

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2020
DCA CASE NO. 3D04-2022

FRANCISCO EDDY SURI,

Defendant,

-vs-

THE STATE OF FLORIDA,

Respondent.

**ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Defendant, Francisco Eddy Suri, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stood in the trial court.

STATEMENT OF THE CASE AND FACTS

Defendant appealed his convictions of two counts of lewd and lascivious molestation on a child less than twelve years of age to the Third District Court of Appeal. (App. A). On September 1, 2006, the court affirmed stating:

Once defense counsel moved to strike for cause Juror Alade because she hesitated, and the trial court disagreed with counsel's representation, it became incumbent on counsel to expand on the objection so that the trial court could properly rule on the motion. Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999); Turner v. State, 645 So. 2d 444, 446 Fla. 1994). This is a lynchpin of our preservation rule. If instead of nonverbal hesitation, defense counsel meant that, there was verbal equivocation of the type recognized in Busby v. State, 894 So. 2d 88 (Fla. 2004), defense counsel should have voiced it. "The mere fact that a juror gives equivocal responses does not disqualify that juror for service. The question is whether the responses voiced by [the juror] were equivocal enough to generate a reasonable doubt about his fitness as a juror." Id. at 96. See also Guzman v. State 31 Fla. L. Weekly D486 (Fla. 3d DCA Feb. 15, 2006). Here the trial court never even had the opportunity to evaluate whether Juror Alade's responses were equivocal enough because that argument was never made. We therefore hold that the argument that Juror Alade's response were equivocal was not preserved when the motion to excuse her only mentioned that she hesitated.

(App. A). Defendant now seeks discretionary review in this Court.

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. The Third District Court's opinion does not conflict with any case of this Court or of any other district court in Florida. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Defendant's petition to review the decision of the district court.

ARGUMENT

THE DEFENDANT’S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL’S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Defendant contends that this Court should invoke its discretionary review power to review the Third District Court of Appeal’s decision in the instant case. Defendant claims only that “[t]he District Court’s opinion that defense counsel’s use of the word hesitate rather than equivocate when he moved to challenge a juror for cause resulted in a waiver of Defendant’s right to have the court review whether the juror in this case should have stricken for cause directly conflicts with cases from both this court and other district court of appeals which have continuously held that no magic words are necessary to preserve an issue on appeal but instead the court must look at the objection in the context in which it was made to determine if the trial judge was put on notice of the grounds for the objection. The State submits that this Court does not have any jurisdiction to review the Third District Court’s opinion.

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. As this Court explained in The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988), the state constitution creates two

separate concepts regarding this Court's discretionary review. The first concept is the broad general grant of subject-matter jurisdiction. The second more limited concept is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. The Florida Star, 530 So. 2d at 288. This Court noted it lacked jurisdiction to review district court opinions that fail to expressly address a question of law. Id.

Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), provide that the discretionary jurisdiction of the Supreme Court of Florida may be sought to review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court of Florida on the same question of law. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions.

The rationale for limiting this Court's jurisdiction is the recognition that district courts "are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy." Jenkins v. State, 385 So. 2d 1356, 1358 (Fla. 1980).

This Court cannot exercise its discretionary jurisdiction to review the decision below because, contrary to Defendant's claim, the decision below is not in direct conflict with the cases cited by Defendant, or any decision from this Court or any other district court on the same question of law.

Defendant alleges that the District Court was mistaken in concluding that defense counsel's use of the word "hesitate" resulted in a waiver of Defendant's right to appellate review of the trial court's decision to deny Defendant's for cause challenge of Juror Alade. Defendant argues that there are several meanings for the word hesitate, other than to pause, and trial counsel may have intended to convey that the juror was equivocal in her responses. However, when the trial court disagreed with the defense counsel's representations that the juror hesitated, he made no attempt to clarify his meaning. Defense counsel not only stated that he objected based on his opinion that the juror hesitated but also made no attempt to give examples of equivocation as illustrated by the following conversation:

COUNSEL: I'm moving for cause on Ms. Alade, Judge, because at sidebar when she was asked whether she could be fair, she hesitated.

COURT: Denied. I disagree with that representation. Anything you want to exercise a peremptory.

COUNSEL: No.

(App. A). Additionally, because equivocal responses alone do not disqualify a juror from service, the trial court must be given the opportunity to evaluate all of

the juror's responses. See Busby v. State, 894 So. 2d 88 (Fla. 2004); see also Parker v. State, 641 So. 2d 369, 373 (Fla. 1994). The trial court was not asked to grant a challenge for cause based upon anything other than defense counsel's representation that the juror hesitated. Based on the common interpretation of the word hesitate, the trial court from its unique vantage point of being able to personally observe the juror's responses, denied the challenge addressing the only reason presented to it, hesitation. Defendant's argument that Juror Alade's responses were equivocal is clearly not preserved.

Defendant's cites to a line a cases that state "there are no magical words that a defendant must divine in order to make an argument in the trial court that is deemed sufficiently preserved for review" and an objection or argument in the trial court must be "specific enough to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." See Williams v. State, 414 So. 2d 509 (Fla. 1992). In the case before this Court, the trial court denied the objection to Juror Alade based on the reason presented to the court; that Juror Alade hesitated in her responses. An objection based on equivocation is a completely different objection than the one that was presented to the trial court. The trial court could not have ruled on the juror's alleged equivocation unless the specific objection was presented to it. Furthermore, the Third District Court's opinion does not require "magic words" but follows previous precedent that

requires an objection to be specific enough to apprise the judge of the error and preserve the issue for intelligent review. Additionally, in none of the cases cited by Defendant does trial counsel simply use the word hesitate with no additional explanation or any attempt to demonstrate how and when the juror hesitated and then subsequently argue on appeal that the cause challenge should have been granted based on the juror's alleged equivocation. Therefore, no precedent exists supporting the notion that using the word "hesitate" sufficiently preserves a cause challenge based on equivocation. Consequently, the District Court's opinion does not give rise to any express conflict and also does not certify conflict with any case or certify a question to this Court. Therefore, this petition to invoke discretionary review must be denied.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, the State respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this 31st day of October, 2006, to Robert Kalter, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

MICHELE SAMAROO
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

MICHELE SAMAROO
Assistant Attorney General