IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 78,905

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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OTHER AUTHORITIES

STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his intitial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts in his initial brief.

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.

In his brief, Appellee asserts that defense counsel questioning of the State's witness, Cheryl Coby, at a discovery deposition waived Bolin's husband/wife communications privilege. Appellee recognizes that the privilege belongs to both parties in a marriage and that one party's waiver of the privilege does not preclude the other party from claiming it. Brief of the Appellee, p.9. Thus, Cheryl Coby's choice to tell law enforcement about communications between Appellant and herself during their marriage waived the privilege only for herself and not for Appellant, Bolin. Brief of Appellee, p.9.

Appellee's claim is that defense counsel's questioning during the discovery deposition of Cheryl Coby on communications where Coby had already waived her privilege acted as a waiver on the part of Bolin. To this end, Appellee cites Tibado v. Brees, 212 So. 2d 61 (Fla. 2d DCA 1968); Savino v. Luciano, 92 So. 2d 817 (Fla. 1957); Fraser v. United States, 145 F. 2d 139 (6th Cir. 1944) and Saenz v. Alexander, 584 So. 2d 1061 (Fla. 1st DCA 1991). However, these cases are simply not on point because in all of them the party waived his privilege when he personally volunteered privileged communications or made admissions which he knew would be conveyed to third persons. At bar, Bolin personally neither revealed nor commented upon marital communications between Coby and himself.

The closer case is Tucker v. State, 484 So. 2d 1299 (Fla. 4th DCA 1986) where a defendant listed his confidential psychiatric expert as a witness and allowed the State to take the psychiatrist's deposition. The Tucker court held that these actions constituted a waiver because the privileged communications were made public without any defense objection. Therefore, the psychiatrist was properly allowed to testify for the State in rebuttal to the defendant's insanity defense.

Tucker, however, can be distinguished from the case at bar on two grounds. First, unlike the defense confidential expert in Tucker, Cheryl Coby was always an adverse witness to Bolin. Bolin never listed Coby as a witness and strenuously objected to the State's motion that a deposition to perpetuate her testimony be

conducted (R1681-2). Taking the deposition of an adverse witness who has already waived her own marital communications privilege is not comparable to failing to protect a privilege belonging to your own witness.

Secondly, the deposition at bar, unlike the one in Tucker never became public record. It was filed with the court and ordered to be a sealed part of the appellate record (R758-60).

Additionally, there is no authority for the State's position that a criminal defendant must elect between having discovery under Fla.R.Crim.P. 3.220 or protecting privileged communications. Rather, Rule 3.220(b)(1)(c) obligates the prosecutor to disclose:

> any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

Following up the alleged oral statements made by the defendant by deposing the witness who claimed to hear the statements is a further substantial right granted to a defendant. Fla.R.Crim.P. 3.220(h). A waiver is not voluntary when the defendant is forced to either waive his privilege or relinquish a substantial right. See, Davis v. Wainwright, 342 F. Supp. 39 (M.D. Fla. 1971), affirmed, 464 F. 2d 1405 (5th Cir. 1972). Compare, State v. DelGaudio, 445 So. 2d 605 (Fla. 3d DCA), rev.den., 453 So. 2d 45 (Fla. 1984) (defendant not required to waive right to speedy trial in order to compel State to fulfill its discovery obligation).

Finally, Appellee contends that any error in admitting the marital communications is harmless. Brief of Appellee, p. 16-18.

Appellee speculates that the two people who last saw Stephanie Collins alive were mistaken when they testified that the victim was riding in a white commercial van. Brief of Appellee, p.17. This speculation is not, however, supported by the jury's verdict which found Bolin guilty of the lesser offense of false imprisonment rather than kidnapping.

Plainly, the evidence supports a theory that another man was responsible for abducting Stephanie Collins and transporting her in his white van to Bolin's trailer. While the blood seen in the trailer supports an inference that Collins was killed there, only Coby's testimony that Bolin finally admitted committing the slaying refutes the possibility that another person was solely responsible for the homicide.

As the United States Supreme Court recently clarified in Sullivan v. Louisiana, 124 L. Ed. 2d 182 (1993), 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 describing how he did it. Without the marital communications, only a weak case of circumstantial evidence could have been presented. The error cannot be harmless.

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.

In his brief, Appellee asserts that the evidence introduced of another homicide committed by Bolin was proper rebuttal to defense cross-examination of Cheryl Coby. Brief of Appellee, p.22. Contending that the other crimes testimony was "impeachment," Appellee cites United States v. Perez-Garcia, 904 F. 2d 1534 (11th Cir. 1990) and Smith v. State, 515 So. 2d 182 (Fla. 1987) as supporting the trial court's ruling that Cheryl Coby could testify about the Natalie Holley homicide. However, Perez-Garcia and Smith are not at all on point because in both of those cases the defendant put his character into evidence by defense testimony. Thus, in Smith, the prosecution was entitled to impeach a defense witness claim that the defendant "would never harm anyone" by the defendant's prior juvenile conviction for killing a classmate. In Perez-Garcia, the prosecution was likewise entitled to refute the defendant's claim that he didn't remember being on a boat by testimony of a rebuttal witness.

At bar, however, Bolin didn't claim to have harmed anyone nor did he otherwise put his character into evidence. This is a necessary predicate for the State to enter evidence of bad character. § 90.404(1)(a), Florida Evidence Code; Bates v. State, 422 So. 2d 1033 (Fla. 3d DCA 1982); Young v. State, 195 So. 2d 569

(Fla. 1939). See generally, Ehrhardt, Florida Evidence §404.5 (1993).

Although the State concedes 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" (Brief of Appellee, p.25), somehow (in Appellee's eyes) Appellant's proper cross-examination of Cheryl Coby "opened the door" to introduction of his prior criminal act. Brief of Appellee, p.25. It must be emphasized that the defense cross-examination of Cheryl Coby was entirely proper. Her trial testimony that Bolin threatened her with a gun was properly impeached by the fact that she never previously mentioned the gun to the investigating detectives (R676) Cross-examination eliciting the fact that there was a reward offered for conviction in this homicide was proper to show that Cheryl Coby had a pecuniary interest in the outcome of this trial (R699-700). It was entirely appropriate for the jury to assess the credibility of Coby's testimony with these factors in mind. Std. Jury Inst. Crim., §2.04 (1992).

ISSUE III

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

Appellee concedes that there was extensive publicity in this case throughout the Tampa Bay area both when Stephanie Collins disappeared and later when Bolin was charged with her murder. Brief of Appellee, p. 30. However, Appellee's contention that

"most of the publicity was factual in nature" (Brief of Appellee, pp. 30-1) ignores the large amount of inflammatory publicity dwelling on items which were inadmissible in evidence and speculation upon numerous homicides nationwide where Bolin was a suspect. See Initial Brief of Appellant.

Appellee cites to both this Court's and the Eleventh Circuit's decisions involving Theodore Bundy. Bundy v. State, 471 So. 2d 9 (Fla. 1985); Bundy v. Dugger, 580 F. 2d 1402 (11th Cir. 1988). The comparison is apt because both Appellant and Bundy received extensive pretrial publicity including speculation about a nationwide trail of victims. However, this Court should specifically note that Bundy was granted one change of venue in each of his prosecutions. Bundy v. State, 471 So. 2d 9 at 11 (Fla. 1985) (from Suwanee to Orange County); Bundy v. State, 455 So. 2d 330 (Fla. 1984) (from Leon to Dade County).

Thus, although Bundy still had to accept jurors who had been exposed to publicity, at least there was an effort made to afford him due process by changing venue. It should also be recognized that jurors in a different venue are more able to set aside initial impressions received from publicity because they have not developed the sense of community outrage which arises from a nefarious crime committed in the local vicinity. The record establishes that Appellant, like Bundy, should have been tried in a different venue from where the homicide occurred. The trial court's failure to grant a change of venue even after Bolin had already been convicted

of one homicide in Hillsborough County and provoked a Guardian Angels demonstration at the courthouse was an abuse of discretion.

ISSUE IV

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

The State misapprehends Appellant's argument by asserting that Bolin did not prove his counsel was ineffective at the pretrial hearing. This is not the issue. Rather, Appellant's complaint concerns procedural due process because he was not allowed to present his reasons for requesting that counsel be discharged before the trial court denied his motion.

Before a trial judge can rule on a claim of ineffectiveness, he must examine both court-appointed counsel and the defendant. Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991); Davenport v. State, 596 So. 2d 92 (Fla. 1st DCA 1992). The court's failure to examine Appellant personally before ruling on the motion mandates reversal for 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.

With regard to Cheryl Coby's motive to testify against Bolin because she feared prosecution herself, Appellee writes:

> 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 fact prosecution under the law. Therefore, the defense assertion that she was testifying against Bolin out of fear of reprisal is without basis.

Brief of Appellee, p. 41-2. This assertion should be juxtaposed against Coby's actual testimony at trial:

> 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, 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.

(R697-8).

The instruction on accessory after the fact requested by the State and given by the trial court could only be understood by a reasonable juror as an instruction not to consider her motive to avoid prosecution when weighing the credibility of Cheryl Coby's testimony. Since the credibility of Coby was the most important issue for the jury's determination in the case at bar, the error in giving the instruction cannot be harmless.

CONCLUSION

Appellant will rely upon his Conclusion as stated in his initial brief.

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 24th day of January, 1994.

Respectfully submitted,

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