IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC18-372

SHAWNEST ANGELO IVEY,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

ANSWER BRIEF OF RESPONDENT

ANDY THOMAS
Public Defender
Second Judicial Circuit

JENNIFER LAVIA
Florida Bar No.0699608
425 West Jefferson St.
Tallahassee, FL 32301
(850) 644-7472
jlavia@law.fsu.edu

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Defendant accepts the Statement of the Case and Facts in the State's Initial Brief.

SUMMARY OF THE ARGUMENT

Juror 46, Ms. Debra Sherman, had a constitutional right to serve on the jury in this case unless the State could provide a non-discriminatory reason for excusing her, which the State failed to do. Defendant made a specific objection to the State's peremptory challenge, and renewed that objection immediately prior to the jury's being sworn. The trial court and the State were both sufficiently on notice as to the grounds for Defendant's objection, and had no reason to believe that Defendant had abandoned that objection. Even though the challenged juror had been excused, the trial judge still had an available remedy because he could strike the entire panel. Therefore, the decision of the First District should be affirmed.

ARGUMENT

I. The trial court's error allowing the State to use a peremptory challenge against an African American juror without offering a race-neutral reason was preserved when Defendant renewed his objection after the challenged juror had been excused but before the jury was sworn. [Restated].

A. Introduction

Thirty-four years ago, this Court decided that it was "time in Florida to hold that jurors should be selected on the basis of their individual characteristics and that they should not be subject to being rejected solely because of the color of their skin." State v. Neil, 457 So. 2d 481, 482 (Fla. 1984). Protection against bias in jury selection is crucial because defendants are entitled to a jury made up of "a fair cross section of the community" and because jury duty is "the most direct way citizens participate in the application of our laws." State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988).

Preservation of error when the State improperly uses a peremptory challenge is complicated. First, the defendant must correctly navigate the three-step test set forth in Melbourne v. State, 679 So. 2d 759, 765 (Fla. 1996). The three-step test is as follows: Step 1: After the peremptory challenge is made, the objecting party must make a timely objection, show that the potential juror is a member of a distinct group, and ask the court to require a reason for the strike. The court then

must ask the striking party to give a reason for the strike. Step 2: The striking party must provide a race-neutral reason for the strike. If the court finds that the reason given is not race neutral, then the court must deny the challenge. However, if the court determines that the reason is facially neutral, the court must proceed to Step 3 and determine whether the reason is merely a pretext. Id.

Despite having already objected to an improper peremptory challenge, a defendant must renew that objection before the jury is sworn. This requirement puts the trial court on notice that the defendant has not abandoned his objection, perhaps because of something that happened between the objection and the swearing of the jury. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993).

By contrast, the State can successfully use peremptory challenges against jurors of a particular race with relative ease. "The burden imposed on the party required to provide a race-neutral justification is, at worst, minimal." State v. Johans, 613 So. 2d 1319, 1321 (Fla. 1993). The Court should not make it more difficult than it already is for defendants to protect their constitutional rights to an impartial jury. That right "is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense." Melbourne, 679 So. 2d at 765.

In balancing the interests involved, this Court has recognized that use of peremptory challenges is "to some degree inconsistent with the requirements of the

Florida and federal constitutions" and that "[t]o the extent of the inconsistency, the constitutional principles must prevail, notwithstanding the traditionally unlimited scope of the peremptory." Slappy, 522 So. 2d at 20.

In Joiner, jury selection continued after the objection and the defendant "affirmatively accepted the jury immediately prior to its being sworn without reservation. 618 So. 2d at 176. So the trial court could have believed that the failure to renew the objection was because the defendant had made a conscious decision to abandon the objection.

In this case, nothing happened between the improper peremptory challenge of Juror 46, Ms. Debra Sherman and the swearing of the jury that could have led Defendant to abandon his objection. Ms. Sherman was the last juror excused and the trial was adjourned for the day. (App. 19-25) The composition of the jury did not change at all after that point. First thing the following morning, the trial court raised the issue of the peremptory challenge of Ms. Sherman, and Defendant made his continuing objection. (App. 27-28) Then the jury was sworn.

When the State asked to use a peremptory challenge on Ms. Sherman, Defendant noted that Ms. Sherman was a black female and requested a race-neutral reason for the challenge. (App. 20) The State asserted that its reason for challenging Ms. Sherman was an incident during jury selection in the preceding

case, during which the prosecutor later made a joke about something Ms. Sherman had said, not realizing that Ms. Sherman was in the courtroom. Defendant noted his objection to the challenge of Ms. Sherman. He made the appropriate argument. The State failed to justify its peremptory challenge, and this Court should not allow the State to benefit from its improper challenge by insisting on an overly-complicated system for preservation of error.

In support of the challenge, the State argued that if Ms. Sherman were excused, the next juror was also black. This Court has rejected this argument, because "[j]urors are not fungible. Each juror has a constitutional right to serve free of discrimination. The striking of a single African-American juror for racial reasons violates the Equal Protection Clause." Joiner, 686 So. 2d at 176. Ms. Sherman had a right to serve on the jury unless excused for a non-discriminatory reason. And whether the State was actually discriminating against Ms. Sherman is irrelevant, because as this Court has recognized, "the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being-to insure equality of treatment and evenhanded justice." Slappy, 522 So. 2d at 20. "This ancient tradition, however, is to some degree inconsistent with the requirements of the Florida and federal constitutions. We thus cannot permit the peremptory's use when it results in the exclusion of

persons from jury service due to constitutionally impermissible prejudice. To the extent of the inconsistency, the constitutional principles must prevail, notwithstanding the traditionally unlimited scope of the peremptory." Id.

Discriminatory jury selection is harmful not just to defendants and to excluded jurors, but to the entire community. Batson v. Kentucky, 476 U.S. 79, 87 (1986), holding modified by Powers v. Ohio, 499 U.S. 400 (1991). "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." Id. "[B]y giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large." Slappy, 522 So. 2d at 20. Allowing such implicit bias based on an overly-complicated system of preservation of error serves to further undermine public confidence.

B. The Standard of Review

The only issue argued in the State's Initial Brief is preservation of error, which this Court reviews de novo. Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010). The State does not dispute that the peremptory challenge of Ms. Sherman was improper. See Dorsey v. State, 868 So. 2d 1192, 1199 (Fla. 2003) (holding that nonverbal behavior may be race-neutral reason for challenge "only if the behavior is observed by the trial court or otherwise has record support").

C. Timing of the Renewed Objection

The question certified by the First District Court of Appeal was:

> HAS A DEFENDANT WHO ACCEPTS A JURY, BUT RENEWED A PREVIOUSLY-RAISED OBJECTION TO A STATE PEREMPTORY CHALLENGE **AFTER THE CHALLENGED JUROR HAS BEEN EXCUSED** BUT BEFORE THE JURY IS SWORN, WAIVED THAT OBJECTION?

(App. at 15) (emphasis added). The question reflects the First District's holding that Defendant properly renewed the objection. Thus, the certified question focuses on the timing of the objection rather than the sufficiency of the language used to renew the objection. The First District's concern apparently was whether Defendant could renew his objection after the challenged juror had been excused.

Based on previous decisions of this Court, a defendant can renew the objection after the juror has been excused, because the trial court still has a remedy available to correct the error. See Joiner, 618 So. 2d at 176. The First District did not think that Joiner answered this timing question. However, dicta in Joiner provides the answer because the trial judge "could have exercised his discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling." Id. Thus, this Court in Joiner recognized that the objection could be renewed after the challenged juror has been

excused. At that point, the trial court still has a remedy available because it can strike the entire panel.

While striking the entire panel is not the preferred remedy, see id., it is nevertheless an available remedy after the juror has been excused through no fault of the defendant. For policy reasons, the Court should not allow the State to benefit from its improper challenge based on "the prosecutor's unilateral claim that the juror gave her the stink-eye during a break in the proceedings." Ivey v. State, 42 Fla. L. Weekly D2004, 2017 Fla. App. LEXIS 13047 (Sept. 13, 2017), reh'g denied, 43 Fla. L. Weekly D413, 2018 Fla. App. LEXIS 2443(1st DCA Feb. 20, 2018) (certifying question). The State should not be permitted to make an improper challenge and then object that no remedy is available once the juror has been excused. Such a ruling would leave the trial court with "no practical device for redressing each person's right to serve on a jury free of being stricken for racially discriminatory reasons." Joiner, 618 So. 2d at 176.

Ms. Sherman was excused because of the State's improper use of a peremptory challenge, and while the remedy may be extreme, perhaps such an extreme remedy is necessary to prevent further abuses of the jury selection process by the State. The state attorney's subjective interpretation of "a look" from Ms. Sherman is not adequate to satisfy Step 2 of the Melbourne test. See Slappy, 522

So. 2d at 23, receded from on other grounds by Melbourne, 679 So. 2d at 765 (noting that implicit bias may unconsciously lead to unfavorable conclusions about jurors). The pernicious nature of implicit bias demands an extraordinary remedy.

Based on established Florida law, a defendant who accepts a jury, then renews a previously-raised objection to the State's peremptory challenge before the jury is sworn has preserved that objection. Joiner, 618 So. 2d at 176. Here, Defendant renewed his objection to the improper peremptory challenge immediately before the jury was sworn. (App. 27-28). Therefore, the issue was preserved.

D. The Language of Defendant's Renewed Objection

The State has restated the certified question to focus on whether the language used by Defendant was sufficient to preserve the error. Even if this Court chooses to answer the question as restated by the State, the decision of the First District should be affirmed. At the time of the State's peremptory challenge of Ms. Sherman, Defendant made a contemporaneous objection that was specific enough to inform the court of the error. See Murray v. State, 3 So. 3d 1108, 1117 (Fla. 2009). In fact, the State did not dispute the sufficiency of that objection. Defendant preserved the error by requesting a continuing objection before the jury was sworn.

The language that Defendant used was sufficient to renew the objection. Defendant reiterated that he had "made a few objection[s] in preliminary proceedings," which, of course, encompasses jury selection. Defendant wanted to be certain that the State did not "come back and say [Defendant] failed to object in the trial."

The trial court recognized Defendant's continuing objection to "**any ruling** that has already been made." The reference to "any ruling" necessarily includes the ruling as to the State's improper peremptory challenge of Ms. Sherman. Thus, the court and the State were both on notice as to Defendant's specific objection. Defendant had the right to rely on the trial court's statement about "any ruling" as including an objection to the racially-discriminatory challenge to Ms. Sherman.

Defendant's "acceptance" of the jury was not an abandonment of the objection. When the trial court read the names of the selected jurors and then asked Defendant if he was "agreeable that this is our jury in this case," Defendant's only choices were to accept the jury, because he had no remaining peremptory challenges (App. 19) or to raise challenges for cause against the selected jurors. Neither option would have resulted in returning Ms. Sherman to the jury. Defendant's acceptance of the selected jurors means only that after reviewing the final panel, he did not choose to exercise any additional challenges for cause.

Defendant made clear the basis for his objection to the peremptory challenge, and the record was as established as it could be, considering that the juror's behavior was not on the record. The trial court had all the information it could have had. An objection under these circumstances would serve no useful purpose and a requirement that Defendant renew the objection would be "a mere technicality designed to place onerous burdens on overstressed trial counsel." See Carratelli v. State, 961 So. 2d 312, 318-19 (Fla. 2007).

The trial court's statements on the record indicate awareness of the objection and awareness that the ruling would be reviewed on appeal. Immediately before the jury was sworn, the trial court recognized the need to clarify the record regarding the challenge to Ms. Sherman, and "**just for record purposes**, wanted to make sure that she was not a cause, she was a peremptory challenge. And there was a challenge race neutral reason given, and she was excused based on the state using a peremptory challenge." (App. 27) After Defendant raised a continuing objection, the trial court said, "I will just say **for record purpose[s]**, any ruling that has already been made by me, I recognized [Defendant's] continu[ing] objection." (App. 28) The jury was then sworn.

The trial court was unquestionably aware of Defendant's position that the peremptory challenge was improper, as evidenced by the trial court's decision to

reiterate "for the record" that the State had used a peremptory challenge on Ms. Sherman and the trial court had found that the State had offered a race-neutral reason for the challenge. See Schummer v. State, 654 So. 2d 1215, 1217 n.1 (Fla. 1st DCA 1995) (recognizing in dicta that a party might not be required to object before the jury is sworn, "when the trial court indicates on the record that it understands the issue has been raised and requires resolution by the appellate court."); see also Langon v. State, 636 So. 2d 578 (Fla. 4th DCA 1994) (renewal of objection at close of voir dire not required where trial court understands issue requires appellate resolution). Defendant's decision not to strike any additional jurors and instead "accept" the jury did not indicate that he had abandoned his objection to the State's improper use of a peremptory challenge.

CONCLUSION

Defendant specifically objected to the State's improper peremptory challenge of Ms. Sherman, and renewed that challenge before the jury was sworn. The fact that Ms. Sherman had been dismissed did not prevent a remedy, because the trial court could have dismissed the entire jury panel. Therefore, this Court should reverse and remand for a new trial.

CERTIFICATES OF SERVICE AND FONT

I hereby certify that a copy of the foregoing has been furnished by electronic mail to Virginia Harris and Trisha Meggs Pate, Office of the Attorney General, at criminalappealsintake@myfloridalegal.com, this 19th day of October, 2018. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

ANDY THOMAS
Public Defender
Second Judicial Circuit

/s/ Jennifer LaVia
JENNIFER LAVIA
Florida Bar No. 0699608
425 West Jefferson St.
Tallahassee, FL 32301
(850) 644-7472
jlavia@law.fsu.edu

ATTORNEYS FOR RESPONDENT