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IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, :

Appellant, :

vs. : Case No. 78,905

STATE OF FLORIDA, :

Appellee. :

_______________________________:

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

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

A Hillsborough County grand jury returned a three-count indictment on August 1, 1990 charging Oscar Ray Bolin, Jr. with the first degree murder, attempted robbery, and kidnapping of Stephanie Collins on November 5, 1986 (R1202-4). The circuit court granted Bolin's Motion for Protective Order to prevent dissemination of any of the discovery materials to the media or "any other member of the general public" on November 2, 1990 (R1879-80). Over defense objection, the State's Motion to Perpetuate Testimony of the witness Cheryl Coby was granted November 21, 1990 (R1681-3,1881-3).

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 (R1687-8,1143-54). 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 (R1847-51,1854-68). 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 (R1870-1).

Before the commencement of the videotaped deposition to perpetuate testimony, defense counsel requested that a judge be present to rule on objections (R1181,1183). 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 (R1186).

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 (R1245-7). At a hearing held on his motion, March 22, 1991, the State contended that Appellant waived the spousal privilege at deposition when his counsel questioned Cheryl Coby about statements she made to law enforcement revealing communications Appellant had made to her during their marriage (R1060-3). 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" (R1273).

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 (R1884-5). He requested appointment of substitute counsel (R1885). 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 (R1105). He denied the motion for discharge (R1105-6).

On June 7, 1991, Appellant filed a motion for change of venue, citing extensive and prejudicial media coverage of Appellant and his alleged crimes (R1321-1411). At a hearing on the motion, held the same date, the trial court "summarily denied" a change of venue until an attempt to seat an impartial jury had been made (R1620, 1625). Later in the hearing, the judge stated that his ruling only affected Appellant's first case set for trial and he would reserve ruling in the case at bar (R1628-9).

On July 18, 1991, Bolin filed a Supplemental Motion for Change of Venue (R1412-56). Then, on July 29, 1991, prior to jury selection, Appellant renewed his motion for change of venue (R1709). When the panel of prospective jurors was exposed to a Guardian Angels demonstration advocating the death penalty for Bolin, the court discharged the prospective jurors (R1840). Another defense motion for change of venue following the tainting of the jury was denied by the court (R1841).

A "Second Supplemental Motion for Change of Venue" was filed July 30, 1991 (R1464-71). At the July 31, 1991 hearing on this motion, the State conceded that the publicity had been such that it would not be "prudent" to attempt to select a jury at that time (R1637-8). While denying change of venue, the trial court acceded to the State's suggestion that trial be continued for two months (R1638,1640-1).

Jury selection commenced on October 7, 1991 (R1-424). Appellant again renewed his motion for change of venue (R23,27-8). After questioning of the prospective jurors revealed that eighty-one of the hundred in the venire had knowledge of the case, Appellant again asserted that a fair and impartial jury could not be selected in Hillsborough County (R392-4). The trial court again denied a change of venue (R394). Defense counsel eventually exhausted his peremptory challenges, requested more, and had to accept a juror who had prior knowledge of the case (R411-7).

At trial, defense counsel moved for a mistrial when the prosecution elicited testimony on redirect examination that

Appellant had committed a prior murder in the course of a robbery (R706). The court ruled that defense impeachment of the credibility of the witness on cross-examination "opened the door" to evidence of the unrelated murder (R708). When Appellant moved for judgment of acquittal, the prosecutor conceded that there was insufficient evidence of the attempted robbery charge (R754-5). The court granted a judgment of acquittal to Count II of the Indictment (R755).

Over Appellant's objection, the Court agreed to gave a State-requested special jury instruction on the law of accessory after the fact although it was not applicable to Appellant (R814,1493). The jury returned a verdict of guilty to the first degree murder count (R881,1516). On the kidnapping count, Appellant was found guilty of the lesser offense of false imprisonment (R881,1516).

In the subsequent penalty trial, the trial judge denied a defense motion for continuance so that witnesses could be brought to testify (R899). Instead, the prior testimony of Bolin's mother and sister was read to the jury (R916-53). The jury was instructed on the aggravating circumstance of prior violent felony and the mitigating circumstances of substantially impaired capacity and the catch-all mitigator (R1038-9,1512-3). A recommendation of death was returned (R1044,1517).

Immediately following rendition of the advisory sentence, the judge proceeded to sentencing (R1047-9). After a short recess, the court sentenced Appellant to death for first degree murder and to a consecutive five-year term for false imprisonment (R1050,1520-4).

The court's written "Findings in Support of Death Sentence" stated that the prior violent felony aggravating circumstance outweighed the mitigating circumstances of impaired capacity and "nightmarish home environment" as a child (R1526-7), see Appendix).

Appellant's motion for new trial was denied October 22, 1991 (R1115,1529-35). Notice of Appeal was given October 31, 1991 (R1536-7). Jurisdiction lies in this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla. R. App. P. 9.030(a)(1)(A)(i).

STATEMENT OF THE FACTS

A. Guilt or Innocence Phase Evidence

Donna Witmer, mother of the homicide victim Stephanie Collins, testified that her daughter was a senior student at Chamberlain high school (R451). Stephanie was a member of the chorus group and held a part-time job at an Eckerd's drugstore located in the Marketplace North shopping center (R451-2). On November 5, 1986, the witness left for work early in the morning (R453). When her daughter did not come home that evening, she reported her missing (R453-4). She later found Stephanie's car parked in the lot at the Marketplace North shopping center (R454).

A classmate of Stephanie's, Catherine Cumpstone, said that she and Stephanie left school together on November 5, 1986 (R459-61). First they stopped at Stephanie's house; and then Stephanie drove her home (R461,464). Stephanie told the witness that she was going to Eckerd's (R462). Stephanie was also planning to attend a chorus rehearsal at 7:00 (R466).

Keith Copeland was an assistant manager with Eckerd Drugs on November 5, 1986 (R504). Around 4:00 p.m. on that day, Stephanie Collins came into the store and asked if she could work some additional hours (R505). Copeland offered to let her work that night, but she said she had to go to choir practice (R509). Stephanie left the store after about fifteen or twenty minutes (R510). She did not tell the witness what she was planning to do until 7:00 p.m. when chorus practice started (R510).

Jerry Cooley, Stephanie Collins' ex-boyfriend, testified that he was at the Marketplace North shopping center on the evening of November 5, 1986 (R467-9). He saw Stephanie's car parked there and waited for about fifteen minutes, thinking that Stephanie would be getting off work at Eckerds (R469-71). However, Stephanie did not come out and the witness left (R471).

Hennie Moss and David Fessler were driving to a jewelry store around 4:00 p.m. on November 5, 1986 when they saw Stephanie Collins in the passenger seat of a white van (R771-2,774,784-6). Stephanie was waving her arms and seemed to be trying to get their attention (R776,781). Hennie Moss said Stephanie was a very enthusiastic person; she thought Stephanie "was just being silly" (R776). David Fessler testified that it looked like Stephanie was arguing with the driver of the van (R785,787). Neither Moss nor Fessler got a view of the driver's face (R774,777,789,791).

A month later, December 5, 1986, the body of Stephanie Collins was found by a Hillsborough County roadside mowing crew (R477-9). The body was clothed and lying in a ditch beside Morris Bridge Road (R513). It was in an advanced state of decomposition (R513). A purse on top of the body and clothing matched the description of what Stephanie Collins was wearing when she disappeared (R536). The victim's gold jewelry was also found intact (R543,546-7). The victim was positively identified by her dental records (R542,569).

The medical examiner, Dr. Peter Lardizabal, testified that he performed an autopsy on the victim (R569). He found numerous fractures to the skull (R573-5). He found slits in the clothing

which Stephanie Collins had been wearing (R570-2), consistent with being caused by a sharp-bladed instrument (R587). He concluded that the cause of death was multiple blunt impact injuries of the head, caused by a heavy metallic object such as a hammer or piece of pipe (R586).

The police investigation of the homicide was unsuccessful until July 1990 when Danny Coby telephoned Crime Stoppers in Fort Wayne, Indiana, with information he had heard from his wife about the killing (R793). Cheryl Jo Coby had been married to Appellant and was living in Hillsborough County when the crime occurred (R631-4). She became the State's star witness at trial.

Cheryl Coby testified that on November 5, 1986, Appellant was living in a travel trailer located at a trailer park on Nebraska Avenue (R635-7,641). She was staying with friends because her physical condition made it difficult for her to climb in and out of the trailer (R640-1,669).

Around 6:30 p.m. on November 5 1986, Coby was at a Waffle House restaurant with friends (R640-1), Appellant came in and joined them between 7:00 and 8:00 (R641-2). After eating, Bolin asked Coby to leave with him because "he said he needed to talk to me" (R642-3). Coby left and rode with Appellant in his silver and black Ford pickup truck (R646,666) Both Coby and witness Paula Cameron agreed that the only vehicle Bolin owned was a silver and black pickup truck (R524,665-6). No one ever saw Appellant driving a white van at any time during this period (R524,666).

While driving in the pickup, Appellant told Coby that there was a dead body in the travel trailer (R646). Bolin then tried to explain why the body was there (R647). Coby testified that altogether, Bolin gave three versions of how the homicide occurred (R648). In the first two explanations, a "guy" and a "girl" were at the travel trailer with him and the "guy" killed the "girl" (R648-9). In the third version, Bolin allegedly confessed that he killed the girl by hitting her over the head and stabbing her "numerous" times (R649-50)

Coby testified that Appellant backed his pickup truck to the door of the travel trailer (R650). He went into the trailer while she waited in the truck (R651). Ten or fifteen minutes later, Bolin reappeared with something wrapped up in Coby's quilt, which he placed in the back of the pickup truck (R651-2). Appellant then reentered the trailer (R653). He emerged ten minutes later, saying that he had cleaned up and "hosed down the bathroom" (R653).

Bolin drove the truck out to Morris Bridge Road (R653). Then he stopped, took the body out of the back of the truck; and threw it into a ditch by the side of the road (R653). He tested to see if the body would be visible in the truck's headlights (R653-4). Satisfied that no one would see it, Appellant and his ex-wife returned to the travel trailer (R654). Once inside, Coby saw that everything was wet; she also noticed blood on some curtains, on the wall, and a spot on the carpet (R654-5). She said that a butcher knife with a wet handle was beside the sink (R655).

Coby testified that she didn't ask any more questions of Bolin about what happened (R656-7). A month later, December 5, 1986, she was about to be discharged from a hospital stay and Appellant was visiting in her room (R657). They were watching television news coverage of the discovery of Stephanie Collins' body on Morris Bridge Road (R657-8). During the TV coverage Bolin exclaimed, "That's her. You know, the travel trailer, that's her" (R658).

Appellant's ex-wife further testified that she never told anyone about this incident until she was about to be married to Danny Coby in April 1989 (R658-9,682). She was angry when she learned that Danny Coby had informed the police in July 1990 (R683). When the police first questioned her on July 16, 1990, she denied knowing anything about the case (R660,684). Corporal Baker of the Hillsborough County Sheriff's Office told her that there was a large reward offered for a conviction in this homicide (R685,690, 692-3). The potential amount according to the witness was $63,000 (R693). Coby also admitted that she worried about being charged with being an accessory after the fact and was still concerned that she could be arrested (R697-8). She testified that the present availability of the reward money was questionable; but that if it was awarded, she wanted part of it (R698-700).

On redirect examination, Coby said that this wasn't the first time that Bolin had taken her for a drive to watch him cover up evidence of a crime (R705). Coby said that in January, 1986, Bolin had taken her to the scene where he killed another woman in the

course of an attempted robbery (R706). She provided the police with information about both murders (R713).

There was a little corroboration of Cheryl Coby's testimony presented. Captain Gary Terry of the Hillsborough County Sheriff's Office testified that Cheryl Coby was able to take him to the "same approximate location" where Stephanie Collins' body had been found (R721). Appellant himself wrote a note to Captain Terry stating that Cheryl knew about the case "because it was her idea on how to dump the body" (R721-2).

Further corroboration of Coby's testimony came from the discovery of a head hair, consistent with Bolin's, on a towel wrapped around the body of Stephanie Collins (R730,743) However, there were several other hairs from an unknown origin found on the victim's body and the towels and bedspreads surrounding it (R746-50). The FBI expert, Mike Malone, also admitted that there was no way of knowing when the hair resembling Bolin's had been transferred to the towel (R744-5).

B. Penalty Phase Evidence

The state's evidence consisted solely of a stipulation published to the jury that Bolin had prior convictions for rape and kidnapping in Ohio as well as prior convictions for first degree murder, armed robbery and kidnapping in Florida (R914-5) The defense presented readings of prior testimony given by Appellant's mother and his sister. Dr. Robert Berland, a forensic psychologist, also testified.

The testimony of Mary Baughman, Bolin's mother, showed that she was never married to Oscar Ray Bolin, Sr., Appellant's father; but she had four children with him (R918). Appellant, the eldest child, was raised in a hellish home environment, where the parents fought constantly, both verbally and physically (R917-9). Oscar Bolin, Sr. refused to provide financially for the children (R919). He often left the home for weeks at a time (R919-20). On several occasions, he threatened Appellant's mother with a gun in front of the children (R922). He physically abused Appellant "whenever he felt like he wanted to do it" (R923-4).

Appellant's parents separated and the children lived part of the time with each parent (R924-5). Appellant's mother said that Bolin often returned from the custody of his father "dirty, half-starved to death," barefoot and sometimes bruised (R926). Nonetheless, Appellant constantly tried to run away from his mother because he wanted to reside with the father (R925). She restrained him with a dog chain to keep him from running away (R925-6). However, by the age of 12 or 13, Appellant was living exclusively with his father (R928-9). When he was 17, he met Cheryl; and they subsequently married (R929).

The prior testimony of Sherry Jauregui, Appellant's sister, was also read to the jury (R940-52). She said that she, her sister and two brothers, grew up in West Liberty, Kentucky (R940-1). The parents "tried to kill each other all the time" (R941-2). The father frequently abused Appellant, beating him with a baseball bat and a dog chain (R942-3). On one occasion, the father locked the

family in the house, doused it with gasoline, and tried to set it on fire (R943). The grandfather prevented him (R943). The witness herself was physically abused by the father in the presence of Appellant (R944). She married at age 14 in order to get away from home (R945).

The testimony of Sherry Jauregui further asserted that Appellant was emotionally devastated by the murder of their brother, Arthur, at age 18 (R945,918-9). Bolin was also deeply depressed by the death of his firstborn son (R946). The witness herself had been diagnosed as suffering from a mental illness (R951). She was a juvenile delinquent while growing up and twice attempted suicide (R951-2).

Dr. Robert Berland, a board-certified forensic psychologist, testified that he did an extensive evaluation of Bolin (R957-60). He administered the MMPI test on two different occasions (R965). The results of these tests indicated that Bolin had profiles "fairly typical of people who are psychotic" (R975). On the WAIS standardized intelligence test, Dr. Berland testified that Bolin's scores showed a "clinically significant" deviation indicating damage to the brain (R977-9).

From interviews with Appellant and lay witnesses, Dr. Berland compiled a list of fourteen incidents which could have caused brain injury (R979-80). His mother drank heavily during the pregnancy (R980). At age 3, during an automobile accident, Bolin was thrown into the windshield and broke it (R980). He was knocked unconscious when he was eight or nine; his sister noticed a change of

behavior after this incident (R980). Later at age 17, Appellant tried to hang himself in jail after being arrested (R980-1). Although he was revived after several minutes, Dr. Berland explained that damage was probably done to brain tissue (R981).

Dr. Berland further testified that he compiled a list of twelve incidents during Appellant's upbringing which likely affected his emotional development (R987). These included his being moved back and forth between parents and relatives (R987-8). In one incident, Appellant's father demanded some money from the mother (R988). When she didn't comply, the father shot holes in the floor at Appellant's feet (R988). Bolin was five or six at the time (R988). Dr. Berland characterized Appellant's upbringing as "a pattern of instability and violence" (R989).

Dr. Berland concluded that Bolin had a psychotic disorder characterized by hallucinations, delusions and mood disturbance (R990). He attributed the psychosis to a combination of brain injury and inherited mental disorder (R990). Appellant was diagnosed as having an organic personality syndrome and organic mood disturbance (R991). Dr. Berland stated that Bolin acted under the influence of a biologically caused mental and emotional disturbance (R998). While Bolin's capacity to appreciate the criminality of his conduct was not substantially impaired, his ability to conform his conduct to the requirements of law was substantially impaired (R998-9).

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.

The trial judge ruled that defense cross-examination of Cheryl Coby opened the door for the State, on redirect examination to

elicit testimony about another homicide she had accused Bolin of committing. The judge ruled that attacking the witness' credibility was the factor which opened the door. However, impeaching the credibility of a witness by showing bias or self-interest is always a proper purpose of cross-examination. Allowing other crime evidence against Bolin did not serve to rehabilitate Coby; it was merely evidence of Bolin's propensity to commit murder. Even when the defense does open the door by cross-examination, the evidence admitted must still meet the test of probative value outweighing prejudice. Coby's testimony about a prior murder, kidnapping and robbery was highly prejudicial and not harmless error.

Highly inflammatory local media coverage of this case and, in particular, speculation about other homicides Appellant might have committed made it evident that Bolin's repeated motions for change of venue should have been granted. The pervasive and prejudicial publicity made it impossible to select an impartial jury in Hillsborough County. Even if Bolin must further show great difficulty in the actual selection of the jury, this test was met also. Almost fifty percent of the venire was immediately discharged upon their admission that they could not be impartial. Another thirty-five percent had been exposed to publicity, but claimed a dubious ability to remain impartial. Appellant exhausted his peremptory strikes, requested more, and identified an unacceptable juror who actually sat on the jury.

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.

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.

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 (R1072).

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 (R1061,1074-6). 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 (R1061-3). 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 (R1060-3,1068-70). 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 (R1076-8). 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" (R1273).

At trial, the court reiterated his finding that "it was a tactical decision well within the realm of effective assistance of counsel to make the decision to ask Ms. Coby concerning husband/wife communications, hoping that you would find some ammunition that would assist the Defense" (R26). When Cheryl Coby was on the witness stand, defense counsel objected when she was first asked to recount Bolin's conversation with her (R642). The trial judge then granted defense counsel a standing objection to all communications between Bolin and Coby while they were husband and wife (R644-5). The discovery deposition of Cheryl Coby was filed with the court and sealed so that it would not become public record (R758-9,767).

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 Stephanie Collins. 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 (R1058-9). 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" (R1060-1). 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 (R1063-4).

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 deposition 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 (R758-9,767,1879-80).

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 that "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 actual disclosure has occurred.

Applying this analysis to the case at bar, Appellant's objection at the taping of the deposition 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. There has been no public disclosure of Cheryl Coby's deposition; in fact, it is still sealed by order of the court (R758-9,767). Defense counsel was always entitled to rely upon the court's protective order entered November 2, 1990 to prevent any public disclosure of the marital communications (R1879-80). 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 (R1686,1854,1861-3). 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 (R1854-5,1868-9). 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 (R1870-2).

After the court's ruling that Appellant's counsel had waived the husband-wife privilege, Appellant moved pro se to discharge his attorneys (R1884-5). In his motion, he specified that he did not consent to waive the privilege (R1884).

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 psychi-

atrist 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 (R1078), 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 Stephanie Collins.

For instance, Coby could properly testify to her observations of Appellant loading the body from the travel trailer into the pickup truck. She could testify about abandoning the body and the efforts made at concealing it from view. Coby could also identify the sheets and quilt in which the body was wrapped. However, she could not properly testify that Bolin admitted to killing Stephanie Collins by beating her on the head and stabbing her.

Without Bolin's admission to the homicide, the most incriminating evidence against him would not be heard by the jury. Moreover, there are demonstrable indications from the verdicts actually returned that Coby's testimony about Bolin's admission to the homicide contributed to the verdict of guilt to the count of first degree murder. The jury, by comparison, returned a verdict of guilt to the lesser crime of false imprisonment on the kidnapping count. This verdict seems likely to result from the lack of evidence connecting Bolin to the white van in which the victim was last seen riding.

In short, if the jury considered only the permissible evidence, they could conclude that Bolin was not the only person involved in the disappearance and killing of Stephanie Collins. While ample evidence connects Bolin to the removal of Collins' body from the travel trailer to its roadside abandonment, there would

only be conjecture as to whether Appellant was the one who killed her.

The United States Supreme Court in Sullivan v. Louisiana, 124 L. Ed. 2d 182 (1993) recently clarified the subject of harmless error review by an appellate court. The question is not what effect the error might be expected to have on a hypothetical "reasonable jury", but its effect upon the guilty verdict in the instant case. The reviewing court must look "to the basis on which 'the jury actually rested its verdict.'" 124 L. Ed. 2d at 189, quoting from Yates v. Evatt, 114 L. Ed. 2d 432 at 449 (1991). At bar, the jury clearly rested its verdict of guilt to first degree murder on Coby's testimony that her ex-husband admitted killing Stephanie Collins and described how he did it. This testimony cannot be harmless error.

ISSUE II

THE TRIAL JUDGE ERRED BY RULING THAT THE DEFENSE CROSS-EXAMINATION OF CHERYL COBY OPENED THE DOOR TO EVIDENCE THAT BOLIN HAD COMMITTED A PRIOR UNRELATED MURDER.

The general rule in Florida is that evidence of a collateral crime is inadmissible where it proves only bad character or propensity to commit a charged crime. Florida courts have reversed convictions where the State introduced evidence that the defendant previously committed an unrelated similar crime. See, Bolden v. State, 543 So. 2d 423 (Fla. 5th DCA 1989) (battery of another law enforcement officer a year earlier); Peek v. State, 488 So. 2d 52 (Fla. 1986) (subsequent sexual battery); Frieson v. State, 512 So. 2d 1092 (Fla. 2d DCA 1987) (attempted sexual battery which occurred two hours prior to the charged sexual battery); Periu v. State, 490 So. 2d 1327 (Fla. 3d DCA 1986) (police officer's testimony that he had recovered stolen motor vehicles from the defendant's body shop previously). Even where the evidence admitted was merely an unsupported boast by the defendant that he previously committed similar crimes, reversible error has been found. E.g., Jackson v. State, 451 So. 2d 458 (Fla. 1984) (witness testimony that Appellant claimed to be a "thoroughbred killer"); Delgado v. State, 573 So.2d 83 (Fla. 2d DCA 1990) (boast of having killed ten men).

The policy behind rejecting evidence of a defendant's propensity to commit a given crime was explained by this Court many years ago:[1]

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.
> Nickels v. State, 90 Fla. 659,685, 106 So. 479, 488 (1925).

At bar, the State never contended that Bolin's prior conviction for murder was admissible in their case-in-chief. Rather, a pretrial ruling was sought which would admit evidence of the second murder if Cheryl Coby were "impeached by cross-examination concerning the time period between when Collins murder occurred and her talking with the police" (R1481). The court deferred ruling on the State's motion on the ground that it was "premature" (R433-4). After the defense cross-examination of Cheryl Coby, the State again requested a ruling that defense counsel had "opened the door" to evidence of the prior murder (R700). The judge merely stated:

> Mr. Firmani (defense counsel) has attacked her credibility and on redirect, if you can come under the Evidence Code, ask your questions (R700-1).

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[1] Compare Michelson v. United States, 335 U.S. at 475-6 (1948). "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

After several defense objections were overruled, Cheryl Coby was permitted to testify that in January 1986, Bolin had told her

> 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.

(R706) Defense counsel then moved for a mistrial, contending that whatever probative value the unrelated murder might have was greatly outweighed by the prejudice (R706-7). The court stated:

> you [defense counsel] made a trial tactical decision to attack Ms. Coby's credibility in front of this jury and this Court has already ruled that by your cross-examination, you have opened the door for this line of redirect by the State.
>
> If I'm wrong, the Florida Supreme Court will tell me that I am wrong . . . I've ruled the door has been opened and Mr. Atkinson has the absolute right to rehabilitate Ms. Coby in the presence of this jury based on Defense counsel's cross-examination of her.

(R708) The state then continued redirect examination:

> Q. 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.

(R713)

A. Defense Counsel Did Not Open the Door

The Sixth Amendment, United States Constitution and Article I, section 16, Florida Constitution provide the criminal defendant with the right to confront adverse witnesses. Essential to the right of confrontation is a full and fair cross-examination. Coco v. State, 62 So. 2d 892 (Fla. 1953). Section 90.612(2) of the Florida Evidence Code defines the scope of cross-examination:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. (e.s.)

The parameters of cross-examination as a tool to test the credibility of a witnesses were defined by this Court in Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). The Steinhorst court wrote:

> The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case. [citations omitted] Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination. [citations omitted]

412 So. 2d at 337. Therefore, it follows that "the credibility of witnesses is in issue at any trial." Wise v. State, 546 So. 2d 1068 at 1070 (Fla. 2d DCA 1989).

At bar, there is no doubt that Cheryl Coby's credibility was challenged vigorously. The witness was asked to explain why she initially told the police that she knew nothing about the case

(R684). The contradiction between her claim that she wanted to inform the police about the homicide and her anger at Danny Coby when he called Crimestoppers was explored (R682-3). Her prior statement at deposition that Bolin had never admitted to killing Collins was introduced to impeach her testimony at trial that Bolin gave three versions of the events, and in the third he implicated himself in the killing (R672-5). Witness Coby was also questioned and later impeached about her own participation in disposing of Collins' body (R679-80,795-6).

Further challenges to Coby's credibility came from her trial testimony that Bolin had a gun on the seat of his truck while Collins' body was taken from the travel trailer and that she later saw a knife in the travel trailer (R676-7). Coby admitted that she couldn't recall whether she had mentioned these weapons in her statements to the police (R676-7). There were also questions about her truthfulness in whether Danny Coby had given her the $1,000 he collected for reporting the crime and her desire to obtain the possible $63,000 reward which had been offered for conviction of Collins' killer (R685,693-5,699).

Certainly the State was entitled to attempt to rehabilitate Coby's credibility on redirect examination, as the judge noted. However, allowing the witness to testify that she had also accused Bolin of another murder does not rehabilitate her own character; it is simply a further attack on Bolin's character. Perhaps the door might have been opened for Coby to present evidence (if any existed) of reputation for truthfulness. See, Arias v. State, 593

So. 2d 260 (Fla. 3d DCA 1992) (witness might be able to present good character evidence when character for truthfulness was attacked on cross-examination). Evidence of Bolin's propensity to murder young women does not reflect on whether Coby's testimony at his trial is credible.

The case at bar is analogous to that of Jenkins v. State, 547 So. 2d 1017 (Fla. 1st DCA 1989), where the trial court erroneously admitted prior consistent statements of the victim to bolster her credibility. The Jenkins court wrote:

> A witness' credibility is always an issue at trial, and a general attack on that credibility does not satisfy the hearsay exception rule.

547 So. 2d at 1021. If a general attack on credibility not amounting to a charge of recent fabrication does not open the door to prior consistent statements, it should not open the door to evidence of the accused's bad character or propensity to commit the charged offense.

Another analogous case is this Court's decision in Czubak v. State, 570 So. 2d 925 (Fla. 1990). In Czubak, when the state's key witness was being cross-examined, she blurted out that the defendant was an escaped convict. In reversing the conviction, this Court rejected the State's assertion that the error was invited. As in the case at bar, a vigorous cross-examination does not "invite" or open the door to collateral crime evidence.

One further case for comparison is Carr v. State, 578 So. 2d 398 (Fla 1st DCA 1991). The defendant in Carr testified that the police had planted the cocaine on him which they accused him of

possessing. As rebuttal evidence, the state was allowed to present the defendant's prior conviction for cocaine possession. The First District reversed, finding that the jury issue was witness credibility and that evidence of propensity should not have been admitted to derogate the defendant's credibility.

At bar, Appellant did not testify. However, the credibility of his ex-wife's testimony was the central issue for the jury. It was equally erroneous to admit propensity evidence under a theory that it rehabilitated Coby's testimony as it was to admit propensity evidence in Carr to rebut the defendant's credibility.

B. 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.

In Henry v. State, 574 So. 2d 74 (Fla. 1991), this Court considered circumstances where evidence of a second homicide was admitted as part of the context of a prolonged criminal episode. This Court observed that the test of Section 90.403 of the Florida Evidence Code must be applied even where collateral crime evidence is relevant and otherwise admissible. Holding that the danger of unfair prejudice from the collateral crime evidence substantially outweighed its probative value, the Henry court reversed for a new trial.

At bar, defense counsel's objections to mention of the prior homicide were (1) spousal privilege,[2] and (2) probative value outweighed by prejudice (R707). The trial judge should at least

[2] (R706) See Issue I for treatment of this ground for exclusion.

have weighed the prejudice caused to Bolin by evidence of the prior unrelated murder against the marginal probative value which the collateral crime evidence might have to explain Cheryl Coby's conduct. The trial court's failure to even address this inquiry was reversible error.

State v. Price, 491 So. 2d 536 (Fla. 1986) is another decision of this Court which is on point here. The Price court wrote:

> Care must be taken, however, not to allow the introduction of unduly prejudicial evidence simply because the evidence is admissible under a different rule.

491 So. 2d at 537. Another decision of this Court which found the probative value of evidence from a collateral crime outweighed by prejudice is Bryan v. State, 533 So. 2d 744 (Fla. 1988).

At bar, the State's redirect examination of Cheryl Coby established that ten months earlier, Bolin had driven Coby to another homicide scene (R705-6). There was no reward for a conviction in the murder of the "Church's Chicken girl" (R706, 713). Coby gave the police information about both cases (R713). Collectively, whatever probative value this testimony had with regard to Coby's credibility was greatly outweighed by the prejudice caused to Bolin by the jury hearing that he previously murdered another girl.

C. Harmless Error Analysis

Improper admission of collateral crime evidence is presumed to be harmful error. Castro v. State, 547 So. 2d 111 at 115 (Fla. 1989); Peek v. State, 488 So. 2d 52 at 56 (Fla. 1986). Even where there is overwhelming evidence of guilt, the State bears the burden

of proving that the erroneously admitted evidence did not affect or contribute to the verdict. State v. Lee, 531 So. 2d 133 (Fla. 1988); State v. Michaels, 454 So. 2d 560 (Fla. 1984).

At bar, almost all of the evidence against Bolin came from Cheryl Coby's testimony. He was never linked to Stephanie Collins' disappearance from the Marketplace North shopping center; indeed, the observation of Collins riding in a white van suggests that Bolin was not involved because he never had access to that type of vehicle. Only a similar head hair links Bolin by way of physical evidence to the body of Stephanie Collins. While Appellant's note to Captain Terry suggests that both he and Cheryl were involved in "dumping the body," the note is not a confession to any crime, let alone murder. Consequently, the credibility of Cheryl Coby's testimony was the essential question for the jury to decide at trial.

The setting of the case at bar is directly comparable to that of Keen v. State, 504 So. 2d 396 (Fla. 1987). As at bar, there was irrelevant evidence of a prior violent act (attempted murder) committed by the defendant introduced into Keen's trial. This Court reversed Keen's conviction, noting that "the real issue presented in this trial centered on the credibility of Shapiro (State's witness) versus the credibility of Keen." 504 So. 2d at 401. The harmless error test is not met by the State when credibility of a key witness is essential to conviction. See also, Carr v. State, supra at 400. Admission of testimony about Appellant's prior murder charge destroyed the fairness of his trial. His conviction must be reversed.

ISSUE III

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

In order to protect a criminal defendant's Sixth Amendment right to a fair trial and his Fourteenth Amendment due process rights, a trial court must grant a change of venue when it appears that prejudicial publicity has impaired the ability to select an impartial jury. This Court wrote in Singer v. State, 109 So. 2d 7 at 14 (Fla. 1959) that when a trial judge considers a motion for change of venue, the judge

> must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish a defendant a trial by fair and impartial jury.

At bar, there was extensive publicity about the case in Hillsborough County since the disappearance of Stephanie Collins in November, 1986. However, what is most significant about the media reports was the attention focused upon other crimes attributed to Appellant and speculation about his involvement in dozens of other homicides. Thus, as in Sheppard v. Maxwell, 384 U.S. 333 (1966), most of the printed stories or news broadcasts dealt with material which never came into evidence at trial.

A brief sampling of the newspaper articles presented as exhibits in Bolin's motion for change of venue and the two supplements to it shows the following inflammatory reportage:

> A. Bolin was a suspect in "at least eight other killings in three states" beside the two Hillsborough County murders he had been indicted for (R1363-4).

B. Appellant fought extradition from Ohio while "[l]aw enforcement officials in Tennessee, Ohio, Georgia and Florida are scrambling to determine which unsolved slaying of young women might be tied to Bolin" (R1367).

C. Bolin showed no remorse for a prior kidnapping and rape (R1371).

D. Appellant was "among seven family members with felony convictions" (R1375-6).

E. Death threats were reportedly made against a "key witness" for the prosecution (R1377).

F. Law enforcement officials from twelve states were investigating Bolin (R1381).

G. Bolin was charged in a 1987 Texas rape and murder, "confirming . . . suspicions that the long-haul trucker could be 'responsible for other murders around the country'" (R1382-4).

H. Bolin and two others were charged with conspiring to kidnap "sheriff's officers and their families" to secure his release (R1385).

I. In surreptitiously taped conversations (which never came into evidence), Bolin was reported as admitting he killed Stephanie Collins and that he "only did [killed] five" (R1386).[3]

J. Bolin attempted suicide while awaiting trial; "suspected serial killer obtains lethal dose of medicine" (R1418-28).

K. "Investigators think Bolin may be linked to killings in as many as 26 states" (R1422).

L. Coverage of trial and death sentence recommendation in the slaying of Natalie Holley (R1432-46).

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[3] See the hearing of June 7, 1991 (R1622-3) for discussion as to whether this statement was a confession.

M. Coverage of inflammatory Guardian Angels demonstration advocating death for Bolin (R1469-70).

Although details of the radio and television coverage are not available, the motion exhibits reflect extensive news broadcasts on the local television stations (R1390-1,1447,1471).

The effect of this extensive inflammatory publicity about Bolin was creation of deep hostility in the community towards him. Unlike such cases as Provenzano v. State, 497 So. 2d 1177 (Fla. 1986) and Copeland v. State, 457 So. 2d 1012 (Fla. 1984), the pre-trial publicity was neither "largely factual, rather than emotional, in nature" (457 So. 2d at 1017), nor "straight news stories . . . therefore not inflammatory" (497 So. 2d at 1182). Rather, Appellant was branded a serial killer before he had ever been tried for a single homicide.

In Murphy v. Florida, 421 U.S. 794 (1975), the United States Supreme Court explained that a defendant can establish presumed prejudice sufficient to require a change of venue by showing pervasive inflammatory news media coverage prior to trial. State court convictions were overturned in Rideau v. Louisiana, 373 U.S. 723 (1963), Estes v. Texas, 381 U.S. 532 (1965), and Sheppard v. Maxwell, supra, without examination of the actual jury selection process because the "influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings." 421 U.S. at 799.

This Court has also recognized the need for change of venue when pretrial publicity is pervasive and prejudicial. In Oliver v. State, 250 So. 2d 888 (Fla. 1971), this Court stated

> as a general rule, when a 'confession' is featured in news media coverage of a prosecution, as here, a change of venue motion should be granted whenever requested.

250 So. 2d at 890. But see, Holsworth v. State, 522 So. 2d 348 (Fla. 1988). In Manning v. State, 378 So. 2d 274 (Fla. 1979), this Court, in reversing for a new trial in another venue, held that

> A trial judge is bound to grant a motion for change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result.

378 So. 2d at 276.

Bolin has met this test. The widespread publicity attributing not only the homicide of Stephanie Collins but numerous other homicides to Bolin made it impossible for him to receive a fair trial in Hillsborough County. On this basis alone, this Court should reverse Bolin's conviction and order a new trial in a different venue.

The second manner in which a defendant can establish that a change of venue should have been granted requires "showing great difficulty in selecting a jury." Copeland v. State, 457 So. 2d 1012 at 1017 (Fla. 1984); Murphy v. Florida, supra. Bolin has met this test also. When the prospective jurors were first questioned about their knowledge of the case, forty-six out of one hundred were immediately dismissed because they had read or heard about

Bolin in the day preceding trial and could not be impartial (R28-9,392). Thirty-five of the remaining prospective jurors admitted knowledge of the case but claimed they were able to be impartial (R29,392). When defense counsel argued to the court that the numbers indicated the impossibility of selecting an impartial jury, the following exchange took place:

> MR. O'CONNOR (Defense counsel): . . . The only fair way to give him a fair trial is to relocate the venue, the location of the trial.
>
> THE COURT: Where? To Australia?
>
> MR. O'CONNOR: Sir?
>
> THE COURT: Where? To Australia?

(R29-30)

While it might have been necessary to change the venue "to Australia" in order to find a jury venire where no one had ever heard of Bolin, only in the Tampa area was there such intense and pervasive publicity. Of the three Florida murders for which Bolin was accused, two of the victims were killed in Hillsborough County and the third in neighboring Pasco County. Of the three victims, the one in the case at bar, Stephanie Collins, generated the most publicity and community outrage -- perhaps the most of any crime ever committed in this area. Given the facts that Collins was a pretty and popular seventeen-year-old high school senior, who was abducted in broad daylight from a shopping area and found a month later by the side of a road, brutally murdered, this case stirred public feeling even without the allegations that Bolin had killed numerous other young women.

Among the prospective jurors who had been exposed to publicity yet claimed impartiality, there were many who fit the Court's description in Murphy:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others's protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

421 U.S. at 803. For instance, prospective juror Reyor said that she was aware that Bolin was a suspect in multiple homicides, but it wouldn't affect her because "I'm here to sit on one case. That's it" (R269-71).[4] Defense counsel noted that it took "repeated and sometimes hostile and adversary questions" to get prospective jurors to reveal their knowledge of the case (R393). Thus, even fair jurors had been alienated by the defense need to ferret out hidden prejudice to Bolin (R393-4).

Finally, it is significant that Appellant exhausted his peremptory challenges and requested additional peremptories (R405-7, 415). He identified juror Hart as an unacceptable juror who he would strike if he were able (R415,417).

Considering the total circumstances of the jury selection, it was an abuse of discretion for the trial court to deny Bolin's repeated motions for change of venue. Appellant was denied his Sixth Amendment right to trial before an impartial jury and his

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[4] Appellant's challenge for cause to this prospective juror was denied; but error was averted when the Court excused her anyway (R396-7).

Fourteenth Amendment right to due process. A new trial should be granted.

ISSUE IV

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" (R1884-5). He stated that he was dissatisfied with his lawyers' performance (R1884). He stated that he had not intended to waive his spousal privilege and that his attorneys rendered ineffective assistance when they did so (R1884-5).

A hearing on this motion was held April 12, 1991 (R1090-1110). 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 (R1092-3). 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 (R1094-5). Counsel also stated that there was no tactical decision involved (R1103). 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 (R1104-05).

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.

(R1105-6)

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. Immediately prior to trial, the trial court had an opportunity to correct this error. The following transpired:

> MR. O'CONNOR: On behalf of our client, we are moving to withdraw because he feels we are ineffective. And we are going to acquiesce with his judgment and move the Court to allow us to withdraw.
>
> THE COURT: Based on what claim?
>
> MR. O'CONNOR: Ineffective assistance of counsel.
>
> THE COURT: Based on what, Mr. O'Connor?
>
> MR. O'CONNOR: In that he perceives us to have effectively and incompetently waived his husband/spousal privilege while taking a deposition months ago.
>
> THE COURT: Specifically limited to that?
>
> MR. O'CONNOR: You have to ask him, Your Honor.
>
> THE COURT: Oh, no, I'm not going to ask him. I don't have to listen to any motions.

(R25-6) The court went on to rule again that Appellant was represented "by highly competent counsel" without permitting Bolin to state his complaints about counsel (R26).

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 of the defendant "adequate", the inquiry at bar was nonexistent. See also, Jones v. State, 612 So. 2d 1370 (Fla. 1992) (Justice Barkett, dissenting opinion at 1376).

Other Florida cases which emphasize the necessity for the trial judge to examine both court-appointed counsel and the defendant before ruling on a claim of ineffectiveness are Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991) and Davenport v. State, 596 So. 2d 92 (Fla. 1st DCA 1992). Appellant should now be granted a new trial.

ISSUE V

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 on the law of accessory after the fact, as requested by the state (R814). The 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.

(R865,1493).

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. Isn't it true that since November the 5th of 1986, until the time when the detectives spoke with you in Indiana on July the 16th, of 1990, you had been worried of being arrested for accessory after the fact?
>
> A. Yes.
>
> Q. Of course, now, you've been told that as a wife of Ray Bolin, you cannot be arrested as being an accessory after the fact?
>
> A. No, no one's told me that.

> Q. That was a concern for you back then before the detectives spoke with you, wasn't it?
>
> A. It's still a concern.
>
> Q. In fact, that thought crossed your mind several times between November the 5th of '86 until July 16th of 1990 and it apparently goes on, does it not?
>
> A. Yes.
>
> Q. And, apparently, at the present time, you have not been arrested for any crime related to the death of Stephanie Collins?
>
> A. That's correct.

(R697-8). Clearly, the State's reason for requesting a jury instruction on the law of accessory after the fact 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. 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.

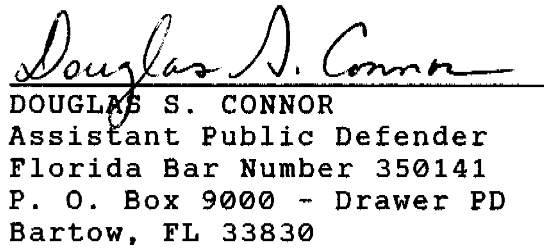
109 So. 2d at 424-5.

At bar, the impartiality of Appellant's trial was impaired by the judge's instruction on accessory after the fact. Because the essential issue for the jury to resolve was whether they thought Cheryl Coby was a credible witness, this jury instruction which tended to bolster Coby's credibility was prejudicial error. Bolin should be granted a new trial.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Oscar Ray Bolin, Jr., Appellant, respectfully requests this Court to reverse his convictions, vacate his sentences, and grant him a new trial.

Respectfully submitted,



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APPENDIX

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1. Findings in Support of Death Sentence (R1526-7)	A1-2

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. 90-11833

TRIAL DIVISION 1

FINDINGS IN SUPPORT OF DEATH SENTENCE

The following Statutory Aggravating Circumstance was proved beyond a reasonable doubt:

The defendant has been previously convicted of another felony involving the use or threat of violence to some person, to-wit: Convicted of Rape and Kidnapping in the State of Ohio and convicted of Murder in the First Degree, Armed Robbery and Kidnapping in the State of Florida.

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

1. The capacity of the defendant to appreciate the criminality of his conduct was impaired and his capacity to conform his conduct to the requirements of law was substantially impaired, 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 aforesaid Aggravating Circumstance outweighs the aforesaid Mitigating Circumstances to such an extent that the defendant deserves the death penalty as unanimously recommended by the jury.

DONE at Tampa, Hillsborough County, Florida, this 11th day of October, 1991.

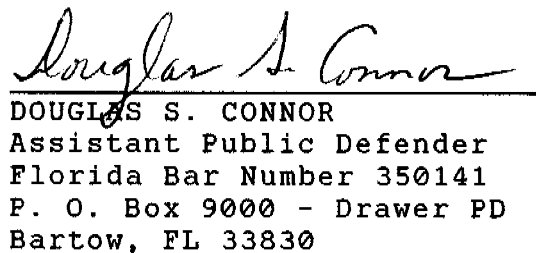
M. WM. GRAYBILL, CIRCUIT JUDGE

Copies furnished to:

Counsel for State and Defendant

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 20th day of July, 1993.



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