IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

Case No. 17-CF00526

STATE OF FLORIDA,

Plaintiff,

v.

DARREL D. HARVEY,

Defendant.
_____/

DEFENDANT'S MOTION FOR NEW TRIAL

The Defendant, DARREL D. HARVEY, by and through his undersigned attorney, moves the Court for an Order granting his Motion for New Trial ("Motion") pursuant to Fla. R. Crim. Pro. 3.580, and in support states as follows:

1. The Defendant was arrested on February 12, 2017. The Defendant was found guilty on three counts on May 23, 2018. Count I is Traveling to Meet a Minor under section 847.0135(4)(a), *Florida Statutes*, a second degree felony. Count II is for Prohibited Uses of Computer Services or Devices, section 847.0135(3)(a), *Florida Statutes*, a third degree felony. Count III is for Tampering with or Fabricating Physical Evidence under section 918.13, *Florida Statutes*, a third degree felony.

2. The Defendant is entitled to a new trial because the jury was not properly instructed on the Defendant's mandatory duty to report and immunity for acting in good faith in accordance with that duty, and because the Court improperly excluded Verizon phone bills that were properly business records.

3. Under Fla. R. Crim. Pro. 3.580, "When a verdict has been rendered against the defendant or the defendant has been found guilty by the court, the court on motion of the defendant, or on its own motion, may grant a new trial or arrest judgment." A new trial is required when "[t]he court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the defendant," if Defendant can establish prejudice. Fla. R. Crim. Pro. 3.600(b)(7).

4. The Defendant is entitled to a new trial because the Court failed to instruct the jury on sections 39.201(1)(a), 39.203(1)(a), and 39.205(1), Fla. Stat. This had a prejudicial effect on the Defendant because the evidence created a fact question as to whether Defendant was acting pursuant to his duty to report. The effect was exacerbated by the State's misstatement of law throughout the trial and in its closing statement. The Defendant requested a jury instruction on a good faith defense, attached hereto as exhibit A. Further the Defendant requested a curative instruction to the jury to clarify the Defendant's duty to report, pursuant to Defendants request to take judicial notice of section 39.201, Florida Statutes. Failure to provide either of these instructions constitutes reversible error.

Defendant was a mandatory reporter.

5. Contrary to statements made by the State, and at least one ruling of this Court, the Defendant was a mandatory reporter of child abuse or neglect. Pursuant to the plain language of section 39.201(1)(a), Florida Statutes, "Any person who knows, or has reasonable cause to suspect, . . . that a child is in need of supervision and care . . . shall report such knowledge or suspicion to the department. . ." (emphasis added). Certain mandatory reporters are required to provide their names when making a report. § 39.201(1)(d), Fla. Stat. The interpretation that any person, including Defendant, is a mandatory reporter is further supported by the plain language of

39.201(1)(d), which provides that "Reporters in the following occupation categories are required to provide their names to the hotline staff. . ." (emphasis added). "Any person" is required to be a "Reporter" but only some persons are required to provide their names when making a report.

6. Failure of "Any person" to make a report constitutes a crime. Section 39.205(1), Florida Statutes, provides that "A person who is required to report known or suspected child abuse, abandonment, or neglect and who knowingly and willfully fails to do so, or who knowingly and willfully prevents another person from doing so, commits a felony of the third degree. . ." (emphasis added). As established by section 39.201(1)(a), "Any person who knows [etc.] . . . shall report." There is no basis in the plain language of the statute to assert that only members of select professions are subject to criminal liability for failure to report child abuse or neglect. However, this was the State's position, and the State elicited testimony from Lorena Vollrath-Bueno to that effect.

7. Further, making a false report of child abuse or neglect is also a crime. § 39.205(9), Fla. Stat. This is why the Department of Children and Families has published guidance that states reporters of child abuse or neglect "need to have" enough information to reliably identify the victim. *See* Fla. Dept. Children and Families, Frequently Asked Questions, no.10.[1] Specifically, the Department states that among the information callers "need to have ready when [they] call" is the child's "Name, date of birth (or approximate age), race, and gender . . . Addresses or another means to locate the subjects of the report, including current location." The evidence in this case clearly shows that the Defendant tried to gather the required information to make a report, but could not.

Mandatory reporters, like the Defendant, are immune from criminal liability for acts taken

1 Available at: http://www.myflfamilies.com/service-programs/abuse-hotline/frequently-asked-questions

in good faith.

8. Section 39.203(1)(a), Florida Statutes, provides that "Any person . . . participating in good faith in any act authorized or required by this chapter, or reporting in good faith any instance of child abuse, abandonment, or neglect . . . shall be immune from any civil or criminal liability which might otherwise result by reason of such action." . *See also Urquhart v. Helmich*, 947 So.2d 539, 541 (Fla. 1st DCA 2006) (holding that a doctor was not liable by law for a false report where he acted with reasonable suspicion and that, even if he could not show reasonable suspicion, he would be given immunity if the facts showed a good faith motive in reporting); *Ross v. Blank*, 958 So.2d 437, 440 (Fla. 4th DCA 2007). If the Defendant can show that he was participating in good faith in an act authorized or required by the statute, he is immune from criminal liability.

Because he was a mandatory reporter, Defendant had was authorized to gather enough information to make a report.

9. Because the Defendant had a statutory duty to report, the Defendant was authorized by law to gather enough information to decide whether, in fact, he was talking to a 14-year-old, or was talking to an adult. It is a basic premise of law that a duty to act creates the authority to act. *See, e.g. Findley v. Jones Motor Freight, Division Allegheny Corp.*, 639 F.2d 953, 957 (3d Cir. 1981) (duty to act on another's behalf creates authority to perform effectively, subject to good faith); *Depriest v. Greeson*, 213 So. 3d 1022, 1026 (Fla. 1st DCA 2017), reh'g denied (Apr. 6, 2017), review denied, SC17-841, 2017 WL 3083864 (Fla. July 20, 2017) (authority to act is a necessary element to a statutory duty to act); *Ralph v. Envoy Point Condo. Ass'n, Inc.*, 455 So. 2d 454, 455 (Fla. 2d DCA 1984) (duty to perform creates the authority necessary to perform); *State ex rel. R.C. Motor Lines v. Florida R.R. Com'n*, 166 So. 840 (Fla. 1936)(duty to act creates authority

to act); *Peklun v. Tierra Del Mar Condo. Ass'n*, 119 F. Supp. 3d 1361, 1369 (S.D. Fla. 2015) (without authority to act there can be no duty to act); *State v. Oxx*, 417 So. 2d 287, 290 (Fla. 5th DCA 1982) ("where the statute imposes an affirmative duty to act and then penalizes the failure to comply" the Defendant must know of the duty and have ability to comply). Because the Defendant was required to report, and knew of that duty, he was either authorized or required by law to gather enough information to make a report.

To be entitled to a jury instruction, Defendant need only show some evidence of his good faith, "regardless of how weak or improbable it may be."

10. "A defendant is entitled to a jury instruction on the theory of his defense if there is evidence in the record to support it, regardless of how weak or improbable it may be." *Solomon v. State*, 436 So. 2d 1041, 1041 (Fla. 1st DCA 1983). Defendant requested that the jury be instructed on his duty to report, and the good faith immunity springing from that duty. *Verdult v. State*, 645 So. 2d 530, 530 (Fla. 4th DCA 1994) (reversing for failure to instruct on good faith defense, "a defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence to support it, no matter how disdainfully the judge may feel about the merits of such defense"). The Defendant clearly met the required standard for his requested instruction, and was entitled to his requested instruction based on the evidence elicited at trial.

There is sufficient evidence in the record to entitle Defendant to a good-faith defense and jury instruction.

11. In his recorded statement played to the jury, Defendant made statements to police that he intended to report the person he was speaking with, but needed to see how old she was. In the text communications with the investigator, Defendant repeatedly asked for confirmation of the

investigator's true age,[2] and asked for details that would allow Defendant to identify the investigator, including requests for impromptu photographs and an address. Based on the testimony of Ed Perrine, Defendant knew he had a duty to report child abuse. Based on the above evidence, and the evidence detailed below, the jury could have found that Defendant was not travelling for the purpose of having sex with the investigator, but to identify whether he had a duty to report an at risk child.

12. Further, the jury could have found that the Defendant's communications with the investigator were not intended to lure or entice the investigator, but to draw out enough information to make a report. To be sure, the text communications in this case included sexual themes, but those themes were introduced by the investigator. Based on this, the jury could have found that Defendant's responses to the investigator were intended to keep the conversation going and to draw out the identity of the investigator, not to lure or entice a minor.

13. The investigator constantly brought the conversation back to sex when the Defendant merely tried to elicit information. From the very beginning, when the Defendant asked "So tell me what you are wanting" the investigator responded with "to have some fun with an older guy." Text communications, 01:18-1:19am. When Defendant warned the investigator that "most guys on [Seeking Arrangement] are looking for something sexual," she responded with "i can do that. ya, i know." 1:20am. When Defendant asked "what do you want to chat about" the investigator responded "u still looking for a toy?" 3:23-3:26pm.

14. Only in response to the investigator's innuendo did Defendant introduce sexual themes, but made it clear he was not interested in a sexual relationship with a 14-year-old. "No i

2 See Text Communications at 1:28am, "You don't look your age" 4:41pm, "So are you 14 or 18?" 5:09pm, "I don't really know your age so you must be 18" (to which the investigator responded "yes") 5:47-5:48pm, "So you're telling me you are 18" 5:49pm

don't want nudes . . . Pictures just show me you're real" 4:33pm. "If you were 18 we'd have fun" 5:03pm. "You can't have sex" 5:05pm. When the investigator asked "what were u looking 4 b4 i told u my age?" Defendant responded that he wanted a sexual friendship, the investigator asked "u want that with me?" Defendant responded in the negative, that he wanted a sexual friendship "With my [sugar baby]." 5:41-5:43pm. When the investigator asked if Defendant wanted her to be his sugar baby, he again responded in the negative, stating he wanted to "fulfill all her wishes." 5:43pm (emphasis added).

15. When Defendant asked for information that could form the basis for a report or identify whether he was talking to a minor, namely, an address, the investigator made information conditional on more innuendo, "i ain't tellin u unless i know ur gonna come and play." 5:23pm. When the two were arranging to meet, the Defendant again made it clear he did not intend to have sex. When the investigator asked, "if i meet u there wher we gonna go and what we gonna do?" Defendant responded "I can give you a ride back home and you can do whatever you want." 5:53pm. When the investigator was incredulous, "why am i gonna meet u if ur just gonna give me a ride back home?" Defendant responded "I'd be able to see that you are for real. . ." 5:54-5:55pm. When the investigator pushed for details, Defendant responded noncommittally, but with enough innuendo that the investigator would agree to meet. From these facts, the jury could have credited the Defendant's statements after his arrest, and found that his intention was to seek information or confirm the age of the person he was speaking with for purposes of making a report, not to lure or entice someone for the purpose of sex.

16. Without enough information to make a report, the Defendant was required or authorized by law to seek further information. Indeed, when the investigator, Ms. Titkanich, was asked on the stand if the purported 14-year-old she portrayed was someone that would need to be

reported to the Department of Children and Families, or some other law enforcement agency, Ms. Titkanich responded that she would need to investigate. Attempting to confirm the identity of the purported child is what the Defendant was doing when he was arrested, or at least, the jury could have so found if properly instructed.

17. The investigator's communications were ambiguous as to age and identity, and did not provide enough information to make a report. The investigator was not using a phone number that could be traced to an address. The investigator refused to provide a street address. The photos the investigator used were of a woman in her late twenties, purporting to be someone 14-years-old. It may be appropriate in many investigatory contexts for law enforcement to hide their identities and communicate ambiguously, but the effect in this case was to prevent Defendant from having enough information to make a report to law enforcement, as he was required to do.

18. If the investigator in this case was in fact a real 14-year-old, the Defendant was required to report her to law enforcement. If Defendant had "reasonable cause to suspect" that he was communicating with a "child in need of supervision … [who] has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision," then he had a duty to report. 39.201(1)(a), Fla. Stat. Here, the investigator pretended to be a 14-year-old girl who was left home alone without supervision for several days. This purported 14-year-old posted an advertisement on an adult website used for sexual encounters. When the Defendant communicated with this person, she made near-constant references to sex, and indicated a willingness to have sex with literally any older man in her parents' home. If the character the investigator portrayed had in fact been a real 14-year-old girl, she would certainly have been "in need of supervision," and Defendant had a duty to make a good faith report. However, as described above, there was not sufficient information to make such a report.

19. Defendant requested that the jury be instructed on a defense to his actions and the request was denied. Had the jury been so instructed, the facts support a conclusion that the jury may have found a mandatory duty to report and invoked the defense. The erroneous decision prejudiced the jury by limiting the Defendant's right to have them instructed on the law applicable to his case. Further creating prejudice, the State misinformed the jury as to the law on this matter. The Defendant was left without adequate recourse to correct the misinformation and the likely result of this is that the jury was prejudiced in their decision.

20. Thus, the Defendant brought an objection to the decision to not admit the instruction on his mandatory duty to report. This denial of his request created an error which unduly prejudiced the juries' conviction. This prejudicial error should be cause under Fla. R. Crim. Pro. 3.580 and 3.600(b)(7) to grant a motion for a new trial.

21. Further, the Court excluded evidence from Ed Perrine on the basis of hearsay, namely, a Verizon phone bill used by Nettally in the ordinary course of their business. Ed Perrine was the records custodian for Nettally, testified that the phone records were the only way that the company can tell if an employee had made or received a particular phone call. He testified that he knew Verizon's retention policy, that the records are only kept for a certain number of days. The Court sustained an objection to these phone records on the basis that these records were hearsay, and did not constitute business records for purposes of the business records exception. The State's contention was that these records were not business records because Nettally did not create them, Verizon did. The Court also commented that these records could have been introduced through the Verizon records custodian.

22. However, there is no requirement that the business records at issue be created by the entity employing the records custodian. When a business uses another business's records and

integrates those records within its own records, the acquired records "constitute the successor business's singular 'business record.' " *Bank of New York v. Calloway*, 157 So.3d 1064, 1071 (Fla. 4th DCA 2015). The witness need only establish the records were relied upon and were deemed trustworthy given the circumstances. *Id.* Trustworthiness can be established by demonstrating there was a contractual relationship between the two businesses so as to create a "substantial incentive for accuracy." *Id.* at 1072. These are exactly the circumstances in this case. Nettally contracted for phone services from Verizon, and Nettally relied on the records for its business purposes. The Verizon phone records were Nettally's business records.

23. The phone records at issue would have shown that when the Defendant discovered the whereabouts of an underage child on an adult website in the past, namely a child named K.P., he reported her whereabouts to law enforcement. Not being able to introduce this evidence significantly prejudiced the Defendant. This evidence was rebuttal evidence to the State's contention that the Defendant's contact with K.P. was nefarious in some way. This evidence, if introduced, would also have demonstrated that the Defendant did not have a propensity to commit the crimes with which he was charged, and would have been further evidence that, when Defendant discovered someone he found on an adult website might have been a minor, he intended to report that person as required by law.

WHEREFORE the Defendant respectfully requests the Court grant his Motion for a New Trial.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by hand delivery on parties listed below, this 1st day of June, 2018.

John Hutchins
State Attorney's Office
Leon County Courthouse
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s/Jonathan Hayes
Attorney

39.203 (1)(A) GOOD FAITH DEFENSE
§ 39.203 (1)(a), Fla. Stat.

The defense of good faith reporting immunity has been raised. (Defendant) **was is immune from criminal liability if:**

1. **[he] was participating in good faith in any act authorized or required by law or**

2. **[he] was reporting in good faith any instance of child abuse, abandonment, or neglect to any law enforcement agency,**

The Defendant is authorized and required by law to make a report to law enforcement if the Defendant knows, or has reasonable cause to suspect:

1. **that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, or**

2. **that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care, or**

3. **that a child is abused by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare, or**

4. **that a child is the victim of childhood sexual abuse.**

If you find that the defendant was participating in good faith in any act authorized or required by law, or that he was reporting in good faith any instance of child abuse, abandonment, or neglect to any law enforcement agency you should find the defendant not guilty.

Approved **Denied**

_____ _____

See Ross v. Blank, 958 So. 2d 437, 440 (Fla. 4th DCA 2007)(affirming judgment in favor of defendant who made report, finding conduct was required by law); §39.203(1)(a), Fla. Stat. "Any person, official, or institution participating in good faith in any act authorized or required by this chapter, or reporting in good faith any instance of child abuse, abandonment, or neglect to the department or any law enforcement agency, shall be immune from any civil or criminal liability which might otherwise result by reason of such action."; §39.201(1)(a), Fla. Stat.