IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

v.

Case No. 78,905

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

SUMMARY OF THE ARGUMENT

As to Issue I: The questioning by defense counsel of appellant's ex-wife during a discovery deposition constituted a waiver of the marital privilege. Additionally, although the law does not require that the waiver be personal, the record reflects that Bolin has personally waived the privilege. Lastly, error, if any, was harmless beyond a reasonable doubt.

As to Issue II: The state was properly permitted on redirect examination to question the state's key witness concerning another murder which Bolin had committed. Although such testimony did not become a feature of the instant trial, it was highly probative and not unduly prejudicial to rebut matters directly raised by defense counsel in cross-examination.

As to Issue III: The trial judge did not abuse his discretion by denying a change of venue in the instant case. Appellant has failed to satisfy the heavy burden of showing that he was denied a fair trial. The methods employed by the trial judge assured that a fair and impartial jury was selected in the instant case. All jurors who had knowledge of any publicity occurring on the eve of trial were immediately excused for cause, and any juror who had during the five year pendency of this case heard anything about it were scrutinized to ascertain that they had no preconceived notion of the defendant's guilt.

As to Issue IV: 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 attorneys. Based on all of this information, the court denied the motion. Accordingly, appellant's motion to discharge was properly heard and denied.

As to Issue V: 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.

ARGUMENT

ISSUE I

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

On December 5, 1986, the murdered body of Stephanie Collins was found lying in a ditch beside Morris Bridge Road in northern Hillsborough County (R 477 - 479, 513). Ms. Collins on the afternoon of November 5, 1986, had been at the Eckerd's Drug Store located in the Marketplace North Shopping Center where she worked (R 504 - 510). Ms. Collins was last seen alive by two acquaintances who saw her in the passenger seat of an "older, dirty white van" (R 771 - 774, 784 - 786) at approximately 4:00 p.m. on November 5th. The investigation of the Collins 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 Collins 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 1681 - 1688). 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 1681, 1683). Prior to the taking of this video tape, the defendant conducted a discovery deposition of Cheryl Coby. During this discovery deposition defense counsel

(not the state) inquired of Ms. Coby concerning the content and context of her conversation with Bolin regarding the murder.[1] Subsequently, 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 1245 - 1247). 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 1060 - 1063). The court denied appellant's motion in limine, finding that the privilege was waived. (R 1273).

Appellant then filed a motion to discharge counsel asserting that his counsel was ineffective for waiving the spousal privilege (R 1884 - 85). 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 1094 - 95). Counsel had also admitted that they wanted to take the deposition of Cheryl Coby

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[1] A review of the discovery deposition shows that only defense counsel questioned Cheryl Coby and that they inquired extensively about the content of the privileged communication without any attempt to preserve the privelege. (R 1552, Deposition of Cheryl Coby, dated January 8, 1991, pgs. 61-64, 73-87, 93-94, 100-2, 183, 185)

in order to find out the basis for her statements as well as the extent of her knowledge (R 1066, 1097). Accordingly, the trial court denied the motion to discharge counsel and found that counsel was not ineffective (R 1106).

Cheryl Jo Coby had been married to appellant and was living in Hillsborough County when the Stephanie Collins murder occurred (R 631 - 634). Ms. Coby was the state's key witness at trial. At trial, Ms. Coby testified that on November 5, 1986, appellant was living in a travel trailer which was at the time located in a trailer park on Nebraska Avenue in Tampa (R 635 - 637, 641). Although married to appellant, Ms. Coby was staying with friends because her physical condition made it difficult for her to get in and out of the travel trailer (R 640 - 641, 669). At some time between 6:00 and 6:30 p.m. on November 5, 1986, Ms. Coby was at a Waffle House Restaurant with the friends with whom she lived and another friend (R 640 - 641). Between 7:00 and 8:00 p.m. that evening, appellant arrived at the Waffle House and had a bowl of chili and a cup of coffee (R 641 - 642). After eating, appellant asked Coby to leave with him because "he said he needed to talk to me" (R 642). Ms. Coby left with appellant in appellant's silver and black Ford pickup truck which contained a camper top (R 635, 646, 651, 666). In response to Coby's questioning as to whether something was wrong, appellant told Coby that there was a dead body in the travel trailer (R 646). Bolin gave her three versions as to how the body came to be located in the trailer. The first two explanations referred to a

"guy" and a "girl" who were at the travel trailer with Bolin and the "guy" killed the "girl" (R 648 - 649). In the third explanation, Bolin stated that he killed the girl by hitting her over the head and by stabbing her "numerous" times (R 649 - 650).

Ms. Coby further testified that appellant backed his pickup truck to the door of the travel trailer (R 650). Bolin went into the trailer while Coby remained in the truck. Ten or fifteen minutes later, Coby heard the door of the travel trailer open and she turned around and looked through the cab of the truck and through the camper. Coby saw appellant pick something up that was wrapped in Ms. Coby's quilt and she observed appellant deposit the object into the back of a truck (R 651 - 652). Appellant advised that he would be back in a moment and he went back into the travel trailer. About ten minutes later, appellant came out to the truck and said that he had "cleaned things up inside and that he hosed down the bathroom" (R 653).

Appellant and Coby drove away and eventually ended up on Morris Bridge Road where appellant drove for "a little ways" and then stopped. Appellant took Stephanie Collins body out of the truck and threw it into a ditch. Appellant then returned to the truck and observed whether the body would be visible in a vehicle's headlights (R 653 - 654). When appellant was satisfied that no one would be able to see the body, appellant drove back to the travel trailer (R 654). Upon arriving at the travel trailer, Coby went in and observed that "everything was wet." Ms. Coby also observed that there was blood on the curtains, on

the wall, and on the carpet (R 654 - 655). Ms. Coby also observed her butcher knife beside the sink, although it was normally kept in the bottom drawer. The knife had a wooden handle and the handle was wet (R 655).

One month later, on December 5, 1986, Ms. Coby was to be discharged from a hospital stay. On that day appellant came to visit and was in her room watching live coverage on television of the discovery of Stephanie Collins' body on Morris Bridge Road. During this television coverage appellant said, "That's her. That's her." Ms. Coby asked, "Who?", to which Bolin replied, "That's her. You know, the travel trailer, that's her" (R 657 - 658).[2]

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

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[2] Cheryl Coby also testified concerning her knowledge of rewards which were available based on information leading to the conviction of Stephanie Collins' killer. In response to this cross-examination, Ms. Coby on redirect examination also testified concerning the time that appellant had taken her to the scene where he killed another woman in the course of an attempted robbery (R 705 - 706). These matters will be discussed in detail under Issue II, infra.

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 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 Collins (and Holley) murder(s). 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.[3] While this may have been a tough choice, as the court noted in Tibado, the person invoking the privilege is required to protect

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[3] 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.

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.

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 1210 - 1212) There was no order, and the trial court specifically noted that there was no order, keeping this deposition private (R 1064). The deposition was not sealed until done so by the trial judge during the course of the trial so that the deposition could be part of the appellate records (R 758 - 760). 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 submits that appellant personally waived any

claim of privilege. Captain Gary G. Terry of the Hillsborough County Sheriff's Office testified that in the latter part of June, 1991, he received a letter from Oscar Ray Bolin in which the defendant told him, "If there was ever anything else that you really wanted to know about [Bolin] you'll have to ask Cheryl Jo because she knew just about everything [Bolin] was ever a part of" (R 722). 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)

Your appellee submits 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 as to all activities undertaken by appellant when he disposed of the body of Stephanie Collins. Indeed, the evidence adduced in the instant case leaves no doubt that Oscar Ray Bolin disposed of the body on Morris Bridge Road where it was ultimately discovered. Appellant's speculation that this evidence would not have been sufficient to convict him of actually committing the murder is premised upon the fact that the two persons who last saw Stephanie Collins alive saw her in a white van and that Bolin did not drive a white van. However, it is undisputed that appellant was driving a silver and black pickup truck which had a white camper top attached to it (R 635, 651, 786, deposition of Cheryl Coby at page 113). Indeed, one of the two witnesses described the vehicle in which Stephanie Collins was sitting in the passenger seat as an older, dirty white van (R 786), a description which, in the eyes of the jury, may not be significantly dissimilar from a silver pickup truck with an attached camper top. Additionally Coby's graphic description of the blood appearing throughout the travel trailer and the location of the wet knife near the sink would have led any reasonable jury to conclude, beyond a reasonable doubt, that Oscar Ray Bolin, the sole occupant of the travel trailer, committed the cold-blooded killing of Stephanie Collins. Thus, your respondent submits that it is beyond a reasonable doubt that

even without the Coby testimony concerning the communications between herself and Bolin the outcome of the proceeding would not have been different. Thus, error, if any, is harmless.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY RULING THAT THE DEFENSE CROSS EXAMINATION OF THE STATE'S KEY WITNESS OPENED THE DOOR SO AS TO PERMIT THE STATE TO REHABILITATE A WITNESS BY USE OF A PRIOR MURDER COMMITTED BY BOLIN.

As his second point on appeal, appellant contends that the trial court incorrectly permitted the state to adduce, on redirect examination, evidence of the prior unrelated murder committed by Bolin. He contends that the use of a collateral crime is inadmissible where it only proves bad character or propensity to commit a crime. The facts and circumstances of the instant case totally belie appellant's contentions and, for the reasons expressed below, appellant's second point must fail.

At issue herein is the testimony of Cheryl Jo Coby, appellant's ex-wife and the state's key witness at trial, pertaining to the commission by Bolin of another murder in January, 1986 (Natalie Holley, the victim in case number 78,468 which is presently pending before this Honorable Court). Testimony concerning the prior murder was not adduced during the state's case in chief. Instead, this testimony was presented during the state's redirect examination of Ms. Coby only after the defense had engaged in an extensive attack upon Ms. Coby's credibility during cross-examination. The testimony offered by Ms. Coby both during direct and cross-examination needs to be reviewed in order to demonstrate the state permissibly examined Ms. Coby concerning the prior murder.

On direct examination, Cheryl Coby testified that appellant basically threatened her by stating "besides, you could end up just like the person in the travel trailer." When appellant made this statement he put his hand on a gun which was on the seat next to him (R 650 - 651). On cross-examination, defense counsel elicited from Ms. Coby the fact that she never gave law enforcement officers even the slightest description of a gun and, indeed, that she never even mentioned the gun to the detectives in her original statements (R 676). Also on cross-examination, defense counsel adduced lengthy testimony concerning Ms. Coby's knowledge of large monetary rewards available to one whose information led to the conviction of the killer of Stephanie Collins (R 685 - 700). There was no doubt left by the cross examination of Cheryl Coby that defense counsel was attempting to portray the state's key witness as one who had a material outcome in helping to obtain a conviction of Oscar Ray Bolin. To say that defense counsel painted the state's key witness as biased and interested in the outcome is to understate the obvious.

On redirect examination based upon the cross examination of Cheryl Coby, the state adduced testimony from Ms. Coby that on the night of the Stephanie Collins murder when appellant threatened Ms. Coby, she had reason to believe that he was, indeed, capable of murder (R 704). The witness related that in January of 1986, she had a very similar experience with appellant where she had been taken for a drive so that appellant could take "some steps to clean up a car and the ground around it" (R 704 -

705). On that evening appellant told Ms. Coby that "he had tried to rob the Church's Chicken girl of the night's receipts and because she could identify him, that he had to kill her" (R 706). At this point, defense counsel moved for a mistrial based upon the testimony concerning an unrelated offense (R 706 - 707). The trial court ruled that because the defense had attacked the credibility of the state's key witness, the door was opened to enable the state to exercise "the absolute right to rehabilitate Ms. Coby in the presence of this jury" (R 708 - 709). Upon resumption of redirect examination before the jury, further relevant testimony was offered:

> Q. (By prosecutor) Mrs. Coby, to your knowledge, has there ever been any kind of reward offer for information concerning the death of the Church's Chicken manager?
>
> A. No.
>
> Q. So, in July when the police came to see you, you actually had information to provide them about two murders?
>
> A. That's correct.
>
> Q. And did you, in fact, do so?
>
> A. Yes, I did.
>
> Q. And when you came to Tampa to assist them, did you, in fact, take them to locations having to do with the other murder, as well?
>
> A. Yes, I did.
>
> Q. And have you, in fact, when you talked to Danny Coby told him some details of both of these events so that he would better understand the person he was marrying and who she had been involved with previously?

A. Yes.

(R 713 - 714)

The above related portions of the trial transcript represents the exclusive discussion concerning the January, 1986, murder committed by appellant.

Your appellee respectfully submits that the testimony described above was permissible on redirect examination based upon the cross-examination conducted by defense counsel. Contrary to appellant's basic contention, the testimony concerning the January, 1986, murder was not introduced to show bad character or propensity to commit a crime. Rather, it was introduced solely in rebuttal to strenuous cross-examination and was legally acceptable evidence with which to rehabilitate a witness. The rebuttal testimony was used for impeachment, not as other acts evidence or Williams Rule evidence. See United States v. Perez-Garcia, 904 F.2d 1534, 1545 (11th Cir. 1990) (rebuttal testimony was not admitted as Rule 404(b) evidence, but rather as impeachment).[4] In his brief, appellant acknowledges that "[c]ertainly the State was entitled to attempt to rehabilitate Coby's credibility on redirect examination" (Appellant's brief at page 34). Appellant merely disagrees with the method employed by the state. Indeed, appellant's reassertion at page 35 of his brief that evidence was presented merely of Bolin's propensity to

[4] Federal Rule of Evidence 404(b) is the federal equivalent of our Williams Rule statute, F.S. 90.404(2).

murder young women was not well taken. As this Court can observe, the January, 1986, murder of Natalie Holley was not similar to Bolin's murder of Stephanie Collins. The Holley murder was committed in conjunction with a robbery and, as Bolin acknowledged, she was killed because she could identify the defendant. The motive for the instant murder, however, is in no way similar. The state acknowledged that there was no evidence of even an attempted robbery (and a motion for judgment of acquittal as to the attempted robbery count was granted by the trial judge) (R 755). Thus, where the evidence of appellant's other Hillsborough County murder was introduced in rebuttal for a purpose other than to show bad character or propensity to commit a crime, the trial judge correctly permitted the rebuttal evidence.

The instant case is not unlike Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), wherein this Court discussed a similar issue:

> . . . Appellant also argues that the judge erred in permitted evidence of a 1960 manslaughter conviction, committed when appellant was a juvenile, to be introduced. The state voluntarily chose not to introduce evidence of this conviction as direct evidence, but reserved the right to introduce the conviction as rebuttal evidence. When a relative of appellant testified that appellant would never harm anyone, the state was permitted to ask if she knew of the manslaughter where appellant stabbed a school mate to death when the school mate refused to surrender small changed. This was proper impeachment. . . . (emphasis supplied)

Although the Smith holding discussed immediately above had its genesis in a penalty phase, the language employed by this Court does not appear to limit the holding to only a penalty phase. Rather, where a prior conviction is relevant to any issue, including one arising in a guilt phase, it is permissible for testimony to be adduced as to that issue. The testimony adduced on redirect examination by the state in the instant case bore directly on those matters upon which defense counsel cross-examined Ms. Coby. Ms. Coby's knowledge of the previous murder committed by Bolin established that she had to take Bolin's threat to kill her seriously in that Coby well knew that Bolin was capable of such an act. The fact that Ms. Coby supplied police with information concerning both murders when only the Stephanie Collins murder was linked to any potential reward permitted the jury to discount defense counsel's vigorous attack as to the possible bias or interest exhibited by Cheryl Coby.

In his brief, appellant cites to Czubak v. State, 570 So. 2d 925 (Fla. 1990), for the proposition that this Court has rejected the state's assertion of "invited error." In the context of Czubak, this Court's decision was undoubtedly correct where a witness was unresponsive to defense counsel's questioning. In the instant case, however, Ms. Coby was directly responsive to questioning of defense counsel. Where defense counsel attempted to impeach Ms. Coby's credibility as to her understanding of appellant's threat and to her understanding of the availability of great rewards in this case, it was totally permissible, as the

trial court correctly ruled, for the state to rehabilitate its witness by use of relevant evidence. Thus, unlike in Czubak, defense counsel surely "opened the door" to proper rehabilitation by the state. There is no doubt that a defendant has an absolute right to fully cross-examine adverse witnesses to discredit them by showing bias, prejudice, interest, or possible ulterior motive for testifying. This principle is particularly applicable where a key witness is being examined. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Your appellee submits that it is permissible for the state to exercise its right to rehabilitate that key witness by use of highly relevant and probative evidence.

Appellant alternatively argues that even if the state should have been given leeway on redirect examination, the probative value of the collateral crime was greatly outweighed by the prejudice. Your appellee submits otherwise where the highly probative evidence did not result in unfair prejudice. See Swafford v. State, 533 So. 2d 270, 275 (Fla. 1988). In determining whether other crimes evidence is inadmissible by virtue of its probative value being substantially outweighed by undue prejudice:

> One of the better known expressions of this standard is that evidence of collateral crimes "may not make such crimes a feature of the trial instead of an incident. . . ." *Ashley v. State*, 265 So. 2d 685, 693 (Fla. 1972).

Travers v. State, 578 So. 2d 793, 797 - 798 (Fla. 1st DCA 1991). Thus, in Henry v. State, 574 So. 2d 74 (Fla. 1991), a case relied upon by appellant, this Court held that reversible error occurred due to the unfair prejudice from collateral crime evidence. In Henry, another murder had been made a feature of the case. Here, however, your appellee submits that it is clear that the evidence concerning Bolin's January, 1986, homicide did not become a feature of the case. Indeed, the prosecutor clearly expressed his intention not to make these matters a feature of the case (R 710). Where the evidence adduced from Cheryl Coby on redirect examination had significant probative value for rehabilitation purposes based upon the extensive impeachment undertaken by defense counsel, such probative value was not clearly outweighed by undue prejudice.

Appellant lastly contends that the state cannot demonstrate that error, if any, was harmless. Appellant relies upon cases which have held that the improper admission of collateral crime evidence is presumptively harmful error. However, as discussed above, the instant case does not feature classic Williams Rule evidence subject to the presumptive error standard. In any event, appellant again focuses his harmless error analysis upon the observance of Stephanie Collins in a white van immediately prior to her disappearance. As discussed above under Issue I, the silver pickup truck with a white camper top could have easily been mistaken for a "van" and, therefore, in conjunction with the evidence that Bolin concededly "dumped" the body and attempted to

cover up his crime, the jury could only conclude that Bolin was the perpetrator of Stephanie Collins' murder. Indeed, the jury heard testimony that Bolin admitted striking Stephanie Collins and stabbing her numerous times. Thus, should this Honorable Court determine that appellant waived the spousal immunity privilege as discussed above under Issue I, the jury heard substantial and overwhelming evidence indicating that Bolin was the perpetrator in the instant case. Therefore, error, if any, was harmless beyond a reasonable doubt.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT A CHANGE OF VENUE FOR TRIAL.

As his next point on appeal, appellant contends that his right to a fair trial was deprived by the trial judge when the judge denied motions for a change of venue. Inasmuch as appellant received a fair trial before an impartial jury, the trial court did not err in denying a change of venue. For the reasons expressed below, appellant's point must fail.

Due process requires either a change of venue or a continuance only "[i]f pretrial publicity is so prejudicial and inflammatory to preclude the selection of an impartial jury." Cummings v. Dugger, 862 F.2d 1504, 1509 (11th Cir. 1989). In order to demonstrate that a change of venue should have been granted, a defendant has the burden of proving either actual or presumed prejudice. Id; see also Murphy v. Florida, 421 U.S. 794, 803, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Coleman v. Zant, 708 F.2d 541, 545 (11th Cir. 1983). Where prejudicial pretrial publicity is alleged, as here, this Court has determined that "the extent of the prejudice or lack of impartiality among potential jurors that may accompany the knowledge of the incident" is the critical factor. Holsworth v. State, 522 So. 2d 348, 351 (Fla. 1988), citing Provenzano v. State, 497 So. 2d 1177, 1182 (Fla. 1986). In Holsworth, this Court observed that "the trial court's ruling on a motion for change of venue will be upheld absent a manifest abuse of discretion. Id. citing Davis

v. State, 461 So. 2d 67 (Fla. 1984); Johnson v. State, 351 So. 2d 10 (Fla. 1977). As will be demonstrated below, the trial judge did not abuse his discretion in the instant case.

Appellant initially contends that because of the extreme amount of publicity surrounding the disappearance of Stephanie Collins and the subsequent publicity surrounding Mr. Bolin pretrial that prejudice can be presumed warranting reversal for failure to grant a change of venue. The United States Supreme Court has overturned state court convictions based on presumed prejudice in three cases: Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); and Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In Murphy v. Florida, supra, the Court observed that the results reached in those cases were obtained because the trial atmospheres had been "utterly corrupted" by press coverage. Murphy v. Florida, 421 U.S. at 798. While observing that the three decisions set forth above involved presumed prejudice, the Court in Murphy v. Florida distinguished those cases from their case at bar, and the holding has applicability for the instant case:

> . . . The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprived the defendant of due process. (421 U.S. at 799)

In order to determine whether a criminal defendant's trial was fundamentally unfair requires an analysis of the totality of the circumstances in which the trial was conducted. Murphy v. Florida, id.

The cases which have found presumptive prejudice seem to arise in small rural counties or towns wherein most of the populous develops preconceived notions about a particular defendant's guilt. E.g., Rideau v. Louisiana, supra (prejudice presumed where the defendant's confession was videotaped and shown three times by television stations to audiences of twenty-four-thousand, fifty-three-thousand and twenty-nine-thousand in a community of one-hundred and fifty-thousand); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985) (prejudice was presumed where brutal murders occurred in a county with a population of seven thousand where much of the small population expressed their preconceived opinions that the defendant was guilty and that he should be put to death). In the instant case, your appellee does not dispute the fact that extensive publicity occurred throughout the Tampa Bay Area at the time of the disappearance of Stephanie Collins. It must be observed, however, that this extensive publicity occurred in 1986, at the time of Stephanie's disappearance, a time frame which was nearly five years prior to the trial of the instant cause. Although there was extensive publicity after Bolin had been charged with the murder of Stephanie Collins (as well as the murder of two other women in the Tampa Bay Area), your appellee submits that most of the

publicity was factual in nature, and such type of coverage does not support a finding of prejudice. See Murphy v. Florida, supra; Cummings v. Dugger, supra; Mardsden v. Moore, 847 F.2d 1536, 1540 - 1543 (11th Cir. 1988) (of dozens of stories, two were perceived as containing prejudicial information, including one on the eve of trial; nevertheless, the defendant was found not to have met the heavy burden of demonstrating presumed prejudice); Bundy v. Dugger, 580 F.2d 1402, 1425 (11th Cir. 1988) (extensive coverage, but factual in nature; no editorial opinion that the defendant was guilty; no prejudicial comments from police or prosecution). The presumed prejudice principle is 'rare[ly] applicable and is reserved for an [extreme] situation.]" Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1986). Your appellee submits that appellant has failed to show that the instant case is one of those rare cases where presumed prejudice is properly found.

Even assuming arguendo that the defendant has met his heavy burden of demonstrating presumptive prejudice, that presumption can be rebutted.[5] Indeed, even in a case where the United States Supreme Court found a presumption of prejudice, the Court nevertheless determined that " . . . where there is a reasonable likelihood that prejudicial news prior to trial will prevent a

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[5] In Coleman v. Kemp, 778 F.2d 1487, 1541, n. 25 (11th Cir. 1985), the Court "assumed" that an examination of the voir dire in a particular case can rebut the presumption of prejudice.

fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." Sheppard v. Maxwell, supra, 384 U.S. at 363. The trial judge in the instant case conducted the proceedings so as to guarantee Bolin his right to a fair trial. When the parties were attempting to select a jury in this cause, a demonstration was held by the Guardian Angels outside the courthouse wherein they displayed several inflammatory placards. Without even inquiring as to whether any particular members of the venire panel had seen the demonstration, the trial judge assumed that undue prejudice to Bolin had occurred and, therefore, the trial court continued the trial for a period of two months (R 1638, 1640 - 1641).

When the jury selection process commenced after a two month continuance, the trial judge insisted upon a method where any possible bias or prejudice could be identified with respect to any potential juror. Indeed, any venire person who had even seen or heard anything on the eve of trial concerning the case, even if that potential juror felt he could be fair and impartial was immediately excused for cause without further questioning (R 11 - 15). For any potential juror who had at any time ever heard, seen, or read something concerning the case or the defendant, individual voir dire was conducted (R 15, et. seq.). This procedure was not, however, good enough to satisfy defense counsel. They renewed their motion for change of venue and alleged that approximately 70% of the panel had heard something

about the case. The judge observed that over half the panel stated that they could be fair and impartial and individual voir dire would be conducted to assure that a fair trial court be conducted in Hillsborough County (R 29 - 30). After general voir dire of the panel (R 33 - 248), individual questioning of prospective jurors out of the presence of other jurors was conducted (R 248 - 382). Immediately thereafter, the trial judge excused several other jurors for cause (R 391, 395 - 396). The defense moved to challenge for cause a juror who may have heard that Bolin was involved in several murders, although that knowledge would not affect her deliberations in the instant case since "each case stands on its own" (R 396). When the state objected to a challenge for cause as to that juror, the trial judge stated in granting the challenge that he was "not going to force the defendant to use a peremptory challenge" and the court was "taking this into consideration when decid[ing] whether or not to allow additional peremptory challenges" (R 397). The trial court then excused other jurors for cause (R 397, 399, 401 - 402, 403, 408, 409). Although the trial judge had liberally granted challenges for cause even in situations where in other cases they would not have been granted, the trial judge decided in an abundance of caution to give each party one additional peremptory challenge (R 411). However, after what the trial judge perceived to be an exercise in gamesmanship, the court retracted his offer of an additional peremptory challenge but instead permitted the defense to challenge another juror for

"cause" and that challenge was granted (R 411 - 416). Your appellee submits that when this Court reviews the voir dire of those jurors selected in light of the procedures employed by the trial judge it can be readily observed that appellant was not denied a fair trial. Your appellee further submits that appellant cannot point to one juror in this process who exhibited such views as to warrant exclusion under applicable law. In this vein, it is helpful to refer to this Court's opinion in Bundy v. State, 471 So. 2d 9, 19 - 20 (Fla. 1985):

> The mere existence of extensive pretrial publicity is not enough to raise the presumption of unfairness of a constitutional magnitude. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), which dealt with the prosecution of the newsworthy "Murph the Surf" for a breaking and entering charge, the United States Supreme Court recognized that qualified jurors need not be totally ignorant of the facts and issues involved in a case. The mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut the presumption of a prospective jurors' impartiality. It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court. (citations omitted) The record shows that, of the twelve jurors at Bundy's trial, three had no knowledge of Chi Omega murders. Of those three, two had never had even heard of Bundy. Five of the remaining nine had some knowledge of the Chi Omega murders, but they had no more than sketchy ideas of what had occurred. The four remaining jurors did know about Bundy's conviction in the Chi Omega murders. However, all the jurors stated they would put aside any opinion they would hold and decide the case only on the evidence presented. We hold that Bundy has failed to show that he did not receive a fair and impartial trial because setting or time of his trial was inherently prejudicial. The

> trial judge committed no error in denying the motion for change of venue or abatement of prosecution.

The jurors selected in the instant case exhibit even less recognition of prejudicial matters than did the jurors in Bundy described above. A review of the voir dire proceedings in the instant case compels but one conclusion, that is, that no actual prejudice ensued to Bolin by virtue of the jurors selected. There simply was no great difficulty in selecting a fair and impartial jury in the instant case and, therefore, it cannot be demonstrated that Bolin received anything less than a fair trial with an impartial jury.

Where appellant has failed to demonstrate presumptive or actual prejudice, and where this record demonstrates clearly that an impartial jury was selected, appellant was not denied a fair trial in contravention of his constitutional rights. Appellant's third point must fail.

ISSUE IV

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 1093) 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 1094 - 1095) 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 1099 - 1100) 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 1066, 1072, 1100) 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 1103) The court then denied the motion to discharge at which point the defendant asked to "say something to the court." (R 1105) The court responded that he could say something but he had denied the motion. (R 1106) 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. Firmani and Mr. O'Connor in connection with your case." The court then stated that the motion to discharge was denied. (R 1106)

On October 7, 1991, at the start of the trial, defense counsel again renewed the motion to withdraw. The trial judge again ruled that appellant was represented by highly competent counsel who had involuntarily waived spousal immunity in order to acquire some ammunition by questioning Ms. Coby. (R 23 - 26).

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."[6]

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[6] Apparently appellate counsel also agrees with trial counsel's conclusion that the inquiry in the deposition did not constitute

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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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 V

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).

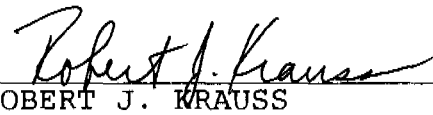
Assuming, arguendo, that it was error for the court to give the instruction, the error was clearly harmless as the instruction was not misleading and did not vouch for the credibility of the witness. Therefore, it is beyond a reasonable doubt that the instruction did not contribute to the jury's verdict.

CONCLUSION

Based upon the foregoing facts, argument and citations of authority, your appellee respectfully submits that the judgment and sentence imposed by the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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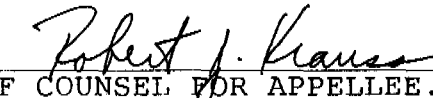
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 22nd day of October, 1993.



OF COUNSEL FOR APPELLEE.