

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

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Defendant accepts the State's Statement of the Case and Facts except the improper inclusion of the dissenting opinion. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) (holding that "[c]onflict between decisions must . . . appear within the four corners of the majority decision").

SUMMARY OF THE ARGUMENT

The First District followed the law of this Court that an objection to an improper peremptory challenge must be preserved by an objection at the time of the challenge and a renewed objection before the jury is sworn. The court did not expand or change existing law; it merely held that **under the specific facts of this case**, Defendant had sufficiently renewed his objection and preserved the error. Therefore, this Court does not have conflict jurisdiction.

Furthermore, this Court should not exercise its discretionary jurisdiction to answer the certified question, which asks whether the opponent of a peremptory challenge can renew his objection after the juror has been excused. This Court has recognized that after the challenged juror has been excused, the trial judge still has the option of striking the entire panel. Therefore, the answer to the certified question is that an objection can be renewed before the jury is sworn, even after the challenged juror has been excused.

ARGUMENT

I. This Court should not exercise its discretionary jurisdiction because the decision of the First District does not conflict with Joiner v. State, and Joiner provides the answer to the certified question.

A. This case does not conflict with Joiner, which is distinguishable on its facts.

The law of this Court is clear: If a Defendant accepts a jury, but renews his objection before the jury is sworn, he has not waived his objection to the peremptory challenge. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993). The First District followed the rule set forth in Joiner, but distinguished its facts. 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 First District noted that the trial court "was apprised of the specifics of Ivey's objection prior to the swearing of the jury, which was far different from the situation in [Joiner], where defense counsel 'affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection.'" Ivey, 2017 Fla. App. LEXIS 13047, at 10. The court distinguished the facts of this case because "[n]o affirmative acceptance was made immediately prior to the jury being sworn that amounted to Ivey's counsel jettisoning his prior objections; instead he renewed them in direct

response to the trial court's inquiry." Id. at 10-11. The First District decided that **based on the specific facts of this case**, Defendant had preserved error as to the trial court's denial of his objection to the State's discriminatory use of a peremptory challenge. Joiner did not answer the question in this case, which was whether the specific words used by Defendant were sufficient to preserve the error. Because this case and Joiner are distinguishable, they do not conflict and this Court does not have conflict jurisdiction. See Joiner, 618 So. 2d at 175 n.1.

B. Joiner provides the answer to the certified question.

This Court unquestionably has discretion to exercise jurisdiction in this case because the First District certified a question of great public importance. However, the Court should not exercise that discretion.

The First District certified the following question:

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?

At the time of the State's peremptory challenge of juror number 46, 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 trial court recognized Defendant's continuing objection to "**any ruling** that has already been made." Ivey, 2017 Fla. App. LEXIS 13047, at 3. The reference to "any ruling" necessarily includes the ruling as to the State's improper peremptory challenge of juror number 46. Thus, the court and the State were both on notice as to the specific objection that Defendant was making.

Furthermore, Defendant did not invite the error. The error occurred because the State made an improper challenge to juror number 46 based on "the prosecutor's unilateral claim that the juror gave her the stink-eye during a break in the proceedings." Id. at 7. Thus, the State, not Defendant, invited the error. Defendant did nothing to cause the error and the First District's holding is not contrary to the invited error doctrine, which quite simply does not apply in this case. See Boyd v. State, 200 So. 3d 685, 702 (Fla. 2015).

Finally, the crux of the question posed by the First District is not whether a defendant who accepts a jury but then renews his previous objection to the State's peremptory challenge has waived the objection. Rather, the First District's question focuses on the timing of the renewed objection. The question the court posed was whether a defendant can preserve his objection by renewing it **after the challenged juror has been excused**. Ivey, 2018 Fla. App. LEXIS 2443, at 1.

The court did not think that Joiner answered this timing question. Id. 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." 618 So. 2d at 176. Thus, this Court 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. Thus, because this Court has already answered the certified question, it should not exercise jurisdiction in this case.

CONCLUSION

This Court does not have conflict jurisdiction in this case because the decision of the First District does not conflict with Joiner. Furthermore, the Court should not exercise its discretionary jurisdiction to review the certified question because the Court has already answered the question.

