IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

v. CASE NO. SC08-1963
L.T. No. 91-521 CFAWS

STATE OF FLORIDA,

Appellee.
_______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 15

ARGUMENT 16

ISSUE I 16

WHETHER TRIAL COUNSEL WAS INEFFECTIVIE FOR FAILING TO OBJECT TO DANNY FERNS' TESTIMONY THAT HE OBSERVED BLOOD ON THE GRASS? (Restated by Appellee)

ISSUE II 27

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL APPELLANT'S FATHER AS A WITNESS TO DISPUTE THE TESTIMONY OF DANNY FERNS? (Restated by Appellee)

CONCLUSION 33

CERTIFICATE OF SERVICE 34

CERTIFICATE OF FONT COMPLIANCE 34

TABLE OF AUTHORITIES

Cases

Arbelaez v. State,
898 So. 2d 25 (Fla. 2005) 29

Blanco v. State,
507 So. 2d 1377 (Fla. 1987) 31

Blanco v. State,
702 So. 2d 1250 (Fla. 1997) 29

Bolin v. State,
531 U.S. 859 (2000) 6

Bolin v. State,
650 So. 2d 19 (Fla. 1995) 1

Bolin v. State,
736 So. 2d 1160 (Fla. 1999) 1

Bolin v. State,
869 So. 2d. 1196 (Fla. 2004) .... passim

Chandler v. State,
848 So. 2d 1031 (Fla. 2003) 24

Chandler v. United States,
218 F.3d 1305 (11th Cir. 2000) 17

Cherry v. State,
659 So. 2d 1069 (Fla. 1995) 21

Davis v. State,
586 So. 2d 1038 (Fla. 1991) 24

Evans v. State,
995 So. 2d 933 (Fla. 2008) 30

Fino v. Nodine,
646 So. 2d 746 (Fla. 4th DCA 1994) 24

Gardner v. State,
480 So. 2d 91 (Fla. 1985) 24

Henry v. State,
948 So. 2d 609 (Fla. 2006) 23

Kimmelman v. Morrison,
477 U.S. 365 (1986) 17

King v. State,
390 So. 2d 315 (Fla. 1980) 24

Lamarca v. State,
931 So. 2d 838 (Fla. 2006) 30

Marquard v. State,
850 So. 2d 417 (Fla. 2002) 30

Melendez v. State,
718 So. 2d 746 (Fla. 1998) 29

Moody v. State,
440 So. 2d 989 (Fla. 1982) 24

Occhicone v. State,
768 So. 2d 1037 (Fla. 2000) 23, 29, 30

Porter v. State,
788 So. 2d 917 (Fla. 2001) 29

Preston v. State,
970 So. 2d 789 (Fla. 2007) 17

Rivera v. Dugger,
629 So. 2d 105 (Fla. 1993) 21

Rose v. State,
675 So. 2d 567 (Fla. 1996) 17

Rose v. State,
774 So. 2d 629 (Fla. 2000) 24

Rutherford v. State,
727 So. 2d 216 (Fla. 1998) 20

Stephens v. State,
748 So. 2d 1028 (Fla. 1999) 16, 27

Strickland v. Washington,
466 U.S. 668 (1984) .... passim

Thorp v. State,
777 So. 2d 385 (Fla. 2000) 24

Valle v. State,
705 So. 2d 1331 (Fla. 1997) 17

STATEMENT OF THE CASE AND FACTS

Oscar Ray Bolin, Jr. was convicted three times for the December 1986 murder of Teri Lynn Matthews. Each time Bolin was sentenced to death. Bolin v. State, 650 So. 2d 19 (Fla. 1995); Bolin v. State, 736 So. 2d 1160 (Fla. 1999); Bolin v. State, 869 So. 2d. 1196 (Fla. 2004). After his second retrial in 2001, the trial court found three aggravating factors: (1) that Bolin was previously found guilty of a felony involving the use or threat of violence to the person, i.e., sexual battery, kidnapping and felonious assault on a guard in an escape attempt; (2) the capital felony was committed while Bolin was engaged in the commission or attempt to commit a kidnapping and/or attempted sexual battery; and (3) the capital felony was especially heinous, atrocious or cruel (R. 4/717-723).[1] Each aggravator was given "great weight" (R. 4/717-23). The court found and gave little weight to the statutory mitigator that the capacity of Bolin to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (R. 4/726). The court also found twelve non-statutory

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[1] The record on direct appeal will be cited throughout this brief as "R" with the appropriate volume and page number (R. V#/page #); the post-conviction record will be cited as "PCR" with the appropriate volume and page number (PCR V#/page#), one supplemental post-conviction record exists and will be cited as "SPCR".

mitigators to which it assigned little, slight or some weight (R. 4/726-32).

Appellant appealed his conviction and sentence to this Court, raising five issues:

> ISSUE I: THE JUDGE ERRED BY DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WOULD REQUIRE APPELLANT TO PROVE HIS INNOCENCE.
>
> 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.
>
> 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.
>
> ISSUE IV: APPELLANT MAY BE ENTITLED TO A NEW TRIAL BECAUSE THERE IS NO RECORD THAT THE PROSPECTIVE JURORS WERE SWORN FOR VOIR DIRE.
>
> 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.

Initial Brief of Appellant, Florida Supreme Court Case No. SC02-37.

This Court affirmed Appellant's conviction and sentence on direct appeal. Bolin v. State, 869 So. 2d 1196 (Fla. 2004). The facts, as found by this Court, are:

> Evidence presented at Bolin's 2001 trial included the following. Mathews' [sic] body was discovered on December 5, 1986, near the side of a road in rural Pasco County. The body was found wrapped in a sheet imprinted with a St. Joseph's Hospital logo. The body had multiple head injuries, was shoeless, and was wet,

although it had not rained recently. The victim’s car keys were found close to the body. Evidence collected from the scene included nylon pantyhose and a pair of white pants. There was a single set of truck tire tracks leading to the body. The victim’s car was found the next day by Mathews’ [sic] boyfriend, Gary McClelland, who was worried about her disappearance and attempted to trace her steps after she left work the previous day. The victim’s red Honda was found parked at the Land O’ Lakes Post Office, with its headlights still on. The victim's mail was found scattered on the ground, and her purse was found undisturbed on the seat inside her car.

Bolin’s half-brother, Phillip, testified that he was awakened by Bolin on the night of December 4, 1986. Bolin appeared to be nervous and told Phillip that he needed Phillip’s help. The two walked outside, and then Phillip heard a moaning sound, which he thought could have been a wounded dog. Instead, he saw a sheet-wrapped body, and Bolin told him that the girl was shot near the Land O’ Lakes Post Office. Bolin then walked over and straddled the body with his feet, raised a wooden stick with a metal end, and hit the body several times. Phillip said that he turned away because he was scared to watch, but compared the sound to hitting a pillow with a stick. Bolin next turned on a water hose and sprayed the body. Bolin demanded that Phillip help him load the body onto the back of a black Ford tow truck, and Phillip helped by picking up the body by the ankles. Phillip testified that he noticed there were no shoes on the body and that the girl was wearing pantyhose. Phillip refused Bolin’s offer of money to go with him to dispose of the body, so Bolin went alone and returned twenty to thirty minutes later. He continued talking to Phillip about the girl, stating that she had been shot in a drug deal.

At school the next day, Phillip talked with his friend, Danny Ferns, about what happened the night before and took Danny to where the body had been. Danny testified at trial, to corroborate Phillip’s account of the murder, that there were blood stains on the ground at the site and that the grass in the area was disturbed. The State presented other corroborating

evidence, which included the testimony of Rosie Kahles Neal. At the time of the murder, Neal co-owned with her now-deceased husband Kahles and Kahles, Inc., the business that employed Bolin as a tow truck driver. She testified that the truck Bolin was driving on the night of the murder was not returned that night, and she thought the truck had been stolen by Bolin because he could not be located and it was the first call he had handled by himself. Neal testified that Bolin was late coming to work the next morning, was wearing the same clothes as he had the day before, and had a foul smell. She further testified that Bolin played with and carried a knife and got excited when the story of the missing girl, Mathews, [sic] was reported on the news. Her testimony also corroborated the murder weapon, as she testified that she gave Bolin a "tire buddy" on the night of the murder. The tire buddy was a two-foot-long wooden club, which was drilled out and filled with lead.

Michelle Steen also offered corroborating testimony. Michelle Steen was married to Bolin's cousin, David Steen. In 1987, while Bolin visited their home, he volunteered that he had killed and beaten a girl in Florida and put a hose down her throat, and that Phillip had watched him do it.

The State then offered the perpetuated videotaped testimony of Cheryl Coby, Bolin's ex-wife, who had died after the first trial. She had been a severe diabetic, was hospitalized numerous times in 1986, often brought home hospital towels and sheets from St. Joseph's Hospital, and identified the sheet that had been wrapped around Mathews' [sic] body as a hospital sheet resembling the ones she brought home. Cheryl Coby had a post office box at the Land O' Lakes Post Office, and Bolin picked up her social security checks there when she was in the hospital.

The State also offered DNA testimony indicating that Bolin could have been the source of the semen found in a stain on Mathews' [sic] pants. Federal Bureau of Investigation forensic serology expert John R. Brown testified that he could not eliminate Bolin as the contributor of the semen stain but could eliminate Gary McClelland, Mathews' [sic] boyfriend, as the

> source of the stain. David Walsh, a molecular biologist, extracted DNA from the stain on the pants and found that he could exclude both the victim and McClelland as the donors of the stain on the pants. Walsh found that five of the six bands of DNA detected in the stain matched five of the six bands from Bolin's DNA. Walsh was not able to visualize one band because of the small amount of DNA remaining on the pants. Dr. Christopher Basten, an expert in population genetic frequency, testified that Bolin was 2100 times more likely to be the source of the semen than a random, unrelated person.

Bolin v. State, 869 So.2d 1196, 1198-99 (Fla. 2004).

In concluding sufficient evidence existed to support Appellant's murder conviction, this Court held:

> Upon a thorough review of the record, substantial evidence exists to support Bolin's conviction. There is substantial testimony in the record of Bolin's half-brother, Phillip, concerning Bolin's activities on the night of the murder. Both Bolin and the victim had post office boxes at the Land O' Lakes Post Office. Mathews' [sic] car was found the next morning at the post office, with its headlights still on and her mail on the ground. Bolin picked up his wife's social security check on the night of the murder from that post office. The victim's body was found wrapped in a sheet from a hospital in which Bolin's then wife, Cheryl Coby, had been hospitalized and from which Coby testified she had brought home sheets like the one wrapped around the victim's body. Bolin failed to return his employer's tow truck to the business on the night of the murder. The victim's body revealed trauma wounds to the victim's head that were consistent with the tire buddy given to Bolin, as corroborated by Phillip Bolin's eyewitness portrayal of the beating of what Phillip testified Bolin told him was a girl's body wrapped in a sheet. Phillip also corroborated that the body was shoeless but that the girl was wearing pantyhose. Bolin's semen was found on the victim's pants, as determined by DNA testing which revealed that Bolin was 2100 times more likely to be the source of the semen than a random, unrelated

> person. Based upon this evidence and the other evidence in the record, we conclude that the evidence is sufficient to support Bolin's first-degree murder conviction. Bolin, 869 So. 2d at 1204-05.

Appellant's convictions and sentences became final on October 4, 2004, when the United States Supreme Court denied certiorari from direct appeal. Bolin v. State, 531 U.S. 859 (2000).

POST-CONVICTION PROCEEDINGS

"Defendant's Initial Motion for Post-Conviction Relief" was filed October 3, 2005. The State filed a "Motion to Strike Defendant's Initial Motion for Post-Conviction Relief" as the motion did not contain a legally sufficient oath.[2] (PCR 1/110-11). The trial court entered an order denying the motion without prejudice due to the legally insufficient oath (PCR 1/112-13). Appellant again filed his initial motion for post-conviction relief with a proper oath on January 5, 2006, raising the following seven issues:

> CLAIM I: THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL WHEN DEFENSE COUNSEL FAILED TO CONTEMPORANEOUSLY AND PROPERLY OBJECT TO THE TESTIMONY OF DANNY FERNS THAT THE SUBSTANCE HE OBSERVED ON THE GROUND IN DECEMBER 1986 WAS BLOOD.

> CLAIM II: THE DEFENDANT WAS DENIED EFFECTIVE EFFECTIVE [sic] ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO INVESTIGATE AND CALL A WITNESS WHO WOULD HAVE REBUTTED THE TESTIMONY OF DANNY FERNS.

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[2] The motion contained an oath by Bolin, qualified with the language "to the best of his knowledge" (PCR 1/112).

CLAIM III: THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO IMPEACH STATE WITNESS MICHELLE STEEN THROUGH CROSS-EXAMINATION AND BY CALLING A WITNESS AS TO HER BIAS AND PREJUDICE AGAINST THE DEFENDANT.

CLAIM IV: THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO IMPEACH STATE WITNESS MICHELLE STEEN BY CALLING A WITNESS WHO WOULD HAVE TESTIFIED THAT STEEN HAD ADMITTED PREVIOUSLY THAT HER TESTIMONY THAT THE DEFENDANT HAD CONFESSED TO HER WAS FALSE.

CLAIM V: THE DEFENDANT'S WAIVER OF HIS RIGHT TO TESTIFY AT TRIAL IN HIS OWN DEFENSE WAS INVOLUNTARY DUE TO MISADVICE OF COUNSEL.

CLAIM VI: THE CONVICTION AND SENTENCE IN THIS CASE ARE ILLEGAL DUE TO THE CUMULATIVE ERRORS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I,SECTIONS 9, 11, 17, AND 20 OF THE FLORIDA CONSTITUTION.

CLAIM VII: THE DEFENDANT'S RIGHTS TO DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE FLORIDA CONSTITUTION HAVE BEEN VIOLATED WHERE THE DEFENDANT HAS BEEN FORCED TO FILE HIS MOTION FOR POST-CONVICTION RELIEF PRIOR TO RECEIVING DOCUMENTS TIMELY REQUESTED FROM THE FEDERAL BUREAU OF INVESTIGATION PURSUANT TO 5 U.S. SEC. 552, THE FREEDOM OF INFORMATION ACT.

(SPCR 1/498-543).

The State filed the "State's Response to Motion for Post-Conviction Relief" on February 6, 2006 (PCR 1/116-23). An evidentiary hearing took place on November 16, and December 22, 2006 (PCR 3/227-359, 4/399-455).

Post-conviction counsel called Rosalie Bolin,[3] Appellant's court-appointed mitigation specialist/investigator who later became his wife, trial counsel John Swisher, and Appellant's father, Oscar Ray Bolin, Sr. (PCR 3/246-50, 272, 284-85, 297; 4/408-09). No witnesses were presented by the State. Appellant waived Claims III and V and subsequently conceded he had not met his burden regarding Claims IV and VII (PCR 3/364-66). Therefore, the focus of the instant proceedings pertain to Claims I and II.[4] The crux of Appellant's two claims are (1) that trial counsel was ineffective for failing to object when State witness Danny Ferns testified at trial that he observed blood on the ground, rather than testifying that the substance "appeared" to be blood,[5] and (2) that trial counsel was ineffective for failing to call Ray Bolin at trial (PCR 3/393; SPCR 1/504-06).

John Swisher was appointed to represent Appellant in his third trial for the murder of Teri Lynn Matthews (PCR 3/284-85). Swisher was a veteran criminal defense attorney with twenty-five years of practice, and twenty capital cases (PCR 3/321-22). Swisher was Appellant's lead counsel and had Sam Williams,

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[3] Mrs. Bolin was called in an attempt to substantiate Claim IV.
[4] Claim VI is a cumulative error claim.
[5] At trial, Phillip Bolin testified he took his friend Danny Ferns to where he witnessed Bolin beating Matthews, and Ferns testified he observed blood on the ground. Bolin, 869 So. 2d at 1198.

another experienced trial attorney, assisting him (PCR 3/299,322). Swisher reviewed all available prior trial transcripts (PCR 3/319).

When questioned regarding Ferns' significance in relation to Phillip Bolin, Swisher recalled he would "confirm that he said he saw blood on the grass, I guess." (PCR 3/286). When asked whether he believed Ferns to be an important witness who would bolster the credibility of Phillip, Swisher had no opinion on the matter (PCR 3/287).

Swisher testified a lay witness could testify to matters they observed, including whether a substance appeared to be blood (PCR 3/292, 341-42, 344)). He agreed that there was a difference between someone testifying something appears to be blood and someone testifying there is no doubt it is blood (PCR 3/292). Swisher was aware of other cases in the judicial circuit were judges allowed a witness, over objection, to testify that what they saw was blood[6] (PCR 3/342). In such an instance, Swisher would then cross-examine the witness as to their knowledge something was blood (PCR 3/342). However, in this case, Swisher did not object to Ferns' characterization that the substance was blood because the evidence that there was

[6] In fact, as will be discussed infra at note 9, the trial court in Bolin's 1996 retrial overruled defense counsel's objection to Ferns' testimony he saw blood.

a hose utilized to wash off the victim conflicted with Ferns' testimony (PCR 3/342).

When asked if he agreed he should have objected to Ferns testifying blood was on the ground, Swisher answered it depends on what else followed (PCR 3/293-94). Having not read the transcript he did not know what followed the testimony or if he objected (PCR 3/294). Swisher believed that if you could minimize the testimony by the fact that Ferns was a child, and there was testimony about a water hose being utilized, that may be just as effective as objecting (PCR 3/294). While Swisher agreed he could have objected, he testified there were other ways to combat the testimony (PCR 3/295). Swisher was questioned about not objecting to Ferns' testimony:

> Q: Assuming you did not object, can you think of any tactical or strategic reason?
>
> A: If I tried to attack Danny Ferns's [sic] testimony through other ways then I would assume that's why I did it the way I did it. If I tried to attack Danny Ferns, the fact that he was young, the fact that there was a hose, the fact that water may have dissipated the blood, to destroy the testimony of Danny Ferns not only for blood, but his other testimony, I think that would be just as effective as saying objection.

(PCR 3/295).

Swisher believed as a trial attorney sometimes you let some evidence come in if you are trying to destroy the whole witness (PCR 3/296). Swisher decided to attack the credibility of Ferns

by arguing that there could still not be blood on the ground days after the murder if the victim's body was hosed off with water as Phillip Bolin had testified (PCR 3/323-24).

Prior to trial, Swisher contacted Appellant's father, Ray (PCR 3/296-97). When asked if he was aware that Ray had spray painted carnival items red on the property, Swisher said he was aware that had taken place, but pointed out that it was several days or weeks before the murder (PCR 3/300-01, 302, 347). The murder in the instant case occurred in early December and Ray would have painted sometime prior to Thanksgiving (PCR 3/325-26).[7] Swisher was also aware that Ray not only used red spray paint, but also used orange and blue (PCR 3/347). Ray had testified to using these other colors in the previous trial (PCR 3/347). No witness testified that any paint color was seen in the vicinity where Ferns testified he saw blood (PCR 3/347). When post-conviction counsel asked Swisher if he assumed that the red paint would no longer be there due to the lapse in time, Swisher answered:

> It wasn't a factor to me. I don't think the blood was there and that's what I tried to show was that the blood wasn't there. Whether it was painted or not, it didn't matter, I don't think the blood was there and that's what I tried to sell.

(PCR 3/348-49).

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[7] During the time of the murder, Ray was not in the state of Florida (PCR 3/299-300).

Swisher's decision not to call Ray as a witness was based in part on reviewing the previous trial, and making enough changes to make a different outcome (PCR 3/355). One of these changes was to argue there was no blood because the wet hose would have washed it away, and therefore Ferns' testimony could not be believed (PCR 3/355-56). Swisher testified he advanced this argument during his closing (PCR 3/356).

Regarding using Ray as a witness to explain the "red substance" on the ground, Swisher testified that it was explained to him by Bolin and his investigator, Rosalie Bolin, that Ray would not be a good witness (PCR 3/301). Rosalie, as Swisher's investigator, worked closely with Bolin, "nothing passed Mr. Bolin without going back to Rosalie Bolin and nothing went passed Rosalie Bolin without clearing it with Oscar Bolin" (PCR 3/298). Rosalie was familiar with Bolin's family, had established a rapport with them and was used for any contact with the family (PCR 3/298). Swisher, who evaluated Ray's credibility, agreed that Ray would not be a good witness "especially on an issue like that" (PCR 3/301, 303). He explained that trying to prove a case though mom, dad and wife is a "disaster" (PCR 3/302). Swisher was told Bolin's parents lived in the "holler," and it would not be a good thing to call them as witnesses (PCR 3/302). Swisher explained:

> They weren't the brightest people in the world, it's not their fault, I'm just saying they would not come across well on the witness stand on these issues. There was no independent evidence to prove that Ray painted with red paint. (PCR 3/302).

Swisher testified he chose not to use Ray to dispute Ferns' testimony, instead he used the physical evidence to dispute it (PCR 3/310). He explained as you go through a trial you make "your choices" (PCR 3/310). Swisher also cited Ray's bias as Appellant's father as a reason for not calling him as a witness (PCR 3/327). Swisher took into account that if he called Ray in the guilt phase and Ray was discredited, the jury would not believe him as a penalty phase witness (PCR 3/329, 332-33). Swisher testified he believed using a "bad" witness can change the focus to your credibility and the witnesses' credibility and that "you cannot just throw everything in" in an attempt to avoid a later ineffectiveness accusation (PCR 3/311).

Swisher could not remember if he spoke to Ray regarding hoses on the property, however, he testified he presented the testimony that hoses would have been taken by Ray with him on the carnival circuit (PCR 3/300).[8] Swisher remembered during the State's closing they made a joke of it, and he recalled how the jury laughed. Swisher commented "we probably shouldn't have

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[8] Bolin's stepmother testified that she and Ray would have taken all water hoses with them when traveling with the carnival (R. 18/1468, 1470-72).

raised it as an issue as we did, let alone through Ray Bolin" (PCR 3/300).

At the post-conviction evidentiary hearing, Appellant's father, Ray, testified that in November 1986, he worked in the carnival business and used spray paint on his property (PCR 4/408-10). He testified he used red spray paint and that when painting different items, paint would get in the grass (PCR 4/410-11). Ray said he also used yellow, blue, and orange spray paint (PCR 4/417).

Ray testified that when he left the property he would have taken any garden type hoses with him and no other hoses were on the property (PCR 4/411). Ray said there were 5 or 6 hoses on the property and he would have taken all of them with him (PCR 4/424). Ray testified he left Florida prior to Thanksgiving to go work with the carnival (PCR 4/414).

SUMMARY OF THE ARGUMENT

The trial court did not err in denying Bolin's claims of ineffective assistance of counsel. Following an evidentiary hearing, the trial court concluded that Bolin had failed to establish deficient performance where trial counsel's tactical decisions were reasonable. The trial court's factual findings are supported by competent, substantial evidence, and the legal principles were properly applied in denying relief.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVIE FOR FAILING TO OBJECT TO DANNY FERNS' TESTIMONY THAT HE OBSERVED BLOOD ON THE GRASS? (Restated by Appellee)

Bolin challenges the trial court's rejection of his claim of ineffective assistance of counsel with regard to the handling of witness Danny Ferns. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle

v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. See generally Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000); see also Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) (counsel must be afforded presumption that he performed competently). "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Preston v. State, 970 So. 2d 789, 803 (Fla. 2007) (*quoting* Whitfield v. State, 923 So. 2d 375, 384 (Fla. 2005).

Bolin's allegation that trial counsel was ineffective in failing to object to Ferns' testimony is without merit. After a hearing on this issue, the trial court held:

> Defendant claims that counsel should have objected to the improper opinion testimony from a lay witness as to whether the substance was blood. Defendant claims that had counsel objected, the evidence would have been excluded from the trial. Defendant further claims that he was prejudiced by the admission of the testimony because it corroborated the testimony of Phillip Bolin, whose credibility was otherwise at issue. Additionally, the failure to object prevented the issue from being raised on appeal.
>
> Generally, lay witnesses are not permitted to testify as to their opinions. However, section 90.701, Florida Statutes, provides an exception to that rule when:
>
> > (1) "The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness' use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
> >
> > (2) "The opinions or inferences do not require a special knowledge, skill, experience, or training."
>
> **Although there may be other ways to say it, the witness probably could not accurately convey to the jury that the substance looked like blood without using the word blood. Had Ferns simply said that he saw a red substance, it would not have conveyed the essence of what he observed. An intelligent person with some degree of experience may testify as a lay witness to what they observe. *See Jones v. State*, 440 So. 2d 570 (Fla. 1983), citing *Peacock v. State*, 160 So. 2d 541 (Fla. 1st DCA 1964). In this case, the**

witness testified that he observed blood. *See Trial Transcript, pp. 874-875.*

Defendant's objection to the testimony is partly that Ferns stated that he was sure it was blood, rather than that it appeared to be, or looked like, blood. *See November 16, 2006 Evidentiary Hearing Transcript, pp. 66-67*. Even if counsel had objected, the testimony would not have been excluded. The State or defense counsel would simply elaborate on Ferns' testimony by further establishing that he could not know to a scientific certainty that the substance was actually blood. There is little danger in this case that the jury was misled by the testimony to believe that the witness had scientifically tested the substance to determine that it was, in fact, actual human blood from the victim. The witness' testimony revealed that he was approximately 13 years old and an elementary school student at the time of the murder. *See Trial Transcript, pp. 871, 885*. Moreover, the State elaborated on Danny Ferns' testimony that he saw blood by questioning him as to whether he had ever seen blood before and whether he had any doubt that the substance appeared to be blood. *See Trial Transcript, pp. 874-875.*

Mr. Swisher testified at the evidentiary hearing that he doesn't recall whether or not he objected. *See November 16, 2006 Evidentiary Hearing Transcript, pp. 68-70*. Nor does he recall specifically why he would not have objected, but posited several tactical reasons why he might not have done so based on and depending on what other testimony followed that opinion. *See id.* During Defendant's trial, Mr. Swisher attempted to show that the victim's body was allegedly sprayed with a hose for several minutes and there was no blood visible on the ground at the time of the murder, yet Danny Ferns testified that he saw a three foot circle of blood on the ground several hours later when Phillip Bolin brought him home after school. *See Trial Transcript, pp. 524, 778-780, 823-826, 882-885; November 16, 2006 Evidentiary Hearing Transcript, pp. 97-98*.

In this case, Mr. Swisher's hypothesized tactical reasons why he may not object coincide with what

> **occurred at trial. An attorney's decisions regarding trial tactics are not subject to attack in a motion for post conviction relief. *See Buford v. State*, 492 So. 2d 355 (Fla. 1986)**. Furthermore, the testimony would not have been excluded even if counsel had objected. An objection would only result in a clarification that the witness could not be certain the substance was actually blood. Between the State's attempted clarification regarding Danny Ferns' knowledge of blood and the testimony that Ferns was a 13 year old elementary student at the time of the murder, there is sufficient clarification that the witness was testifying as to what he observed and not that he was testifying as to any scientific certainty that the substance was blood. This claim is denied accordingly.

(PCR 2/135-36, 141)(emphasis supplied).

When questioned at the hearing regarding Ferns' testimony, Swisher, a seasoned trial attorney, explained that he may have made the decision not to object to Ferns' testimony, instead opting to show that his testimony was not credible.[9] This was a strategic decision. Thus, Bolin has simply established that current counsel disagrees with trial counsel's strategic decision on this issue. This is not the standard to be considered.[10]

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[9] Although trial counsel may not have recalled his exact reasoning, he stated he reviewed the prior trial transcripts (PCR 3/319), wherein Ferns' testimony that he saw blood was *admitted over defense counsel's objection that Ferns was not qualified to give an opinion.* See Record on Appeal, Bolin v. State, FSC #89,385 (V. 12/909-11); (transcript attached to Motion to Supplement filed simultaneously with the Answer Brief of Appellee).

[10] Strickland, 466 U.S. at 689; Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute

A review of the record reveals and supports Swisher's strategy. During his opening statement to the jury, Swisher advanced his theory regarding Ferns' testimony. He told the jury that Ferns would testify he saw blood on the grass even though the body was hosed off (8/524).

Regarding Phillip Bolin's account of the events of December 4, 1986, Phillip testified he witnessed Bolin straddle Matthews' body and strike her several times with a club (R. 15/775-78). According to Phillip, after Bolin stopped beating Matthews, Bolin turned on a water hose, stood over her body and sprayed the body (R. 15/778-79).

The next day at the bus stop on the way to their elementary school, Phillip told his friend Danny Ferns what happened (R. 15/786, 809, 871). After school, Phillip and Danny returned to the property where Philip testified, on direct examination, blood was on the grass where the body would have been (R. 15/787). Upon cross-examination, Phillip testified the hose

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ineffective assistance if alternative courses of action have been considered and rejected"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial").

produced a “steady pour” for a few minutes and there was a lot of water (R. 15/825-26). Thereafter Swisher asked Phillip:

> **Q: And you still didn’t see any blood, right.**
> **A: No. No.**

(R. 15/826). (emphasis supplied).

Danny Ferns was called next to testify. At the time of his testimony, Ferns was 26 years old (R. 15/870). After testifying he saw blood on the grass, the State asked Ferns if he ever had seen blood before and if he know the color of blood (R. 15/874). Ferns testified in the affirmative to both questions. Regarding the blood, Ferns was asked if he was comfortable enough in his own mind that what he saw “appeared” to be blood, and if there was any doubt in his mind what he saw “appeared” to be blood (R. 15/874-75). Ferns answered both questions in the affirmative. At the time he saw the blood, Ferns was 13 years old (R. 15/885).

Swisher questioned Ferns regarding the amount of blood he saw. Ferns eventually stated there was “a decent amount” of blood that covered an area as big as a “three-foot circle” (R. 15/882). Further, upon cross examination, Ferns was asked if he saw “fresh blood” to which he responded in the affirmative (R. 15/883). Swisher would later refer to what Ferns saw as a “three-foot puddle of blood” (R. 15/887). Ferns was questioned regarding the hose. Ferns testified the hose came from the

mobile home and it was real close to the blood (R. 15/883-84). He described the ground where the blood was as "beat up," "stirred up" (R. 15/883). Ferns then testified that other than the blood, the grass was dry (R. 15/884).

During closing argument, Swisher asked the jury if they wanted to "buy" the "story" of Danny Ferns that blood was present in a three-foot circle. Swisher noted that there was no evidence of blood on Matthews' clothes. (R. 19/1559). He argued:

> **How about the clothes? Any blood on the clothes? If there was you would have heard about it**.

(R. 19/1559)(emphasis supplied).

Trial counsel cannot be deemed ineffective merely because post-conviction counsel disagrees with trial counsel's strategic decisions. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000); see also Henry v. State, 948 So. 2d 609, 619 (Fla. 2006) ("We have repeatedly rejected claims of ineffective assistance of counsel when the allegedly improper conduct was the result of a deliberate trial strategy."). Where, as here, trial counsel acted strategically, Bolin has failed to establish trial counsel's performance was deficient. Henry, 948 So. 2d at 619; Occhicone, 768 So 2d. at 1048.

Furthermore, where the State's questions and the witness's answers were proper, Bolin cannot establish that counsel's

failure to object "resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test." See Chandler v. State, 848 So. 2d 1031, 1046 (Fla. 2003) (where comments not error prejudice not established). "Acceptable lay witness testimony typically involves matters such as distance, time, size, weight, form and identity." Fino v. Nodine, 646 So. 2d 746, 748-49 (Fla. 4th DCA 1994). Further, as this Court has noted, a "lay witness may give opinion testimony so long as the opinion testimony does not mislead the trier of fact." Gardner v. State, 480 So. 2d 91, 93 (Fla. 1985). Lastly, this Court has noted on many occasions the identification of blood by a lay witness. Thorp v. State, 777 So. 2d 385, 390 (Fla. 2000) (defendant seen with blood on his clothes); Rose v. State, 774 So. 2d 629, 632-33 (Fla. 2000) (witnesses testified Rose had blood on his person); Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991) (witness observed victim lying in pool of blood); Moody v. State, 440 So. 2d 989, 991 (Fla. 1982) (witness saw puddle of blood on floor); King v. State, 390 So. 2d 315, 317 (Fla. 1980) (witness observed blood on defendant's pants).

As the trial court noted, the witness probably could not identify the substance without using the word "blood." Ferns had seen blood and knew the color of blood. As noted above, the

prosecutor questioned Ferns whether the substance "appeared" to be blood. The prosecutor's questions simply asked if Ferns saw what appeared to be blood. There was nothing objectionable about this and Ferns surely could be cross examined on his observations. It takes a stretch of the imagination to suggest that anyone could possibly have thought that thirteen-year-old Ferns had scientifically tested the substance and confirmed his observations.

Even if Ferns' testimony was objectionable, the result of the trial would not have been different and thus prejudice under Strickland cannot be established. Strickland, 466 U.S. at 687, 695. Assuming Ferns simply testified that Phillip Bolin took him to where Matthews' body was and the ground was disturbed and wet with a fresh, red substance, this testimony too would be significant corroboration of Phillip's testimony. Furthermore, as this Court found on direct appeal, the State offered other testimony which corroborated Phillip's account of the murder:

> The State presented other corroborating evidence, which included the testimony of Rosie Kahles Neal. At the time of the murder, Neal co-owned with her now-deceased husband Kahles and Kahles, Inc., the business that employed Bolin as a tow truck driver. She testified that the truck Bolin was driving on the night of the murder was not returned that night, and she thought the truck had been stolen by Bolin because he could not be located and it was the first call he had handled by himself. Neal testified that Bolin was late coming to work the next morning, was wearing the same clothes as he had the day before, and had a foul

> smell. She further testified that Bolin played with and carried a knife and got excited when the story of the missing girl, Mathews, [sic] was reported on the news. Her testimony also corroborated the murder weapon, as she testified that she gave Bolin a "tire buddy" on the night of the murder. The tire buddy was a two-foot-long wooden club, which was drilled out and filled with lead.
>
> Michelle Steen also offered corroborating testimony. Michelle Steen was married to Bolin's cousin, David Steen. In 1987, while Bolin visited their home, he volunteered that he had killed and beaten a girl in Florida and put a hose down her throat, and that Phillip had watched him do it.

Bolin, 869 So. 2d at 1198-99. Additionally, Phillip's description of Matthews' body wrapped in a sheet, shoeless, with pantyhose was corroborated by the fact that she was found wrapped in a sheet, shoeless, and wearing pantyhose (R. 13/551-52, 576, 618, 620; 15/774-75, 781-82).

Moreover, in finding sufficient evidence existed to support Bolin's murder conviction, this Court *did not rely upon the testimony of Danny Ferns*. Bolin, 869 So. 2d at 1204-05. Ample evidence, including Bolin's semen found on Matthews' body, supported Bolin's conviction. Accordingly, denial of this claim was proper where counsel's decision was tactical, the testimony was proper, and no prejudice can be discerned based upon these facts.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL APPELLANT'S FATHER AS A WITNESS TO DISPUTE THE TESTIMONY OF DANNY FERNS? (Restated by Appellee)

Appellant challenges the trial court's rejection of his claim of ineffective assistance of counsel in regard to his decision not to call Ray Bolin as a trial witness. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033. As previously discussed, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984).

Appellant's allegations that his attorney performed deficiently with regard to the presentation of witness Ray Bolin was refuted by the testimony at the evidentiary hearing. The trial court properly denied this claim as the record reflects that trial counsel Swisher, a seasoned trial attorney, conducted a reasonable investigation, consulted with his investigator and Appellant, and made a strategic decision regarding Ray Bolin's testimony. Specifically, Appellant claims that his father should have been called as a witness to dispute the testimony of Danny Ferns. No deficient performance or prejudice can be discerned on the facts of this case.

The trial court rejected Appellant's claim with the following findings:

> The testimony referred to in this claim is, once again, Danny Ferns' testimony that he saw blood on the ground at the scene of the murder. Defendant claims that trial counsel failed to investigate and call as a witness Oscar Ray Bolin, Senior, who was present and available to testify. Bolin Senior would have testified that he was a carnival worker, and that he sprayed painted several items used in his carnival concession in the area where Ferns saw what he believed to be blood, but was actually red spray paint. Bolin Senior would also have testified that there were no hoses remaining on the family property on Valencia Drive, as he took all hoses with him in his travels with the carnival.
>
> **Mr. Swisher testified that he spoke to Bolin Senior, but that he made a tactical decision not to call him as a witness for several reasons. First, there is the fact that Bolin Senior was out of state for the two weeks prior to the murder and any spray painting would have been done prior to his departure. *See Trial Transcript, p. 1472*. Second, there was no way to independently corroborate Bolin Senior's testimony 15 years after the murder. *See November 16, 2006 Evidentiary Hearing Transcript, pp. 75-76, 99-101*. Third, there is the perceived bias on the part of a father testifying for his son. *See Id. at 76*. Fourth, counsel did not want to risk his being discredited in the guilt phase if he needed him to testify in the penalty phase. *See Id. at 103, 106-107*. And fifth, Bolin Senior was not a good witness. *See id. at 75-77*. Not only did counsel believe so based on his own interview with Bolin Senior, but he testified that both Defendant and his wife, Rosalie Bolin, told him that Bolin Senior would not be a good witness. *See Id.***
>
> Furthermore, the information about the spray painting of carnival equipment and the removal of all hoses from the property was presented to the jury in the testimony of Gertrude Bolin, Defendant's stepmother. *See Trial Transcript, pp. 1470; November 16, 2006 Evidentiary Hearing Transcript, p. 74-76.*

> Whether the decision not to call Bolin Senior as a witness was the best tactical decision is not at issue in this proceeding. As long as an attorney has considered and rejected alternative courses of action, tactical or strategic choices do not constitute deficient conduct on the part of the attorney. *See Henry v. State*, 948 So. 2d 609 (Fla. 2006). **The decision not to call Bolin Senior was a tactical decision made by counsel, and it was made with the agreement of Defendant. Based on the foregoing, the Court finds that counsel was not deficient, and the claim is denied accordingly.**

(PCR 2/141, 137-38)(emphasis supplied).[11]

Nothing presented in post-conviction should impair this Court's confidence in the propriety and reliability of Appellant's conviction. No basis for deficient performance or prejudice can be found with regard to the representation provided. Accordingly, the trial court's resolution of this issue must be affirmed.

Trial counsel cannot be deemed ineffective merely because post-conviction counsel disagrees with trial counsel's strategic decision not to call Ray Bolin as a witness. In Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000), this Court, applying Strickland, emphasized that "strategic decisions do not constitute

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[11] Bolin refers to Swisher's testimony as "disingenuous at best", and "excuses." Initial Brief of Appellant at p. 42-43. Bolin fails to recognize this Court will not substitute its judgment for that of the trial court regarding questions of fact and on the credibility of witnesses and the weight to be given to the evidence. See Arbelaez v. State, 898 So. 2d 25, 32 (Fla. 2005); Melendez v. State, 718 So. 2d 746, 747-48 (Fla. 1998); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997); see also Porter v. State, 788 So. 2d 917, 923 (Fla. 2001) (recognizing trial court's superior vantage point in assessing credibility of witnesses and making findings of fact).

ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." The fact post-conviction counsel would have called Ray Bolin as a witness does not render trial counsel's decision not to call the witness unreasonable in hindsight. Occhicone, 768 So. 2d at 1049.

In the instant case, Swisher was told by Appellant and investigator Rosalie Bolin that Ray Bolin would not be a good witness. Swisher also independently evaluated Ray's credibility and determined Ray would not be a good witness. This Court has previously denied similar post-conviction claims. Specifically, this Court has found that trial counsel was not ineffective where counsel made the tactical decision not to call a witness who was not credible. See Evans v. State, 995 So. 2d 933, 940, 943 (Fla. 2008) (trial counsel's tactical decision not to present witnesses with questionable credibility does not constitute ineffective assistance); Lamarca v. State, 931 So. 2d 838, 849 (Fla. 2006) (reasonable trial strategy for counsel not to call persons who were not credible and would not have made good defense witnesses); Marquard v. State, 850 So. 2d 417, 428-29 (Fla. 2002) (denying ineffective assistance claim for failing to call witness when defense counsel did not find the witness credible). Moreover, as he testified at the post-conviction evidentiary hearing, Swisher

was trying to "sell" that there was no blood on the property, thus there would be no reason to call Ray to dispute the testimony blood was seen in the grass. Swisher's decision was informed, reasonable and sound trial strategy. Appellant offers no reason for this Court to disturb the trial court's resolution of this issue.

Appellant has not only failed to show trial counsel's conduct fell outside the wide range of reasonable professional assistance, but he has also failed to show the result of his trial would have been different had Ray's testimony been presented. See Blanco v. State, 507 So. 2d 1377, 1381 (Fla. 1987) (discussing heavy burden claimant asserting ineffective assistance of counsel must satisfy). Even had Ray testified he used red spray paint on the property, this testimony would not have refuted Ferns' observations. Ray painted with multiple colors prior to Thanksgiving and Ferns was on the property December 5th, many days later. Due to the lapse in time, it is simply not plausible that the grass would still be wet with spray paint. Indeed, there was no evidence of any spray paint color on the property. Furthermore, Ray's testimony would not have refuted the substantial evidence, including DNA evidence, this Court found supported Appellant's conviction. Bolin, 869 So. 2d at 1204-05. Appellant has failed to establish trial counsel acted deficiently

and has failed to establish prejudice. The trial court's resolution of this issue must be affirmed.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the denial of Bolin's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea M. Norgard, Esquire, Norgard and Norgard, Post Office Box 811, Bartow, Florida 33831-0811, this 15th day of October, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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