IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1083

WILEME BAPTISTE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
DISTRICT COURT CASE NO. 3D18-2403

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Wileme Baptiste, was the Defendant and Appellant below; this brief will refer to Petitioner as such or by proper name. The State of Florida was the prosecution and Appellee below; this brief will refer to the State of Florida as "Respondent" or the State. The symbol "A" refers to the Appendix as attached to Petitioner's Brief on Jurisdiction.

STATEMENT OF THE CASE AND FACTS

A jury convicted Petitioner of the lesser included offenses of manslaughter with a deadly weapon, two counts of attempted manslaughter, and unlawful possession of a firearm by a minor. (A. 2-3). During deliberations, the trial court gave an Allen[1] charge. (A. 3). The jurors later returned, stating that they had reached a verdict. (A. 3). When the clerk polled the jury, one of the jurors disagreed with the verdict. (A. 3).

After the jury left the courtroom, defense counsel conferred with Petitioner. (A. 3). The defense then requested that the judge send the jurors: a note instructing them to continue deliberating, a copy of the jury instructions, as well as new verdict forms. (A. 3). Because it had already read an Allen charge, the court stated that it did not intend for deliberations to continue. (A. 3). Instead, the court told the parties that it would solely instruct the jurors to memorialize its verdict, if they had one, on

[1] Allen v. United States, 164 U.S. 492 (1896).

the new verdict forms. (A. 3-4). Both the state and defense agreed to the proposed instruction. (A. 4).

When the jury returned to the courtroom, the court instructed the jurors that it would provide them with new verdict forms. (App. 4). It asked the jury to fill them out if they had a unanimous verdict. (A. 4). The judge continued that "if [it did] not have a unanimous verdict, [it should] knock on the door…and [the court would] bring [the jury] back [to the courtroom]." (A. 4). The jury then returned a unanimous verdict. (A. 4).

The Third District Court of Appeal ("Third District") found that the "go back" and "fill out" a new verdict form statement was a modified Allen charge and was thus erroneous. (A. 5). However, because Petitioner failed to move for a mistrial when the nonunanimous verdict was announced and did not object to the final instruction, the Third District held Petitioner waived the issue and could not take advantage of an invited error on appeal. (A. 6).

SUMMARY OF ARGUMENT

There is no basis upon which discretionary review can be granted in this case where there is no express and direct conflict between the Third District's decision and any decision of another district court of appeal or the Florida Supreme Court. Fla. Const., art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(iv).

ARGUMENT AND CITATION TO AUTHORITIES

"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." Fla. Const., art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(iv). An express and direct conflict is one in which it can be shown that two opinions cannot be reconciled. Aravena v. Miami-Dade Co., 928 So. 2d 1163, 1166-67 (Fla. 2006). A conflict arises where the appellate court "reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated" the result reached by the conflicting appellate decision. Aravena, 928 So. 2d at 1166-67 (quoting Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992)).

Discretionary jurisdiction cannot be invoked merely because of a disagreement with the district court's decision or a factual finding by the trier of fact. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975); Kincaid v. World Ins. Co., 157 So. 2d 517, 518 (Fla. 1963). The Court may not exercise jurisdiction over a decision that fails to expressly address the relevant question of law. Tippens v. State, 897 So. 2d 1278, 1280 (Fla. 2005).

The conflict between decisions "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to

establish the conflict. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Moreover, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So.2d at 1359 (quoting Gibson v. Malony, 231 So. 2d 823, 824 (Fla. 1970)). Any conflict may not be inherent or implied and any conflicting language must be more than "mere obiter dicta". Dep't Health and Rehab. Svcs. v. Nat'l Adoption Counseling Svcs., 498 So. 2d 888, 889 (Fla. 1986); Ciongoli v. State, 337 So. 2d 780, 781 (Fla. 1976).

I. THE THIRD DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH RUBI V. STATE.

In his brief on jurisdiction, Petitioner argues that the instant decision expressly and directly conflicts with the Fourth District Court of Appeal's decision in Rubi v. State, 952 So. 2d 630 (Fla. 4th DCA 2007). He is incorrect, because the decisions do not "reach[ ] the opposite result on controlling facts which, if not virtually identical, more strongly dictated" the result reached by the conflicting appellate decision. Aravena, 928 So. 2d at 1166-67. Instead, the Fourth District's per se reversal rule was applied in a case whose facts are starkly different than those of the instant case.

In Rubi, after an Allen charge was given, the jury sent out a second note explaining that one of the jurors was "assuming and speculating on the evidence and

was not following the law." Rubi, 952 So. 2d at 632. In response, the trial court gave another instruction, which stated:

> You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

Id. at 633.

The Fourth District decided that the second note announced a second deadlock and the court's charge amounted to coercion, pressuring a holdout juror to conform his views to those of his peers. Id. at 634-35. Under these circumstances, the Court held that even though defense counsel did not object to the second instruction, it was fundamental error. Id. at 635. It stated that if the totality of the circumstances supports the finding of improper coercion of the jury, then it is fundamental error, and per se reversible. Id.

The Rubi trial court's final instruction was clearly coercive. The judge appears to have accepted the foreperson's assertion that one of the jurors was speculating on non-factual matters and not following the law. By instructing the jury that it had to follow the law, the instruction was directed at one juror. Here, the trial court's final instruction was not specific to a single juror and gave the jurors the option of either returning a unanimous verdict or returning to the courtroom. It did not express any opinion, or say anything further.

Further, in Rubi, the jury returned a verdict of guilty. The opinion states nothing about lesser included offenses. Here, by contrast, the jury returned verdicts of guilt on lesser included offenses for all but one of the charges. That is indicative of a few possibilities that go against any per se rule of reversal.

Defense counsel may have been engaging in strategic decisions for what was perceived as a likelihood that this jury would come back with lessers, which would be viewed as preferable to either convictions for the greater offenses or a mistrial with a new jury. Or, if the jury's original verdict, which the juror did not agree with, was for the greater offenses, as it was, the fact that the jury came back with lessers the second time around clearly shows that the final instruction in this case had no coercive effect. If anything, the dissenting juror carried the day and persuaded the others.

Given the potential strategic benefits to the defense by agreeing with the court's final instruction in this case, the Third District's opinion is in line with this Court's precedent that fundamental error is waived under the invited error doctrine because a party may not make or invite error at trial and then take advantage of the error on appeal. See Boyd v. State, 200 So. 3d 685 (Fla. 2015) ("It is well-settled under Florida law that 'a party may not make or invite error at trial and then take advantage of the error on appeal.'") (quoting Universal Ins. Co. of N. Am. V. Warfel, 82 So. 3d 47, 65 (Fla. 2012) (quoting Sheffield v. Superior Ins. Co., 800 So. 2d 197,

202 (Fla. 2001))); see also Norton v. State, 709 So. 2d 87 (Fla. 1997) ("[A] party may not invite error during the trial and then attempt to raise that error on appeal.").

Because the controlling facts of Rubi and those of the instant case are starkly different, the decisions are not irreconcilable. As such, there is no express and direct conflict.

CONCLUSION

Respondent respectfully requests that the Court decline discretionary jurisdiction.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing document – *Brief of Respondent on Jurisdiction* – has been filed with the Clerk of Court using Florida's E-Filing Portal, which will send notice via e-mail to counsel for Petitioner,

Maria Lauredo, Chief Assistant Public Defender, at AppellateDefender@pdmiami.com and MLauredo@pdmiami.com on this 11th day of August 2020. I also certify that this brief was computer generated using Time New Roman 14-point font.

/s/ Brian H. Zack
By: BRIAN H. ZACK
ASSISTANT ATTORNEY GENERAL