IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-531

LOWER CASE NO.: 3D01-679

DWAYNE CURTIS DORSEY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, **DWAYNE CURTIS DORSEY**,[1] petitions for discretionary review of a decision of the Third District Court of Appeal which affirmed his conviction for resisting an officer with violence. *Dorsey v. State,* 806 So. 2d 559 (Fla. 3d DCA 2002). (Appendix). Petitioner was the appellant in the district court. Respondent, the **STATE OF FLORIDA** was the appellee. In this brief, the parties will be referred to by their proper names. The symbol "R." refers to the record on appeal and the symbol "T." refers to the transcript of proceedings. All emphasis is supplied unless otherwise indicated.

[1]Mr. Dorsey expired on December 26, 2001. The district court denied defense counsel's motion to dismiss the appeal and to withdraw the opinion under review.

STATEMENT OF THE CASE AND FACTS

On December 30, 1999 the State filed an information charging Mr. Dorsey with battery on a law enforcement officer and resisting an officer with violence. (R. 1-4). Mr. Dorsey entered a not guilty plea and the case proceeded to trial by jury.

The following transpired when the State sought to exercise a peremptory challenge against prospective juror George:

> [PROSECUTOR]: The State would exercise a peremptory challenge on Ms. George. She appeared disinterested throughout. I was looking at her. She was sort of staring at the wall.
>
> [DEFENSE COUNSEL]: Your Honor, we would ask for a race neutral reason one for several reasons –- Ms. George has four golds on the bottom –- I know that because she smiled the whole time I was up there talking –- I also noticed when you were doing voir dire, I also saw that it wasn't that she was disinterested, she listened.
>
> She was very attentive, she smiled in a lighthearted manner. She is also African-American. Dwayne Dorsey is African-American.
>
> THE COURT: State is that the only reason?
>
> [PROSECUTOR]: That's the reason. To me, she appeared disinterested. She did not –- wasn't listening to anything.
>
> [DEFENSE COUNSEL]: Also, say this –- when Mr. Rahman asked who was happy to be here on jury duty, she was the only person who affirmatively respond [sic] she was happy. We are objecting to the State peremptory.

It doesn't agree to be any reason.

THE COURT: Well, I just must make a finding. It is not contextual [sic]. Her first challenge was against a Hispanic female. Now, we are talking a [sic] African-American female. It is not as if she is trying to single out any particular group.

[DEFENSE COUNSEL]: Well, Your Honor especially the test is the genuineness of the reason provided by the State.

THE COURT: Absolutely. And a pattern is not controlling.

[DEFENSE COUNSEL]: Right. And here, because the reason it's been produced by the State and what Ms. Blake says, her only reason, is simply not supported in the record.

Her statement that the juror is disinterested is affirmatively rebutted by the fact that this is the only juror who actually said she wanted –- I'm sorry what she said, she was happy when she got her jury document notice. I mean –-

THE COURT: Ms. Blake[2], I didn't notice it but are you telling me as Officer of the Court that that was your observation of this juror and that is why you wish to have her excused?

[PROSECUTOR]: Exactly.

THE COURT: I'm going to take Ms. Blake at her word. I'm going to allow the challenge.

(T. 135-136).

The jury convicted Mr. Dorsey of the resisting with violence

[2]Prosecutor.

charge and acquitted him of the battery on a law enforcement officer charge. (T. 311-313, R. 53-54). The trial court entered judgment in accordance with the verdict. (R. 56-58). The court sentenced Mr. Dorsey as a habitual violent felony offender to five years imprisonment. (R. 59-61).

On appeal of his conviction, Mr. Dorsey complained, *inter alia,* that the trial court reversibly erred when it allowed the State to exercise the peremptory challenge against Ms. George. Relying on *Wright v. State,* 586 So. 2d 1024 (Fla. 1991), Mr. Dorsey argued that the trial court erred in permitting the strike where the trial judge did not himself observe and confirm on the record the body language which the prosecutor proffered as the neutral reason for the strike. *Dorsey v. State,* 806 So. 2d at 562.

The Third District Court of Appeal found that Mr. Dorsey's reliance on *Wright v. State*, was misplaced. The court opined that the analysis applicable to the *Wright v. State* type situation was changed by the procedure outlined in *Melbourne v. State,* 679 So. 2d 759 (Fla. 1996). The court held that under the third step outlined in *Melbourne,* the trial court was required to assess the genuineness of the offered reason for the strike considering all of the circumstances surrounding the

strike. *Dorsey v. State,* 806 So. 2d at 562. The court observed that *Melbourne* requires it, as the reviewing court, to use common sense in evaluating the trial court's ruling. *Id.* The court noted that "evaluation of the prosecutor's state of mind, as well as the proffered reasons for the peremptory challenge, 'lies peculiarly within a trial judge's province.," *Id.* at 563. (citing *Commonwealth v. Snodgrass,* 831 S.W.2d 176, 179 (1992). Consequently, the court held that the trial court's ruling was not clearly erroneous since it was in the best position to assess the prosecutor's veracity and thus, the genuineness of the reason for the strike. *Dorsey v. State,* 806 So. 2d at 563.

This Court granted review.

ISSUE PRESENTED

I

WHETHER WHERE BODY LANGUAGE IS PROFFERED AS THE NEUTRAL REASON FOR EXERCISING A PEREMPTORY CHALLENGE, *MELBOURNE V. STATE,* 679 so.2d 759 (Fla. 1996), REQUIRES THAT THE TRIAL JUDGE PERSONALLY OBSERVE THE BODY LANGUAGE.

SUMMARY OF ARGUMENT

Where body language is proffered as the neutral reason for exercising a peremptory challenge, *Melbourne* does not mandate that the trial court personally observe the alleged body language. In *Melbourne,* this Court adopted the Federal three step procedure for analyzing whether a peremptory challenge is being exercised in a discriminatory manner. Under step three of that procedure, the trial court is required to evaluate the genuineness of the proffered reason. In making this evaluation, the court must evaluate the credibility of the person making the challenge. Since the trial court has to make an independent evaluation of the genuineness of the proffered reason, whether the court in fact observed the alleged body language is not the determinative factor. Instead, the determinative factor is whether the court finds the person making the challenge credible.

In the instant case, the trial court properly applied *Melbourne's* three step procedure. In applying step three, the court did not simply accept the prosecutor's reason for attempting to excuse Ms. George. Instead, the court evaluated the genuineness of the proffered reason by assessing the credibility of the prosecutor. The court found the prosecutor credible and accepted the proffered reason as genuine. The

trial court's finding is not clearly erroneous. This Court should therefore approve the district court's decision which affirmed Mr. Dorsey's conviction.

ARGUMENT

WHERE BODY LANGUAGE IS PROFFERED AS THE NEUTRAL REASON FOR EXERCISING A PEREMPTORY CHALLENGE, *MELBOURNE V. STATE,* 679 so.2d 759 (Fla. 1996), DOES NOT REQUIRE THAT THE TRIAL JUDGE PERSONALLY OBSERVE THE BODY LANGUAGE.

In *Melbourne v. State*, 679 So.2d 759 (Fla.1996), this Court established the following three step procedure for analyzing whether the peremptory challenge is being exercised in a discriminatory manner:

> Step 1 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 venire person is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike.
>
> Step 2 At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.
>
> Step 3 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.

Id. at 764. Mr. Dorsey's complaint, that the State's proffered reason for excusing Ms. George is not supported by the record, implicates step 3 of the *Melbourne* test. Under step 3, the trial court must determine whether the proffered reason is

pretextual. *Id.* "[T]he trial court's decision on the ultimate issue of pretext 'turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.'" *Green v. State,* 718 So. 2d 334, 335 (Fla. 3d DCA 1998)*, citing Melbourne*, 679 So.2d at 764.

In the instant case, the State proffered as its race neutral reason for excusing Ms. George:

> [PROSECUTOR]: She appeared disinterested throughout. I was looking at her. She was sort of staring at the wall.

(T. 135). Thereafter, the following transpired:

> [DEFENSE COUNSEL]: Your Honor, we would ask for a race neutral reason one for several reasons –- Ms. George has four golds on the bottom –- I know that because she smiled the whole time I was up there talking –- I also noticed when you were doing voir dire, I also saw that it wasn't that she was disinterested, she listened.
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> She was very attentive, she smiled in a lighthearted manner. She is also African-American. Dwayne Dorsey is African-American.
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> THE COURT: State is that the only reason?
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> [PROSECUTOR]: That's the reason. To me, she appeared disinterested. She did not –- wasn't listening to anything.
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> THE COURT: Well, I just must make a finding. It is not contextual [sic]. Her first challenge was against a Hispanic female. Now, we are talking a [sic] African-American female. It is not as if she is trying to single out any particular group.
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> [DEFENSE COUNSEL]: Well, Your Honor especially the test is the genuineness of the reason provided by the State.
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> THE COURT: Absolutely. And a pattern is not controlling.
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> [DEFENSE COUNSEL]: Right. And here, because the reason it’s been produced by the State and what Ms. Blake says, her only reason, is simply not supported in the record.
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> Her statement that the juror is disinterested is affirmatively rebutted by the fact that this is the only juror who actually said she wanted –- I’m sorry what she said, she was happy when she got her jury document notice. I mean –-
>
> THE COURT: Ms. Blake, I didn’t notice it but are you telling me as Officer of the Court that that was your observation of this juror and that is why you wish to have her excused?
>
> [PROSECUTOR]: Exactly.
>
> THE COURT: I’m going to take Ms. Blake at her word. I’m going to allow the challenge.

(T. 135-136). Based on the foregoing, it is apparent that the issue stemmed from the observation of Ms. George’s demeanor. The prosecutor observed her demeanor and interpreted what she

saw as disinterest. Defense counsel, however, thought that from what he observed of Ms. George she was happy to be there. He argued that Ms. George "was very attentive, smiled in a lighthearted manner." (T. 153). The court admitted that it did not notice Ms. George's demeanor. (T. 136). The court, in resolving the issue, inquired of the prosecutor as an officer of the court, whether she in fact saw what she said she saw. *Id.* The court accepted the prosecutor's answer as the truth. This assessment of credibility is not clearly erroneous. *Melbourne*, 679 So.2d at 764.

Mr. Dorsey now complains that the Third District erred in upholding the trial court's ruling because the trial judge did not himself observe the alleged body language. According to Mr. Dorsey, the Third District's error stemmed from its erroneous conclusion that the *Melbourne* test does not require that the neutral reason have a basis in the record. Thus, according to Mr. Dorsey, the challenge should not have been permitted because the alleged basis for the challenge is not supported by the record.

The Third District was correct, the analysis in *Melbourne* does not mandate the automatic rejection of a peremptory challenge based on body language not observed by the trial court. The three step analysis established by this Court in

Melbourne was adopted from the federal caselaw governing peremptory challenges. *See Melbourne v. State,* 679 So. 2d at 764. (noting that under step 3 federal courts focus on the genuineness of the neutral reason, not on the reasonableness).

Under federal law, trial courts are afforded great deference in the assessment of the genuineness of a proffered reason for exercising a peremptory challenge. *See Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (trial court's decision on ultimate issue of discriminatory intent represents finding of fact which largely turn on evaluation of credibility); *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed. 2d 834 (1995) (under third step trial court determines whether the opponent of the strike carried burden of proving purposeful discrimination).

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." [co]. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind

> based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 1869, 114 L. Ed.2d 395 (1991) (plurality opinion) (citations omitted).

Indeed, federal courts routinely permit the exercise of peremptory challenges based on subjective reasons such as body language whether or no observed by the trial judge. *See e.g., McCurdy v. Montgomery County, Ohio,* 240 F.3d 512 (6th Cir. 2001) (recognizing that body language and demeanor are permissible race-neutral justifications for the exercise of a peremptory challenges), *U.S. v. Cooper,* 19 F.3d 1154 (7th Cir. 1994) (rejecting argument that objective verification should be required to support subjective race-neutral reason). Federal courts, however, require that the trial court conduct an on the record analysis of the genuineness of such subjective reasons. *See e.g. McCurdy v. Montgomery County, Ohio, supra.* ("The need for an explicit, on-the- record analysis of each of the elements of a *Batson* challenge is especially important when the purported race-neutral justification is predicated on subjective explanations like body language or demeanor"), *U.S. v. Jenkins,* 52 F.3d 743 (8th Cir. 1995) (approving trial court's finding of

genuineness of race-neutral reason where court's finding regarding demeanor was not based on court's own observations but was based on assessment of prosecutor's credibility).

In the instant case, the issue stemmed from the interpretation of Ms. George's demeanor. The prosecutor interpreted her demeanor as disinterest. Defense counsel, however, thought that Ms. George was happy to be there. He argued that Ms. George "was very attentive, smiled in a lighthearted manner." (T. 153). The court admitted that it did not notice her demeanor. (T. 136). The court, in resolving the issue, inquired of the prosecutor as an officer of the court, whether she in fact saw what she said she saw. *Id.* The court accepted the prosecutor's answer as the truth. The fact that the trial judge found the prosecutor credible is entitled to great deference.

> Whether an improper factor motivated a lawyer's use of a peremptory challenge is a determination which must be made by the district judge--often after an assessment of the lawyer's credibility. A trial judge develops an intuitive sense for evaluating the actions played out in the courtroom. An evaluation--such as determining credibility--is often difficult to make from reviewing a written transcript (or even viewing a video replay). It is the trial judge's sensory perceptions of what occurs during the course of a case, combined with an understanding of the bar and the public gained from experience in the community

> served by the court, which provides the trial judge with a unique insight. Consequently, on appeal, we give great deference to the findings of the trial court judge which call this insight into play. We will only overturn the trial court's determination that a prosecutor's use of peremptory challenges was not motivated by purposeful discrimination if that determination is clearly erroneous

U.S. v. Williams, 934 F.2d 847, 849 (7th Cir. 1991) (citation omitted). *See also U.S. v. Perez,* 35 F.3d 632, 636 (1st Cir. 1994)("[T]he trial court must choose whether to believe the prosecutor's race-neutral explanation or to find that the explanation was pretext to cover race-based motives. This determination turns upon an assessment of the credibility of the prosecutor's explanation, the 'best evidence' of which 'often will be the demeanor of the attorney who exercises the challenge.'"); *U.S. v. Cooper,* 19 F.3d at 1161-1162 ("The trial judge sits in the unique position to make credibility assessments of the actions of trial attorneys. In some cases, ..., the judge has had the opportunity to observe patterns and practices of particular attorneys during prior jury selections.")

Clearly, that the trial court did not observe Ms. George's demeanor did not preclude the court from permitting the challenge. As is evident from the above discussion, the critical

factor is that the court did not simply accept the prosecutor's reason. The court evaluated the genuineness of that reason by assessing the prosecutor's credibility. The court therefore properly complied with step three of *Melbourne*.

Since the trial court's finding of genuineness is not clearly erroneous, this Court should approve the district court's affirmance of Mr. Dorsey's conviction.

CONCLUSION

Based upon the foregoing argument and cited authorities, this Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to Andrew Stanton, Assistant Public defender, 1320 N.W. 14th street, Miami, Florida 33125 on this 15th day of November 2002.

PAULETTE R. TAYLOR
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this brief is composed in 12 point Courier New type.

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IN THE SUPREME COURT OF FLORIDA

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_____/

APPENDIX

Exh. A *Dorsey v. State*, 806 So. 2d 559 (Fla. 3d DCA 2002).