IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

v.

Case No. 80,794

STATE OF FLORIDA,

Appellee.

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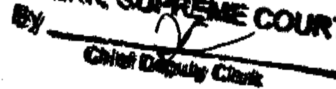
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BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

Appellant asserts a due process violation based on an allegation that the state mispresented a material factor in the trial court's ruling admitting other crimes evidence. Specifically, he contends that the order admitting the collateral crime evidence relied upon four similarities, two of which were bogus and based upon state misrepresentations. It is the state's position that this claim is not properly before this Honorable Court as appellant did not raise this argument to the court below. Accordingly, the claim is procedurally barred.

It is the state's position that the state limited the collateral crimes evidence to that which was relevant to show Bolin's identity, motive, and intent. This evidence was merely an addition to the substantial evidence of Bolin's guilt for the murder of Teri Mathews and did not become a feature of the instant case.

Appellant contends that the collateral crimes evidence was not sufficiently similar to the facts in the case at bar and, therefore, the case should be reversed. It is the state's contention that the admission of this evidence was a matter within the discretion of the trial court and, that appellant has failed to show an abuse of that discretion.

The trial court's denial of the defense request to question jurors as to whether they had begun deliberations and as to whether they had seen any prejudicial publicity was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Appellant claims that the trial court erred in allowing Cheryl Coby to testify as to statements he made to her concerning the murders of Teri Mathews, Natalie Holley, and Stephanie Collins. It is the state's contention that Bolin waived the spousal privilege and that error, if any, was harmless.

Appellant contends that it was error for the trial court to allow Sergeant Kling to testify during the penalty phase about an incident which Phillip Bolin related to him wherein he and Oscar Ray Bolin discussed kidnapping a female jogger by sticking a gun in her ribs. He contends that this was hearsay testimony which denied him his right of confrontation. It is the state's position that the trial court properly admitted this evidence. Florida law clearly provides that "any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay statements." *Section 921.141(1), Fla. Stat.* (emphasis added). The defendant was afforded the opportunity to rebut this evidence and the testimony was properly admitted.

The evidence clearly established that Teri Mathews murder was not the result of a sexual assault that went wrong, but, rather, was the result of an established and well thought out plan to kidnap a young woman and murder her. As such the trial court properly found the aggravating circumstance of cold, calculated, and premeditated.

Under the facts of this case, the state urges this Honorable Court to find that even if the trial court should have instructed the jury to consider the facts of the escape to determine if it was a violent felony, error, if any, was harmless.

ARGUMENT

ISSUE I

WHETHER APPELLANT WAS DENIED DUE PROCESS WHEN THE STATE OBTAINED A FAVORABLE PRETRIAL RULING ADMITTING COLLATERAL CRIME EVIDENCE.

Appellant asserts a due process violation based on an allegation that the state mispresented a material factor in the trial court's ruling admitting other crimes evidence. Specifically, he contends that the order admitting the collateral crime evidence relied upon four similarities, two of which were bogus and based upon state misrepresentations. It is the state's position that this claim is not properly before this Honorable Court as appellant did not raise this argument to the court below. Accordingly, the claim is procedurally barred.

The record shows that during the hearing on the motion to admit collateral crimes evidence Corporal Lee Baker of the Hillsborough County Sheriff's Office was allowed to testify as to the facts and similarities of each of the three murders. (R 294) Corporal Baker made it clear to the court that he was testifying from reports and that he wasn't positive as to all of the evidence. (R 309) Baker was subject to cross examination by defense counsel and the evidence was open to challenge. The court told defense counsel that if at the end of the hearing he had a problem with the evidence that was presented that he could tell the court how it differed and the court would reserve ruling. (R 294) Appellant agreed to the method used and, despite the court's direction to point out any discrepancies in

the evidence, he did not contend that there were any misrepresentations as now alleged by appellate counsel. Furthermore, this claim was not presented during the trial when the evidence was admitted nor subsequently in the motion for new trial. If appellant believed that the ruling was based upon false evidence, it was incumbent upon him to present this claim to the trial court for determination as to the validity of the claim. Accordingly, this claim is procedurally barred. See, Lindsey v. State, 19 Fla. L. Weekly S241 (Fla. April 28, 1994) (Issue not preserved where defendant failed to object on ground now argued).

Assuming, arguendo, that this claim was properly before this Court, appellant's allegation of prosecutor misconduct is essentially an allegation of a violation of Brady v. Maryland, 373 U.S. 83 (1963). To establish a Brady violation a defendant must establish the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170 (Fla. 1991), quoting, United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989). The paramount goal of Brady is to guard against miscarriages of

justice. Therefore, unless the prosecutor's omission deprives the defendant of a fair trial, there is no constitutional violation requiring the verdict to be set aside. Consequently, the United States Supreme Court has deemed it appropriate to apply the harmless error rule adopted in Chapman to Brady violations, thereby preventing the automatic reversal of convictions where the discovery violation was harmless beyond a reasonable doubt. Smith v. State, 500 So.2d 125 (Fla. 1986).

The evidence that Bolin alleges was misrepresented was also available to the defense. Bolin made no attempt to clarify or introduce the allegedly contradictory evidence. Further, the evidence was properly admitted based on the facts admitted at trial. Accordingly, error, if any, was harmless.

ISSUE II

WHETHER THE COLLATERAL CRIMES EVIDENCE BECAME A FEATURE OF THE CASE REQUIRING REVERSAL IN THE INSTANT CASE.

Appellant contends that even though collateral crime evidence is admissible, the prosecution cannot be permitted to make collateral crimes the "feature" of the case. He contends that in the instant case the prosecutor emphasized to the jury that Bolin was a serial killer and that much of the testimony and evidence admitted was of no relevance whatsoever to the homicide for which Bolin was being tried. It is the state's position that the state limited the collateral crimes evidence to that which was relevant to show Bolin's identity, motive, and intent. This evidence was merely an addition to the substantial evidence of Bolin's guilt for the murder of Teri Mathews and did not become a feature of the instant case.[1]

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[1] Appellant takes out of context a statement of the trial judge wherein the court stated, "What are we trying him for and what is the nature? It sounds to me like the volume of evidence we are going to start ending up with two thirds of the evidence dealing with things that aren't really before us." (T 389). This statement was made by the trial court in ruling upon a proffer presented by the state of Phillip Bolin's testimony. This statement by the court was made before any Williams Rule evidence was presented and had to do with his determination that Phillip Bolin's testimony was admissible. It was not, as appellant infers, a lament about the evidence that was already presented. It should also be noted that although the trial court found this evidence was admissible, the state chose not to present it in the guilt phase.

Appellant complains that fully one third of the witnesses' testimony was devoted to evidence solely connected to the homicides of Natalie Holley and Stephanie Collins. He claims that another sixty *pages* of testimony related to the Holley and Collins homicides in some way. A review of the record, however, shows that much of the testimony that was presented was subject to strenuous objections by trial counsel and, therefore, a large number of the *pages* which appellant alleges contain reference to Collins or Holley consists of legal argument at the bench.

Even if the evidence did, as appellant suggests, consist of a third of the evidence presented, this fact standing alone does not support a conclusion that reversible error was committed. See, Wilson v. State, 330 So.2d 457 (Fla. 1976), (six hundred pages of transcript pointing to separate crimes by the defendant, not error.); Headrick v. State, 240 So.2d 203 (Fla. 1st DCA 1970) (nine witnesses called to establish six other burglaries); Stano v. State, 473 So.2d 1282 (Fla. 1985) (evidence detailing eight other homicides in sentencing proceedings); Burr v. State, 466 So.2d 1051 (Fla. 1985) (evidence of three other incidents); Snowden v. State, 573 So.2d 1383 (Fla. 3d DCA 1989) (more is required for reversal than showing that evidence is voluminous); see also, Townsend v. State, 420 So.2d 615 (Fla. 1982) (collateral evidence was not an impermissible feature although twice as many pages of testimony related to other crimes). In the instant case, although there was evidence introduced pertaining to collateral offenses for two other victims, the

evidence did not become an impermissible feature transcending the bounds of relevance to the charge being tried.

While the testimony was necessarily detailed enough to establish relevance to the charged crime, the direct examinations were focused and closing argument was limited. The bulk of the state's closing focused, as it should have, on the issue of cause of death, Bolin's intent, and the evidence with regard to the murder of Teri Mathews. The jury was repeatedly instructed as to the limited nature and purpose of such evidence. Clearly, no reversible error occurred in this regard. Coleman v. State, 484 So. 2d 620 (Fla. 1st DCA 1986).

Further, evidence that the murders of Natalie Holley and Stephanie Collins were not a feature of the instant case is supported by the magnitude of the evidence in support of Oscar Ray Bolin's guilt for the murder of Teri Mathews. The evidence shows that Oscar Ray Bolin's half-brother Phillip Bolin lived with his parents in Pasco County in Kent Groves a few miles from where the body of Teri Lynn Mathews was found. At midnight on December 5, 1986, Oscar Ray Bolin came to Phillip saying he needed some help. (T 458) When Phillip went outside he heard funny sounds which made him think that his dog had just gotten run over. (T 459) Appellant told Phillip to follow him to the camper. When he got to the side of the camper he saw a big white sheet lying on the ground. It appeared that the noises were coming from the sheet. (T 460) Appellant told Phillip that there was a girl in the sheet, she got shot in a drug deal in

Land O' Lakes and he didn't know what to do so he had come there. Appellant told him that this girl worked at a bank and that he had followed her to the post office and they had walked across the road. At that point appellant sprayed her with a water hose - "like he was trying to drown her." (T 461) He then started beating her with a wood-like object from the wrecker. (T 462) The young Phillip Bolin heard thumping sounds as Bolin beat the body under the sheet. (T 463) Appellant then hosed her down again. After he beat her with the club the noises stopped. (T 464) The appellant then asked Phillip to help him load her up. (T 464) They picked up the body and when he grabbed her by the feet he noticed that she did not have any shoes on. They put her body in the wrecker. After Phillip refused to help him get rid of the body, Bolin left. After about twenty or thirty minutes he came back. (T 467) The next day Phillip told his friend Danny Ferns what had happened. When he got home that day he found out that a body had been found nearby. (T 469)

Around 10:00 a.m. that morning a female body was discovered about a half a mile from the Bolin residence. (T 222, 225) The body was fully clothed except for the shoes and was wrapped in a white sheet marked St. Joseph's Hospital. (T 223 - 224, 240, 281, 336) The clothing was wet and it had not rained. (T 337) The medical examiner testified that death was caused by a combination of five stab wounds and a blunt trauma to the head. (T 282) The evidence showed that Teri Lynn Mathews was on a video tape taken by a surveillance camera at the Land O' Lakes

Post Office during the night in question. (T 292, 317) Her automobile was found in the parking lot of the post office with the headlights on, unlocked and her purse sitting on the front seat. (T 297, 303) Teri Lynn Mathews had stopped at the post office to pick up mail from a box she maintained with her parents. Bolin also had a post office box at the Land O' Lakes Post Office. (T 325) DNA expert David Walsh testified that a semen stain found on the pants that Teri Mathews was wearing matched a blood sample taken from appellant. (T 551 - 552) Rose Mary Cahles testified that on the night in question Oscar Ray Bolin was driving a wrecker with dual tires. On December 4, 1986, Bolin was dispatched to a service call in Pasco County. (T 439 - 440) He should have returned with the wrecker by late afternoon but did not report until 10:00 a.m. the following morning. (T 443 - 445) Tire tracks at the scene where Teri Mathews body was discovered were made by a vehicle having dual wheels on the rear, consistent with the wrecker Bolin was driving on that night. (T 341, 351 - 352, 355, 360) Further, the defendant's ex-wife Cheryl Coby testified that she brought hospital property home with her after her stay in St. Joseph's Hospital during 1985.[2] (T 692)

Thus, unlike this Court's decision in Long v. State, 610 So. 2d 1276 (Fla. 1992), where little if any evidence was presented on Long's guilt, the evidence in the instant case of appellant's

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2 Testimony of Cheryl Coby as to her actions were clearly not privileged.

guilt for the murder of Teri Lynn Mathews was substantial. The Williams Rule evidence did not become a feature of the case and no reversible error has been shown.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN THE ADMISSION OF THE COLLATERAL CRIMES EVIDENCE.

Appellant contends that the collateral crimes evidence was not sufficiently similar to the facts in the case at bar and, therefore, the case should be reversed. It is the state's contention that the admission of this evidence was a matter within the discretion of the trial court and that appellant has failed to show an abuse of that discretion.

Many states follow a general rule of exclusion of evidence of other crimes; to be admissible, the evidence must fit an "exception" by being relevant to one of the number of permissible subjects which have become crystallized through precedent. Since at least Williams v. State, 110 So.2d 654 (Fla. 1959), however, Florida has joined the increasing number of states who admit all such relevant evidence unless its sole relevance is to prove propensity. The statement of the rule as one of inclusion emphasizes the flexibility. In some, but not all situations, similarity is a factor in determining the relevance of evidence of other crimes. Bryan v. State, 533 So.2d 744 (Fla. 1988). The degree and nature of the required similarity may vary depending on the issues sought to be proven. Gould v. State, 558 So.2d 841 (Fla. App. 2d 1990), ref. on other grounds, 577 So.2d 1302 (Fla. 1991); Jensen v. State, 555 So.2d 414 (Fla. App. 1st DCA 1989) rev. denied, 564 So.2d 1086 (Fla. 1990); Mitchell v. State, 471 So.2d 596 (Fla. App. 1st DCA 1986) rev. denied, 500 So.2d 545

(1986). The existence of some dissimilarities will not prevent admissibility.

Relevance, not necessity, is the standard for admissibility. Before allowing admission, the Court should determine: (1) that the collateral crime or bad act and defendant's connection to it are sufficiently proven, e.g. Saxton v. State, 226 So.2d 925 (Fla. App. 4th DCA 1969), and (2) that the proffered evidence has a reasonable tendency to prove the defendant's guilt or the charged offense. Sheley, 265 So.2d 685 (Fla. 1972). On the other hand, the evidence need not be conclusive if "it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator. Bryant v. State, 235 So.2d 321 (Fla. 1970).

The state may intend to establish the prior crime or bad act for one or more of several purposes. Despite the numerous "categories" or exceptions, proof tends to fall into general areas: to establish defendant as perpetrator of the charged crime, to establish the appropriate mens rea, to establish or corroborate the existence of the other elements of the corpus delicti, to establish motive or to corroborate the testimony of the victim. The similarities between the charged and collateral offense will necessarily differ depending on the purpose to be served and the issues to be proven.

The requirement of similarity is most demanding and most strictly applied, when the collateral crime's relevance is to prove identity of the perpetrator through showing the use of a

similar modus operandi. Courts have repeatedly held that the evidence must show more than the mere similarity inherent in committing the same or similar crime, i.e., Braen v. State, 302 So.2d 485 (Fla. App. 2d DCA 1974). It is not necessary that individual similarities be unique or unusual; it is sufficient that the aggregate pattern of activity is so. Smith v. State, 479 So.2d 804 (Fla. App. 1st DCA 1985).

In Drake v. State, 400 So.2d 1217 (Fla. 1981), this Court explained "The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to prove identity." Id. at 1219. This Court went on to rule inadmissible evidence that Drake had bound the hands of two women during separate sexual assaults, one whom he choked, a second whom he struck. These cases were not sufficiently similar to the charged murder where the victim, although similarly bound, had been stabbed to death. (There was no proof of rape or sexual activity). Since the only common thread in all three cases was the binding of the hands behind the victims' back, this was not of such a special character or so unusual as to point to the defendant. Id.

This requirement of heightened similarity has been repeatedly held applicable to cases involving proof of identity through modus operandi. The instant case is not analytically unlike Buenoano v. State, 527 So.2d 194 (Fla. 1988), where the

defendant killed or attempted to kill relatives living with her by the administration of poison. Similarly, in Duckett v. State, 586 So.2d 891 (Fla. 1990), this Court authorized the admission of evidence showing that the defendant had a "tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty, and in uniform," Id. at 895. The victim in that case was an 11 year-old girl who was last seen with the defendant (a municipal police officer) at his patrol car near a convenience store. The victim's body was later found in a lake, having been sexually assaulted, strangled and drowned. A pubic hair similar to Duckett's was found in the victim's underpants and tire tracks in the mud near the lake were the same make and design as used on the city's two police cruisers. No blood was found in the defendant's vehicle, nor was any mud or debris from the lake found on his person or on the cruiser.

In Duckett, the state presented evidence of two sexual encounters between Duckett and young women as "Williams Rule" evidence. On one occasion, Duckett had encountered a petite 19 year-old woman who was looking for her boyfriend. Saying he was also looking for her boyfriend, he drove the victim around. While in the car, he placed his hand on her shoulder and attempted to kiss her, but stopped when she refused. Some months later picked up a second petite 18 year-old woman who was walking along the highway. He drove her to a remote area, parked the car then placed his hand on her breast, and attempted to kiss her. When she resisted, he stopped and drove her to where she

requested. Clearly, there were dissimilarities in the age of the victims and in the end result. Neither of the "Williams Rule" victims had been raped and only the final victim had been murdered. Moreover, since the victim was dead and the defendant denied involvement, there was no direct evidence of exactly how or where the fatal assault had occurred. The evidence in the instant case has much greater similarity than that required for admissibility in Duckett.

This Court, as well as the District Courts, have recognized the "similarity" requirement may vary depending on the issue sought to be proved. In Bryan v. State, supra, for instance, this Court allowed evidence of dissimilar collateral crimes which it felt relevant to an issue in the case. This Court ruled: "Evidence of 'other crimes' is not limited to other crimes with similar facts. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant."

The rigid similarity requirement applicable to proving identity through modus operandi is not applicable when similar fact evidence is used to prove other issues such as intent or knowledge. Gould v. State, supra; Jensen v. State, supra;

Mitchell v. State, supra. For instance, court's have held that evidence of a dissimilar collateral crime in which a gun was relevant to place the defendant in possession of the weapon subsequently to murder an unrelated victim. Amoros v. State, 531 So.2d 1256 (Fla. 1988). See also Bryan v. State, supra. Evidence of the kidnapping and tying up of a previous girlfriend has been held relevant to show intent when the defendant was charged with later kidnapping, tying up and threatening a girlfriend. Gould, supra, at 485. See also, Rossi v. State, 416 So.2d 1166 (Fla. App. 4th DCA 1982). When the defendant was charged with abuse or exploitation of the elderly, the court allowed use of evidence of financial dealings with others to establish motive, as well as evidence of the general conditions of the ACLF not directly related to the charged victims. Evidence of difficulties the defendant had previously experienced in a similar facility in Iowa was admissible to explain why the defendant would have a motive to pay special attention to the home's day to day management. Mitchell v. State, 491 So.2d 596 (Fla. App. 1st 1986). Finally, in Coleman v. State, 484 So.2d 624 (Fla. App. 1st DCA 1986), the District Court affirmed the use in trial involving sexual battery of a nine-year-old of evidence of similar sexual batteries against the same and other witnesses. The court approved the use of such evidence as tending to show the "capacity to obtain gratification from oral sex with young children" and because it supported an inference "that he had a motive to have such a relationship with a child. Id. at 625, 627.

In Crump v. State, 622 So. 2d 963 (Fla. 1993), this Court rejected Crump's claim that a trial court erred in admitting Williams Rule evidence. Crump argued that the similarities between the murder for which he was being charged versus the evidence of the Williams Rule murder, were not sufficiently unusual to serve as evidence of identity. For support, Crump relied on this Court's decision in Drake v. State, supra. This Court rejected Crump's argument as meritless, noting that it has upheld the use of collateral crime evidence when the common features considered in conjunction with each other establishes a sufficiently unusual pattern of criminal activity. Upon review of this claim , this Court stated:

> "Although the common features between Smith's murder Clark's murder may not be unusual when considered individually, taken together these features establish a sufficiently unusual pattern of criminal activity. The common features of the two crimes include: Both victims were African-American women with a similar physical build and age (Clark was twenty-eight years old, five feet, two inches and weighed one-hundred and seventeen pounds; Smith was thirty-four years old, five feet five inches tall and weighed a hundred and twenty pounds); Crump admitted to giving a ride to each victim in his truck in the same area, off Columbus Boulevard in Tampa; Crump admitted to the police that he argued with each victim while giving the victims a ride in his truck; both victim's body showed evidence of ligature marks on the wrist; both victims died from strangulation; both victim's bodies were found nude and uncovered in an area adjacent to a cemetery within the distance of a mile from each other; and the victims were murdered at different cites from where the bodies were discovered. The cumulative effect of the numerous similarities between the crimes establishes

> an unusual modus operandi which identifies Crump as Clark's murderer. Thus, we find no error in the admission of the Williams Rule evidence.

Id. at 968

In the instant case, as in Crump, although the common features between the three murders may not be unusual when considered individually, taken together these features establish a sufficiently unusual pattern of criminal activity. The common features of the three crimes include: all three victims were young women, Holley was twenty-six years old, Mathews was twenty-five to twenty-six years old and Collins was seventeen; each was a white female; each was kidnapped from or near their cars and removed to another site where they were murdered; each victim was stabbed multiple times, while two of the victims were stabbed and beaten; two of the victims were wrapped in sheets and towels from St. Joseph's Hospital; each of the victims' bodies were dumped on the side of the road in rural areas; matching black and red fibers were found on all three girls; each of the victims was fully clothed when found; and, finally, in each case Bolin went to a third party for assistance in disposing of the body or of the evidence of the crime.

Accordingly, the state urges this Honorable Court to affirm the trial court's ruling and find that this evidence was properly admitted.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN INQUIRY INTO POSSIBLE JUROR MISCONDUCT.

Appellant contends that the trial court erred in denying defense motions for a mistrial and to inquire of the jurors as to whether discussion had occurred and as to whether the jury had been exposed to any publicity about the case during their weekend recess. He contends that the Court's failure to inquire of the jurors denied him a fair trial.

First, with regard to appellant's contention that the trial court erred in failing to inquire of the jury as to whether they had begun deliberations, it is the state's contention that the trial court properly denied the motion for mistrial. On the third day of trial, during the state's case, Judge Mills informed counsel for the state and the defense that:

> "Tony tells me that we had also a matter come up with the jurors in which they have asked <u>why it is that they cannot ask questions</u>. So, he has done what he knows he should do, and that is, simply <u>told them to reduce their comments to writing, and they are back there doing that now</u>, apparently; but I assume that what we are going to have here is a situation where the jurors wish to ask questions directly of the witnesses, which really can't be done as far as I'm concerned." (T 421)

After some discussion, the state and the defense both agreed that the court should instruct the jury that the could not ask questions. (T 423 - 425) During this discussion, the jury wrote down the questions that they had. (T 427) When the court received the questions he read them into the record.

> "The first question is: Has Mr. Bolin entered a plea? The next question is: Did the man from Kahles and Kahles know who was driving the truck when the truck came in? The next question: Can we play cards in the back room?" . . . Can we help Cindy count votes for homecoming queen for her school. This will be tomorrow." (T 427-8)

At that point Bolin objected and requested an inquiry to determine if these questions were a result of deliberations or if they were the questions of a single individual. (T 429) The state responded:

> "Judge, let's put this in perspective. They say they have questions. The Court tells them if you have questions, let me know. They tell Tony they have questions, and the Court then instructs them to write the questions out. We know one person wrote out the questions and probably said who has a question, and then a person said I have a question, that individual wrote it out. I think that can be determined just from that piece of paper.
>
> How is that discussing the case in violation of the Court's orders when the Court has ordered them to have somebody write out the questions so we can all see it? I mean in essence what counsel is saying is that by somebody saying here is the question I would like the Court to answer and somebody else is writing it down, is that discussing the case? I don't think that that is discussing the case.
>
> And number two, counsel says they are violating the Court's order not to discuss the case, when the Court told them to have somebody write out the questions. So why should we bring in people and ask them about that? (T 430 - 431)

The court responded that he was concerned about the dangers of individually singling the jurors out and holding them up to some type of ridicule. At that point defense counsel made a motion for mistrial which was denied. (T 432) The jury was then brought back in and the court instructed them as follows:

> "Folks, Tony has brought to my attention, as we know he will do, some questions you had. I have discussed them with the attorneys. The first two questions deal with facts and matters that have been the results of questioning by the attorneys at this point. My problem is that I can't comment on that.
>
> As I explained to you at the very beginning, my job and yours are separate. Your job is to be in effect the judge of the facts, and my job is to be the judge of the law. If I were to answer those questions based on my own opinion, we'd actually have another person over there in the jury box, one that the attorneys didn't have an opportunity to question and who is not sworn to do the job that you are sworn to do.
>
> About the best I can tell you and I know that it's frustrating sometimes, but we need to be very careful. There are rules of evidence that govern this case and any other case. Sometimes just the way a question is phrased can cause serious problems. And that's why as a common practice jurors are not permitted to ask questions directly of the witnesses.
>
> It's not that the questions would be silly or anything of that nature, frankly they probably wouldn't be, but they might be phrase in such a fashion to in an of themselves cause serious problems under the evidence code, something that each of these fellows have gone to school for an additional three years on top of college and have had a lot of experience in dealing with, and something that has nothing to do with intelligence or lack thereof. It has a lot to do with experience.

I don't like to think of myself as foolish, but I hate to tell you what I look like around the house trying to do the job that an experienced plumber or electrician might do. Perhaps after the trial is over I can tell you some stories, but my wife certainly could. And it's in that same vein, it's not that I consider myself less intelligent than any of those folks, I just don't have any experience in that regard. So, we have to be very cautious.

Then there's this second problem that in order to formulate the questions it might actually be necessary for jurors to talk about the case together, which as I've told you before, you certainly can't do until you have all the tools that you need to properly do your job in this case.

Now, that leads us into the second two questions. I've seen jurors bring books, you know, I think some of you indicated you read historical fiction, I'm sure some of you read adventure things, things of that nature. As long as it's not something about this case, you can bring in whatever you want.

And within reason, obviously, and I'm sure you'll all understand that, you can do about whatever you need to do to entertain yourselves. As explained to you, you can't talk about the case. Well, what can you do? I've seen people bring with them knitting, both men and women incidentally, and I've seen folks bring books, magazines of a type that would not likely be reporting anything of this nature.

I've seen people bring their work. As a matter of fact, I can recall distinctly people when I served in Pasco County, bringing briefcases with them containing some of their work. Just as I take some of my work to a doctor's office or the auto mechanic or anyplace else I have some downtime, and I need to get work out of the way, I take it along and do it. So, you can do those sorts of things too, as long as it does not interfere with your ability to pay attention to what is going on in the courtroom.

> Obviously, you're not going to be doing any of these things in the courtroom, but I understand that when you have downtime and you're wondering what are those folks doing out there and what are they doing in the courtroom, you need something to do. If some of you want to help one of the other jurors in doing something that is completely unconnected with this case, such as counting some votes, well, I don't see the harm in that. There is no problem with it at all.
>
> To be honest with you, I don't see the harm in a game of friendly, hopefully very friendly game of cards or anything else. It's not against the law. <u>And when you're in a situation when you can't talk about the case anyway, frankly it probably takes away the temptation to think about doing that</u>. The attorneys have certainly discussed this with me and I think it's safe to say that none of us have a problem with that.
>
> So, good questions. The first two I'm afraid I can't help you with except to explain to you again that these attorneys are quite experienced, they know what they can bring out and what they should not be bringing out, and they know the way to bring it out. Frankly, there have been very few objections here, a few, that's to be expected. There will probably be more, but take my word for it, for the type of case we're handling, they have been very good about it, and that's because these lawyers know what they are doing.
>
> So please understand that they will do the best they can to help you, please let the rules work for you."

(T 433 - 437)

There is absolutely no support for a contention that the jury had begun deliberations and that this action in any way prejudiced the defendant. The law is clear that dealing with the conduct of jurors is within the trial court's discretion and

appellant has failed to show an abuse of that discretion. Doyle v. State, 460 So. 2d 353 (Fla. 1984), grant of habeas corpus reversed 922 F.2d 646, cert. denied, 112 S.Ct. 342, 116 L.Ed.2d 282; Orosz v. State, 389 So. 2d 199 (Fla. 3d DCA 1980). In McNeil v. State, 208 So. 2d 628 (Fla. 3d DCA 1968), the court reviewed a similar case and held that on the record the trial court was justified in concluding that the jurors had not violated his admonition given pursuant to §918.06, Fla. Stat. FSA, and the trial court's denial of the defendant's motion for a mistrial with reference thereto was not abuse of discretion. As the jury, in the instant case, was instructed not to begin deliberations until instructed by the court, it should be assumed that the jury abided by the court's directions. Further, error, if any, was harmless in light of the court's instruction.

With regard to appellant's complaint that the trial court should have inquired of the jury after their weekend recess as to whether any juror had read or heard about anything about the case during the weekend, again this is a matter which is within the discretion of the trial court and appellant has failed to show an abuse of that discretion.

Prior to closing arguments in the instant case, defense counsel stated: "Your Honor, before we do that, the defendant has requested that I ask the Court to inquire of the jury to make sure they have not heard or read something inadvertently about the trial over the weekend." (T 790) The court denied the motion stating:

> "While I appreciate that this is an extremely serious matter for the defendant, as it is for the rest of us, but once again, these folks have been instructed repeatedly and I think it would be counterproductive to basically insult them by letting them know that the judge suspects them of somehow violating their duties as jurors. I see no evidence that any of them would have done that and, of course, I'm rather loath to say that the request is brought to them by the defense, because then they would think that you distrust them, which would certainly be counterproductive. So, unless there is some particular reason for that, being something that someone has seen or heard, if so, please let me know now and I will reconsider, but right now if its just sort of a gratuitous honesty check, I think that is vaguely insulting to the jury and I am not about to do that. So, if there is something more to it, let me know now, please."

(T 791)

Defense counsel at that point told the court that he had no knowledge of anything. (T 791) Based on defense counsel's representations to the court there was no basis for the request to have the jury interrogated.

Those cases relied upon by appellant in the initial brief are each based on allegations that specific material had been presented to the jury. As there were no such allegations in the instant case, the trial court's denial of the motion was within the court's discretion and appellant has failed to show an abuse of that discretion.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY FOLLOWING THE RULING FROM APPELLANT'S PRIOR TRIAL IN HILLSBOROUGH COUNTY THAT APPELLANT WAIVED THE SPOUSAL PRIVILEGE, AND WHETHER ADMISSION ON THE MARITAL COMMUNICATIONS WAS REVERSIBLE ERROR.

Appellant claims that the trial court erred in allowing Cheryl Coby to testify as to statements he made to her concerning the murders of Teri Mathews, Natalie Holley, and Stephanie Collins. It is the state's contention that Bolin waived the spousal privilege and that error, if any, was harmless.

On April 21, 1994, this Honorable Court issued its opinions in Bolin v. State, 19 Fla. Law Weekly S 208 (Fla. April 29, 1994)(Bolin I); Bolin v. State, 19 Fla. Law Weekly S 226 (Fla. April 29, 1994) (Bolin II), reversing and remanding for a new trial. Reversal was based on the admission of statements made by Bolin to his then-wife Cheryl Coby concerning the murders of Natalie Holley and Stephanie Collins. This Court found that while using a discovery deposition waives the spousal privilege, merely taking such a deposition does not. This conclusion was based on an analogy to the "Dead Man's" statute. *§90.602, Fla. Stat. (1991)*.

It is the state's contention that because the purpose of the dead man's statute is not consistent with the purpose of the spousal privilege, the basis for a waiver is distinguishable. The purpose of the dead man's statute is to seal the lips of those whose personal and immediate interest in the issue

litigated might tempt them to give false testimony of a self-serving nature where, by reason of the death of the adversary, the representative is deprived of the decedent's version of the events. Heebner v. Summerlin, 372 So. 2d 518 (Fla. 4th DCA 1979). Thus, because one of the two parties is deceased and not available to provide counsel with his or her version of the facts of the case it would be necessary to investigate the matter during a discovery deposition. Under those circumstances an exception to the 'privilege waiver rule' is equitable.

In the instant case, however, where Oscar Ray Bolin clearly knew what he had told his wife during the course of their marriage concerning the murders and presumably could tell his lawyers what information Cheryl had,[3] such an inquiry was not necessary. Public policy does not mandate a revision of the rule to allow a defendant to determine that which he already knew. Accordingly, the state urges this Court to reconsider the application of the 'dead-man' statute rule to the spousal privilege.

The state also contends that this Court has overlooked the fact that Oscar Ray Bolin not only waived the privilege during the taking of the deposition, but he also subsequently waived the privilege when he wrote a letter to Captain Gary Terry and gave his permission for Capt. Terry to inquire of Cheryl Coby as to anything concerning these murders. Captain Terry testified that

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[3] Furthermore, this information was available to them through the police reports.

he received a letter from Oscar Ray Bolin on June 22, 1991, in which Bolin told him, "If there was ever anything else that he really wanted to know about [him] to ask Cheryl Jo because she knew just about everything [he] was ever a part of and that she knew about the homicides [he] was charged with." (R 747, 765) It is the state's position that this letter constitutes a personal waiver of any privileged communications.

The spousal privilege is deemed waived when the person who has the privilege consents to disclosure of any significant part of the matter or communication. Saenz v. Alexander, 584 So. 2d 1060 (Fla. 1st DCA 1991). Thus, Bolin's statement in the letter to Captain Terry that Cheryl Coby knew all about the homicides he was charged with and that Terry was free to ask about it constitutes a waiver of any privilege regarding the matter.

To conclude that this does not constitute a waiver of privilege is to elevate an evidentiary rule to a constitutional right. At no time has the spousal privilege been deemed to require a knowing and intelligent waiver or to have been saved by the mere inadvertence of the waiver. The only requirement is that the person maintaining the privilege (Bolin) ceases to treat the matter as private. Bolin's statement to Capt. Terry that he was free to ask Cheryl Coby about any of these homicides that he was charged with clearly indicates that Bolin had ceased to treat the matter as confidential and had waived the privilege.

Furthermore, even if this Honorable Court should once again determine that the privilege was not waived, it is the state's

contention that the admission of this testimony during the instant trial was clearly harmless. In the instant case, Cheryl Coby's testimony as to privileged statements made to her by Oscar Ray Bolin was only a minor and insignificant part of the entire trial. The murder for which Bolin was tried and convicted in the instant case was witnessed by Bolin's half-brother Phillip. Phillip testified that he saw Bolin actually commit the murder and assisted him in loading the body onto Bolin's truck. Phillip Bolin's testimony was in no way privileged or otherwise protected.

In addition to Phillip Bolin's testimony that he saw Oscar Ray Bolin kill Teri Mathews, Bolin's guilt for the murder of Teri Mathews was also supported by evidence that tire tracks from the wrecker were found near the sight of the body, that Bolin had a post office box at the same post office where Teri Mathews was kidnapped from and that semen found on Teri Mathews' body matched Bolin's DNA. In addition, there was the similar fact evidence which established Bolin's identity as the perpetrator of the Teri Mathew's murder. Even excluding Coby's testimony concerning Bolin's confession of guilt, there was otherwise reliable evidence presented with regard to the murders of Natalie Holley and Stephanie Collins. These murders were sufficiently similar to the instant case to support the conclusion that the admission of any statements Bolin made to Coby about the murders of Natalie Holley and Stephanie Collins was harmless.

Accordingly, the state urges this Honorable Court to recede from its prior opinions in Bolin I and II. However, even if this Court should decline to do so and finds that Cheryl Coby's testimony should not have been admitted in the instant case, the state urges this Honorable Court to find the admission of same to be harmless.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY ALLOWING SERGEANT KLING TO TESTIFY IN PENALTY PHASE ABOUT AN INCIDENT WHICH PHILLIP BOLIN RELATED CONCERNING STATEMENTS APPELLANT MADE TO HIM.

Appellant contends that it was error for the trial court to allow Sergeant Kling to testify during the penalty phase about an incident which Phillip Bolin related to him wherein he and Oscar Ray Bolin discussed kidnapping a female jogger by sticking a gun in her ribs. He contends that this was hearsay testimony which denied him his right of confrontation. It is the state's position that the trial court properly admitted this evidence. Florida law clearly provides that "any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is afforded a fair opportunity to rebut any hearsay statements." *Section 921.141(1), Fla. Stat.* (emphasis added). The defendant was afforded the opportunity to rebut this evidence and the testimony was properly admitted.

During the guilt phase Phillip Bolin testified in a proffer concerning the now-challenged testimony. The young Bolin testified that on Thanksgiving or thereabouts in 1986, he was in a wrecker-type vehicle with Oscar Ray Bolin in Tampa. He said that they saw a female jogger going down the street and that Oscar Ray pulled over and asked her if she wanted a ride. She said no she was just jogging. Oscar told Phillip to go out and put a gun to her and tell her to get in the vehicle. Oscar told

him that he used to do it all the time. (T 365 - 367) Phillip refused to do so. During the proffer defense counsel cross-examined Phillip Bolin about the statement. (T 368) Based upon this proffer and subsequent argument, the trial court ruled that the statement made by Oscar Ray Bolin to Phillip Bolin was admissible to show intent based on this Court's decision in Swafford v. State, 533 So. 2d 270 (Fla. 1988). (T 389) Nevertheless, in an abundance of caution the state decided to withhold admitting the evidence during the guilt phase. During the penalty phase, however, Sergeant Kling was permitted to testify to the statements that Bolin made to support the aggravating circumstance of cold, calculated and premeditated.

To support his claim of error appellant relies on Engle v. State, 438 So.2d 803 (Fla. 1983) and Walton v. State, 481 So.2d 1197 (1985), wherein testimony was presented concerning a confession of a codefendant. This is readily distinquishable from the instant case. By its very nature, a confession of a codefendant denies a defendant the right to confront the witness against him as the codefendant cannot be compelled to incriminate himself.

This Court in Engle noted that there is no confrontation problem in consideration of a presentence report because if the defendant disputes the latter, he can secure confrontation and cross-examine its preparers or otherwise rebut the same. In the instant case, Phillip Bolin could have been called as a defense witness to rebut Sgt. Kling's statements or the defendant himself could have testified to rebut the claim.

In Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992), this Court again made it clear that hearsay testimony is permissible provided the defendant has a fair opportunity to rebut it. Because defense counsel in Waterhouse was afforded the opportunity to cross-examine the detective who testified concerning Waterhouse's prior conviction for second degree murder, this Court found no error in the admission of this testimony. Id. at 1016. In the instant case, not only did the defense have the opportunity to cross-examine Phillip Bolin during the proffer or to call Phillip Bolin as a defense witness, it was also afforded the opportunity to cross-examine Sergeant Kling about the statement.

Furthermore, even if this evidence was improperly admitted, it is clearly harmless. The evidence was substantial that Phillip Bolin had a pattern and prearranged design to kidnap and murder the young women. As such, the statement by Phillip Bolin was harmless.

Appellant also contends that the evidence was inadmissible as it was hearsay within hearsay. Clearly the statement by Oscar Ray Bolin to Phillip Bolin was admissible as admission against interest and Sergeant Kling was properly allowed to testify to it. This testimony was relevant to show the cold, calculated, and premeditated nature of the instant crime and was properly admitted by the trial court.

ISSUE VII

WHETHER THE SENTENCING JUDGE ERRED BY FINDING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS PROVED.

Appellant contends that the trial court incorrectly found cold, calculated and premeditated aggravating circumstance. He contends that the evidence suggests that Bolin did not necessarily intend to kill Teri Mathews when he encountered her at the post office and the murder may have been just the result of a sexual assault that went wrong.

This argument by appellant totally ignores the evidence of the instant case. The record shows that Teri Mathews was kidnapped from the Land O' Lakes Post Office by Oscar Ray Bolin. Bolin then stabbed the victim several times and rapped her in a white sheet. She was placed in the back of his truck and taken to Phillip Bolin's house. (T 282 - 284, 296, 325, 329 - 330) Phillip Bolin testified that when he first saw the victim wrapped in the white sheet that she was still alive and making whimpering sounds. (T 459) Oscar Ray Bolin then got a garden hose and doused the bundle with water. (T 461 - 462) Bolin then took a wooden club off the wrecker he was driving and started beating the body. (T 462 - 463, 467) At that point the noises stopped. (T 464) Bolin the doused the body again with the water hose and with the assistance of Phillip loaded the body back onto the wrecker. (T 464) Appellant then took the body of Teri Mathews and dumped it in a rural area. (T 222, 225)

This is not evidence of sexual assault that went wrong. To the contrary, the evidence shows that he kidnapped and murdered this victim in a manner very similar to his prior victims indicating indeed that the murder was cold, calculated, and premeditated. The evidence also shows that he removed her to a different site where she was assaulted and stabbed. He then took her to Phillip Bolin's where Appellant ultimately ended her young life by beating her wounded body with a wooden club. The evidence clearly supports a finding that this murder was cold, calculated and premeditated. See Hall v. State, 614 So. 2d 473 (Fla. 1993); Henry v. State, 586 So. 2d 1033 (Fla. 1991). Accordingly, the trial court properly found the aggravating circumstance of cold, calculated and premeditated.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE PENALTY JURY THAT ESCAPE IS A VIOLENT FELONY QUALIFYING FOR THE AGGRAVATING CIRCUMSTANCE.

Appellant contends that the trial court should not have instructed the jury that escape was a violent felony for the purpose of finding a prior violent felony. He contends that escape is not necessarily a violent felony and, therefore, in light of this Court's opinions in Johnson v. State, 465 So. 2d 499 (Fla. 1985); and Sweet v. State, 624 So. 2d 1138 (Fla. 1983), that the jury should have been instructed they had to consider the individual circumstances of the crime in order to determine if it was violent before weighing it as a prior violent felony.

In the instant case, the trial judge instructed the jury as follows:

> "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. First, the defendant has been previously convicted of another capital offense or a felony involving the use or threat of violence to some person. The crime of first degree murder is a capital felony. Crimes of rape, kidnapping, felonious assault and escape, are felonies involving the use of or threat of violence to another person." (T 1204)

In the sentencing order, the trial court found with regard to the prior violent felony aggravating factor:

> "(a) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to another person. Evidence presented during the sentencing phase clearly establish that the defendant has been convicted of first

> degree murder on two previous occasions and, in addition to his convictions for these capital felonies, the defendant has also been previously convicted of kidnapping, rape, escape and felonious assault. There is absolutely no contradiction concerning these factors. Although the escape might not be considered violent in and of itself, it was clearly established by the state that the felonious assault was upon a guard and was perpetuated in an extremely violent fashion during the course of the escape attempt. Even if the defendant's prior convictions for first degree murder should be reversed on appeal, and the court acknowledges that those convictions are properly under appeal, the remaining convictions set forth in this paragraph would still convince this Court that the state has clearly established this aggravating factor and that it is entitled to great weight"
>
> (R 178)

In Johnson v. State, supra, this Court held that whether a previous conviction of burglary constitutes a felony involving violence under §*921.141(5)(b), Fla. Stat. (1981)*, depends upon the facts of the previous crime. "Those facts may be established by a documentary evidence, including the charging of conviction documents or by testimony or by a combination of both. However, simply to instruct the jury at the sentencing phase of a capital felony trial that burglary is a felony involving the use or threat of violence for purposes of applying the aggravating circumstance in §*921.141(5)(b)* without making clear that this depends on the facts of the burglary is error." Nevertheless, this Court held that based on the facts of the case shown by documentary and testimonial evidence, it was reasonable to suggest that the judge's instruction that the burglary was a

crime of violence involving the use or threat of violence was not error. Furthermore, this Court held that even if it was erroneous, the instruction was clearly harmless because there was a separate, previous conviction of robbery to support the finding of the aggravating circumstance. Id. at 506.

Similarly, in Sweet v. State, supra, this Court held that while the offense of possession of a firearm by a convicted felon is not *per se* a crime of violence, the circumstances of the particular crime were shown to have a violent aspect, as Sweet used the firearm to hit someone in the face and ribs. However, this Court held that the trial court did err in failing to instruct the jury that they had to consider the individual circumstances of the crime in order to determine if it was violent before weighing it as a violent felony. Nevertheless, as this Court did in Johnson, supra, this Court found the error in Sweet to be harmless where there were several other convictions supporting the prior violent felony aggravator. Id. at 1143.

In the instant case, the facts presented during the penalty phase showed that the escape was coupled with a felonious assault upon a guard and was perpetrated in an extremely violent fashion. (R 178) Furthermore, as in Johnson and Sweet, the defendant had, in addition to the crime of escape, two convictions for first degree murder and he had previously been convicted of kidnapping, rape, and felonious assault. (R 178) Under the facts of this case, the state urges this Honorable Court to find that even if the trial court should have instructed the jury to consider the

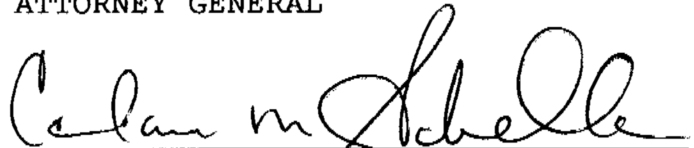
facts of the escape to determine if it was a violent felony, error, if any, harmless.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 25 day of May, 1994.

OF COUNSEL FOR APPELLEE.