IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

v.

Case No. 78,468

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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ISSUE I

The questioning during the discovery deposition constituted a waiver of the marital privilege. Additionally, although the law does not require that the waiver be personal, the record shows Bolin has personally waived the privilege. And, finally, error, if any, was harmless beyond a reasonable doubt.

ISSUE II

The trial court read the motion to discharge, listened to the evidence, and heard argument from Bolin, the state and defense counsel. The court was very familiar with the issues before it, as well as the trial lawyers. Based on all of this information, the court denied the motion. Accordingly, appellant's motion to discharge was properly heard and denied.

ISSUE III

The record before the court showed that both sides had struck both white and black prospective jurors and there was no evidence that any of the strikes were racially motivated. Accordingly, the trial court properly held that appellant failed to carry his initial burden in showing a violation of Neil.

ISSUE IV

The accessory after the fact instruction was necessary in order to clarify the suggestion by the defense that Cheryl Coby was testifying against Oscar Ray Bolin because of fear of prosecution. As such, it was within the trial court's discretion to give the specially requested instruction to the jury in order to clarify the issues before it.

ISSUE V

Mr. Lopez' statements do not indicate a juror that has made up his mind and would impose the death penalty in all cases of first degree murder. Thus, it was within the court's discretion to deny a challenge for cause and appellant has failed to show an abuse of that discretion.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY RULING THAT APPELLANT WAIVED HIS SPOUSAL PRIVILEGE BY FAILING TO PREVENT HIS EX-WIFE, A STATE WITNESS, FROM REPEATING MARITAL COMMUNICATIONS DURING A DISCOVERY DEPOSITION.

On January 25, 1986, Natalie Holley's murdered body was found in a wooded area in north Tampa. (R 635 - 6) Ms. Holley was last seen at a Church's Fried Chicken Restaurant in Tampa where she had worked around 1:30 a.m. on January 24, 1986. (R 503) The investigation of the Holley homicide remained open until July, 1990. In response to a telephone tip from Danny Coby, police officers interviewed the defendant's ex-wife Cheryl Coby on July 16, 1990, about the Holley homicide. Based on this conversation with Cheryl Coby, appellant was indicted for first degree murder.

During preparation for trial, the state filed a motion to perpetuate the testimony of Cheryl Coby. (R 1289 - 91, 1741 - 8) The state urged and the court agreed that due to the precarious health of Cheryl Coby that it would be prudent to get her testimony on tape. (R 1743) Prior to the taking of this video tape, the defendant did a discovery deposition of Cheryl Coby. During this discovery deposition defense counsel (not the state) inquired of Ms. Coby concerning the the content and context of her conversation with Bolin regarding the murder.[1] Subsequently,

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[1] A review of the discovery deposition shows that only defense counsel questioned Cheryl Coby and that they inquired extensively

during the videotaping of the deposition to perpetuate testimony of Cheryl Coby defense counsel objected to the state inquiring with regard to conversations between appellant and his spouse during the time they were married. On March 11, 1991, appellant filed a motion in limine regarding the conversations. (R 1309 - 11) At a hearing held on this motion on March 22, 1991, appellant urged that these communications were privileged and inadmissible. The state responded that the defendant had waived the spousal privilege when his counsel questioned Cheryl Coby about these communications during the discovery deposition. (R 1337 - 9, 1085 - 8) The court denied appellant's motion in limine, finding that the privilege was waived. (R 1340)

Appellant then filed a motion to discharge counsel asserting that his counsel was ineffective for waiving the spousal privilege. (R 1386 - 87) A hearing was held on this motion wherein defense counsel stated that they had researched the issue and believed that the questioning during the discovery deposition did not constitute a waiver. (R 1118 - 19) Counsel had also admitted that they wanted to take the deposition of Cheryl Coby in order to find out the basis for her statements as well as the extent of her knowledge. (R 1091, 1097) Accordingly, the trial

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about the content of the privileged communication without any attempt to preserve the privelege. (R 187, Deposition of Cheryl Coby, dated January 8, 1991, pgs. 61-64, 73-87, 93-94, 100-2, 183, 185)

court denied the motion to discharge counsel and found that counsel was not ineffective. (R 7, 1130)

At trial, appellant's ex-wife, Cheryl Joe Coby, testified that on the evening of January 24, 1986, she and appellant drove to a Burger King Restaurant which is directly across the street from the Church's Chicken Restaurant where Natalie Holley worked. (R 559 - 60) Coby and Bolin went through the drive-through at the Burger King, then sat in the parking lot for at least an hour. (R 560) Bolin told her he was scoping the place out. (R 564) They then went home where she watched the news and went to bed. Early the next morning she was awakened by Bolin. He told her to get up and get dressed. Bolin had changed clothes from the previous evening. (R 565) He said, "Get up. Come on. I got to show you something." Cheryl Coby testified that Bolin acted very nervous and upset; that he paced the floor. While she was getting dressed Bolin changed his shoes and she noticed that there was blood them. (R 566) She identified them as Trax tennis shoes. (R 567) As she was sitting on the side of the bed putting her tennis shoes on, he dropped a purse between her feet. She had never seen this purse before and told him, "That's not my purse." (R 567) He told her that he knew that. He then picked the purse back up and dumped the contents on the bed. He took some pills and money from the purse, then put everything else back in it. (R 568) He told her the purse belonged to the manager of the Church's Chicken. (R 569) Bolin then changed his shoes for the second time to a pair of old tennis shoes. They

left in their Isuzu truck and Bolin took the purse and bloody tennis shoes. (R 570 - 571)

Bolin told her that he had followed the manager of the Church's Chicken and got her to pull over. He said he had flashed his headlights at her to get her to stop. Bolin told Coby that he was planning on robbing Holley. Bolin said he believed Holley had the day's cash receipts with her. Bolin told Coby that when Holley got out of the car she said that, "You scared me, but now that I know who you are, I'm not scared." And then a cop pulled up. (R 573) He said that after the cop pulled up that he (Bolin) pulled his gun out, put it in Holley's side and told her to get rid of the cop. He told the cop that they were just having car trouble and that she was assisting him. (R 574) The cop then got in his car and left. Bolin told her he searched the car for money and couldn't find it. He then told Holley to get in his car. (R 574) Bolin said he took Holley to an orange grove but that he couldn't shoot her because it would make too much noise and someone would hear. When he pulled out a knife Holley started screaming. He said that he stabbed her in the throat so that she would stop screaming. He told Coby that Holley wouldn't die so he had to keep stabbing her. Bolin said that he had stood away from the victim so there wouldn't be any hair or fiber transfers. He also said that he wore rubber gloves. (R 575)

Coby testified that Bolin then took her to a spot on Erlich Road where there was an older car parked. Bolin parked his

truck, then got out and started dragging a branch across the ground covering up tracks. He also took a towel and wiped the other car down. Then he moved the Isuzu up to the pavement, took the branch and wiped the tracks away from it too. (R 575) They headed north on the interstate to Highway 52. On the way Bolin threw his tennis shoes out the window. After they got off the interstate he threw the purse out. (R 578) They then went home and went back to bed. Later that same day she and Bolin took the Pontiac Grand Prix (which he had used to commit the murder) to the car wash where he washed the outside and wiped down the inside of the trunk, the doors and the interior. (R 580)

Now on appeal Bolin is alleging that the trial court erroneously admitted the testimony of Cheryl Coby. Appellant's argument herein is threefold; 1) he claims counsel's inquiry during the discovery deposition did not constitute a waiver because his ex-wife only disclosed marital communications which she had already disclosed to law enforcement, (2) that there was no waiver because no actual public disclosure of the confidential communications occurred prior to trial and, (3) appellant did not personally waive the husband/wife privilege nor authorize his lawyers to waive it. It is the state's position that the questioning during the discovery deposition did constitute a waiver and public disclosure and that, although the law does not require that the waiver be personal, the record shows Bolin has personally waived the privilege.

First appellant argues that he did not waive the husband/wife privilege at the discovery deposition because his ex-wife, Cheryl Coby, only disclosed marital communications which she had already disclosed to law enforcement. He contends that since counsel only sought to discover from Cheryl Coby what marital communications she had already disclosed to law enforcement officers that this did not constitute a waiver of the privilege. This position is wholly unsupported by the facts and the law.

A review of the discovery deposition shows that defense counsel inquired extensively about the conversations Coby had with Bolin before and after the murder. It was only later in the deposition that defense counsel inquired as to her conversations with the police and what she had told them about Bolin and the Holley murder. (R 1087, pgs. 132-141, 146, 196) Thus, even if the law recognized an exception for inquiries about conversations revealed to the police by one spouse, the record clearly shows that counsel inquired about everything Bolin had said to her, not just what she had told the police.

Furthermore, the law does not recognize such an exception. Rather, the law is clear that the privilege belongs to both parties and, therefore, the communication can only be admitted when the privilege has been waived by the defendant. Section 90.504 (1), Fla. Stat. Thus, despite Coby's original disclosure, Bolin maintained the right to preclude admission of the conversation until he ceased to treat the matter as confidential

and put the communication at issue. The inquiry about the actual conversations by defense counsel put the communications at issue and waived the privilege.

In Tibado v. Brees, 212 So. 2d 61 (Fla. 2nd DCA 1968), the court held that where appellant gave his oral deposition prior to the trial, at which time he voluntarily without objection testified to confidential communications between him and his wife, that the privilege was deemed waived. The court rejected appellant's argument that the rules of procedure did not require him to make an objection to such privileged communications at the time of the taking of his deposition. The court noted that Rule 1.280(b) provides that unless otherwise ordered by the court, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter of the pending action. Thus, under the above stated rule a person being deposed is not required to divulge any matter which is privileged and has the right to refuse to give such privileged information on deposition. The court in Tibado went on to note that the privilege existing between husband/wife as to their communications is a personal privilege. "It is clear under the law of Florida that a personal privilege may be waived. When Mr. Tibado voluntarily and without objection testified on deposition to the privileged communications they lost their confidential character." Id. at 63. Quoting, Savino v. Luciano, 92 So. 2d 87 (Fla. 1957), the court held that "when a party himself ceases to treat a matter as confidential, it looses its confidential character."

The court went on to acknowledge the case of Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), where a husband refused to divulge a communication between him and his wife at the taking of his deposition. When faced with the possibility of contempt, however, Fraser waived the privilege. On appeal the court held that even though it was under the threat of punishment for contempt, that Fraser's waiver of the privilege was valid.

Bolin argued below and argues herein that under this rule he would be precluded from inquiring of Cheryl Coby as to the communications she had made to law enforcement officers concerning what he (Bolin) had told her on the night of the murder. Defense counsel noted that they felt it was necessary to inquire of these matters in order to defend Oscar Ray Bolin.[2] While this may have been a tough choice, as the court noted in Tibado, the person invoking the privilege is required to protect same or suffer the consequences of a waiver. Absent the inquiry in the deposition, it is without question that Cheryl Coby would not have been able to testify as to the actual statements that Bolin made on the night of the murder. Thus, it was Bolin's choice to inquire as to the statements Coby made and having determined the necessity of making such an inquiry he must now be prepared to suffer the consequences.

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[2] As previously noted, counsel did not limit themselves to inquiring about what Coby had told the police but, rather, inquired extensively as to conversations she had with Bolin regarding the murder.

The court below also relied on Tucker v. State, 484 So. 2d 1299 (Fla. 4th DCA 1986). Tucker was charged with attempted first degree murder, kidnapping and grand theft. After his arraignment, his attorney made a motion that the court appoint a psychiatric expert to evaluate Tucker. On the basis of this evaluation Tucker was initially declared incompetent to stand trial. However, after treatment in a state hospital, Tucker was consequently found competent to stand trial. Tucker then filed a notice of intent to rely on the insanity defense at trial and listed the psychiatrist as one of the witnesses. Consequently, the state took the psychiatrist's deposition and later secured disclosure of his notes without objection by Tucker's attorneys. At trial, the psychiatrists testified on rebuttal for the state, over appellant's objection, and presented testimony adverse to Tucker's insanity defense. The Court held that where an expert is hired solely to assist the defense and will not be called as a witness, the state may not depose the expert or call him as a witness. Nevertheless, because Tucker not only placed the psychiatrist's name on the witness list, but also allowed the state to take her deposition pursuant to *Florida Rule of Criminal Procedure 3.220* and did not object to disclosure of the psychiatrist's notes, the defense did not assert the protection of *Rule 3.220*. The Court noted that the defense had failed to raise the issue at an earlier time despite the fact that it had notice shortly after the state took the deposition that the prosecution intended to call the psychiatrist in rebuttal.

Tucker's counsel, like Bolin's, conceded that it had not done so as a part of a conscious strategy since it believed that no objection need be made until the state actually calls the witness at trial. The Court rejected this argument and noted that it is clear that once privileged communications are voluntarily disclosed, the privilege is waived and cannot be reclaimed. Id. at 1301. Thus, in the instant case where defense counsel made a thorough inquiry of Cheryl Coby concerning communications made to her by Oscar Ray Bolin during their marriage the privilege was waived and could not be later reclaimed.

Appellant attempts to distinguish both of these cases by the simple fact that Cheryl Coby was the one that made the initial disclosure of the privileged communications. Again, the law is clear that although either party may make statements concerning a privileged communication, the privilege belongs to both parties. As the state used this evidence against Oscar Ray Bolin, admission of the evidence depended on Bolin's waiver of the privilege. Cheryl Coby's waiver of the privilege would not make this evidence admissible against the defendant at trial and does not excuse the defendant's inquiry regarding the content of the communication. This point is clearly illustrated by the facts in Koon v. State, 463 So. 2d 201 (Fla. 1985), cert. denied, 472 U.S. 1031. Although Mrs. Koon voluntarily testified as to the substance of her conversation with her husband on the night of the murder, this Court held that where Koon himself had not waived the privilege the evidence was not admissible against him.

Appellant also contends that his inquiry during the deposition did not constitute a waiver because no actual public disclosure of the confidential communications occurred prior to trial. To support this proposition, appellant cites to Truly Nolen Exterminating v. Thomason, 554 So. 2d 5 (Fla. 3d DCA 1989), which provides that the privilege must be asserted before there has been an actual disclosure of the information alleged to be protected. In the instant case, not only was there no objection to the disclosure of the information, defense counsel is the one who elicited said information, thereby putting the conversation at issue. Defense counsel, standing in the place of the defendant, having discussed this conversation with law enforcement and the state, waived any claim or privilege as to that conversation. Accordingly, the trial court properly denied the motion in limine.

Appellant also asserts based on In re Doe, 964 F.2d 1325 (2nd Cir. 1992) that the discovery deposition was tantamount to an in-camera proceeding subject to a protective order and therefore should not constitute a waiver of the privilege. First of all, the protective order that defendant refers to was pursuant to a motion made by defense counsel to preclude dissemination of information to the media. (R 1282 - 6) There was no order, and the trial court specifically noted that there was no order, keeping this deposition private. (R 1089) The deposition was not sealed until it was admitted at trial. (R 545 - 7) Further, defense counsel did not make any attempt to

insure confidentiality of this communication. This was no in-camera proceeding but rather was a normal discovery deposition where the information was fully available to all the parties involved. The analogy of In re Doe simply is not applicable to the instant case.

It is the state's position that any reference in Tibado to the publication of the deposition in order to make the information public is merely dicta and is not determinative of the waiver. The law is very clear that any voluntary disclosure of the communication waives the privilege and that once waived the privilege remains waived. In the instant case, defense counsel is the one that put the communication at issue in the deposition and, therefore, waived any claim of privilege.

Appellant also claims that because he was not present during the deposition defense counsel's waiver of the privilege does not bind him. This position was rejected in Tucker, supra:

> "However, Tucker claims that the privilege is personal to him and could only be waived by him, not his attorney. In Schetter v. Schetter, 239 So. 2d 51, 53 (Fla. 1st DCA 1970), an attorney tape recorded his conversations with his client and gave the tape to a psychiatrist. On the basis of this tape, the psychiatrist testified at hearing the client should be placed under guardianship. The appellate court reversed the trial court's order, holding that the attorney had no authority to disclose the conversations to the psychiatrist. We are not faced with that situation here. In most instances, an attorney has implied authority to waive the privilege for his client. United States v. Miller, 660 F.2d 563, 572 (5th Cir. 1981), reh. denied, opinion modified, 675 F.2d 711, vacated for mootness,

685 F.2d 123 (1982); Ehrhardt, Florida Evidence, 2nd Edition, §507.1. See also §90.502(3)(e), Fla. Stat.)." Id. at 1301. (Emphasis added)

The court went on to note that in United States v. Miller, supra, the 5th Circuit confirmed that since the attorney has implied authority from the client to make admissions and to otherwise act in all that concerns the management of the cause, all disclosures (oral or written) voluntarily made to the opposing party or to third persons in the course of negotiations for settlement, or in the course of taking adverse steps in litigation, are receivable as being made under an implied waiver of privilege, giving authority to disclose the confidences when necessary in the opinion of the attorney. This is so unless it appears that the attorney has acted in bad faith for the client. Id. at 1301, citing Miller, at 572. Thus, the law is clear that the waiver by appellant's counsel is binding on appellant.

Assuming arguendo that counsel's waiver was not binding upon appellant, the state asserts that appellant personally waived any claim of privilege. Captain Gary G. Terry of the Hillsborough County Sheriff's Office testified that he received a letter from Oscar Ray Bolin on June 22, 1991, in which the defendant told him, "If there was ever anything else that he really wanted to know about [him] to ask Cheryl Jo because she knew just about everything [he] was ever a part of and that she knew about the homicides [he] was charged with." (R 747, 765) This waiver was a postscript to the letter that has been sealed and included in

this record on appeal. The prosecutor represented to the court that the letter specifically said that Cheryl Coby knew all about three of the homicides which Bolin was charged with, because it was her idea on how to dump the bodies. (R 753-54)

It is the state's position that this letter constitutes a personal waiver of any privileged communications. The spousal privilege is deemed waived when the person who has the privilege consents to disclosure of any significant part of the matter or communication. Saenz v. Alexander, 584 So. 2d 1061 (Fla. 1st DCA 1991); §*90.507 Fla. Stat*. Thus, Bolin's statement in the letter to Captain Terry that Cheryl Coby knew all about the homicides he was charged with and that Terry was free to ask her about it constitutes a waiver of any privilege regarding the matter.

Finally, appellant argues that the alleged error cannot be deemed harmless. Appellant admits, however, that even without the waiver the defendant's wife could properly testify to the actions of the defendant on the night of the murder and that she was only precluded from stating the content of their conversations. See, also, Ross v. State, 202 So. 2d 582 (Fla. 1st DCA 1967); Gates v. State, 201 So. 2d 786 (Fla. 3 DCA 1967).

Thus, even absent the waiver, Cheryl Coby could have testified that they sat in the parking lot of the Burger King across from the Church's Fried Chicken on the day of the murder for over an hour watching the Church's Fried Chicken. She could have also testified that later that night when the defendant awoke her, he had blood on his tennis shoes and an unidentified

purse. Her testimony that they went to the scene where the victim's car was found abandoned and where a police officer had previously seen Oscar Ray Bolin with an unidentified woman around the time of the murder was also admissible. She could have testified that Bolin cleaned the victim's car out then drove north on the interstate where he disposed of the bloody shoes and the purse. And finally, that the next day he took his own car to the car wash and washed it thoroughly inside and out. This evidence in conjunction with the evidence presented at trial which established that Oscar Ray Bolin knew the victim in the instant case, that his car was at the scene where the victim's own car was later found abandoned, that he was seen at the site with an unidentified woman around the time of the murder, and that fibers from his back seat matched fibers found on the body is clearly sufficient to support the judgment and sentence. Accordingly, it is beyond a reasonable doubt that even without the additional evidence the outcome of the proceeding would not have been different. Therefore, error, if any, was harmless.

ISSUE II

WHETHER THE TRIAL COURT CONDUCTED A SUFFICIENT INQUIRY INTO APPELLANT'S PRO SE MOTION TO DISCHARGE COUNSEL.

Appellant contends that the hearing conducted on appellant's "Pro Se Motion to Discharge Counsel" was insufficient. He claims that the trial court did not follow the procedure mandated by this Court pertaining to the necessary inquiry and that he did not allow appellant to be heard until after he already denied the motion. The state contends that a review of the record in the instant case clearly shows that the inquiry and the hearing were sufficient and comported with this Court's procedural requirements as set forth in Nelson v. State, 274 So.2d (Fla. 4th DCA 1973), and approved in Hardwick v. State, 521 So.2d 1071 (Fla.), *cert. denied,* 488 U.S. 871, 109 S.Ct. 182, 102 L.Ed.2d 154 (1988). Nelson mandates that once the competency of counsel is sufficiently challenged a trial judge should make an inquiry of the defendant and his attorney to determine whether there is reason to believe that the attorney is not rendering effective assistance to the defendant.

After the trial court denied Bolin's motion in limine, appellant filed a pro se "Motion to Discharge Counsel." (R 1386 - 87) In this motion, appellant alleged:

> 1. I am dissatisfied with my lawyers and I believe I am receiving ineffective assistance of counsel.
>
> 2. The Court in its order dated March 25, 1991 stated that my attorneys waived my husband wife privilege by taking the

deposition of my ex-wife Cheryl Coby on January 8th and 9th, 1991.

3. I did not consent to waive my husband wife privilege.

4. This Court told my attorneys that they should have filed a motion in limine concerning the husband wife privilege before the deposition was taken.

5. Mr. Atkinson, the prosecutor said my attorneys knew they were waiving the privilege when they took her deposition.

6. My attorneys told me that they did not believe the privilege would be waived by taking my ex-wife's deposition and asking her questions about our discussions during our marriage.

7. I believe I have received ineffective assistance of counsel and I request a hearing on it before April 11, 1991 to decide if this is so.

8. I want new lawyers who will represent me effectively.

A hearing was held on this motion on April 12, 1991. (R 1114 - 34) At this hearing the court inquired as to whether there was evidence to be presented. Both Mr. Firmani and Mr. O'Connor alleged that it was Mr. Bolin's motion and they had nothing to present. At that point, with appellant's motion in front of him alleging ineffective assistance of counsel based on the waiver of the husband/ wife privilege, the court made inquiry of both Mr. Firmani and Mr. O'Connor as to the waiver. The court inquired as to whether each counsel was aware of the husband/wife privilege under Florida's Evidence Code before the discovery deposition of Ms. Coby was taken. (R 1117) Firmani and O'Connor

both asserted that before the taking of discovery deposition they researched the law with reference to the issue and determined based upon their research and discussions with other lawyers in their office that the taking of the deposition did not waive the husband/wife privilege. (R 1118 - 1119) The state then argued that it was a tactical decision based upon the assumption that either way the defendant couldn't lose; even if the court found that the privilege was waived then he had a claim of ineffective assistance of counsel which could preclude introduction of the evidence. (R 1123 - 1124) Defense counsel admitted that although Cheryl Coby gave her statements to the police officers and they were in the police report, they wanted to avail themselves of the discovery tool to be sure they knew what the witness could say at trial. (R 1091, 1097, 1124) Firmani also stated that he had researched the case law and made a decision that Tibado and Tucker were so different that it would not waive the privilege to inquire into Coby's testimony. (R 1127) The court then denied the motion to discharge at which point the defendant asked to "say something to the court." (R 1129) The court responded that he could say something but he had denied the motion. (R 1130) The defendant then proceeded to reassert that which was already in his motion and that he was not comfortable with his counsel because the state was asserting that they should have filed a motion in limine and because counsel didn't advise Bolin that this communication was privileged. At that point the court said that; "I am not finding that you are represented by

ineffective assistance of counsel based on any prior activity from Mr. Fimmel and Mr. O'Connor in connection with your case." The court then stated that the motion to discharge was denied. (R 1130)

On July 8, 1991 at the start of the trial, the court again revisited the issue. The court stated; "This court is going to rule, and has ruled in the past and will continue to rule throughout the trial of this case, that defense counsel waived husband/wife privilege, but that defense counsel are not ineffective . . . ." (R 7)

The inquiry conducted by the court was sufficient to support the conclusion that there was no reasonable basis for discharging counsel based on a claim of ineffective assistance of counsel. Therefore, the motion was properly denied. To support a claim of ineffective assistance of counsel, the defendant must first show counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel did not function as 'counsel' for Sixth Amendment purposes. Strickland v. Washington, 80 L.Ed. 2d 674 (1984). Counsel in the instant case represented to the court that they were aware of this issue, had thoroughly researched it and had come to the conclusion that the inquiry during the deposition did not waive the husband/wife privilege. Simply because counsel had a different interpretation

of the law than the trial court does not mean that counsel failed to perform as "counsel for Sixth Amendment purposes."[3]

The trial court read the motion, listened to the evidence, and heard argument from Bolin, the state and defense counsel. The court was very familiar with the issues before it, as well as the trial lawyers. Based on all of this information, the court denied the motion. Accordingly, appellant's motion to discharge was properly heard and denied.

Further, although an indigent defendant has an absolute right to counsel, he does not have a right to have a particular lawyer represent him. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 161, 75 L.Ed.2d 610 (1983); Koon v. State, 513 So.2d 1253 (Fla. 1987), *cert. denied*, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988). As in Koon, there is nothing in the instant record to indicate the appellant could have been better served by other counsel. The appellant has not alleged that the denial of his motion to discharge was prejudicial, or deprived him of effective assistance of counsel. On these facts, Bolin has failed to show that the denial of motion to discharge his court appointed counsel constitutes reversible error.

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[3] Apparently appellate counsel also agrees with trial counsel's conclusion that the inquiry in the deposition did not constitute a waiver. Otherwise, he would not be asserting in Issue I in the instant brief that the trial court erred in finding a waiver based on the deposition inquiry.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY FAILING TO REQUIRE THE PROSECUTOR TO GIVE HIS REASONS FOR PEREMPTORILY EXCUSING A BLACK PROSPECTIVE JUROR.

In State v. Neil, 457 So.2d 481, 486 (Fla. 1984), *clarified sub nom*, State v. Castillio, 486 So.2d 565 (Fla. 1986), and State v. Slappy, 522 So.2d 18, 22 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), this Honorable Court established the procedure to be followed when a party seeks to challenge the opposing party's peremptory excusals:

> "A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race." 486 So.2d 481, 486 (Fla. 1984).

Thus, the threshold question is not whether the court erred in not making an inquiry, but, rather, whether the defense established a prima facia showing of discrimination.[4] In Smith v. State, 562 So.2d 787 (Fla. 1st DCA, 1990), the First District Court found that defense counsel's request to have the record show an excusal of black jurors was insufficient to constitute a timely objection under Neil and Slappy. The Court stated:

> " . . . No argument was made showing a likelihood that the potential jurors have

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[4] Appellant concedes that this Court's decision in State v. Johans, 18 Fla. L. Weekly S 124 (Fla. Februaury 18, 1993), wherein this Court held that an inquiry is mandatory, does not apply to the instant case.

> been challenged solely because of their race. Slappy. holds that the spirit and intent of Neil was not to obscure the issue and procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facia showing that a 'likelihood' of discrimination exists. As the state agreed voluntarily to proceed with the Neil inquiry, we will pass upon the merits of the alleged discrimination. However, defense counsel should be aware that the Neil and Slappy procedure should be complied with in order to properly preserve the issue of appeal."

In the instant case, as in Smith, appellant wholly failed to allege or demonstrate at trial that there was a strong likelihood that the potential juror was challenged solely because of race.

After the state moved to strike prospective juror Lee, trial counsel raised the following objection:

> MR. FIRMANI: Judge, the State, having excused Felicia Lee, No. 23, I think the record should reflect she is a black female, and under the case law of Neil and Slappy and their progeny, I would ask the Court to make an inquiry as to their reason for excusing that juror.
>
> MR. ATKINSON: You're saying, then, that a single strike of a black juror in a case where there's a white victim and a white defendant, and therefore, there's no reason to believe that sympathy would play any part in the role of the jurors' decision-making processes, establishes the Neil showing so that the Court has to make inquiry?
>
> MR. FIRMANI: That's what I'm saying, yes. That is my understanding of the Common Case Law.

(R 462 - 463)

Subsequently, after defense counsel struck a prospective black juror, the state excused prospective juror Presley. Defense counsel then argued:

> MR. FIRMANI: Right, and I'll again ask the Court to make inquiry of the State in that there is now two black individuals who have been struck by the State, and I don't see any reason why they should be struck, other than race.
>
> THE COURT: The State has peremptorily challenged two blacks. The defendant has challenged peremptorily one black. The defendant has not made the proper showing. You have not established that there is a strong likelihood that the State is improperly exercising its peremptory challenges, based on racial bias.

(R 468 - 469)

Appellant now alleges, in part, upon this Court's decision in Reynolds v. State, 576 So. 2d 1300 (Fla. 1991); Thompson v. State, 548 So. 2d 198 (Fla. 1989); and, State v. Slappy, 522 So.2d 18 (Fla. 1988), that the racially discriminatory excusal of even one prospective juror taints the jury selection process. Id. at 21. The above reference in Slappy assumes that the objecting party first satisfied the initial burden of demonstrating on the record a strong likelihood that the state struck the subject juror solely because of race. If such a demonstration is made, then Slappy indicates that the discriminatory excusal of even a single prospective juror taints the selection process.

The state contends that the foregoing objection was insufficient to mandate that the court inquire as to the prosecutor's reasons for excusing the jurors. As appellant failed to satisfy the third Neil requirement, the trial court did not err in finding that the defendant did not demonstrate any

Neil violation. Accordingly, the prosecutor's reasons for excluding the juror were not subject to review. Adams v. State, 559 So.2d 1293 (Fla. 3d DCA 1990).

In Adams, supra, the Third District Court found no error on the part of the trial court in failing to conduct a Neil inquiry into the state's reasons for peremptorily excusing the first black juror on the panel where the defense failed to show a strong likelihood that the juror was rejected on racial grounds. In Adams, the Court stated:

> "A trial judge is in the best position to determine whether there is a need for an explanation of challenges on the basis that they are racially motivated. Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA), *review denied*, 509 So.2d 1119 (Fla. 1987), see Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In the present case, by the time Mrs. Arlington was challenged, the trial judge had already heard the answers she had given during questioning. He had heard the tone of her voice. The judge was satisfied that the question challenges were not exercised solely because of the juror's race. Adams failed to demonstrate that there was a strong likelihood that black prospective jurors were challenged solely on the basis of their race. See Woods v. State, 490 So.2d 24 (Fla.), *cert. denied*, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986). The record does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court. In fact, we find, just as the court did in Parker v. State, 476 So.2d 134 (Fla. 1985), that the record reflects nothing more than a normal jury selection process. For these reasons, the trial court did not err in failing to inquire into the state's motives for excusing Ms. Arlington. (emphasis added)

Similarly, in Williams v. State, 567 So.2d 1062 (Fla. 2nd DCA, 1990), the Second District Court of Appeal rejected William's argument that the state's challenge to one black jury veniremen was racially motivated and that the trial court failed to conduct the requisite inquiry under State v. Neil. The court found that the burden initially lies with the defendant to demonstrate a likelihood of discriminatory motivation and that trial counsel's perfunctory objection in the case was insufficient. And, in Verdelleti v. State, 560 So.2d 1328 (Fla. 2nd DCA 1990), the Second District again found that the defendant did not carry his burden of showing that a prospective juror was challenged solely because of race.

This Honorable Court in Reed v. State, 560 So.2d 203 (Fla. 1990), stated: "In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process. " Id. at 206

In the instant case, the record before the court showed that both sides had struck both white and black prospective jurors and there was no evidence that any of the strikes were racially motivated. Even appellant concedes that the first black prospective juror excused by the state was objectionable based on her views on the death penalty and, therefore, has waived any objection to her excusal. (Initial Brief of Appellant, pg 34)

While appellant contends that nothing objectionable appears in the record about Presley, this observation is based upon his interpretation of a cold review of the transcript. The trial judge was in a much better position to determine whether the challenge was racially motivated. Accordingly, the state urges this Honorable Court to affirm the trial court's holding that appellant failed to carry his initial burden in showing a violation of Neil that would require the court to make an inquiry.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY GIVING THE STATE'S SPECIALLY REQUESTED JURY INSTRUCTION ON THE LAW OF ACCESSORY AFTER THE FACT.

Appellant contends that the trial court erred in giving the state's special requested jury instruction concerning the law on accessory after the fact. He alleges it did not properly relate to the evidence and could be construed by the jury as a comment on the credibility of the state's key witness. Nevertheless, appellant admits that the state's reason for requesting the special jury instruction was to rebut the defense's assertion that Cheryl Coby testified as she did because she feared that she might be arrested as an accessory after the fact. He contends, however, that this was not proper rebuttal in that it was immaterial whether Coby could have actually been prosecuted as an accessory after the fact; the question is whether she was, in fact, afraid of being prosecuted for her role in assisting Bolin to cover up evidence from the homicide and taking the money from the victim's purse. Appellant contends that it was this fear of prosecution which supplied a motive for her to testify falsely.

It is the state's position that the instruction was necessary in order to clarify the suggestion by the defense that Cheryl Coby was testifying against Oscar Ray Bolin because of fear of prosecution. While this false fear of prosecution may have been relevant to her initial motive in making statements to the police officers, this fear was obviously without basis by the time of the trial. Clearly, Coby would have been told by the

state that she did not face prosecution under the law. Therefore, the defense's assertion that she was testifying against Bolin out of fear of reprisal is without basis.

Furthermore, the instruction as given was clearly an impartial and correct statement of the law. The instruction in no way constituted a comment on the credibility of Cheryl Coby. It merely gave the jury the correct information to assess Cheryl Coby's motive for testifying. The giving of the instruction was a matter within the trial court's discretion to give the specially requested instruction to the jury in order to clarify the issues before it, and appellant failed to show an abuse of that discretion. See, generally Robinson v. State, 574 So. 2d 108 (Fla. 1991) (giving of jury instructions is a matter within the trial court's discretion); Cruse v. State, 588 So. 2d 983 (Fla. 1991) (standard instructions are a guideline to be modified or amplified depending upon the facts of each case).

Assuming, arguendo, that it was error for the court to give the instruction, the error was clearly harmless as the instruction was not misleading and did not vouch for the credibility of the witness. Therefore, it is beyond a reasonable doubt that the instruction did not contribute to the jury's verdict.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR LOPEZ.

During voir dire questioning of prospective jurors regarding their positions on the death penalty, the following colloquy took place between defense counsel and prospective juror Lopez:

> MR. O'CONNOR: Mr. Lopez, have you had occasion to think about capital punishment in the last forty-five hours?
>
> MR. LOPEZ: No. I was raised in believing that an eye for an eye, tooth for a tooth, a life for a life.
>
> MR. O'CONNOR: Your position is based on a Biblical interpretation or a religious interpretation?
>
> MR. LOPEZ: No, I was just raised that way.
>
> MR. O'CONNOR: So, are your beliefs the result of your upbringing and input from your parents, for example?
>
> MR. LOPEZ: That's correct.
>
> MR. O'CONNOR: By being raised, you mean your parents, right?
>
> MR. LOPEZ: And grandparents.
>
> MR. O'CONNOR: Have you ever before been in a situation where the imposition of capital punishment might be directly in your hands, or the recommendation of that particular mode of punishment be used directly in your hands?
>
> MR. LOPEZ: No.
>
> MR. O'CONNOR: Is there anything, Mr. Lopez, that I've explained about the way I understand the determination of a recommendation for capital punishment or life imprisonment -- is there anything that seems inherently unfair to you in that mechanism?

MR. LOPEZ: No.

MR. O'CONNOR: Do you think your could follow those instructions if you got them from the Court?

MR. LOPEZ: Yeah.

MR. O'CONNOR: Now, as far as things in mitigation, Mr. Lopez, would you be interested in knowledge of the defendant's past and his background in making a determination about the appropriateness of the sentence, should you convict him for it?

MR. LOPEZ: I don't believe so.

MR. O' CONNOR: Excuse me?

MR. LOPEZ: I don't think so.

MR. O'CONNOR: I'm sorry, sir, I didn't hear you.

MR. LOPEZ: No.

(R 453 - 455)

Subsequently, when the court asked if there were any objections to Mr. Lopez, defense counsel then stated:

MR. FIRMANI: Judge, we would challenge for cause Juror No. 3, Herman Lopez, on the basis that he has stated he is unable to follow the jury instructions, one of which would be that he should consider any mitigating circumstances. And he stated, to my recollection, that he would not be at all interested in the Defendant's background, and that would be one of the several possible areas of mitigation in the second phase.

THE COURT: The Court recalls Mr. Lopez saying that he didn't, that should he have to consider that - but I don't recall him being asked that if the Court told you, that you may consider the statutory enumerated, as well as the catch-all that is a Standard Jury Instruction. I don't recall him saying that.

MR. FIRMANI: Judge, I believe Mr. O'Connor, towards the very end -- and he had to repeat the question, because I didn't hear his answer, said, "Would you be interested in the defendant's background?"

THE COURT: And he said no.

MR. ATKINSON: He said no.

MR. FIRMANI: He said no.

THE COURT: Why, certainly. It's not saying -- it's not saying if he's told by the Court that he must consider it, that he would not follow the law. That's my recollection of that voir dire of Mr. Lopez.

State agree I should excuse Mr. Lopez?

MR. ATKINSON: No, Your Honor.

MR. JAMES: No.

THE COURT: Your challenge for cause is denied.

MR. FIRMANI: Then I would strike him, Judge.

(R 465 - 467)

Bolin is now alleging that the court erred in refusing to strike Lopez for cause. He contends that a reasonable doubt about the juror's impartiality was raised that was not dispelled by either the court or the state. It is the state's position that the court properly denied the challenge for cause.

This issue has been squarely addressed by this Honorable Court in Penn v. State, 574 So.2d 1079 (Fla. 1991), wherein this Court held that it was not an abuse of the trial court's discretion to refuse to excuse prospective jurors for cause where they ultimately demonstrated their competency by stating that

they would base their decisions on the evidence and the instructions.

In Penn, as in the instant case, a prospective juror indicated that he strongly favored the death penalty, but on further questioning he said he would follow the law as instructed. Prospective juror Lopez clearly stated that he could follow the law and the court's instructions. (R 454) Mr. Lopez' statements do not indicate a juror that has made up his mind and would impose the death penalty in all cases of first degree murder. Thus, it was within the court's discretion to deny a challenge for cause and appellant has failed to show an abuse of that discretion.

CONCLUSION

Based on the foregoing facts, arguments and citations of law the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 21 day of July, 1993.

OF COUNSEL FOR APPELLEE.