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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

SHAWNEST ANGELO IVEY,

Respondent.

Case No. SC18-372

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

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced as the State. Respondent, Shawnest Angelo Ivey, the Appellant in the DCA and the defendant in the trial court, will be referenced by name.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, State v. Ivey, No. 1D15-5803 (Fla. 1st DCA September 13, 2017) and State v. Ivey, No. 1D15-5803 (Fla. 1st DCA February 20, 2018), attached in slip opinion forms [hereinafter referenced as "slip op1" and "slip op2" (Appendixes A and B). The relevant portion of the opinion indicates that after the prosecutor attempted to use a peremptory strike on juror 46, defense counsel requested a race neutral reason for the strike. (slip op1-2). After the prosecutor provided a reason, the trial court found it to be race-neutral and removed juror 46 from further consideration. (slip op1-2-3). The remainder of the facts in the opinion reflect as follows:

> Immediately thereafter, the trial court asked the State and defense counsel if they were agreeable to the jury members who had been selected. Defense counsel said he went over the entire panel with Ivey, who said he "agrees and accepts this jury." Just prior to swearing the jury, however, the trial court and defense counsel had the following exchange:
>
> > Court: The only additional thing is looking at my seating chart for jury selection yesterday, I had

> seated for juror number 46, and just for record purposes, wanted to make sure 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. With that, is there anything else we need to address this morning before we bring the jury in?
>
> Defense: Your Honor, the only thing other than—everything you said is fine. What I would like to do, I've made a few objection in preliminary proceedings and objected to evidence and objected to different things. I would like to just make that as a continuing objection, so they don't come back and say we failed to object in the trial.
>
> Court: I will just state for record purposed [sic], any ruling that has already been made by me, I recognized [defense counsel's] continue [sic] objections, that has been the ruling that has been made by the Court.

> The jury was sworn and Ivey was later found guilty on the possession charges. On appeal, he argues that the trial court erred in allowing the State to use its peremptory strike on the potential juror.

(slip op1-3).

The majority opinion indicated that error occurred when the trial court removed juror 46, which the State did not dispute. (slip op1-3-4). The majority opinion indicated that the claim was not waived because no affirmative acceptance was made immediately prior to the jury being sworn and that defense counsel did not abandon his objection, but renewed it in direct response to the trial court's inquiry. (slip op1-9). The dissent indicated that Respondent abandoned his prior objection to juror 46 and noted that the language used by defense counsel to request a standing objection to "unspecified 'different things'" was not sufficient

to renew his abandoned objection. (slip op1-10-11). The dissent noted that Respondent had previously argued an unsuccessful motion in limine, an unsuccessful motion to dismiss, and an unsuccessful motion to suppress, which included an evidentiary hearing with contested evidentiary rulings. (slip op1-10).

SUMMARY OF ARGUMENT

The State asserts that the majority opinion from the First District is in direct and express conflict with Joiner v. State, 618 So. 2d 174 (Fla. 1993). In Joiner, this Court indicated that a defendant waived a claim regarding the State's use of a peremptory challenge by accepting the jury without renewing his earlier objection. In the case at bar, Respondent accepted the jury at the end of jury selection. Respondent subsequently indicated that the trial court's statements about excusing juror 46 for a race neutral reason were "fine" and made a generic comment that he wanted to have a standing objection to different issues he had previously objected to in preliminary proceedings. Respondent's acceptance of the jury, coupled with his statement that what the trial court stated about juror 46 was fine, constituted a waiver of his earlier objection to the removal of juror 46. Respondent's subsequent request to have a standing objection to different things he previously objected to in preliminary proceedings did not undo his waiver and/or preserve the issue as to juror 46.

In regard to the question of great public importance, the majority opinion has created a very bad policy. It essentially indicates that if a party poses an initial objection, but eventually abandons or waives the issue, the party can still receive a windfall on appeal by subsequently requesting a generic standing objection to things he previously objected to. However, it is reasonable for a trial court to assume that an attorney is not renewing objections to issues he abandoned or invited, especially when the attorney does not specifically indicate that he is doing so. For all these reasons, this Court should accept jurisdiction of this case.

ARGUMENT

ISSUE I: WHETHER THIS COURT SHOULD ACCEPT JURISDICTION OF THE CASE AT BAR? (RESTATED)

A. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, §3(b)(3), Fla. Const. The constitution provides:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions is "express and direct" and "appear[s] within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling

Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition).

B. The decision below expressly and directly conflicts with Joiner v. State, 618 So. 2d 174 (Fla. 1993)

In Joiner v. State, 618 So. 2d at 176, this court stated as follows:

> **We do not agree with Joiner, however, that he preserved the Neil issue for review. He affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection.** We agree with the district court that counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. **It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn.** We therefore approve the district court to the extent that the court held that Joiner waived his Neil objection when he accepted the jury. **Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise.** Such action would have apprised the trial judge that Joiner still believed reversible error had occurred. At that point the trial judge could have exercised 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.

(emphasis added).

In the case at bar, the relevant facts in the majority opinion reflect as follows:

> Immediately thereafter, the trial court asked the State and defense counsel if they were agreeable to the jury members who had been selected. Defense counsel said he went over the entire panel with Ivey, who said he "agrees and accepts this jury." Just prior to swearing the jury, however, the trial court and defense counsel had the following exchange:
>
> > Court: The only additional thing is looking at my seating chart for jury selection yesterday, I had

> seated for **juror number 46,** and just for record purposes, wanted to make sure 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.** With that, is there anything else we need to address this morning before we bring the jury in?
>
> Defense: Your Honor, **the only thing <u>other than</u>— everything you said is fine.** What I would like to do, I've made a few objection in preliminary proceedings and objected to evidence and objected to different things. I would like to just make that as a continuing objection, so they don't come back and say we failed to object in the trial.
>
> Court: I will just state for record purposed [sic], any ruling that has already been made by me, I recognized [defense counsel's] continue [sic] objections, that has been the ruling that has been made by the Court.

> The jury was sworn and Ivey was later found guilty on the possession charges. On appeal, he argues that the trial court erred in allowing the State to use its peremptory strike on the potential juror.

(emphasis and underlining added). (slip op1-3)

The facts above indicate that defense counsel accepted the jury and indicated that his client accepted the jury. After this occurred, the trial court brought up juror 46, noted that a race neutral reason was provided, and that she was excused based on the State using a peremptory challenge. The trial court then asked if there was anything else that needed to be discussed. Immediately after the trial court made its statements, defense counsel stated, "[y]our Honor, the only thing **<u>other than</u>--everything *you said* is fine.**" (emphasis and underlining added). Therefore, not only did defense counsel indicate that he and his client accepted the jury,

he noted that he wanted to address something "other than" what the trial court had said, which was "fine." The trial court had just finished discussing juror 46 being removed by the State's use of a peremptory, which it stated was race neutral.

Contrary to the holding of the majority opinion, the case at bar is not distinguishable from Joiner. In the case at bar, defense counsel not only indicated that he and his client accepted the jury, he stated that what the trial court stated about juror 46 being excused by the State for a race neutral reason was fine. Hence, just as in Joiner, defense counsel accepted the jury *and* the fact that juror 46 was removed based on a race neutral reason, so it was reasonable to assume that he was satisfied with the jury as it was. The statements of defense counsel indicate that he wanted to raise something "other than" what the trial court had just discussed. If defense counsel had wanted to renew the objection to juror 46, he would have said so, he would not have said it was "fine."

In any event, right after defense counsel made the above-mentioned statement, he said, "[w]hat I would like to do, I've made a few objection [sic] in preliminary proceedings and objected to evidence and objected to different things, I would just like to make that as a continuing objection, so they don't come back and say we failed to object at trial." When one looks at the context of the statements, defense counsel had just indicated that he

wanted to raise something "other than" what the trial court had just discussed regarding juror 46, which was "fine," and that he wanted to request a standing objection to objections he previously made in preliminary proceedings, including evidence and different things. Therefore, not only does defense counsel request a standing, generic objection to "different" things or evidence from preliminary proceedings, instead of a specific objection, he indicated that they were "other than" what the trial court had just mentioned regarding juror 46. Respondent's claim regarding the peremptory challenge was waived pursuant to Joiner.

C. The First District certified a question of great public importance

Most importantly, this Court should accept jurisdiction in this case based on the certified question, as the State argues that the majority opinion has created a very bad policy. The opinion indicates that an initial objection is preserved even when an attorney subsequently agrees to a jury panel and indicates that he is "fine" with a trial court's statements as to why it removed a juror, as long as the attorney requests a standing objection to nonspecific things he had previously objected to in preliminary proceedings *after* he waives the issue. This principle could also be extrapolated to other matters. It could be used to argue that an initial objection is preserved anytime an attorney requests a standing objection to "different" things or things he had

previously objected to even if the attorney abandoned or stipulated to the issue after the initial objection.

Furthermore, the principle from the majority opinion is contrary to the reasoning of the invited error doctrine and the legal requirement that a party make a specific objection in order to preserve an issue for appeal. In Boyd v. State, 200 So. 3d 685, 702 (Fla. 2015), this Court stated that it was well-settled under Florida law that a party could not make or invite error at trial and then take advantage of the error on appeal. The holding of the majority opinion would allow a party to invite or make error, take it back, and then get a windfall on appeal. It would also allow the party to do it in such a way that the trial court was not put on notice that the attorney was taking the error back because the objection would be posed in a generic way. It is for this reason that the holding of the majority opinion is inconsistent with the law regarding preservation. In Murray v. State, 3 So. 3d 1108, 1117 (Fla. 2009), this Court stated, in regard to preservation, that the "articulated concern must be 'sufficiently specific to inform the court of the perceived error.'" It is reasonable for a trial court to assume that an attorney is not renewing objections to issues he abandoned or invited, especially when the attorney does not specifically indicate that he is doing so.

<u>CONCLUSION</u>

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it has jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jennifer LaVia, Esquire, at jlavia@law.fsu.edu, on this 10th day of April, 2018.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12-point font.

Respectfully submitted and certified,
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