report because the case number was correct. (T548,559-60).

The author listed on State Exhibit 4 was W. Caruthers, who Ms. Wilbur knew as Sergeant Willie Caruthers. (T535). Sergeant Caruthers was not working at the Intracoastal District Station at that time. (T535).

The same suspect was listed on State Exhibits 3 and 4, Clyde Edwards. (T535,536). Accordingly, Ms. Wilbur concluded that someone within the MDPD created the documents sent to Mr. Raij. (T552).

Willie Caruthers

Sergeant Willie Caruthers worked at the Intracoastal

District Station from 2006 through February 2012. (T577). Sgt. Caruthers testified that State Exhibit 3 was not created by him. (T578). It is not his signature on the report although the badge number is his. (T578-79).

Rafael Rodriguez

Lieutenant Rafael Rodriguez testified that he worked at the Intracoastal District Station in 2013. (T610). Lt. Rodriguez was aware that Ms. Edwards worked the dayshift, either 6 a.m. to 2 p.m. or 7 a.m. to 3 p.m. (T586).

Lt. Rodriguez further testified that Mr. Raij told him he had received two reports that were faxed to him regarding his employee who he had been told was under police investigation. (T592-93). Lt. Rodriguez requested the case numbers from Mr. Raij and told him he would look into the matter the following business day. (T593). Lt. Rodriguez conducted his research the following day. He testified that one of the reports that Mr. Raij received (State Exhibit 4) had the same case number as another report, State Exhibit 9, but the contents of State Exhibit 4 were different. (T595). State Exhibit 9 was already in the system as having been written and processed by the Criminal Analysis Unit. (T595).

Lt. Rodriguez reviewed a log of faxes sent or received by the station's copy machine. (T598,599). The log showed several faxes sent by Ms. Edwards, including one on July 8 at 4:09 p.m. (T600,616-18). Lt. Rodriguez claimed that, on that day at about

4:09 p.m., he was at the station having a conversation with several detectives when he saw Ms. Edwards. (T601,628,633). According to Lt. Rodriguez, Ms. Edwards exited the elevator and walked towards the administrative offices. (T602,625,629).

Lt. Rodriguez testified that Ms. Edwards was dressed in sweatpants and a sweatshirt. (T601). He testified that he had never seen her on the second floor at that time and dressed in civilian attire. (T605,616). However, he acknowledged that Station Control Officers like her may be called at odd hours to open the building with the master key or to hand over a gun, at which time they may arrive in civilian clothing. (T630,631).

Lt. Rodriguez claimed that Ms. Edwards had a folder in her hand. (T602,604,605). However, at his deposition, Lt. Edwards testified that Ms. Edwards did not have any documents in her hand. (T604,613,614,615,626).

Mishka Lahiff

In July 2013, Mishka Lahiff was the Administrative Lieutenant at the Intracoastal District Station. (T680). Lt. Lahiff explained that, in July 2013, Sonya King was the front desk officer. (T683). There were extra keys for everything on the front desk. (T712,729). Lt. Lahiff testified that she did not know if Officer King was unhappy about not getting the job as SCO when the job was given to Ms. Edwards. (T714). Lt. Lahiff was aware that Ms. Edwards and Diann Michnowicz would squabble since the two of them worked closely together. (T685-86).

On July 10, 2013, Sgt. Wilbur showed Lt. Lahiff State Exhibits 2, 3, and 4 which had been sent to Mr. Raij and said she could not figure out what was going on with those documents. (T686-88, 719). One of the documents reflected that a fax had come out of the copy machine a few minutes after 4:00 p.m. on July 8. (T720).

Lt. Lahiff further testified that State Exhibit 4 was an offense information report on which the "Z" name was Clyde Edwards, Ms. Edwards' husband. (T688). Lt. Lahiff testified that State Exhibit 3, a "theft over" report, also had Clyde Edwards' name on it. (T689-90,693).

Lt. Lahiff testified that, when she saw the reports, she recalled that she was working a few days before around 4:00 p.m. when Ms. Edwards walked by her office in civilian clothing carrying papers in her hand. (T690,704). Lt. Lahiff testified that she asked Ms. Edwards what she was doing, at which time she said she was sending something. (T690,703).

Lt. Lahiff further testified that, earlier that day, Ms. Edwards told Lt. Lahiff that she was having some personal and health issues and did not want to have a problem with taking some extra time off. (T691,710,726,733,745). Ms. Edwards explained that she was not feeling well and would be getting some tests done. (T691,726).

Lt. Lahiff testified that a copy machine is located on the second floor next to her office. (T692,693). There were also

copy machines on the first floor. (T722). According to Lt. Lahiff, on July 8th, she heard the copy machine running after Ms. Edwards walked past her office but never saw Ms. Edwards using it. (T693). Ms. Edwards' office was located on the first floor. (T704).

Lt. Lahiff used a key to let the Professional Compliance Bureau into Ms. Edwards' office on July 16, 2013 so that they could take Ms. Edwards's computer. (T699-700). The computers are on a network. (T726). Ms. Edwards routinely kept her office locked. (T700,701,731). Ms. Edwards was not at the station at the time because she had been purposefully sent out on an assignment. (T700-01,723-24,740-41). Lt. Lahiff testified that the administrative personnel and anyone with a master key had access to Ms. Edwards' office. (T725-26,731). She, the Major, the Captain, the Sergeant and two administrative personnel had master keys. (T711-13).

Saima Plasencia

Ms. Plasencia was a Major at the Intracoastal District Station in July 2013. (T765). She met Ms. Edwards there in April 2013. (T766). Major Plasencia was not Ms. Edwards' immediate supervisor, but she was the last stop in the chain of command. (T766). Major Plasencia testified that Ms. Edwards was a great employee. (T767).

Marjor Plasencia further testified that, on July 10, 2013, she joined in a conversation between two lieutenants who were

reviewing two Offense Incident Reports (State Exhibits 3 and 4), a brief email and a report from a machine. (T771-72). The two Offense Incident Reports were generated from a computer but hand-signed. (T774,775). Major. Plasencia testified that reports generated from a computer contain printed signatures, not handwritten. (T774).

She noticed that one of the OIRs, State Exhibit 3, was classified as "theft over," but there was not another document addressing what had been stolen, which is a requirement. (T774). The officer whose signature was printed on the bottom, Officer Carothers, did not work at Intracoastal District Station at the time. (T774-75). Major Plasencia testified that, although the other OIR, State Exhibit 4, contained a printed signature of Officer D. Jennings, there was no Officer Jennings with the MDPD. (T775,776).

Major Plasencia further testified that she was at the Intracoastal District Station on July 8, 2013 at 4:09 p.m. when a transmission was made from a scanning machine there. She saw Ms. Edwards down the hallway coming towards her office dressed in civilian clothing and possibly carrying a document. (T778,779). There were only three places to go past her office—the scanning machine area, the conference room, and the building's exit. (T779). Major Plasencia testified that she also saw Ms. Edwards a second time a couple of minutes later. (T779,780).

Major Plasencia testified that, if an individual made a

public records request for State Exhibit 3's case number, it would not exist in the public record. (T791,792). And, if an individual made a public records request for State Exhibit 4's case number, PD120927368864, a different document would come up. (T791,798,799 802). Major Plasencia further testified that, if she received a public records request with the report for State Exhibit 4, she would find State Exhibit 9. (T798,802).

Major Plasencia had heard rumors that Ms. Edwards was still early in her career and some were unhappy because they felt the SCO position should have gone to someone more senior. (T768,793,794-95).

Tracy Tompkins

Officer Tompkins works for the MDPD Crime Scene Investigative Support Section Digital Forensic Unit, which specializes in computers, cell phones, and similar items. (T811). Officer Tompkins took custody of both the computer and flash drive in Ms. Edwards' office, placed them in her car, and took them to her office at the police headquarters building. (T822-23,872). Officer Tompkins testified that she did not have a warrant to seize the computer or the flash drive. (T827).

Marcelo Yanes

Marcelo Yanes worked in the Digital Forensics Unit as a certified computer forensic examiner. (T829,831). Yanes testified that he used software to created an exact duplicate copy of the contents of the hard drive. (T846). Once completed,

he put the hard drive away and conducted his examination from the forensic copy. (T847). This was done for the flash drive as well. (T847-48).

Yanes was instructed to search for Offense Incident Reports and certain MDPD case numbers. (T845,848,903,904,915). He was provided State Exhibits 3 and 4 by an investigator. (T903,904). Yanes testified that, when he searched PD130417146512 (State Exhibit 3), he found a document labeled "PD130417146512 Offense Incident 2" as a deleted file on the flash drive. (T904-06). Mr. Yanes testified that when he opened the document in End Case, it was still a "live" file. (T906). He explained that the narrative portion of State Exhibit 3 was the same as the narrative portion of the document on the flash drive called "Offense Incident 2." (T906).

Yanes testified that a file's properties are called "metadata." (T908). Mr. Yanes was asked what it means when the metadata stated that a document was created on July 8, 2013 at 3:48 p.m. (T909). He replied that it could mean it was a new document that did not exist before and had been created on the flash drive. (T909). Another way was by cutting/pasting a file and dragging it into a flash drive and creating a new creation date. (T909). Yanes testified that deleting the file can show up as the last modification date. (T910). Ms. Edwards was listed as the one who last modified the document named "Offense Incident 2." (T910). Yanes testified that "last printed date" is the

last date a document was printed, which was July 8, 2013 at 4:01 p.m. (T909).

Yanes also conducted a search on the flash drive for case number PD120927368864. (T910). It showed up there as "Offense Incident 1." (T910). Yanes testified that the narrative portion of State Exhibit 4 was the same as the narrative portion of the "Offense Incident 1." (T910). The created date showed July 8, 2013 at 3:45 p.m. Mr. Yanes testified that the last printed date showed July 8, 2013 at 4:01 p.m. and the last modified date was on July 9, 2013 at 7:09 a.m., which was consistent with when the file was deleted. (T911,930,931). Ms. Edwards was listed as the one who last modified the document, "Offense Incident 1." (T911-12). Yanes testified that the user who was logged into the computer at the time the document was generated was Ms. Edwards. (T913-14).

Yanes testified that the narrative in Offense Incident 368864 was the same as the narrative in State Exhibit 8. (T914). The document was created on September 27, 2012 at 12:53 p.m. (T914). Mr. Yanes testified that Property Report 1 was an empty offense incident report. (T914). Mr. Yanes testified that State Exhibit 8 showed several pages of a property report. (T915).

Yanes testified that the Google search history of Ms. Edward's office computer showed a user inputting into Google, "Jose R-A-G-I" or "Jose R-A." (T918,919,920). The user visited

the whitepages.com dedicated to Jose Raij on July 8, 2013 at 12:22 p.m. (T923,924,928-29).

Yanes acknowledged that he does not have evidence as to who was typing at the keyboard. (T907,926). He did not know who personally conducted the Google searches. (T927). Mr. Yanes testified that the MDPD's computer system is on a network, where one can access other parts of the county's computers. (T927).

The Defendant's Case

Maria Alvarez

In July 2013, Ms. Alvarez worked at the front desk of a preschool called the Precious Years Christian Learning Center in Miramar where she greeted the parents and children. (T976,977). One of the children was Ms. Edwards' daughter, Chloe. (T977).

Ms. Alvarez testified that the procedure to drop off and pick up children at the school required that parents sign a "sign-in/sign-out sheet" in a logbook that was located on the front desk a few feet from where she sat. (T977,978). In addition to signing, parents were also required to write the times that they picked up and dropped off their children. (T978). At the first of each month, a page for each child was placed in the log book so that there would be a one page of logins and logouts completed each month for each child. (T980).

Although the school did not check the accuracy of the parents' entries, Ms. Alvarez observed that Ms. Edwards followed the log in/out procedure "all the time." (T978-979). In fact,

Ms. Alvarez testified that Ms. Edwards made a habit of going to the sign-in/sign-out sheet whenever she dropped off or picked up Chloe. (T981). Ms. Alvarez further testified that Ms. Edwards would usually pick up Chloe between 4:00 and 4:30 p.m. (T980).

Ms. Alvarez explained that, at the end of the month, the sign-in/sign-out pages are removed from the book and placed in a secured room that is only available to employees. (T980-81). Ms. Alvarez testified that it is not possible for anyone to access the sign-in/sign-out sheets to modify them after they are secured in the book kept on her desk or in the secured room. (T982) She testified that, with the school director present, she pulled a page of the log sheet records that Ms. Edwards had requested. (T981-82). Although this page showed that, on July 8, 2013, Ms. Edwards picked up Choe at 4:20 p.m., only 11 minutes after the OIRs at issue were sent to Mr. Raij by someone at the Miami police station, the trial court ruled that it was inadmissible. (T19,22).[1]

Thomas Gilligan

Sergeant Thomas Gilligan, the Administrative Sergeant at the Intracoastal District Station, testified that Ms. Edwards was his subordinate in July 2013. (T994).

He did not recall malfunction issues with the fire alarm in July 2013 but testified that a significant malfunction would be

[1] The Appellant is filing a motion to supplement the record with this document.

the responsibility of the SCO, Ms. Edwards. (T995-96,999). Sgt. Gilligan explained that Ms. Edwards went home early on occasion in July 2013, which was approved by him. (T999).

Saintamen Edwards

Ms. Edwards testified that she first arrived at the Intracoastal District Station in December 2007 as a patrol officer. (T1002). She interviewed for the position of SCO. (T1002). Sonya King also interviewed for the position. (T1003). Officer King had previously held that position in another district and had significantly more seniority. (T1003). Ms. Edwards was awarded the position. (T1005). Ms. Edwards testified that Officer King told her and others that she had a problem with Ms. Edwards getting the position instead of her. (T1072).

Ms. Edwards testified that she did not create any of the documents which were created on her office computer on July 8, 2013 and then deleted the next day. (T1005,1058). Ms. Edwards further testified that she did not use her computer to create State Exhibit 3 or State Exhibit 4, the Offense Incident Reports identifying her husband as a subject. (T1056).

She testified that she did not perform any Google searches for Jose Raij's address and phone number since her husband worked for him and she was familiar with where he worked and the phone number at his place of employment. (T1005,1006). Ms. Edwards explained that she was married and pregnant in July 2013 and had no reason to sabotage her husband's job. (T1056). She was still

married to him at the time of the trial. (T1068,R492). She also testified that she did not know who faxed the documents to Mr. Raij from the machine in the station on July 8, 2013 at approximately 4:09 p.m. (T1060).

Ms. Edwards testified that she did not make any calls or leave a voicemail to Jose Raij impersonating an officer regarding an investigation against her husband. (T1055,1060,1071). She did not scan the email marked as State Exhibit 1 or create the cover page for State Exhibits 3 and 4 which was admitted as State Exhibit 2. (T1055).

Ms. Edwards also testified that there was a problem with the fire alarm in July 2013. (T1006). She explained that the sensor was located upstairs in the second floor and she would have to reset the panel to stop the blinking green lights and the annoying noise. (T1006,1071). Ms. Edwards testified that this panel had a specific key for which only she and persons from facility maintenance had a copy. (T1006-07).

A problem with the fire alarm began a couple of days before July 4, 2013. (T1007). She had to go to the station on July 4, 2013 to shut it off. (T1008).

On July 5, 2013, Ms. Edwards again went to the station after hours in civilian clothes to shut off the alarm. (T1008-09). She saw the Major because she was working late. (T1009). Ms. Edwards recalled the Major making a comment to her about the fire alarm continuously going off. (T1009).

Ms. Edwards testified that, she was not on the second floor at 4:00 p.m. or 4:30 p.m. on Monday, July 8th. (T1009). She reported to work that morning feeling ill because she was experiencing a difficult pregnancy. (T1011). She told Lt. Lahiff that morning that she was having personal medical issues that were affecting her coming to work and that she wanted to ensure there were no issues because of it. (T1012). She explained that she left at noon that day because she was feeling ill. (T1012-13). She testified that she then went to see Dr. Carlos Sarduy at Femlife Healthcare located in Pembroke Pines for a 1:30 p.m. appointment. (T1013,1072). She was at the doctor's office until 3:30 p.m. (T1014). She then ate at a restaurant, drove home to switch from her police car to her personal car, and then drove from her home to pick up her daughter at her pre-school located in Miramar. (T1014,1042-43,1054,1055). She picked her up there at 4:20 p.m. (T1042,1055). Ms. Edwards explained that the drive from the station to her home is 35 minutes and from her home to Chloe's pre-school is ten minutes. (T1043).

Ms. Edwards testified that she continued to feel poorly so she sent Sgt. Gilligan a text message at about 2:00 a.m. that evening saying that she did not feel well and would not be reporting to work that day. (T1047). Sgt. Gilligan responded between 5:30 a.m. and 6:00 a.m. and, based upon his response, she believed she had his permission not to report to work that day. (T1048,1058,1059). She reported back to work on July 10, 2013.

(T1049). Over the defense's objection, the trial court ruled that these text messages were inadmissible. (T991-92). Ms. Edwards could not recall how it was calculated in her pay for leaving early on July 8, 2013. She testified that she was paid for July 9, 2013. (T1049-50,1073-74).

Ms. Edwards testified that, on July 16, 2013, she was asked by her lieutenant to go to police headquarters to pick up a vehicle. (T1051). Upon her return to the station, she noticed her computer and several laptops were missing from her office and was told she was under investigation. (T1052).

Ms. Edwards testified that she had access to Mrs. Michnowicz's computer and vice versa because they worked together and their computers each contained information the other might need if one of them was absent. (T1057,1058). Ms. Edwards wrote down their passwords under her calendar in case Mrs. Michnowicz or other staff needed access to her computer. Thus, her passwords were readily accessible to anyone. (T1057).

Ms. Edwards testified that she created the legitimate offense incident report, State Exhibit 9, on her office computer. (T1059). She explained that, as the SCO, she had every document on her computer so she could provide them to others who needed a copy as they were transitioning to paperless records at the station. (T1059). Ms. Edwards could not recall if she logged out of her computer when she went home sick on July 8, 2013. (T1059-60).

Ms. Edwards' flash drive was confiscated with her computer. (T1075). Ms. Edwards did not have her flash drive with her when she went home early on July 8, 2013. (T1075,1076).

Ms. Edwards testified that she had been arguing with her husband in July 2013 over her multiple miscarriages. (T1068-69). That month, she had experienced her third miscarriage in a year. (T1069). In August 2013, her husband moved out but, as previously explained, they were happily married at the time of the trial. (T1068,1070,1074;R492).

Defense recalls Saintamen Edwards

Ms. Edwards was recalled to testify as to her having an appointment on July 8, 2013. (T1195). Ms. Edwards testified that she originally believed that her appointment that day was with Dr. Sarduy. (T1195). She subsequently realized that her testimony was inaccurate. (T1195). Ms. Edwards testified that she had an appointment outside of the office on July 8, 2013, but it was at 2:00 p.m. in Pembroke Pines with her psychotherapist, Jennifer Spinner - not Dr. Sarduy. (T1196). Ms. Spinner's office was located close to Dr. Sarduy's. (T1196). Ms. Edwards testified that she mixed up her dates on the appointments, which were almost a week apart. (T1198-99). She explained that she made an honest mistake and had no reason to mislead the jury. (T1197,1198). Ms. Edwards testified that, because she was confident that she was out of the office on July 8, 2013, and over two years passed from the date she was terminated by MDPD

until the date she was arrested, she reached out to any professional she might have seen that day, including Ms. Spinner. (T1204,1209,1211).

Ms. Edwards testified that she asked Ms. Spinner to provide her with a list of the dates that she had met with her. (T1197,1199,1210). Ms. Spinner then gave her an envelope which she did not recall opening. (T1197,1200).

Ms. Edwards explained that, after she met with Ms. Spinner from 2:00 p.m. to 3:00 p.m. on July 8, 2013, she ate lunch at a restaurant and then picked up her daughter from her Miramar pre-school at 4:20 p.m. (T1042,1055,1198).

Jennifer Spinner,

Ms. Spinner testified that she had a series of therapy sessions with Ms. Edwards in July 2013 in Pembroke Pines. (T1212,1213). She corroborated Ms. Edwards' testimony that the two of them met on July 8, 2013 at 2:00 p.m. for one hour. (T1213).

Ms. Spinner also testified that, on the previous Friday of Ms. Edwards' trial, Ms. Edwards asked Ms. Spinner to obtain her files documenting her past meetings with her. (T1216-17,1221).

State's Rebuttal Case

Nuria Martin

Ms. Martin is the office manager for Femlife Healthcare for Women, Dr. Sarduy's office, which is located in Pembroke Pines. (T1223). Ms. Martin testified that the billing records did not

reflect an appointment with Ms. Edwards on July 8, 2013. (T1234). However, the records reflected that Ms. Edwards had an appointment one week later on July 15, 2013. (T1239).

Ms. Martin testified that Ms. Edwards was in the office on November 19, 2010, followed up in July 2010, and then back to the office three years later on July 16, 2013. (T1245). Ms. Martin did not know if Ms. Edwards was seeing a different doctor during the three-year gap (T1245). Ms. Martin testified that a patient summary for Ms. Edwards reflected that she had one pregnancy. (T1236). However, Ms. Martin acknowledged that, during the three year gap, Ms. Edwards may have had miscarriages that she would not have discussed. (T1249).

Leila Zinati

Ms. Zinati is the Human Resources Manager at the MDPD. (T1263). Miami-Dade County's payroll system is a "time and leave" system. (T1264). Ms. Zinati testified that an employee must first log into the PeopleSoft Epar online system, input their time and leave, which then transfers the information electronically into the MDPD's system. (T1264,1266,1267,1275).

Ms. Zinati testified that the payroll records showed Ms. Edwards was paid for eight hours worked on July 8, 2013 and July 9, 2013. (T1271). The payroll records showed the approval of Thomas Gilligan. (T1273). Ms. Zinati testified that a supervisor can choose whether or not to make an employee fill out a slip if the employee goes home early one day. (T1275,1276,1280).

Julio Perez

Mr. Perez works for the Miami-Dade Information Technology Department where he provides IT services on behalf of the MDPD. (T1281). He has access to emails that are sent to and from County employees. (T1282). Mr. Perez further testified that, on July 9, 2013, Ms. Edwards sent only two emails: one at 7:16 a.m. and another email at 12:01 p.m. (T1283-84,1289). Mr. Perez did not have information on where the emails were sent from. (T1291). Police officers have the ability to send emails from any device that is connected to the Internet, such as a phone or a laptop, but are supposed to first complete a form that is then stored in a network server. (T1288-86,1289-91). Mr. Perez testified that a search was conducted to determine whether Ms. Edwards had submitted such a form and none was found. (T1286).

SUMMARY OF THE ARGUMENT

I. The trial court erred in denying Ms. Edwards' motion to suppress evidence found on her personal flashdrive during a warrantless search. The admission of this evidence violated the Fourth and Fourteenth Amendments' prohibition of unreasonable searches and seizures.

II. The trial court erred in repeatedly ruling that documentary evidence which was critical to Ms. Edwards' alibi defense was inadmissible. However, the rules of evidence required the admission of this evidence. Furthermore, the rules

of evidence must allow for liberal admission of evidence which tends to support the defendant's theory of his case.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS WHERE LAW ENFORCEMENT ILLEGALLY SEIZED, AND SUBSEQUENTLY SEARCHED, HER *PERSONAL* FLASH DRIVE FROM HER OFFICE WITHOUT A WARRANT.

The trial court erred in denying Ms. Edwards' motion to suppress evidence which was obtained as a result of an illegal warrantless search and seizure, in violation of her Fourth Amendment rights. First, the trial court's findings of fact are *unsupported by the record*, and the conclusions of law were predicated on those facts. Second, even if the trial court's findings of fact can be sustained, the trial court misapplied applicable law. Each of these errors independently warrants reversal.

A. EVIDENTIARY STANDARD OF REVIEW

"A reviewing court must accept the trial court's findings of fact in an order on a motion to suppress, *so long as those findings are supported by the record*." *Underwood v. State*, 801 So. 2d 200, 202 (Fla. 4th DCA 2001) (emphasis added). However, where the trial court's factual findings are "clearly shown to be *without a basis in the evidence* or [are] predicated upon an incorrect application of the law" the order denying suppression is subject to reversal. *State v. Smith*, 529 So. 2d 1226, 1229 (Fla. 3d DCA 1988) (emphasis added). Further, in regard to purely

legal issues, "a suppression order that turns on an issue of law is reviewed by a *de novo* standard." *Underwood*, 801 So. 2d at 202.

B. THE TRIAL COURT'S FINDINGS OF FACT ARE CONTRARY TO THE RECORD EVIDENCE ESTABLISHED AT THE HEARING ON MS. EDWARDS' MOTION TO SUPPRESS.

The trial court denied Ms. Edwards' motion to suppress (R28-30), based on the premise that Ms. Edwards did not possess a subjective expectation of privacy in the flash drive (hereinafter, "storage device") that was seized and subsequently searched without a warrant. (R421-22). In support of that conclusion, the Court stated:

> There is clearly no subjective expectation of privacy ***in a countywide computer system*** that could be accessed by at least the IT professionals from anywhere in the system. No one needed to go into that room. Nobody needed to take that hard drive. ***Nobody needed to do any such thing. It's an integrated system.***

(R421-22) (emphasis added). The Court further noted, that, "If [the storage device] was sitting in [Ms. Edwards'] desk drawer, or in her pocket, maybe we could talk about a lot of these things, but once it's plugged into that computer it's only accessed through the computer, ***it's accessed by any computer.***" (R423-24).

The trial court's findings that the *contents of the storage device*, which was the sole item alleged to have been illegally searched,[2] were available for viewing on the integrated system,

[2] Ms. Edwards did not contend that the warrantless search of her Miami-Dade County work computer was in violation of her Fourth Amendment rights. (R28-29). Ms. Edwards asserted that a storage device, that happened to be plugged into the computer at the time

(continued...)

by any other user of those systems, was unsupported by the testimony presented at the hearing.

The sole witness who was qualified to testify regarding the nature of the computer system in operation by the MDPD was Officer Tracy Tompkins. (R266). Officer Tompkins testified that the MDPD computers are "networked" meaning that "it's like the internet except smaller, and it's only, you know, Miami-Dade, all the Miami-Dade County has computers that just talk to each other in a very, very large network." (R291).

Officer Tompkins clarified what can be accessed through the "network" during her cross-examination. (R300). Officer Tompkins stated that, although the computers are on a 'network' with each other, ***only the information saved to one of the "shareable drives" on a computer would be accessible to be viewed by other network computers***. (R300).[3] She also plainly stated that you

[2](...continued)
that the computer was searched, was impermissible. (R28-29).

[3] Officer Tompkins later gave a more in-depth example of what information would be available for access by *any user* in the network from *any computer* in the network, stating:

> Well, in the county setups you'll have the C [drive], which is what we call the, the local data, the C drive that is on this particular machine in that thing [and is not accessible to other network users]. But then there's also, like the big generic one is the, is the O drive. Well, the O drive is down at headquarters building, and that is a , a network drive that then you could, you could, so if you're – if there was – if you're, I don't know, you have some job that you have to go all around the Department, and go into other buildings and, and be able to access data, you can store it on the O drive, and then I could have logged into this machine [or any machine in the 'network'] and accessed the O drive. Then

(continued...)

cannot see another individual's (network users) "stuff", unless that "stuff" *was* ***saved to a share drive***. (R301). Accordingly, the contents of a storage device would not be viewable by any other user on any other computer in the network at any given time. No other witness testified regarding the nature of the computer network, shareable drives, or what type of information would be accessible to each networked computer apart from Officer Tompkins.[4]

Thus, it is clear from the unrefuted testimony at the suppression hearing that the contents of the storage device *would not have been accessible* to other computers that were linked to the network because the contents of the storage device were not saved to the *shared drive*. The trial court based its legal conclusion that there was no subjective expectation of privacy, on its factual finding that the contents of the storage device "could be accessed from anywhere in the system" because the

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[3](...continued)

> I could have gone to Cutler Ridge, logged onto a machine and accessed the O drive [because it is the 'shareable drive' visible to all 'network' computers]. I could go to headquarters, log onto a machine and access the O drive.

(R303). The C drive is only visible on a particular computer. The C drive is where the storage device would have appeared when plugged in. Only files that were saved in the "O drive", which was designated as the "shared drive" in Officer Tompkins example would be accessible or even visible from other 'network' computers. (R300-03).

[4] Ms. Edwards did testify that she did not save her storage device files on the shared drive, and that the storage device came with her every day when she left work and was not generally left at the office. (R387;396).

computer was part of an "integrated system" and that the contents of the storage device "could be accessed by any computer." (R421-24). These factual findings are simply ***contrary to the record evidence***. (R421-24).

C. THE TRIAL COURT MISAPPLIED APPLICABLE LEGAL PRECEDENT IN DENYING MS. EDWARDS' MOTION TO SUPPRESS.

Assuming *arguendo* that the trial court's findings of fact could be sustained, the court nevertheless misapplied existing precedent in determining that Ms. Edwards did not possess a subjective expectation of privacy.

> The fourth amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. As the United States Supreme Court held in *Katz v. United States*, 389 U.S 347 (1967), a "search" occurs within the meaning of the fourth amendment when government action invades an individual's justifiable or reasonable expectation of privacy.

Randall v. State, 458 So. 2d 822, 824 (Fla. 2d DCA 1984) (citation omitted). "Under *Katz* and its progeny, a reasonable expectation of privacy exists if the individual has exhibited an actual, subjective expectation of privacy which society is prepared to recognize as reasonable." *Id.* (citations omitted). These same rules apply where the challenged search occurs in an office, rather than a home. *See United States v. Anderson*, 154 F. 3d 1225 (10th Cir. 1998)(discussing searches and seizures in the workplace setting).

In considering whether an individual has a reasonable expectation of privacy in items found in his or her workspace,

the courts consider a variety of factors including: "(1) the employee's relationship to the item seized; (2) whether the item was in the immediate control of the employee when it was seized; and (3) whether the employee took actions to maintain his privacy in the item." *Anderson*, 154 F.3d at 1232. Courts may also consider: "(1) [the employees] ownership, possession and/or control; (2) the historical use of the property searched, or the thing seized; (3) the ability to regulate access [to the item]." *United States v. Mancini*, 8 F.3d 104, 109 (1st Cir. 1993).

Analyzing the search in question under the factors presented above makes it clear that Ms. Edwards *did* have both a subjective and objective expectation of privacy in her personal *storage device*. First, the storage device was purchased by Ms. Edwards personally, with her own funds. (R386-88). In addition, Ms. Edwards *kept the storage device with her* at all times when she left the office at the end of the work day. (R396). Moreover, the storage device was used by Ms. Edwards to keep photographs of her daughter, recipes, marathon notes, and other personal items *in addition to* a few outdated work-related templates. (R387-89;403-04).[5] Further, *at the time of the search and seizure* no other officers had been made privy to the information or content

[5] The Court pointed this detail out to the State, during the State's argument after the close of the evidence. (R403-04). The Court noted that there were "marathon running plans" and a recipe for teriyaki curry salmon contained on the drive. *Id.*

contained on the storage device, according to the testimony at the hearing.[6]

As to the second consideration, Ms. Edwards had sole authority and control over the storage device. Ms. Edwards took the storage device with her every day when she left work. (R369). And, Ms. Edwards' office had a lock, which she was diligent in using when she was out of the office, even only temporarily.[7] (R372;390). Furthermore, the *only reason* why the storage device was in the office at all during the time of the seizure of the computer was because law enforcement officers *conjured up* a last-

[6] It is critically important here to reiterate that any testimony regarding the "shared use" of the drive, although contested by Ms. Edwards, encompassed a time frame *well after the search and seizure had taken place*. It is well-settled that only the facts as they stand at the *time of the search or seizure* are relevant to a court's determination as to a Fourth Amendment violation. *See Smith v. Thornburg*, 136 F.3d 1070, 1074 (6th Cir. 1998) ("In determining whether probable cause exists, [the Court] may not look to events that occurred after the search or to the subjective intent of the officers; instead, [the Court] look[s] to the objective facts known to the officers at the time of the search.").

[7] The State repeatedly argued that Ms. Edwards did not have a subjective expectation of privacy in the contents of the storage device *because the office which she occupied was accessible to others*, and her superiors all had access to the keys to open the office. (R326;329-30;372;390;). However, the fact that an office is "shared" or may be accessible to other employees does not defeat a defendant's privacy interest in the contents of his or her office. *O'Connor v. Ortega*, 480 U.S. 790, 716-18(1987) ("constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer."); *United States v. Mancini*, 8 F.3d 104, 108 (1st Cir. 1993)("shared access to a document [or item] does not prevent one from claiming Fourth Amendment protection in that document."); *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968)("It has long been settled that one has standing to object to a search of his office as well as his home.").

minute errand for Ms. Edwards to run, to *purposefully oust her* from the office, and ensure that she did not have an opportunity to object to the search. (R345). Although the storage device was not on Ms. Edwards' person at the time of the seizure, it was under her exclusive control, and *would have been* with her, if not for the trickery employed by law enforcement in executing the search.[8]

Third, Ms. Edwards did take action, prior to the search to protect her privacy in the item: she took it home with her every day when she left work; she locked her office every time she left; and she never saved her files onto the *shared drive*, where they could be accessed by others. (R372;387;390). In addition, the computer that she maintained would "lock" requiring a password protected login if Ms. Edwards' were to walk away from the computer. (R295). Also, as previously explained, ***at the time***

[8] Although law enforcement may employ trickery, or deceptive tactics in carrying out their investigative duties, such conduct can deprive a criminal defendant of due process under the Fifth and Fourteenth Amendments. *See United States v. Mitchell*, 966 F. 2d 92, 101 (2d Cir. 1992) (explaining that where law enforcement agents affirmatively mislead a subject as to the nature of their investigation to materially induce some results, the officers violate due process); *Lisenba v. People of State of Cal.*, 314 U.S. 219, 237 (1941) ("If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law."). Here, law enforcement officers knew that they were dealing with a fellow officer, who understood her rights to object or consent to a search or seizure, and so intentionally removed her from the building so that she had no opportunity to object to the conduct of the officers. Such deceitful and intentional acts, taken with a purpose of executing a search free from interruption or objection, should be taken into consideration by this Court, regardless of whether such actions rise to the level of a violation of due process.

of the seizure, Ms. Edwards' had not disclosed the contents of the storage device to other individuals. (R355;383;387).

Next, the MDPD had no way to *regulate* the storage device in any way. The storage device was a personal item, which Ms. Edwards took to and from the office every day; in fact, all of the State's witnesses testified that they had *no idea* what was *on the storage device* at the time that it was seized, clearly evidencing the fact that no staff member had the ability to control or regulate the drive. (R289;347;369;383).

Finally, the collective bargaining agreement which was repeatedly referenced by both the State and the defense at the suppression hearing supports a subjective, and objective, expectation of privacy in the *storage device*. The collective bargaining agreement regarding work-place searches specifically states: "The County retains the right to inspect and search ***issued property and equipment***, and all County property. Upon request employees will be given the reason for such search. ***Personal property and equipment will not be searched except pursuant to law.***" (R305). The evidence at the hearing was uncontroverted that Ms. Edwards *owned* the storage device in question. (R299;349;369;382;386). As such there can be no argument that the storage device was "issued property" or that it belonged to the MDPD.

The collective bargaining agreement *promised* Ms. Edwards that her *personal property*, not issued by the Department, would

not be subject to a search or seizure except "pursuant to law" (with a warrant). (R305). Ms. Edwards was more than reasonable in relying on this departmental policy and binding contractual agreement in believing that her storage device, as personal property, was protected by the Fourth Amendment.[9]

Based on all the factors for *work-place* related searches and seizures analyzed above, there can be no doubt that Ms. Edwards had a subjective expectation of privacy, which society would objectively be willing to recognize in the *storage device*.

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[9] There were numerous discussions about and references to the "logon banner" that each user sees upon starting up their computer, and prior to the computers use, at the suppression hearing. The banner in question reads:

> *This computer system* is the *property of the Miami-Dade Police Department*. It is for authorized use only. Users have no explicit or implicit expectation of privacy. Any or all uses of *this system* and all *files on this system* may be intercepted, monitored, recorded, copied, audited, inspected, and disclosed to authorized personnel. By using *this system* the user consents to such interception, monitoring, recording, copying, auditing, inspection and disclosure. Unauthorized or improper use of *this system* may result in administrative disciplinary action or civil/criminal penalties. By continuing to use *this system*, you indicate your awareness of and consent to these terms and conditions.

(R37). Although the State relied *heavily* on this logon banner in asserting that Ms. Edwards had no subjective expectation of privacy, the banner actually *supports* Ms. Edwards' position. The banner repeatedly refers to "this system" and "this computer" which is "the property of Miami-Dade Police" (R37). The above language is congruous with the collective bargaining agreement, which provides that ***County Property*** is subject to search at any time, and in which, the employee can have no expectation of privacy. In contrast, the *storage device* in question was *personal property*, which was not *part of the system* as it could be removed, and was in fact frequently removed, and was not a file or piece of data "contained on the system." This is the point and purpose of a storage device, that it contains its own separate files, which need not be saved on the actual computer, for the purpose of saving hard drive and memory space.

A critical distinction must be noted, and drawn, at this juncture, between the search and seizure of the *computer itself* and the *storage device.* Ms. Edwards has never asserted an expectation of privacy in the *county issued computer* itself, based on the clear terms of the 'logon banner' and the collective bargaining agreement. However, the *storage device*, which was *personal property*, and was not a "part of the system", as it contained its own storage capacity and files, was protected under the Fourth Amendment by the clear terms of the collective bargaining agreement, the 'logon banner' and the factors established by law and explained in detail above. *See Anderson*, 154 F.3d at 1232. The *storage device* is merely a *container*, to be analyzed like any other container that would be brought to work and left in the office.[10]

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[10] *See e.g., United States v. Chan*, 830 F. Supp. 531 (N.D. Cal., 1993) (comparing the contents of a "pager" to "the contents of any other container" for the Fourth Amendment analysis); *United States v. David*, 756 F. Supp. 1385, 1391 (D. Nev., 1991) (finding that a computer memo book is "indistinguishable from any other closed container, and is entitled to the same Fourth Amendment protection); *United States v. Blas*, 1990 WL 265179, No. 90-CR-162, *21 (E.D. Wisc., Dec. 4, 1990) ("[A]n individual has the same expectation of privacy in a pager, computer ***or other electronic data storage and retrieval device*** as in a closed container."); *United States v. Barth*, 26 F. Supp. 2d 929, 936 (W.D. Tex. 1998) ("Although the protection afforded to a person's computer files and hard drive is not well-defined, the Court finds that the Fourth Amendment protection of closed computer files and hard drives is similar to the protection it affords a person's closed containers and closed personal effects. Outside of automobile searches, a warrant is usually required to search the *contents* of a closed container, because the owner's expectation of privacy relates to the *contents* of that container rather than to the container itself."); *United States v. Knoll*, 16 F.3d 1313, 1321 (2d Cir.

(continued...)

In addition, any argument that Ms. Edwards' personal "storage device" and the County issued "computer" are somehow *one and the same* (R312-14) is ludicrous and contrary to the plain definition of a "storage device." *See In Re Trek 2000 Intern'l, Ltd.*, 2010 WL 5099653, No. 77099785 (Trademark Tr. & App. Bd., Nov. 30, 2010)("flash drive [is defined] as a *portable storage device* that is small enough to fit in a pocket and can be connected to the USB port of a computer or other device. Flash drives use flash memory chips for storage. Also called flash Disk, key drive, thumb drive, USB flash drive, USB Key.").[11]

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[10](...continued)
1994) ("Under Fourth Amendment law a container need not be locked or fastened shut for there to be a legitimate expectation of privacy in its contents, though those facts are emphasized when they exist. The Supreme Court has rejected a constitutional distinction between 'worthy' and 'unworthy' containers and has noted that 'the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.").

[11] The State, in defending against Ms. Edwards' motion, relied almost exclusively on *O'Connor v. Ortega*, 480 U.S 790 (1987), asserting that *O'Connor* created a novel *three-prong test* for workplace-searches; however, *O'Connor* merely held that the Fourth Amendment is applicable to non-investigatory work-place searches, which must be *reasonable* under the circumstances. *Id.* at 715-16, 725-26 ("We hold, therefore, that *public employer* intrusions on the constitutionally protected privacy interests of government employees for *non-investigatory,* [sic] *work-related purposes*, as well as for work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."). In addition, *O'Connor* actually supports Ms. Edwards argument that the storage device was a separate container, and that such containers do not lose their expectation of privacy, simply because they transgress the threshold of the office door. The Court in *O'Connor* used the example of a piece of luggage stating that,

> [A]n employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the

(continued...)

The State and the trial court conflated the issues of the search of the computer and the search of the storage device and treated them as one and the same. The trial court failed to consider that the storage device is an individual container the contents of which do not lose their Fourth Amendment protection by virtue of entering the work-place. Viewing the storage device as a mere container, housed in an office, makes it clear that Ms. Edwards had a subjective expectation of privacy in the contents of the storage device, which society was and is willing to recognize as reasonable and the warrantless search of which was contrary to law.

II. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT WENT TO THE HEART OF THE THEORY OF DEFENSE.

"[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice and is a part of the due process of law that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." *Masaka v. State*, 4 So.3d 1274, 1284 (Fla. 2d DCA 2009) (quoting *Gardner v.*

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[11](...continued)
employee has in the *existence and outward appearance of the luggage* is affected by its presence in the workplace, the employee's expectation of privacy *in the contents of the luggage* is not affected in the same way.
O'Connor, 480 U.S. at 716. The hypothetical piece of luggage is akin to the storage device in this case: although Ms. Edwards certainly had no privacy in the outward appearance of the drive, she did have such an expectation in the *contents* of the drive, which remained personal and hidden from the view of any meandering employees or superiors.

State, 530 So.2d 404, 405 (Fla. 3d DCA 1988)). *See also McDuffie v. State*, 970 So.2d 312, 321 (Fla. 2007) (recognizing the additional layer of analysis for exclusion of defense offered evidence, in light of the fundamental right of the accused to present a defense); *Washington v. State*, 737 So. 2d 1208 (Fla. 1st DCA 1999) ("The constitutional guarantees of due process provide for the admission of evidence relevant to the defense of the accused, and it is clear that few rights are more fundamental than that of an accused to present [] [] his own defense."). Accordingly, the rules of evidence must allow for ***liberal admission*** of evidence, which tends to support the defendant's theory of his case. *See Vannier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998)(explaining the importance of the right to present a defense); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)(explaining the import of the right to present a defense).

In light of these principles, it is well-settled that, "[a]ny evidence that *tends to support* the defendant's theory of defense is admissible, and it is error to exclude it." *Dean v. State*, 916 So. 2d 962, 964 (Fla. 4th DCA 2005) (emphasis added). The definition of "tends to support" in this context is *extremely broad*, requiring that *any* evidence that "tends in any way, even indirectly" to prove the theory presented by the defense must be admitted. *Id. See also Vannier*, 714 So. 2d at 472.

Further, in considering evidence that is not directly related to the theory of the case, but could supply a reasonable

doubt to defeat a conviction, it has been held that: "if there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility." *Dean*, 916 So. 2d at 964. *See also State v. Savino*, 567 So. 2d 892, 893 (Fla. 1990) (explaining that evidence that has any possibility of a tendency to create reasonable doubt should be admitted); *Story v. State*, 589 So. 2d 939 (Fla. 2d DCA 1991) (explaining that the rules of evidence should be construed in favor of admissibility of evidence where it tends to create a reasonable doubt).

A. THE TRIAL COURT ERRED IN EXCLUDING A SIGN-IN/SIGN-OUT SHEET FROM THE APPELLANT'S DAUGHTER'S PRE-SCHOOL WHICH WAS CRUCIAL TO THE APPELLANT'S ALIBI DEFENSE

The State filed a motion in limine seeking to preclude the admission of a sign-in/sign-out sheet (hereinafter "log sheet") from the Precious Years Christian Learning Center that was attended by Ms. Edwards' child, Chloe. The State acknowledged that the log sheet was a business record but claimed that the signatures written by Chloe's parents next to the times Chloe was dropped off and picked up were hearsay that was inadmissible under the business records exception to the hearsay rule. (R83-89). Ms. Edwards opposed the motion in limine. (R90-92;T14-25). The trial court ruled that the log sheet did not satisfy the business records exception because the times and signatures on the log sheet were placed there by non-business employees (the parents) rather than an employee of the child care center. (T19-

22,27).[12]

The court's ruling was error which went to the heart of Ms. Edward's alibi defense because the log sheet proved that Ms. Edwards was picking up her daughter at the child care center in Miramar at almost the same time that she was alleged to have sent the emails at issue to Mr. Raij from the Intracoastal District Station in Miami.

Section 90.803(6)(a) of the Florida Statutes provides:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The log sheet met the strictures of the rule. As previously explained herein at pages 18-24, it was made at the time the parents dropped off and picked up their child. It was made and securely kept in the course of the child care center's regularly conducted business activity. And, it was the regular practice of

[12] Ms. Edwards filed a motion for new trial based upon this ruling which was denied. (R206,479).

the child care center to require that the parents record the drop off and pick up times on the log sheet.

Although the parents were outsiders to the child care center which kept the log sheets, numerous courts have held that records made by an outsider of which a business takes custody are admissible under the business records exception if they are used and relied upon by the business in the regular course of its business. *E.g., United States v. Goodchild*, 25 F.3d 55, 60 (1st Cir. 1994); *United States v. Doe*, 960 F.2d 221, 222-23 (1st Cir. 1992); *United States v. Mendel*, 746 F.2d 155, 165-66 (2nd Cir. 1984); *United States v. Bueno-Sierra*, 99 F.3d 375, 378-79 (11th Cir. 1996); *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984); *Residential Funding Co., LLC v. Terrace Mortgage, Co.*, 725 F.3d 910, 920-22 (8th Cir. 2013); *BP Amoco Chemical Co. V. Flint Hills Resources, LLC*, 697 F. Supp. 2nd 1001,1020-22 (N.D. Ill. 2010).

Notably, once the party offering the evidence lays the predicate pursuant to Section 90.803(6)(a), the burden is on the party opposing the admission to prove the untrustworthiness of the document. *Nimmons v. State*, 814 So.2d 1153, 1154-55 (Fla. 5th DCA 2002); *Friedrich v. State*, 743 So.2d 1125, 1126 (Fla. 4th DCA 1999). The state cannot meet this burden. There was no evidence of a lack of trustworthiness of the circumstances of the entries into the log sheet. The book containing the log sheets was only

used by parents when dropping off or picking up their children. That book was kept at the front desk about three feet from a chair in which the front desk person sat and could observe the parents signing it. The front desk person testified that Ms. Edwards usually picked up Chloe between 4:00 p.m. and 4:30 p.m. which was consistent with Ms. Edwards' entry for July 8, 2013 showing she picked up Chloe at 4:20 p.m. The log sheets were prepared in furtherance of the child care center maintaining its certifications and for its own reporting process. (T19). Moreover, the July 8, 2013 entry at 4:20 p.m. was made long before Ms. Edwards' computer and flash drive were seized at a time when she was unaware that she would be arrested and charged in this case.

Finally, courts have recognized that sign-in sheets do not have to be completely accurate in order to be admissible under the business records exception because allegations that a sign-in sheet is inaccurate go to the weight of the evidence, not its admissibility. *E.g. Munoz v. Giumarra Vineyards Corporation*, 2015 W.L. 5350563 *5 (E.D. Cal. 2015).

B. THE TRIAL COURT ERRED IN EXCLUDING A TEXT MESSAGE THAT STRONGLY SUPPORTED THE APPELLANT'S ALIBI DEFENSE.

As previously explained, the defense theory was that Ms. Edwards left work early because she was feeling ill on July 8, 2013, went to an office visit with her therapist in Pembroke Pines from 2 p.m. to 3 p.m., ate lunch, switched from her police

vehicle to her civilian car at home and then picked up her daughter at the child care center in Miramar at 4:20 p.m. Thus, she could not have emailed the two Offense Incident Reports to Mr. Raij from the Miami police station at 4:09 p.m. that day.

To support her theory of defense that she left early because she felt sick, Ms. Edwards sought to admit a screen shot of a text message sent by her to her supervisor, Sergeant Gilligan, later that evening on July 9, 2013 at 2:29 a.m. (T942-52). The text message provided as follows:

> Sir, I'm not feeling well. I feel like total crap. I will not be in today. I will call the desk.

(T987-88).

The text message in response sent at 5:40 a.m. that same day provided:

> Morning. I got your text. Take care of yourself, and hope to see you tomorrow.

(T987-88).

Sergeant Gilligan testified outside the jury's presence that the time and content of the text response were consistent with when and how he would have responded. He further explained that both text messages looked like a text message conversation he would have had with Ms. Edwards if she was calling out sick and that he encouraged employees to text him about such matters, although he did not have an independent recollection of these particular texts years later. (T988-90). Based upon his testimony, the trial court ruled that the text messages were

inadmissible because they could not be authenticated. (T991-92).

Thereafter, defense counsel again sought the admission of this text message of Ms. Edwards on the basis that she was going to testify that she authored and sent it to Sergeant Gilligan. However, the trial court refused to admit it on the basis that it was not independently "verified." (T1040-41). This was error.

Section 90.901 of the Florida Statutes addresses the authentication of evidence. It provides, "Authentication...of evidence...[is] satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Evidence may be authenticated by appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances." *Jackson v. State,* 979 So.2d 1153, 1154 (Fla. 5th DCA 2008).

An electronic document [e.g., email, text message, and networking sites like Facebook] may continue to be authenticated by traditional means such as direct testimony of the purported author...." *State v. Eleck,* 130 Conn. App. 632, 23 A.3d 818, 822-23 (2011), certification granted in part, 302 Conn. 945, 30 A.3d 2 (2011). Indeed, "[t]he most common method to authenticate the electronic record or message is by the testimony of the person with knowledge who created the record or message that [the] print-out accurately reflects the contents that the witness created or sent." 1 Fla. Prac. Evidence Section 901.1a (2017 ed.). *Accord Symonette v. State,* 100 So.3d 180, 183 (Fla. 4th DCA

2012) (circumstantial evidence was sufficient to authenticate pictures of text messages on the defendant's cell phone where, *inter alia*, the person who authored and sent those messages testified that she had done so and discussed their contents).

Thus, since Ms. Edwards testified before the jury that she sent the text message described above and described its contents and Sergeant Gilligan testified *in camera* that this text conversation was consistent with what she and he would texted if she was calling out sick, the trial court erred in excluding this evidence on the ground that it was not properly authenticated.

C. THE TRIAL COURT ERRED IN REFUSING TO ADMIT A REDACTED APPOINTMENT CALENDAR AND DATED TREATMENT NOTES OF THE APPELLANT'S THERAPIST STRONGLY SUPPORTING THE APPELLANT'S DEFENSE.

As previously explained, as part of Ms. Edward's alibi defense that she was not at the police station the afternoon of July 8, 2013, she and her therapist testified that she was with her therapist in Pembroke Pines from 2:00 p.m. to 3:00 p.m. that day. At trial, she sought the admission of her therapist's redacted appointment calendar and dated treatment notes showing her attendance at her therapist's office beginning at 2:00 p.m. on July 8, 2013. These documents were redacted in order to exclude the therapist's findings.[13]

The trial court refused to admit these records unless they were unredacted which would have revealed the content of Ms.

[13] The Appellant is filing a motion to supplement the record with these documents.

Edward's medical treatment and forced her to waive her psychotherapist-patient privilege which is codified in Section 90.503 of the Florida Statutes.[14] (T1152-57). Section 90.503 protects confidential communications between the patient and psychotherapist and records of mental health treatment from disclosure to third parties. *See Flood v. Stumm*, 989 So.2d 1240, 1241 (Fla. 4th DCA 2008).

The confidential medical records showing the reason for Ms. Edwards' office visit were of no relevance whatsoever to the alibi purpose for which the records were sought to be admitted. Accordingly, the trial court's ruling deprived Ms. Edwards' of her statutory right to present relevant evidence under Section 90.401 of the Florida Statutes and her constitutional right to fully present her defense.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Ms. Edwards respectfully requests that this Honorable Court reverse her judgment and sentence and remand this case with appropriate directions.

[14] Ms. Edwards raised this issue again in a motion for new trial which was denied. (R204-05;T____).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed to the Criminal Appeals Division, Office of the Attorney General at: CrimAppMiA@myfloridalegal.com on this 19th day of March 2018.

BY: /s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQUIRE

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New font type, in compliance with a R. App. P. 9.210(a)(2).

BY: /s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQUIRE