IN THE
SUPREME COURT OF FLORIDA

JAMES WILLIAM HAYES, JR.,

Petitioner,

v. **Case Number: SC10-2104**

STATE OF FLORIDA,

Respondent.
_________________________/

ON DISCRETIONARY REVIEW

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS....................i

TABLE OF AUTHORITIES....................ii

PRELIMINARY STATEMENT....................1

STATEMENT OF THE CASE AND FACTS....................1

SUMMARY OF THE ARGUMENT....................7

ARGUMENT....................7

THE FIRST DISTRICT APPLIED AN ERRONEOUS STANDARD OF REVIEW TO THE TRIAL COURT'S RULING ON THE THIRD STEP OF THE MELBOURNE PROCEDURE....................7

A. STANDARD OF REVIEW....................7

B. ARGUMENT....................8

1. The Trial Court's Ruling Was Clearly Erroneous....................8

2. The First District Interpreted The Clearly Erroneous Standard Of Review As Requiring Complete Deference To The Circuit Court....................12

CONCLUSION....................15

CERTIFICATE OF SERVICE....................15

CERTIFICATE OF FONT AND TYPE SIZE....................15

TABLE OF AUTHORITIES

Case **Page**

Bowden v. State, 787 So. 2d 185 (Fla. 1st DCA 2001) 10

Busby v. State, 894 So. 2d 88 (Fla. 2004).......................10

Chambers v. State, 682 So. 2d 615 (Fla. 4th DCA 1996) 10

Czaja v. State, 674 So. 2d 176 (Fla. 2nd DCA 1996) 10

Davis v. State, 691 So. 2d 1180 (Fla. 3rd DCA 1997) 11

Dorsey v. State, 868 So. 2d 1192 (Fla. 2003)...................13

Hayes v. State, 45 So. 3d 99 (Fla. 1st DCA 2010) 5-7, 13, 15

Melbourne v. State, 679 So. 2d 759 (Fla. 1996) 5, 7-9, 14

Murray v. State, 3 So. 3d 1108 (Fla. 2009) 14

Nowell v. State, 998 So. 2d 597 (Fla. 2008)....................12

Porter v. State, 708 So. 2d 338 (Fla. 3rd DCA 1998) 12

Ratliff v. State, 666 So. 2d 1008 (Fla. 1st DCA 1996) 10

Robinson v. State, 832 So. 2d 944 (Fla. 3rd DCA 2002) 11

Rojas v. State, 790 So. 2d 1219 (Fla. 3rd DCA 2001) 8, 10

Russell v. State, 879 So. 2d 1261 (Fla. 3rd DCA 2004) 9

Senatus v. State, 40 So. 3d 878 (Fla. 3d DCA 2010) 12

Smith v. State, 662 So. 2d 1336 (Fla. 2nd DCA 1995) 12

Windom v. State, 656 So. 2d 432 (Fla. 1995).....................12

Young v. State, 744 So. 2d 1077 (Fla. 4th DCA 1999) 14

PRELIMINARY STATEMENT

This proceeding involves the direct appeal from Appellant's convictions and sentences on one count of petit theft, two counts of robbery with a weapon, and three counts of false imprisonment with a weapon or firearm. The following symbols will be used to designate references to the record in the First District:

"R. [page number]" - one volume labeled "Record on Appeal";

"T[volume number]. [page number]" - two volumes of transcript;

"SR1. [page number]" - one volume labeled "Supplemental Record on Appeal";

"SR2. [page number]" - one volume labeled "Second Supplemental Record on Appeal";

"SR3. [page number]" - one volume labeled "Third Supplemental Record on Appeal."

STATEMENT OF THE CASE AND FACTS

Appellant, James Hayes, went to trial on three counts of robbery armed with a firearm (Counts 1, 2, 3) and three counts of false imprisonment with a weapon or firearm (Counts 4, 5, 6) (R. 1-2). At the conclusion of jury selection on June 16, 2008, the judge informed Mr. Hayes that the defense had used two peremptory challenges and that the law allowed Mr. Hayes to use ten peremptory challenges (R. 44). The judge also said that he

was going to ask the selected jurors to stand and, “If you wish to use any more challenges, when the jurors stand, let your attorney know” (R. 45).

After the jurors stood, defense counsel sought to exercise a peremptory challenge on Juror 21 (R. 46). Juror 21 was Robin Haupt (SR3. 241).

During voir dire, the prosecutor had asked prospective jurors whether they had any close friends or family who worked in law enforcement and then questioned those jurors who raised their hands (SR2. 190-95), including Ms. Haupt:

MR. GORDON [prosecutor]: Okay. Ms. Haupt.

PERSPECTIVE [sic] JUROR: I have two family members in law enforcement, but they’re out of state.

MR. GORDON: Okay. And would any of those relationships cause you any undue biased [sic] towards law enforcement?

PERSPECTIVE [sic] JUROR: No, sir.

(SR2. 193).

When defense counsel moved to excuse Juror 21, Ms. Haupt, the following exchange occurred:

MR. PFEIFFER [defense counsel]: Your Honor, we’ll back strike number 21.

MR. GORDON [prosecutor]: Your Honor, is it out of line if the State requests a gender neutral reason?

MR. PFEIFFER: A what?

MR. GORDON: A gender neutral reason for using a strike against this female.

THE COURT: Counsel?

MR. PFEIFFER: I don't have a gender neutral reason. She has some relatives or whatnot in law enforcement. She really didn't answer many questions, at all. She didn't say much of anything. To me, she's somewhat of an unknown quantity.

THE COURT: Counsel, anything else.

MR. PFIEFFER: Nothing.

MR. GORDON: Your Honor, she did indicate that she knew law enforcement officers, but she indicated affirmatively that that would have no bearing on her potential as a juror.

THE COURT: All right. Counsel, while you've identified, we talked about -- and I'm not sure that it applies as to a gender neutral reason to strike a potential juror in this manner. She did indicate she knew two law enforcement officers, but it created no problem for her. Otherwise, she had no other comments relating to this case. The State's objection?

MR. GORDON: If I can add to that, that that is a person who Mr. Reed [sic], himself, wanted to strike.

THE COURT: All right. The comment remains the same.

MR. GORDON: Yes.

THE COURT: All right. Any others?

MR. GORDON: Your Honor, not to be difficult, but to go back to the gender neutral reason. If we strike that juror, the next juror in line was a woman, anyway. So it wouldn't change the gender makeup of the jury.

THE COURT: I'm aware of that, but each juror has the right to serve at their own right.

MR. GORDON: What?

THE COURT: I'm aware of that, but each juror has the right to serve, at their own right, absent a sufficient basis to exclude them.

MR. PFEIFFER: Tender.

MR. GORDON: Accept.

THE COURT: Then you'll each have unconditional peremptory for your alternate. It would be juror number 24.

MR. GORDON: The State tenders, Your Honor.

MR. PFEIFFER: Tender.

(R. 46-48). Juror 21, Ms. Haupt, was on the jury (R. 49). The jurors were not sworn, and the court adjourned for the day (R. 48-50).

On June 18, 2008, the day of trial, defense counsel renewed his objection to the court's denial of a peremptory challenge on Juror 21 (T1. 3). Counsel argued that the court had not followed the correct procedure in addressing the issue, citing the three-step procedure set out in Melbourne v. State, 679 So. 2d 759 (Fla. 1996) (T1. 4). Counsel stated that the first two steps had been followed, but did not recall whether or not the court addressed the third step, in which the court is required to decide whether or not the reason was a pretext or was genuine (T1. 4-5). The court responded to counsel's argument:

I concluded that your reason was not genuine under the circumstances, which presumes that it was gender -- or excuse me, a gender neutral reason -- explanation.

Now that does not address your client's issue about wanting other people, but on the basis that was stated as the general ground, that's presumed in that -- going to the next step.

(T1. 4). The State said all of defense counsel's arguments were made during jury selection and the court had ruled on them (T1.

5). The court responded, "Not all of them, but I've made my observations and rulings. They stand" (T1. 5). After the court heard some pretrial motions, the jury was sworn (T1. 73).

At the conclusion of trial, the jury found Mr. Hayes guilty of the lesser included offense of petit theft on Count 1, guilty of the lesser included offenses of robbery with a weapon on Counts 2 and 3, and guilty as charged on Counts 4, 5 and 6 (R. 61-63). The court adjudicated Mr. Hayes guilty (R. 97-98). On Count 1, the court imposed a 60-day jail sentence (R. 81, 101). On each of Counts 2, 3, 4, 5 and 6, the court imposed concurrent sentences of 126 months in prison (R. 81, 99-100). On each of Counts 2 and 3, the court also ordered that Mr. Hayes' prison sentences be followed by concurrent 10 year terms of probation (R. 99, 107). Mr. Hayes timely filed a notice of appeal (R. 114).

In addressing Mr. Hayes' argument on direct appeal that the trial court erred in denying the defense peremptory challenge to juror Haupt, the First District cited and discussed Melbourne. Hayes v. State, 45 So. 3d 99, 102-03 (Fla. 1st DCA 2010). The court concluded that the first two steps of the Melbourne procedure had been followed: "the prosecutor requested a gender-neutral reason for the peremptory strike of juror Haupt, and defense counsel offered an explanation which satisfied the court as being gender neutral." Hayes, 45 So. 3d at 104. The court

affirmed Mr. Hayes' convictions, with one judge dissenting. TA \c 33 \s "Hayes v. State, 45 So. 3d 99, 102€03 (Fla. 1st DCA" \l "Hayes, 45 So. 3d at 104-05 (Kahn, J., dissenting).

Mr. Hayes filed a notice of intent to seek discretionary review and a jurisdictional brief. This Court accepted jurisdiction and ordered briefing on the merits.

SUMMARY OF THE ARGUMENT

In Hayes, the First District applied the standard of review for a trial court's ruling on the genuineness of a peremptory strike with such great deference as to render the trial court's ruling unreviewable. Although peremptory strikes are presumed to be exercised in a nondiscriminatory manner, although the opponent of a strike carries the burden to show purposeful, invidious discrimination, and although something in the record must show discriminatory intent, the First District did not apply these principles of law and ignored what the record in Petitioner's case actually reflects. The First District erroneously interpreted and applied Melbourne, and this Court should quash its decision.

ARGUMENT

THE FIRST DISTRICT APPLIED AN ERRONEOUS STANDARD OF REVIEW TO THE TRIAL COURT'S RULING ON THE THIRD STEP OF THE MELBOURNE PROCEDURE.

A. STANDARD OF REVIEW

A trial court's ruling on a challenge to a peremptory strike is reviewed on appeal under the clearly erroneous standard. TA \c 33 \s "Melbourne v. State, 679 So. 2d 759 (Fla. 1996) " \l "Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996).

B. ARGUMENT

On direct appeal, Mr. Hayes argued that the trial court erred in denying the defense peremptory challenge to Juror 21. The issue raised by the First District's affirmance of Mr. Hayes' convictions is the standard of review applicable to a trial court's ruling on the third step of the Melbourne procedure.

Melbourne established a three step procedure for resolving an allegation of discrimination in the exercise of a peremptory challenge:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3).

Rojas v. State, 790 So. 2d 1219 (Fla. 3rd DCA 2001) TA \c 1 \s "" \l "Rojas v. State, 790 So. 2d 1219, 1220-21 (Fla. 3rd DCA 2001).

1. The Trial Court's Ruling Was Clearly Erroneous.

In Mr. Hayes' case, the issue involves step 3 of the Melbourne procedure. When defense counsel exercised a peremptory challenge on Juror 21, the prosecutor asked the court

to require a gender neutral reason for the strike, satisfying step 1. Defense counsel responded that Juror 21 was related to law enforcement officers. A prospective juror's relationship with law enforcement is a facially gender-neutral basis for a peremptory strike. Russell v. State, 879 So. 2d 1261, 1263 (Fla. 3rd DCA 2004); Chambers v. State, 682 So. 2d 615 (Fla. 4th DCA 1996). The proffered basis for the strike thus satisfied step 2 of the Melbourne procedure.

After defense counsel proffered a gender-neutral basis for the strike, the prosecutor argued, "she did indicate that she knew law enforcement officers, but she indicated affirmatively that that would have no bearing on her potential as a juror" (R. 47). The trial court then ruled:

> Counsel, while you've identified, we talked about -- and I'm not sure that it applies as to a gender neutral reason to strike a potential juror in this manner. She did indicate she knew two law enforcement officers, but it created no problem for her. Otherwise, she had no other comments relating to this case.

(R. 47). The next day, when defense counsel asked whether the trial court had made findings regarding Melbourne's step 3, the trial court stated:

> I concluded that your reason was not genuine under the circumstances, which presumes that it was gender -- or excuse me, a gender neutral reason -- explanation.
>
> Now that does not address your client's issue about wanting other people, but on the basis that was stated as the general ground, that's presumed in that -- going to the next step.

(T1. 4).

The trial court's duty during Melbourne's step 3 is to "determine[] whether the *opponent* of the strike has carried his burden of proving purposeful discrimination." Ratliff v. State, 666 So. 2d 1008, 1014 (Fla. 1st DCA 1996) (emphasis in original); Bowden v. State, 787 So. 2d 185, 190 (Fla. 1st DCA 2001); Czaja v. State, 674 So. 2d 176, 177 (Fla. 2nd DCA 1996). Because peremptory challenges "are presumed to be exercised in a nondiscriminatory manner," "the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination." Chambers v. State, 682 So. 2d 615 (Fla. 4th DCA 1996)Rojas, 790 So. 2d at 1220. Further, this reason for denying the strike does not address the State's burden to show purposeful discrimination.

The next day, the trial court stated it had found that defense counsel's reason for the strike "was not genuine under the circumstances." If the court was referring back to its ruling the previous day, that ruling was clearly erroneous as explained in the paragraph above. If the court was adding to its ruling of the previous day, the court pointed to no evidence of purposeful discrimination which supported the State's objection.

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[1] *See generally* Busby v. State, 894 So. 2d 88 (Fla. 2004)Busby v. State, 894 So. 2d 88, 95-96 (Fla. 2004).

The State cited no evidence showing purposeful discrimination. The State objected that Juror 21 said that her relationship to law enforcement officers would not affect her ability to serve. As explained above, this is not a valid consideration for exercising a peremptory strike.

The State also pointed out that Mr. Hayes personally wanted to strike Juror 21. First, the trial court had told Mr. Hayes he had the right to exercise peremptory challenges and even had the potential jurors stand so that Mr. Hayes could exercise that right. Second, the fact that Mr. Hayes himself wanted to excuse Juror 21 is not evidence of purposeful discrimination. The trial court alluded to Mr. Hayes "wanting other people," but nothing about that fact alone is evidence of purposeful discrimination. "There is nothing in [State v.] Neil, [457 So. 2d 481 (Fla. 1984),] or its progeny, that forbids choosing among available jurors, even for capricious reasons, so long as the reasons are not . . . discriminatory." Davis v. State, 691 So. 2d 1180, 1182 (Fla. 3rd DCA 1997); Robinson v. State, 832 So. 2d 944, 944 (Fla. 3rd DCA 2002). For example, the State did not point to a male juror who also had relatives in law enforcement but whom the defense had not struck.

2. The First District Interpreted The Clearly Erroneous Standard Of Review As Requiring Complete Deference To The Circuit Court.

On direct appeal, Mr. Hayes argued that the trial court's ruling on the genuineness inquiry was clearly erroneous because that ruling did not require the opponent of the strike--the State--to support its objection with evidence of purposeful, invidious discrimination. This Court has explained the standard of review as follows:

> [T]he appropriate standard of appellate review for determining the threshold question of whether there is a likelihood of racial discrimination in the use of peremptory challenges is abuse of discretion. Hoskins v. State, 965 So. 2d 1, 7 (Fla. 2007) (quoting Jones v. State, 923 So. 2d 486, 490 (Fla. 2006), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1112, 169 L.Ed.2d 827 (2008); *accord* Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992). Generally, the trial court is in the best position to assess the genuineness of the reason advanced, and the decision will be affirmed unless clearly erroneous. *See* Jones, 923 So. 2d at 490. However, this Court has also confirmed that "deference does not imply abandonment or abdication of judicial review," Dorsey v. State, 868 So. 2d 1192, 1200 (Fla. 2003) (quoting Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003), because "[d]eference does not by definition preclude relief." Miller-El, 537 U.S. at 340, 123 S. Ct. 1029.

Nowell v. State, 998 So. 2d 597, 602 (Fla. 2008).

In basing its holding on its inability to "definitively say the trial court's ruling is clearly erroneous and wholly unsupported by the record," Porter v. State, 708 So. 2d 338 (Fla. 3rd DCA 1998) Windom v. State, 656 So. 2d 432 (Fla. 1995)Smith v. State, 662 So. 2d 1336 (Fla. 2nd DCA 1995)Senatus v. State, 40 So. 3d 878 (Fla. 3d DCA 2010) Smith v. State, 662

So. 2d 1336, 1338 (Fla. 2d DCA 1995) (record contains "nothing to overcome the [*State v.*] *Neil*[, 457 So. 2d 481, 486 (Fla. 1984),] presumption or to justify a finding of discriminatory intent"). When the proponent of a the strike meets the burden of production of providing a neutral reason, "the proponent is entitled to the presumption that the reason is genuine." Dorsey v. State, 868 So. 2d 1192, 1199 (Fla. 2003).

In Mr. Hayes' case, the First District ignored these principles of law, applying the clearly erroneous standard arbitrarily and ignoring what the record actually reflected. The actual bases of the trial court's finding that the strike was not genuine were the trial court's uncertainty that defense counsel's reason (Haupt's relationship to law enforcement officers) constituted a gender neutral reason, Haupt's statement that her relationship to law enforcement officers "created no problem for her," and Petitioner's desire for a different juror (R. 47; T1. 4). All of these bases for the trial court's decision were errors of law which resulted in a clearly erroneous ruling, as explained in Section 1, above.

Rather than address the trial court's actual reasons for denying the strike, the First District arbitrarily chose to rely upon defense counsel's initial statement that he did not have a gender neutral reason. Hayes, 45 So. 3d at 104, but disregarded the fact that six women served on the jury, 679 So. 2d at 764

n.8. The facts that six women served on the jury and that the next prospective juror after Haupt was a woman demonstrate that the defense was not exercising strikes with discriminatory intent. *See* Murray v. State, 3 So. 3d 1108, 1121 (Fla. 2009) (upholding prosecution's strike of black juror where trial court stated that because prosecution had not moved to strike two other black jurors, "I don't believe there is a racial pattern"); Young v. State, 744 So. 2d 1077, 1083 (Fla. 4th DCA 1999) (upholding prosecution's strike of Hispanic juror because "the trial court could have relied heavily on the presence of two Hispanic members of the jury and concluded that the prosecutor's proffered reason for the strike was nonracial"). *Compare* Doolittle v. State, 679 So. 2d 1258, 1259 (Fla. 4th DCA 1996) (affirming denial of defense strikes based on trial court's observation of a "pattern of excluding women to get to male jurors").

The First District never applied the presumption that peremptory strikes are exercised in a nondiscriminatory manner, never determined whether the opponent of the strike had proved purposeful, invidious discrimination and never examined the record for evidence of discriminatory intent. The First District's interpretation and application of the standard of review thus conflicts with Melbourne, as well as with the other decisions of this Court and the district courts cited above.

This Court should quash the decision in Hayes.

CONCLUSION

Based upon the arguments presented here, this Court should quash the First District's decision and order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was furnished by U.S. mail to **Trisha Meggs Pate**, Assistant Attorney General, Counsel for the State of Florida, The Capitol PL01, Tallahassee, Florida 32399-1050, and to **Mr. James Williams Hayes, Jr.**, DOC# P37534, New River-East Unit, 7819 N.W. 228th Street, Raiford, FL 32026-3000, on this 11th day of April, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

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