IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN, JR., :

Appellant, :

vs. : Case No. SC02-37

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

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

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 JUDGE ERRED BY DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WOULD REQUIRE APPELLANT TO PROVE HIS INNOCENCE.

Appellee argues that Bolin waived this issue because he personally accepted the jury that was selected. Brief of Appellee, page 18, 27. The record does not show a waiver, but rather the following colloquy between the trial judge and Appellant:

> THE COURT: So we have a panel. Right? Now we're going to question Mr. Bolin that he's participated in jury selection, which he obviously has. But he needs to signify on the record that he's participated, he has agreed with counsel in the panel chosen; is that correct, Mr. Bolin?
>
> THE DEFENDANT: Yeah. I have participated.
>
> THE COURT: Okay. Well, he's picked a panel with your knowledge and agreement. You know who's on your case, correct?
>
> THE DEFENDANT: Right.
>
> THE COURT: You've agreed to those folks?

THE DEFENDANT: Yes.

THE COURT: Okay. Appreciate that.

(XII, T460-1).

Clearly, the reason for the trial court's questioning of Bolin was to make certain that defense counsel had exercised challenges to prospective jurors after consultation with his client. In Coney v. State, 653 So. 2d 1009 (Fla. 1995), this Court recognized a defendant's right to be present when juror challenges are exercised. Subsequent cases have clarified that the defendant need not be present at the bench when juror challenges are exercised. Gibson v. State, 661 So. 2d 288 (Fla. 1995); Lee v. State, 713 So. 2d 1003 (Fla. 1998). However, if counsel exercised strikes contrary to the defendant's expressed desire, an issue could be raised in postconviction proceedings. See, Lee, supra (concurring opinion of J. Pariente).

At bar, the trial judge's inquiry was intended to foreclose any later claim that defense counsel had chosen different jurors than Appellant wanted. It was not intended, nor does it operate as a waiver of the court's ruling in denying Appellant's challenges for cause. Any

doubt must be resolved by the fact that before the jury was sworn, defense counsel did renew his request for extra peremptory strikes because cause challenges had been disallowed (XIII, T482, 488). The issue was properly preserved. Cf., Williams v. State, 619 So. 2d 487 (Fla. 1st DCA 1993).

Turning to the merits, Appellee doesn't really contest Appellant's argument that prospective juror Almas should have been excused for cause. Defense counsel's questioning of the prospective jurors regarding whether the jurors would require Bolin to testify is quoted in Appellee's brief at pages 24-5. However, Appellee draws the unsupported inference from the exchange that "only prospective jurors Pruitt and Bilby affirmatively indicated they would require Bolin to testify". Brief of Appellee at page 25.

A fair reading of the record shows that when defense counsel asked whether he would be required to put Bolin on the stand, prospective jurors Glass, Gale, Straquadine and McMichael raised their hands (XI, T292; Brief of Appellee, page 25). Prospective juror Pruitt then stated that she didn't understand the question (XI,

T292; Brief of Appellee, page 25). After defense counsel repeated the question, prospective juror Pruitt answered affirmatively and prospective juror Bilby nodded her head (XI, T292; Brief of Appellee, page 25). When defense counsel asked, "Anybody else?", there was no reason for prospective jurors Glass, Gale, Straquadine and McMichael to raise their hands again because they had already answered the question (XI, T292; Brief of Appellee, page 25). The record does not support Appellee's conclusion that prospective jurors Glass, Gale, et. al. changed their minds once the question was repeated.

Appellee further asserts that "defense counsel did not dispute it when the court inquired 'Is there any dispute that Glass said he could follow the law?'" (XI, TT327; Brief of Appellee page 25). The record shows that the court's question came in the middle of the prosecutor's argument against granting the challenge for cause (XI, T327-8). When defense counsel argued for granting the cause challenge, he summarized:

> Therefore, the last statement we have from this juror is that he expects me to put on a case. That's not the law.

> Even though he says he can follow the law if you told him what the law was, he gave the wrong answer. He said, I'd still want you to put on the case after Your Honor said I don't have to.
>
> So I think those actions speak louder than the words. Yeah, I can follow the law, but when given a specific instance, he failed.

(XI, T329).

The record supports defense counsel's position. The trial judge explained to the prospective jurors at the commencement of proceedings that "[t]he defendant has no burden and needs to prove nothing" (X, T16). The judge asked the prospective jurors, "Do you each understand that concept and agree to abide by it?" (X, T16). All of the prospective jurors agreed that they would (X, T16).

This rote assurance cannot override the later indications by prospective jurors Glass and Gale that they would "require [defense counsel] to prove his innocence" (XI, T290-1; Brief of Appellee, page 24) and "require [defense counsel] to put Mr. Bolin on the witness stand" (XI, T292; Brief of Appellee, page 25). The trial judge's finding that "my present sense impression is that these people can follow the law, and even though

they initially gave answers which might cause doubt, the doubt's been erased in the final analysis" (XI, T334) was unreasonable and constitutes an abuse of discretion. The record, not "my present sense impression", must support the trial court's ruling. As this Court has recognized, "the presumption of innocence is defeated if 'a juror is taken upon a trial whose mind is in such condition that the accused must produce evidence of his innocence to avoid a conviction'". Overton v. State, 801 So. 2d 877, 891 (Fla. 2001), quoting from Singer v. State, 109 So. 2d 7, 24 (Fla. 1959) and Powell v. State, 131 Fla. 254, 175 So. 213, 216 (1937).

Finally, Appellee argues that any error in denying Appellant's challenges for cause is harmless because of the two jurors he would have struck if allowed additional peremptories, one was replaced (Juror Cox); and the other (Bradley) was specifically accepted when the court later considered a request to strike her. Brief of Appellee, pages 22-3. In the first place, Appellee's argument wholly ignores the fact that one of the challenged jurors, Herbert Gale, actually sat on the jury that convicted Bolin (XII, T464; XIX, T1660-1). When a

juror who should have been excused for cause actually sits on an accused's jury, reversal is mandated under the Sixth and Fourteenth Amendments, United States Constitution. United States v. Martinez-Salazar, 528 U.S. 304 (2000); Ross v. Oklahoma, 487 U.S. 81 (1988).

Secondly, the situation at bar is not comparable to that in Overton v. State, 801 So. 2d 877 (Fla. 2001) where the trial judge allowed an additional peremptory strike. At bar, the trial judge did not allow a single additional peremptory strike when Appellant made his request. The Overton court held that the defendant could only prevail on appeal if two defense cause challenges had been wrongfully denied because the extra peremptory nullified one of the erroneous denials. But Appellant need only show that he exhausted peremptories, requested an additional one and identified a juror that he would have excused had an additional peremptory been granted. Trotter v. State, 576 So. 2d 691 (Fla. 1990). Consequently, Bolin should be granted a new trial if any one of his three cause challenges (Almas, Glass or Gale) was wrongfully denied.

ISSUE II

THE COURT ERRED BY REPLACING JUROR COX WITH AN ALTERNATE JUROR WITHOUT A SUFFICIENT SHOWING THAT JUROR COX WOULD BE UNABLE TO CONTINUE SERVICE.

Appellant agrees with Appellee that the appropriate standard of review for the trial judge's replacement of a seated juror with an alternate is abuse of discretion. However, in order for a judge to exercise discretion properly, the ruling must be based upon facts rather than speculation.

At bar, the only evidence that Juror Cox had to be replaced by an alternate for medical reasons came from the conclusions drawn by a judicial assistant and the jury manager based upon their telephone conversations with Juror Cox. Juror Cox did not say whether or not he would be able to resume jury service in the afternoon (XVI, T991, 992). He was suffering from an asthmatic or emphysemic attack and was going to see his doctor or the emergency room at the time that the court personnel spoke to him (XVI, T990, 992). It was only the jury manager's "present impression" that supported any find-

ing that Juror Cox would not be able to return to jury service that day (XVI, T993).

This "present impression" was an insufficient basis for sound exercise of judicial discretion. Neither should Appellee's assertion that "[t]he court offered and appellant apparently declined the invitation to check further into the situation with Cox's doctor or hospital officials" (Brief of Appellee, page 36) be given status as a waiver. Clearly, any contact between counsel and medical personnel might be improper and would not be productive; such an inquiry should have been taken by the judge or court staff alone. Cf., Brown v. State, 538 So. 2d 833 (Fla. 1989).

Finally, the question of whether a short delay in the trial would prejudice the State by making witnesses unavailable must be considered. The trial judge found:

> my understanding was this is not going to be a half a day case today, it's going to be a potential breaking early, whatever that means. So it's not like a minor inconvenience. There's witnesses that can't be relocated easily, so we're going to have to impanel another alternate.

(XVI, T996). Appellee argues that two expert witnesses

would be unavailable if the trial was continued over the weekend and that two others would have to be flown back and forth at state expense. Brief of Appellee, page 36-7. While the unavailability of the experts would be prejudicial, if the trial recommenced in the afternoon, both could certainly have testified. The additional expense the State might incur if all the scheduled witnesses could not testify is not a factor which can outweigh the defendant's right to be tried by the jury he selected.

In short, the judge's decision to replace juror Cox with an alternate juror was premature. He should at least have ascertained whether juror Cox would be medically able to resume jury service in the afternoon. Juror Cox should have been asked whether he wanted to resume jury service in the afternoon if medically fit or whether he didn't believe that he could give sufficient attention to the proceedings. Because the trial judge failed to take these steps, he abused his discretion and Bolin should be granted a new trial.

ISSUE III

THE JUDGE ERRED IN ALLOWING IMPROPER EXPERT TESTIMONY ABOUT DNA EVIDENCE ON THE GROUND THAT A PRIOR RULING WAS LAW OF THE CASE.

Appellee argues that Bolin's claim is procedurally barred and that "[t]here was no error in Walsh's having used the term 'match' since he was referring to the bands on the autorad". Brief of Appellee, page 42. Neither of these two assertions is supportable.

With regard to any procedural bar, it is evident that Appellant specifically objected to allowing witness David Walsh to give an opinion about whether there was a DNA "match":

> Q. In your opinion was there a match of the bands in the semen sample as compared to the bands in Oscar Ray Bolin's blood?
>
> MR. SWISHER (defense counsel): Your Honor, I object and ask to approach the bench.
>
> * * *
>
> According to the National Research Council that's an improper question. You can't say a match....

(XVI, T1162-3). Therefore, Appellant did make a contemporaneous objection to the expert opinion coming into

evidence and the basis of his objection. The trial court's ruling is preserved for appellate review.

What is evident from the prosecutor's argument to the trial judge on this issue is that he agreed that the National Research Council considered this to be an improper opinion (XVI, T1163-4).[1] Yet he persisted and convinced the trial court to allow the jury to be misled into thinking that the laboratory results did establish a "match". The jury heard:

> Q. Sir, I just want to qualify my last question by asking within a reasonable degree of certainty in your profession was there a match between the two?
>
> A. Yes, there was.
>
> Q. In your opinion did it come from the same source?
>
> A. In my opinion it did come from the same source.

(XVI, T1165-6).

Although Appellee points out that the jury also heard permissible expert testimony regarding the significance of the DNA testing, there is no way for this

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[1]Where is there a case that says it's an improper question, Judge? That's not a case, Judge. That's a Research Council opinion. (XVI, T1164).

Court to determine how the jury resolved the different expert opinions. They may have credited Walsh more than the other witnesses. Without his improper "certainty" in his profession that Bolin's DNA and the sample found on Mathews' pants was a "match" and "came from the same source", the jury may have evaluated the other expert opinions and concluded that there was room for reasonable doubt.

Accordingly, the improper scientific opinion of Walsh cannot be found to be harmless error because it may have affected the jury's verdict. Sullivan v. Louisiana, 508 U.S. 275 (1993); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As in Murray v. State, 838 So. 2d 1073 (Fla. 2002), this Court should reverse Bolin's conviction and sentence.

ISSUE IV

APPELLANT MAY BE ENTITLED TO A NEW TRIAL BECAUSE THERE IS NO RECORD THAT THE PROSPECTIVE JURORS WERE SWORN FOR VOIR DIRE.

Appellant does not dispute Appellee's assertion that

fundamental error cannot be found based upon the record before this Court at this time. Appellant also agrees that he did not make a contemporaneous objection at trial to lack of compliance with Fla. R. Crim. P. 3.300(a).

However, unlike Gonsalves v. State, 830 So. 2d 265 (Fla. 2d DCA 2002), the State did not supplement the record at bar to show compliance with Rule 3.300(a). Therefore, Appellant continues to urge this Court to either order the State to supplement the record or else to remand this case to the trial court for an evidentiary hearing to determine whether the jury venire was sworn in conformance with Rule 3.300(a).

ISSUE V

THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S WAIVER OF A PENALTY PHASE JURY RECOMMENDATION AS TO SENTENCE WITHOUT A SUFFICIENT INQUIRY INTO WHETHER APPELLANT UNDERSTOOD ALL OF THE RIGHTS THAT HE WAS RELINQUISHING.

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

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _ ___ day of April, 2003.

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