A grant of alimony pendente lite is predicated upon need. *Sutliff v. Sutliff,* Pa. Super. , 474 A.2d 599 (1984). "Courts have defined the standards governing alimony pendente lite, counsel fees and expenses in language focusing on the husband's ability to pay and the wife's right to recover." *Wechslar*, supra at 362, 1310. The fact that George earns more than Maxine does not automatically entitle her to alimony pendente lite, counsel fees or expenses. "There must be a showing that the spouse earning less needs the relief sought in order to adequately defend his or her rights in the principal litigation." *Sutliff,* supra at 600.

As the moving party, it is Maxine's burden, "to allege and prove need and ability to pay." *Dimock v. Dimock*, 21 D.&C.3d 499, 503 (Luzerne Cty. 1982). Since George has stipulated as to his ability to pay, if Maxine can prove need then she would be entitled to alimony pendente lite. Detailed financial information concerning George's business holdings is totally irrelevant to proving Maxine's "need" for alimony pendente lite, counsel fees and expenses.

In conclusion, we make absolute our rule issued February 22, 1985, stating that the proceedings should go forth in two phases, and reaffirm our memorandum and order of December 7, 1984, regarding the discoverability of the financial information requested in Maxine's interrogatories.

ORDER OF COURT

June 14, 1985, the rule issued February 22, 1985 is made absolute and this action shall proceed in two phases. The Master shall proceed immediately with the taking of evidence on the subject of divorce and alimony pendente lite, counsel fees and expenses and make a report. If the Master recommends a divorce, then within thirty (30) days from the date of such recommendation, the Master shall proceed with the taking of testimony on equitable distribution and make a report on that subject.

COMMONWEALTH OF PENNSYLVANIA v. CARBAUGH, C.P. Franklin County Branch, No. 228 of 1984, No. 229 of 1984, and No. 230 of 1984

Criminal Law - Miranda Warnings - Robbery

1. Where the defendant's initial incriminating statements are in violation of Miranda, they may be considered harmless if properly admitted evidence is substantially similar to the erroneously admitted evidence.

2. An accused who has invoked his rights may change his mind and choose to waive his rights so long as he initiates further communication and so long as his waiver is voluntary and intelligent.

3. The crime of robbery may be found even when the defendant's assault on the victim and the intent to steal are not exactly contemporaneous.

John F. Nelson, Esquire, Assistant District Attorney

Douglas W. Herman, Esquire, Assistant Public Defender

OPINION AND ORDER

EPPINGER, P.J., July 16, 1985:

Late on the evening of April 16, 1984, or early in the morning of April 17, 1984, defendant, Randy Scott Carbaugh, met the victim, Diane Reed, at the Cabbage Patch bar in Chambersburg. They left the bar together in the victim's car. Sometime later, Carbaugh beat and killed her. Carbaugh then took the body to a wooded area near Cowans Gap and buried it. He kept her car and took some of her checks.

On the morning of April 17, 1984, Carbaugh went to the homes of his two sisters. He confessed to both that he had just killed a female. Both sisters observed blood on him.

On April 17 and 19, 1984, Carbaugh forged several of the checks belonging to the victim, endorsed them, and cashed them at the Letterkenny Federal Credit Union. The head teller identified Carbaugh from photographs as the individual who cashed the checks.

On April 20, 1984, while operating the victim's car, Carbaugh struck another car. He abandoned the car and fled the scene but the other driver knew him and informed the police that Carbaugh was the driver. The Chambersburg police officer investigating the accident noticed blood in the victim's car.

At approximately 5:45 p.m. on April 20, 1984, Carbaugh was arrested at his mother's house. He was given the *Miranda* warnings on the way to borough police headquarters.

Carbaugh was taken to the interrogation room at 6:15 p.m. on April 20, 1984. He was again informed of his rights, signed the waiver and consent form, and stated that he understood his rights as they were explained. Then he told the police that he had had the victim's car, and he forged two of her checks and cashed them at the Federal Credit Union. The questioning lasted nearly thirty minutes. Towards the end Carbaugh advised the officers that he no longer wished to continue the interrogation. Nonetheless, the police continued.

At 6:45 pm., Carbaugh was taken to a holding cell and strip searched. A few minutes later he and Detective Haldeman returned to the interrogation room alone. This questioning lasted until 7:15 p.m. when Carbaugh admitted that he had done what the detective said he did but he wanted to talk with his mother. This was the first statement made to the police implicating himself in the killing.

Carbaugh's mother arrived at police headquarters at 7:20 p.m. and talked with him alone for ten minutes. She then invited Detective Haldeman into the room, and Carbaugh told the detective that he had killed the victim by beating her, and he would take the detective to her body.

Carbaugh took Detective Haldeman to the location of the body. The detective then arranged to transfer Carbaugh to the custody of Sergeant Manns at the Milky Way Drive-In in Fort Loudon and did so at 9:30 p.m. On the way back to Chambersburg, Sergeant Manns again advised Carbaugh of his rights. Carbaugh replied that he knew his rights. He then questioned Carbaugh who told him that he killed the victim by beating her about the head and face with his fists. The sergeant asked him where the homicide occurred, and Carbaugh took the sergeant to the place in Chambersburg where it happened.

GROSH: First and final account, statement of proposed distribution and notice to the creditors of Margaret E. Grosh, Executrix of the Estate of Omer E. Grosh, late of Montgomery Township, Franklin County, Pennsylvania, deceased.

HAAGEN: First and final account, statement of proposed distribution and notice to the creditors of Martha L. Cutshaw, Executrix of the Estate of Richard H. Haagen a/k/a Dick Haagen, late of Montgomery Township, Franklin County, Pennsylvania, deceased.

2-7, 2-14, 2-21, 2-28

George B. Heefner
Acting Clerk of Orphans' Court
Franklin County, Pennsylvania

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Deparmtnet of State of the Commonwealth of Pennsylvania, on January 21, 1986, an application for a certificate for the conducting of a business under the assumed or fictitious name of J & K Distributing Co., with its principal place of business at 207 Homewood Avenue, Waynesboro, Pennsylvania. The names and addresses of the persons owning or interested in said business are: Joseph W. Sullivan, 207 Homewood Avenue, Waynesboro, PA 17268; Peggy M. Sullivan, 207 Homewood Avenue, Waynesboro, PA 17268; J. Kevin Sullivan, 207 Homewood Avenue, Waynesboro, PA 17268.

Martin and Kornfield
17 North Church Street
Waynesboro, PA 17268

2-21-86

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on December 20, 1985, an application for a certificate for the conducting of a business under the assumed or fictitious name of Wetzel's Floor, Wall & Window Coverings, with its principal place of business

LEGAL NOTICES, cont.

at 33 Walnut Street, Waynesboro, PA 17268. The name and address of the person owning or interested in said business is Bonnie J. Elgin, 33 Walnut Street, Waynesboro, PA 17268.

Stephen E. Patterson, Esquire
Patterson, Kaminski, Keller and Kiersz
239 East Main Street
Waynesboro, PA 17268-1681

2-21-86

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on January 30, 1986, for the purpose of obtaining a certificate of incorporation. The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364, as amended, is J-Bar Leasing, Inc. The purpose for which the corporation has been organized is purchase, development and leasing of real estate and to do any other lawful act or activity for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

Donald L. Kornfield
Martin and Kornfield
17 North Church Street
Waynesboro, PA 17268

2-21-86

At 4:50 a.m. on April 21, 1984, Detective Haldeman talked to Carbaugh and his mother at the Chambersburg Police Headquarters. In the presence of his mother, Carbaugh was again advised and signed the consent and waiver form. At the detective's request, Carbaugh dictated a statement while the detective typed it. The statement was signed by Carbaugh and witnessed by his mother and the detective.

After a trial by jury, Carbaugh was convicted of Murder of the Third Degree, Robbery, Theft, and two counts of Forgery. Following the verdicts, Carbaugh filed post verdict motions for a new trial and in arrest of judgment. These motions are now before us.

Carbaugh's first contention is that having filed a proper omnibus pretrial motion, his initial incriminating statements given during the 6:45 p.m. interrogation by Detective Haldeman should have been suppressed because of the detective's failure to scrupulously honor his request to remain silent and not answer any further questions. In addition, he argues that all the statements obtained after the initial incriminating statements are fruits of the poisonous tree and should also be suppressed.

We agree that Detective Haldeman should have stopped the questions when Carbaugh stated he wished to remain silent.

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Commonwealth v. Rose,* 483 Pa. 382, 393, 396 A.2d 1221, 1226-27 (1979); *Commonwealth v. Youngblood*, 453 Pa. 225, 232, 307 A.2d 923, 926 (1973).

If Carbaugh's initial incriminating statements were the only evidence available to the Commonwealth to support the charges against him, then under the doctrine of *Rose* and *Youngblood*, supra, there is no choice but to suppress this statement. Since it was admitted, we would be required to grant Carbaugh's request for a new trial. However, "an error, which, viewed by itself, is not minimal, may nonetheless be harmless if properly admitted evidence is substantially similar to the erroneously admitted evidence." *Commonwealth v. Story,* 476 Pa. 391, 411, 383 A.2d 155, 165 (1978). Carbaugh's sisters each testified he said he had just

killed a female and the way he appeared when he visited each of their houses on April 17, 1984. This was several days before he was apprehended. The Commonwealth also introduced Carbaugh's written statement he made on April 21, 1984, and the oral statement he made after consulting with his mother on April 20, 1984. Not only is this evidence substantially similar to Carbaugh's initial incriminating statements but it is in much greater detail.

The admissibility of Carbaugh's initial incriminating statement was harmless beyond a reasonable doubt. The statement was "merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." *Commonwealth v. Knight,* 469 Pa. 57, 63, 364 A.2d 902, 905 (1976).

Therefore, a new trial is not required on this basis.

> "Although we agree that the admissibility at trial of this first inculpatory statement constituted a technical violation of *Miranda*, we do not believe that it required a disturbance of the verdict. . . . the subsequent statements, which were more detailed and comprehensive, were properly admitted and thereby rendered the introduction of the initial statement harmless." *Commonwealth v. Chacko,* 500 Pa. 571, 580, 459 A.2d 311, 316 (1983).

Carbaugh contends that his later statements were tainted by the illegality in eliciting the initial incriminating statements. We disagree.

> "An accused who has invoked his rights may change his mind and choose to waive his rights, so long as it is he who initiates further communication, and so long as his waiver is voluntary and intelligent." *Commonwealth v. Brown,* Pa. Super. , 476 A.2d 965, 967 (1984); *Commonwealth v. Mercier,* 451 Pa. 211, 216, 302 A.2d 337, 340 (1973).

We find that Carbaugh waived his rights when he talked to his mother alone, who then asked Detective Haldeman to come back into the room. Carbaugh and his mother initiated that conversation.

> "The burden is on the Commonwealth to demonstrate that the subsequent statement was not the product of the exploitation of the original illegality and was obtained under circumstances sufficiently distinguishable to purge it of its original taint. The causal connection can be broken by a sufficient showing that the confession was 'an act of free will.'" *Commonwealth v. Chacko,* supra at 580, 316.

We find that the causal connection was broken when Carbaugh talked to his mother and then invited Detective Haldeman back into the room. Carbaugh's subsequent oral statement was an "act of free will."

Carbaugh's later oral statement to Sergeant Manns and his written statement given to Detective Haldeman were also "acts of free will." The statement to Sergeant Manns was approximately two to three hours after his initial incriminating statements. Sergeant Manns advised Carbaugh of his constitutional rights, and Carbaugh stated that he knew his rights.

The written statement given to Detective Haldeman was approximately nine to ten hours after the initial incriminating statements. The detective again advised Carbaugh of his constitutional rights in the presence of his mother, and he signed the consent and waiver form.

These statements were obtained under circumstances easily distinguishable from the initial statements thus purging any taint. There is nothing in the record to indicate that the police, "attempted to exploit his initial statement, or created psychological pressure to confess." *Commonwealth v. Chacko,* supra at 581, 316. A knowing and intelligent waiver of *Miranda* rights existed if Carbaugh, "has made inculpatory statements after he has been read his constitutional rights and has acknowledged his understanding of them." *Commonwealth v. Green,* 315 Pa. Super. 564, 571, 462 A.2d 736 (1983). Before his statement to Sergeant Manns and his written statement to Detective Haldeman, Carbaugh acknowledged his understanding of his rights and voluntarily chose to waive them.

The consequences of a *Miranda* violation are much less onerous than if the Fourth Amendment was violated. The United States Supreme Court has recently discussed this difference in results between violations of the Fourth and Fifth Amendments.

> "A procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits . . . The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." *Oregon v. Elstad,* 53 U.S.L.W. 4244, 4246-47 (1985).

We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case. "No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." *Oregon v. Elstad,* supra at 4250.

Carbaugh's remaining contentions all relate to his robbery conviction. He argues that we erred in denying his demurrer to the evidence on the robbery charge, that the evidence of robbery was insufficient to sustain a verdict of guilty, that the verdicts of guilty to robbery and theft are inconsistent, and that we erred in our instructions to the jury on the definition of robbery.

Carbaugh argues that his statements show, at the most, that the car and the check book were stolen from the defendant after he had beat her and points out that "a person is guilty of robbery if, in the course of committing a theft, he: (a) inflicts serious bodily injury upon another," Crimes Code, 18 Pa.C.S.A. §3701(a)(1)(i). Thus, he says the Commonwealth has not shown that at the time he beat her he had formed the intent to commit the crime of theft. In Commonwealth v. Kesting, 274 Pa. Super. 79, 93 417 A.2d 1262, 1269 (1979), that precise issue was addressed. The court held an exact contemporaneity of the assault and the intent to steal was not required.

However, in *Commonwealth v. Legg,* 491 Pa. 78, 82, 83, 417 A.2d 1152, 1154-55, (1980) where the charge was felony murder, the court held that for a defendant to be guilty of that offense, he had to have formed the intent to commit the robbery prior to death, saying that where a defendant kills prior to formulating the intent to commit the underlying felony, it cannot be said that he knew or should have known death might occur from involvement in a dangerous felony because no involvement in a dangerous felony existed since the intent to commit the felony is not yet formulated.

In this case, we followed *Legg* in our charge and told the jury that as to felony murder, the intent to commit the robbery had to be formed before killing. However, we followed *Kesting* when we charged that the defendant could be found guilty of robbery even if the jury found he formed the intent to steal after the alleged killing. We do not agree with Carbaugh's contention that *Kesting* was overruled by *Legg*, for the latter concerned itself exclusively with the felony-murder rule.

Referring to *Kesting* in Criminal Offenses and Defenses, Pa. 213, Professor John M. Burkoff says "The Superior Court has also concluded that the intent to rob need not be exactly contemporaneous with an assaultive act in order to support conviction." He goes on to say: "While the Court did not explicitly mention the point, this conclusion fits squarely within the extremely broad §3701(a)(2) definition of 'in the course of committing a theft.' "

The evidence in this case establishes that the defendant inflicted serious bodily injury on the victim resulting in her death, and he took property from her. While it may be true so far as felony-murder is concerned that he was not in the process of committing a felony when he killed her, surely having killed or harmed her, and then stealing from her constitutes the crime of robbery. The taking of her property was a continuation of the episode that began with his beating her.

The Commonwealth concedes that for the purposes of sentencing, the theft offense merges with the robbery conviction. There is no need to discuss that issue.

ORDER OF COURT

July 16, 1985, Randy Scott Carbaugh's post trial motions are denied. It is ordered that a presentence investigation report be prepared by the probation department and that when the report is completed, the defendant be forthwith listed by the District Attorney for sentencing.

LEINBAUGH AND SHOCKEY V. ANTRIM TOWNSHIP ZONING HEARING BOARD, C.P. Franklin County Branch, Civil Action, Vol. Y, Page 461.

Zoning - Special Use Exception - Burden of Presentation

1. The burden of presentation usually falls on the party with the burden of proof, but it may shift through the operation of logic, presumptions, and rules of law.

2. Objectors to the granting of a special exception must prove to a high degree of probability that the proposed use will impact adversely and abnormally on the public interest.