IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT
STATE OF FLORIDA

CASE NO.: 4D11-2628

DALIA DIPPOLITO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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JURISDICTIONAL STATEMENT

Venue is proper in this Court pursuant to Section 35.043, Florida Statutes. FLA. STAT. § 35.043. Ms. Dippolito timely filed her Notice of Appeal within thirty (30) days of issuance of the Judgment and Sentence. (R. Vol. I at 94). Accordingly, jurisdiction lies in this Honorable Court. FLA. R. APP. P. 9.140(b); FLA. R. APP. P. 9.030(b)(1)(A).

INTRODUCTION

Ms. Dippolito appeals her conviction on the charge of solicitation to commit first degree murder. The State alleged that Ms. Dippolito paid an undercover officer to murder her husband. At trial, the defense maintained that her husband, a reality television fanatic, engineered the plot to take his own life to garner media attention that would allow him to pursue opportunities in reality television.

During the course of the investigation, law enforcement conducted video surveillance of the solicitation. Law enforcement also took the unusual step of inviting a reality television show, COPS, to document the events as they unfolded. The Boynton Beach Police Department staged a fake crime scene and invited the COPS crew to film Ms. Dippolito's reaction as she was informed (falsely) that her husband had been killed. The video footage went viral on the internet, and, as a consequence, the case garnered an extraordinary amount of media attention in advance of litigation. The jury found Ms. Dippolito guilty as charged.

Ms. Dippolito raises four issues on appeal:

I. The trial court denied an unopposed request to conduct individual voir dire of prospective jurors. Then, after a potential juror informed the venire of a Palm Beach Post report that Ms. Dippolito tried to poison her husband with antifreeze, an allegation previously deemed inadmissible, the trial court denied motions to strike the panel and for mistrial. Did the court abuse its discretion?

II. At trial, the State presented the perpetuated deposition testimony of Mohamed Shihadeh, a key witness who was not only available to testify, but was arrested for DUI in South Florida in the middle of trial. Did the admission of his perpetuated testimony violate Ms. Dippolito's rights under the Confrontation Clause?

III. Is Ms. Dippolito entitled to a new trial where the trial court introduced prior bad act evidence featured at trial that was not inextricably intertwined with the charged crime and was not supported by clear and convincing evidence?

IV. During closing, the State called critical witnesses "truthful" and "honest," referred to facts not in evidence, shifted the burden of proof, featured inadmissible and inflammatory prior bad act evidence, and commented on Ms. Dippolito's right not to testify by pointing directly at the defendant and asking, "Where's the testimony?" Did the remarks deprive Ms. Dippolito of a fair trial?

STATEMENT OF THE CASE

On September 3, 2009, the State charged Ms. Dippolito with Solicitation to Commit First Degree Murder with a Firearm, in violation of Sections 777.04(2), 782.04(1)(a)(1) and 782.04(1)(a)(2), Florida Statutes. A jury trial ensued from April 25, 2011, through May 13, 2011. The jury returned a guilty verdict. (Tr. T. 3540-41). The trial court imposed a prison sentence of twenty (20) years. (R. at 1051)

STATEMENT OF THE FACTS

A. The Incident

In July of 2009, Mohamed Shihadeh approached an officer of the Boynton Beach Police Department to report that Ms. Dippolito requested his help to kill her husband. (Tr. T. at 1718-19). During the resulting investigation, the police set up several controlled phone calls between Mr. Shihadeh and Ms. Dippolito and video-recorded meetings between the two. (Tr. T. at 767, 1722, 1731). Ms. Dippolito later met with an undercover police officer, Widy Jean, for the alleged purpose of arranging the murder of her husband. (Tr. T. at 2547-59).

Ms. Dippolito followed Mr. Jean's instructions to leave her house the morning of the planned hit. (Tr. T. at 2207). Upon her return, she encountered a fake crime scene staged by the police to make it appear as if her husband had been killed. (Tr. T. at 2200-02). After informing Ms. Dippolito that her husband had

not, in fact, been killed, the police arrested Ms. Dippolito. (Tr. T. at 2450-54). The COPS camera crew captured the drama as it unfolded.

B. Ms. Dippolito's Theory of Defense

Ms. Dippolito's theory of the case was that the plot to murder her husband was a hoax devised by Mike Dippolito to garner fame as a reality television personality. (Tr. T. at 746-85). During opening statements, defense counsel argued that "the plot for the contract killing of Mike Dippolito was never real. It was a stunt. It was a hoax, a ruse, a plan that Mike hoped to capture the attention of someone in reality t.v." (Tr. T. at 749).

In support of her theory of defense, Ms. Dippolito provided the testimony of three witnesses: Ms. Dippolito's mother, Randa Mohammed; Dr. Sarah Coyne; and Carol Peden. Randa Mohammed testified that Ms. Dippolito had previously taken television production courses and had been a paid actress. (Tr. T. at 3177). Dr. Sarah Coyne, a professor at Brigham Young University and a reality TV expert, testified that there are three ways to break into reality TV: (1) through an audition process, (2) by pitching a reality TV show, or (3) engaging in "crazy" activity to become noticed. (Tr. T. at 3208). Dr. Coyne explained that through reality TV, anyone can become famous, garner celebrity status, and earn millions of dollars. (Tr. T. at 3209).

Carol Peden, a senior computer forensics analyst, was asked to search the Dippolitos' computer for anything related to reality TV shows and castings. (Tr. T. at 3232- 34). Ms. Peden testified that on May 13, 2009, the user searched numerous websites for reality TV castings generally, reality TV castings in Florida, and VH1 castings. (Tr. T. at 3240). On May 26, 2009, the user accessed a generic talent advertisement. (Tr. T. at 3240). On June 12, 2009, the user accessed a website called Affinity Models Talent Blogger, and on June 17, 2009, the user accessed a castings link on another reality TV website. (Tr. T. at 3240-1).

Counsel for Ms. Dippolito also highlighted the fact that (1) Ms. Dippolito looked directly at the camera during the course of the surveillance; and (2) the law enforcement failed to follow proper procedure in supervising Mr. Shihadeh; and (3) Mr. Dippolito and Mr. Shihadeh lacked credibility. (Tr. T. at 3430-31; 3385; 3399).

C. Jury Selection

Anticipating intense media scrutiny surrounding the trial, defense counsel submitted an unopposed motion requesting that prospective jurors be questioned individually. (R. at 238). Counsel noted that the case had been featured on national news programs, such as the Today Show, Good Morning America, CNN News, CBS Good Morning, 20/20, and Nancy Grace. (R. at 238). Counsel also noted that a number of DVDs and CDs which were provided to the defense by the

State during discovery were published on YouTube in advance of trial. (R. at 239, 257-63). Several of the videos published by the Boynton Beach Police Department to YouTube received tens of thousands of views. (R. at 239-240, 257-63; Tr. T. at 2109). The overwhelming majority of the media accounts portrayed Ms. Dippolito in a negative light, at times referring to her as the "Black Widow," and insinuating that Ms. Dippolito's guilt was a foregone conclusion. (R. at 240, 257-63).

The trial court denied the unopposed motion without prejudice. (R. at 551-553). Defense counsel raised the issue again prior to jury selection, noting that several newly-published articles discussed Ms. Dippolito's "surgical enhancements" and likened the case to the cases of Scott Peterson, Martha Stewart, or Michael Jackson. (Tr. T. at 14-15). He also noted that one of the articles suggested "there's no gray areas for the jury in this case," implying that the case is "some sort of slam dunk." (Tr. T. at 14-15). The trial court again denied the motion and proceeded with jury selection. (R. at 551-553).

During voir dire, defense counsel asked the jurors whether they had heard anything about the case in the media. (R. at 836). Twenty-eight of the fifty-four potential jurors acknowledged their exposure to media coverage regarding Ms. Dippolito's case. (R. at 836). Defense counsel then renewed his request for individual voir dire, explaining that asking each potential juror about the media coverage in the presence of the other potential jurors posed the risk of

contaminating the entire jury pool. (Tr. T. at 422-23). The trial court denied the request. (Tr. T. at 423).

As defense counsel feared, the potential jurors openly discussed their exposure to local and national media coverage of the case. (Tr. T. at 426-44). One potential juror, Mr. Marzouca, stated that he recalled Ms. Dippolito was reportedly arrested for "trying to have her husband killed for the proceeds of a townhouse." (Tr. T. at 433). Mr. Marzouca also candidly stated that he had "already made a judgment" that Ms. Dippolito was guilty based on his exposure to the media accounts. (Tr. T. at 434). Another potential juror, Ms. Caracciola, stated that she saw a video of Ms. Dippolito in handcuffs and recalled the allegation that Ms. Dippolito hired a hit man to kill her husband. (Tr. T. at 438-39).

Another potential juror, Mr. Baer, commented that, in addition to hearing the allegation of Ms. Dippolito hiring a hit man to kill her husband, he read an article in the Palm Beach Post reporting that Ms. Dippolito had attempted to kill her husband by poisoning him with antifreeze. (Tr. T. at 443). Since the trial court already ruled that any reference to the poisoning allegation was inadmissible, defense counsel requested that the entire jury panel be stricken and moved for a mistrial. (Tr. T. at 444-45). The trial court denied both requests. *Id*.

D. Perpetuated Testimony of Mohamed Shihadeh

On February 1, 2011, the State moved the Court to perpetuate the testimony of Mr. Shihadeh. (R. at 162-65). The State claimed he was a material witness, but would be beyond the territorial jurisdiction of the trial court at the time of trial because he lived in California. (R. at 162). Assistant State Attorney Elizabeth Parker submitted a verified affidavit averring that Mr. Shihadeh resided in California. (R. at 164). The State provided no other justification for the perpetuation of his testimony.

Over Ms. Dippolito's objection, the trial court ruled that Mr. Shihadeh's perpetuated testimony could be used at trial in lieu of his live testimony, provided that Mr. Shihadeh was unavailable to testify at trial. (R. at 891). On March 7, 2011, the parties took a video deposition of Mr. Shihadeh. (R. at 926). Contrary to the averment in the State's affidavit, Mr. Shihadeh testified that he had moved back to Florida and provided a mailing address in Boca Raton. (Tr. T. at 1760-62).

Prior to trial, Mr. Shihadeh informed the State that he would be out of the United States for an indefinite period of time and stated that he was not willing to come back to testify at trial. (R. at 926). However, on April 15, 2011, Mr. Shihadeh contacted counsel for the State. (R. at 927). During the conversation, Mr. Shihadeh told counsel that he would like to testify at trial and inquired as to whether the State would be willing to cover his traveling and lodging expenses.

(R. at 927). The State refused the request, reasoning that it had already paid for the video deposition and did not want to pay additional expenses. (R. at 927). In response, Ms. Dippolito offered to pay all expenses associated with procuring Mr. Shihadeh's attendance at trial. (R. at 927). However, Mr. Shihadeh ultimately reneged on his offer, citing a "family obligation." (R. at 927).

On April 19, 2011, Ms. Parker contacted Immigration Customs Enforcement ("ICE") to determine whether Mr. Shihadeh was outside of the United States. (R. at 927). ICE confirmed that Mohamed Shihadeh had boarded a plane on March 27, 2011, to Amman, Jordan. (R. at 927). Trial began on April 25, 2011. On April 26, 2011, Ms. Parker spoke with Mohamed Shihadeh's attorney, Ian Goldstien. (R. at 928). Mr. Goldstein represented that "he was under the belief that Mr. Shihadeh was still out of the country." (R. at 928). The State made no further inquiries regarding Mr. Shihadeh's availability between April 26 and April 29, 2011.

On April 29, 2011, the State informed the trial court that it intended to introduce Mr. Shihadeh's perpetuated testimony. (Tr. T. at 1651). The trial court made no inquiry as to the unavailability of Mr. Shihadeh or the diligence of the State in determining whether he could attend trial. (Tr. T. at 1651-63). The State then introduced nearly five (5) hours of Mr. Shihadeh's perpetuated testimony. (R. at 891; Tr. T. at 1655-1936). Because the State represented that Mr. Shihadeh

remained in Jordan, Ms. Dippolito did not object to the presentation of Mr. Shihadeh's perpetuated testimony. (R. at 893).

However, On May 9, 2011, Ms. Dippolito learned that Mr. Shihadeh had been arrested for DUI on May 3, 2011, in Boca Raton. (R. at 892; Tr. T. at 1946). Further investigation revealed that Mr. Shihadeh returned from Jordan to the United States on April 22, 2011, four days before the start of trial. (R. at 892). After the conclusion of the trial, defense counsel filed a motion for a new trial, arguing that the presentation of Mr. Shihadeh's testimony violated Ms. Dippolito's rights under the Confrontation Clause. (R. at 890-924). The trial court denied the motion. (R. at 949).

E. <u>Prior Bad Acts Evidence</u>

Prior to trial, the State asked the trial court to consider the admissibility of prior bad acts allegedly committed by Ms. Dippolito. (R. at 216-31). The State asserted that these acts were "inextricably intertwined" with the charged offense, and necessary to show Ms. Dippolito's intent and motivation. (R. at 224). Over strenuous objection, the trial court permitted the State to introduce evidence of a number of prior bad acts allegedly committed by Ms. Dippolito, including the following uncharged crimes. (R. at 614-19).

1. The First Attempt to Violate Mike Dippolito's Probation by Planting Drugs in his Chevy Tahoe.

Mr. Dippolito pled guilty in 2002 to organized fraud and was sentenced to two years in prison and twenty-eight years of probation. (Tr. T. at 806-07). Mr. Dippolito testified that he owed $191,000 in restitution to the victims. (Tr. T. at 808). He also testified that he gave Ms. Dippolito $100,000, with the understanding she would put that money and $91,000 of her own money into the trust account of an attorney, who would pay off the restitution and facilitate the termination of Mr. Dippolito's probation. (Tr. T. at 854).

According to the State, Ms. Dippolito never transferred the money to the trust account of Mr. Dippolito's attorney. (Tr. T. at 726, 732). The State suggested that Ms. Dippolito took the money for her own benefit and subsequently made several attempts, with the help of Mr. Shihadeh and Mr. Stanley, two of her alleged lovers, to violate Mr. Dippolito's probation so she would not have to repay the money. (R. at 216-31; Tr. T. at 3350, 3360). Two of the purported attempts to violate Mr. Dippolito's involved planting drugs in his car and setting up encounters with law enforcement.

The purported attempt occurred on March 15, 2009, after the couple spent an evening at the Ritz Carlton in Manalapan. (Tr. T. at 907). The next morning, after the valet brought Mike Dippolito's Chevy Tahoe to the front of the hotel, police stopped Mr. Dippolito to inform him they received a tip that he was selling drugs

from his car. (Tr. T. at 908). Mr. Dippolito consented to a search of the vehicle, but law enforcement found no evidence of contraband. (Tr. T. at 908). Mike Dippolito testified that the next day he found a baggie of Xanax and cocaine in the gas tank of his Chevy Tahoe and threw the drugs in a garbage can. (Tr. T. at 909). In opening and closing statements, the State maintained that Ms. Dippolito planted the drugs in his car to violate his probation. (Tr. T. at 727, 3468).

To establish that Ms. Dippolito planted the drugs, the State primarily relied on Mr. Shihadeh's perpetuated testimony. Mr. Shihadeh claimed that Ms. Dippolito told him about this incident and informed him that she was attempting to violate Mr. Dippolito's probation. (Tr. T. at 1680). Yet, on cross-examination, Mr. Shihadeh admitted that Ms. Dippolito never told him that she planted the drugs. (Tr. T. at 1843). Mr. Shihadeh also testified that law enforcement found the drugs in the gas tank, testimony that conflicted with every other witness who testified regarding the incident, including Mr. Dippolito. (Tr. T. at 1843).

The trial court also heard testimony from Mr. Dippolito's probation officer, who referred to a report that Barbara Lee, a neighbor of the Dippolitos, lodged a complaint about Mr. Dippolito "selling drugs to her son again." (Tr. T. at 1663, 1645). Mike Dippolito also testified that he had a long history of drug abuse, having smoked marijuana at the age of twelve before moving to cocaine and LSD at the age of fifteen. (Tr. T. at 809). He admitted that he had a "horrific" addiction

and had been admitted to a number of different drug rehabilitation facilities before regaining his sobriety. (Tr. T. at 808, 810-14, 817). Ms. Dippolito was neither arrested, nor charged, with any crime in connection with this incident.

2. The Second Attempt to Violate Mike Dippolito's Probation by Planting Drugs in his Chevy Tahoe.

Mr. Dippolito testified that, on March 29, 2009, as he and Ms. Dippolito were driving home, they decided "on the spur of the minute" to stop at City Place to shop and have dinner. (Tr. T. at 912). After their dinner, law enforcement again stopped Mr. Dippolito and again asked him to consent to a search. (Tr. T. at 913). Law enforcement found cocaine in the car, but released Mr. Dippolito without arrest. (Tr. T. at 915).

The State referred to the incident at City Place in opening and closing statements, attempting to establish that Ms. Dippolito planted the drugs and tipped off police. (Tr. T. at 729, 3360). Again, this accusation was developed through the perpetuated testimony of Mr. Shihadeh, who stated that Ms. Dippolito told him about the incident and informed him that this was another attempt to arrange a violation of Mr. Dippolito's probation. (Tr. T. at 1680). Yet, on cross, Mr. Shihadeh admitted that Ms. Dippolito never told him that she planted the drugs. (Tr. T. at 1843).

Mr. Dippolito testified that he told a law enforcement officer on the scene, Officer Hooper, he thought his ex-wife, Maria Longo, set him up because she was

mad at him for cheating on her and lying to her. (Tr. T. at 1257-58). Officer Hooper corroborated this testimony and confirmed that Mr. Dippolito told her he suspected his ex-wife was trying to set him up so he would go to prison. (Tr. T. at 1408). Officer Hooper also testified that law enforcement tested the bag of cocaine for fingerprints, but the results were inconclusive. (Tr. T. at 1402). Ms. Dippolito was neither arrested, nor charged with a crime in connection with this incident.

3. Ms. Dippolito's Alleged Attempt to Hire Another Hit Man.

According to Mr. Shihadeh's perpetuated testimony, Ms. Dippolito became acquainted with a "Larry" from Riviera Beach. (Tr. Tr. at 1701). Mr. Shihadeh testified that "Larry" told him Ms. Dippolito showed him where she lived, in hopes that "Larry" would kill her husband. (Tr. T. at 1701-02). Mr. Shihadeh testified that he later received calls from "Larry" asking if Ms. Dippolito was "legit" and stating that they needed the money before they could do the job. (Tr. T. at 1705). When asked, Mr. Shihadeh could not verify who "Larry" was, but referred to him as a "really bad person in Riviera Beach." (Tr. T. at 1704). Mr. Shihadeh could not provide "Larry's" phone number because he stated that "Larry" "changes his number every week." (Tr. T. at 1718).

The State attempted to establish that Ms. Dippolito had several phone conversations with "Larry" through the testimony of Sergeant Eddy. (Tr. T. at 1957). However, during cross examination, Sergeant Eddy admitted (1) he had no

knowledge that Ms. Dippolito made the calls in question; (2) he had no knowledge that the calls were answered by "Larry"; and (3) he had no knowledge that Ms. Dippolito even knows "Larry." (Tr. T. at 1959-60). Sergeant Eddy also confirmed that the phone number he attributed to "Larry" was registered to a female, whose name he could not recall. (Tr. T. at 1960).

4. Quitclaim Deed

On July 31, 2009, the Dippolitos executed a quit claim deed of their marital property to Ms. Dippolito's name only. (R. at 222-23; Tr. T. at 739-43, 3354). The State contended Ms. Dippolito arranged the transaction in order to get sole ownership of the home, so that when Mike Dippolito's probation was violated, she could divorce him and take the home while he was in prison. (R. at 222-23; Tr. T. at 739-43). At trial, however, the attorney who effectuated the transaction testified that Mr. Dippolito came to his office with Ms. Dippolito to execute the quit-claim deed. (Tr. T. at 1559). According to the attorney, Mr. Dippolito said the transaction was necessary for him to receive a grant or a loan. (Tr. T. at 1559). The attorney also stated that he did not suspect any fraudulent activity at the time they executed the transaction. (Tr. T. at 1559).

5. Theft of Mohamed Shihadeh's Firearm

Mr. Shihadeh owned several guns. (Tr. T. at 1716-17). On direct examination, Mr. Shihadeh testified that Ms. Dippolito asked him for his gun

outside the Mobil gas station near her house. (Tr. T. 1718). Mr. Shihadeh thought she was joking and they exited the car. (Tr. T. at 1718). According to Mr. Shihadeh, Ms. Dippolito told him that she forgot something in the car and went to retrieve it. (Tr. T. at 1718). Mr. Shihadeh later realized the gun was missing and retrieved it from her. (Tr. T. at 1718). Mr. Shihadeh changed his story later in the deposition, claiming that he left her inside the car while he went to purchase something from the gas station. (Tr. T. at 1720). Mr. Shihadeh maintained that this event, coupled with the calls he received from "Larry," prompted him to report Ms. Dippolito to law enforcement. (Tr. T. at 1718).

Although he claimed to have a photographic memory (Tr. T. at 1827), on cross examination, Mr. Shihadeh acknowledged he previously stated that Ms. Dippolito had taken his gun when he got out of his car to smoke a cigarette with his cousin in front of his cousin's store – not the Mobil gas station near Ms. Dippolito's house. (Tr. T. At 1877). He confessed that he was not entirely sure whether incident occurred in front of the Mobil gas station. (Tr. T. at 1877).

This was not the only fact that Mr. Shihadeh could not recall: he cited a lack of recollection forty-eight times during the course of the deposition. (Tr. T. at 1668, 1672, 1674, 1677, 1680, 1681-82, 1686-87, 1694, 1695-96, 1697, 1700, 1706, 1713, 1714, 1722, 1727-29, 1734-35, 1735, 1742-43, 1745, 1747, 1750-51, 1754, 1760, 1769, 1777, 1794, 1799, 1812, 1814, 1817, 1822, 1826, 1831, 1845,

1854, 1855, 1874-75, 1875-76, 1885-86, 1897, 1913, 1915-16, 1917, 1919, 1932, 1933). In one particular lapse of memory, Mr. Shihadeh stated that he could not remember whether Ms. Dippolito ever changed her mind about carrying out the alleged plot. (Tr. T. at 1747).

F. <u>The State's Closing and Rebuttal Arguments</u>

On May 13, 2011, the court heard closing arguments. The State argued that the case "is about greed, manipulation and doing whatever and anything it takes to get exactly what [Ms. Dippolito] wants." (Tr. T. at 3336-37). As evidence of greed, the State argued that Ms. Dippolito manipulated Mr. Dippolito into signing the quit-claim deed. (Tr. T. at 3354-55). The State also referred to Ms. Dippolito's attempts to get his probation violated. (Tr. T. at 3353).

With respect to manipulation, the State defined the word as "an evil tactic" employed by Ms. Dippolito to "get exactly what she wants." (Tr. T. at 3350). As evidence of manipulation, the State cited Ms. Dippolito's "use" of sex, "one of her most powerful tools." (Tr. T. at 3351). Counsel stated that Ms. Dippolito used sex to manipulate Mr. Shihadeh, noting they "had sex in parking lots" and that she would "randomly give him blow jobs when she would see him." (Tr. T. at 3351). Counsel then discussed Ms. Dippolito's purported use of sex to manipulate Mike Stanley:

> He'd meet with the defendant, they'd have sex. She's make promises to him. She promised him they'd be together. She told him

> constantly you're my soulmate, reeling him in. . . . Now some of those texts. . . . I miss you kissing me. I haven't stopped think about you. I love you so much. I'm so attracted to you, inside me and out. Baby, you're everything I want and need. Do you feel the same? I love you so much. I'm so horny for you. I want your baby in me. I think now we're closer than ever, do you agree? Love you so much. I love the way you are with me. I love the attention. To do this she needs to continue manipulating, so the sexting continues. What time will you be here? I want us to start baby making. Soulmates is what we are, meant to be together. Do you know I have baby names picked out? I want your child in me.

(Tr. T. at 3352-53). Counsel for the State then declared its disapproval of Ms. Dippolito's purported promiscuity: "During what should have been the honeymoon phase, the first six months of her marriage, she's out sleeping with three different men." (Tr. T. at 3364).

The State also repeatedly referred to the prior bad act evidence introduced through Mr. Shihadeh during its closing arguments. The State first discussed the purported theft of Mr. Shihadeh's firearm. (Tr. T. at 3338). According to the State, as soon as Mr. Shihadeh found out she had stolen the gun, he "knew that she was serious. She wanted to kill her husband." (Tr. T. at 3339). The State described the execution of the quit-claim deed as the accomplishment of "one huge goal." (Tr. T. at 3354).

The State also referred to the two purported instances of planting drugs as evidence of Mr. Shihadeh's honesty, suggesting that the two instances were consistent with Mr. Dippolito's testimony, despite the conflict in their testimony

regarding law enforcement's discovery of drugs in the gas tank. (Tr. T. at 3360). The State pressed on, insisting that Mr. Shihadeh's testimony was "consistent and truthful." (Tr. T. at 3360). Similarly, the State characterized the testimony of Mr. Dippolito as "honest" – "He sat up there and was honest. And he is consistent with his answers." (Tr. T. at 3360).

By contrast, when discussing Randa Mohamed, a key defense witness, the State referred to her "obvious bias" and suggested that Ms. Mohamed grew upset on the stand because she "knew her daughter was out meeting with a hit man to have her husband murdered." (Tr. T. at 3362-63). Defense counsel moved for mistrial after this comment because the State adduced no evidence at trial regarding Ms. Mohamed's belief that her daughter committed the alleged offense. (Tr. T. at 3363). The trial court denied the request. (Tr. T. at 3363).

Counsel for the State then addressed Ms. Dippolito's theory of defense: "The defense wants you to believe that this was a bad prank, a stunt. There's absolutely no evidence of this. You have seen a greedy, manipulative evil woman who won't stop at anything to get what she wants." (Tr. T. at 3364).

After counsel for Ms. Dippolito presented closing statements, the State gave its rebuttal. It began by quoting Sir Walter Scott,[1] directly alluding to media's penchant for calling Ms. Dippolito the "Black Widow": "Oh, what a tangled web

[1] W. Scott, *Marmion, Canto VI, st. 17* (1808).

we weave, when we practice to deceive." (Tr. T. at 3458). The State then extended the spider metaphor through reference to prior bad acts: "The tangled web of trying to get Mr. Dippolito's probation violated, have him arrested. A tangled web of using sex to get what she wants." (Tr. T. at 3458). After discussing the evidence, counsel for the State expressed her opinion regarding Ms. Dippolito's guilt: "There is no denying it. They can't say it's not her. They can't say she didn't say it. They can't say she didn't do it. . . ." (Tr. T. at 3459).

Then, the State directly addressed Ms. Dippolito's theory of defense and highlighted the purported lack of evidence presented by Ms. Dippolito:

> [W]here is the evidence? Where is evidence that this was a reality show? Where was the stunt? We don't know. There is none. Absolutely none. Nothing but innuendo by Mr. Salnick, suggestions and a great story. Where is the evidence? Not one document, not one phone call, not one video, not one statement, not one word - - not one word was uttered during this investigation, not one word was uttered to the detective, not one word was captured on the phone calls about this being a reality stunt, not by the defendant or anyone else.

(Tr. T. at 3461).

Similarly, when discussing the opinion of Ms. Dippolito's expert, Dr. Coyne, counsel for the State again highlighted what it viewed as a lack of evidence, "what evidence did she offer? No opinion. She never even spoke to the defendant." (Tr. T. at 3462). Later in closing, counsel for the State maintained that in "order to believe Mr. Salnick's story everyone's testimony in this case has to be a lie." (Tr. T. 3507-08).

Counsel for the State later summarized the theory of defense as follows:

> What the defense has presented to you, ladies and gentlemen, that's a hoax. It's not supported by the evidence. The evidence shows just the opposite. This is a plan. This is a plot. This was a cold, calculated, premeditated murder. . . . The defendant - - defense wants you to speculate, to think, could have been possible - - maybe - - could have been true that this was a stunt for reality television, but again, where is the evidence? Where is the testimony? Where is it?

(Tr. T. at 3463-64).

After this remark, counsel for Ms. Dippolito immediately moved for mistrial. (Tr. T. at 3464). At sidebar, defense counsel argued that the prosecutor looked "right at Ms. Dippolito" and stated "where's the testimony." (Tr. T. at 3464-65). Defense counsel told the trial court there "could not be any more clear comment" on Ms. Dippolito's right not to testify. (Tr. T. at 3465). The trial court denied the motion. (Tr. T. at 3465). In his post-trial motion for new trial, defense counsel further explained that the prosecutor walked over to the defendant and pointed purposely and emphatically at her while making this comment. (R. at 824). The trial court denied that motion as well. (R. at 886).

After the denial of a mistrial, the State continued as follows: "Where's the evidence . . . . they want you to speculate because there is no evidence." (Tr. T. at 3465). Prior to concluding its rebuttal, the attorney for the State made repeated references to prior bad act evidence, including the alleged attempts to plant drugs to violate Mr. Dippolito's probation (Tr. T. at 3468, 3471, 3480, 3487, 3497, 3509,

3522), her alleged attempt to divest Mr. Dippolito of their house (Tr. T. at 3468, 3469, 3480, 3495), her alleged attempt to hire "Larry" (Tr. T. at 3470, 3471-72, 3489, 3490, 3499, 3512), and her alleged attempt to steal Mr. Shihadeh's gun (Tr. T. at 3472). According to the State, Ms. Dippolito "wasn't acting. That's who she is. She's like poison candy, attractive on the outside but deadly on the inside." (Tr. T. at 3486).

Near the conclusion of the rebuttal, the State rhetorically asked if Mr. Shihadeh had "wanted his big break for reality television wouldn't he have been here live to testify?" (Tr. T. at 3483). Counsel for Ms. Dippolito objected to this line of argument. (Tr. T. at 3484) According to defense counsel, bolstering the testimony of Mr. Shihadeh by virtue of his failure to provide live testimony was "certainly not within the spirit of the perpetuated deposition testimony." (Tr. T. at 3484). Mr. Salnick asked that the testimony be stricken and requested a curative instruction. (Tr. T. at 3484-85). The trial court overruled the objection.

After the conclusion of the trial, the jury returned a guilty verdict.

SUMMARY OF THE ARGUMENT

The trial court committed four reversible errors. First, the trial court abused its discretion when it inexplicably refused an *unopposed* request to conduct individual and sequestered voir dire to ascertain the degree to which the jury pool had been exposed to prejudicial media reports. The court compounded that error

when it empaneled a jury tainted by comments of members of the venire, including one potential juror who informed the panel that the Palm Beach Post reported that Ms. Dippolito attempted to kill her husband by poisoning him with antifreeze. Though the court had already ruled that this highly prejudicial claim would be inadmissible at trial, the court refused Ms. Dippolito's request to strike the jury and replace it with an uncontaminated panel.

Second, the trial court erred when it permitted the introduction of the videotaped deposition of Mohamed Shihadeh, the State's most important witness, in lieu of live testimony. In the pretrial hearing on the matter, the State explained that Mr. Shihadeh could not attend because he resided in California. Under *Knox v. State*, 98 So. 3d 679 (Fla. 4th DCA 2012), this explanation is inadequate to justify the perpetuation of a videotaped deposition. More troubling, during the deposition testimony, Mr. Shihadeh informed the participants that he lived in Florida, not California. Finally, during the course of trial, it came to light that Mr. Shihadeh was not only available to testify, he was arrested for DUI in South Florida. Under *Knox*, this Court must reverse this violation of Ms. Dippolito's rights under the Confrontation Clause.

Third, the trial court erred in permitting the State to introduce evidence of prior bad acts, including a number of uncharged and unsubstantiated crimes that bore only a tenuous connection to Ms. Dippolito. The State failed to establish that

Ms. Dippolito committed the acts in question by clear and convincing evidence, and failed to show the acts were "inextricably intertwined" with the charged offense. The State amplified the prejudice to Ms. Dippolito when it chose to feature the prior bad acts prominently in its closing statements, thereby transforming a trial on solicitation of murder into a trial on Ms. Dippolito's character. The trial court should have granted Ms. Dippolito's motion for new trial.

Finally, the State's closing statements were littered with improper arguments. Counsel for the State: (1) bolstered the testimony of key witnesses, including Mr. Shihadeh, who the State characterized as "truthful," and Mike Dippolito, who the State characterized as "honest"; (2) referred to facts not in evidence, when it argued that Ms. Dippolito's mother "knew her daughter was out meeting with a hit man to have her husband murdered," despite the absence of any evidence that Ms. Mohammad had knowledge of the alleged offense; (3) launched an improper attack on Ms. Dippolito's character, featuring inadmissible prior bad act evidence to show her propensity to commit the charged offense and lurid details of Ms. Dippolito's purported promiscuity to inflame the passion of the jury; (4) impermissibly attempted to shift the burden of proof by repeatedly asking the jury to identify the evidence offered in support of her theory of defense; and (5)

impermissibly commented on Ms. Dippolito's right not to testify when counsel for the State pointed directly at Ms. Dippolito and asked, "Where's the testimony?"

The errors above cannot be explained away as harmless. From its inception to its conclusion, the jury was exposed to inadmissible, inappropriate, and highly prejudicial allegations about Ms. Dippolito. This information flowed from the media, members of the venire, counsel for the State, and the videotaped deposition of a readily available witness. Then, in the *coup de grace*, counsel for the State vitiated Ms. Dippolito's theory of defense by pointing directly at her and asking, "Where's the testimony?" These interlocking errors had the cumulative effect of depriving Ms. Dippolito of a fair trial. Accordingly, this Court should reverse the judgment and conviction and remand this matter for a new trial.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED AN UNOPPOSED REQUEST TO CONDUCT INDIVIDUAL AND SEQUESTERED VOIR DIRE AND REFUSED TO STRIKE THE JURY AFTER A MEMBER OF THE VENIRE INFORMED THE JURORS OF AN INADMISSIBLE NEWS REPORT THAT MS. DIPPOLITO ATTEMPTED TO POISON HER HUSBAND

A. Standards of Review

This Court reviews the denial of a request for individual examination of prospective jurors or a request to strike a jury panel for abuse of discretion. *Stone*

v. State, 378 So. 2d 765 (Fla. 1979), *cert. denied*, 449 U.S. 986 (1980); *Brower v. State*, 727 So. 2d 1026, 1027 (Fla. 4th DCA 1999).

B. Argument on the Merits

The trial court abused its discretion when it rejected a stipulated request to conduct individual and sequestered voir dire and then declined to strike the panel when a prospective juror informed the entire venire of media reports alleging that Ms. Dippolito previously attempted to kill her husband by poisoning him with antifreeze.

"Under article I, section 16, of the Florida Constitution, and Florida Rule of Criminal Procedure 3.251, an accused has the right to trial by an impartial jury." *Evans v. State*, 36 So. 3d 185, 186 (Fla. 4th DCA 2010) (citing FLA. CONST. ART. I, § 16; FLA. R. CRIM. P. 3.251); *see also Wilding v. State*, 427 So. 2d 1069, 1069 (Fla. 2d DCA 1983) (same). This right is violated when jurors are inadvertently informed that the defendant has other pending charges or when jurors are inadvertently informed that the defendant is a convicted felon. *Evans*, 36 So. 3d at 186 (citations omitted).

The right to an impartial jury is also violated when the trial court seats a juror who has been recently exposed to pretrial media reports containing damaging inadmissible information. *Bolin v. State*, 736 So. 2d 1160, 1162 (Fla. 1999); *see also Boggs v. State*, 667 So. 2d 765, 768 (Fla. 1996); *Kessler v. State*, 752 So. 2d

545, 552 (Fla. 1999). As such, the Florida Supreme Court has repeatedly stated that the "preferred approach" is to permit individual and sequestered voir dire of prospective jurors who have learned of inadmissible and prejudicial facts through media reports. *Kessler*, 752 So. 2d at 550 (citing *Bolin*, 736 So. 2d at 1165-66). The Florida Supreme Court has also found the failure to follow this procedure constitutes prejudicial error. *Bolin*, 736 So. 2d at 1166; *Boggs*, 667 So. 2d at 768; *Kessler*, 752 So. 2d at 552 ("we must reverse because the trial court failed to allow adequate screening of jurors concerning pretrial publicity").

As in *Bolin*, *Boggs* and *Kessler*, the trial court here abused its discretion when it failed to permit individual and sequestered voir dire of prospective jurors. Defense counsel and counsel for the State *agreed* that the intense media scrutiny required the court to follow the Florida Supreme Court's "preferred approach" of individual and sequestered voir dire of prospective jurors. In his motion, defense counsel provided the court with guidance regarding the preferred approach. (R. at 265-76). Defense counsel also provided the court with specific evidence of the remarkable amount of national and local publicity surrounding the case, the overwhelming majority of which portrayed Ms. Dippolito in a negative light, referring to her as the "Black Widow," and presuming that she committed the crime in question. (R. at 240, 258).

Moreover, unlike other high-profile criminal prosecutions, the general public in this case had exposure through media reports and YouTube to the very same videographic evidence that formed the cornerstone of the State's case. (R. at 257-63). The trial court abused its discretion when it denied defense counsel's motion requesting individual and sequestered voir dire, especially considering the State's acquiescence to the request. *See Bolin*, 736 So. 2d at 1162; *Boggs*, 667 So. 2d at 768. The trial court further abused its discretion when it denied defense counsel's renewed request after twenty-eight of the fifty-four potential jurors confessed that they had heard or read something in the media about this case. *Id*.

Compounding this error, in a perfect illustration of the dangers associated with collective voir dire under such circumstances, the trial court permitted the entire jury panel to listen while each potential juror rebroadcast the prejudicial media coverage. One juror commented that he saw Ms. Dippolito in handcuffs. (Tr. T. at 438). Another potential juror recalled the Palm Beach Post reported that Ms. Dippolito attempted to poison her husband with antifreeze. (Tr. T. at 443).

After hearing this response, trial counsel for Ms. Dippolito contemporaneously moved the court to strike the jury or grant a mistrial. The trial court abused its discretion in denying the requests. *See Evans v. State*, 36 So. 3d at 186 (court abused its discretion when it failed to grant mistrial when comment of potential juror raised inference that defendant had prior criminal charges and/or

convictions); *Wilding*, 427 So. 2d at 1069 (similar). As explained in *Wilding*, when evidence is introduced in this manner, "the prejudice . . . is almost as certain to be as great, if not greater," than "when it is a part of the prosecutor's evidence and subject to protective procedures." *Id*.

In this case, the comment exposed each member of the venire to highly prejudicial and inadmissible information. Accordingly, the trial court abused its discretion when it denied Ms. Dippolito's request for individual voir dire of prospective jurors and then denied her request for a mistrial after the entire jury panel was exposed to highly prejudicial and otherwise inadmissible evidence.

II. THE TRIAL COURT ERRED WHEN IT ALLOWED THE PERPETUATION OF MR. SHIHADEH'S TESTIMONY BECAUSE THE STATE DID NOT COMPLY WITH RULE 3.190(i) AND THE WITNESS WAS AVAILABLE TO TESTIFY WHEN THE STATE INTRODUCED HIS PERPETUATED TESTIMONY.

A. Standard of Review

A decision on whether to grant a motion to perpetuate testimony lies within the discretion of the trial court. *See Hurst v. State* , 18 So. 3d 975, 1007 (Fla. 2009). A trial court has broad discretion in ruling on a motion for a new trial, and that ruling will not be disturbed except on a showing of clear showing of abuse of discretion. *Cloud v. Fallis*, 110 So. 2d 669 (Fla. 1959).

B. Argument on the Merits

The trial court erred when it permitted the State to perpetuate the deposition testimony of Mr. Shihadeh, in spite of the abject failure to comply with Rule 3.190(i) of the Florida Rules of Criminal Procedure. The trial court also erred when it failed to inquire as to Mr. Shihadeh's availability prior to the admission of his deposition at trial and then failed to grant a mistrial after it became apparent that Mr. Shihadeh was available to testify. This Court should grant Ms. Dippolito a new trial to remedy this manifest violation of her rights under the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . ." The Confrontation Clause ensures that: (1) the witness will give the testimony under oath; (2) the witness will be subject to cross-examination, and (3) that the jury will have the chance to observe the demeanor of the witness in order to properly assess credibility. *Knox v. State*, 98 So. 3d 679, 682 (Fla. 4th DCA 2012) (quoting *Harrell v. State*, 709 So. 2d 1364, 1368 (Fla. 1998)). Article 1, Section 16(a) of the Florida Constitution places additional emphasis on the provision of *live* testimony in criminal proceedings: "In all criminal prosecutions the accused . . . shall have the right . . . to confront *at trial*

adverse witnesses. . . ." Art. I, § 16(a), Fla. Const. (emphasis added); *Harrell v. State*, 709 So. 2d 1364, 1367 (Fla. 1998).

However, the right to physically confront a witness is not absolute, and Florida law permits parties to move to perpetuate testimony by deposition in limited circumstances. *See* FLA. R. CRIM. P. 3.190(i). Rule 3.190(i)(1) requires the movant to swear "that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice." FLA. R. CRIM. P. 3.190(i)(1). A party's deposition testimony is not admissible as substantive evidence at trial unless the proponent complies with Rule 3.190(i). *See Melehan v. State*, 4D09-5326, 2012 WL 2012218 at *4 (Fla. 4th DCA June 6, 2012); *Rodriguez v. State*, 609 So. 2d 493 (1992).

Even when a party has strictly complied with the requirements of Rule 3.190(i), the perpetuated deposition is still inadmissible "*when the attendance of the witness can be procured*." FLA. R. CRIM P. 3.190(i)(6) (emphasis added); *see also McMillon v. State*, 552 So. 2d 1183, 1184 (Fla. 4th DCA 1989) ("it is clear that the mere taking of a deposition to perpetuate testimony does not *ipso facto* qualify it for admission at a subsequent trial or hearing unless . . . it becomes necessary due to the incapacity or inability of the witness to attend and testify.")

The party asserting the unavailability of a witness for trial must show due diligence in searching for the witness and attempting to coordinate live trial testimony in order for the prior deposition testimony to be admissible. *See Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983) (holding that party offering deposition testimony in lieu of live testimony must perform more than a perfunctory attempt to contact a witness). Furthermore, "mere reluctance of a witness to attend a trial - understandable or not - does not mean that the State is unable to procure his attendance." *McLain v. State*, 411 So. 316, 317 (Fla. 3d DCA 1982).

This Court recently reiterated the importance of strict compliance with the requirements of Rule 3.190. *Knox v. State*, 98 So. 3d 679 (Fla. 4th DCA 2012). In *Knox*, the State sought to perpetuate the testimony of an out-of-state victim. *Id*. The State provided the victim's sworn affidavit, which explained that "she is unable to travel again to Florida due to the economic hardship it would present to her." *Id*. at 680-81. The trial court granted the motion, reasoning that the out-of-state victim "cannot afford to return to Florida for the trial and . . . is a material witness." *Id*. At trial, the court perpetuated the victim's videotaped deposition testimony. *Id*.

On appeal, the defendant argued that the trial court violated the Confrontation Clause. *Id*. at 681-82. This Court agreed. *Id*. at 682. It reasoned that (1) the motion and affidavit did not provide any explanation as to why the

State could not have remedied the out-of-state victim's alleged economic hardship; and (2) the State did not meet its burden of demonstrating that the victim's attendance could not be procured. *Id*. Since the State did not meet its burden in demonstrating that the perpetuated testimony was justified "based on important state interests, public policies, or necessities of the case" or that it was "necessary . . . to prevent a failure of justice" this Court reversed and remanded the case for a new trial. *Id.* (*citing Harrell*, 709 So. 2d at 1369).

As in *Knox*, the State failed to strictly comply with Rule 3.190(i) because it (1) proffered an entirely inadequate explanation as to why the failure to take Mr. Shihadeh's deposition would constitute a failure of justice; and (2) it failed to meet its burden in demonstrating his attendance could not be procured. In its motion, the State maintained that the perpetuation of Mohamed Shihadeh's testimony was necessary because he resided in California at the time. (R. 162). The State attempted to substantiate Mohamed Shihadeh's purported residency in California through a verified affidavit of Elizabeth Parker, counsel for the State. (R. at 164). However, under *Knox*, residence in another state is insufficient to meet the State's burden of showing that the perpetuated testimony was justified "based on important state interests, public policies, or necessities of the case" or that it was "necessary . . . to prevent a failure of justice." *Knox*, 98 So. 3d at 682 (citing

Harrell, 709 So. 2d at 1369). Thus, under *Knox*, this introduction of the perpetuated testimony is reversible error.

Even if the proffered explanation satisfied Rule 3.190(i), Mr. Shihadeh provided testimony that directly conflicts with the affidavit offered by the State. Mr. Shihadeh admitted that he resided in Florida and actually confirmed his current mailing address in Boca Raton. (Tr. T. at 1760-62). At that point, the State should have realized that Mr. Shihadeh was no different from any other witness and called off the deposition. It failed to do so. Because the State failed to comply with the requirements of Rule 3.190(i), it was error to use the perpetuated deposition testimony as substantive evidence at trial.

The trial court also committed reversible error when it allowed the use of Mohamed Shihadeh's perpetuated testimony at trial. Under Rule 3.190(i)(6), the party seeking the admission of perpetuated testimony carries the burden of demonstrating that the witness's attendance could not be procured. *Knox*, 98 So. 3d at 683 (citing FLA. R. CRIM. P. 3.190(i)(6) and *McMillon v. State*, 552 So. 2d at 1185).

In this case, the trial court made no inquiry whatsoever into the availability of the witness. (Tr. T. at 1651). Had it done so, the trial court would have learned that Mr. Shihadeh unilaterally contacted the State's attorney and offered to provide live testimony if the State could pay for his travel expenses. (R. at 927). The State

admitted that it declined to pay the travel expenses because it was a last-minute trip and because it already expended costs on the deposition. *Id*.

This rationale flawed for two reasons. First, as recognized in *Knox*, the Florida Statutes specifically provide the state attorneys' office with resources to cover the costs of travel expenses of State witnesses in criminal trials. *Knox*, 98 So. 3d at 682 (citations omitted). Second, if reliance on the costs associated with taking the deposition were sufficient to establish that a witness is unavailable, then Rule 3.190(i)(6) would have no legal effect. Any time the State attempts to use perpetuated deposition testimony it has necessarily borne the costs associated with taking the deposition. But those costs do not supplant the requirement that the State show that the attendance of the witness cannot be procured prior to using the deposition at trial. *Id*.; *McMillon v. State*, 552 So. 2d at 1184; FLA. R. CRIM. P. 3.190(i)(6). Thus, the State should have agreed to pay for the costs associated with Mr. Shihadeh's attendance at trial.

It is true that Mr. Shihadeh subsequently rejected defense counsel's offer to pay for travel expenses, citing unspecified family obligations. However, Mr. Shihadeh, himself, demonstrated that this excuse regarding family obligations was patently false. On May 3, 2011, four days after the presentation of his deposition testimony, law enforcement arrested Mr. Shihadeh for DUI in South Florida. (R. at 892; Tr. T. at 1946). The trial court learned that Mr. Shihadeh returned to South

Florida on April 22, 2011. (R. at 892). After the conclusion of trial, counsel for Ms. Dippolito moved for mistrial because Mr. Shihadeh's testimony had already been presented to the jury. (Tr. T. at 1666-1938). The trial court should have granted the motion. *See Melehan v. State*, 4D09-5326, 2012 WL 2012218 at *4 (trial court should have granted mistrial because striking deposition testimony and give curative instruction were insufficient to cure prejudice resulting from 2-day delay in providing the instruction).

It is anticipated that the State will argue, as it did below, that Ms. Dippolito waived the right to complain of this error because counsel did not move for mistrial after belatedly learning of Mr. Shihadeh's availaibility, and because she had the opportunity to call Mr. Shihadeh as a witness in her case-in-chief. (R at 926-32). This argument fails for two reasons. First, as noted, the two errors associated with the presentation of Mr. Shihadeh's testimony occurred prior to the discovery of his whereabouts. To wit, Mr. Shihadeh's testimony should not have been taken via deposition and the testimony should not have been introduced at trial. Mr. Shihadeh's reemergence should not inure to the benefit of the State, the party who should have procured his attendance in the first instance.

Second, the prejudice associated with the presentation of Mr. Shihadeh's deposition testimony was irreparable. No curative instruction or subsequent presentation of Mr. Shihadeh's testimony would have been "sufficient to 'unring

the bell'" sounded by his perpetuated testimony. *Melehan v. State*, 4D09-5326, 2012 WL 2012218 at *5. In *Melehan*, the trial court erred when it failed to grant a mistrial after belatedly realizing that the deposition testimony should not have been admitted. *Id*. Here, four days had passed, and the trial court failed to give a curative instruction or strike the testimony. Moreover, Mr. Shihadeh's deposition testimony, which consists almost entirely of admissions purportedly made by Ms. Dippolito, is replete with leading questions, rank hearsay, and inadmissible prior bad act testimony, all of which was presented directly to the jury. (Tr. T. at 1666-1938). Perhaps the most telling illustration of this point is Mr. Shihadeh's testimony regarding "Larry," the alleged first hit man.

Mr. Shihadeh testified that "Larry" told him that Ms. Dippolito had shown them her house so that he and his associates could later kill her husband or commit a robbery. (Tr. T. at 1700-02). He also testified that he received calls from "Larry" asking if Ms. Dippolito was "legit" and stating that they needed the money before they could do the job. (Tr. T. at 1705, 1718). "Larry's" testimony is hearsay because it was introduced for the truth of the matter asserted. The substance of the hearsay is prior bad act evidence, and, given its resemblance to the charged offense, any arguable probative value of the testimony is substantially outweighed by the danger that the jury would consider it for the improper purpose

of propensity to commit the crime. *Ritz v. State*, 101 So. 3d 939, 944 (Fla. 4th DCA 2012).

Surely, the trial court would not have permitted the introduction of this incredibly damaging hearsay evidence if the State had presented the testimony live at trial and defense counsel had timely objected. Yet, because the trial court abdicated its role as an evidentiary gatekeeper, the testimony was erroneously presented to the jury. No curative instruction or *post hoc* cross-examination could suffice to cure the prejudice worked on Ms. Dippolito. Because the testimony vitiated Ms. Dippolito's right to a fair trial, the court should have granted a mistrial. *Melehan v. State*, at *5-6.

Considering the importance of Mr. Shihadeh's testimony, the trial court abused its discretion when it perpetuated his testimony and denied a mistrial after it discovered that Mr. Shihadeh was available to testify at trial.

III. MS. DIPPOLITO IS ENTITLED TO A NEW TRIAL BECAUSE THE PRIOR BAD ACT EVIDENCE FEATURED AT TRIAL WAS NOT INEXTRICABLY INTERTWINED WITH THE CHARGED CRIME AND WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

A. Standards of Review

A decision on whether to admit evidence of prior bad acts will not be disturbed absent an abuse of discretion. *McGirth v. State*, 48 So. 3d 777, 786-87 (Fla. 2010). A trial court has broad discretion in ruling on a motion for a new trial.

Cloud v. Fallis, 110 So. 2d 669 (Fla. 1959). Its ruling will not be disturbed except on the clear showing of abuse. *Id*.

B. <u>Arguments on the Merits</u>

The trial court abused its discretion when it denied Ms. Dippolito's motion for new trial because the prior bad act evidence featured at trial was unsupported by clear and convincing evidence, and was not "inextricably intertwined" with the charged crime.

Before evidence of a collateral act can be admitted at trial, the State must prove by clear and convincing evidence that the defendant committed the act. *See State v. Norris*, 168 So. 2d 541 (Fla. 1964); *see also Acevedo v. State*, 787 So. 2d 127 (Fla. 3d DCA 2001). The "clear and convincing" standard requires the evidence to be: 1) credible; 2) distinctly remembered; and 3) precise and explicit in detail, with no confusion from the testifying witness as to the facts underlying the collateral matter. *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). The evidence must carry enough weight to compel the fact finder to arrive at a firm belief as to the truth of the collateral allegations, without hesitation. *Id*.

Here, the following uncharged crimes were not supported by clear and convincing evidence: (1) Ms. Dippolito's alleged attempts to plant drugs in her husband's car in order to violate his probation; (2) Ms. Dippolito's alleged attempt to steal Mr. Shihadeh's gun; (3) Ms. Dippolito's alleged attempt to hire "Larry" to

kill her husband; and (4) Ms. Dippolito's attempt to divest her husband of title to his home.

To support its theory that Ms. Dippolito planted drugs in her husband's car, the State relied on anonymous phone calls made to probation officers. (Tr. T. at 3-4). Yet, at trial, Mr. Dippolito's probation officer referred to a complaint in Mr. Dippolito's file from Barbara Lee, a neighbor who claimed Mr. Dippolito was "selling drugs to her son again." (Tr. T. at 1663, 1645). The calls might also have come from Mr. Dippolito's ex-wife, as he originally suspected. (Tr. T. at 1257-58). Or, given Mr. Dippolito's admission that he had been an addict with a "horrific" drug problem, the drugs might have belonged to Mr. Dippolito. (Tr. T. at 808).

Thus, in the absence of direct evidence, the State had to rely on the testimony of Mr. Shihadeh. Yet, Mr. Shihadeh admitted on cross-examination that Ms. Dippolito never told him that she planted the drugs. (Tr. T. at 1843). Mr. Shihadeh also had a remarkable amount of difficulty remembering critical facts, particularly in light of his claim that he has a photographic memory. (*See* record citations, *supra* at 17). Therefore, the evidence supporting the theory that Ms. Dippolito planted drugs in her husband's car is not sufficiently credible, distinctly remembered, or precise and explicit in detail to warrant its admission as collateral crime act evidence. *Alsfield v. State*, 22 So. 3d 619, 621 (Fla. 4th DCA 2009).

Similarly, the testimony regarding Ms. Dippolito's purported theft of Mr. Shihadeh's gun was not supported by clear and convincing evidence. The only evidence offered in support of this claim was the testimony of Mr. Shihadeh, who provided the following differing accounts of the event: (1) it happened at a convenient store by his cousin's house; (2) it happened a Mobil gas station by Ms. Dippolito's house; (3) it happened after Ms. Dippolito claimed that she left something in his car; and (4) it happened when he left Ms. Dippolito in the car to make a purchase from the convenience store. Again, this testimony does not meet the standard for clear and convincing evidence articulated by this Court. *Alsfield v. State*, 22 So. 3d at 621. In addition, the introduction of this evidence carried a substantial risk that jurors would consider the evidence for its improper purpose (propensity to commit the charged offense), rather than its proper purpose (to provide context for the crime). *Ritz*, 101 So. 3d at 944.

Perhaps the most damaging, and least substantiated, of the collateral crime evidence is the claim that Ms. Dippolito previously discussed killing her husband with "Larry," the mysterious hit man from Riviera Beach. The primary source of evidence regarding this prior alleged attempt to solicit murder comes from Mr. Shihadeh. Yet, Mr. Shihadeh's testimony regarding what "Larry" purportedly told him was hearsay.

To the extent the State relies on the testimony of Sergeant Eddy, his testimony is undermined by his admission that he had no knowledge (1) that Ms. Dippolito made the calls in question; (2) that the calls were answered by "Larry"; or (3) that Ms. Dippolito even knows "Larry." (Tr. T. at 1959-60). Sergeant Eddy also confirmed that the phone number he attributed to "Larry" was registered to a female, whose name he could not recall. (Tr. T. at 1960). This is not clear and convincing evidence. Like the allegation regarding the theft of the gun, the risk that the jury would consider this evidence for the improper purpose of propensity is staggering. Therefore, the trial court abused its discretion in admitting this evidence.

Finally, there was no clear and convincing evidence to support the State's allegation that Ms. Dippolito schemed to obtain sole ownership of the marital home. (R. at 222-23; Tr. T. at 739-43). At trial, the attorney who effectuated the transaction testified that Mr. Dippolito came to his office with Ms. Dippolito to execute the quit-claim deed. (Tr. T. at 1559). According to the attorney, Mr. Dippolito said the transaction was necessary for him to receive a grant or a loan. (Tr. T. at 1559). The attorney also stated that he did not suspect any fraudulent activity at the time they executed the transaction. (Tr. T. at 1559).

Not only was the prior bad act evidence unsupported by clear and convincing evidence, it was not inextricably intertwined with the charged crime.

Evidence is "inextricably intertwined" if it is *necessary* to (1) adequately describe the deed; (2) provide an intelligent account of the crime(s) charged; (3) establish the entire context out of which the charged crime(s) arose; or (4) adequately describe the events leading up to the charged crime(s). *Ritz v. State*, 101 So. 3d 939, 943 (Fla. 4th DCA 2012) (emphasis added) (quoting *Ward v. State*, 59 So. 3d 1220, 1222 (Fla. 4th DCA 2011)).

None of the prior bad act evidence emphasized by the State at trial was necessary to adequately describe Ms. Dippolito's alleged solicitation of Mr. Jean to kill her husband. It was not necessary to provide an intelligent account of the alleged incident. It was not necessary to provide context for the alleged crime, and it was not necessary to describe the events leading to the crime. Ms. Dippolito was charged with solicitation to commit murder. None of the prior bad act evidence was *necessary* to accomplish the four objectives described above. *See Ritz*, 101 So. 3d at 943 ("The question is not whether evidence of the ax incident is helpful to understand the entire story and relationship between the defendant and the victim. Rather the question is whether such evidence is *necessary* to accomplish any of the four objectives described above.").

Even if the evidence were properly admitted, as stated in *Randolph v. State*, 463 So. 2d 186, 189 (Fla. 1984), "the prosecution should not go too far in introducing evidence of other crimes . . . or to go so far as to make the collateral

crime a feature instead of an incident." *Randolph v. State*, 463 So.2d 186, 189 (Fla. 1984). Here, the State distracted the jury from the charged offense by featuring the prior bad act evidence, both in its case in chief and in closing. Given the insufficiency of the supporting evidence, the tenuous relevance of the prior bad acts, and the importance ascribed by the State to the prior bad act evidence, Ms. Dippolito is entitled to a new trial.

IV. THE TRIAL COURT ERRED WHEN IT DENIED MS. DIPPOLITO'S MOTION FOR MISTRIAL BASED ON THE STATE'S IMPROPER CLOSING REMARKS.

A. Standards of Review

This Court reviews a prosecutor's improper comments for abuse of discretion. *See Etsy v. State*, 642 So. 2d 1074, 1079 (Fla. 1994). Even in the absence of objection to each improper comment, a new trial is warranted where the cumulative effect of the errors denies the defendant a fair trial. *Charriez v. State*, 96 So. 3d 1127, 1128 (Fla. 5th DCA 2012).

B. Arguments on the Merits

The trial court erred when it failed to grant a mistrial based on the prosecutor's improper argument during closing statements, including a comment on Ms. Dippolito's decision not to testify. First, the prosecution improperly bolstered the testimony of key witnesses. Improper bolstering of witness testimony occurs when the prosecutor attempts to improve the witness' credibility

by putting the weight of the government behind the witness' testimony. *See Hutchinson v. State*, 882 So. 2d 943, 953 (Fla. 2004). Therefore, it is impermissible for a prosecutor to argue that they believe a key witness is being truthful. *See State v. Ramos*, 579 So. 2d 360, 362 (Fla. 4th DCA 1991).

In *Ramos*, the prosecutor stated during closing argument, "And Susan testified, I believe she testified totally truthfully to you." Ramos challenged the prosecutor's comment as an improper expression of the prosecutor's personal belief during closing arguments. This Court reversed. It noted the importance of the witnesses' credibility as a critical issue at the trial and concluded that (1) Ramos was improperly prejudiced by the prosecutor's comment; and (2) the error was not harmless.

Ramos controls this case. During closing, the State characterized Mr. Shihadeh's testimony as "consistent and truthful." (Tr. T. at 3360). Similarly, the State characterized the testimony of Mr. Dippolito as "honest" – "He sat up there and was honest. And he is consistent with his answers." (Tr. T. at 3360). Ms. Dippolito's defense rested entirely on calling the credibility of these witnesses into doubt. Moreover, the error here is more pronounced than in *Ramos* because Mr. Shihadeh never faced the crucible of cross-examination at trial. Thus, the prosecutor's bolstering of the testimony of its witnesses merits a new trial.

Second, the prosecution raised a clearly improper argument when it claimed that Ms. Dippolito's mother "knew her daughter was out meeting with a hit man to have her husband murdered." This comment, which is entirely without evidentiary support, suggests that Ms. Dippolito is so guilty that even her own mother knew that she was plotting to commit the crime. The trial court should have granted the objection of defense counsel and stricken this line of argument. *See Linic v. State*, 80 So. 3d 382, 393 (Fla. 4th DCA 2012) ("Where, as here, it may have been a close call for the jury and the prosecutor improperly injected facts and inferences that were not supported by the evidence on multiple occasions, which could only mislead and distract the jury from considering the evidence it had heard, the trial court should have affirmatively rebuked the offending prosecutor . . . .")

Third, the prosecution launched an improper attack on Ms. Dippolito's character by (1) harping on the prior bad act evidence (*see* citation supra at 21); and (2) relying on allegations of promiscuity, which only served to inflame the passion of the jury. *Reyes v. State* is on point. In *Reyes*, the appellate court reversed the appellant's conviction, holding that the evidence of promiscuity was solely intended to inflame the passion of the jury, and should have been excluded. *Reyes v. State*, 976 So. 2d 1169, 1170 (Fla. 1st DCA 2008). Specifically, the appellate court held that "[j]urors might understandably take a dim view of such

conduct, and hold it against the defendant standing trial on unrelated charges. Even the most conscientious juror could find" such tales a distraction. *Id*.

Just as in *Reyes*, evidence suggesting Ms. Dippolito was promiscuous served no purpose other than to impugn her character, and was unnecessary for the State to prove she was guilty of soliciting Mr. Jean to kill her husband. As such, the State crossed the line in its incessant refrain that Ms. Dippolito "used" sex to manipulate men. Of particular concern is the suggestion that Ms. Dippolito spun a "tangled web of using sex to get what she wants" (Tr. T. at 3458), an allegation that plainly played on the media's penchant for referring to Ms. Dippolito as a "Black Widow."

In addition, the State improperly shifted the burden of proof and violated Ms. Dippolito's presumption of innocence under the Federal and Florida constitutions. It is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict for some reason other than that the State proving its case beyond a reasonable doubt. *Gore*, 719 So. 2d at 1200; *Atkins v. State*, 878 So. 2d 460 (Fla. 3d DCA 2004).

Here, the prosecutor stated that Ms. Dippolito had not presented any evidence in support of her theory of defense and repeatedly asked, "where's the evidence." As an initial matter, Ms. Dippolito did present testimony and evidence in support of her theory of defense. Thus, the prosecutor mischaracterized the

evidence presented. More importantly, the comment suggests that Ms. Dippolito has the duty to present evidence of her own innocence.

This is not the law. Ms. Dippolito need not present any case at all, because the burden of proof rests squarely with the State, not with Ms. Dippolito. *Bell v. State*, 108 So. 3d 639 (Fla. 2013) ("the State may not comment on a defendant's failure to mount a defense because doing so could lead the jury to erroneously conclude that the defendant has the burden of doing so."). By highlighting the purported failure of Ms. Dippolito to offer evidence in support of her theory of defense, the State engaged in improper burden-shifting. *See id*.

The State also employed this tactic when it suggested that in "order to believe Mr. Salnick's story everyone's testimony in this case has to be a lie." (Tr. T. 3507-08). This comment implied that the jury could ignore Ms. Dippolito's argument regarding her lack of intent if it believed the witnesses presented by the State. This is improper. *See Atkins v. State*, 878 So. 2d 460, 461 (Fla. 3d DCA 2004).

Finally, the trial court erred when it declined to grant a mistrial after the State commented on the exercise of Ms. Dippolito's right not to testify in her defense. A defendant has a constitutional right to decline to testify in a criminal proceeding. *See* U.S. Const. Amend. V: Art. I, § 9, Fla. Const. Therefore, "any comment on, or which is *fairly susceptible* of being interpreted as referring to, a

defendant's failure to testify is error and is strongly discouraged." *Rodriguez v. State*, 753 So. 2d 29, 37 (Fla. 2000) (*citing State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985)) (emphasis added).

The "fairly susceptible" test is a "very liberal rule." *State v. Diguilio*, 497 So. 2d 1129, 1131 (Fla. 1986). Comments on a defendant's failure to testify can be of an "almost unlimited variety," and any remark which is "fairly susceptible" of being interpreted as a comment on silence creates a "high risk" of error. *Id*. at 1135-36.

In this case, on rebuttal the prosecutor advocated

> The defendant - - defense wants you to speculate, to think, could have been possible - - maybe - - could have been true that this was a stunt for reality television, but again, *where is the evidence? Where is the testimony? Where is it?*

(Tr. T. 3463-64) (emphasis added). While the prosecutor made this statement, she walked over to Ms. Dippolito at counsel's table and pointed directly at the defendant and asked, "Where is the testimony?"

After this comment and gesture, trial counsel immediately objected and moved for a mistrial on the ground that this was a violation of Ms. Dippolito's right to remain silent. The trial court denied the motion and gave no curative instruction. (Tr. T. 3465). This is clear error since the prosecutor's comment, coupled with her gesture towards Ms. Dippolito was, at the very least, was "fairly susceptible" of being interpreted as referring to a defendant's failure to testify.

This transgression, when considered in conjunction with all the other instances of prosecutorial misconduct arising during the closing statements and rebuttal, constitutes error so fundamental that it denied Ms. Dippolito of her right to a fair trial. *Charriez v. State*, 96 So. 3d at 1128.

Due process requires reversal.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Court must vacate Ms. Dippolito's conviction and sentence, and grant her a new trial.

DATED this 12th day of April, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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