

# Third District Court of Appeal

State of Florida, July Term, A.D. 2010

Opinion filed October 20, 2010.

Not final until disposition of timely filed motion for rehearing.

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No. 3D09-1544  
Lower Tribunal No. 08-7891

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**Hector Garcia,**  
Appellant,

vs.

**The State of Florida,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Yvonne Colodny, Judge.

Carlos J. Martinez, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant.

Bill McCollum, Attorney General, and Ansley B. Peacock, Assistant Attorney General, for appellee.

Before SHEPHERD, CORTIÑAS, and SALTER, JJ.

SALTER, J.

Hector Garcia appeals his conviction and sentence for burglary of an

unoccupied dwelling and felony theft. Finding that the trial court erred in disallowing a defense peremptory challenge to a prospective juror, we reverse and remand for a new trial.

Initially, jury selection in the case proceeded smoothly and without incident. After six persons had been selected to serve on the jury, the state exercised a backstrike on one juror. The next venire member to be considered was Ms. Runno. The defense sought to exercise a peremptory challenge on Runno.

[Defense]: We will exercise our fourth peremptory on Ms. Runno, No. 26.

[State]: And we would ask for a race neutral reason.

[Defense]: Race neutral. Ms. Runno has previous jury experience.

[State]: I don't know if that is a valid reason for a peremptory challenge.

THE COURT: The Court is going to deny that.

[Defense]: Prior jury experience has been held as a race and gender neutral reason to strike somebody from the panel.

THE COURT: Doesn't the case law not say that it has to be something tangible, not tangible, but cognitive -- from that jury experience that causes the concern, not just the simple fact that they served?

The court disallowed the peremptory. Venire member Cartotto, the only remaining person who had listed prior jury service on the juror questionnaire, was chosen as the alternate juror. The panel was accepted and the defense preserved its objection.

The following day the court stated on the record that while the defense's reason for the peremptory on Runno was race neutral, it was not genuine. The court stated that other jurors had prior jury experience.

The defense objected to the court's explanation and proffered the juror questionnaires to show that no one who served on the jury other than Runno and Cartotto had prior jury experience. In fact, there were six venire members who listed prior jury service on the questionnaire. The court had excused one person based on personal hardship. Two had been stricken for cause based on stipulation by both parties without further discussion. The fourth venire person's fiancé was a police officer; she felt that police officers were more credible. She was stricken for cause. The issue of prior jury service was not discussed at all before Ms. Runno was considered.

Defense counsel also argued that Ms. Runno was Hispanic, as were the defendant and three other jurors. The court did not comment further.

We reverse the conviction because the procedures required by Melbourne v. State, 679 So. 2d 759 (Fla. 1996), were not followed in this case. "The proper starting point in any analysis of Melbourne issues is the principle that on appeal, peremptory challenges are presumed to be exercised in a nondiscriminatory manner. Furthermore, throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination." Julmice v. State, 14 So. 3d 1199, 1203 (Fla. 3d DCA 2009), review denied, 22 So.

3d 68 (Fla. 2009) (citations omitted).

“[T]he prosecutor’s simple declaration that the ‘state is requesting a neutral reason’ after the strike was attempted was, without more, insufficient to trigger a [State v.] Neil, [457 So. 2d 481 (Fla. 1984),] inquiry . . . .” Miller v. State, 664 So. 2d 1082, 1082 (Fla. 3d DCA 1995). The proper means of testing the peremptory challenge would have been to object, to show that the venire member is a member of a distinct racial group and then to request that the court ask a reason for the strike. Melbourne; Sparks v. Allstate Const., Inc., 16 So. 3d 161 (Fla. 3d DCA 2009).<sup>1</sup>

Had this procedure been followed, this Court would have been in a better position to assess whether the strike was truly being exercised in a discriminatory manner. As the record stands, however, we cannot make that determination.

Reversed and remanded.

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<sup>1</sup> This case is distinguishable from Rodriguez v. State, 753 So. 2d 29 (Fla. 2000). Not only was the Rodriguez record surrounding the challenge fully developed, in Rodriguez the validity of the challenge rested on “exactly the type of credibility assessment that must be made by the trial court . . . .” Id. at 41.