DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ASHLEY RIVERA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2022-0652

[October 25, 2023]

CORRECTED OPINION

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barbara Anne McCarthy, Judge; L.T. Case No. 18-003400-CF-10A.

Eric T. Schwartzreich of Schwartzreich & Associates, Fort Lauderdale, and Sheila Zolnoor of the Law Office of Shelia Zolnoor, P.A., Fort Lauderdale, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Luke R. Napodano, Senior Assistant Attorney General, West Palm Beach, for appellee.

CONNER, J.

The defendant appeals from her convictions for vehicular homicide and reckless driving with serious bodily injury. The defendant argues the trial court abused its discretion in restricting jury voir dire questioning. We agree and reverse for a new trial. We decline to address the defendant's other arguments on appeal as moot.

Background

The defendant proceeded through a multi-lane busy intersection with traffic lights and collided with another vehicle. The color of the traffic lights at the time of the crash was the main factual issue at trial.

The two victims, a mother and school-age daughter, had been stopped in a left-hand turn lane, waiting for the traffic light to change. As the

mother then proceeded to turn left through the intersection, heading east, the defendant's vehicle crashed into them while heading west. The mother was declared dead at the scene. The daughter suffered significant internal injuries requiring a ten-day hospital stay and missing almost two months of school. The defendant suffered some internal bleeding and a broken ankle.

The State charged the defendant with vehicular homicide, reckless driving with serious bodily injury, and reckless driving with property damage. The case proceeded to trial on the first two charges.

During voir dire, the defendant sought to question Juror 28 on the defendant's main theory of the case:

> [DEFENSE]: Okay. [Juror 28], I want to ask you about the charge in this case, vehicular homicide. Are you open to the theory that an accident can occur involving a death and there be no criminal culpability in that case?
>
> [STATE]: Objection, Your Honor. Pre-trying the case.
>
> THE COURT: Yeah, that's sustained. You may go sidebar.

At sidebar, the defendant protested the ruling, arguing, "[A]re we not allowed to question regarding our theory of defense?" The trial court responded, "It's sustained. It's a legal conclusion." When the defendant countered, "My last question I laid to the jury whether she could be open if a death occurred; would she be open," the trial court responded, "Objection sustained."

The defendant did not repeat the question. The State later used a preemptory challenge to strike Juror 28.

Prior to accepting the jury, the defendant renewed her previous motions and objections. She twice confirmed that she was accepting the jury panel subject to her prior objections.

Analysis

The defendant argues the trial court abused discretion in precluding her from questioning the jury on her main theory of defense during voir dire. We agree. We also reject the State's argument that the issue was not preserved.

A trial court's decision to limit questions during voir dire is reviewed for an abuse of discretion. *Calloway v. State*, 210 So. 3d 1160, 1178 (Fla. 2017); *Hoskins v. State*, 965 So. 2d 1, 13 (Fla. 2007).

"To obtain a fair and impartial jury, and for 'voir dire examination of jurors . . . to have any meaning, counsel must be allowed to probe attitudes, beliefs and philosophies for the hidden biases and prejudices designed to be elicited by such examination.'" *Jones v. State*, 216 So. 3d 742, 744 (Fla. 4th DCA 2017) (quoting *Lowe v. State*, 718 So. 2d 920, 923 (Fla. 4th DCA 1998)). A trial court abuses its discretion where it precludes prospective juror questioning pertaining to willingness and ability to accept a valid legal theory. *Lavado v. State*, 492 So. 2d 1322, 1323 (Fla. 1986); *see also Ruiz v. State*, 271 So. 3d 138, 139-40 (Fla. 3d DCA 2019). In contrast, it is proper for a trial court to prohibit counsel from asking questions designed to preview the prospective jurors' opinions of the evidence. *Hoskins*, 965 So. 2d at 12-13. Such questions are sometimes referred to as "pre-trying" the case.

Questions that cross the line into pre-trying the case are those "primarily [] intended to plant seeds in the jury's mind about the defendant's theory of the case, to be argued later during trial." *Thomany v. State*, 252 So. 3d 256, 257 (Fla. 4th DCA 2018); *cf. Hillsman v. State*, 159 So. 3d 415, 420 (Fla. 4th DCA 2015) (holding trial courts should "permit questions on jurors' attitudes about issues where those attitudes are 'essential to a determination of whether challenges for cause or peremptory challenges are to be made . . .'" (quoting *Walker v. State*, 724 So. 2d 1232, 1233 (Fla. 4th DCA 1999))). The primary concern is the extent to which the question incorporates the facts of the case.

The defendant relies on three cases, all of which we find instructive here: *Lavado*, *Walker*, and *Ruiz*.

In *Lavado*, the Florida Supreme Court adopted the district court's dissenting opinion holding that the trial court's refusal to allow the defendant to question prospective jurors on their willingness to accept a voluntary intoxication defense denied the defendant the right to a fair and impartial jury. *Lavado*, 492 So. 2d at 1323. Similarly, in *Walker*, we held that the trial court erred in refusing a defendant's request to question prospective jurors as to whether they were willing to accept defense of entrapment, as the questioning did not rise to the level of pre-trying the facts or attempting to elicit a promise from the jurors as to how they would weigh that defense. *Walker*, 724 So. 2d at 1234. In *Ruiz*, the Third District held that the trial court's refusal to allow the defendant to discuss

excessive force with the jury venire deprived the defendant of his right to a fair trial and impartial jury. *Ruiz*, 271 So. 3d at 139-40.

Here, similarly, in the contested portion of voir dire, the defendant was attempting to ask Juror 28 about the defendant's main theory of defense—i.e., that the victim's death did not automatically mean the defendant was driving in a criminally reckless manner. The defendant's question was, quite appropriately, targeted at whether a juror would automatically or was more likely to convict where an accident resulted in a death, regardless of criminal fault. The defendant did not delve into the facts of the case or attempt to "plant seeds." *See Thomany*, 252 So. 3d at 257. The defendant was simply exploring the juror's attitudes, namely "their willingness and ability to accept the defense's theory." *Ruiz*, 271 So. 3d at 140.

Indeed, the State does not argue to the contrary. Instead, the State pursues its lack of preservation argument by relying on *State v. Ivey*, 285 So. 3d 281 (Fla. 2019). We find *Ivey* distinguishable. There, the defendant accepted the jury without reservation, then, on the morning of trial, "stated that he would like to make a 'continuing objection' to 'evidence' and 'different things' he had objected to 'in preliminary proceedings.'" *Id.* at 288. Here, in contrast, the trial transcript shows the defendant renewed all prior objections when accepting the jury and stated her acceptance was subject to those objections. The trial court acknowledged that all prior objections were renewed. This was sufficient. Thus, on appeal, the defendant need only show an abuse of discretion (which she has done).

We determine that the trial court's error was not harmless. We reject the State's argument that other general questions which the defendant asked about the presumption of innocence were sufficient to address views on the defendant's theory of defense in relation to the death of a victim. The presumption of innocence despite the victim's death was a central concept in the defendant's defense theory, which she referenced in both opening and closing. The defendant was unable to ascertain whether any jurors may have had a bias against this theory of defense.

Additionally, the error was not absolved by the State striking Juror 28 because the trial court's ruling effectively precluded further inquiry of other prospective jurors on this subject. *See Ingrassia v. State*, 902 So. 2d 357, 358-59 (Fla. 4th DCA 2005) (holding on rehearing the trial court abused its discretion by depriving the defendant of the opportunity to question prospective jurors about their possible bias against a significant aspect of the defense, where it "gave counsel reason to believe that [the defendant] would not be permitted to inquire further as to possible juror

bias on the subject . . ."). The trial court sustained the State's objection as "a legal conclusion" even after the defendant clarified she was discussing her theory of defense, and her question was simply whether the juror "could be open if a death occurred[.]" The trial court indicated it would not entertain any further questions on the subject.

The trial court effectively precluded the defendant from asking any jurors about a potential bias that concerned the defendant's main theory of defense. The error was not harmless. We therefore reverse and remand the case to the trial court for a new trial. We decline to address the other issues raised on appeal as moot.

Reversed and remanded.

CIKLIN and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.