IN THE SUPREME COURT OF FLORIDA

CEDRICK JONES,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: SC04-1217

L.T. CASE NO.: 4D01-3810

****

ON PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Cedrick Jones, was the defendant in the trial court and was the appellant in the Fourth District Court of Appeal. Petitioner will be referred to herein as “petitioner.” Respondent, the State of Florida, was the prosecution in the trial court and was the appellee in the Fourth District Court of Appeal. Respondent will be referred to herein as “respondent” or “the State.”

The following symbols will be used throughout this Brief:

IB = Petitioner’s Initial Brief on the Merits

IBDA = Petitioner’s Initial Brief on Direct Appeal

JB = Petitoiner’s Brief on Jurisdiction

R = Record on Appeal

SR = Supplemental Record

T = Trial Transcripts

STATEMENT OF THE CASE AND FACTS

Petitioner was charged, by Information, with two counts of battery on a law enforcement officer, resisting with violence, and depriving an officer of means of communication. (R. 3-4).

At trial, Broward County Sherriff's Deputy Daniel Miller (Deputy Miller) testified he was on road patrol on May 30, 1999. (T. 76-77). At approximately 4:54 a.m., Deputy Miller came into contact with petitioner when he [Deputy Miller] began following a vehicle because he could not read the tag. (T. 78, 104). The tag was flapping in the wind and was secured with a paper clip. Id. Deputy Miller was unable to read the vehicle's tag number because the vehicle began making quick turns and going in circles in an attempt to elude Deputy Miller. (T. 79). The vehicle traveled through alleyways, ran stop signs, and ignored the traffic laws. (T. 79-80). Deputy Miller did not put his lights and siren on while following the vehicle. (T. 80).

At one point, Deputy Miller's sergeant called off the pursuit. (T. 81). Deputy Miller lost sight of the vehicle for a short while, but encountered it again after it had crashed into a car port support column. Id. Deputy Miller turned on his lights at that time and approached the vehicle. (T. 82). Petitioner then jumped out of the driver's side of the vehicle

and took flight. (T. 82-83). Deputy Miller began chasing petitioner on foot. (T. 83). Petitioner was ordered to stop multiple times, but he did not comply. Id. Petitioner jumped over a fence, and Deputy Miller dove over the fence and tackled petitioner. Id. After the tackle, both men rose to their feet. Id. Deputy Miller ordered petitioner to the ground, but he did not comply. (T. 84).

Petitioner told Deputy Miller "we're going to fight," grabbed Deputy Miller's radio, and threw the radio away. (T. 83-86). The two men began fighting and petitioner punched Deputy Miller in the face and ribs. (T. 86). Petitioner then fled through yards and over fences. Id. Deputy Miller pursued petitioner until he saw Deputy Boris in a patrol vehicle. (T. 86-87). Deputy Miller did not continue with the pursuit at that point because he was out of breath. (T. 87). Deputy Boris took up the pursuit of petitioner and Deputy Miller entered Deputy Boris's patrol car to continue searching for petitioner. (T. 88).

Deputy Miller encountered petitioner and Deputy Boris a block or so away. (T. 89). Deputy Boris pointed to petitioner and Deputy Miller drove the patrol car over to confront petitioner again. (T. 92). Petitioner was ordered to the ground, but did not comply. Id. Deputy Miller tried to tackle

petitioner and was able to get petitioner to the ground with Deputy Boris's assistance. Id. Deputy Miller and Deputy Boris were eventually able to get petitioner under control. (T. 92-93). Petitioner was pepper sprayed and Deputy Bell was the one who placed the handcuffs on petitioner. (T. 93).

On cross-examination, Deputy Miller stated there was a female passenger in the vehicle with petitioner. (T. 98). Deputy Miller ordered her to remain at the scene of the crash, but she did not. (T. 127-128). The probable cause affidavit did not mention the female passenger. (T. 99). Deputy Miller ordered petitioner to stop and did not tell petitioner that he was under arrest during the pursuit. (T. 109-110). Petitioner threw Deputy Miller's radio approximately ten feet away. (T. 110). Deputy Miller and Deputy Boris were pinning petitioner to the ground. (T. 119-120). Deputy Boris pepper sprayed petitioner. (T. 121). Petitioner was not given any tickets. (T. 123-124).

Deputy Boris testified that he came into contact with petitioner between 4:30 a.m. and 5:00 a.m. on May 30, 1999. (T. 134-135). Deputy Boris was responding as backup to Deputy Miller. (T. 136). Deputy Boris first saw petitioner when Deputy Miller was chasing him on foot. (T. 139). Deputy Boris stated he made contact with petitioner but did not contact

Deputy Miller. (T. 140). Petitioner was out of breath when Deputy Boris exited his vehicle and approached him. (T. 141). Petitioner assumed a fighting stance and said "Cracker, we're going to fight." Id. Petitioner threw several punches at Deputy Boris when he tried to place him under arrest. Id. Petitioner then ran away and jumped over a fence. (T. 142). Deputy Boris temporarily lost sight of petitioner, but petitioner lunged at Deputy Boris and struck him in the rib cage. (T. 143). Deputy Boris was knocked to the ground by petitioner's blow. Id.

Deputy Boris continued the pursuit of petitioner and Deputy Miller eventually arrived and pursued petitioner again. (T. 144-145). Petitioner was fighting with Deputy Miller and Deputy Boris attempted to help Deputy Miller take control of petitioner. (T. 145). Petitioner continued struggling with Deputy Miller and Deputy Boris, and Deputy Bell eventually placed handcuffs on petitioner. (T. 145-149). Deputy Boris pepper sprayed petitioner. (T. 148).

On cross-examination, Deputy Boris stated he did not see Deputy Bell strike petitioner with a flashlight. (T. 154). Deputy Boris did not speak with any civilians who were outside when petitioner was arrested. (T. 162, 168). The people on the street were not relevant to this case because they did not see

anything that happened prior to the arrest. (T. 168). Deputy Boris testified the civilians showed up when the screaming started. (T. 170). Deputy Boris could not say whether the civilians witnessed petitioner being pepper sprayed or handcuffed. (T. 170-171).

Deputy Bell testified that she came into contact with petitioner as a backup officer on May 30, 1999. (T. 190-191). Petitioner was on the ground struggling with two deputies, who were trying to place handcuffs on him. (T. 191-192). Deputy Bell tried to place handcuffs on petitioner. (T. 193). After Deputy Bell handcuffed one of petitioner's hands, he pulled away and grabbed her [Deputy Bell's] pants in an attempt to pull her feet from underneath her. (T. 194-195). Deputy Bell then struck petitioner with her flashlight in the upper back area. (T. 196). Deputy Bell was unsure how many times she struck petitioner. Id. Deputy Bell stopped striking petitioner when he let go of her pants leg (when Deputy Boris pepper sprayed him). (T. 197). Deputy Bell finished handcuffing petitioner and transported him to the district office. Id.

On cross-examination, Deputy Bell testified that she did not observe any injuries on petitioner after his arrest. (T. 201). Deputy Bell did not fill out a police report in this case, even though it was required due to her use of force. (T. 215-217).

At the time of the incident, petitioner was in great physical shape. (T. 224).

The jury found petitioner guilty of both counts of battery on a law enforcement officer, guilty of the lesser included offense of resisting without violence, and not guilty of depriving an officer of means of communication. (T. 315-316). On August 2, 2001, petitioner filed a motion for new trial that set forth numerous bases for relief. (T. 122-123). Petitioner's motion for new trial did not raise any issues regarding jury selection. Id. On August 24, 2001, a hearing was held on petitioner's motion for new trial. (T. 323-340). Petitioner did not raise any issues regarding jury selection at the hearing. (T. 328-333). The trial court denied petitioner's motion for new trial. (T. 334).

Petitioner appealed his convictions and sentences to the Fourth District Court of Appeal. (R. 142). In addition, petitioner filed an exhaustive statement of judicial acts to be reviewed. (R. 144-145). Petitioner's statement of judicial acts to be reviewed did not raise any issues regarding jury selection during this trial. Id.

The transcript filed by the court reporter in this case does not contain the jury selection portion of the trial. (T. 32-33). On March 19, 2002, petitioner filed an Unopposed Motion to

Relinquish Jurisdiction and Toll Time because the voir dire in the this case was not transcribed. On May 17, 2002, the trial court held a "hearing" on the reconstruction issue. (SR. 6-18). The State was not represented at the May 17, 2002 hearing. Id. During the hearing, petitioner asserted the voir dire proceedings could not be reconstructed because (1) his trial counsel (Mr. Simon) had no recollection of the voir dire, and (2) Mr. Simon "no longer has his notes with respect to this case." (SR. 7-8). After the hearing, the trial court entered an order stating the voir dire could not be reconstructed. (SR. 6/5/02 Order).

The State subsequently filed a second motion to relinquish jurisdiction[1] because: (1) the State was not represented at the May 17, 2002 hearing, (2) the State was never afforded the opportunity to call witnesses, present evidence, etc. on the reconstruction matter, (3) the court reporter never testified, nor did she detail what steps she took to recover the missing transcript from her computer, (4) the record demonstrated that another court reporter also transcribed portions of the proceedings in this case, and (5) justice demanded that "no stone be left unturned" in the quest to determine whether the

[1] The State's initial motion to relinquish jurisdiction was denied.

voir dire transcripts could be obtained. (11/14/02 State's Mot. Relinquish Jurisdiction). Although petitioner declared the voir dire transcripts were necessary for a complete review in this case, petitioner opposed the State's attempt to ascertain whether the voir dire transcripts could be recovered. (11/27/02 Petitioner's Response to State's 11/14/02 Motion). On December 11, 2002, the Fourth District granted the State's motion to relinquish jurisdiction because the State was not represented at the May 17, 2002 hearing. (SR. 22).

On February 21, 2003, an evidentiary hearing was held regarding the reconstruction issue. The prosecutor at trial, Julie Porter, testified that there were two trials in this case. (SR. 71-72). After reviewing her notes, Ms. Porter had a recollection of the voir dire in the second trial. (SR. 72). A chart containing Ms. Porter's notes during petitioner's second trial was entered into evidence. (SR. 73). Ms. Porter exercised two peremptory challenges during voir dire and petitioner exercised three peremptory challenges. (SR. 72). Ms. Porter did not recall petitioner exercising any cause challenges. (SR. 73).

On cross-examination, Ms. Porter stated she recalled petitioner's counsel objecting to the trial going forward. (SR. 74). The second jury selection was much quicker than the first

one. Id. Ms. Porter previously advised the Assistant State Attorney that she had tried a case with petitioner's counsel (Mr. Simon) where they reached the end of the jury panel and she struck a black juror. (SR. 75). Mr. Simon asked for a race neutral reason, Ms. Porter gave one, and the trial court upheld it. Id. Mr. Simon then struck a white juror, Ms. Porter asked for a race neutral reason, and Mr. Simon gave one. Id. A discussion ensued and the trial court ended up leaving both jurors on the panel. (SR. 75-76). Ms. Porter knew these things did not occur in this [petitioner's second] trial. (SR. 77-78).

Ms. Porter stated she did not recall whether Mr. Simon made any objections to Ms. Porter's peremptory challenges. (SR. 78). Ms. Porter did not recall Mr. Simon making any objections while she was questioning the jurors. (SR. 81). Ms. Porter did not believe any Neil[2] or Slappy[3] challenges were made when she exercised her peremptory challenges because she believed the two people stricken where white. Id. Ms. Porter did not write down the race of any jurors on her chart, nor did she write down the questions that were asked during voir dire. (SR. 82). Ms. Porter did not believe that she objected to any of Mr. Simon's strikes. Id. Ms. Porter conceded that it was possible that she

[2] State v. Neil, 457 So. 2d 481 (Fla. 1984).

[3] State v. Slappy, 522 So. 2d 18 (Fla. 1988).

did not recall all of the objections and rulings made during voir dire. (SR. 82-83). When questioned by the trial court, Ms. Porter stated that there was not anything during jury selection in this trial that would have alerted her to a possible fundamental error. (SR. 89).

Court Reporter Lauren Foren testified that she prepared the transcript in this case which omitted the jury selection. (SR. 99). Ms. Foren stated that there was no transcript of the jury selection because her computer crashed. Id. Ms. Foren stated she did not have any legible paper notes of the jury selection in this case because the paper was "flipped." (SR. 101). Ms. Foren testified that she advised her boss, Pat Bruins, of the fact that she was unable to transcribe the jury selection in this case. (SR. 103). Ms. Bruins told Ms. Foren to "do the best you can," and she filed the transcript in this case without the jury selection. Id.; (T. 1-39).

Mr. Simon testified that he was petitioner's trial counsel. (SR. 106). Mr. Simon did not recall anything about the voir dire in this case. (SR. 107, 110-111).

Petitioner testified that he was tried twice in this case. (SR. 116). Petitioner stated that Mr. Simon made objections during jury selection of the second trial. (SR. 118). According to petitioner, who has multiple felony convictions,

Mr. Simon "was saying something like Neo [sic] Slappy when the State was striking a witness or something." (SR. 118; R. 131). Petitioner admitted it was difficult in keeping the trials in this case straight. (SR. 119). Petitioner could not remember how many challenges Mr. Simon used in this case, nor could he recall the race of the two persons stricken by Ms. Porter. (SR. 119-121).

The trial court found that petitioner had three peremptory challenges remaining when the jury was sworn in this case. (SR. 128). The trial court then stated that the voir dire cannot be accurately reconstructed. (SR. 128-129, 131). Petitioner requested the trial court to find that "it is likely that objections were made that cannot be recalled as well as rulings of the Court." (SR. 129). The trial court expressly refrained from making any such finding in this case. Id.

Before the Fourth District Court of Appeal, petitioner argued the absence of a voir dire transcript entitled him to a new trial even though he did not allege that any reversible error occurred during voir dire. (IBDA. 17-18). The Fourth District rejected petitioner's argument based upon this Court's opinion in Darling v. State, 808 So. 2d 145 (Fla. 2002). Jones v. State, 870 So. 2d 904 (Fla. 4th DCA 2004). On September 21, 2004, this Court accepted jurisdiction over the instant case.

SUMMARY OF ARGUMENT

This Court's opinion in Darling is controlling in this case, and there is no express and direct conflict between the Fourth District's decision in Jones and the decisions of other district courts of appeal. The absence of a voir dire transcript does

not automatically entitle a defendant to a new trial; rather, the question to be asked is whether the missing portions of the transcript are necessary for a complete review.

In Darling, this Court addressed an argument nearly identical to the one raised by petitioner in this case. This Court expressly rejected such an argument and held that "Darling has failed to demonstrate what specific prejudice, if any, has been incurred because of the missing transcripts. The missing portion of the transcript has not been shown to be necessary for a complete review of this appeal." Darling, 808 So. 2d at 163. Similarly, the voir dire transcripts are not necessary for a complete review in this case because the record shows that: (1) petitioner never claimed an error occurred during voir dire in his 14-point motion for new trial, (2) at the hearing on the motion for new trial, petitioner never argued he was entitled to a new trial based upon anything that occurred during voir dire, (3) petitioner's 19-point statement of judicial acts to be reviewed did not raise any voir dire issues during this trial, (4) petitioner only exercised three peremptory strikes, which precludes him from challenging any of the jurors that actually sat on the panel, (5) petitioner's trial counsel failed to maintain "his notes with respect to this case," (6) the evidence presented at the reconstruction hearing demonstrates that any

purported Neil or Slappy objections to the State's peremptory challenges could be resolved as a matter of law, and (7) petitioner never claimed he wanted to challenge any ruling of the trial court that occurred during voir dire. Accordingly, the Fourth District's decision should be affirmed because it merely follows the precedent established by this Court in Darling.

ARGUMENT

THE ABSENCE OF A COMPLETE VOIR DIRE TRANSCRIPT DOES NOT AUTOMATICALLY ENTITLE A DEFENDANT TO A NEW TRIAL; A DEFENDANT MUST DEMONSTRATE THE MISSING TRANSCRIPT IS NECESSARY FOR MEANINGFUL REVIEW OF A SPECIFIC, IDENTIFIABLE ISSUE ON APPEAL

Petitioner argues he is entitled to a new trial because the court reporter in this case was unable to provide a voir dire transcript and the trial court was only able to reconstruct a limited portion of the voir dire proceedings. For the reasons set forth below, petitioner's argument should fail.

Contrary to petitioner's assertions, the Fourth District properly rejected his argument on direct appeal under the binding authority of this Court's decision in Darling.[4] In Darling, a death penalty case, the record on appeal did not contain transcripts from various pretrial hearings. The defendant (Mr. Darling) argued the absence of transcripts from the pretrial hearings precluded meaningful consideration of his case. This Court rejected Mr. Darling's argument and held:

> Darling has failed to demonstrate what specific prejudice, if any, has been incurred because of the missing transcripts. The missing portion of the transcript has not been shown to be necessary for a complete review of this appeal. *Cf. Velez v. State*,

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[4] The Fourth District was also bound by its own decisions in Velez v. State, 645 So. 2d 42 (Fla. 4th DCA 1994) and Burgess v. State, 766 So. 2d 293 (Fla. 4th DCA 2000).

> 645 So.2d 42, 44 (Fla. 4th DCA 1994) (concluding that the appellant was not prejudiced in the review of his conviction and sentence, "[c]onsidering the limited portion of transcript which is missing and the errors alleged to have occurred in the trial court"). Therefore, this claim too lacks merit.

Darling, 808 So. 2d at 163. Since petitioner never alleged that any error occurred during the voir dire in this case, the Fourth District properly held:

> Under existing law by which we are bound, defendant has failed to demonstrate that the missing portions of the transcript are necessary for meaningful review of a specific, identifiable issue in his appeal. It is not enough to say that as a result of the omission we do not know whether any error occurred, and therefore a new trial is required. A new trial would be required under *Darling-Burgess-Velez* only if Jones could point to a specific decision by the trial judge that he would use to show reversible error.

Jones, 870 So. 2d at 905.

Petitioner suggests the decision in Darling is distinguishable from the instant case by stating "[h]ow Darling's right to meaningful appellate review was not prejudiced by the absence of pre-trial hearing transcripts is not hard to imagine as any pre-trial motion would have to be renewed at trial to preserve the court's denial of the motion for appeal. *Perez v. State*, 717 So. 2d 605 (Fla. 3d DCA 1998)." (IB. 14). Petitioner's attempt to distinguish Darling must fail because a defendant is not required to renew all pretrial motions at trial in order to preserve an issue for appellate

review. See § 90.104(1)(b), Fla. Stat. (if a trial court makes a definitive pretrial ruling on a motion to exclude evidence, a party need not renew the objection at trial to preserve the issue for appellate review); Bender v. State, 472 So. 2d 1370 (Fla. 3d DCA 1985)(where trial court granted the State's motion in limine to prevent certain evidence from being presented at trial, the defendant preserved the issue for appellate review even though he did not attempt to elicit such testimony at trial); Boyd v. State, 578 So. 2d 718 (Fla. 3d DCA 1991), disapproved of on other grounds, Gross v. State, 765 So. 2d 39 (Fla. 2000)(defendant's pretrial motion to dismiss one of the RICO counts adequately preserved an issue for appellate review). In addition, petitioner's attempt to distinguish Darling is fruitless because, as Chief Judge Farmer astutely pointed out during oral argument, transcripts of certain pretrial hearings are often essential to the resolution of a defendant's case.[5]

[5] For example, a pretrial hearing on a defendant's motion to suppress evidence seized by law enforcement in a simple drug possession case may be dispositive of the entire proceeding. See Howard v. State, 515 So. 2d 346 (Fla. 1st DCA 1987)("A typical example of dispositiveness is where the trial court has entered a pretrial order denying a motion to suppress drugs in a drug case. Such a ruling is dispositive if the state has no other evidence with which it can proceed to trial against the defendant."). Furthermore, transcripts of the following pretrial hearings would also be necessary for a "complete and adequate review" because the resolution of either motion could be dispositive: (1) a hearing on a defendant's motion to dismiss the charges against him due to a

Since pretrial hearing transcripts may be more integral to a "complete and adequate review" on appeal than voir dire transcripts, petitioner's attempt to distinguish Darling from the instant case must fail.

The Fourth District's decision in this case is bolstered by this Court's decision in Armstrong v. State, 862 So. 2d 705 (Fla. 2003). In Armstrong, another death penalty case, the defendant claimed his appellate counsel was ineffective because "critically important depositions" and voir dire conferences were absent from the record on direct appeal. This Court rejected the defendant's argument and held that "[b]are allegations of unrecorded depositions and proceedings are legally insufficient to entitle him to relief." Id. at 721. In addition, the defendant's argument in Armstrong was meritless because he failed to link the absence of the voir dire transcripts to a meritorious appellate issue. Id. Similarly, petitioner's argument that he "was prejudiced by the complete absence of the voir dire transcript" is without merit because he failed to allege the voir dire transcripts were necessary for a meaningful review of a specific, identifiable issue in his appeal. Id.; Jones, 870 So. 2d at 905; (IB. 13).

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flaw in the charging document, and (2) a defendant's motion to dismiss for lack of jurisdiction.

The record in this case demonstrates that petitioner did not need the voir dire transcripts to conduct a complete review of his direct appeal. Several days after the jury's verdict, petitioner filed an extensive motion for new trial. (R. 122-123). Petitioner's motion argued he was entitled to a new trial based upon fourteen (14) separate points. Id. Although petitioner's motion for new trial was filed when the case was still fresh in Mr. Simon's mind (within a week of the jury's verdict), he did not allege that petitioner was entitled to a new trial based upon anything that occurred during jury selection. Id.

During the hearing on the motion for new trial, petitioner never argued that he was entitled to a new trial based upon anything that occurred during voir dire. (T. 330-334). The statement of judicial acts to be reviewed filed by petitioner in this case included nearly everything under the sun. (R. 144-145). Although petitioner's statement of judicial acts to be reviewed was quite intensive, the statement included nineteen (19) separate bases for review, it did not raise any issues regarding jury selection during this trial. Id. The fact that Mr. Simon specifically listed an event that occurred during the jury selection in the original trial (i.e., the denial of his "Motion to Enforce Agreement to pick a new jury panel") in the

statement of judicial acts to be reviewed in this case shows that he would have undoubtedly listed any jury selection issues that arose during the second trial, if any existed. (R. 145).

The trial court specifically found that petitioner used only three peremptory challenges during voir dire, which effectively precludes petitioner from challenging any of the jurors that actually sat on the panel. See Burgess, 766 So. 2d at 293; Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990)(defendant must show that all peremptory challenges were exhausted and that objectionable juror had to be accepted). Ms. Porter did not recall Mr. Simon making any objections while she was questioning the jurors. (SR. 81). Furthermore, Ms. Porter believed that the venire members she exercised her peremptory challenges on were white. Id. Thus, Ms. Porter did not believe any Neil or Slappy challenges were made when she exercised her peremptory challenges.[6] Id. Ms. Porter's testimony is bolstered by the

[6] Petitioner's new assertion that he "needed to review the transcript to see if there were *Neil-Slappy-Melbourne* objections to the state's use of peremptory challenges" is not preserved for appellate review because it was not properly raised below. (IB. 19); M.W. v. Davis, 756 So. 2d 90, 97 n.17 (Fla. 2000); Jaworski v. State, 804 So. 2d 415, 419 (Fla. 4th DCA 2001)("Generally issues not raised in a party's brief(s) are deemed waived and may not be considered for the first time in a motion for rehearing."). In any event, assuming *arguendo* that petitioner actually made Neil-Slappy challenges during

fact that Mr. Simon did not even mention the second trial's jury selection in his exhaustive motion for new trial or in the over-inclusive statement of judicial acts to be reviewed. (R. 122-123, 144-145).

Due to the factual similarities, the Fourth District's decision in this case was controlled by its previous decision in Burgess. In Burgess, the court reporter's notes from the voir dire were destroyed and the trial court held a hearing, as it did in this case, in an attempt to reconstruct the record. The trial court concluded that the record could be reconstructed to a limited extent. Similarly, the trial court in this case found that a limited portion of voir dire could be reconstructed, i.e., that petitioner exercised three peremptory challenges.

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voir dire, the jury chart entered into evidence established there were race-neutral reasons for the State's peremptory strikes, i.e., one prospective juror was a crime victim and the other was affiliated with law enforcement officers. (7/30/03 Sup. Rec.); Porter v. State, 708 So. 2d 338 (Fla. 3d DCA 1998)("the fact that a juror has been the victim of crime has been consistently held to be a valid, race-neutral and gender-neutral reason for a peremptory strike."); Czaja v. State, 674 So. 2d 176 (Fla. 2d DCA 1996)("A close relationship between the juror and a law enforcement officer is a race-neutral reason for exercising a peremptory strike."). The trial court would have obviously found Ms. Porter's challenges to be genuine and race-neutral because neither Ms. Normington nor Mr. Wolf (the potential jurors stricken by the State) sat on the jury. (R. 105). Therefore, the voir dire transcripts in this case were not necessary for a complete review because any claim of error regarding the purported Neil-Slappy challenges could have been decided as a matter of law. See Velez, 645 So. 2d at 44.

The defendant in Burgess, like petitioner in this case, did not identify any prejudicial error that occurred during voir dire. The Fourth District affirmed the defendant's convictions and sentences in Burgess even though the voir dire transcript could not be obtained or entirely reconstructed.[7] Similarly, the Fourth District properly affirmed petitioner's convictions and sentences in this case. See Burgess; Velez, 645 So. 2d 42 (not all omissions of transcripts result in reversal for a new trial, the question to be asked is whether the missing portions of the transcript are necessary for a complete review).

The Fourth District's decision in this case comports with well-established federal case law on the matter. In Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985), the defendant argued that an incomplete trial transcript denied him a meaningful appeal in state court. The portions of the transcript missing in Schwander included the voir dire, opening and closing statements, and jury instructions. Id. at 497. The defendant, however, did not contend the missing transcripts contained any additional error. Id. at 498. The Fifth Circuit rejected the defendant's argument and noted that he was unable "'to indicate one specific error committed during the portions of the trial

[7] This Court previously chose not to accept jurisdiction over the Fourth District's decision in Burgess. See Burgess v. State, 767 So. 2d 454 (Fla. 2000).

not included in the record.'" Id. Similar results reached in White v. Singletary, 939 F.2d 912 (11th Cir. 1991)(transcript of suppression hearing was incomplete and defendant claimed he was denied due process on direct appeal; deficient transcript did not prevent defendant from meaningful review on direct appeal because defendant failed to demonstrate how the suppression hearing transcript prejudiced his direct appeal), United States v. Malady, 960 F.2d 57 (8th Cir. 1992)(lack of complete transcript does not necessarily require reversal), and Bransford v. Brown, 806 F.2d 83 (6th Cir. 1986)(defendant argued missing transcript of jury instructions violated his due process rights because he was unable to comb the transcripts for potential errors; absence of transcripts did not violate the defendant's due process right to a fair appeal). Accordingly, the propriety of the Fourth District's decision in this case is bolstered by the pertinent federal case law.

Petitioner cites a multitude of pre-Darling cases to support his argument, but all of the cases petitioner relies upon are distinguishable from the instant case. For example, in Delap v. State, 350 So. 2d 462 (Fla. 1977), this Court was constitutionally required to conduct a complete review of the entire record. In this case, however, the Fourth District was not required to review the voir dire because it was not

necessary for a complete review. In addition, the record in Delap was missing the jury charge conferences, the charge to the jury in both the trial and penalty phases, the voir dire of the jury, and the closing arguments of counsel in both the trial and penalty phases. The instant case merely involves a missing voir dire transcript.

Petitioner's reliance on several cases from the Third District is misplaced. In Blasco v. State, 680 So. 2d 1052 (Fla. 3d DCA 1996), the trial transcript did not include all of the evidence presented at trial. The court reporter's notes of the State's rebuttal witnesses were lost, and the record could not be adequately reconstructed. Id. at 1052-1053. The trial transcript in this case, however, included all of the evidence presented against petitioner at trial. Furthermore, the trial court specifically found that petitioner used only three peremptory challenges during voir dire, which effectively precluded petitioner from challenging any of the jurors that actually sat on the panel. Thus, the decision in Blasco is distinguishable from the instant case.

The other cases cited by appellant to support his argument are similarly distinguishable. The decisions in Hernandez v. State, 824 So. 2d 997 (Fla. 3d DCA 2002), Bogdanowicz v. State, 744 So. 2d 1155 (Fla. 2d DCA 1999), and Swain v. State, 701 So.

2d 675 (Fla. 3d DCA 1997) are inapposite because they all involve concessions of error by the State. No such concession of error exists in this case. The decisions in Hernandez, Bogdanowicz, and Swain are also distinguishable because they do not involve a partially reconstructed record. Swain, 701 So. 2d 675 (entire voir dire proceedings missing and both parties stipulated this portion of the transcript could not be reconstructed); Bogdanowicz, 744 So. 2d 1155 (entire hearing on dispositive motion to suppress was lost); Hernandez, 824 So. 2d 997 (parties unable to reconstruct the record and the State agreed material omissions in the transcript of testimony made meaningful review impossible). Unlike Swain, Bogdanowicz, and Hernandez, the record of the voir dire in this case was partially reconstructed by the trial court.

In Jones v. State, 780 So. 2d 218, 218 (Fla. 2d DCA 2001), "the transcript reported the bench conferences as inaudible, the defense closing arguments appear incomplete, and the State's closing argument is completely missing." Upon relinquishment, the trial court concluded it was impossible to reconstruct the missing portions with any accuracy. Unlike Jones, there is only one portion of the transcript missing in this case. In addition, the trial court in this case was able to partially reconstruct the missing voir dire proceedings. The trial court

in Jones, in contrast, was not able to partially reconstruct the missing portions of the transcript. Thus, the Second District's decision in Jones is distinguishable from the instant case.

The Third District's decision in Rozier v. State, 669 So. 2d 353 (Fla. 3d DCA 1996) is also distinguishable from the instant case. In Rozier the Third District appointed a commissioner, not the trial court judge, to inquire into the circumstances of the incomplete record. Rozier, 669 So. 2d at 353. In this case, the trial court judge presided over the reconstruction proceedings. In Rozier the commissioner reported that the voir dire proceedings could not be reconstructed and recommended that a new trial be awarded. In contrast, the trial court in this case found that the voir dire proceedings could be partially reconstructed (i.e., petitioner had three peremptory strikes left when the jury was sworn in this case), and no recommendation for a new trial was made. Nothing in Rozier indicates how many peremptory challenges were made by each side, so it is unclear whether the defendant was effectively precluded from challenging any of the jurors that actually sat on the panel (as petitioner was in this case). Finally, the decision in Rozier held the trial minutes of jury selection did not contain sufficient detail to allow meaningful appellate review. However, the record in this case (e.g., the hearing on motion to

reconstruct record, the prosecutor's jury chart, petitioner's motion for new trial, petitioner's statement of judicial acts to be reviewed, the trial court's order partially reconstructing the record, etc.) contains sufficient detail and petitioner was not precluded from meaningful appellate review.

The final substantive case cited by petitioner, Hernandez v. State, 838 So. 2d 683 (Fla. 3d DCA 2003), actually conforms with the Fourth District's decision in the instant case. In Hernandez, the only post-Darling case petitioner cites to support his argument, the defendant (Mr. Hernandez) specifically wanted to challenge "the trial court's refusal of an additional peremptory challenge." Id. at 684. Mr. Hernandez, however, was unable to make such a challenge because a transcript of the voir dire proceedings was unavailable, and the parties were unable to reconstruct the record. Since Mr. Hernandez was unable to challenge "the trial court's refusal of an additional peremptory challenge" due to the complete absence of the voir dire proceedings, the Third District held Mr. Hernandez was entitled to a new trial because he could not receive meaningful appellate review.

The decision in Hernandez is consistent with Darling, Armstrong, and Jones because Mr. Hernandez claimed he wanted to challenge a specific ruling of the trial court, but was

precluded from doing so because there was no voir dire transcript. Petitioner, in contrast, never claimed he wanted to challenge any ruling of the trial court in this case. Instead, petitioner simply argued the absence of a voir dire transcript constituted *per se* error that entitled him to a new trial. (IBDA. 17-18). This argument must fail because "[a]ny time a page is missing from the transcript we cannot assume that reversible error may have been reflected on that page, but rather some modicum of evidence must support such a conclusion." Bransford, 806 F.2d at 86; see also Darling, 808 So. 2d at 163; Armstrong, 862 So. 2d at 721. Accordingly, this Court should reject petitioner's argument and affirm the Fourth District's decision in this case.

The State submits that the missing portions of the transcript in this case are not necessary for a complete review. Petitioner does not identify any prejudicial error that occurred during the voir dire, and this is not a first degree murder case involving the death penalty (where this Court has a constitutional duty to review the entire record). See Burgess, 766 So. 2d at 294 (citing Delap). Ms. Porter's testimony at the reconstruction hearing, the jury chart entered into evidence, Mr. Simon's failure to maintain his "notes with respect to this case," and the fact that Mr. Simon failed to raise any voir dire

issues in either the motion for new trial or in the statement of judicial acts to be reviewed all demonstrate that no prejudicial error occurred during voir dire in this case. Petitioner's entire argument on this point is based on speculation and conjecture. The law is clear, however, that reversible error cannot be predicated upon mere conjecture. Jacobs v. Wainwright, 450 So. 2d 200, 201 (Fla. 1984); Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974). Accordingly, this Court should follow the precedent in Darling and Armstrong and affirm the Fourth District's decision in this case.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished via courier to: Margaret Good-Earnest, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on December 27, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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