IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, :

Appellant, :

vs. : Case No. 78,468

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

A Hillsborough County Grand Jury returned an Indictment on August 1, 1990 charging Oscar Ray Bolin, Jr. with first degree murder, armed robbery and kidnapping (R1272-5). The Court granted Appellant's Motion for Protective Order to prevent dissemination of any of the materials provided in discovery to the media or "any other member of the general public" on November 2, 1990 (R1282-6). Subsequently, over Appellant's objection, the State's Motion to Perpetuate Testimony of the witness Cheryl Coby was granted November 21, 1990 (R1289-91,1741-8).

Subsequently, Appellant moved to continue the deposition of Coby, citing the vast amount of discovery and the State's failure to supply tapes of conversations between the witness and Appellant in a timely fashion (R1296-8,1748,1767-78). On January 8, 1991, the discovery deposition of Cheryl Coby commenced and Appellant's request to be present in person was denied by the court (R1139-43, 1146-60). The court also denied Appellant access to the deposition by electronic means, allowing him only to be in a nearby room where counsel could visit him (R1162-3).

Before the commencement of the videotaped deposition to perpetuate testimony, defense counsel requested that a judge be present to rule on objections (R1755,1757). The State contended that if the videotape were ever to be played for the jury, the court could rule on defense objections at that time (R1760).

On March 11, 1991, Appellant filed a Motion in Limine Regarding Husband/Wife Privilege seeking to exclude from evidence all

communications from Appellant to his spouse during the time they were married (R1309-11). At a hearing held on this motion, March 22, 1991, the State contended that Appellant waived the spousal privilege when his counsel questioned Cheryl Coby about statements she had made to law enforcement revealing communications Appellant had made to her during their marriage (R1337-9,1085-8). The court denied Appellant's motion in limine, stating that counsel waived the "defendant's husband/wife privilege . . . unless Defense counsel can establish ineffective assistance of counsel by competent evidence" (R1340).

Appellant, acting pro se, then filed a "Motion to Discharge Counsel" asserting that he was dissatisfied with his attorneys because they had waived his spousal privilege without his consent (R1386-7). He requested appointment of substitute counsel (R1387). At a hearing held April 12, 1991, the court addressed Appellant and told him that his counsel had previously appeared before him and were competent (R1129). He denied the motion for discharge (R1129-30).

The case came to trial before Circuit Judge M. William Graybill and a jury on July 8-12, 1991 (R1-1077). During jury selection, defense counsel objected to the State's excusal by peremptory strike of two African-American prospective jurors and asked the Court to require the prosecutor to give reasons for their excusal (R462,468). The Court ruled that the defense had not shown a strong likelihood that the State based their strikes on racial bias (R463,468-9).

Appellant also challenged for cause a prospective juror who said on voir dire that he would not consider mitigating evidence (R465-6). The Court denied the challenge for cause and defense counsel used a peremptory strike to excuse him (R467). Appellant subsequently exhausted his peremptory strikes, moved for an additional peremptory, and identified the member of the jury panel who he would excuse if granted the additional strike (R470). The court refused to allow an additional peremptory strike (R474).

During the guilt or innocence trial, Appellant objected to the introduction into evidence of an altered portion of a letter which he wrote, while incarcerated, to a police detective (R755-63). The court allowed the State to elicit testimony from the detective about the contents of the letter (R762-5).

Over Appellant's objection, the Court agreed to give a State requested special jury instruction on the law of accessory after the fact although it was not applicable to Appellant (R825-6,829-30,1585). The jury returned verdicts of guilty as charged to first degree murder, robbery with a weapon and kidnapping (R898,1580-1).

In the subsequent penalty trial, the jury was instructed on the aggravating circumstances: (1) prior conviction of violent felony, (2) during the course of a kidnapping, and (3) committed for financial gain (R1065-6,1582). The jury was permitted to consider the mitigating circumstances of: (1) impaired capacity to conform behavior to the requirement of law, and (2) any other aspect of character or background (R1066,1583). The jury returned a recommendation of death (R1071,1592).

A sentencing hearing was held July 31, 1991 (R1219-37). Appellant's motion for new trial was denied (R1227,1593-7). After hearing arguments of counsel (R1227-32), the court recessed and returned with findings that the three aggravating circumstances instructed upon were proved (R1232-3,1605, see Appendix). The court found two mitigating circumstances: (1) impaired capacity due to a mental disturbance, and (2) abused childhood (R1233-4,1606, see Appendix).

The court sentenced Appellant to death on the first degree murder count (R1234,1601). On the robbery and kidnapping charges, the court departed from the guidelines recommended sentence of 17-22 years (R1607) and imposed consecutive sentences of thirty years and life (R1234-5,1603-4). As a reason for guidelines departure, the court cited the unscored capital felony (R1236-7,1607).

Appellant filed a timely notice of appeal on August 12, 1991 (R1610-1). Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla. R. Crim. P. 9.030(a)(1)(A)(i), jurisdiction lies in this Court.

STATEMENT OF THE FACTS

A. State's Evidence - Guilt or Innocence Phase

On January 25, 1986 around 8:00 a.m., a jogger discovered a body in the woods near his home (R635-6). He notified the Hillsborough County Sheriff's Office (R636). When they arrived, he pointed out a set of tire tracks which had crossed over those of his daughter's car (R636-7). She had returned home shortly after 1:00 a.m. that morning (R636-7).

Associate Medical Examiner, Lee Miller, went to the scene and concluded that the victim had died from multiple stab wounds (R698-9). He testified that the victim, determined to be Natalie Holley, was fully clothed and was wearing several items of jewelry (R702-3).

Vinda Woodson, Natalie Holley's co-worker at a Church's Fried Chicken restaurant in Tampa, said that the two of them closed up the restaurant around midnight on January 24, 1986 (R502-3). After cleaning up and locking up the cash receipts, she and Natalie Holley walked out together and left in their respective cars about 1:30 a.m. (R503-5).

Holley's automobile was found abandoned at the intersection of Smitter Road and Lake Magdalene Boulevard, estimated at 5.4 miles from where her body was discovered (R647,656). Sergeant Raney, a homicide investigator, found a shoe impression in the sand next to the driver's door (R642,649). He purchased a pair of Trax tennis shoes from a K-Mart outlet for comparison purposes (R652-4,663). The FBI laboratory later determined that it was highly likely that

this shoe impression was made by a Trax tennis shoe (R689). However, the FBI Agent could not connect questioned shoe impressions from the scene where the body was found with the one at the victim's car (R693).

On the opposite corner from where the victim's car was found, Deputy Ronald Valenti had observed two vehicles, one with its hazard lights on, around 2:00 a.m., January 25, 1986 (R509-11). He stopped to investigate and found a man and a woman in the vehicle which had its hazard lights on (R516). Deputy Valenti put the tag number into his computer and learned that the 1984 Pontiac Grand Prix was registered to Cheryl and Oscar Bolin (R515-6).

The male driver explained to the deputy that he had run out of gas and that the woman was taking him to get some (R518). Deputy Valenti asked the woman if she was okay and she replied that she was (R518).

At trial, the deputy said he was "vague" on whether he saw the victim's vehicle parked on the southwest corner of the intersection at the same time that he was investigating the two cars stopped on the northwest corner (R531). He said that he had come to believe that he hadn't seen Holley's Dodge Dart on the southwest corner until after this incident (R531-2). Deputy Valenti could not recall what type of vehicle was parked in front of Bolin's Pontiac when he checked the tag (R531). He agreed that a little over two weeks after the incident he had written, "writer is almost sure that the victim's vehicle was at said location when writer observed the other two parked vehicles" (R552).

Sergeant Raney, as part of his investigation of the homicide, contacted Cheryl Bolin on January 28, 1986 with reference to Deputy Valenti's report about her car (R666). She told him that she hadn't been driving and that as far as she knew it was parked outside her home on the night in question (R580-1).

At this point, the investigation of the Holley homicide remained in limbo until July 1990. Cheryl Bolin had been remarried to Danny Coby and was living in Indiana (R614-5). In response to a telephoned tip from Danny Coby, police officers interviewed Cheryl on July 16, 1990 about the Holley homicide (R615-6). At trial, over Appellant's objection that her testimony violated the spousal privilege, she was the State's key witness against Appellant (R544-6).

Appellant's ex-wife testified that on the evening of January 24, 1986, she and Appellant drove to a Burger King restaurant which was directly across the street from the Church's Chicken restaurant where Natalie Holley worked (R559-60). They bought coffee and sat in their car in the Burger King parking lot for "at least an hour" facing the Church's Chicken outlet (R560). Cheryl Coby testified that Appellant told her he was "scoping the place out" (R564).

They returned home, watched television and went to bed at 10:20 p.m. (R602). Cheryl Coby testified that she fell asleep, but was awakened by her husband around 2:00 a.m. (R565,604-5). He was fully dressed and told her to get up, saying "I got to show you something" (R565-6). The witness testified that while Bolin was changing his shoes, she noticed blood on the new Trax tennis shoes

they had recently purchased (R566-7). He dropped a purse in front of her and then dumped the contents out on the bed (R567-8).

Cheryl Coby testified that her husband said that the purse belonged to the manager of the Church's Chicken restaurant (R569). He told her that he followed the manager of Church's Chicken as she drove away from work and got her to pull over by flashing his headlights (R572). Appellant said he believed that the manager would be carrying the cash bank deposit with her (R573). He intended to rob her of this money (R573).

Bolin further told his wife that after he had stopped the Church's Chicken manager, a policeman pulled up (R574). Bolin held a gun at the woman's side and told her to get rid of the cop (R574). He convinced the police officer that they were just having car trouble and the officer left (R574).

Next, Bolin said he searched the manager's car, but could not find any money (R574). He and the woman then went to a orange grove (R575). Appellant's ex-wife said that he told her that he couldn't shoot the manager because it would make too much noise (R575). He stabbed her to death instead (R575).

Cheryl Coby further testified that she and Appellant left their mobile home and drove to where a car was parked (R570-2). The witness identified a photographic exhibit as depicting the car and the location where she and her husband drove the early morning of January 25, 1986 (R576). While she watched, Appellant took a branch and wiped over tracks on the ground (R577). He also took a towel and wiped down both the inside and outside of the parked

automobile (R577). Then, Bolin and his wife drove north on Interstate 275 as far as the intersection of Route 52 (R578). During this drive, Bolin threw the blood-stained tennis shoes and the purse out the window (R578).

Appellant's ex-wife said that a few days later she was contacted by a law enforcement officer who asked about the whereabouts of her vehicle on the night of the homicide (R580-1). She told him that she didn't drive anymore and that as far as she knew, the car was parked outside her mobile home (R581). She didn't mention anything concerning her husband's admissions because he was "sitting right there" (R581). Cheryl Coby testified that the first person she told about what happened was her next husband, Danny Coby (R581). She admitted that she was very upset when Danny Coby informed the Indiana police in July 1990 about the homicide (R616). She said that she was afraid that she might face prosecution for her part in covering up the homicide (R617).

Some corroboration for Cheryl Coby's testimony came from Deputy Ronald Valenti. On July 16, 1990 (approximately 4 1/2 years after the stop), he was shown a photopack and asked to identify the man who was driving the Grand Prix on the night of the homicide (R525-8). He selected Bolin's photo (R526-9). However, he was never able to identify the woman (R529).

The Hillsborough County Sheriff's Office was able to locate the Pontiac Grand Prix in July 1990, although Bolin had sold it years earlier (R708-11). Comparison between two nylon fibers in the clothing of Natalie Holley and the rear seat cover of the Grand

Prix showed that they matched (R739-40). FBI Agent Michael Malone was able to conclude that the fibers on the victim's clothing came from either Appellant's Grand Prix or another vehicle with the same upholstery (R739-40,744).

Captain Gary Terry of the Hillsborough County Sheriff's Office became involved in 1990 with the investigation of the Holley homicide (R747). He testified that on June 22, 1991 he received a letter written to him by Appellant (R764-5). In the letter, Bolin told Captain Terry to ask Cheryl if there was anything else he wanted to know because Cheryl " knows just about everything that he was ever a part of" (R765). Captain Terry further testified that Bolin wrote that Cheryl knew about "this homicide he's charged with" (R765).

B. Defense Evidence - Guilt or Innocence Phase

Danny Coby, Sr., testified that he married Bolin's ex-wife in April, 1989 (R770). Around July 16, 1990 he contacted the police with regard to this homicide which Cheryl had told him about (R771). Coby testified that his wife never acted as though she intended to tell the police about the crime (R771-2). This contradicted her earlier testimony (R583). In fact, she reacted to his disclosure to the police by saying she "hated a f-in snitch" (R772). Danny Coby further testified that Cheryl "bragged" about how she had misled the police officer who investigated the stop of Bolin's Grand Prix on the night of the homicide (R772-3).

Mr. Bolin testified in his own defense (R785-823). He explained that his stepsister, Milanda Williams, who resided with the

Bolins, worked at Church's Chicken (R786). She had told him that Church's deposited their receipts during the day (R787). Therefore, he was aware that a manager leaving at night would not have the bank deposit (R787).

On the night in question, a friend of Appellant, Harold Jackson, asked to borrow Bolin's car (R800). Appellant left the keys in the Grand Prix for Jackson (R800). After Bolin and his wife watched the news on television, they went to bed (R788).

Around 2:00 a.m., Appellant was awakened by a telephone call from Jackson (R788). Jackson said that he had had a "confrontation" with Natalie Holley and that he was in trouble (R788). Jackson didn't give Appellant all of the details, but told him that since Appellant's Grand Prix was involved, he had better "clean up a car" on Smitter Road (R788).

Bolin woke up his wife and made her accompany him to the parked vehicle (R790). Contradicting the testimony of his ex-wife, Bolin testified that he found the victim's pocketbook on the floor of the abandoned car (R790-1). He wiped the victim's car down and drove away (R791). While they were driving on the interstate, Cheryl went through the pocketbook and took out seventy-five dollars (R792). Then she threw the pocketbook out the window (R792).

Bolin denied that he was the person to whom Deputy Valenti spoke on the night of the homicide (R792-3). Appellant explained that Harold Jackson was of a similar height and weight to himself (R790,820) Both men had long brown hair and mustaches (R820-1). Appellant was not surprised that Deputy Valenti mistakenly identi-

fied him as being the person driving the Grand Prix on Smitter Road the morning of the homicide (R821-2).

Appellant further testified that Harold Jackson telephoned him again on the Monday following the homicide (R812). Jackson admitted over the phone that he had killed Natalie Holley (R813). Jackson also explained the details of the incident (R813-5). Bolin then repeated to his ex-wife what Jackson had told him (R793-4, 814).

Sherry Jauregui, Appellant sister, testified that her brother and an individual named Harold Jackson visited her home in Union City, Indiana, during the latter part of 1986 (R778-9). Bolin was driving a truck at the time (R779). Jackson had about the same build as Bolin (R779). It was a short visit during which her brother and Jackson took showers to avoid stopping at a truck stop (R780-1,789).

C. Penalty Phase Evidence

The State published a stipulation agreed to by the defense that Bolin had Ohio convictions in 1988 for rape and kidnapping (R926). No further evidence in aggravation was presented by the State.

The defense presented testimony by Bolin's mother, his sister and a mental health expert (R926-1042). Mary Baughman, Appellant's mother, testified that she was never married to Oscar Bolin, Sr., Appellant's father, but had four children with him (R927-8). Appellant, the oldest, was raised in a nightmarish home environment, where the parents fought constantly, both verbally and physi-

cally (R927-9). Appellant's father would not provide for the children (R929). He threatened the children's mother with a gun on many occasions (R933). He physically abused Appellant "whenever he felt like he wanted to do it" (R934-5).

Appellant's parents separated and the children spent some time with each (R935-6). Appellant's mother testified that Appellant would return from the custody of his father "dirty, half-starved to death" and sometimes bruised (R937). Nonetheless, Appellant often tried to run away from his mother's custody and she kept him bound with a dog chain at home to prevent this (R936).

When Appellant was 12 or 13, he went to live with his father permanently (R939). When he returned, around age 17, he soon met Cheryl and married her (R939-40).

Appellant's younger sister, Sherry Jauregui, also testified about their upbringing (R949-68). She said that they grew up in West Liberty, Kentucky with two parents who "tried to kill each other all the time" (R950-1). The father often abused Appellant, beating him with a baseball bat and a dog chain (R953). On one occasion, the father locked the family in the house, doused it with gasoline, and tried to set it on fire (R954). The grandfather intervened and prevented the burning (R954). The witness said she got married at age 14 in order to get away from home (R955).

Sherry Jauregui further testified that Appellant was devastated by the murder of their brother Arthur, at age 18 (R955,928). Appellant was also deeply depressed about the death of his first-

born son (R956). The witness herself had twice attempted suicide and had been a juvenile delinquent (R967).

Dr. Robert Berland, a board certified forensic psychologist testified that he did an extensive evaluation of Bolin (R969-74). He administered the Minnesota Multiphasic Personal Inventory to Bolin on two occasions (R975). Dr. Berland said that the results of those tests indicated that Bolin was psychotic (R987-90). Particularly significant was Bolin's unusually high score on the mania scale in addition to high scores on the paranoia and schizophrenia scales (R987-9).

Dr. Berland also administered the Weschler Adult Intelligence Scale (R990). Bolin showed clinically significant deviations in his performance on different parts of this test from well above average I.Q. to low average (R991-2). Dr. Berland testified that this type of disparity indicates damage to some part of the brain (R992-3).

The doctor conducted a clinical interview with Appellant and interviews with family members and other people who knew him (R993, 999). These interviews supported the conclusion that Bolin had a genuine genetically inherited mental illness (R996-7,1007-9). There was also a history of head injuries which could have caused brain damage (R1001-3). His mother drank heavily on a daily basis throughout the pregnancy (R1001). At age 17, Bolin was in jail and tried to hang himself (R1003). Efforts at reviving him took some time (R1003). Finally, Appellant reported abusing amphetamines for a period of five years on a daily basis (R1003). Dr. Berland

explained that such persistent use of amphetamines causes measurable brain damage and "an acute paranoid condition which appears to be permanent" (R1003).

Dr. Berland gave his opinion that Bolin suffered from an organic personality syndrome from an early age (R1009). From his late teens or early twenties on, he had either schizo-affective disorder or bipolar disorder (R1009). While Bolin was not legally insane, he was under the influence of a biologically-caused mental or emotional disturbance for a long time before the offense and continues to be mentally ill (R1012-3). Bolin was capable of recognizing the criminality of his conduct, but was substantially impaired in his ability to resist illegal impulses (R1013-4).

The State presented a rebuttal witness, Corporal Lee Baker of the Hillsborough County Sheriff's Department (R1042-3). He testified that he interviewed Bolin's mother, Mary Baughman on July 27, 1990 (R1043). At that time, she said that she placed Appellant with his father at age 12 because he was beating up his brothers and sisters (R1043). Allegedly, he was "attempting to tear the arms and legs off these children" (R1043).

SUMMARY OF THE ARGUMENT

Appellant did not waive the husband-wife privilege which would have prevented Cheryl Coby from testifying about the admissions Bolin allegedly made to her about this homicide at the time they were married. The trial court's ruling that Appellant waived the privilege by failing to file a motion in limine prior to the taking of Cheryl Coby's deposition to perpetuate testimony was error. Appellant did object to the confidential communications being revealed in the deposition to perpetuate testimony. Defense counsel's prior inquiry into the communications during the discovery deposition was not a waiver because Coby had previously told law enforcement about Bolin's statements. Defense counsel merely asked to discover what Coby had told law enforcement. Significantly, a protective order had already been granted which precluded Coby's deposition from becoming public record. Indeed, there was no actual public disclosure of the privileged communications until trial. Also, Appellant had always asserted the privilege personally and had attempted to attend the deposition. He never ratified his counsel's action. If counsel did impair the spousal privilege, it was adverse to Bolin and he should have been entitled to bar the marital communications from coming in at trial. Finally, the privileged communications were a highly prejudicial and substantial part of the evidence against Appellant. The error in admitting them cannot be harmless.

After the trial court's ruling that defense counsel had waived the husband-wife privilege, Appellant filed a pro se motion to dis-

charge his counsel and have other counsel appointed. Although the trial judge held a hearing on this motion, he did not allow Appellant to be heard until after he had already denied the motion. The trial court did not follow the procedure mandated by this Court pertaining to the necessary inquiry when an indigent defendant desires to discharge his court-appointed counsel.

Appellant objected to the prosecutor's use of two peremptory challenges to strike African-American prospective jurors, but the trial court refused to make the prosecutor state non-racial reasons. One of these challenged jurors had said nothing on voir dire which would suggest that she would not be impartial. The court erred by not requiring the prosecutor to give reasons for his excusal of this prospective juror.

The State's specially requested jury instruction on accessory after the fact was not relevant to the evidence and should not have been given. It was prejudicial to Appellant because the jury could have interpreted it as the trial judge's comment on the credibility of the State's key witness, Cheryl Coby.

A prospective juror stated that he believed in "an eye for an eye" and would not be interested in hearing mitigating evidence about the defendant's background. Appellant's challenge for cause to this prospective juror should have been granted because a reasonable doubt about the juror's impartiality was raised and neither the State nor the trial judge did anything to rehabilitate the challenged juror.

ARGUMENT

ISSUE I

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. ADMISSION AT TRIAL OF THESE PRIVILEGED COMMUNICATIONS WAS REVERSIBLE ERROR.

Section 90.504 of the Florida Evidence Code (1991) sets forth the Husband-Wife privilege:

> (1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.
>
> (2) The privilege may be claimed by either spouse.

Since Oscar Ray Bolin and Cheryl Coby were husband and wife at the time when both this homicide and the alleged admissions occurred, the privilege is applicable to Coby's testimony. In fact, the State specifically conceded that the communications between Appellant and his ex-wife could not come into evidence at trial absent a waiver by Appellant of the husband-wife privilege (R1097).

Waiver of privilege has been addressed by the legislature. Section 90.507 of the Florida Evidence Code provides:

> **Waiver of privilege by voluntary disclosure.** A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he, or his predecessor while holder of the privilege, voluntarily discloses or makes the communication when he does not have a reasonable expec-

> tation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication.

Professor Ehrhardt sums up this provision as meaning that "the party who is the holder of a privilege against the disclosure of confidential communications waives the privilege when the contents of the communication are voluntarily disclosed." Ehrhardt, Florida Evidence §507.1 (1992 edition). A waiver of the privilege lets "the horse out of the barn" and the privilege cannot be reinstated later. Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111 at 1114 (Fla. 4th DCA 1982).

At bar, defense counsel first invoked the husband-wife privilege during the January 11, 1991, deposition to perpetuate testimony of Appellant's ex-wife, Cheryl Coby (R1086,1099-1101). The State took the position both then and in the hearing held March 22, 1991 on Appellant's "Motion in Limine Regarding Husband/Wife Privilege" that Appellant had already waived his privilege during the discovery deposition of Cheryl Coby by asking her questions about statements she attributed to her husband (R1086-8). The prosecutor argued that Appellant had to elect between having discovery of his former wife's statements to law enforcement and preservation of the husband-wife privilege (R1085-8,1093-5). The court asked defense counsel why, prior to taking the discovery deposition, he didn't file a motion to prohibit the State from eliciting marital communications during the deposition to perpetuate testimony (R1101-3). The court eventually ruled that defense questioning of Cheryl Coby

about marital communications during the discovery deposition was a waiver of the husband-wife privilege "unless such delving is tantamount to ineffective assistance of counsel" (R1340).

At trial, the judge acknowledged the possible legal infirmity of his ruling and suggested that the State "give serious consideration" before eliciting testimony of marital communications from the witness, Cheryl Coby (R7). The State offered and defense counsel accepted a stipulation granting a standing objection to each spousal communication introduced into evidence by the testimony of Cheryl Coby (R544-5). The court noted that the discovery deposition of Coby was not public record yet and ordered it to be a sealed portion of the court file for appellate purposes (R545-7). Before Cheryl Coby divulged any communication from Bolin in her testimony, defense counsel objected (R561) and was instructed by the court to make no more objections based on the spousal privilege unless the confidential communication elicited had not been a part of the discovery deposition (R562-4).

A. Appellant 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.

It is undisputed that Cheryl Coby had already told law enforcement about Appellant's statements during their marriage which tended to incriminate him in the homicide of Natalie Holley. Thus, she had already breached the confidential relationship by her voluntary disclosures before the discovery deposition. However, Appellant retained the power to prevent his ex-wife from testifying

at his trial as to his communications which occurred during their marriage under Section 90.504, Florida Evidence Code (1991). Brown v. May, 76 So. 2d 652 (Fla. 1954).

The important feature of the discovery deposition is that defense counsel only sought to discover from Cheryl Coby what marital communications she had already disclosed to law enforcement (R1083-4). The prosecutor took the position that defense counsel had to rely upon "the police accounts of Ms. Coby's statements concerning what has occurred between these two" or else waive the privilege by asking Coby about the statements "in any type of proceeding" (R1085-6). The trial judge cited Tibado v. Brees, 212 So. 2d 61 (Fla. 2d DCA 1968) and asked defense counsel why a similar waiver had not occurred at bar (R1088-9).

Tibado presented a quite different situation from the case at bar. The husband in Tibado testified voluntarily at deposition about confidential communications between himself and his wife. Then, he tried at trial to assert the husband-wife privilege to prevent his disclosures from coming into evidence. The Second District correctly held that he waived the privilege by divulging confidential communications in a depostion that was filed as public record.

At bar, however, Appellant did not reveal any confidential communications, so he retained his privilege. His ex-wife only disclosed what she had already told law enforcement. Finally, Coby's deposition was not and could not be made public in accord with the protective order issued by the trial court (R5-6,1285-6).

Another case heavily relied upon by the State was Tucker v. State, 484 So. 2d 1299 (Fla. 4th DCA), rev.den., 494 So. 2d 1153 (Fla. 1986). In Tucker, the defendant's attorney-client privilege was waived when defense counsel listed his confidential expert psychiatrist appointed pursuant to Fla. R. Crim. P. 3.216(a) as a witness and allowed the State to take her deposition.

Tucker might be on point with the case at bar if Cheryl Coby were a defense witness. However, Coby was always a state witness. Moreover, she had already disclosed the confidential communications to the State; therefore, the State did not gain information through the discovery deposition as was the case in Tucker. Tucker's rationale is no more than the general rule of law tht "any voluntary disclosure by the holder of . . . a privilege is inconsistent with the confidential relationship and thus waives the privilege." United States v. A.T.T. Co., 642 F. 2d 1285 at 1299 (D.C. Cir. 1980). At bar, there was simply no disclosure attributable to the defense because the privileged communications had already been disclosed to the State by Coby's betrayal of Bolin's confidential communications.

Another case for comparison is People v. Simpson, 68 Ill. 2d 276, 12 Ill. Dec. 234, 369 N.E.2d 1248 (1977). The Supreme Court of Illinois held in Simpson that the defendant waived his privilege when he made a public reply to his wife's revelation of confidential communications. The Simpson court emphasized that the wife's disclosure of confidential communications to police officers while in the defendant's presence did not waive the privilege. However,

the defendant's response which admitted the confidential communication acted as a waiver. The court wrote:

> When confronted by his prior, privileged statement in the trailer he could have remained silent or denied having made such a statement. Under these circumstances, the privilege of the communication in the trailer would, no doubt, have been preserved, despite his wife's revelation of that conversation to the police.

369 N.E.2d at 1252.

At bar, Appellant in no way admitted the statements attributed to him by his ex-wife in her account to the police and at her discovery deposition. Accordingly, under the rationale of the Simpson court, no waiver occurred because Appellant did not reveal anything himself or adopt Coby's account.

This Court's prior decision in Koon v. State, 463 So. 2d 201 (Fla.), cert.den., 472 U.S. 1031 (1985) applies at bar. The Koon court noted the "strong public policy in favor of the marital privilege" and held that it was reversible error to admit testimony from the defendant's wife which disclosed marital communications over her husband's objection. 463 So. 2d at 204. Moreover, this Court rejected the State's contention that Koon waived his privilege by making admissions about the murder to two other people.

At bar, Appellant neither made admissions about the homicide nor disclosed marital communications. Consequently, he never waived his privilege to prevent his ex-wife from testifying at his trial to the confidential communications.

B. Appellant Did Not Waive the Husband-Wife Privilege Because No Actual Public Disclosure of the Confidential Communications Occurred Prior to Trial.

In Truly Nolen Exterminating v. Thomasson, 554 So. 2d 5 (Fla. 3d DCA 1989), it was argued that the work-product privilege was waived when a party failed to assert it at the earliest opportunity. The Third District, however, held that there was no waiver because there had never been an actual disclosure of the privileged information. Consequently, a pleading asserting the privilege is effective anytime before an acutal disclosure has occurred.

Applying this analysis to the case at bar, Appellant's objection at the taping of the depostion to perpetuate testimony and the subsequent Motion in Limine Regarding Husband/Wife Privilege preserved his right to invoke the privilege. While the trial court's observation that Appellant could have filed a motion prior to the discovery deposition of Cheryl Coby was correct, Appellant still did not waive his privilege by waiting until a later time to assert it. As the court noted, there was no public disclosure of Cheryl Coby's deposition or any communications prior to testimony at trial (R545-6). Defense counsel was entitled to rely on the court's protective order entered November 2, 1990 to prevent any public disclosure of the marital communications (R1285-6). Hence, there was no waiver.

Another case which is relevant by analogy is In re Doe, 964 F. 2d 1325 (2d Cir. 1992). In Doe, a government witness asserted the psychotherapist-patient privilege in refusing to allow the defense access to his psychiatric files or to answer defense counsel's

questions at a pretrial hearing. The trial court held the witness in contempt of court. On appeal, the Second Circuit recognized the psychotherapist-patient privilege, but affirmed the district court. Because a protective order was in force, there would be no public disclosure of confidential matters by answers of the witness. The court wrote:

> The discovery concerning appellant's history of mental illness and treatment may go on in camera subject to the protective order and that rulings as to the admissibility of particular items of evidence must await trial.

964 F. 2d at 1329.

In essence, the Second Circuit took the position that there is no waiver when privileged matters are disclosed in discovery as long as they are not made public. Indeed, a witness may be held in contempt for asserting a privilege when the witness is otherwise protected from having a confidential matter publicly disclosed.

If the logic of this decision is applied to the facts at bar, it is evident that defense counsel could question Cheryl Coby during discovery about privileged communications without waiving the right to assert the privilege at trial. The fact that a protective order prevented public disclosure of confidential communications was sufficient to ensure appellant's ability to claim the husband-wife privilege. Accordingly, the trial court erred by finding a waiver of the privilege where the marital communications could not be made public.

C. Appellant Did Not Personally Waive the Husband-Wife Privilege; Neither Did He Authorize His Lawyers to Waive It.

At all times during the proceedings, Appellant personally continued to assert the husband-wife privilege. Prior to his ex-wife's discovery deposition, he requested permission from the court to be present (R1146,1153-5,1746). The court ruled that Appellant could not be physically present at the discovery deposition; he could only be in a nearby room where counsel could consult with him (R1146-7,1160-1). The court also rejected requests that Appellant have electronic access to the deposition and that he be made co-counsel in order to be present (R1162-4).

After the court's ruling that Appellant's counsel had waived the husband-wife privilege, Appellant moved pro se to discharge his attorneys (R1386-7). In his motion, he specified that he did not consent to waive the privilege (R1386).

Under these circumstances, it should be held that if counsel did impair the husband-wife privilege by deposing Cheryl Coby, the action did not bind Bolin personally because he never ratified his counsel's action. The decision of Schetter v. Schetter, 239 So. 2d 51 (Fla. 4th DCA 1970) is relevant here. In Schetter, the defendant's attorney tape recorded a conversation with the defendant and submitted the recording to a psychiatrist without the consent of the defendant. The psychiatrist then testified at a hearing, basing his opinion that the defendant was incompetent on the taped conversations. On appeal, the Fourth District reversed, holding that the lawyer's adverse action in giving the tape to the psychiatrist did not waive the attorney-client privilege. Therefore, the

defendant was entitled to bar the psychiatrist from testifying at the hearing.

A similar consideration is present at bar. If, as the trial court ruled, Appellant's counsel should have filed a motion to prohibit the State from eliciting any confidential communications prior to taking the discovery deposition of Cheryl Coby (R1103), it follows that counsel's eliciting of confidential communications was adverse to Appellant. Accordingly, it should be held that Appellant did not waive his husband-wife privilege because his attorneys' action at the discovery deposition was neither authorized by him nor in his interest.

D. Harmless Error Analysis

If the State cannot prove beyond a reasonable doubt that impermissible evidence did not contribute to the jury's verdict, the error is not harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Proper application of the test requires "a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." Id., 491 So. 2d at 1135.

At bar, it is clear that Cheryl Coby was the State's star witness and that Bolin could not have been convicted without her testimony. Absent the marital communications, Coby would still have been permitted to testify to her observations of Appellant's conduct at the time surrounding the homicide. See, Kerlin v. State, 352 So. 2d 45 (Fla. 1977). However, without the verbal

admissions Appellant allegedly made to his ex-wife, the observations themselves were only marginally incriminating as to the homicide of Natalie Holley.

For instance, Coby could properly testify that she and Bolin drank coffee in the parking lot of a Burger King restaurant facing the Church's Chicken outlet where the victim was employed (R560). However, without Appellant's communication that "he was scoping the place out" (R564), the fact of drinking coffee in proximity to the victim's place of employment is practically irrevelant.

Similarly, Coby could properly testify to her observations when Bolin awakened her at home in the early morning hours. These observations were that Appellant was acting nervous (R566), that there was blood on his new tennis shoes (R566-7), and that he dumped out the contents of a purse which did not belong to her (R567-9). However, without Appellant's statement that the purse belonged to "the manager of the Church's Chicken" (R569), there is nothing to connect the purse with the victim of this homicide.

Even the excursion where Coby accompanied Appellant and watched him wipe a car clean inside and out was only circumstantial evidence without the accompanying marital communications. Coby did not remember anything specific about the car; only that it "looked like an older car" (R572). While Bolin's throwing his shoes and the purse out the car window is also some evidence of covering up a crime, there is no evident connection with this particular crime. The same is true with regard to Bolin's thorough cleaning of the couple's Pontiac Grand Prix the following day (R579-80).

By contrast, the marital communications which Coby divulged were highly incriminating. Bolin allegedly confessed to his ex-wife that he "followed the manager of Church's Chicken and got her to pull over" (R572). Bolin said that his intention was to rob her of the restaurant's cash receipts which he thought she would be carrying (R573). Bolin told Coby about a police officer stopping while he was with the victim (R573-4). Coby testified that Bolin said he took the victim to an orange grove and stabbed her to death (R575).

These marital communications were highly prejudicial to Appellant, particularly because they were corroborated by the other evidence. A reasonable juror might well question Deputy Valenti's ability to make an identification of Bolin 4 1/2 years after a routine encounter (R528). However, Coby's testimony that Bolin told her about the incident buttressed the deputy's credibility.

In short, the revealed marital communications transformed a weak case of circumstantial evidence against Appellant into a case where the jury had to convict unless they believed Coby was a total liar. If the marital communications were admitted in error, the error clearly contributed to the jury's verdict.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO CONDUCT A SUFFICIENT INQUIRY INTO APPELLANT'S PRO SE MOTION TO DISCHARGE COUNSEL.

After the trial judge had ruled that Appellant waived his spousal privilege, Appellant filed a pro se "Motion to Discharge Counsel" (R1386-7). He stated that he was dissatisfied with his lawyers' performance (R1386). He stated that he had not intended to waive his spousal privilege and that his attorneys rendered ineffective assistance when they did so (R1386-7).

A hearing on this motion was held April 12, 1991 (R1114-34). At this hearing, the judge questioned defense counsel as to whether they were aware of the husband-wife privilege in the Florida Evidence Code at the time they took Cheryl Coby's discovery deposition (R1116-7). Both counsel said that they had researched the law before taking Coby's discovery deposition and were of the opinion that asking her questions about marital communications would not waive the husband-wife privilege (R1118-9). Counsel also stated that there was no tactical decision involved (R1127). If, as the trial judge had found, defense counsel should have moved the court for an order precluding the State from delving into marital communications prior to taking the discovery deposition, counsel made a mistake by not following that procedure (R1128-9).

The trial judge then proceeded to rule, as follows:

> Mr. Bolin, both Mr. Firmani and Mr. O'Connor have been before this court on cases that do not involve your case, or cases. I have found both attorneys to be very compe-

> tent. Mr. O'Connor has years of experience in handling first degree murder cases and Mr. Firmani, I've already told you that in this Court's opinion, is a fine lawyer. Your motion to discharge--
>
> THE DEFENDANT: Can I say something?
>
> THE COURT: -- the Public Defender is denied.
>
> THE DEFENDANT: So I can't say nothing?
>
> THE COURT: Yes, you can say something. I've denied your motion.

(R1129-30)

In denying his motion to discharge counsel, Bolin was deprived of the elementary due process right to be heard before a ruling was made. Furthermore, the trial court's handling of this motion did not comport with the procedure endorsed by this Court in Hardwick v. State, 521 So. 2d 1071 (Fla.), cert.den., 488 U.S. 871 (1988). The Hardwick court wrote:

> If incompetency of counsel is assigned by the defendant. . .the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare for the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

521 So. 2d at 1074-5), quoting from Nelson v. State, 274 So. 2d 256 at 258-9 (Fla. 4th DCA 1973).

At bar, the trial judge not only made no "sufficient inquiry of the defendant"; he made no inquiry whatsoever. He forced Bolin to proceed with counsel who he had come to distrust. Above all, the court did not even clearly rule whether Bolin had received ineffective assistance of counsel.

When an indigent criminal defendant establishes adequate ground, he has a constitutional right to replacement of his court-appointed counsel. Capehart v. State, 583 So. 2d 1009 at 1014 (Fla. 1991), cert.den., 112 S. Ct. 955 (1992). Failure to follow the procedure mandated by Hardwick and Nelson requires reversal. Chiles v. State, 454 So. 2d 726 (Fla. 5th DCA 1984). Unlike the situation in Bowden v. State, 588 So. 2d 225 (Fla. 1991), cert. den., 112 S. Ct. 1596 (1992), where a majority of this Court found the inquiry "adequate", the inquiry at bar was inadequate. See also, Jones v. State, 18 Fla. L. Weekly S 11 (Fla. December 17, 1992) (Justice Barkett, dissenting opinion at S 13). Appellant should now be granted a new trial.

ISSUE III

THE TRIAL JUDGE ERRED BY FAILING TO REQUIRE THE PROSECUTOR TO GIVE HIS REASONS FOR EXERCISING PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN PROSPECTIVE JURORS.

During jury selection, the State used one of its peremptories to strike prospective juror Felicia Lee (R462). Defense counsel objected, pointed out that Ms. Lee was African-American, and asked the trial court to require the prosecutor to give a reason for the excusal (R462). The judge denied the defense request (R463).

Later, the State used another peremptory challenge to excuse prospective juror Linda Presley, also an African-American (R468). Again, defense counsel objected and asked the court to inquire into the prosecutor's reason for the strike (R468). The court ruled that the defense had not established a strong likelihood of racial bias in the exercise of the State's peremptories (R468-9). He did not require the prosecutor to give reasons.

In State v. Johans, 18 Fla. L. Weekly S 124 (Fla. February 18, 1993), this Court held that a Neil [1] inquiry into reasons for exercise of a peremptory strike must be held whenever a party objects that a peremptory has been used in a racially discriminatory manner. However, the Johans opinion also states that the holding is to be given prospective application only. Therefore, the case at bar must be analyzed within the framework of "whether there was a showing of a 'strong likelihood' that the venire member was

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[1] State v. Neil, 457 So. 2d 481 (Fla. 1984).

being challenged solely because of race." Johans, 18 Fla. L. Weekly at S 125.

In this appeal, Appellant will abandon the objection at trial to the excusal of prospective juror Lee.[2] However, the record shows no indication whatsoever that prospective juror Presley would not have been a fair and impartial juror. Ms. Presley said that she had been employed as a custodian by the University of South Florida for four years (R96). She was in favor of the death penalty (R96). She had seen a news flash on television about Bolin's upcoming trial, but had not formed an opinion about the case (R368-9).

Although the record reflects that two African-Americans ultimately sat on Appellant's jury, even one racially motivated strike violates both the Equal Protection Clause of the Fourteenth Amendment and the Florida Constitution, Art. I, sec. 16. Reynolds v. State, 576 So. 2d 1300 at 1301 (Fla. 1991); Thompson v. State, 548 So. 2d 198 at 202 (Fla. 1989); Slappy v. State, 522 So. 2d 18 at 21 (Fla.), cert.den., 487 U.S. 1219 (1988). Any doubt about whether the objecting party has shown a likelihood of racial motivation in peremptory strikes should be resolved in favor of that party. Slappy, 522 So. 2d at 22; Tillman v. State, 522 So. 2d 14 at 17 (Fla. 1988).

This Court has found reversible error in situations similar to the one at bar where the trial judge refused to conduct a Neil

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[2] Lee said that she was generally opposed to the death penalty, but could vote for it under some circumstances (R77-8).

inquiry. In Blackshear v. State, 521 So. 2d 1083 (Fla. 1988), this Court observed "no indication that any of the excluded blacks would be unfair or partial." 521 So. 2d at 1084. Again in Reynolds v. State, 576 So. 2d 1300 (Fla. 1991), reversible error was found where the minority prospective juror's answers did not suggest a valid ground for excusal and the trial court failed to require the prosecutor to give reasons for his peremptory strike. Since the prospective juror at bar, Linda Presley, also said nothing which would suggest a reason to excuse her, this Court should hold that the trial judge committed error by declining to require the prosecutor to give non-racial reasons.

Because Appellant was convicted by a jury which may have been selected under the taint of racial bias, he was deprived of rights under Article I, sections 2 and 16 of the Florida Constitution and the Equal Protection Clause of the Fourteenth Amendment, United States Constitution. He should now be granted a new trial.

ISSUE IV

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

Over Appellant's objection, the trial judge agreed to give a special jury instruction which the State requested (R825-6,1585). As modified by the trial judge, Appellant's jury was instructed:

> Spouses, parents, grandparents, children or grandchildren of any person who has committed a felony cannot be prosecuted in Florida as an accessory after the fact for giving the offender any aid or assistance with the intent of helping the offender cover up the crime or avoid or escape detection, arrest, trial or punishment.

(R888-9,1574)

Although accessory after the fact was not a crime for which Bolin could be convicted, the purpose of the instruction was evident. On defense cross-examination of Cheryl Coby, the following occurred:

> Q. Were you not worried, ma'am, that you might be charged with an offense related to the death of Natalie Holley?
>
> A. I don't know. The thought entered my mind, yes.
>
> Q. So, did you not fear that you might be arrested for being an accessory after the fact at the very least?
>
> A. That's a possibility, yes.

Q. Would I be correct in saying that fact has passed through your mind on more than one occasion since July the 16th of 1990?

A. The thought of being arrested, you mean?

Q. Yes.

A. On more than one occasion, yes.

(R617) The State's reason for requesting the special jury instruction was to rebut the defense impeachment of Cheryl Coby as it related to possible bias and motive in testifying for the prosecution.

However, this was not proper rebuttal. It is entirely immaterial whether Coby could have been prosecuted as an accessory after the fact; the point is that she was 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. It is this fear of prosecution which supplies a motive for her to testify falsely. What exact charges she might face and whether her fears were realistic are beside the point.

Consequently, the special instruction read to the jury was irrelevant to any fact in evidence. It was prejudicial to Appellant however, because the jury might have interpreted the instruction as a comment by the judge on the credibility of Cheryl Coby. In effect, the court's instruction tended to negate the proper impeachment of Coby's testimony.

This Court held in Butler v. State, 493 So. 2d 451 (Fla. 1986) that trial judges should only give jury instructions which concern

evidence received at trial and that the instructions must not be misleading or confusing. This Court has also said:

> It is fundamental that instructions should be confined to the law applicable to the controversy. Abstract instructions on questions of law not applicable should not be given by a trial court.

Driver v. State, 46 So. 2d 718 at 719 (Fla. 1950). The instruction at bar clearly falls within the category proscribed by these decisions. Jury instructions pertaining to crimes which were unrelated to the evidence or confusing have been the basis for reversal in such decisions as Griffin v. State, 370 So. 2d 860 (Fla. 1st DCA 1979) (instruction on possession of stolen property) and Doyle v. State, 483 So. 2d 89 (Fla. 4th DCA 1986) (altered instruction on third degree murder).

This Court has also found error where the trial court's instruction can be construed as a comment on the evidence. In Whitfield v. State, 452 So. 2d 548 (Fla. 1984), this Court reversed a conviction stating:

> Especially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to the weight, character, or credibility of any evidence adduced.

452 So. 2d at 459. Accord, Fenelon v. State, 594 So. 2d 292 (Fla. 1992). The prejudice caused by a judge's comment on the evidence was explained by the Third District in Hamilton v. State, 109 So. 2d 422 (Fla. 3d DCA 1959):

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him,

> overshadow those of the litigants, witnesses and other court officers. Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled.

109 So. 2d at 424-5.

At bar, the impartiality of Appellant's trial was impaired by the judge's instruction as accessory after the fact. Because the trial was essentially a contest between Coby's accusations of Bolin and his version of the events, the error cannot be harmless. Appellant should be granted a new trial.

ISSUE V

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

Prospective juror Lopez was initially questioned during voir dire about his attitude towards capital punishment. He stated, "I was raised in believing that an eye for an eye, tooth for a tooth, a life for a life" (R453). Defense counsel later asked prospective juror Lopez:

> 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.

(R454-5)

Defense counsel then moved to excuse Mr. Lopez for cause on the ground that he would not consider Appellant's background as possible mitigation (R465-6). The court denied Appellant's challenge for cause (R467).

The initial inquiry in any jury selection issue on appeal is whether the issue was properly preserved. At bar, Appellant exhausted his ten peremptory challenges, one of which was used to excuse prospective juror Lopez (R467,469-70). Defense counsel

requested an additional peremptory challenge (R470). Counsel further stated that if he had an additional peremptory, he would excuse juror McCombs (R470). After hearing argument (R470-3), the court declined to grant any additional peremptory challenges (R474).

Appellant followed the procedure which this Court required in Trotter v. State, 576 So. 2d 691 at 693 (Fla. 1990) (defendant must show that peremptories were exhausted and that an objectionable juror sat on his jury). At bar, Appellant objected to having juror McCombs on his jury, but McCombs was seated (R470-1,478). Consequently, Appellant did all that was required to preserve his claim that denial of his challenge for cause was error. Trotter; Zippo v. State, 18 Fla. L. Weekly D 144 (Fla. 4th DCA December 23, 1992).

Turning to the merits of the claim, the United States Supreme Court has recently made clear that a capital defendant's Sixth and Fourteenth Amendment rights to trial by an impartial jury are violated if a juror is seated who would vote to impose a death sentence regardless of whatever mitigating evidence might be presented. Morgan v. Illinois, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 492 (1992). The Court declared that

> Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the law.

119 L. Ed. 2d at 506. Basically, the Morgan decision applied the Court's precedents in Eddings v. Oklahoma, 455 U.S. 104 (1982) (capital sentencer may not refuse to consider any relevant miti-

gating evidence) and Hitchcock v. Dugger, 481 U.S. 393 (1987) (Florida penalty jury must be instructed to consider evidence of nonstatutory mitigating circumstances) to the Sixth Amendment requirement of juror impartiality.

In Florida, the test of when a challenge for cause on the grounds of lack of impartiality should be granted is that set forth by this Court in Singer v. State, 109 So. 2d 7 (Fla. 1959). The Singer court wrote:

> if there is basis for any reasonable doubt as to any juror's possessing the state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused. . . .

109 So. 2d at 23-4. Accord, Hill v. State, 477 So. 2d 553 (Fla. 1985).

At bar, the statement of prospective juror Lopez that his basic attitude was "an eye for an eye" combined with his statement that he wouldn't consider the background of a defendant when determining the appropriate sentence to recommend was sufficient to raise a reasonable doubt about his impartiality. When the trial judge noted that Mr. Lopez did not say "if he's told by the Court that he must consider it [the defendant's background], that he would not follow the law" (R466), the Singer test was not applied. If Appellant had shown that prospective juror Lopez would have refused to follow the court's instruction, he would have conclusively proved that Lopez was not an impartial juror. The Singer test requires only a "reasonable doubt" that the prospective juror lacks impartiality.

When presented with similar situations in the past, this Court has found reversible error. A prospective juror in Hill v. State, 477 So. 2d 553 (Fla. 1985) admitted that he was inclined toward recommending a death sentence if the defendant was found guilty of first-degree murder. In holding that this prospective juror should have been excused for cause, this Court stated that the trial judge "failed to apply the rules of law set forth in Singer." 477 So. 2d at 556.

Even more on point with the case at bar is this Court's decision in Bryant v. State, 601 So. 2d 529 (Fla. 1992). There, eleven prospective jurors agreed that if the defendant were found guilty of premeditated murder, they would "pretty much automatically" vote to impose death. In denying the defendant's challenge for cause to these jurors, the trial judge stated that defense counsel did not "explain to them their options under mitigating circumstances." 601 So. 2d at 532. On appeal, this Court held that "it is not defense counsel's obligation to rehabilitate a juror who has responded to questions in a manner that would sustain a challenge for cause." 601 So. 2d at 532. Rather the burden is on the prosecutor or the judge "to make sure the prospective juror can be an impartial member of the jury." 601 So. 2d at 532. Since there was no rehabilitation, the Bryant court reversed for a new penalty proceeding.

Applying the Bryant decision to the case at bar, it was incumbent upon the prosecutor or the judge to attempt to rehabilitate prospective juror Lopez before denying Appellant's challenge for

cause when the prospective juror said that he wouldn't be interested in considering the defendant's background with regard to the penalty recommendation. It was up to the prosecutor or the judge to inquire whether Mr. Lopez would follow the court's instruction to consider nonstatutory mitigating evidence despite the prospective juror's disinclination to do so. Since this did not occur, Appellant's challenge for cause should have been granted. His death sentence should now be vacated and a new penalty proceeding ordered.

CONCLUSION

Based upon the foregoing arguments, reasoning and authorities, Oscar Ray Bolin, Jr. Appellant, respectfully requests this Court to grant him relief as follows:

As to Issues I - IV - remand for a new trial.

As to Issue V - vacation of death sentence and remand for a new penalty proceeding before a new jury.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA)
vs.)
OSCAR RAY BOLIN, JR.,)
Defendant.)

Case No. 90-11832
TRIAL DIVISION I

FINDINGS IN SUPPORT OF DEATH SENTENCE

The following Statutory Aggravating Circumstances were proved beyond a reasonable doubt:

1. The defendant has been previously convicted of another felony involving the use or threat of violence to some person as evidenced by his stipulation that he was convicted of the crimes of Kidnapping and Rape in the State of Ohio back in 1988.
2. The crime for which the defendant is to be sentenced was committed for financial gain as evidenced by his conviction of Robbery with a Weapon under Count Two of the Indictment.
3. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of Kidnapping as evidenced by his conviction of Kidnapping under Count Three of the Indictment.

The following Statutory and Non-statutory Mitigating Circumstances were properly established.

1. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired due to a mental disturbance as evidenced by the expert testimony of Dr. Robert M. Berland.

2. Any other aspect of the defendant's character or background as evidenced by the testimony of his mother and sister to the effect that during his childhood he was subjected to a nightmarish home environment and was physically and mentally abused by his father.

The jury's 11 to 1 recommendation was reasonable since the Aggravating Circumstances outweigh the Mitigating Circumstances to such an extent that the defendant deserves the death penalty.

M. Wm. Graybill

M. WM. GRAYBILL, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 6th day of April, 1993.

Respectfully submitted,

Douglas S. Connor

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