

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution below; the brief will refer to Petitioner as such, the prosecution, or the State. Respondent, Shawnest Angelo Ivey, was the defendant in the trial court; this brief will refer to Respondent as such, Defendant, or by proper name.

"IB" will designate Petitioner's Initial Brief, followed by any appropriate page number. "AB" will designate Respondent's Answer Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State relies on its statement of the case and facts from its initial brief.

ARGUMENT

ISSUE I: WHETHER A REQUEST FOR A STANDING OBJECTION TO NONSPECIFIC THINGS PREVIOUSLY OBJECTED TO IN PRELIMINARY PROCEEDINGS REVIVES A SPECIFIC OBJECTION TO AN ISSUE THAT WAS ABANDONED? (RESTATED)

***Merits***

In his reply brief, Respondent makes several arguments, most of which were addressed in the State's initial brief. First, Respondent argues that "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." (AB-4). However, this was not the case.

As noted in the initial brief, the following occurred during jury selection after the prosecutor stated her reason for wanting to use a peremptory strike on juror 46:

Defense counsel, Mr. Green, made the following objection:

Your Honor, we would submit for the record that she's an older black female, **only black person on the jury**, and there is nothing in the record – she should give a race neutral reason for her to be kicked off, and we object to her being kicked off because the state has not presented any race neutral reason that's in the record.

(JS 123). The prosecutor responded as follows:

I believe I just have with her bias towards me. **Your Honor, Mr. Patterson is black male that is on the jury and we accepted that.** The only reason that I am objecting to Ms. Sherman is because I made that joke about her calling Lieutenant Garvin the wrong name, and I saw her acknowledge it and give me a look as to not appreciating it.

(JS 123).

Defense counsel then stated as follows:

The problem I have with that is, if she thought that that was a problem, she should have brought it up during voir dire where we could have addressed it. The only thing we have is Ms. Wahlquist telling us this at sidebar what happened and I have no way to show that this-- I just don't think it's a race neutral reason in the record and that's what she has to have.

(JS 123-124).

The prosecutor subsequently advised the court that ". . . it has nothing to do with race because **by striking Ms. Sherman I get another black individual on the jury**, it doesn't have to do with race, it has to do with this incident and I do accept Mr. Patterson as a member of the jury and Ms. Sims as the alternate." (JS 124). The trial court then found that the State's reason was race neutral "**. . . with the understanding that Mr. Patterson will be on the jury**," and defense counsel (Mr. Green) agreed:

The Court: **I find that's a race neutral reason, with the understanding that Mr. Patterson will be on the jury.**

Ms. Wahlquist: Yes. Your Honor, I accepted.

Mr. Green: And Sims as the alternate?

Ms. Wahlquist: Yes.

Mr. Green: **Okay.**

The Court: That gives us number 72, Busby, number 83, Fowler, number 88, Pantoja, number 1, Whitfield, number 28, McKay, number 49, Patterson, and that puts our alternate then as Sims, number 52.

Mr. Green: That's it.

(JS 124).

After the judge read out the names of the persons chosen to

serve on Respondent's jury for the second time, he asked Mr. Ivey if he participated with his attorney during jury selection and Ivey said yes. Defense counsel stated that he wanted to take Mr. Ivey to the table **so he could point the jurors out to him**. The judge stated, "[o]kay, I just want to make sure the record reflects that **he participated with our jury selection** and was at sidebar the whole time and participated in our jury selection process. Defense counsel stated "[o]kay." (JS 125).

The judge asked defense counsel if he and Mr. Ivey were "agreeable that that is our jury in this case?" (JS 125). Defense counsel responded as follows:

Yes, your Honor, I had the opportunity to go back over it. It's kind of confusing, especially if you've never done this--I have done it, but he hasn't, it gets confusing to understand exactly how it works and **I've gone over the entire panel and he agrees and accepts this jury, your Honor**.

(JS 125-126).

Shortly thereafter, the trial judge announced who the jurors were by name and asked defense counsel and the prosecutor if they were in agreement with the jurors. Defense counsel stated **yes**. The trial judge then asked the parties if they had **any objection to excusing the remaining members** of the venire that were not selected to serve on Appellant's jury (which included Ms. Sherman), and defense counsel responded, "**[n]o, your Honor**." (JS 126). The judge then thanked those members of the venire for their service and excused them. (JS 126). After giving some preliminary instructions

to the panel selected to serve on Appellant's jury, the trial court asked counsel if there was anything else that needed to be addressed before adjourning for the day. (JS 128). Defense counsel responded, "[n]o, your Honor." (JS 128).

There are a few reasons defense counsel likely decided to abandon his objection. Based on the record, defense counsel expressed concern that the prosecutor was removing what he initially believed to be the only black juror from the panel. However, the prosecutor explained that by removing juror 46, there would be another black juror on the panel. The trial court announced that it would accept the State's reason as race neutral based on the understanding that Patterson (the black juror that would be on the jury due to the removal of juror 46) would remain on the jury. Defense counsel said ok. After the trial court specifically read out the names of the jurors that would remain on the jury, it was noted that Respondent was actively participating in jury selection. Defense counsel went over the prospective jury panel with Respondent, actually pointed out the jurors to him, and announced that they accepted the jury.

In fact, defense counsel specifically stated that they had no objection to **excusing** the remaining jurors. It looks as though defense counsel abandoned his objection after he realized that there would be a black juror on the jury even if juror 46 was removed and after speaking to his client. In light of the

statements by defense counsel, it looks as though they determined that they were satisfied with the jury they ended up with. Perhaps defense counsel learned, after speaking to Respondent, that Respondent would prefer to have Patterson as a juror than juror 46 and/or that he was satisfied with the jury despite what occurred with juror 46. Hence, there were reasons that would have led defense counsel to abandon the objection.

Second, Respondent indicated, "[i]n support of the challenge, the State argued that if Ms. Sherman were excused, the next juror was black." Respondent then argued that this alleged claim had been rejected by this Court. (AB-5). However, Respondent overlooks that the State never made this argument and is not making it now. The State limited its argument to whether or not the issue was preserved.

As explained above and in the initial brief, the State believes defense counsel abandoned his objection, in part, because he learned that there would be a black juror on the panel even if juror 46 was removed. The State never argued that jurors were fungible or that the removal of juror 46 was acceptable because there was another black juror on the panel. The State indicated as follows in the initial brief:

It looks as though defense counsel was initially upset about the fact that he believed the State was removing the only black juror. However, after realizing that there was going to be a black juror on the case and going over the jurors with his client, defense counsel and Appellant decided they were satisfied with the jury.

(IB-17-18).

Third, Respondent raises the issue from the certified question regarding whether a defendant can renew a previously raised objection after the challenged juror has been excused, but before the jury was sworn. However, as noted in the initial brief, this was not an issue in the case. The certified question posed by the judges, who wrote the majority opinion, presumes the disputed issue in their favor. The disputed issue between the majority opinion and the dissent, as well as the State and Respondent, is *whether Respondent renewed his initial objection to juror 46*. See Ivey v. State, No. 1D15-5803 (Fla. 1st DCA September 13, 2017) and Ivey v. State, No. 1D15-5803 (Fla. 1st DCA February 20, 2018). This is the reason the State restated the question to include whether a request for a standing objection to nonspecific things previously objected to in preliminary proceedings revives a specific objection to an issue that was abandoned.

Fourth, Respondent argues that he preserved his objection to juror 46 by requesting a continuing objection before the jury was sworn. (AB-9). Respondent further argues that his acceptance of the jury was not an abandonment of the objection and that he had no choice but to accept the jury. (AB-10). The State disagrees. As extensively noted in the initial brief, case law reflects that a defendant abandons an objection to a juror if he accepts the jury and does not renew his prior objection prior to the jury being sworn. (IB-14-15, 23-24). As noted above, defense counsel did not just accept the jury, he specifically indicated that he had no objection to the trial court *excusing the remaining jurors*. Contrary to assertion by Respondent, he did

have a choice in this situation. Respondent could have informed the trial court that he accepted the jury subject to his prior objection to juror 46. Also, when the trial court asked Respondent if he objected to the remaining jurors being excused, he could have chosen to say yes, instead of no. The State further notes that a reasonable attorney would have made it very clear to the trial court that he wanted to revive an objection to juror 46, if he had wanted to do so, especially after expressly abandoning the issue multiple times.

Furthermore, not only did defense counsel expressly abandon the objection to juror 46 during jury selection, he specifically indicated that his request for a continuing objection was "other than" what the trial court had just stated about the removal of juror 46 and that what the trial court had stated regarding juror 46 was "fine." For these reasons, this issue was waived pursuant to Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993), which requires that an attorney renew his objection to a juror he previously objected to prior to the jury being sworn. Therefore, the case at bar is in conflict with Joiner.

The record shows that Respondent expressly abandoned his prior objection to juror 46 multiple times, including right before he requested a continuing objection. When court resumed the next day after jury selection, the following exchange occurred between the trial court and defense counsel before the jury was sworn:

Court: The only additional thing is looking at my seating chart for jury selection yesterday, I had seated for **juror number 46, Ms. Sherman**, 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 [sic] **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.

(T 4-5). (Emphasis and underlining added).

Fifth, Respondent argues that the trial court recognized a continuing objection to any ruling that had already been made by it and that the trial court was "unquestionably aware of Defendant's position that the peremptory challenge was improper." (AB-10-11). However, the trial was not unquestionably aware that that Respondent was not satisfied with the jury and that he wanted to revive an abandoned objection to juror 46. In fact, it was reasonable for the trial court to assume that Respondent was not referring to issues that he had expressly abandoned multiple times, especially since he indicated, in the statement just before his request for the continuing objection, that his request did not include the issue regarding juror 46. The record shows that the trial court was not asking defense counsel about juror 46, but was simply noting *for record purposes* that juror 46 was removed by the State's use of a peremptory challenge and that she was not a challenge for cause. Despite Respondent's assertion to the contrary, the language used by defense counsel unquestionably put the trial court on notice that he was not attempting to

revive his abandoned objection to juror 46.

Moreover, Respondent provides absolutely no explanation for why defense counsel would state, in response to the trial court's discussion of the removal of juror 46, that he wanted to raise something "other than" and that what the trial court had stated regarding juror 46 was "fine" if he intended to include the issue regarding juror 46 in his request for a continuing objection. Also, Respondent does not explain why he would ask for a *continuing objection* to the issue regarding juror 46, so it could not be said he did not object *at trial*, when a jury selection issue would not come up again at trial.

Finally, as noted in the initial brief, the approval of this case would create bad policy. If this Court were to allow a vague and general renewal of previously unspecified objections to revive a prior abandoned or settled matter, it would erode preservation requirements and even encourage sandbagging by lawyers.

#### CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the First District Court of Appeal in Ivey v. State, No. 1D15-5803 (Fla. 1st DCA September 13, 2017), should be quashed, and the judgment and sentence entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jennifer LaVia, Esquire, at JLAVIA@LAW.FSU.EDU, on this 24th day of October, 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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