IN THE SUPREME COURT OF FLORIDA

JEANIE H. MELBOURNE,

Petitioner,

v.

CASE NO. 86,029

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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POINT 2: Melbourne's multiple convictions are appropriate. Legislative history and precedent demonstrate an intent for separate convictions for each count of DUI manslaughter and each count of DUI with serious bodily injury.

POINT 3: The information filed in circuit court specifically charged Melbourne with violating §877.111, Florida Statute (1991). The verdict slips all reflect a finding of guilty as charged to each count. Consequently, judgment was properly entered.

POINT 1

THE CLAIM THAT THE TRIAL COURT FAILED TO CONDUCT A PROPER INQUIRY WHEN THE STATE EXERCISED A PEREMPTORY CHALLENGE WAS WAIVED BELOW; ERROR DID NOT OCCUR.

Melbourne claims that the trial court erred in failing to conduct a *Batson/Johans*[1] inquiry when an objection was raised to the state illegally exercising a peremptory challenge against a black venire person. Respondent first contends that this claim is not cognizable because it was waived below. A review of the colloquy between the judge, the prosecutor and defense counsel concludes with defense counsel stating "I have nothing else to say". As the district court noted, Melbourne did not contend below that the reason offered by the prosecution was insufficient. *Melbourne v. State,* 655 So. 2d 126 (Fla. 5th DCA 1995). The record likewise reflects that Melbourne did not raise any further objection at any time prior to the jury being sworn, nor was there any objection to the jury as composed. Thus, the issue was not preserved for review. *Joiner v. State,* 618 So. 2d 174, 176 (Fla. 1993) ("[w]ere we to hold otherwise, Joiner could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial"). *See also, Floyd v. State,* 569 So. 2d 1225 (Fla. 1990) (once state has proffered facially race neutral reason, defendant who contests factual existence must place court

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[1]*Batson v. Kentucky,* 476 U.S. 79 (1986); *State v. Johans,* 613 So. 2d 1319 (Fla. 1993).

on notice). Respondent submits that the defendant must bear some burden other than covertly injecting error or simply allowing error to occur, where there is no discernible prejudice apparent from the fact of the record.

Respondent next contends that the claim was not preserved due to failure to make a specific enough objection. In *State v. Johans,* 613 So. 2d 1319 (Fla. 1993), this court held that a *Neil*[2] inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. The objection in the instant case was limited to "Mr. Dewey Wells, the black man, I would raise a Baxter Johans challenge, JOHANS. He's a black man, number 19." (R 269). Respondent contends that this was not sufficient to trigger an inquiry.

In this respect, respondent would first point out that several district courts interpret the language of *Johans* as still requiring a fact supported inference that the peremptory challenge is being used in a racially discriminatory manner. *Cruz v. State,* 20 Fla. L. Weekly D2169 (Fla. 3d DCA September 20, 1995) (the objecting party must make a timely objection and create a fact supported inference that a peremptory challenge is being used in a racially discriminatory manner); *Portu v. State,* 651 So. 2d 791 (Fla. 3d DCA 1995) (the presumption in Florida is that peremptories will be exercised in a nondiscriminatory manner, and the initial burden was on the state to create the inference that

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[2]*State v. Neil,* 457 So. 2d 481 (Fla. 1984).

defense counsel's peremptory challenge was made for racially discriminatory reasons); *Barquin v. State*, 654 So. 2d 1069 (Fla. 3d DCA 1995) (state merely requested *Neil* inquiry without alleging challenge was in any way discriminatory); *Betancourt v. State*, 650 So. 2d 1021 (Fla. 3d DCA 1995) (party's discretion in exercising peremptory challenge may only be challenged and reasonable basis for strike may only be required when it rationally may be determined that the juror's status is the reason for the challenge); *Stroud v. State*, 656 So. 2d 195 (Fla. 2d DCA 1995) (once a trial judge is satisfied that a complaining party's objection was proper, the other party must give a legitimate reason for the use of a peremptory); *Jones v. State*, 640 So. 2d 1161 (Fla. 1st DCA 1994) (we find that the defense met its initial burden of showing that the strikes were racially based, thereby requiring a hearing in accordance with *Johans*).

Under the reasoning of these cases, simply stating that the prospective juror was a black man and that a challenge was being made, with no additional factual basis, was not enough to trigger an inquiry. The courts of this state have long recognized a presumption that peremptories will be exercised in a nondiscriminatory manner. A holding that a bare bones objection such as the one in the instant case is sufficient to trigger an inquiry not only obliterates that long recognized presumption, it actually creates a complete opposite one: that peremptories are being exercised in a racially discriminatory manner, so an inquiry must be held any time a prospective juror of a potentially suspect

class is challenged.

Even if this court determines that the claim is preserved, respondent contends, as the district court found, that a sufficient *Neil* inquiry was conducted. As this court has recognized, an appellate court must rely primarily on the inherent fairness and color blindness of the trial judges to see that peremptories are not exercised to mask improper motives or bias. *Reed v. State,* 560 So. 2d 203 (Fla. 1990). In the instant case, the prosecutors specifically stated that the peremptory was not being exercised because of race, and noted that the state had accepted three black jurors, whereas the defense had stricken two black jurors. Further, the *voir dire* in this case was not lengthy, and the record demonstrates that the trial court was well aware of which prospective jurors may be challenged because of experience with driving under the influence, alcohol, and even scheduling difficulties (R 263, 264, 268, 271). The record also demonstrates that the challenged juror's wife had died from alcohol, which certainly provides a race neutral reason for excusing a juror in a DUI manslaughter/serious bodily injury case. In fact, the record demonstrates that every prospective juror who a close family member or friend with alcohol problems or DUI problems was excused.[3] Thus, the district court correctly

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[3]Hart, whose son was facing DUI charges was peremptorily excused; Walsh, who had an alcoholic father was excused for cause; Fann, whose friend was killed by a drunk driver was excused for cause; Ray, who was an alcoholic and had a DUI conviction was peremptorily stricken; Aldred, whose brother had a DUI conviction was peremptorily stricken; Davis, who had two friends killed was peremptorily stricken; Dickie, who had a DUI conviction was

determined that a sufficient inquiry was conducted, that the record contains a race neutral reason for the strike, and there was no abuse of discretion in excusing the juror.

Respondent further contends that where the prosecutor states that the peremptory was not exercised in a racially discriminatory manner, and the record demonstrates that the state has already accepted three black jurors, and the defense simply replies that it has nothing else to say, this constitutes a factually sufficient race neutral reason for the strike. In all other instances, the trial court, as fact finder and determiner of credibility, is permitted to simply believe a witness. For example, at a suppression hearing on a consent issue, one witness may testify there was consent, while the defendant may testify, with no other supporting facts, that he did not consent. In a trial, one witness may testify that the defendant struck him, while the defendant may testify that he did not. Based solely on the representations of the witnesses, the trial court may find as a matter of fact that there was no consent or that the defendant did not commit the crime. Likewise, in a case where the prosecutor states that the peremptory strike was not racially motivated, and there is no further objection from the defense, the trial court should be entitled to exercise its discretion based on the events before it and make a factual determination that the

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stricken; Cslandi, whose friend's niece was killed, was peremptorily stricken; Grider, whose cousin was killed was excused for cause; Davis, who had been a witness to a DUI; and Wines, who dated and was beaten by an alcoholic was excused.

strike was not racially motivated.

Finally, respondent contends that even if the claim is preserved and this court determines that the inquiry was insufficient, this court should hold that in a case such as this, where it is clear from the face of the record that the peremptory challenge was not racially motivated and there has been no demonstration of prejudice, reversible error did not occur. As demonstrated, the prosecution had accepted three black jurors. As also demonstrated, the challenged juror's wife died of alcoholism, which is certainly a race neutral reason for the strike, particularly where every other juror with a close friend or family member with an alcohol related problem was excused. Respondent acknowledges that this court has recognized the citizen's right to serve as a juror, but would point out in this case that the challenged juror was specifically asked if he wanted to serve, and merely replied "I will do what I have to do" (R 257). It is apparent from the face of the record that there was no prejudice, so the harmless error rule should be applicable. §924.33, Fla. Stat. (1993). The instant convictions should be affirmed.

POINT 2

MELBOURNE'S MULTIPLE CONVICTIONS FOR DUI MANSLAUGHTER AND DUI SERIOUS BODILY INJURY DO NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Melbourne contends that based on *Boutwell v. State,* 631 So. 2d 1094 (Fla. 1994), her two convictions for DUI manslaughter and her conviction for DUI serious bodily injury violate the prohibition against double jeopardy. The district court held that she did not improperly receive multiple convictions for one incident of driving under the influence. *Melbourne v. State,* 655 So. 2d 126 (Fla. 5th DCA 1995). The Fourth District recently certified conflict with *Melbourne.*

Respondent contends that even assuming *Boutwell, supra,* was correctly decided, it is inapplicable to the instant case and Melbourne's multiple convictions are proper. In *Boutwell,* this court held that regardless of the number of injured persons, there can only be one conviction under section 322.34(3), Florida Statutes (driving with a suspended license and causing death or serious bodily injury) arising from a single accident. A review of the legislative history of the statutes at issue clearly demonstrates that the legislature intended separate convictions for each count of DUI manslaughter and each count of DUI with serious bodily injury.

DUI manslaughter has been a homicide crime in this state for years. *See, Hauser v. State,* 474 So. 2d 1193 (Fla. 1985). The 1985 statute specifically stated:

> If the death if any human being is caused by the operation of a motor vehicle by any person while so intoxicated, such person shall be deemed guilty of manslaughter and on conviction shall be punished as provided by existing law relating to manslaughter.

§316.1931(2)(c), Fla. Stat. (1985). That same statute made it a third degree felony if an intoxicated person caused serious bodily injury to another **and** had a suspended or revoked license, was a habitual traffic offender, or had previously been convicted of a violation of that section. §316.1931(2)(b), Fla. Stat. (1985).

That statute was repealed in 1986, and section 316.193, Florida Statutes, was substantially amended to include the aforementioned offenses. The new statute no longer required the additional elements of suspended license, habitual offender, or prior conviction for DUI with serious bodily injury, and created the specific crime of "DUI manslaughter". §316.193(3), Fla. Stat. (1987). It is beyond dispute that the DUI laws have gotten even tougher since that time, including the imposition of lower blood alcohol limits and stiffer penalties, along with mandatory adjudication for DUI offenses. §316.656, Fla. Stat. (1993). In 1988, the legislature amended section 775.021, Florida Statutes, to specifically state its intent to convict and sentence for each criminal offense committed in the course of one criminal episode.

A review of judicial interpretation of these statutes demonstrates that DWI manslaughter has always been considered a homicide offense. *Hauser, supra.* As the district court recognized, this court has repeatedly reiterated its satisfaction

with *Hauser*. *Melbourne* at 129, *citing, State v. Cooper,* 634 So. 2d 1074 (Fla. 1994)); *Goodwin v. State,* 634 So. 2d 157 (Fla. 1994); *State v. Chapman,* 625 So. 2d 838 (Fla. 1993); *State v. Thompson,* 607 So. 2d 422 (Fla. 1992). Both the Second and Third Districts have upheld multiple convictions for DUI serious bodily injury where there were multiple victims. *Pulaski v. State,* 540 So. 2d 193 (Fla. 2d DCA), *review denied,* 547 So. 2d 1210 (Fla. 1989); *Wright v. State,* 592 So. 2d 1123 (Fla. 3d DCA 1991), *quashed,* 600 So. 2d 457 (1992).[4] In terms of general legislative intent, this court held in *State v. Smith,* 547 So. 2d 613 (Fla. 1989), that multiple punishments may be imposed for separate offenses even if only one act is involved, pursuant to section 775.021(4)(a), Florida Statutes.

Section 322.34(3), Florida Statutes, which imposes punishment for causing serious bodily injury while driving with a suspended or revoked license, **was not even enacted until 1988.** Ch. 88-381, §69, Laws of Fla. Respondent contends that the legislature did not intend to undo years of manslaughter and DUI jurisprudence, providing for punishment for each victim as opposed to each driving incident, when it made it a crime to cause serious bodily injury when driving with a suspended license. It is an accepted rule of statutory construction that the legislature is presumed to know existing statutes and case law construing them, and that

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[4]The *Boutwell* court noted that its disapproval of the *Wright* opinion was based solely on the district court's handling of a peremptory challenge issue.

it is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute. *Ford v. Wainwright,* 451 So. 2d 471 (Fla. 1984); *Williams v. Christian,* 335 So. 2d 358 (Fla. 1st DCA 1976). Thus, it would be more logical to presume that the legislature was familiar with the DUI statutes and jurisprudence, as well as its own expressed intent statute, when it enacted the suspended license serious bodily injury statute, and intended punishment for each victim. *Contra, Boutwell, supra.*

At a minimum, *Boutwell* is not applicable to the DUI statutes, which have remained in a separate section within the statutes. The fact that the legislature specifically labeled the crime of killing a person while operating a motor vehicle under the influence as "DUI manslaughter" indicates it fully intended such crime to remain within the scope of the state's regulation of homicide. Homicide statutes have always required separate punishment for each victim. For example, a person who commits one felony and in the course thereof kills any number of people is criminally liable for each death. Likewise, a person who gets behind the wheel of a car while under the influence and kills any number of people should be criminally liable for each death. Further, a person who gets behind the wheel of a car while under the influence and causes serious bodily injury to any number of people should be held responsible for each victim that person seriously injures. In this respect, respondent would point out that the legislature has defined serious bodily injury as "a

physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ." §316.193(3)(c), Fla. Stat. (1993); §316.1933(1), Fla. Stat. (1993). The drunk driver should not benefit where he "fortuitously" almost kills four people instead of actually killing only one.

DUI statutes were not enacted to inure to the benefit the drunk driver. The bottom line is and always has been that when you are under the influence you don't get behind the wheel of a several ton machine and attempt to maneuver it down the highways and byways of the state, putting the rest of the population at risk of loss of life and limb. If you do, you pay the consequences. As the district court found, Melbourne committed three offenses: two homicide crimes and one driving under the influence resulting in serious bodily injury. Multiple convictions and sentences are appropriate.

POINT 3

THE JUDGMENT CORRECTLY REFLECTS MELBOURNE WAS FOUND GUILTY AS CHARGED ON COUNTS II, IV, AND V.

The information filed in circuit court specifically charged Melbourne with violating §877.111, Florida Statute (1991) (R 208, 210, 211). The verdict slips all reflect a finding of guilty as charged to each count (R 569-71). Consequently, judgment was properly entered.

CONCLUSION

Based on the foregoing arguments and authorities, respondent requests this court approve the decision of the Fifth District Court of Appeal, and affirm the judgments and sentences of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to Terrence E. Kehoe, Law Offices of Terrence Kehoe, Tinker Building, 18 West Pine Street, Orlando, FL 32801, this 19th day of December, 1995.

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