



LEXSEE 34 FLWD 191

Andre Howell, Appellant, vs. The State of Florida, Appellee.

No. 3D07-1166

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

1 So. 3d 322; 2009 Fla. App. LEXIS 326; 34 Fla. L. Weekly D 191

January 21, 2009, Opinion Filed

PRIOR HISTORY: [**1]

An Appeal from the Circuit Court for Miami-Dade County, Mark King Leban, Judge. Lower Tribunal No. 06-28801.

COUNSEL: 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.

JUDGES: Before RAMIREZ, WELLS and SUAREZ, JJ.

OPINION BY: RAMIREZ

OPINION

[*322] 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*, 995 So. 2d 1099, 33 Fla. L. Weekly D 2741 (Fla. 3d DCA Nov. 26, 2008), that meant such nonverbal communication cannot support the strike, relying [**2] 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.