

Third District Court of Appeal

State of Florida, January Term, A.D. 2009

Opinion filed January 21, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D07-1166
Lower Tribunal No. 06-28801

Andre Howell,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mark King Leban, Judge.

Carlos J. Martinez, Public Defender, and Maria E. Lauredo, Assistant Public Defender, for appellant.

Bill McCollum, Attorney General, and Timothy R.M. Thomas, Assistant Attorney General, for appellee.

Before RAMIREZ, WELLS and SUAREZ, JJ.

RAMIREZ, J.

Andre Howell challenges his conviction on the basis of an error that occurred during jury selection. Because Howell's reason for the peremptory

challenge was based on how the juror was looking at him and the court did not observe this, under Dorsey v. State, 868 So. 2d 1192 (Fla. 2003), the stated reason was not supported by the record and was properly denied.

When Howell attempted to exercise a peremptory challenge of juror Maria Bermudez, the prosecutor requested a gender neutral reason. The trial court added that the juror was Hispanic. Defense counsel stated that their client expressed discomfort with the way the juror was looking at him. The judge said that he did not see that. As in Brown v. State, 33 Fla. L. Weekly D2741 (Fla. 3d DCA Nov. 26, 2008), that meant such nonverbal communication cannot support the strike, relying on Dorsey. In Dorsey, the Florida Supreme Court held that “a potential juror’s nonverbal behavior, the existence of which is disputed by opposing counsel and neither observed by the trial court nor otherwise supported by the record, is not a proper basis to sustain a peremptory challenge as genuinely race neutral.” Id. at 1202. Here, as in Dorsey, the defense relied on nonverbal conduct which neither the judge nor the prosecutor could confirm and is not supported by the record. Consequently, the proffered reason was not gender, or ethnically, neutral and the judge properly denied the challenge.

We therefore affirm.