IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, Jr.,

Appellant,

vs. CASE NO. 89,385

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

ISSUE I

Appellant alleges that the trial court's denial of his motion for individual sequestered voir dire of prospective jurors who had been exposed to pretrial publicity was an abuse of discretion. He contends that the denial to allow him individual sequestered voir dire precluded him from making intelligent use of his peremptory challenges, thereby depriving him of the right to an impartial jury. It is the state's position that the denial of the motion for individual sequestered voir dire rests within the sound discretion of the trial court and appellant has failed to show an abuse of that discretion. Accordingly, appellant is not entitled to relief on this point.

ISSUE II

The trial court did not err in making appellant's half brother, Phillip Bolin, a court witness where state established he had recanted eyewitness testimony and had resisted appearing at trial. Appellant's challenge to state's use of prior inconsistent statements to impeach the witness is procedurally barred where no objection was presented on that basis and no limiting instruction was requested.

ISSUE III

As this Court has held that it is not error to deny a motion for mistrial where the jury learned that the defendant had been previously tried, appellant has failed to establish that error, if any, was harmful.

ISSUE IV

Appellant's next contention is that the trial court erred by allowing Detective Kling to testify about details of the homicide which were not reported to the media. He contends that the testimony was inadmissible hearsay. Detective Kling's testimony was not hearsay as he was testifying to evidence that was within his personal knowledge. No harmful error has been shown by appellant.

ISSUE V

Appellant claims that the trial court used an improper standard in the written order admitting the DNA evidence and that during closing arguments the prosecutor misrepresented the blood and DNA statistical evidence. It is the state's position that appellant has failed to show reversible error with regard to either claim.

ISSUE VI

Appellant's next claim is that he was denied access to a member of his defense team during a recess in violation of his right to counsel. This argument refers to mitigation specialist

Rosalie Martinez's removal from the courtroom during the testimony of Phillip Bolin and an allegation that she was kept from consulting with appellant during a recess. It is the state's position that the latter claim was not preserved for review. Furthermore, neither claim has merit. As Mrs. Martinez is not a lawyer, the control of her access to the trial and appellant is a matter within the discretion of the trial court and appellant has failed to show an abuse of that discretion.

ISSUE VII

Appellant next contends that there was insufficient evidence to support the underlying felony of sexual battery and, therefore, it was erroneous to instruct the jury on the state's felony murder theory. He contends that since the jury was instructed both on felony murder and first degree murder that there was no way of knowing if the jury relied on felony murder for which there was insufficient evidence. First, the state does not agree that the evidence of a sexual battery was insufficient. Additionally, sexual battery was not the only basis upon which the first degree verdict could have rested. In addition to premeditated first degree murder, the jury was also instructed that it could consider kidnapping as a basis to support the felony murder charge. As appellant does not challenge the sufficiency of the evidence to

support either premeditated first degree murder or felony murder with the underlying felony of kidnapping, no reversible error has been shown.

ISSUE VIII

Appellant's final claim challenges the trial court's denial of his untimely request for a PET scan. Appellant contends that although he did not request the test until the close of the guilt phase, the trial court erred in denying the motion. It is the state's contention that the motion was untimely filed and that it was within the trial court's discretion to deny the requested 60 day continuance and the funds to conduct a PET scan.

ARGUMENT

ISSUE I

WHETHER APPELLANT HAS SHOWN THAT THE DENIAL OF HIS MOTION FOR INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO HAD BEEN EXPOSED TO PRETRIAL PUBLICITY BUT STATED THAT THEY COULD RENDER A VERDICT BASED ONLY ON THE EVIDENCE WAS AN ABUSE OF DISCRETION.

Appellant, Oscar Ray Bolin, Jr., alleges that the trial court's denial of his motion for individual sequestered voir dire of prospective jurors who had been exposed to pretrial publicity was an abuse of discretion. He contends that the denial to allow him individual sequestered voir dire precluded him from making intelligent use of his peremptory challenges, thereby depriving him of the right to an impartial jury. It is the state's position that the denial of the motion for individual sequestered voir dire rests within the sound discretion of the trial court and appellant has failed to show an abuse of that discretion. Accordingly, appellant is not entitled to relief on this point. Randolph v. State, 562 So.2d 331, 337 (Fla.1990), cert. denied, 498 U.S. 992 (1990); Davis v. State, 461 So.2d 67, 69 (Fla.1984), cert. denied, 473 U.S. 913 (1985). It is well settled that because the purpose of conducting voir dire is to secure an impartial jury, the trial court's denial of individual voir dire will only be reversed where a defendant demonstrates the partiality of the jury or an abuse of discretion by the trial court. San Martin v. State, 705 So.2d 1337

(Fla. 1997), pet. cert. filed May 26, 1998; Farina v. State, 680 So.2d 392, 396 n. 2 (Fla.1996); Jordan v. State, 694 So.2d 708, 713 (Fla. 1997). The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness. Bundy v. State, 471 So.2d 9, 19 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). "It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court." Id. at 20.

The record, in the instant case, indicates that all of the prospective jurors who indicated on their juror questionnaire forms that they could not be impartial were removed for cause by the trial court. (V, T40-46; VI, T224) No juror who indicated that they had formed an opinion from the pretrial publicity sat on the jury. Compare, Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986) To be qualified, jurors need not be totally ignorant of the facts of the case nor do they need to be free from any preconceived notion at all:

> To hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
>
> Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961).

Thus, if prospective jurors, as the jurors in the instant case did, can assure the court during voir dire that they are impartial despite their extrinsic knowledge, they are qualified to serve on the jury. Davis, 461 So.2d at 69. Although such assurances are not dispositive, they support the presumption of a jury's impartiality. Rolling v. State, 695 So.2d 278, 285 (Fla. 1997), cert. denied, 118 S.Ct. 448 (1997); Copeland v. State, 457 So.2d 1012, 1017 (Fla. 1984); Davis v. State, 461 So.2d 67, 69 (Fla. 1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). Because the trial court has the opportunity to observe and evaluate the prospective juror's demeanor and credibility, this Court has recognized that the dismissal of a juror is subject to an abuse of discretion review. Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986); Castro v. State, 644 So.2d 987, 990 (Fla. 1994). Since appellant has failed to establish that any of the challenged jurors should have been dismissed for cause or that they were not qualified to serve as jurors, no abuse of discretion has been shown.

Moreover, a defendant does not have a constitutional right to question potential jurors about exactly what they have read--even when a case generates extensive publicity. Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). "[I]t is not enough that such questions might be helpful. Rather, the trial

court's failure to ask these questions must render the defendant's trial fundamentally unfair." Id. at 425-26, 111 S.Ct. at 1905. See also Cummings v. Dugger, 862 F.2d 1504, 1508-09 (11th Cir.), cert. denied, 490 U.S. 1111, 109 S.Ct. 3169, 104 L.Ed.2d 1031 (1989); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 515 U.S. 1147 (1995).

Although, appellant contends that he was deprived of the right to question the prospective jurors who stated that they had read about the case, but had not formed any opinions, these jurors were subject to voir dire by both the state and the defense. Nowhere in this record is there any support for the contention that he was limited in his voir dire, only that he was refused the opportunity to question the jurors after sequestration. Although counsel proffered the questions he would have asked if he had been granted individual sequestered voir dire, there is nothing indicating that some of these same questions would not have been appropriate to the entire venire. (VI, T244) For example, counsel could have inquired of prospective jurors as to how they knew about the case, whether it was from television or the newspapers; he could also have asked about the timing of the publicity. In other words, he could have discerned what information they had without getting into the exact content. The failure to establish that the jurors he peremptorily challenged had even been exposed to truly prejudicial

information distinguishes this case from Reilly v. State, 557 So.2d 1365 (Fla. 1990) and Boggs v. State, 667 So.2d 765, 766-67 (Fla. 1996) as relied upon by appellant.

First, relying upon Reilly v. State, 557 So.2d 1365 (Fla. 1990), appellant urges that the publicity, in the instant case, contained evidence of a confession and, therefore, reversal is mandated. Reilly does not stand for the proposition that knowledge of a suppressed confession is per se reversible error. In Reilly, this Court reversed a trial court's denial of a challenge to a juror who knew that Reilly had given a confession to law enforcement.

Bolin never gave law enforcement a confession to the murder of Teri Lynn Matthews. The only reference to a "confession" by Bolin was a reference at the end of an article about DNA challenges. The article noted that Bolin's ex-wife had previously testified that he had "confessed" to the killings. "Confessions" to an ex-wife do not carry the same indicia of reliability that a confession made to law enforcement does. Further, unlike Reilly there is no evidence that any juror who sat on Bolin's jury had even read the article. (II, R355) Additionally, in contrast to Reilly where this Court found prejudice resulted because the juror was aware of a fact that was inadmissible and far more damaging to Reilly than anything which was actually introduced into evidence, the evidence in the

instant case included not only Bolin's confession to his cousin's wife, Michelle Steen, that he had killed a girl in Florida by beating her and putting a hose down her throat, but, also, the jury heard the eyewitness testimony of appellant's half-brother, Phillip Bolin. (XIII, T950-58)

Moreover, this Court has held that even publicity about a confession is not a per se ground for granting a change of venue and that a defendant must still demonstrate that publicity was prejudicial either by evidence that particular jury was affected or by evidence that general state of mind of community's residents was so infected that fair trial could not be obtained. Holsworth v. State, 522 So.2d 348, 351 (Fla. 1988). As Bolin failed to establish that any juror even saw the article, he has not demonstrated any prejudice that resulted.

Appellant's reliance on Boggs v. State, 667 So.2d 765, 766-67 (Fla. 1996) is also misplaced. Prior to Boggs' retrial, there was substantial publicity about the case in newspaper articles read by members of the venire. These articles included the fact that Boggs had previously been convicted and sentenced to death for this crime and a statement by the trial judge that he believed that Boggs was faking mental illness to avoid execution. Nevertheless, Boggs' trial court decided that it would not alter its procedure of conducting voir dire in groups. This inquiry revealed that six of

the first thirteen prospective jurors had read or heard something about the case prior to the retrial, and five had formed some opinion as to Boggs' guilt. Three of those five stated that they would be able to set aside their opinions and base a verdict solely on the evidence presented at trial. One of these three, who had read one of the newspaper articles and had formed an opinion, worked in the communications division of the Pasco County Sheriff's Office and knew by name or knew personally all of the officers named as potential witnesses in the case. The remaining two jurors of the five who had formed opinions as to Boggs' guilt were equivocal as to whether they could render a verdict solely on the evidence presented at trial. Prospective juror Johnson, who worked near the scene of the crime at the time of the crime, stated that it would be difficult to render an unbiased verdict based solely and entirely upon the evidence presented in the courtroom. She further stated that she was unsure if she could put aside her present feeling about Boggs' guilt and base a verdict solely and entirely upon the evidence. Similarly, prospective juror Erbe also read about the case in the newspaper and had formed an opinion as to Boggs' guilt. At the time of trial, Erbe was divorcing her husband, who was a Hillsborough County Sheriff's deputy and had a daughter who was a Tampa police dispatcher. Even though the prospective juror said she would try not to let those relationships

affect her feelings toward police officers in general, when asked if she could base her verdict solely on the evidence presented, she responded that she "would certainly try." Boggs' counsel moved for more extensive voir dire to determine the extent of the jurors' knowledge about the case, but the court denied the motion. Counsel then moved to excuse these three prospective jurors for cause. When the trial court denied the motion, counsel used a peremptory challenge to excuse Johnson, Erbe and the prospective juror who was employed by the Pasco County Sheriff's Office.

Upon reversing in Boggs, this Court explained:

> The purpose of conducting voir dire is to secure an impartial jury. See *Davis v. State*, 461 So.2d 67 (Fla.1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). To this end, the trial court has broad discretion in deciding if prospective jurors must be questioned individually about publicity the case may have received. See *Johnson v. State*, 608 So.2d 4 (Fla.1992), cert. denied, 508 U.S. 919, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993); *Pietri v. State*, 644 So.2d 1347 (Fla.1994), cert. denied, --- U.S. ----, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995). Additionally, the United States Supreme Court has held that individual voir dire to determine juror impartiality in the face of pretrial publicity is constitutionally compelled only if the trial court's failure to ask these questions renders the trial fundamentally unfair. See *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991).
>
> In this case, because of the timing and the content of the newspaper articles and the ***statements made by these prospective jurors that they had read newspaper articles and had***

> ***formed opinions about the case, individual voir dire examination of these prospective jurors was compelled.*** Through individual voir dire, the trial court could have determined the extent of the prospective jurors' knowledge of the newspaper articles and evaluated whether their preformed opinions could be set aside. This procedure would have also protected the remainder of the venire from any potential contamination resulting from this questioning. ***Given the particular facts of this case, including the fact that several jurors had read these newspaper articles and formed opinions as to the defendant's guilt, we find that the trial court abused its discretion by not allowing further individual inquiry of the two prospective jurors who could not unequivocally state that they could not set aside their preformed opinion as to Boggs' guilt and base a verdict solely on the evidence presented, and of the prospective juror who worked for the same sheriff's office that investigated the case and stated that he had formed a tentative opinion as to Boggs' guilt.***
>
> Boggs v. State, 667 So.2d 765, 766-67 (Fla. 1996)

Nevertheless, this Court in Boggs noted that in Pietri v. State, 644 So.2d 1347 (Fla. 1994), there was no error because Pietri's trial judge, like the trial judge in the instant case, readily excused prospective jurors who had heard about the case and formed an opinion. (V, T44, VI, T224) Additionally, in contrast to Boggs, none of the articles in the instant case contained any comments by the trial judge as to Bolin's guilt or defense. The trial court, in the instant case, did not abuse its discretion in denying individual voir dire.

Finally, the state asserts that section 924.051, Florida Statutes (Supp. 1996), which was created by the Criminal Appeal Reform Act of 1996 (ch. 96-248, §4, at 954, Laws of Fla.) applies. Section 924.051 became effective on July 1, 1996. Appellant was not tried until August 12, 1996 and was not sentenced until October 9, 1996. (III, R499-508, V, T1) The statute provides that the *party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court and precludes review unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.* Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) (on reh'g). Given that the jurors, in the instant case, were examined by the court, prosecutor and defense counsel on the issue, and yet no evidence that the challenged jurors should have been excused for cause or that any unfit juror actually sat or that any prejudice resulted, appellant has failed to carry his burden show harmful error. §924.051 Fla. Stat. (1996). Accordingly, this claim should be denied.

ISSUE II

WHETHER IT WAS REVERSIBLE ERROR FOR THE STATE TO INTRODUCE PRIOR STATEMENTS DURING THE STATE'S EXAMINATION OF PHILLIP BOLIN.

Phillip Bolin testified at appellant's original trial as an eyewitness to the murder of Teri Lynn Matthews. In 1996, after this Court remanded the cause for a new trial, Phillip wrote the following letter recanting his prior trial testimony:[1]

> To Whom it May Concern:
> I, Phillip Neal Bolin, is making this statement on this date because I can know longer let the truth not be known of the incident that ocured on 12-5-86 reference Terry Lynn Matthews. I was told to and was coerced into making false statements reference my brother, Oscar Ray Bolin Jr. by his ex-wife Cheryl Jo Colby. The events I testified to under oath both in my depsition and trial testmony are not true I wish to make this wrong right. I am making this hand written statement in order to preserve the integrity of this recantation. I wish to have this statement sworn to befor two witness. I am not under duress, coercion, drugs or alcohol. This statement is the truth and all previous statement are void I understand that this statment is subject to examinations. I affirm and swear this statment to be the truth in fait. I have in no way any information regarding this homocide (Matthews) or any other involving Oscar Ray Bolin, Jr.
>
> Phillip Bolin
> 1-20-96
>
> (I R86)

Prior to the instant trial, the state filed a motion requesting that appellant's half brother, Phillip Bolin, be made a

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[1] Errors in the original.

court witness. (II R171) Phillip Bolin had previously testified before the grand jury, in a deposition and in the 1992 trial. At the hearing on the motion, the prosecutor asked the court to make Phillip Bolin a court witness, based on his recantation, subsequent conflicting statements, his opposition to being called as a witness against his brother and the fact that he was an eyewitness to the crime. (IV T728) The court granted the motion and called Phillip Bolin as a court witness. (II R337, IV R732).

The calling of a witness as a court witness is appropriate when a party is unable to vouch for its witness's credibility, yet the witness's testimony is so important that the interests of justice demand a vehicle to present the evidence to the jury. §90.615, Fla. Stat.; Shere v. State, 579 So.2d 86 (Fla. 1991); State v. Smith, 573 So.2d 306 (Fla. 1990). It is a very narrow exception to the rules generally governing witness interrogation, and should only be applied to witnesses that were actually eyewitnesses to the crime being tried. Shere, 579 So.2d at 92; Jackson v. State, 498 So.2d 906, 909 (Fla. 1986). The Florida Evidence Code specifically allows "all parties" to cross-examine a court witness and notes that ordinarily, leading questions should be permitted on cross-examination. §§ 90.612(3) and 90.615(1) Fla. Stat. (1995)

While appellant concedes that cross-examination of a court witness is permissible, he contends that "the prosecutor went too

far when he continuously read Phillip Bolin's prior statements to the jury under the guise of impeachment or refreshing the memory of the witness." Appellant also concedes, however, that trial counsel's primary objection below to the form of the examination was "leading questions." (XI, T758, 759; XII, T816-17, 834, 846, 889) He did not object on the basis now being asserted nor did he request a limiting instruction. Nevertheless, appellant contends that his objection to leading questions was sufficient to put the trial court on notice that the prosecutor's procedure was improper.

Absent fundamental error, an issue will not be considered for the first time on appeal. Farinas v. State, 569 So.2d 425, 429 (Fla. 1990); Clark v. State, 363 So.2d 331 (Fla. 1978). Fundamental error must rise to the level of a denial of due process where "the interests of justice present a compelling demand for its application." Downs v. State, 572 So.2d 895, 900 (Fla. 1990), quoting, Ray v. State, 403 So.2d 956, 960 (Fla. 1981). The impeachment of Phillip Bolin did not constitute fundamental error. Farinas.

Further, a general objection on other grounds is not sufficient to preserve this claim. An objection must be made with sufficient specificity to apprise trial court of the potential error in order to preserve issue for appeal. Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982). As appellant's complaint that the prosecutor improperly impeached Phillip Bolin with his prior

statements was not presented to the court with sufficient specificity, the issue must be considered waived. Farinas; Jones v. State, 652 So.2d 346, 352 (Fla. 1995), cert. denied, 516 U.S. 875 (1995); Davis v. State, 461 So.2d 67, 71 (Fla. 1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).

Moreover, even if this claim was not barred, it is without merit. In general a prior statement may be introduced as a prior inconsistent statement to impeach a witness (§90.608) or to refresh the recollection of a testifying witness (§90.613). Florida Statutes §90.614 provides for the method to be used in order to properly impeach a witness with a prior inconsistent statement:

> (1) When a witness is examined concerning his prior writing statement or concerning an oral statement that has been reduced to writing, the court, on motion of the adverse party, shall order the statement to be shown to the witness or its contents disclosed to him.
>
> (2) Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit that he has de the prior inconsistent statement, extrinsic evidence of such statement is admissible. This subsection is not applicable to admissions of a party-opponent as defined in §90.803(18).

This procedure was used in the instant case, without an objection by the defense.

In a virtually identical case, Freeman v. State, 547 So.2d 125 (Fla. 1989), this Court rejected the contention that the trial court erred by declaring the defendant's half-brother a hostile witness and by permitting the state to impeach and bolster his testimony with prior consistent statements.

> In his third and fourth points, Freeman argues that the trial court erred by declaring his stepbrother a hostile witness and by permitting the state to impeach him with prior inconsistent statements and bolster his testimony with prior consistent statements. On direct examination, the stepbrother stated that he made his earlier sworn statements under pressure by the state attorney's office and implied that his statements were not true. The trial judge became so concerned about the exchange between counsel and the witness that he suggested the witness should have the advice of independent counsel before proceeding since he faced possible perjury charges. ***We believe the record indicates that the stepbrother was being both difficult and recalcitrant in responding to inquiry. We find the trial judge did not abuse his discretion in declaring the stepbrother a hostile witness. This record reflects more than a mere lapse of memory*** and, consequently, our decision in Jackson v. State, 451 So.2d 458 (Fla.1984), is inapplicable to these circumstances. Further, we find that the state, on redirect, did not improperly use the prior statements.
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> Id. at 128 (emphasis added)

In the instant case, as in Freeman, Oscar Ray Bolin's brother, Phillip, stated that he made his earlier sworn statements under pressure by the State Attorney's Office and maintained that the statements were not true. Similarly, Phillip was being 'both

difficult and recalcitrant in responding to inquiry and his responses indicated more than a mere lapse of memory.' As an eyewitness to the murder, Phillip Bolin's obvious and stated reluctance to testify against his brother, coupled with his recantation and other statements that conflicted with his sworn trial and grand jury testimony (as well as other sworn statements) supports the trial court's declaring him a court witness. (IV, 728; XI, T754)

Nevertheless, relying on this Court's opinion in Morton v. State, 689 So.2d 259 (Fla. 1997), appellant asserts that it was error to do so because the prosecutor's sole purpose in calling the witness was to present Phillip Bolin's prior inconsistent statements. Contrary to appellant's assertion, Phillip Bolin was not called as a court witness simply as a vehicle for the state to introduce his prior inconsistent statements. Given the difficulty the state encountered in actually obtaining Phillip as a witness, the state could have simply come into court, as it did with the testimony of the now deceased Sheryl Jo Haffner (Colby), assert that Phillip was unavailable and request that his prior trial testimony be introduced as substantive evidence. Jackson v. State, 575 So.2d 181, 187 (Fla. 1991); Section 90.804(1)(e). The state, however, diligently sought and procured Phillip Bolin's presence at trial.[2] One can assume nothing more from that than the state was

[2] The prosecutor told the court that the state had not been able to locate Phillip, that Bolin's family had refused to cooperate in

seeking to put the truth before the jury. In order to accomplish this goal, the state correctly sought and obtained the court's ruling making Phillip Bolin a court witness.

Furthermore, Morton is readily distinguishable on its facts. At Morton's trial, *the State called as witnesses* Morton's friends and sister. This Court found that "the prosecutor obviously was hoping to elicit through the witnesses' testimony the same information that they had given in their earlier statements." Id. at 259 Unlike Phillip Bolin, who had completely disavowed his former testimony, the witnesses called by the state to testify against Morton had mere lapses in memory and, consequently, whenever the prosecutor believed that a given witness's response did not sufficiently track the prior statement that the witness had made, the prosecutor would read the applicable portion of the prior statement and ask the witness if it refreshed his or her memory.

In the instant case, when Phillip Bolin took the stand, after having written a letter of recantation, he initially rejected his prior testimony. He denied that he was at home the night the murder happened and claimed that he was staying at his neighbors, the Canard's. When presented with his prior testimony, he stated, "I said what you wanted me to say, sir." (XI, T732) This is a

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obtaining Phillip's attendance at trial and that it was finally secured by obtaining a Kentucky court order, ordering Phillip to attend the Florida hearing. (I, R171, IV, 728)

far cry from the "nit-picking" and lapses in memory that concerned this Court in Morton.

Nevertheless, after getting over the initial hurdle of being compelled to testify against his brother contrary to the demands of his family[3] and after being confronted with his prior trial testimony, he ultimately testified consistently with his prior trial testimony. (XI T734-59, 761, 763, 764, 765, 775, 779; XII, T816, 902). Then on cross-examination, Phillip consistently reaffirmed his prior trial testimony, despite defense counsel's repeated attempts to impeach him with prior statements. (XII, T 853, 858-59, 861-72, 878-83) On redirect, after again implicating appellant in the crime, Phillip agreed that there was absolutely no doubt in his own mind that he witnessed his brother kill the female and load her with his help into the wrecker. (XII, T 902) Moreover, Phillip Bolin, unlike the witnesses in Morton was not the state's witness. Rather, he was called as a court witness and, is, therefore, subject to cross-examination as any other witness. Accordingly, the prior statements were properly admitted.

Additionally, appellant asserts that the prosecutor attempted to impeach Phillip, not with his prior statements, but "from the scenario which the prosecutor hoped to present to the jury." To

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[3] Phillip Bolin testified that he had been pressured by his brother, his father and Rosalie Martinez to not testify against Bolin. (XII, T 897-90) The state also introduced a letter from Oscar Ray Bolin to Phillip Bolin urging him not to testify. (XII, T 830)

support this proposition he quotes the following passage from the record:

> Q. Tell me what you remember his explanation of how the girl got killed.
>
> A. He said he met her and that he was going to do a drug deal and she got shot.
>
> Q. He actually told you that she had come to Tampa to get him to do a drug deal with her, that she came down in her car and he followed her in the wrecker and that they parked at the Land O'Lakes Post Office and that they walked across the road where there's a ball field, then there was some shooting, he ran across the road and she got shot in the car, he picked her up, put her in the wrecker and came back to his place, right?
>
> * * *
>
> Q. Philip, did you understand that?
>
> A. Yes, sir.
>
> Q. Is that what ... Oscar Ray Bolin told you after he loaded her up in the wrecker?
>
> A. Yes.

Brief of Appellant, pgs. 64-65, quoting Volume XII, pgs 816-7

Appellant's argument overlooks the fact that Phillip Bolin was a *court witness*. Accordingly, as previously noted, the state was properly allowed to ask leading questions. The foregoing passage, as well as many of the other passages challenged by appellant, is not an improper introduction of a prior statement but, rather, proper examination of a court witness by the use of leading questions.

Finally, appellant quotes extensively from the record, taking several excerpts out of context, and urges that these portions of Phillip's testimony alone constitute error. Phillip Bolin testified extensively. The trial transcript of his testimony encompasses almost 200 pages. (XI-XII, T715-905) During the course of this testimony Phillip Bolin changed his testimony from outright denials of his prior statements to complete agreement with his prior statements and trial testimony. When Phillip Bolin's testimony is reviewed in its entirety and the responses put in context, appellant has failed to show that harmful or fundamental error occurred. Accordingly, as this claim is procedurally barred, meritless and harmless, the state urges this Court to deny relief.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR MENTIONED BOLIN'S FIRST TRIAL IN THE PRESENCE OF THE JURY.

During the examination and attempted impeachment of court witness Phillip Bolin, the prosecutor referred Bolin to his prior trial testimony. (XI, T723) Specifically, the record shows the following exchange:

> Q. Then do you remember after that in October of 1992 actually being in a courtroom and offering testimony? Remember in October of 1992 being there, being asked questions by the prosecutor, myself, and an attorney representing your brother?
>
> MR. LIVERMORE: Your Honor, at this time we would object. Request a conference.
>
> THE COURT: All right. Ladies and gentlemen of the jury, it's going to be necessary for me to address a matter outside your presence. I anticipate that it will be very brief; therefore, I ask that you accompany Mr. Nelson to the jury deliberation room.
>
> JURY OUT
>
> BAILIFF NELSON: Jury is in the deliberation room, your Honor.
>
> THE COURT: All right. Mr. Livermore.
>
> MR. LIVERMORE: Your Honor, the first motion I would have for this Court is a motion for mistrial. The State attorney just asked this witness if he testified prior to this back in October in a courtroom like this. It infers that he was in a trial before on this case. This is entirely improper and raises the specter of the prior trial and I believe that that is grounds for a mistrial at this point.
>
> THE COURT: Motion is denied. I would, however, ask counsel for the state, since of course you can ask leading questions and you have posed leading questions to the witness --

MR. HALKITIS: Yes, sir.

THE COURT: -- to make certain that your questions do not invite an answer as to identification of the nature of the proceedings.

MR. HALKITIS: And to give the Court some clarification, Mr. Haldeman instructed Mr. Bolin this morning that we will not and we don't want him to refer to prior trial, to a prior trial in October, prior jury, anything along those lines. The questions will call for responses concerning his prior testimony in October of '92. That was related to Mr. Bolin, that those questions will refer to a prior proceeding in October of 1992 as to not prejudice the Defendant in this case by any reference to another trial.

And that's been communicated to Mr. Bolin. Why Mr. Bolin at this point in time when I asked him do you remember giving prior testimony in a prior proceeding in October of '92 is now saying I don't recall is beyond me, Judge, but I have to delve into the subject. And I don't want the jury to know there was a prior trial.

(XI, T 723-725)

THE COURT: Mr. Philip Bolin, let me make certain that you understand that regardless of whether you may be responding to questions from the State or to the Defense that you should be responsive to the question. That means that you should listen to the question and respond to the question that has been posed to you. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: And I am confident that neither counsel for the State, nor counsel for the Defense are going to ask you to identify the nature of the October '92 proceeding, and you are not to volunteer the nature of that proceeding, that is that it was a prior trial. Do you understand?

THE WITNESS: yes, sir.

(XI, T 728)

Q. And you spoke with Ms. Martinez, right?

A. Yes, sir.

Q. And she talked to you after your parents picked her up at the Lexington Airport, correct? They brought her back to their home, right?

A. Yes, sir.

Q. And she told you, Mr. Bolin, that everything in the case was falsified, the only piece of evidence they got was me, meaning you, everything else is no good and that you're the remaining concern in this particular case; isn't that what she talked to you about?

A. Pretty much, sir.

Q. She told you, Mr. Bolin, that she was concerned about your testimony in that October 1992 trial, that that was going to hurt --

MR. LIVERMORE: Objection, your Honor.

Q. -- your stepbrother --

MR. LIVERMORE: Renew the motion.

THE COURT: All right. Ladies and gentlemen of the jury, it's necessary for me to conduct some proceedings outside your presence. I'm going to ask that you be returned to the jury deliberation room. Mr. Nelson.

BAILIFF NELSON: Yes, sir, your Honor.

JURY OUT

BAILIFF NELSON: Jury is in the deliberation room, your Honor.

THE COURT: All right. Mr. Livermore.

MR. LIVERMORE: Your Honor, at this time we would renew our motion for mistrial. The prosecutor despite the prior testimony and despite the prior contact -- discussions we've had has just referred to the October proceeding as the prior -- as a trial. That raises only one thing for the jury to hear and that is that this case was tried once before. That it's entirely prejudicial. There's no way to unring the bell. Every time he mentions the trial I have to object again and it still rings the bell. I believe there's no option at this point other than a mistrial. They know now that there was a trial of this

case in October.

THE COURT: Let me ask you this, Mr. Livermore -- can you hear me?

MR. LIVERMORE: Yes, sir.

THE COURT: My recollection -- I presume you don't have any authority to cite at this point?

MR. LIVERMORE: Not at the moment, no, sir.

THE COURT: My recollection of the case law refers to mention of a prior conviction as opposed to prior trial.

MR. LIVERMORE: But the only way we can be here is if there was a prior conviction, and we can't guess what they know, whether that's true or not.

THE COURT: Well, no. Could have been a mistrial, that's another way. But in any event, okay, what says the State?

MR. ATTRIDGE: Judge, I looked into this issue before and that was my -- one of the points I'd raise to the Court, there is no per se case law that says if there's any reference of a prior trial that that's necessarily something that is so prejudicial to a defendant that requires a mistrial. Now, if they had moved in limine and there was a deliberate violation of course, but there haven't been any motions in limine. There was something during the course of the proceedings here, but as the Court's pointed out, just because there's a prior trial does not necessarily mean that this jury's going to realize that it had to be a conviction. It could have been a mistrial. For all we know lay people think a person can be tried, acquitted, and tried again. And that assumption does not -- I don't think necessarily -- we would know that, but they wouldn't know that.

Secondly, I don't think Mr. Halkitis' remarks about the prior trial were deliberate. I think -- he came back to me and first thing out of his mouth was, did I say trial? So I think you can see it was something that was mentioned that was inadvertent based on the type of questioning going on.

Above and beyond that, above and beyond

that, the way this witness has just testified that he's been pressured into testimony, I think he has opened the door and the whole area as to the arena of that October 1992 proceeding needs to be brought forth before this jury, because if he's going to say that he was pressured into this and we can point out that he was in an open courtroom where you were present or a court was present, a judge, his defense attorneys were present, the public was present, the press was present, that would have been the perfect time back in October 1992 if he was being pressured --

THE COURT: Keep your voice down.

MR. ATTRIDGE: If he was being pressured by the police or by the prosecutors that was his one moment of freedom where he could have come in and spilled his guts about all this pressure. Otherwise, if we just keep talking about these things as proceedings and depositions how's the jury going to know that you or a court was present back then, that defense attorneys, that the press were present back then. And the way he has now said about his prior testimony, the jury without knowing it was a prior trial could be led to believe that it was done in a closed proceedings, that police were all around him, that he was being watched by prosecutors. He keeps referring to Mr. Halkitis's attorneys. The implication is clear that he's trying to make it sound like people were standing over him and forcing him to say so.

So based on his own testimony, Judge, I think we can point out to the Court that he had the occasion back in October during a public trial where the public was there, the press was there, if he was -- if he was given pressure to give false testimony against his brother that would have been the perfect time for someone like him to come in here and let people know. I think it's something now, Judge, that the jury should know. They should know the type of proceeding, the type of courtroom that it was in. There was an open courtroom. They had perfect opportunity at that time to come forward and give -- and let the public know if we are to believe what he's

saying today.

MR. HALKITIS: Judge, there's one other thing. The Court has to realize that in Defense counsel Livermore's opening he made this statement, the evidence will show that when Philip Bolin was surrounded by law enforcement officers he gives their version, which implies that the only time Philip Bolin testifies adversely against his stepbrother is when he's surrounded by assistant State attorneys, detectives and police officers. He was not -- that did not happen on October -- in October of 1992.

And as Mr. Attridge suggests, there's a different environment here than there is at a State Attorney's Office investigation, at a police department when they're investigating a case, and even in a grand jury proceeding. And so I think that that October 1992 trial proceeding has to be brought out in order to ensure that the State gets a fair trial and showing this jury exactly how and where Mr. Bolin testified.

THE COURT: All right. Defense counsel.

MR. FIRMANI: Well, Judge, I think if I follow the State's argument it's we opened the door so we can walk through it. This testimony's been brought out through no participation of the Defense counsel. This is the door that the State's tried to --

THE COURT: You need not respond to that argument. I'm not going to accept that argument.

MR. FIRMANI: Judge, you know, we're in a tough situation. Mr. Halkitis is trying t imply that in October of '92 this witness was not surrounded by police. One, two, three, four, five, six uniformed officers in the courtroom. Whether it's --

THE COURT: Wait a second.

MR. FIRMANI: Whether it's a trial is no relevance.

THE COURT: Wait a sec. Mr. Bolin -- escort Mr. Philip Bolin to the witness room.

BAILIFF NELSON: Yes, sir.

(Thereupon, the witness left the courtroom.)

THE COURT: You may proceed.

MR. FIRMANI: What is relevant is that it

was a prior proceeding; they're entitled to know that. The fact that it's a trial has no relevance whatsoever. It's totally irrelevant and the only purpose to mention a trial is to give this jury the idea that we've been through this before. And the only, the only thing that they can imply from this is that he was convicted and is back.

Remember that this Court is aware that at least five or six members of this jury is aware of pretrial publicity and has probably read about the pretrial and the previous trial and the conviction and the imposition of the death penalty. We don't know because we weren't allowed to ask them those questions, but now this comment about the prior trial has inflamed that within the jury to the point where I don't think they can be fair and impartial any more and we'd move for a mistrial.

THE COURT: All right. I'm going to take the motion for mistrial under advisement. Does Defense request the cautionary instruction to the jury to disregard the nature of the October '92 trial proceedings?

MR. FIRMANI: Yes, Judge, we're going to have to ask for it because I think it's going to kind of unring the bell and probably just remind them, but I think we have to ask them to at least preserve this issue.

THE COURT: And let me indicate this, I've already heard State's argument as to the breadth of examination concerning the October of '92 trial proceeding, court proceeding to include the presence of a judge, the presence of the media, the presence of the Defendant, presence of Defense counsel. Does the State -- excuse me, does the Defense want to be heard concerning this issue because at this juncture it is my intention to allow broad questioning concerning the nature in terms of who was present at the October '92 court proceeding, not to have it identified as a trial, but to allow questioning by either side, and you obviously both have your questions as to who all was present for that court proceeding. So does the Defense have any further argument in that regard?

MR. LIVERMORE: Yes, sir. You're just instructing them that it was a trial, there's no other conclusion. By saying who's present we're just instructing them even further that it was a prior trial. I'd object to any of those kind of references.

THE COURT: That objection's overruled. All right. Let's return the witness.

(Thereupon, the witness resumed the stand.)

THE COURT: Let's return the jury.

BAILIFF NELSON: Yes, sir, your Honor.

JURY IN

BAILIFF NELSON: Your Honor, the jury is present in the courtroom.

THE COURT: Thank you, sir. Ladies and gentlemen of the jury, you are hereby instructed to disregard any prior question and/or answer regarding the nature of the October 1992 court proceeding. You may proceed.

BY MR. HALKITIS:

Q. Mr. Bolin, in the October 14th proceeding that we've talked about earlier, right, you remember that?

A. Yes, sir.

Q. And you were sitting in a courtroom, were you not?

A. Yes, sir.

Q. And it was a courtroom that was even larger than this courtroom, was it not?

A. I'm pretty sure, sir.

Q. And to your left was sitting a judge, correct?

A. Yes, sir.

Q. And there was a court reporter like a court reporter here today taking down what you're saying, correct?

A. Yes, sir.

MR. LIVERMORE: Your Honor, at this time we would ask for a standing objection.

THE COURT: That will be permitted and overruled. You may proceed.

(XI, T 737-745)

Appellant contends that the trial court's denial of his motion for mistrial was error. He bases this assertion on the contention

that the prosecutor intended that the jury be informed that Bolin had previously been tried and that this was the sole purpose of the prosecutor's statements.

This argument overlooks the context in which these questions were put to Phillip Bolin. Bolin was a court witness, who had completely recanted his prior trial testimony. The recantation alleged that his prior statement was a result of coercion by law enforcement. In defense counsel's opening statement to the jury he asserted:

> You've heard about the testimony expected of Philip Bolin. We believe you will hear his testimony in the next day or so. The evidence will show that ***whenever he's surrounded by law enforcement officers he gives their version. The evidence will show that when he's not surrounded by law enforcement officers and not talked to time and again and again that he has -- that he says it is not true.*** The evidence will also show that his story makes no sense even if you believe the first one. Not going to go for an hour and tell you all the details. The evidence will show that his story makes no sense even matched up, even if you follow the first statement.

(IX, T 523)

Thus, in the context of this case, the prosecutor's questions concerning the context of Bolin's prior testimony were relevant to refute the contention that his statements implicating appellant in the murder of Teri Lynn Matthews were the result of state coercion. Further, the trial court's limiting instruction to the jury and his instruction to Phillip limited any prejudice to appellant.

This Court has repeatedly held that a ruling on a motion for a mistrial is within the sound discretion of the trial court. Merck v. State, 664 So.2d 939 (Fla. 1995); Power v. State, 605 So.2d 856 (Fla. 1992), cert. denied, 507 U.S. 1037, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993); Salvatore v. State, 366 So.2d 745, 759 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial. Merck v. State, 664 So.2d 939 (Fla. 1995); Marek v. State, 492 So.2d 1055, 1057 (Fla. 1986).

As appellant concedes, this Court in Jennings v. State, 512 So.2d 169 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988), noted that, "It is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony." This Court held that the judge committed no error in denying appellant's motion for mistrial where the jury learned that Jennings had been previously tried. Specifically, this Court stated:

> Point XI involves the discovery by three jurors between the guilt and penalty phases that the appellant had been tried before for the same crimes. Appellant argues that this knowledge on the part of the jurors deprived him of his constitutional right to a fair trial on the issue of his penalty. As evidence that the jury may have been influenced, appellant points to the fact that during their deliberations the jury sent a note to the judge asking him if they were allowed to know the reasons for the retrials.

> The judge replied that the question and answer "should not be considered by you...."
>
> It is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony. There is no indication that the jurors knew what had occurred at appellant's previous trial. We conclude that the judge made the appropriate response and committed no error in denying appellant's motion for mistrial.

Id. at 173

Subsequently, in Robinson v. State, 574 So.2d 108 (Fla. 1991), cert. denied, 502 U.S. 841 (1991), this Court reaffirmed the holding in Jennings, stating:

> We reject Robinson's argument that a mistrial should have been granted because the venire may have known that Robinson was being resentenced. This claim is based upon a sign posted in the courthouse directing Robinson's jury to the proper courtroom. The sign described the proceeding as a "Criminal re-sentencing hearing." Counsel moved for a mistrial, arguing that the sign implied that Robinson previously had been sentenced to death and thus violated his right to due process and a fair trial. Robinson acknowledges that Jennings v. State, 512 So.2d 169 (Fla.1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988), controls, but urges reconsideration of Jennings. We decline. As in Jennings, there is absolutely no indication in this record that the jurors knew anything about what transpired in the previous trial.

Id. at 111

Nevertheless, appellant urges that this Court's decision in Jackson v. State, 545 So.2d 260, 262-263 (Fla. 1989) mandates

reversal. In Jackson, this Court agreed that it was error for the trial court to allow testimony concerning Jackson's previous convictions for the offenses for which he was being tried and rejected the state's reasoning that the jury should be informed that Jackson had previously been convicted of these offenses as a result of his wife's testimony and in order to correct the erroneous impression left by defense counsel that Jackson was merely awaiting trial at the time he received the letters at issue. This Court noted that although the fact that there has been a prior trial many times is inadvertently presented to the jury through various means during the course of a second trial, it was error for the trial court to allow the prosecutor to question appellant about his previous convictions. Id. at 262-263

Clearly, this case is distinguishable. No one in the instant case asserts that "the jury should be informed that [Bolin] had previously been convicted of these offenses." In fact, the court specifically instructed the jury that they were not to consider the nature of the proceeding and instructed Phillip Bolin to limit his testimony so as to preclude the jury being informed of the nature of the prior proceeding.

Based on the foregoing the state asserts that no error has been shown. Furthermore, in light of the substantial evidence before the jury in this case, appellant has failed to establish that error, if any, was harmful.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY ALLOWING DETECTIVE KLING TO TESTIFY THAT CERTAIN DETAILS OF THE HOMICIDE WERE NOT REPORTED TO OR BY THE MEDIA.

Appellant's next contention is that the trial court erred by allowing Detective Kling to testify about details of the homicide which were not reported to the media. He contends that the testimony was inadmissible hearsay that prejudiced him because its purpose was to bolster Phillip Bolin's credibility. It is the state's contention that Detective Kling's testimony was admissible and that harmful error has not been shown by appellant.

Detective Kling was called by the state to testify concerning his review of newspaper articles and police reports containing specific information about details of the murder of Teri Lynn Matthews. He testified that as an investigative tool certain facts of the crime are generally withheld from the media and the general public. The goal of limiting the information that is released is to be able to distinguish the perpetrator of the crime and eyewitnesses who would only have that particular information. Based on his review of the news articles published prior to August of 1990, he testified that in this particular case that there were things withheld from the media. (XVI, T 1327-1330) The fact that the body and clothing of Teri Matthews was soaking wet, that her shoes were missing, and that she was wearing nylon stockings was not published in any of the articles. (XVI, T 1336-1337)

Detective Kling's testimony was not hearsay. Rather, he was testifying to a fact within his personal knowledge. As the state noted below, if Detective Kling was offering the content of the reports to show the truth of the matter asserted - that Teri Lynn Matthews' body and clothing were wet, that her shoes were missing and that she was wearing nylon stockings, then appellant would be correct in his assertion that this evidence would be hearsay. A hearsay objection is unavailing, however, when the inquiry is not as to the truth of the words spoken, but merely whether they were in fact spoken. Koon v State, 513 So.2d 1253 (Fla. 1987); General Tire of Miami Beach, Inc. v. N.L.R.B., 332 F.2d 58 (5th Cir. 1964); Section 90.801(1)(c), Fla. Stat.; Ehrhardt EV § 801.2 page 940.

In Koon v State, 513 So.2d 1253 (Fla. 1987), this Court explained:

> The next point concerns the testimony of a secret service agent that, at a preliminary hearing on the federal counterfeiting charges, the U.S. magistrate stated in Koon's presence that she would have dismissed the charge against him had there been only one witness. . . . ***[T]he testimony was properly admitted because it was not hearsay in the first place.***
>
> Hearsay is a statement, other than one made by a declarant while testifying, offered to prove the truth of the matter asserted in the statement. Sec. 90.801(1)(c), Fla. Stat. (1985). An out-of-court statement is admissible to show knowledge on the part of the listener that the statement was made if such knowledge is relevant to the case. *E. Cleary, McCormick on Evidence* Sec. 249 (3d ed. 1984); *S. Gard, Jones on Evidence* Sec. 8.6 (6th ed. 1972). See *Heritage Homes of*

> *Attleboro, Inc. v. Seekonk Water District*, 648 F.2d 761 (1st Cir.), vacated on other grounds, 454 U.S. 807, 102 S.Ct. 81, 70 L.Ed.2d 76 (1981); *Freeman v. Metropolitan Life Insurance Co.*, 468 F.Supp. 1269 (W.D.Va.1979). ***Here, the testimony was not offered to prove the truth of the magistrate's statement but rather to show that having heard the statement, Koon could have formed the motive for eliminating one of the two prosecuting witnesses.***

Koon v. State, 513 So.2d at 1255 (emphasis added)

In the instant case, as in Koon, Detective Kling's testimony was introduced to show that no statement was made.

Moreover, appellant's reliance on this Court's decision in Norton v. State, 23 Fla. Law Weekly S12 (Fla. 1997), is misplaced. In Norton, this Court held that it was error to admit Detective Childers' testimony that he could not find anyone who had sold appellant tires because ***the detective's conclusion was predicated on information he secured from someone else,*** and, therefore, constitutes hearsay to which no exception was offered. Norton, citing, Trotman v. State, 652 So.2d 506 (Fla. 3d DCA 1995) (reversing conviction where police officer offered hearsay testimony as to what non-testifying, unidentified witness had told him about defendant's involvement in crime); Bell v. State, 595 So.2d 232, 234 (Fla. 3d DCA 1992) (finding error where police officer testified regarding statements by non-testifying witness); Burney v. State, 579 So.2d 746 (Fla. 4th DCA 1991) (holding that testimony as to statements by unidentified witnesses implicating

defendant was inadmissable hearsay when offered to show the logical sequence of events.)

Unlike Detective Childers, whose conclusion was predicated on information he secured from someone else and recounted out of court statements that were being offered to prove the truth of the matter asserted, i.e., that they had not sold the defendant tires, Detective Kling's testimony was based on personal knowledge, i.e., that having looked for something, he did not see it. As this Court in Norton noted, it would not have been error for Detective Childers to testify that he went to the address given to the police by appellant and that there was no tire store at that location. In any case, the Norton Court noted that in light of all of the evidence against appellant, the admission was harmless under the circumstances. Id.

Moreover, contrary to appellant's assertion that Detective Kling's testimony was impermissible bolstering of Phillip's credibility, the detective's testimony did not contain any opinion concerning Phillip's credibility, but, rather, was limited to a fact within the officer's personal knowledge. Furthermore, as appellant concedes, Phillip Bolin's testimony was not challenged during the trial as having been manufactured through the use of news reports. Regardless, as this Court recognized in Norton, in light of all of the evidence against appellant, the admission of the testimony was harmless under the circumstances. Accordingly,

as appellant has failed to carry his burden to show harmful error, this claim should be denied. §924.051 Fla. Stat. (1996).

ISSUE V

WHETHER MISUSE OF THE DNA STATISTICAL EVIDENCE DURING THE PROSECUTOR'S CLOSING ARGUMENT CREATED REVERSIBLE ERROR.

After conducting a Frye[4] hearing, the trial court in the instant case, allowed the state to present evidence concerning semen samples found on Teri Lynn Matthews' pants in 1985. (XV, T 1209) The evidence showed that the sample was small and had degraded to the point that only five bands were available for comparison. (XV, T 1227) The DNA obtained from the semen sample found on Teri Lynn Matthews' pants was subsequently compared to DNA obtained from Oscar Ray Bolin's blood. (XV, 1226-30) Two experts testified for the state that five of the six bands obtained from Bolin matched those found on the victim. David Walsh testified that in 1989, while employed at Cellmark, he received swabbings and clothing from Teri Lynn Matthews and a blood sample from Gary McClelland which did not match. (XV, 1223) The following year, in August of 1990, Walsh received a blood sample from Oscar Ray Bolin which matched the semen sample found on Teri Lynn Matthews. (XV, T 1237) Dr. Robin Cotton, Laboratory Director for Cellmark, confirmed the match between the semen sample and Bolin's blood sample. (XVI, T 1284, 1300)

Appellant now claims that the trial court used an improper standard in the written order admitting the DNA evidence and that

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[4]Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

during closing arguments the prosecutor misrepresented the blood and DNA statistical evidence. It is the state's position that appellant has failed to show reversible error with regard to either claim.

The Trial Court's Order

A Frye hearing was held in the instant case prior to trial. At the close of the hearing the trial court agreed that the criteria of Frye had been met and that the evidence would be admitted. (XV, T 1209) On November 19, 1997, the court entered an Order Permitting DNA Evidence *nunc pro tunc* to August 12, 1996. (Second Supp. R 873-76). The order states in entirety:

ORDER PERMITTING DNA EVIDENCE

> THIS CAUSE coming on upon the order of the Florida Supreme Court temporarily relinquishing jurisdiction in order to allow the trial court to determine if a written order concerning the admission of DNA evidence exists and/or can be filed nunc pro tunc and this court having examined the record and having found no evidence of the recording of a written order permitting the admission of DNA evidence hereby enters this order nunc pro tunc to August 12, 1996, and makes the following findings of fact:
>
> 1. Expert testimony concerning DNA analysis and comparison will assist the jury in understanding the evidence and determining the facts in issue in this cause in that DNA comparison is an area that utilizes cutting edge knowledge of molecular biology and hence expert testimony is essential in assisting the understanding of jurors.
>
> 2. The expert's testimony concerning DNA analysis and comparison is based upon a scientific principal that is sufficiently established to gain general acceptance in the

scientific community, i.e. biology in that all experts called both by the State and the defense agreed that DNA analysis is, in fact, generally accepted by the scientific community.

3. Experts as to DNA analysis tendered and called by both the State and the defense were found to be qualified to present opinion testimony on the subject of DNA comparison in that all experts held advanced academic degrees, honors, and positions and had testified on least thirty occasions in the past as to DNA comparison and had been accepted on those occasions by other courts. This court, in its role as "gatekeeper", has determined that experts for both the State and the defense may render an opinion as to the DNA analysis and comparison in this case leaving the issue of relative credibility of the expert's opinion as expressed during trial to the jury.

The defense presented testimony of Dr. Aimee Bakken as an expert in molecular biology and DNA testing. Dr. Bakken opined that the samples in question (autorads) could not be compared from the defendant to the unknown sample due to the presence of unexplained extra bands and that the DNA concentration in unknowns was so low in certain lanes that they could not be identified. She disagreed with the State's expert from Cellmark Laboratories that there was a match between the defendant and the sperm fraction on the cloth base upon only a match of five out of six bands. The credibility of Dr. Bakken was seriously attacked and eroded by the State in that she conceded that over forty percent of her income for the past year was obtained from court testimony and that in twenty-nine criminal cases she has always testified for the defense. It was further pointed out that she had found deficiencies to the point of not meeting Frye standards from all laboratories in which she had testified including FBI lab, Lifecodes, California Department of Justice, Arizona Department of Public Services, Oregon State Crime Lab, Washington State Crime Lab,

Riverside California Lab, Wausau County Lab, and Genetic Design. She further stated that in a prior case in which she testified for the defense she expressed the opinion that DNA testing in general was not quite ready for the courtroom but she conceded in this case that DNA testing was a generally accepted scientific procedure in the scientific community. Dr. Bakken's opinion was that she felt Cellmark Labs had erred in two proficiency tests (one out of fifty times two) and as such their opinion should be precluded from being admissible in this cause as protection against false tests and contamination. She further specifically felt there was not a match in the instant case, even setting aside her opinion concerning the deficiency of the testing laboratory in general.

Dr. Martin Tracy testified on behalf of the State and he was accepted as an expert in the field of molecular biology and population genetics. He opined, like Dr. Bakken, that the DNA testing procedure that was followed in the instant case is an accepted procedure in the scientific community and that specifically the procedures utilized by the testing lab, Cellmark, are likewise accepted in the scientific community and in fact is the same procedure utilized by all current DNA testing labs including the FBI lab. Dr. Tracy testified that he had reviewed Dr. Bakken's testimony in the instant case and pointed out that her opinion as to one error in fifty test samples was erroneous and that actually each sample was tested against each of the other fifty samples thereby creating a proficiency test of approximately twelve hundred. He further pointed out that the error in the first proficiency test in 1989 was determined to be based upon a label having rubbed off a sample and then mistakenly mislabeled. This error was identified and corrected and brought about a change in procedure not only at Cellmark Labs but all other DNA testing labs. Dr. Tracy was further of the opinion that both reports from the National Research Council concluded that DNA

testing for exclusion and identification is sufficiently accepted in the scientific community to be accepted in court proceedings. Dr. Tracy agreed with Cellmark Laboratory expert's opinion in the instant case by concluding that there was a five band match between the defendant's known DNA sample and the unknown DNA sample. He concluded that the sixth band that was not present in the unknown sample could not be a basis to exclude or match and simply pointed out that it was missing in the unknown sample. He observed that this would in fact constitute a match under National Research Council guidelines. He expressed the opinion that Dr. Bakken in her previous testimony in this cause did not simply misinterpret the National Research Council guidelines, but rather she committed an error in logic in her analysis.

Dr. Tracy further gave testimony that the population frequency evidence from Cellmark Laboratory utilized the same database as used by all other DNA labs and it was that which was recommended by the National Research Council and met the Frye standard. He concluded by observing that Dr. Bakken's mismatch opinion in this cause is unique among experts in the field of DNA comparison. This Court has therefore concluded that the requirements under United States vs. Frye, 293 Fed. 1013 (D.C. Cir. 1923) and Ramirez v. State, 651 So.2d 1164 (Fla.1995) and Hayes v. State, 660 So.2d 257 (Fla. 1995), have been met. Noting the case of Brin v. State, 654 So.2d 184 (Fla. 2nd DCA 1995) where there are two differing, but both generally accepted deductions that can be made from generally accepted scientific evidence, they may both be admitted provided that the underlying scientific evidence satisfies Frye. The Brin case is factually and legally on point with the instant case. A careful review of the differing opinions from the experts called by the State and the defense and the basis of their opinion might reasonably lead to the conclusion that the expert called by the defense had reached her opinion and simply cited some of the evidence to support her

> conclusion utilizing "voodoo science", but nevertheless was of sufficient probative value to be admitted to a jury. Certainly, the State demonstrated a sufficient basis for the admission of the DNA evidence.
>
> The defense's Motion in Limine as to DNA evidence is denied. The Frye standard has been met and DNA evidence shall be admissible in the above cause by both the State and the defense.
>
> DONE AND ORDERED in Chambers, New Port Richey, Pasco County, Florida this 19 day of November, 1997, nunc pro tunc August 12, 1996.
>
> /s/
> WILLIAM R. WEBB
> Circuit Judge

Appellant first takes exception to the court's reference to the Second District's opinion in Brim v. State, 654 So.2d 184 (Fla. 2nd DCA 1995), to wit: "Noting the case of Brin [sic] v. State, 654 So.2d 184 (Fla. 2nd DCA 1995) where there are two differing, but both generally accepted deductions that can be made from generally accepted scientific evidence, they may both be admitted provided that the underlying scientific evidence satisfies Frye." Appellant correctly notes that Brim was subsequently reviewed by this Court and remanded for further proceedings. Brim v. State, 695 So.2d 268 (Fla. 1997). Nevertheless, the proposition for which the court below relied on Brim remains intact. Specifically, this Court stated:

> . . . It is clear that scientific unanimity is not a precondition to a finding of general acceptance in the scientific community. People v. Dalcollo, 282 Ill.App.3d 944, 218 Ill.Dec. 435, 445, 669 N.E.2d 378, 387 (1996). Instead, general acceptance in the scientific

> community can be established "if use of the technique is supported by a clear majority of the members of that community." *People v. Guerra*, 37 Cal.3d 385, 208 Cal.Rptr. 162, 183, 690 P.2d 635, 656 (1984). "Of course, the trial courts, in determining the general acceptance issue, must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique. Mere numerical majority support or opposition by persons minimally qualified to state an authoritative opinion is of little value...." *People v. Leahy*, 8 Cal.4th 587, 34 Cal.Rptr.2d 663, 678, 882 P.2d 321, 336-37 (1994). Therefore, while a "nose count" is not alone sufficient to establish general acceptance in the scientific community, such acceptance likewise need not be predicated upon a unanimous view.
>
> Id. at 272
>
> * * *
>
> The district court's result, however, is correct. We may allow multiple reasonable deductions when all are based on generally accepted principles of population genetics and statistics.
>
> Id. at 273

Beyond appellant's quarrel with the language employed by the court in an order prepared over a year after the ruling had been made, appellant does not appear to challenge the actual admission of the DNA evidence or whether it satisfied the Frye test. Rather, the challenge appears to be the sufficiency of the Order. Thus, any challenge to the admission of the evidence has been waived. Further, since the admission of DNA is subject to *de novo* review, this Court can determine from the record before it that the evidence was properly admitted. Brim v. State, 695 So.2d 268, 274

(Fla. 1997) (the standard of review in cases such as these should be de novo); Murray v. State, 692 So.2d 157, 164 (Fla. 1997) (Under the *de novo* standard of review we have in this area of law, evidence falls short).

Prosecutor's Argument

The focus of Appellant's argument, however, is on the prosecutor's use of statistics provided by the expert testimony presented. David Walsh and Dr. Robin Cotton testified that Cellmark analyzed the DNA samples and found a match. Walsh testified that when the match was made in August of 1990, that the statistics they had *then* showed that this same series of bands would be found in about 1 in every 2200 people. (XVI, T 1276) Dr. Cotton explained, however, that the database had been revised and that whenever Cellmark has a report issued before the revisions, they updated the report whenever it is used again. In this case, the match statistics were revised to 1 in 1800. (XVI, T 1300-01) Robert Hall, a serology expert with the FBI testified that the defendant was an AB secretor and that 33% of the population (both male & female) are AB secretors. (XIII, T 976, 987, 993)

During closing argument Assistant State Attorney Robert Attridge, argued these statistics to the jury in support of the state's position that Oscar Ray Bolin was responsible for the murder of Teri Lynn Matthews. A review of the argument, however, shows that the prosecutor's use of the statistics was proper and

that appellant has failed to show harmful error.

In general, "wide latitude is permitted in arguing to a jury." Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). ***Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments.*** Spencer; Davis v. State, 698 So.2d 1182, 1191 (Fla. 1997). The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). Bonifay v. State, 1996 WL 385504 (Fla. 1996). This Court further noted that the control of the prosecutor's comments is within a trial court's discretion, and a court's ruling will not be overturned unless an abuse of discretion is shown. Esty v. State, 642 So.2d 1074 (Fla. 1994)

Despite the unfortunate and unsupported allegation that the prosecutor's argument demonstrates that "figures don't lie - but

liars can figure," (Initial Brief of Appellant, pg. 98) it is the state's contention that the prosecutor's argument was a proper comment on the evidence and a reasonable inference drawn therefrom. This claim is well supported by a review of the specific arguments challenged by appellant and the evidence actually presented at trial.

First, appellant alleges that it is "appropriate to say that one in 1800 Caucasian men could have left the semen stain, not 1 in 3600 people." Dr. Robin Cotton specifically stated: "The frequency we calculated, which I remember because I reviewed the reports again this morning, is that you would see this group of five bands in about *one in every eighteen hundred or one thousand eight hundred* ***people.***" (XVI, T1300) Dr. Cotton did not limit it to eighteen hundred men. Thus, the logical inference drawn from this statement is that the number included women.

Next, appellant challenges the use of evidence concerning Bolin's blood type. Agent Hall testified that Bolin is an AB secretor. He stated that an AB secretor does have the A blood group substance in their nonblood body fluids and is, therefore, a potential source of the A blood group substance. He further noted that 33% of population (both male and female) are AB secretors. (XVI, T988-993) Again, the prosecutor's argument is a logical inference to be drawn from the evidence.

Assuming, arguendo, that any of the foregoing constitutes

error, appellant has failed to establish that it is harmful error. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So.2d 377, 383 (Fla. 1994).

The jury, in the instant case, heard the expert testimony and, therefore, was able to assess the validity of Attridge's argument and reject it if it was flawed. Based on the totality of evidence before the jury, including the eyewitness testimony of Phillip Bolin, appellant has failed to establish that error, if any, was harmful. §924.051 Fla. Stat. (1996).

ISSUE VI

WHETHER APPELLANT HAS SHOWN REVERSIBLE, HARMFUL ERROR WAS COMMITTED WHEN APPELLANT WAS NOT PERMITTED TO CONSULT WITH HIS "INVESTIGATOR\MITIGATION SPECIALIST" DURING A TRIAL RECESS.

Appellant's next claim is that he was denied access to a member of his defense team during a recess in violation of his right to counsel. This argument refers to mitigation specialist Rosalie Martinez's removal from the courtroom during the testimony of Phillip Bolin and an allegation that she was kept from consulting with appellant during a recess. It is the state's position that the latter claim was not preserved for review. Furthermore, neither claim has merit. As Mrs. Martinez is not a lawyer, the control of her access to the trial and appellant is a matter within the discretion of the trial court and appellant has failed to show an abuse of that discretion.

The role Mrs. Martinez was to play in the instant trial was explored at the outset of the trial. During a delay caused by appellant's refusal to get dressed, the court addressed the question of whether Mrs. Martinez would be allowed to sit at counsel table:

> THE COURT: . . . Is there any housekeeping chore we can address while we wait for Mr. Bolin? Obviously he isn't here.
>
> MR. FIRMANI: Yes, Judge, there's one matter we'd like to bring up. That is, I guess, as far as once we get started with the actual trial beyond voir dire there basically is a team of four on this case for the Public

Defender's office; that's myself, Mr. Livermore, George Fought, who has been our investigator on the case, but unfortunately he can't be with us this week or --

THE COURT: George who?

MR. FIRMANI: George Fought, our normal Public Defender investigator. We've had Leonard Harris come over from the Dade City office, but quite obviously he isn't as familiar with the case as Mr. Fought was. We'd like to have available -- I see we have three chairs here. Ms. Rosalie Martinez has been retained by our office as a mitigation specialist and has been doing a lot of other extensive work in first phase as well. We have a vast amount of materials that she is intimately familiar with and assists us greatly. We'd like Ms. Martinez and also Mr. Leonard Harris to be available in those two chairs so we can communicate with them at a moment's notice without any disruption to the jury, to the Court, or to anybody else. So if we could, we've had a table put up with all our materials, and that's our request, Judge.

I think this Court had made it known that the Court only wanted attorneys this side of the bar. Quite frankly, we need the assistance of Mr. Harris and Ms. Martinez during the course of the trial. I don't want to be bending over the bar being disruptive to the proceedings. That's our request.

THE COURT: What is Ms. Harris' -- excuse me. I'm familiar with Mr. Harris. What is Ms. Martinez's actual relationship to the Public Defender's Office?

MR. FIRMANI: She was retained as an independent contractor by the Public Defender's Office because, one, she's been retained by the counsel in Hillsborough County, so she's assisting on the two homicide cases over there as well. And she was -- also was an employee of the Public Defender's Office in Hillsborough, had done substantial mitigation work for the Hillsborough County Public Defender's Office previously, and so we retained her to make use of that knowledge to assist us in our case over here.

THE COURT: So is she an actual employee?

MR. FIRMANI: She's not an employee, Judge. We've retained her just like we'd retain an expert for voir dire or an expert for a confidential, things like that. She's not an employee of the Public Defender's Office, but she was retained by the Public Defender's Office as a mitigation specialist.

THE COURT: All right. I'm sure you can understand some reason for my questions and concern when it appears that this delay in this trial, I understand, has been occasioned by Ms. Martinez's participation in terms of clothing selection. I simply don't want this kind of nonsense to continue and I certainly don't want to do anything to foster it.

MR. FIRMANI: I understand, Judge. And I think probably if I go over and see Mr. Bolin myself we can resolve it. But all we're doing is taking over a new clean set of clothing every day; there's nothing sinister about that. And I'm not quite sure why Mr. Bolin has taken the position he's taken, but I don't think it's any of Ms. Martinez's fault. All she did was take a clean set of clothing for each day of trial; I don't think that's too much to ask.

THE COURT: What's the State's position?

MR. HALKITIS: Judge, we would object. First of all, it's proper protocol only to let members of the Bar sit at counsel table. This courtroom is a small courtroom. They have easy access to both Mr. Harris and Ms. Martinez, just as we have easy access to Mr. Haldeman who sits behind us.

Number two, there's a little bit of concern I have for safety reasons if we allow Ms. Martinez to be present here in the courtroom in close contact with the Defendant, Oscar Ray Bolin. It appears from what I know about this case in Hillsborough that she was actually banned from the jail from any visitation with Mr. Bolin, that the Public Defender's Office desired not to utilize her services in their cases, Ms. Holtz's office,

because of her close relationship with Mr. Bolin.

I would suggest to the Court that because Mr. Bolin is such a security risk that to have someone like Ms. Martinez sit in that close of proximity to the Defendant could possibly, possibly lead to problems in the future. There is no right for counsel to have someone they've independently contracted with sit at counsel table or in close proximity, that close proximity to counsel table, and I would suggest to this Court that you should deny that request. There is ample opportunity, as the Court can see, from the small confines of this courtroom to allow access.

MR. FIRMANI: If I may briefly respond, Judge. The fact that she was banned from Hillsborough County jail is absolutely, one hundred percent incorrect and a fallacy. She had visited him at the Hillsborough County jail where they only had one guard checking on the situation every fifteen minutes or every five minutes. She's been seeing him at the Pasco County jail with instructions from the Public Defender's Office and there have been no situations that have arisen then when she's had an officer checking on her through the glass interview room. We have four, five, six uniformed officers here to take care of the security of the courtroom.

She is an integral part of the team despite any illusions or aspersions Mr. Halkitis is making about any possibility of a problem in this courtroom; I don't believe it's going to happen. And she's going to be of great assistance to this team that's representing Mr. Bolin, and to deprive us of the ability to consult with her at a moment's notice I think is depriving Mr. Bolin of the effective assistance of counsel.

MR. HALKITIS: Judge, if I could, just to clarify what I said is I do have documentation here which says that on 5/12 of '95 that a deputy with the Hillsborough Corrections, Stuart Register, observed Ms. Martinez rubbing Inmate Bolin's neck in a caressing manner. On 8/12 of '95 Hillsborough

Sheriff's Office was advised by the Public Defender's Office that Ms. Martinez was removed from the Bolin case, that there were pieces of papers that were taken from Mr. Bolin, one of which happened to be a love note, that Ms. Martinez has been noticed to deposit an amount of money in Mr. Bolin's account on two, four, five separate occasions. These are things that have been documented and have been turned over to us concerning Ms. Martinez. I have yet in twenty years of practice to see anyone in the Public Defender's Office where there's even been an allegation that they were caressing one of the inmates, so that, of course, concerns me.

And Judge, there was a newspaper article, I think everyone in this courthouse has been aware of that article, where Ms. Martinez has made statements to a reporter, T. Miller, concerning her relationship with Oscar Ray Bolin, that they've had a friendly relationship is the quotation that I read. And I'm concerned because in twenty years of prosecuting I've never seen anyone from the Public Defender's Office make that kind of comment. So I think there is more than a professional relationship that the Court has to be aware of and that concerns me by way of security provisions.

THE COURT: All right. Thank you, counsel. I think that the relevant issue is the proximity and ease of contact that is already present between Defense counsel, both Defense counsel and public investigators -- Public Defender investigators and independent contractors, and that is that it's simply an arm's reach away already behind the bar. And I'm not making an exception for the State, I'm not making an exception for the Defense to my general rule and the rule in this case that only Defense counsel will be allowed in front of the bar. And in no way, shape or form do I feel that that impairs, inhibits, or obstructs communication and contact between Defense counsel and investigator and independent contractor, so the motion's denied.

MR. FIRMANI: Judge, can we assure then that the Public Defender's Office does

have the front two seats on the right side here in front row so that we can have at least access across the bar?

THE COURT: Yes.

MR. FIRMANI: Thank you.

THE COURT: And I'll make the same offer to the State to have two seats available in the first row on -- behind State's table.

Is there any other housekeeping matter that we can address while we're waiting for the Defendant?

(VII, T 249-255)

Subsequently, during opening argument by the state, the court noted that a bailiff had advised him Mrs. Martinez was responding to witnesses' names during the state's opening, by smiling and shaking her head. The trial judge warned defense counsel that, "I want that to come to a screeching halt otherwise she is going to be excluded from the courtroom." (IX, T 508-09).

Subsequently, during the direct examination of Phillip Bolin, Mrs. Martinez was observed violating the court's directive:

THE COURT: I wanted to alert counsel for the Defense and counsel for the State that I observe Mrs. Martinez shaking her head during the testimony of this witness. I find it particularly worrisome in light of the testimony concerning her having taken the statement or spoken to this witness on a prior occasion and me having advised Defense counsel I wasn't going to permit her to continue to do this. I didn't see it the first time, it was seen by the bailiff, but I did see it on this occasion. Does the State want to be heard?

MR. HALKITIS: Yes, sir. Judge, I'd request that this Court ask Ms. Martinez to leave the courtroom. She's been forewarned concerning any gestures. Obviously it's impossible for me to see what's going on, but the witness is looking right towards that

section of the courtroom at times. If the Court saw her shaking her head then she's in direct violation of this Court's ruling. The Court has a couple of options; one, you could possibly hold her in contempt, number two, to preclude her from sitting here during the remainder of the testimony. And I'd ask that the Court utilize the second option.

THE COURT: Defense want to be heard?

MR. FIRMANI: No, Judge. I think the Court has made an admonishment in open court. It will not happen again. And anything like asking Ms. Martinez to leave is going to deprive us of the ability to effectively defend this case. I didn't see it so I'm not here to be able to respond to that allegation. And I haven't been able to see the other side of the courtroom to see how the other side has been reacting to the conversation. I'm at somewhat of a disadvantage. So the Court has made its admonition. I would make sure it doesn't happen again. The Court can take appropriate sanctions if it does happen again.

THE COURT: Well, counsel just as I indicated when I mentioned this before that I was going to be alert to anyone on any side -- either side of the courtroom making any gestures or facial expressions that could be deemed distracting or intimidating to witnesses. I didn't care who it was or what side it was, but I wasn't going to permit it. And I'm not going to follow the State's suggestions or position entirely, but I am going to exclude Ms. Martinez for the remainder of this witness's testimony.

And Ms. Martinez, I'm telling you that if you decide to sit back in the courtroom after this witness testifies and I see you making any gestures or facial expressions that might be viewed as intimidating or distracting to any subsequent witness I am going to hold you in contempt of court and certainly exclude you for the balance of the trial. You may be excused.

MS. MARTINEZ: Thank you, your Honor.

(Thereupon, Ms. Rosalie Martinez left the courtroom.)

MR. FIRMANI: At this time the Defense would move for a mistrial based on the Court's actions.

THE COURT: That's denied. Let's return the witness.

(XII, T 811-813).

The court's statement concerning "her having taken the statement or spoken to this witness on a prior occasion" was in reference to the state's contention that Phillip Bolin's recantation was at the behest of Rosalie Martinez, that he used her words and that she knew the content of the letter was untrue. (IX, T 515-517) Phillip Bolin admitted during direct examination that he had been pressured by Mrs. Martinez, that the words in the letter dated January 20, 1996, where he recanted his prior testimony, are basically the words Mrs. Martinez told him to write down, that after he wrote it out he told her it wasn't true. (XI, T 737, XII, T835) Nevertheless, she then took him to a notary and had him swear it was the truth even though he had told her it wasn't true. (XII, T 839) She also told him she was in love with his brother. (XII, T 841)

This Court has clearly held that trial courts have broad discretion in the procedural conduct of trials. Moore v. State, 701 So.2d 545 (Fla. 1997); Rock v. State, 638 So.2d 933, 934 (Fla. 1994) The court in the instant case, chose the least obtrusive method for handling the situation. After having warned her

initially, he only removed her for the remainder of Phillip Bolin's testimony, with a warning that she not continue the behavior.

Appellant concedes that the expulsion may have been within the discretion of the trial court but contends that denial of a consultation between Mrs. Martinez and appellant during a recess deprived him of a fair trial just as surely as a denial of consultation with counsel. This claim has not been preserved for appeal. At the close of Phillip Bolin's direct testimony, the record reveals the following:

> THE COURT: All right. Mr. Philip Bolin, you should follow the same procedures as I ordered during the luncheon recess. You should not discuss this case or your testimony with anyone. I ask that you return to the jury -- excuse me, to the witness room until recall. We'll be in recess until 3:45.
>
> MR. FIRMANI: Excuse me. Judge, we'd like the opportunity to consult in private with our client. Can we utilize either the jury room or some other facility other than this open courtroom?
>
> THE COURT: Oh, that will be permitted. Does that cause a problem, Mr. Nelson?
>
> BAILIFF NELSON: No, sir.
>
> THE COURT: Is there a room available?
>
> BAILIFF NELSON: The deliberation room will be possible, your Honor.
>
> THE COURT: That will be fine.
>
> (Thereupon, there was a brief recess.)

(XII, T 850-852)

After the recess, defense counsel raised the instant claim for the first time:

DEFENDANT PRESENT IN COURTROOM

THE COURT: All right. Any preliminary matters that need to be addressed before the witness is returned to the stand?

MR. FIRMANI: Just our request that we would have like to have had Ms. Martinez present during our discussions with our client outside the courtroom. It was my understanding that we could have that. Apparently the bailiffs have informed us that that cannot be done.

THE COURT: I had previously addressed this issue and I thought I was clear on it and that it that I do not intend for security reasons inside this courtroom there to be any direct contact with the Defendant except through Defense counsel, and that pertains to whether we're at a break or whether we're in session. And I certainly didn't understand Mr. Livermore's request to include Mrs. Martinez to be in that room, not for a fifteen minute recess. So if I didn't understand your request then I apologize, but now that I understand your request it wasn't going to be granted.

MR. FIRMANI: My objection is noted. And that was my request as well as Mr. Livermore's request.

THE COURT: Okay. I viewed it as your joint request. All right. We need to return the witness to the stand.

(XII, T 850-852)

While the court made an after the fact determination that Mrs. Martinez would not have been allowed to consult with Bolin during the recess, the fact remains that no objection was tendered until after the break was over and trial had resumed. As the objection was not timely presented, it is barred. In Gibson v. State, 661 So.2d 288, 290-91 (Fla. 1995), this Court found a similar claim procedurally barred where counsel did not make it clear that he

wanted to consult with his client over which jurors to exclude and to admit. This Court stated:

JURY SELECTION

> During a small portion of a long jury selection process, Gibson's lawyer asked the trial court whether he could take a ten-minute recess to permit him to consult with his client:
>
> Mr. Rinard: Your Honor, if I may have--if we may take an afternoon recess so I may have ten minutes or so to speak with Mr. Gibson to advise him of some things and see how he would like for me to proceed.
>
> The Court: Let's proceed with this round. Are there any additional challenges for cause?
>
> By this exchange, it is apparent the trial court implicitly denied counsel's request for a recess, and directed counsel to proceed with his challenges for cause. The record reflects that immediately thereafter, without further comment or objection, Gibson's counsel began making challenges for cause to the jury panel.
>
> Based on this brief exchange, Gibson claims error in two respects. First, he argues that the trial court violated his right to be present with counsel during the challenging of jurors by conducting the challenges in a bench conference. Second, he argues that the trial court violated his right to the assistance of counsel by denying defense counsel's request to consult with Gibson before exercising peremptory challenges.
>
> In *Steinhorst v. State*, 412 So.2d 332 (Fla.1982), we said that, "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion

> below." In this case, we find that Gibson's lawyer did not raise the issue that is now being asserted on appeal. If counsel wanted to consult with his client over which jurors to exclude and to admit, he did not convey this to the trial court. On the record, he asked for an afternoon recess for the general purpose of meeting with his client. Further, there is no indication in this record that Gibson was prevented or limited in any way from consulting with his counsel concerning the exercise of juror challenges. On this record, no objection to the court's procedure was ever made. In short, Gibson has demonstrated neither error nor prejudice on the record before this Court. Cf. *Coney v. State*, 653 So.2d 1009, 1013 (Fla.1995) (holding trial court's error in conducting pretrial conference where juror challenges were exercised in absence of defendant was harmless beyond reasonable doubt).
>
> Gibson v. State, 661 So.2d 288, 290-91 (Fla. 1995)

See, also, Crutchfield v. Wainwright, 803 F.2d 1103, 1109 (11th Cir. 1986) (Defendant or defendant's counsel must indicate, on record, desire to confer in order to preserve deprivation of assistance of counsel claim.)

Moreover, despite appellant's contention that it was the equivalent of a denial of the right to assistance of counsel, Mrs. Martinez was not appellant's lawyer. If defense counsel needed to consult with Mrs. Martinez before cross-examination of Phillip Bolin, there is nothing in this record that suggests that they were precluded from doing so or that any prejudice actually resulted from Bolin's inability to see Mrs. Martinez during the recess. Gibson v. State, 661 So.2d 288, 290-91 (Fla. 1995).

Furthermore, given the security concerns, it was within the court's discretion to make reasonable restrictions on the access of nonlawyers during the course of the trial. Cf. Derrick v. State, 581 So.2d 31, 35 (Fla. 1991) and Stewart v. State, 549 So.2d 171, 174 (Fla. 1989), cert. denied, --- U.S. ----, 110 S.Ct. 3294, 111 L.Ed.2d 802 (1990)(court can properly exercise its discretion to shackle "to ensure the security and safety of the proceeding.") Bolin was already serving a sentence for escape, rape and kidnapping, as well as facing charges on three separate first degree murders where the death penalty was being sought. (III, R448-454) This, coupled with the obvious concerns of giving unrestricted access to a woman, albeit a member of his staff, who Phillip Bolin claimed had coerced him into offering perjured testimony and who had admitted to being in love with the defendant, supports the trial court's ruling.

Thus, even if this claim was properly preserved, the state maintains that Bolin has demonstrated neither error nor prejudice on the record before this Court. As appellant has failed to show harmful error, he is not entitled to relief on this claim. §924.051 Fla. Stat. (1996).

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FELONY MURDER WITH SEXUAL BATTERY AS THE UNDERLYING FELONY WHERE APPELLANT CONTENDS THERE WAS INSUFFICIENT EVIDENCE TO PROVE SEXUAL BATTERY.

Appellant next contends that there was insufficient evidence to support the underlying felony of sexual battery and, therefore, it was erroneous to instruct the jury on the state's felony murder theory. He contends that since the jury was instructed both on felony murder and first degree premeditated murder that there was no way of knowing if the jury relied on felony murder for which there was insufficient evidence.

First, the state does not agree that the evidence of a sexual battery was insufficient. Compare, Dailey v. State, 594 So.2d 254, 258 (Fla. 1991) (sexual battery established where nude victim's underwear was found 140 feet from her other clothing, with a trail of blood leading from the clothing to the underwear.) Additionally, sexual battery was not the only basis upon which the first degree verdict could have rested. The jury was also instructed that it could consider kidnapping as a basis to support the felony murder charge, as well as premeditated first degree murder. As appellant does not challenge the sufficiency of the evidence to support either premeditated first degree murder or felony murder with a kidnapping, no reversible error has been shown.

While Bolin recognizes that this Court has consistently rejected similar arguments, he urges reversal based on Justice Anstead's dissent in Mungin v. State, 689 So.2d 1026 (Fla. 1995). This Court recently had the occasion to reaffirm the majority holding in Mungin in San Martin v. State, 23 Fla. L. Weekly S335 (Fla. June 11, 1998). This Court stated:

> San Martin also contends that the evidence was insufficient to prove premeditated first-degree murder and thus his conviction must be reversed. We agree with San Martin that the evidence in this case does not support premeditation, but do not find that reversal is warranted on this basis. While it may have been error to instruct the jury on both premeditated and felony murder, *see Mungin v. State*, 689 So. 2d 1026, 1029 (Fla. 1995), any error in this regard was clearly harmless. The evidence supported conviction for felony murder and the jury properly convicted San Martin of first-degree murder on this theory. In his statement to the police, San Martin admitted his involvement in the robbery of the bank and described the incident in great detail. San Martin admitted that he and the codefendants checked out the bank before the robbery; that he helped steal the vehicles used during the robbery; that he drove one of the vehicles; that he took the cash box from the teller; and that he received $3000 from the robbery. He also admitted that during the robbery he heard gunshots and saw Officer Bauer on the ground. These circumstances clearly support San Martin's conviction for first-degree murder under the felony murder theory and reversal is not warranted.
>
> While a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory, reversal is not warranted where the general verdict could have rested

upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient. *Griffin v. United States*, 502 U.S. 46 (1991). The Supreme Court explained this distinction in *Griffin* as follows:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence, see *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968). As the Seventh Circuit has put it:``It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance--remote, it seems to us--that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.'' *United States v. Townsend*, 924 F.2d 1385, 1414 ([7th Cir.] 1991).

Griffin, 502 U.S. at 59-60; *see also Mungin v. State*, 689 So. 2d at 1030.

San Martin v. State, 23 Fla. L. Weekly S335 (Fla. June 11, 1998)

See, also, Jordan v. State, 694 So.2d 708, 712-13 (Fla. 1997) (no merit to the claim that the jury's general verdict is invalid);

Parker v. Dugger, 660 So.2d 1386, 1390 (Fla. 1995)(holding there was not ineffective assistance of counsel where attorney failed to challenge sufficiency of proof of felony murder when general verdict was returned and premeditation was supported by the evidence); Tefteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984); Knight v. State, 394 So.2d 997 (Fla. 1991).

Appellant also contends that consideration of the sexual battery may have influenced the jury recommendation. This Court in Bowden v. State, 588 So.2d 225 (Fla. 1991) cert. denied, --- U.S. ---, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992), considered and rejected a similar claim, stating:

> The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.

Id. at 231

Thus, as evidence of the aggravating factor, including the condition of the victim's body and the presence of semen on her pants, was presented to the jury, an instruction on the factor was required. Bowden v. State, supra. The fact that the aggravator was not ultimately found to exist does not mean there was insufficient evidence to allow the jury to consider the factor.

Id.; Raleigh v. State, 705 So.2d 1324 (Fla. 1997); Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994).

Even if there was no basis for the aggravator, any error would be harmless because the jury was properly instructed and the trial court did not find that the circumstance existed but did find four other aggravating factors, including cold, calculated and premeditated, heinous, atrocious or cruel, during the course of a kidnapping and several prior violent felonies. Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994); Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Johnson v. Singletary, 612 So.2d 575 (Fla.), cert. denied, --- U.S. ----, 113 S.Ct. 2049, 123 L.Ed.2d 667 (1993).

Accordingly, as appellant has failed to establish harmful error, the state urges this Court to reject the instant claim. §924.051 Fla. Stat. (1996).

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S UNTIMELY REQUEST TO HAVE A PET SCAN PERFORMED ON APPELLANT BETWEEN THE GUILT AND PENALTY PHASES OF THE TRIAL.

Appellant's final claim challenges the trial court's denial of his untimely request for a PET-scan. Appellant contends that although he did not request the test until the close of the guilt phase, the trial court erred in denying the motion. The motion claimed that counsel had further discussions with his forensic psychologist, Dr. Robert Berland, the night before and that Dr. Berland had indicated that in his opinion, a PET-scan of the defendant's brain would be very helpful in confirming that the Defendant has suffered brain damage and that the brain damage is a factor to be considered in mental mitigation. The motion further requested funds for the testing which was estimated to cost about $4,500.00 and would take about 60 days to complete. Testing of the defendant would also necessitate transporting him to Jacksonville to have the testing done, and then having the results sent to Dr. Fred Woods in North Carolina, who is an expert in the field of translating pet scans. (II, R. 357)

After the jury retired to deliberate guilt, the motion was addressed by the court:

> THE COURT: . . . Now, there's a motion for costs and a motion to continue the sentencing phase, if necessary, based upon a request for a PET scan. I have to confess, Mr. Livermore, I'm not familiar with the term

PET scan. I know about CAT scans. You weren't referring to a CAT --

MR. FIRMANI: CAT scans. PET scans are even better. You have CAT scans and you have your MRIs, but in order -- according to Dr. Berland, in order to get an effective image of the brain to show brain damage the -- I guess the most effective is a PET scan. And that's where basically you inject the brain with sugar substance to show how the sugar is absorbed by the brain, and it shows dead parts of the brain. And that, of course, would be used by Dr. Berland and the other expert to show physically in picture images just like an x-ray whether there is any actual brain damage.

We have the WAIS testing that he previously testified to. The State made an issue about, well, what about some other WAIS. *I know Dr. Merin made that issue at the last trial.* When that was brought up with Dr. Berland last night about eleven o'clock he said, well, as a matter of fact, there's another way now medically that you can show brain damage above and beyond just plain testing like the WAIS or WAIS-R or the WAIS-III, and that is this PET scan. *He's utilized it before. He's found it to be effective in Bobby Joe Long, for instance, where the idea that he was brain damaged was rejected by the State. They did a PET scan.* Sure enough there was a dead spot in his brain, left temple lobe, the size of a walnut. So we would like the ability to get the PET scan done.

And it does involve quite a lot of work. I've set out in my motion it involves sending Mr. Bolin up to Jacksonville, having it done there. They're the only facility that can do this nowadays. Having the results read by Dr. Wood from North Carolina and give us his judgment, then I can present it to the Court at that time and to the jury.

THE COURT: You made mention of a matter arising in the last trial. Is this a -- are you representing that this is a phenomenon in medical advancement?

(XX, T 1736-1738)

THE COURT: And I'll file this note. All right. While Mr. Nelson, the bailiff, is proceeding in that regard I think the last question was the issue of when this information became known and relative to when it had previously come up, that is in '92, I believe, '91 or '92.

MR. FIRMANI: Yeah, '92 is when. I guess in the direct of Dr. Sidney Merin his comment was that the WAIS was not the appropriate manner in which to evaluate brain damage and suggested that a medical test would be a better way. I think at that time we were in the level of MRIs and CAT scans.

When I was discussing proposed testimony with Dr. Berland he came up with a suggestion that since that time -- and he apologized for not coming up with it sooner, but the first time we had the chance to actually discuss that issue is that there is now a thing called a PET scan, and it's been the most successful at being able to picture brain damage. For instance, I come back to Bobby Joe Long because he used that example, brain damage did not -- was not shown on an MRI or a CAT scan. It was shown very dramatically on the PET scan. Appears to be medically, scientifically the best method now to show that.

THE COURT: Okay. What's the State's position?

MR. HALKITIS: Judge, back on October 6th of 1992 Dr. Berland's deposition was taken. And on page fifty-nine of that deposition he refers to this widespread so-called brain injury of the Defendant, the question that was asked of him, had he ever had an x-ray done? No. Had he ever had any type of diagnostic test done at the hospital? No. EEG's, things like that? No, I didn't. And then the question, some of these tests, in fact, could indicate if brain injury was present; isn't that correct? And the answer was yes.

So my concern, Judge is that back on October 6th of 1992 counsel knew that's a potential issue in this case. The issue being that there's a doctor's opinion that there was

widespread brain injury, and, in fact, we were asking questions along the line of why wasn't there any testing done to determine brain injury. Now we're here concluding the trial, possibly proceeding to penalty phase tomorrow and now counsel makes this type of motion.

I would submit that based on all they knew back in 1992, and as counsel says, even back when Bobby Joe Long went to trial, which was a couple of years ago, they had such a thing as a PET scan, there was no request for CAT scans or any type of x-ray, any type of diagnostic tests and now they're making that request. In essence what this would do would is push the trial, the penalty phase, if we get to a penalty phase, until next week, and I would submit that it's untimely.

THE COURT: Motion's denied. We'll be in recess then awaiting the verdict.

(XX, T 1741-1743)

The next day, appellant reasserted his request for a PET scan as follows:

MR. FIRMANI: No, sir. We would waive opening. However, I have filed with the Court the affidavit of Dr. Berland in support of my previous motion yesterday for the PET scan. It basically sets out what I represented to the Court yesterday. I have no additional argument. I would, however, reurge my motion to continue the sentencing and the request for the PET scan to be done.

THE COURT: Well, I note in reviewing the affidavit that the affidavit does not address what Dr. Berland has done in the preceding four years or why he hasn't made this suggestion earlier or why he hasn't acted upon it, particularly since we've had numerous status conferences on this case, specifically set so that there wouldn't be any unnecessary delay in the trial of this case and this was never raised at any of those status conferences nor by motion earlier. Do you want to address that, Mr. Firmani?

MR. FIRMANI: Well, it's true the

affidavit doesn't reflect that, Judge, but he represents in the affidavit that he did bring it up for the first time with myself, as I represented, yesterday, eleven o'clock on I guess it was Monday night. So I think it would be derelict of me and ineffective of me not to raise the issue even though it was at the eleventh hour so to speak.

THE COURT: All right. Any additional arguments from the State?

MR. HALKITIS: Judge, just what we indicated yesterday. If you take a little bit of time and you review two depositions of Dr. Berland, October 6th, October 12th, and you look at the trial testimony of Dr. Berland which was in mid October of 1992, it's apparent there that one of the concerns everyone had by way of questioning was what tests were done. And counsel knew about it in 1992. They've known about it for many, many, many, many months now and this appears to me to be just an attempt to delay the proceedings, Judge. We brought in witnesses from Ohio. We're ready, willing, and able to proceed, and then yesterday was the first inkling that they needed some kind of PET scan done.

THE COURT: All right. The motion -- the ruling on the motion denying it yesterday is reaffirmed. I'll file you affidavit.

(XXI, T 1753-1755)

The affidavit of Dr. Berland provided in pertinent part:

5. After completing review of my past testimony in the case of State of Florida vs. Oscar Ray Bolin and the psychological testing in that case, on August 20, 1996, I made a recommendation to Mr. Paul Firmani, counsel for the defendant, that we would be remiss in not seeking a PET Scan on this defendant as part of our preparation for presenting mitigating evidence to the jury.

6. Particularly in a case where a victim has died and the jury must consider whether an accused defendant should live or

die, the stakes are obviously very high and the evidence to be presented to the jury must be of the highest quality. It is my opinion that a PET Scan would serve a valuable ***corroborating and explanatory function*** in presenting an account of this defendant's behavior to a jury. The PET Scan measures the different levels of brain activity (i.e. levels of metabolic activity) in different brain locations in a series of slices through the brain comparable to those obtained in a CT Scan. Many forms of injury to brain tissue both traumatic and otherwise, do not affect the structural integrity of the brain tissue. Rather, the shape of the brain tissue remains unchanged, but its ability to function properly is altered by the injury.

7. The anticipated results of a PET Scan on this defendant's brain would provide graphic, visual corroboration of the physiological, medical underpinnings of this defendant's impairment and related emotional problems for an understandably skeptical lay jury. This test would also avoid having the defense ask the jury in a case of this magnitude to rely solely on a form of testing which indicates brain injury (i.e. the Weschler Adult Intelligence Scale) which depends on voluntary response by the defendant and whose outcome could be argued (incorrectly) to be subject to manipulation by the defendant. No argument could be made that the defendant manipulated the outcome of this medical examination. Although the Weschler is associated with over four decades of research verifying its utility as a measure of impairment from brain injury, a medical test to supplement and elaborate on the Weschler results would add a significant impetus to a jury presentation.

8. One of the principle criticisms [sic] leveled against the presentation of mental mitigators to the jury in this case in the past was the lack of medical, corroboratory testing. At the time this case was originally tried and subsequently retried,

> the PET Scan was not as widely available or as well supported by research verifying its appropriateness and utility as is the case now. Since evidence of brain injury is central to the presentation of mental mitigators for this defendant, it would appear that a PET Scan would add a persuasive, medical support to an argument which has been lacking this in the past. Given the nature of this defendant's history of incidents involving potential brain injury, and the test results suggesting impairment from brain injury, it is reasonably anticipated that the results of the PET Scan would be significant and useful.
>
> (III, R 398-399)

It is the state's contention that the motion was untimely filed and that it was within the trial court's discretion to deny the requested continuance and PET scan. This Court has consistently held that the granting or denying of a continuance or for the appointment of experts is within the sound discretion of the trial court and this Court will not disturb such a ruling absent an abuse of discretion. This is true ***even in capital cases***. Williams v. State, 438 So.2d 781 (Fla. 1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984), Accord, Curtis v. State, 685 So.2d 1234, 1236 (Fla. 1996); Rose v. State, 461 So.2d 84, 87 (Fla. 1984). As this Court explained in Williams:

> The granting or denial of a motion for continuance is within the discretion of the trial court. *Durcan v. State*, 350 So.2d 525 (Fla. 3d DCA 1977); *Mills v. State*, 280 So.2d 35 (Fla. 3d DCA 1973); *Douglas v. State*, 216 So.2d 82 (Fla. 3d DCA 1968). This principle remains intact even in situations where the death penalty is of issue. See

Cooper v. State, 336 So.2d 1133 (Fla.1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). This Court in *Cooper* announced:

> While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance.
>
> 336 So.2d at 1138 (emphasis added).

> We find no evidence that the trial judge abused the above mentioned discretion. Appellant moved for a continuance at the conclusion of the guilt phase of the trial. The trial judge's decision to deny the motion was not made in haste. The decision to deny was rendered subsequent to a two-hour recess--a period of time sufficient to review the relevant circumstances surrounding appellant's motion. In our review of the record we find that appellant's counsel had been aware, since his appointment eleven weeks prior, that this was a case in which the death penalty would be sought. Eleven weeks' notice is adequate time to prepare for both the trial and sentencing phases of this litigation. See Valle v. State, 394 So.2d 1004, 1008 (Fla.1981). We further find that appellant, in presenting his motion for continuance, never offered reasons for his unpreparedness. Likewise he failed to demonstrate due diligence in locating mitigating witnesses and never alleged that the motion was made in good faith and not for delay only. Hence the trial judge acted within his bounds when he refused to grant appellant's motion for continuance. See *Moore v. State*, 59 Fla. 23, 52 So. 971 (1910).

Id. at 785

Where, as here, the issue of appellant's brain damage was known to the defense years prior to the penalty phase, it was not

an abuse of discretion to deny the continuance or the requested expert tests and evaluation. As the state argued below, the question of Bolin's claim of brain damage was raised during the first trial and was again addressed during Dr. Berland's deposition taken on October 6, 1992, where the doctor acknowledged that additional tests and x-rays could be conducted to support the claimed brain damage. Under similar circumstances, this Court has not hesitated to affirm the lower court's denial of experts or tests.

For example, in Gorby v. State, 630 So.2d 544 (Fla. 1993), cert. denied, 513 U.S. 828 (1994), this Court rejected Gorby's claim that it was an abuse of discretion to deny a continuance because, among other things, the neuropsychologist needed more time to "confirm" his findings. Recognizing that the granting of a continuance is within a trial court's discretion, and the court's ruling on a motion for continuance will be reversed only when an abuse of discretion is shown, this Court noted that Gorby's counsel had two investigators and also personally traveled to West Virginia to investigate Gorby's background, and that the mental health expert had more than adequate time to prepare for trial. Id. at 546. See, also, Sliney v. State, 699 So.2d 662 (Fla. 1997) (court's ruling on a motion for continuance and for appointment of experts will not be overturned unless defendant demonstrates a palpable abuse of discretion); Branch v. State, 685 So.2d 1250

(Fla. 1996), cert. denied, 117 S.Ct. 1709 (1997)(no abuse of discretion to deny request to delay penalty phase to give mitigation specialist more time to prepare where there was conflicting evidence before the court as to whether additional time would be helpful); Fennie v. State, 648 So.2d 95, 97 (Fla. 1994), cert. denied, 513 U.S. 1159 (1995)(no abuse of discretion to deny request for a mid-trial continuance to secure expert to possibly refute tests when Fennie had access to all witness's prior statements, could not have been surprised by testimony and had an opportunity to conduct the tests prior to trial); Robinson v. State, 610 So.2d 1288, 1291 (Fla. 1992), cert. denied, 510 U.S. 1170 (1994)(no abuse of discretion in the trial court's refusing a continuance where through depositions counsel knew the results of that testing the week before trial and received a copy of the written report at least three days before the laboratory employees testified); Echols v. State, 484 So.2d 568, 572 (Fla. 1985), cert. denied, 479 U.S. 871 (1986)(no abuse of discretion to deny motion for continuance to obtain appointment of voice print experts and their analysis of voices on tape recording made by an informant, since defendant had known two months previously that State had two tapes purporting to contain inculpatory statements made by defendant).

To support his contention that the motion for a PET-scan should have granted, appellant relies on this Court's decision in

Hoskins v. State, 702 So.2d 202 (Fla. 1997). In Hoskins this Court remanded the case for the limited purpose of having the trial judge order a PET-scan be conducted on Hoskins and to then determine whether the PET-scan shows an abnormality and, if so, whether the results of the PET-scan cause Hoskins' expert to change his trial testimony. *Hoskins, however, unlike Bolin, did not wait until the eve of the penalty phase to ask for the PET-scan.* 702 So.2d at 204. In the instant case, despite counsel knowing since February of 1995[5] that this case was going to trial again, no request for testing was made until the close of guilt phase. Further, unlike Hoskins, where it was shown that funds were available from the office of the public defender to pay for the test, the motion, in the instant case, requested the funds necessary to conduct the PET-scan. Moreover, even appellant's own expert, Dr. Berland testified that Bolin's IQ scores ranged from a high of 123 to a low of 88, as opposed to Hoskins whose I.Q. was estimated to be about 71. Hoskins v. State, 702 So.2d 202, 204 (Fla. 1997). (XXI, 1832)

Even if the request for a continuance and an expert were timely made, this Court has recognized that there are other considerations before an expert should be appointed. Recently, in

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[5] This Court's opinion reversing and remanding was issued February 9, 1995. See, Bolin v. State, 650 So.2d 19 (Fla. 1995)

San Martin v. State, 705 So.2d 1337, 1347 (Fla. 1997), this Court held:

> A trial court's refusal to provide funds for the appointment of experts for an indigent defendant will not be disturbed unless there has been an abuse of discretion. Martin v. State, 455 So.2d 370, 372 (Fla.1984). In evaluating whether there was an abuse of discretion, courts have applied a two-part test: *(1) whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the court's denial of the motion requesting the expert assistance.* Dingle v. State, 654 So.2d 164, 166 (Fla. 3d DCA 1995). In the instant case, we agree with the trial court that jury selection is a legal function that should be within the competence of experienced trial lawyers. Moreover, defense counsel made no particularized showing of need; he merely stated that due process required appointment of such an expert where the State sought the death penalty. Thus, we find no abuse of discretion by the trial court in denying this request.

Id. at 1347

In the instant case, appellant did not meet either requirement. He did not allege that the PET scan was the only test available to establish his purported brain damage or that no other tests were available that could be performed locally in less time. In fact, Dr. Berland testified that in addition to the WAIS testing that he did on Bolin, there a variety of tests that could be tried, including an EEG, a CT-scan, an MRI, as well as the PET-scan. (XXI, 1837) He further noted that although the PET scan is well established as a research measure, it is not approved by the FDA,

so there are not a lot of people working with interpreting PET scans at this stage around the country. (XXI, 1838) Moreover, appellant did not establish that even if a PET scan was conducted that it would produce corroborative evidence or that the results would be admissible.

As appellant noted with regard to the admission of the DNA tests, the admission into evidence of expert opinion testimony of a new scientific principle requires a four-step inquiry. Ramirez v. State, 651 So.2d 1164, 1166 (Fla. 1995). The trial judge must determine whether: (1) expert testimony will assist the jury in understanding the evidence or in determining a fact in issue; (2) the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs" under the Frye test; and (3) the particular expert witness is qualified to present opinion evidence on the subject in issue. Hayes v. State, 660 So.2d 257, 262 (Fla. 1995). No such showing was made in the instant case and, unlike DNA evidence, this Court has also not had the occasion to make such a determination. Notably, although this Court in Hoskins v. State, remanded the case for the limited purpose of having the trial judge order that a PET-scan be conducted on Hoskins, the question of whether PET-scans satisfy the Frye standard was not addressed.

This same question was recently addressed in federal court with the court concluding that the results were not admissible, even under the less strenuous federal standard for admissibility of scientific evidence. The court stated:

> General acceptance in the scientific community is no longer a precondition to the admission of scientific evidence. *Daubert*, 509 U.S. at 597, 113 S.Ct. at 2798-99. However, a trial judge must still ensure that "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 113 S.Ct. at 2796. ***In this case, plaintiffs failed to establish a sufficient foundation to support the admission of the PET scan evidence.***
>
> Penney v. Praxair, Inc., 116 F.3d 330, 333 (8th Cir. 1997) (emphasis added)

Despite having waited until the last minute to make this request and despite appellant's failure to present anything more than mere speculation that any admissible evidence would be discovered, appellant contends that this trial judge should have put the entire proceeding on hold for at least 60 days. Appellant had already complained that his jury was possibly exposed to prejudicial publicity. Absent sequestering the jury for 60 days, the delay had the inherent risk of having to seat a new jury and represent the case. Given that the purpose of this test was not to determine whether Bolin was legally responsible for the crime or

whether he was competent to stand trial, but, rather, to conduct testing that may or may not corroborate that which Dr. Berland already testified was true,[6] it was within the court's discretion to deny the motion. Gorby, supra. (XXI, 1847)

Additionally, while the state recognizes that this Court in Hoskins found that the denial therein of a PET scan violated Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the state maintains that, in the instant case, no violation has been shown. In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the United States Supreme Court considered an indigent defendant's entitlement to expert assistance in establishing the sole defense of insanity. Ake was not seeking funds to obtain evidence that was only potentially corroborating of test results developed as mitigating evidence. Ake was pursuing the only opportunity to present information to the jury on the ultimate issue being tried. Recognizing that a defendant must be provided "access to raw materials integral to the building of an effective defense," the Court suggested three factors for identifying "basic tools of an adequate defense" necessary to provide a criminal defendant with a fair opportunity to present his claims. The first

---

[6] Dr. Berland testified that the defendant was suffering from some brain damage that could result in "emotional instability, alienation, people [who] are unable to adjust to or find a proper place in society, poor judgment, poor social adjustment . . . mood shifts, . . . becom[ing] hypersensitive to other people's actions around them and misunderstand[ing] and misapprehend[ing] what people around them intend by the things they do." (XXI, 1847)

of these is the private interest, which the state agrees is the same "compelling" interest at issue in Ake. However, the other factors clearly weigh against the appellant's argument.

The governmental interest, which includes not only the $4500.00 expense for the test, but, also, the cost of delaying the trial, reproducing out-of-state witnesses, as well as the considerable risk of the jury being exposed to prejudicial publicity or other outside influences during the delay, is a significant burden. In Ake, the governmental financial burden was greatly discounted by the Court due to the recognition that many states and the federal government currently provided for psychiatric assistance for indigent defendants. 470 U.S. at 78. No such showing has been made with regard to the testing sought in this case.

The third factor, the probable value of the assistance sought, is the one primarily discussed by the Court in Ake. The state maintains that the value of test results which remain "speculative," is insufficient to establish a due process violation. Caldwell v. Mississippi, 472 U.S. 320, 324, n. 1, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This is clearly a far cry from the crucial nature of the assistance sought in Ake, which was necessary to provide information to support the only viable defense to the jury. See also, McKinley v. Smith, 838 F.2d 1524, 1530 (11th Cir. 1988) (denial of funds for pathologist to assist defense

counsel in understanding autopsy report did not violate due process).

Nevertheless, appellant asserts that he was prejudiced by the absence of these test results because, the state's expert Dr. Merin testified that he "would never use just this test [Wais] alone to determine the presence or absence of brain damage." Dr. Merin, however, did not testify that a PET scan or any other test that would require extensive delay in the middle of trial was necessary. Rather, Dr. Merin testified that the brain is much more complex than what would be defined by the nature of this examination. Therefore, to do a comprehensive neuropsychological evaluation in his office he would give perhaps as many as fifteen or twenty different types of tests.[7] (XXII, 1947)

In considering appellant's mental mitigators, the trial court wrote:

> The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> The defendant cites the opinion of Dr. Robert Berland to support this statutory mitigating factor. Dr. Berland was of the opinion that the defendant had brain damage at the time of this murder. Dr. Berland testified that this opinion was based upon the Minnesata [sic] Multiphasic Personality Inventory results and the defendant's history as furnished by the defendant and the defendant's family who were supportive of the defendant. The testimony and opinion of Dr. Sidney Merin, however, was that he had

[7] Dr. Merin also testified that probably more than half of the population has suffered some brain damage. (XXII, 1952)

reviewed the defendant's MMPI results (1988, 1990, and 1991). Dr. Merin opined that the defendant manipulated the tests to attempt to appear to have a mental illness (brain damage) and that the Wechsler Adult Intelligence Test did not show brain damage. Moreover, contrary to Dr. Berland, Dr. Merin observed that the defendant did not suffer from fetal alcohol syndrome, pointing out that the defendant exhibited no physical or psychological symptoms which are characteristic of this syndrome. The Court has concluded that if the defendant experienced brain damage, it was extremely minimal in that the defendant was able to perform all ordinary and customary functions of daily life including working, conversing with co-workers, and engaging in familial relationships including marriage. The defendant's cunning and methodical commission of this murder is likewise contrary to the notion that defendant suffered brain damage. Therefore, the Court finds that this mitigating factor does not exist as a statutory mitigating factor buy only minimal brain damage as a non-statutory mitigating factor and gives it some moderate weight.

2. At the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The defendant suggests that this mitigating factor exists, based on Dr. Berland's opinion, on a bad childhood, brain damage, fetal alcohol syndrome, a poor education, alcohol and drug use, and a wife in poor health. The evidence demonstrates that the defendant did poorly in school, not that he received a poor education. The evidence demonstrates that if the defendant was brain damaged, it was minimal and did not affect his everyday functioning in society. The opinion of Dr. Berland that the defendant had a bad childhood, used alcohol and drugs, and suffered fetal alcohol syndrome was based upon the defendant's and his immediate, supportive family's information. Dr. Berland testified that he did not attempt to, nor did he,

> confirm this information outside the defendant or his supportive family. Dr. Berland did concede that he disregarded information regarding the defendant from one source outside the defendant's immediate, supportive family. The evidence confirms that the defendant's wife was hospitalized at the time he committed this brutal murder. There is no plausible evidence that the defendant was concerned about his wife's hospitalization. Dr. Merin was of the opinion that defendant possessed no statutory mental mitigators. Therefore, this Court finds that the mitigating statutory factor of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but not substantially impaired. It is accepted as a non-statutory mitigating factor and given some slight weight.
>
> (III, R 451-452)

Under these circumstances, it cannot be said that the trial court abused its discretion in denying the motion. Moreover, given the substantial evidence in aggravation, appellant has failed to establish that error, if any, was harmful. §924.051 Fla. Stat. (1996).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Douglas S. Connor, Assistant Public Defender, Public Defender's Office, Post Office Box 9000, Drawer PD, Bartow, Florida 33831, this 22 day of July, 1998.

CM Sabella

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, Jr.,

Appellant,

vs. CASE NO. 89,385

STATE OF FLORIDA,

Appellee.

_____/

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY

STATE OF FLORIDA

VS.

OSCAR RAY BOLIN, JR.
_____/

CASE NO.: 91-0521CFAWS
SPN: 148878

FILED IN OPEN COURT
THIS 9 DAY OF OCT, 1996
Jed Pittman, Clerk
BY _____ D.C.

SENTENCING ORDER

The defendant was tried before this Court on August 12, 1996 - August 21, 1996. The jury found the defendant guilty of Murder in the First Degree. The same jury re-convened and evidence in support of aggravating factors and mitigating factors was heard. On August 23, 1996, the jury returned a unanimous recommendation that the defendant be sentenced to death. The Court requested memoranda from both counsel for the State and counsel for the defendant. The memorandum from the State was received on August 29, 1996 and the memorandum from the Defense was received on September 25, 1996. On September 25, 1996, the Court held a further sentencing hearing where both sides made further legal argument and the testimony of George Forte was received. The Court set final sentencing for October 9, 1996.

This Court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and further argument both in favor and in opposition to the death penalty, finds as follows:

A. AGGRAVATING FACTORS

1. The defendant was previously convicted of four (4) felonies involving the use or threatened use of violence to another person. Each felony conviction was shown, beyond a reasonable doubt, to be violent and perpetrated against persons. The defendant, as to the Ohio rape case, did enter a guilty plea thus allowing the victim to avoid the necessity of a trial as to the defendant and that was given some minimal

weight by this Court as a non-statutory mitigating factor. The defendant's four (4) felony convictions involving the use or threatened use of violence to another person have been given great weight by this Court as an aggravating factor.

2. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The evidence conclusively demonstrates that the victim was abducted from the area of the Land O' Lakes Post Office to which she had driven at night and where she had a post office box. The evidence does not support robbery as the defendant's purpose for the victim's abduction due to there being no articles of significance found missing from victim's automobile or purse. The defense has argued in its sentencing memorandum that the victim's abduction and murder was committed in an impulsive, disorganized manner. The evidence, however, is to the contrary. The defendant abducted the victim from the area of a post office, late at night in his vehicle, and took the bleeding, but alive body of the victim to his house to obtain assistance from his brother in disposing of the body. The defendant then proceeded to beat the victim with a heavy club and then washed the body with large amounts of water from a hose. The defendant then transported the body to another location and dumped the victim off the road. The evidence fully supports the conclusion that the murder was committed in a cold, calculated, and premeditated manner and same has been proved beyond a reasonable doubt. The Court has given great weight to the aforesaid aggravating factor.

3. The murder was especially heinous, atrocious, and cruel. The evidence shows that the victim, after being abducted from the post office, was brought to the defendant's home where his brother was residing. She was bloodied, but alive, emitting an animal like moan according to the defendant's brother. The defendant then beat the victim, in his brother's presence, repeatedly with a large and heavy

club. No further sounds emanated from the victim. Defense has argued that the defendant's actions in beating the victim repeatedly, shows that the defendant intended to hasten her death thereby to decrease her suffering. That interpretation of the defendant's actions is not supported by any reasonable view of the evidence. The evidence fully supports the conclusion that the murder was especially heinous, atrocious, and cruel and same has been proved beyond a reasonable doubt. The Court has given great weight to the aforesaid aggravating factor.

4. The murder was committed during the course of a kidnapping. The evidence adduced at trial is that the victim was taken forcibly by the defendant from the Land O' Lakes Post Office, leaving behind the victim's car with headlights on and the victim's purse on the front seat. The defendant transported the victim from this public place to the relatively isolated, rural area of his home. Once there he proceeded to bludgeon her repeatedly with a club and wrap her bleeding and bloody body in a sheet prior to transporting to an area away from his home where he dumped her body, still wrapped in a sheet. The evidence fully supports the conclusion that the defendant committed the murder during the commission of the felony of kidnapping. The Court has given great weight to the aforesaid factor.

None of the other aggravating factors enumerated by statute are applicable to this case and none other was considered by this Court. Nothing, excepted as previously indicated in above paragraphs 1-4 above, was considered in aggravation. B. MITIGATING FACTORS:

Statutory Mitigating Factors

As to mitigating factors, the Court acknowledges its responsibility to consider all non-statutory mitigating factors as well as the statutory mitigating factors set forth in Florida Statute 921.141(6). In his sentencing memorandum, the defendant requested the Court to consider the following statutory mitigating factors:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

The defendant cites the opinion of Dr. Robert Berland to support this statutory mitigating factor. Dr. Berland was of the opinion that the defendant had brain damage at the time of this murder. Dr. Berland testified that this opinion was based upon the Minnesata Multiphasic Personality Inventory results and the defendant's history as furnished by the defendant and the defendant's family who were supportive of the defendant. The testimony and opinion of Dr. Sidney Merin, however, was that he had reviewed the defendant's MMPI results (1988, 1990, and 1991). Dr. Merin opined that the defendant manipulated the tests to attempt to appear to have a mental illness (brain damage) and that the Wechsler Adult Intelligence Test did not show brain damage. Moreover, contrary to Dr. Berland, Dr. Merin observed that the defendant did not suffer from fetal alcohol syndrome, pointing out that the defendant exhibited no physical or psychological symptoms which are characteristic of this syndrome. The Court has concluded that if the defendant experienced brain damage, it was extremely minimal in that the defendant was able to perform all ordinary and customary functions of daily life including working, conversing with co-workers, and engaging in familial relationships including marriage. The defendant's cunning and methodical commission of this murder is likewise contrary to the notion that defendant suffered brian damage. Therefore, the Court finds that this mifigating factor does not exist as a statutory mitigating factor but only minimal brain damage as a non-statutory mitigating factor and gives it some moderate weight.

2. At the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The defendant suggests that this mitigating factor exists, based on Dr. Berland's opinion, on a bad childhood, brain damage, fetal alcohol syndrome, a poor education, alcohol and drug use, and a wife in poor health. The evidence demonstrates that the defendant did poorly in school, not that he received a poor education. The evidence demonstrates that if the defendant was brain damaged, it was minimal and did not affect his everyday functioning in society. The opinion of Dr. Berland that the defendant had a bad childhood, used alcohol and drugs, and suffered fetal alcohol syndrome was based upon the defendant's and his immediate, supportive family' s information. Dr. Berland testified that he did not attempt to , not did he, confirm this information outside the defendant or his supportive family. Dr. Berland did concede that he disregarded information regarding the defendant from one source outside the defendant's immediate, supportive family. The evidence confirms that the defendant's wife was hospitalized at the time he committed this brutal murder . There is no plausible evidence that the defendant was concerned about his wife's hospitalization. Dr. Merin was of the opinion that defendant possessed no statutory mental mitigators. Therefore, this Court finds that the mitigating statutory factor of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but not substantially impaired. It is accepted as a non-statutory mitigating factor and given some slight weight.

3. The age of the defendant at the time of the murder was twenty-four years.

The evidence from Dr. Merin was that the defendant was of average intelligence. No contrary evidence was submitted. The defendant's age at the time of the crime is not a statutory mitigating factor.

Non-Statutory Mitigating Factors

1. The defendant has organic brain damage.

2. The defendant was an abused and battered child.

3. The defendant had a deprived childhood and poor upbringing.

4. The crime for which the defendant is to be sentenced was committed while he was under the influence of mental or emotional disturbance.

5. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

6. The defendant's behavior during trial. The Defendant was respectful to all parties at all times.

7. The defendant's actions in saving the life of another when he saved Kim Harrison from a potential drowning.

8. The defendant was gainfully employed at the time of this offense.

The Court has previously in this opinion addressed the aforesaid numbered non-statutory mitigating factors and has found that while factor 4 exists, it is minimal and gave it some moderate weight. Factor 5 is accepted as a non-statutory factor and given slight weight. Factors 1, 2, and 3 are accepted as mitigating circumstances, but in light of the defendant's ability to perform all usual and customary functions of daily life, they are given little weight.

6. The defendant was not disruptive during the trial. The Defendant stated that he would have to be restrained to be present for the testimony of the victim of his Ohio rape. It was not necessary, however, to physically restrain the defendant. The Court accepts this as a non-statutory mitigating factor and assigns it little weight.

7. The defendant told the investigator for his lawyer that he had rescued a friend, Kim Harrison, from drowning. The investigator called a telephone

number and spoke to a person who identified herself as Kim Harrison who confirmed defendant's story. The Court accepts this as a non-statutory factor and gives it little weight.

8. The evidence supports the defendant's contention that he was employed at the time he murdered the victim and the Court gives it little weight.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present. Accordingly, it is

ORDERED AND ADJUDGED that the defendant, Oscar Ray Bolin, Jr. is hereby sentenced to death for the murder of the victim, Terri Lynn Matthews. The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

DONE AND ORDERED in New Port Richey, Pasco County, Florida this 9th day of October, 1996.

WILLIAM R. WEBB
Circuit Judge

copies to : State Attorney
Public Defender