IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, JR.,

Appellant,

vs. Case No. 89,385

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
Assistant Public Defender
FLORIDA BAR NUMBER 0350141

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT CERTIFYING TYPE FONT

This brief is reproduced in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE

Appellant will rely upon his statement of the case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon his statement of the facts as presented in his initial brief.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ABUSED HIS DISCRETION BY NOT PERMITTING INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO HAD BEEN EXPOSED TO PRETRIAL PUBLICITY CONTAINING HIGHLY PREJUDICIAL AND INADMISSIBLE INFORMATION ABOUT OTHER HOMICIDES ALLEGEDLY COMMITTED BY APPELLANT AS WELL AS PRIOR DEATH SENTENCES IMPOSED IN THIS CASE AND OTHERS.

Appellant agrees with the general rule of law that denial of individual voir dire will not cause reversal absent a showing of juror partiality or an abuse of the trial court's discretion. Brief of Appellee, page 5; San Martin v. State, 705 So. 2d 1337 (Fla. 1997). In Davis v. State, 461 So. 2d 67 (Fla. 1984), this Court wrote:

> Media coverage and publicity are only to be expected when murder is committed. The critical question to be resolved, however, is not whether the prospective jurors possessed any knowledge of the case, but, rather, whether the knowledge they possessed created prejudice against [the defendant].

461 So. 2d at 69. Voir dire must be sufficient for the defendant to be able to determine whether prospective jurors harbor prejudice because of what they have learned about the case from the media.

Accordingly, when the pretrial publicity consists of factual reporting about the incident and the items reported will be part of the evidence presented to the jury, there will be no abuse of discretion if the trial judge denies individual voir dire.

Conversely, where there is extensive prejudicial publicity of facts and opinions which will not be in evidence, juror impartiality cannot be determined without a more searching examination of the prospective jurors. The Eleventh Circuit describes its review of the trial judge's discretion as determining "'whether the procedure used for testing juror impartiality created "a reasonable assurance that prejudice of the jurors would be discovered if present"'". Cummings v. Dugger, 862 F. 2d 1504, 1507 (11th Cir.), cert. den., 490 U.S. 1111 (1989), quoting from United States v. Tegzes, 715 F. 2d 505, 507 (11th Cir. 1983).

In her brief, Appellee cites a number of decisions from this Court, but none approving a denial of individual voir dire where there was the type of prejudicial publicity present in the case at bar. She cites Cummings, supra (at page 8) for the proposition that individual voir dire is not always constitutionally mandated, but does not acknowledge the portion of the Cummings opinion where the court wrote:

> "in situations of potential prejudice, the jurors must be questioned individually about whether they have been exposed to pretrial publicity and to what degree it has affected their decisionmaking ability".

862 F. 2d at 1508, quoting from Jordan v. Lippman, 763 F. 2d 1265, 1281 (11th Cir. 1985). In particular, it was noted in Cummings that the defendant's constitutional rights to an impartial jury and due process of law are not protected by asking the prospective jurors for a show of hands if their ability to make an impartial decision had been impaired by prejudicial publicity.

See, United States v. Davis, 583 F. 2d 190 (5th Cir. 1978).

The procedure used at bar was scarcely better than this. The judge reviewed the juror questionnaires and excused those who stated that exposure to publicity rendered them unable to be impartial (V, T44, 46, VI, T225-6). The voir dire examination was limited to asking the panels of prospective jurors whether they had formed an opinion concerning Appellant's guilt or innocence that could not be set aside (VI, T155-6, VII, T308). Defense counsel argued that denying him permission to ascertain what articles the jurors had read and having to "take their word" for their ability to be impartial denied Appellant his constitutional rights under the Sixth and Fourteenth Amendments, United States Constitution and the corresponding provisions of Art. I, sections 9 and 16, Florida Constitution (IX, T476-8).

Appellee's brief relies on other case authorities which do not really support her position. For instance, Holsworth v. State, 522 So. 2d 348 (Fla. 1988) is cited for the proposition that publicity about a defendant's confession does not necessarily require a change of venue. Brief of Appellee, page 10. However, Appellee does not note the portion of the Holsworth opinion where this Court found no prejudice because all of the prospective jurors who had been exposed to press coverage were excused for cause. 522 So. 2d at 351. Similarly, Jordan v. State, 694 So. 2d 708 (Fla. 1997) and Pietri v. State, 644 So. 2d 1347 (Fla. 1994) support the notion that pretrial publicity alone does not create a presumption of juror impartiality. However, in

contrast to the case at bar, there was no showing in Jordan and Pietri of any media coverage of evidence which would be inadmissible at trial.

An analogy should be drawn between the duty of a trial judge to allow questioning of jurors when there is a showing of prejudicial media coverage during the course of a trial and how inquiry must be permitted when prejudicial publicity is released, as in the case at bar, on the eve of trial. In Cappadona v. State, 495 So. 2d 1207 (Fla. 4th DCA 1986), three jurors admitted exposure to a newspaper article reporting that the defendant had been previously convicted for the murder for which he was on trial and detailing some of the evidence. Although the jurors stated that they could still render an impartial verdict, the Fourth District reversed the conviction, calling the influence of the newspaper article "an intolerable dilution of the presumption of innocence". 495 So. 2d at 1208. Likewise, in Weber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987), a juror learned from extrinsic sources that the defendant had been previously convicted but won his appeal on "a technicality". The court, in reversing, agreed with decisions from other courts finding that "information that the defendant has been previously convicted of the crime for which he is being tried almost stands alone in its capacity to prejudice". 501 So. 2d at 1383.

Because the newspaper articles at bar featured Bolin's prior convictions and death sentences (not only in this case but in two others as well), the trial judge abused his discretion by pre-

venting individual questioning of jurors Ringuette, Spack, Copeland, Hill and Wade. Although Appellee faults Appellant for failing "to establish that any of the challenged jurors should have been dismissed for cause or that they were not qualified to serve as jurors" (Brief of Appellee, page 7) or that they "had even been exposed to truly prejudicial information" (Brief of Appellee, page 8-9), how could Appellant possibly do this under the trial court's restriction of voir dire without contaminating the entire panel? Again making a comparison with the situation where prejudicial publicity comes out after a jury has been selected, the court in Robinson v. State, 438 So. 2d 8 (Fla. 5th DCA 1983) held that it was error for the trial court to refuse to inquire whether any of the jurors had been exposed to and prejudiced by the articles.

As in Boggs v. State, 667 So. 2d 765 (Fla. 1996), the timing and extremely prejudicial nature of the newspaper publicity made it imperative that prospective jurors who admitted exposure to publicity be questioned individually. A ritual assurance by the prospective juror on a questionnaire that he or she could remain impartial is woefully inadequate under these circumstances.

ISSUE II

APPELLANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR REPEATEDLY INTRODUCED PRIOR STATEMENTS BY PHILIP BOLIN. PURPORTEDLY INTENDED TO IMPEACH THE WITNESS, THE PRIOR STATEMENTS (PRIMARILY FROM THE STATE ATTORNEY'S INVESTIGATION) WERE USED AND ARGUED AS SUBSTANTIVE EVIDENCE TO PROVE APPELLANT'S GUILT.

In her brief, Appellee first argues that Appellant's objection at trial was inadequate to preserve this claim for appellate review. Brief of Appellee, page 17-8. However, the case most germane to Appellee's argument, Farinas v. State, 569 So. 2d 425 (Fla. 1990) is readily distinguishable because counsel in Farinas made absolutely no objection to the improper impeachment. At bar, defense counsel's objections could have been more precise; nonetheless, the trial judge was certainly aware of Appellant's multiple objections to the prosecutor's procedure in examining Philip Bolin. The purpose of the contemporaneous objection rule is not to establish a pitfall for the unwary; rather, it is to simply ensure that the trial judge has adequate opportunity to rule on evidentiary points and to avoid error. Since the trial court at bar declined ample opportunities to sustain Appellant's objections to improper leading questions, improper foundation for impeachment, and characterization of Philip Bolin's prior statements as "truthful" (see Initial Brief, page 81-2), the policy reasons for the contemporaneous objection rule were fulfilled and there is no waiver of appellate review.

Secondly, Appellee contends that the procedure employed to introduce Philip Bolin's prior statements was appropriate. Contrary to her assertion (Brief of Appellee, page 20), Appellant does not fault the trial court for declaring Philip Bolin a court witness because his veracity was highly dubious. However, making a witness into a court witness does not mean that prior inconsistent statements can be admitted as substantive evidence. Dudley v. State, 545 So. 2d 857 (Fla. 1989); Ellis v. State, 622 So. 2d 991 (Fla. 1993). This includes statements given by the witness at a discovery deposition taken pursuant to Fla. R. Crim. P. 3.220. State v. Green, 667 So. 2d 756 (Fla. 1995).

Finally, Appellee asserts that the prosecutor's lengthy recounting of statements allegedly made by Appellant to Philip Bolin (Brief of Appellee, page 23) was "proper examination of a court witness by the use of leading questions". Brief of Appellee, page 23. This ignores the difference between asking leading questions and putting words into a witness' mouth. The prosecutor was simply testifying himself about statements of Appellant that he had not heard and asking Philip Bolin to agree with his suggested scenario.

Conspicuously absent from Appellee's brief is any explanation or justification for the prosecutor's repeated vouching for the credibility of Philip Bolin's prior statements. See, Appellant's Initial Brief, page 55-6. Indeed, a recent decision of the Fourth District, Freeman v. State, 23 Fla. L. Weekly D1950 (Fla. 4th DCA August 21, 1998) found fundamental error where the

prosecutor bolstered the credibility of State witnesses during his closing argument. See also, Pacifico v. State, 642 So. 2d 1178, 1183-4 (Fla. 1st DCA 1994); State v. Ramos, 579 So. 2d 360, 362 (Fla. 4th DCA 1991).

Appellee does acknowledge that Philip Bolin "testified extensively", filling "almost 200 pages" of trial transcript. Brief of Appellee, page 24. Given the admitted importance of Philip Bolin as a witness, it seems totally incongruous for Appellee to also assert that any error in admission of his prior inconsistent statements as substantive evidence was harmless.

ISSUE III

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR INTENTIONALLY INFORMED THE JURY THAT THERE HAD BEEN A PRIOR TRIAL IN THIS CASE.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING DETECTIVE KLING TO TESTIFY ABOUT DETAILS OF THE HOMICIDE WHICH WERE ALLEGEDLY NOT REPORTED TO THE MEDIA BECAUSE THE TESTIMONY WAS NOT ADMISSIBLE UNDER THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE AND ITS TRANSPARENT PURPOSE WAS SIMPLY TO BOLSTER PHILIP BOLIN'S CREDIBILITY.

Although Appellee asserts that Detective Kling was testify-

ing to a fact within his personal knowledge and that it "did not contain any opinion concerning Philip's credibility" (Brief of Appellee, page 40), the fact remains that it was improper evidence. The newspaper articles written as coverage of this homicide would clearly be irrelevant and inadmissible hearsay if a party tried to introduce them into evidence. What was not written in these news reports is just as irrelevant and inadmissible as what was.

The prosecutor's contention that facts not contained in the newspaper coverage was relevant to rebut any future assertion by defense counsel that Philip learned details about the homicide by reading the newspaper need not be considered by this Court because this theoretical defense argument was never presented at trial.[1] It is sometimes possible that otherwise inadmissible evidence will become admissible if the defense opens the door. For instance, the State cannot usually introduce evidence that a defendant refused to take a polygraph test. However, in Williams v. State, 238 So. 2d 137 (Fla. 1st DCA), cert. den., 241 So. 2d 397 (Fla. 1970), the State's crossexamination on this subject was held permissible because the defendant had testified that he offered to take a polygraph. Needless to say, the Williams result does not give future prosecutors a license to inquire about polygraphs based upon speculation that the defense might later attempt to make an issue about a polygraph.

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[1] Appellee agrees that "Philip Bolin's testimony was not challenged during the trial as having been manufactured through the use of news reports". Brief of Appellee, page 40.

Another good analogy to the situation at bar is the case of Doyle v. Ohio, 426 U.S. 610 (1976). Doyle stands for the proposition that the State cannot introduce the defendant's silence in the face of Miranda warnings as impeachment to his testimony at trial. However, if the defendant makes a post-Miranda statement that is inconsistent with his trial testimony, there is no bar to using the statement as impeachment. Anderson v. Charles, 447 U.S. 404 (1980).

Contrary to Appellee's assertion, the admission of Detective Kling's opinion that Philip Bolin knew facts that "only an eyewitness would know" cannot be found harmless. Since Philip Bolin's testimony (and prior statements) provided the bulk of the State's evidence against Appellant, Kling's statement improperly bolstering Philip Bolin's doubtful credibility cannot be deemed harmless.

ISSUE V

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

Although Appellee's brief refers to the DNA evidence as a "match" (pages 42, 49), the State's own witness, Dr. Robin Cotton testified that a five out of six band correlation belongs in the category of "partial match", rather than "match" (XVI, T1312). Appellee quotes the testimony of Dr. Cotton with regard to population frequency:

> you would see this group of five bands in about one in every eighteen hundred or one thousand eight hundred people.

Brief of Appellee, page 51. However, Appellee fails to justify why the prosecutor argued to the jury, "We're talking about one out of ten thousand eight hundred" (XX, T1695) except to quote the aphorism "wide latitude is permitted in arguing to the jury". Brief of Appellee, page 50.

In fact, there is no latitude for misstating mathematical and scientific evidence. As the California court stated in People v. Kelly, 17 Cal. 3d 24, 549 P. 2d 1240 at 1245, 130 Cal. Rptr. 144 (1976):

> Lay jurors tend to give considerable weight to "scientific" evidence when presented by "experts" with impressive credentials.

For this reason, it is likely that Bolin's jury considered the misstated probability statistics when arriving at their verdict. Accordingly, the error cannot be harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Sullivan v. Louisiana, 508 U.S. 275 (1993).

ISSUE VI

REVERSIBLE ERROR WAS COMMITTED WHEN APPELLANT WAS NOT PERMITTED TO CONSULT WITH AN INTEGRAL PART OF THE DEFENSE COUNSEL TEAM DURING A TRIAL RECESS.

Appellee argues that this issue is procedurally barred because defense counsel did not object until after the recess was over. Brief of Appellee, page 62-3. However, defense counsel

could not have anticipated that the bailiff would arbitrarily decide to bar the defense investigator, Ms. Martinez, from consulting with Appellant and the defense team during the recess. Therefore, the objection was timely. Clearly, the court could have easily extended the recess time if he were inclined to allow the entire defense team to consult before beginning crossexamination of Philip Bolin.

Appellee also faults Appellant for failing to demonstrate prejudice from the court's ruling. This would be impossible because we simply cannot tell for certain whether Ms. Martinez's input would have produced a more effective crossexamination of Philip Bolin. What is certain is that Ms. Martinez was directly involved with Philip Bolin's recantation of his prior testimony and therefore the person most able to suggest a rebuttal to his claim at trial that the recantation was untrue.

Indeed, Appellee suggests that because "Philip Bolin claimed [she] had coerced him into offering perjured testimony", the court's ruling denying her participation in the defense preparation for crossexamination was proper. Brief of Appellee, page 65. To the contrary, the charges made by Philip only highlight the Due Process violation committed by depriving the defense of a reasonable opportunity to attempt, with the help of Ms. Martinez, to discredit Philip's claims on crossexamination.

ISSUE VII

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

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S REQUEST TO HAVE A PET SCAN PERFORMED ON APPELLANT BEFORE THE COMMENCEMENT OF THE PENALTY TRIAL.

Appellant will rely upon his argument as presented in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 24th day of September, 1998.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 0350141
P. O. Box 9000 - Drawer PD
Bartow, FL 33831