

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

SHAWNEST ANGELO IVEY,

Respondent.

Case No. SC1B-372

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INDEX TO APPENDIX

- A. Ivey v. State, No. 1015-5803 (Fla. 1st DCA September 13, 2017)..... Pg. 2
- B. Ivey v. State, No. 1D1S-5803 (Fla. 1st DCA February 20, 2018)..... Pg. 14
- C. Relevant pages for jury selection from the record on appeal in SC1B-372..... Pg. 18
- D. Relevant pages for the discussion, which occurred just before trial, from the record on appeal in SC1B-372 Pg. 26

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SHAWNEST ANGELO IVEY,
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D15-5803

STATE OF FLORIDA,
Appellee.

Opinion filed September 13, 2017.

An appeal from the Circuit Court for Jackson County.
Shonna Young Gay, Judge.

Andy Thomas, Public Defender, Jennifer P. LaVia, Special Public Defender, for
Appellant.

Pamela Jo Bondi, Attorney General, Michael McDermott, Assistant Attorney
General, for Appellee.

MAKAR, J.

Shawnest Angelo Ivey, who was convicted of possession of XLR11
(commonly referred to as K2, Spice, or Synthetic Marijuana) and methamphetamine,
argues that the trial court erred in allowing a peremptory challenge to strike an

African-American juror where the State’s race-neutral reason—that the juror gave the prosecutor a dirty look—was neither observed by the trial court nor supported by the record. We agree and reverse.¹

I. Background

Juror number 46 is an African-American woman. During jury selection, neither the State nor defense counsel questioned her other than to ask whether she was employed (she said yes). After the close of voir dire, but before finalizing the jury, the prosecutor informed the trial court that the State wanted to use a peremptory strike on the potential juror. In response, defense counsel requested a race-neutral reason for the strike because juror number 46 was the only African-American on the jury panel.

According to the prosecutor, the basis for the peremptory strike was that she had made a joke about the potential juror during a break in jury selection between a prior case and Ivey’s case. She said the potential juror overheard her and then gave “a look” that the prosecutor believed reflected bias against her. Neither the trial judge, defense counsel, nor anyone else observed the described encounter; nor was there any record evidence to establish “the look” other than the prosecutor’s statement. The trial court accepted the State’s proffered reason for the strike as race-

¹ As to Ivey’s claim that the trial court erred in denying his motion to suppress his statements to police, we affirm.

neutral and removed juror number 46 from further consideration.

Immediately thereafter, the trial court asked the State and defense counsel if they were agreeable to the jury members who had been selected. Defense counsel said he went over the entire panel with Ivey, who said he “agrees and accepts this jury.” Just prior to swearing the jury, however, the trial court and defense counsel had the following exchange:

Court: The only additional thing is looking at my seating chart for jury selection yesterday, I had seated for juror number 46, and just for record purposes, wanted to make sure she was not a cause, she was a peremptory challenge. And there was a challenge race neutral reason given, and she was excused based on the state using a peremptory challenge. With that, is there anything else we need to address this morning before we bring the jury in?

Defense: Your Honor, the only thing other than—everything you said is fine. What I would like to do, I’ve made a few objection in preliminary proceedings and objected to evidence and objected to different things. I would like to just make that as a continuing objection, so they don’t come back and say we failed to object in the trial.

Court: I will just state for record purposed [sic], any ruling that has already been made by me, I recognized [defense counsel’s] continue [sic] objections, that has been the ruling that has been made by the Court.

The jury was sworn and Ivey was later found guilty on the possession charges. On appeal, he argues that the trial court erred in allowing the State to use its peremptory strike on the potential juror.

II. Analysis

At the outset, the State does not argue that the trial judge’s substantive ruling

on the State’s peremptory strike was correct, probably because it is directly contrary to Dorsey v. State, 868 So. 2d 1192 (Fla. 2003), which held that a proponent of a peremptory strike “based on nonverbal behavior may satisfy its burden of production of a race-neutral reason . . . only if the behavior is observed by the trial court or otherwise has record support.” Id. at 1199. Here, “the look” was neither observed by the trial judge nor does it have record support (other than the prosecutor’s say-so, which Dorsey says is inadequate). As such, the State makes two preservation arguments: (a) Ivey failed to dispute the factual basis of the race-neutral reason offered by the State, and (b) Ivey failed to renew his objection prior to the jury being sworn.

A. Dorsey – Footnote 3

First, the State argues that the challenge to its peremptory strike is unpreserved because defense counsel did not challenge the factual basis for the State’s proffered race-neutral reason, citing a footnote in Dorsey that the genuineness of a race-neutral reason offered by a party “does not arise where the opponent does not dispute the observation proffered as the reason for the strike.” 868 So. 2d at 1196 n.3. The footnoted language, however, relates to situations—such as in Dorsey—in which the nonverbal behavior occurs where the judge and defense counsel are physically present and able to observe it, which was not the case here.

The issue in Dorsey was “whether a party’s observation of a juror’s nonverbal

behavior may constitute a genuine, race-neutral reason for a peremptory challenge when the purported behavior is challenged by the opposing party and was neither observed by the trial court nor otherwise supported by the record.” Id. at 1194. In Dorsey, the prosecutor believed that a prospective juror showed a lack of interest during attorney questioning and moved to strike her on that basis; defense counsel disagreed and countered that the prospective juror was the only one who showed interest and enthusiasm for being on the jury. Id. The trial judge, who was present throughout juror questioning, did not observe the alleged indifference, but took the prosecutor “at her word” in claiming it occurred, thereby upholding the strike. Id. at 1194-95. The supreme court overturned that ruling, holding that the record must have support—other than the prosecutor’s own perception of the nonverbal conduct—to meet the burden imposed under Melbourne v. State, 679 So. 2d 759 (Fla. 1996), and its progeny. Dorsey, 868 So. 2d at 1200.

The supreme court in Dorsey rejected the view that the testimony of the prosecutor was itself sufficient, even when the judge and others are present, saying, “if the proponent of a strike were permitted to meet its burden of production based solely on an attorney’s subjective, uncorroborated, and disputed impression of a juror’s demeanor, the appellate court would have no basis to determine if the trial court’s decision to accept the explanation was clearly erroneous.” Id. at 1200. Ivey’s counsel made a similar point, saying, “[t]he only thing we have is [the prosecutor]

telling us this at sidebar what happened and I have no way to show that this—I just don't think it's a race neutral reason in the record and that's what she has to have.”

As is evident, the situation in Dorsey involved a prosecutor's interpretation of events that occurred during voir dire, where defense counsel was present and had an observable basis for disagreeing with the prosecutor's assertion. That is why the supreme court in Dorsey cited both Watson v. State, 841 So. 2d 659 (Fla. 4th DCA 2003) and Carter v. State, 762 So. 2d 1024 (Fla. 3d DCA 2000), each involving juror behavior that was observed in the courtroom during the jury selection process. Under those circumstances, if defense counsel is present, observes the juror's nonverbal conduct, and “does not dispute the observation proffered as the reason for the strike,” the admonition in footnote three would apply. 868 So. 2d at 1196 n.3.

Unlike Dorsey, however, neither the trial judge nor the defense counsel in Ivey's case were present when juror number 46 allegedly gave “the look” that the prosecutor says occurred. For this reason, Ivey's counsel could not have disputed the prosecutor's unilateral claim that the juror gave her the stink-eye during a break in the proceedings. Indeed, Ivey's counsel pointed out that the prosecutor failed to raise “the look” until late in the jury selection process, making it doubly difficult to assess the matter (“if [the prosecutor] thought that that was a problem, she should have brought it up during voir dire where we could have addressed it”).

Because defense counsel did not have the benefit of observing the juror's

nonverbal behavior, it was impossible for him to object to the factual basis for the prosecutor's assertion. As such, defense counsel was not required to disagree with the prosecutor's subjective interpretation of events under Dorsey.

B.

The State also argues that Ivey failed to preserve the issue for review because his "continuing objection" prior to the jury being sworn was inadequate, relying on Mobley v. State, 100 So. 3d 1170 (Fla. 1st DCA 2012). Ivey counters that the "continuing objection" was made directly in response to the trial judge confirming for record purposes the various objections raised, including the strike of juror number 46, which the trial court specifically raised and discussed.

This case differs from Mobley because the race-neutral reason offered in Mobley was based, at least in part, on interactions with the juror that occurred during voir dire, and was therefore on the record with defense counsel present. The State in Mobley offered a valid race-neutral reason for its strike, such that it was entitled to the presumption that its peremptory challenge was used in a nondiscriminatory manner; defense counsel was then required to "voic[e] a specific objection that the reason [was] not genuine or [was] not a pretext." Id. at 1172. The defendant in Mobley did neither—thereby failing to meet his burden to rebut the presumption to which the State was entitled for having offered a valid race-neutral reason. In this case, however, the State is not entitled to that presumption because

the reason it offered was facially invalid under Dorsey: the nonverbal conduct of juror number 46 was neither witnessed by the trial court nor had record support, apart from the prosecutor's unilateral belief. See Dorsey 868 So. 2d at 1199.

This case is more similar to Denis v. State, 137 So. 3d 583 (Fla. 4th DCA 2014), where defense counsel objected to the State's use of a peremptory challenge, and the State's race-neutral justification offered for the strike was that the juror was "dozing off while the judge was speaking." Id. at 584. Defense counsel didn't observe the juror dozing and asked the trial judge whether he had witnessed it; the judge said he did not, but that that he would "take [the State]'s word for it" and upheld the strike. Id. In reversing, the Fourth District noted that "[p]reservation of an objection to the use of a peremptory strike requires more than one objection: an objection to initiate a *Melbourne* inquiry and another objection before the jury is sworn in." Id. at 585. As to the initiating objection, it held that the defendant had sufficiently preserved the issue for review by contesting the factual basis for the State's race-neutral reason because he "inform[ed] the court that defense counsel did not see the juror fall asleep and ask[ed] the court to address whether it witnessed this behavior." Id. at 585. This, the Fourth District stated, was enough to put the trial court "on notice that defense counsel questioned the genuineness of the state's reason for the challenge." Id. As to confirming the objection before the jury was sworn, the appellate court noted that "[i]n addition to making a proper objection to

initiate a *Melbourne* inquiry, defense counsel preserved her objection to the state's peremptory challenge before the jury was sworn by accepting the jury 'subject to prior objections.'" Id.

Here, Ivey's counsel timely raised an objection to the State's improper peremptory challenge and sufficiently confirmed that objection just prior to the jury being sworn in response to the trial judge's specific reference to the "juror number 46" issue. No doubt exists that the trial court knew of and was apprised of the specifics of Ivey's objection prior to the swearing of the jury, which was far different from the situation in Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993), where defense counsel "affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection." No affirmative acceptance was made immediately prior to the jury being sworn that amounted to Ivey's counsel jettisoning his prior objections; instead, he renewed them in direct response to the trial court's inquiry. Because the State's stated reason was insufficient on its face under Dorsey, and Ivey adequately preserved the issue, we reverse and remand for a new trial.

REVERSE and REMAND.

BROWN, JOHN, ASSOCIATE JUDGE, concurs, and WINSOR, J. concurs in part and dissents in part with opinion.

WINSOR, J., concurring in part and dissenting in part.

I agree that we should affirm as to the trial court's order denying Ivey's motion to suppress. I would also affirm as to the disputed peremptory challenge because Ivey failed to preserve it.

After raising the objection initially, Ivey's counsel affirmatively told the court that Ivey "agrees and accepts this jury." Counsel's acceptance of the jury would lead "to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection." *Joiner v. State*, 618 So. 2d 174, 176 (Fla. 1993). The only question is whether counsel's discussion with the court the following day was sufficient to re-raise the issue. In the exchange, which the majority accurately recites in full, counsel said he'd "made a few objection (sic) in preliminary proceedings and objected to evidence and objected to different things." He then said he "would like to just make that as a continuing objection." That was not enough.

Reiterating objections to unspecified "different things" does not preserve a specific objection to a peremptory challenge. Up to the point of his general objection, Ivey had argued an unsuccessful motion in limine, an unsuccessful motion to dismiss, and an unsuccessful motion to suppress (which included an evidentiary hearing with contested evidentiary rulings). If Ivey sought to renew an objection on the peremptory issue, he needed more specificity. *Cf. Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005) (noting that statutory requirement that objections be

“sufficiently precise” to “fairly apprise[] the trial court of the relief sought and the grounds therefor,” § 924.051(1)(b), Fla. Stat., is consistent with Florida Supreme Court holdings on preservation). Because Ivey did not specifically renew his abandoned objection before the jury was sworn, his claim is not preserved. *See Zack v. State*, 911 So. 2d 1190, 1204 (Fla. 2005). I would therefore affirm.

Exhibit B

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D15-5803

SHAWNEST ANGELO IVEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court, Jackson County.
Shonna Young Gay, Judge.

February 20, 2018

ON MOTION FOR REHEARING

PER CURIAM.

We deny the State's motion for rehearing, but we pose the following certified question of great public importance:

HAS A DEFENDANT WHO ACCEPTS A JURY, BUT RENEWED A PREVIOUSLY-RAISED OBJECTION TO A STATE PEREMPTORY CHALLENGE AFTER THE CHALLENGED JUROR HAS BEEN EXCUSED BUT BEFORE THE JURY IS SWORN, WAIVED THAT OBJECTION?

Art. V, § 3, Fla. Const. We view this important question as unanswered, or at least left open, under the decision in *Joiner v. State*, 618 So. 2d 174, 176 (Fla. 1993). In that case, the defendant "affirmatively accepted the jury immediately prior to its being

sworn without reservation of his earlier-made objection.” *Id.* The Court said that “counsel’s action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection.” *Id.* It noted, however, that:

Had [defendant] renewed his objection or accepted the jury subject to his earlier [peremptory] objection, we would rule otherwise. Such action would have apprised the trial judge that [defendant] still believed reversible error had occurred. *At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.*

Id. (emphasis added). As the italicized language reflects, the Court envisioned three options at the time of the renewed objection: recall the challenged juror, strike the panel and start over, or stand pat.

But once a jury is accepted and a challenged juror is dismissed and unavailable, as in this case, only two options remain: strike the panel or stand by the prior ruling. That only two of these three options remain after jurors are *dismissed*, however, does not strike us as a basis to alter the long-standing principle that a defendant has a right to lodge an objection up until the jury is *sworn*, as Ivey did in this case. *See, e.g., Jackson v. State*, 464 So. 2d 1181, 1183 (Fla. 1985); *O’Connor v. State*, 9 Fla. 215, 229 (1860); *Shelby v. State*, 301 So. 2d 461, 462 (Fla. 1st DCA 1974). Drawing the line at this point makes the most sense because it is the final step before the jury selection process ends and trial begins. As such, we pass upon the certified question and answer it in the negative.

In light of the three-option language in *Joiner*, however, a plausible argument is that accepting a jury and allowing a challenged juror to be dismissed is sufficient grounds to conclude that the peremptory objection has been abandoned entirely, which would move the existing timeline back and preclude a renewed objection after juror dismissal but before the jury is sworn. To allow our supreme court to consider the matter, we certified the question above for its consideration. *Barritt v. State*, 517 So. 2d 65, 68 (Fla. 1st DCA 1987) (certifying question due to perceived need

to clarify supreme court caselaw), *decision quashed*, 531 So. 2d 338 (Fla. 1988) (accepting jurisdiction and quashing decision).

MAKAR, J., and BROWN, JOHN, ASSOCIATE J., concur; WINSOR, J., dissents in part with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINSOR, J., dissenting in part.

The panel reversed Ivey's conviction, concluding the trial court should have disallowed a particular peremptory challenge. Because Ivey did not preserve this argument, we should have affirmed, *see* Op. at 4 (Winsor, J., dissenting in part), and we should now grant rehearing to correct our error. For the same reason, we should not pass upon the question certified. Irrespective of whether a defendant generally may later renew a previously waived objection, Ivey did not do that. No matter the certified question's answer, Ivey's objection was waived. Nonetheless, the panel's decision *did* pass on the certified question, so our decision today confers discretionary jurisdiction. If the supreme court accepts review—and if it agrees with the panel that Ivey lodged a sufficient renewed objection—it could aid this court (and others) by clarifying its *Joiner* holding.

Andy Thomas, Public Defender, Jennifer P. LaVia, Special Public Defender, for Appellant.

Pamela Jo Bondi, Attorney General, Michael McDermott, Assistant Attorney General, for Appellee.

Exhibit C

1 Mixson, number 1, Whitfield and number 28, McKay. Right now
2 I have McKay as the alternate.

3 MR. GREEN: Can I talk to him a second?

4 THE COURT: Okay.

5 (Mr. Green conferred with Shawnest Ivey.)

6 MR. GREEN: Okay, excuse Miller.

7 THE COURT: Mr. Green, the first one number 69,
8 Miller?

9 MR. GREEN: Yes, ma'am.

10 THE COURT: That puts me with number 72, Busby,
11 number 83, Fowler, number 88, Pantoja, number 91, Mixson,
12 number 1, Whitfield, number 28, McKay and our alternate,
13 number 46, Sherman. I show 7 for cause.

14 MR. GREEN: Okay, excuse Mixson.

15 MS. WAHLQUIST: That's it for Mr. Green, he can't
16 excuse anymore.

17 MR. GREEN: I thought I'd done five.

18 MS. WAHLQUIST: You've done six.

19 THE COURT: You've got, Brock was number 1, Cass,
20 number 97 was 2, number 100, Hartford was number 3, Anderson
21 was 4, Miller was 5 and Mixson, number 91, is 6.

22 MR. GREEN: Okay, then I have to shut up then.

23 MS. WAHLQUIST: Your Honor, I would like to strike
24 Ms. Sherman and the reason being, I'd like to put the reason
25 on the record, is I did not address this earlier in jury

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1 selection because I honestly did not believe we would get to
2 Ms. Sherman, but during Ms. Teeple's selection, she called
3 Lieutenant Garvin, Jerome, and that's his brother's name.
4 Whenever we came back from lunch, I made a joke about
5 calling him Jerome and started laughing, not realizing she
6 was in the room. I turned around and I saw her give me a
7 look about it, because of that, I think she may have some
8 bias towards me. That's my own misstep for saying that, but
9 that is my reason for wanting to excusing her.

10 MR. GREEN: Your Honor, we would submit for the
11 record that she's an older black female, only black person
12 on the jury, and there is nothing in the record--she should
13 give a race neutral reason for her to be kicked off, and we
14 object to her being kicked off because the state has not
15 presented any race neutral reason that's in the record.

16 MS. WAHLQUIST: I believe I just have with her
17 bias towards me. Your Honor, Mr. Patterson is black male
18 that is on the jury and we accepted that. The only reason
19 that I am objecting to Ms. Sherman is because I made that
20 joke about her calling Lieutenant Garvin the wrong name, and
21 I saw her acknowledge it and give me a look as to not
22 appreciating it.

23 MR. GREEN: The problem I have with that is, if
24 she thought that that was a problem, she should have brought
25 it up during voir dire where we could have addressed it.

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1 The only thing we have is Ms. Wahlquist telling us this at
2 sidebar what happened and I have no way to show that this--I
3 just don't think it's a race neutral reason in the record
4 and that's what she has to have.

5 MS. WAHLQUIST: Your Honor, I will say it has
6 nothing to do with race because by striking Ms. Sherman I
7 get another black individual on the jury, it doesn't have to
8 do with race, it has to do with this incident and I do
9 accept Mr. Patterson as a member of the jury and Ms. Sims as
10 the alternate.

11 THE COURT: I find that's a race neutral reason,
12 with the understanding that Mr. Patterson will be on the
13 jury.

14 MS. WAHLQUIST: Yes, your Honor, I accepted.

15 MR. GREEN: And Sims as the alternate?

16 MS. WAHLQUIST: Yes.

17 MR. GREEN: Okay.

18 THE COURT: That gives us number 72, Busby, number
19 83, Fowler, number 88, Pantoja, number 1, Whitfield, number
20 28, McKay, number 49, Patterson, and that puts our alternate
21 then as Sims, number 52.

22 MR. GREEN: That's it.

23 MS. WAHLQUIST: Yes. Your Honor, for the record,
24 we would also like it acknowledge that there was only, out
25 of the two we discussed, one other black individual,

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1 Ms. Johnson, and she was removed for cause.

2 THE COURT: Let me make sure of what I have, sir.
3 Mr. Ivey, I've got number 72, Busby. I've got number 83,
4 Fowler. I've got number 88, Pantoja. I've got number 1,
5 Whitfield. I've got number 28, McKay, number 49, Patterson.
6 Then I have your alternate as number 52, Sims. Did you
7 participate with your attorney during jury selection?

8 SHAWNEST ANGELO IVEY: Yes.

9 MR. GREEN: Just let me take him to the table, so
10 I can point out the jurors to him.

11 THE COURT: Okay, I just want to make sure the
12 record reflects that he participated with our jury selection
13 and was at sidebar the whole time and participated in our
14 jury selection process.

15 MR. GREEN: Okay.

16 (The following proceedings continued within the hearing of
17 the jury, as follows:)

18 THE COURT: The last thing that was announced, is
19 the state agreeable with that as the jury in this case?

20 MS. WAHLQUIST: Yes, your Honor, we are.

21 THE COURT: Mr. Green, with how it was announced
22 before when we were at sidebar, sir, is your client and you
23 agreeable that that is our jury in this case?

24 MR. GREEN: Yes, your Honor, I had the opportunity
25 to go back over it. It's kind of confusing, especially if

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1 you've never done this--I have done it, but he hasn't, it
2 gets confusing to understand exactly how it works and I've
3 gone over the entire panel and he agrees and accepts this
4 jury, your Honor.

5 THE COURT: If I call your name out, you have
6 selected to serve as a juror in this case. Number 72,
7 Busby, number 83, Fowler, number 88, Pantoja, number 1,
8 Whitfield, number 28, McKay, number 49, Patterson and number
9 52, Sims.

10 Is that the agreement with the state and the defense?

11 MS. WAHLQUIST: Yes, your Honor.

12 MR. GREEN: Yes, your Honor.

13 THE COURT: If your name was not called, you are
14 excused and released at this time. If your name was called,
15 I would ask you to just stay around for one minute, we need
16 to get some information from you.

17 Any objection from the state or the defense to any of
18 the individual that remain out in the courtroom being
19 excused at this time?

20 MR. GREEN: No, your Honor.

21 MS. WAHLQUIST: No, your Honor.

22 THE COURT: The seven up here with us, I need you
23 to stay just for a minute. Anyone else who is in the
24 courtroom, y'all are excused at this time. Thank you so
25 much for your service. I know it's been a long day, but we

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1 really do appreciate your service with us today. Thank you.

2 (Jury venire exited the courtroom.)

3 THE COURT: Our clerk is going to need to get some
4 information from y'all for tomorrow. We are due to be back
5 tomorrow at 8:45. If you will be back at 8:45, we will
6 start, hopefully, promptly at 9:00.

7 I do want to make sure you understand that you should
8 not form any deliberate or fixed opinion on the merits of
9 the case until you have heard all the evidence, the argument
10 of the lawyers and the instructions on the law by the judge.
11 Until that time you should not discuss the case among
12 yourselves.

13 During the course of the trial, the Court may take
14 recesses, during which time you will be permitted to
15 separate and go about your personal affairs. During these
16 recesses, you will not discuss the case with anyone, nor
17 permit anyone to say anything to you or in your presence
18 about the case.

19 If anyone attempts to say anything to you or in your
20 presence about this case, tell him or her that you are on
21 the jury trying the case and ask him or her to stop. If he
22 or she persist, please leave him or her at once and
23 immediately report the matter to the bailiff, who will
24 advise me.

25 The case must be tried by you only on the evidence

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1 presented during the trial in your presence and in the
2 presence of the defendant, the attorneys and the judge.

3 Jurors may not conduct any investigation on their own.
4 Accordingly you may not visit any of the places described in
5 evidence and you must not read, nor listen to any reports
6 about this case. Further, you must not discuss this case
7 with any person and you must not speak with the attorneys,
8 the witness or the defendant about any subject until your
9 deliberation are finished.

10 I think you may have heard me say this early, but if
11 either the state or the defense or myself, if you see any of
12 us and we look the other way and we do not speak to you, we
13 do not mean anything personal by that, we're just trying to
14 avoid any appearance of impropriety.

15 Do you still need to get some stuff from them?

16 THE CLERK: I do.

17 THE COURT: Once she gets all that from you, y'all
18 will be released and excused for the rest of this day, and
19 we will y'all in the morning at 8:45.

20 Anything else from the state or the defense?

21 MS. WAHLQUIST: No, your Honor.

22 MR. GREEN: No, your Honor.

23 THE COURT: Then we will be in recess until in the
24 morning at 9:00 a.m.

25

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Exhibit D

1 THE COURT: We're here in the case of State of
2 Florida versus Shawnest Angelo Ivey, case number, 15-192CF.

3 Ms. Wahlquist and Mr. Green, I just want to make sure,
4 since I've turned the record on, we went over the
5 preliminary instructions and it was the agreement with the
6 state and the defense that the right to remain silent
7 paragraph would be included in my preliminary instructions.
8 There would be no note-taking, so that would not be
9 mentioned this morning. There is no stipulation, so that
10 will not be mentioned this morning. There are no questions
11 by the jurors, so that will not be mentioned this morning.

12 Is that the agreement with both the state and the
13 defense?

14 MS. WAHLQUIST: Yes, your Honor.

15 MR. GREEN: Yes, your Honor.

16 THE COURT: Mr. Ivey, you are here present with
17 us, sir.

18 The only additional thing is looking at my seating
19 chart for jury selection yesterday, I had seated for juror
20 number 46, Ms. Sherman, and just for record purposes, wanted
21 to make sure she was not a cause, she was a peremptory
22 challenge. And there was a challenge race neutral reason
23 given, and she was excused based on the state using a
24 peremptory challenge.

25 With that, is there anything else we need to address

1 this morning before we bring the jury in.

2 MR. GREEN: Your Honor, the only thing other
3 than--everything you said is fine. What I would like to do,
4 I've made a few objection in preliminary proceedings and
5 objected to evidence and objected to different things. I
6 would like to just make that as a continuing objection, so
7 they don't come back and say we failed to object in the
8 trial.

9 THE COURT: I will just state for record purposed,
10 any ruling that has already been made by me, I recognize Mr.
11 Green's continue objection, that has been the ruling that
12 has been made by the Court.

13 MR. GREEN: Thank you, your Honor.

14 THE COURT: The only other issue, though, is there
15 was a stipulation, I believe, that this was not going to be
16 used, our disc that was provided to me.

17 MS. WAHLQUIST: Your Honor, we have a different
18 disc that we plan to play today with out audio. The only
19 thing that we would ask is that disc not go back to the
20 jury, if they ask to see it again, should the jury receive
21 the case today, that we play it for them again to ensure
22 that the audio is not played.

23 MR. GREEN: I agree with that, your Honor, we'll
24 play the disc with out the audio.

25 THE COURT: Okay, and I was just trying to find