TRIAL PRACTICE

Trial Practice: Closing Argument

***Zackery v. State*,**
849 So. 2d 343 (Fla. 4th Dist. App. 2003)

When the only evidence a defendant presents simply duplicates evidence that the State previously entered, the defendant maintains the right to open and close final argument. Therefore, if the State's videotape evidence is a compilation of photographs and not a conventional moving picture, a defendant who introduces only the individual photographs does not waive the right to close.

FACTS AND PROCEDURAL HISTORY

The State tried Kenneth Zackery for armed robbery and the use of a false name. During his trial, Zackery offered into evidence two still photographs made from a videotape that the State entered during its case-in-chief. The trial court refused to allow Zackery to rebut after final argument and he appealed. The Fourth District Court of Appeal initially affirmed the trial court's decision and held that Zackery waived his right to conclude final argument by offering the photographs into evidence. On Zackery's motion for rehearing, however, the Fourth District Court reconsidered the specific characteristics of the State's videotape and reversed its own ruling. Accordingly, the court reversed Zackery's conviction and remanded the case for a new trial. The Fourth District Court published both its original affirmation and its subsequent reversal in the same opinion.

ANALYSIS

In a criminal trial, the State is ordinarily allowed to open and close final argument because it has the burden of proof. *Smith v. State*, 19 So. 2d 698 (Fla. 1944). According to Florida Rule of Criminal Procedure 3.250, however, "a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury." This rule, known as the "sandwich" rule, determines which party closes final argument. And though the rule's text refers only to testimony,

under Florida case law, a defendant who likewise offers documentary evidence will waive the right to close. Applying the sandwich rule to *Zackery*, the Fourth District Court initially agreed with the trial court that the defendant lost his right to close when he entered the photographs (i.e., documents) into evidence. Zackery argued that he should be entitled to an exception under the rule because his still photographs simply duplicated the State's videotape evidence, even though they presented it in a different format. The court, however, found that Zackery's still photographs did not merely duplicate the State's videotape. According to the court, "[t]he still photos were enlarged versions of something from the video and showed in more detail what might not have been apparent merely watching the video itself." *Zackery*, 849 So. 2d at 345. Because Zackery offered evidence that added to what the State presented, the court concluded that Zackery waived his right to close final argument.

In his motion for a rehearing, Zackery informed the Fourth District Court that the State's videotape "was not in fact a conventional videotape of a motion picture depicting continuous action." *Id.* Zackery characterized the tape as a collection of photographs that simulated movement instead of recording it. The State characterized the tape as a "single video recording . . . which was fed sequentially from a number of cameras located around the store." *Id*. (quoting the State's response to Zackery's motion for rehearing). To resolve the dispute, the Fourth District Court reviewed the State's videotape and found that the "cameras fed only still photographs into the recording device, not conventional motion pictures." *Id.* The court concluded that the State's videotape "was nothing more than an assemblage of still photographs." *Id.* The court found, therefore, that Zackery's introduction of the same still photographs did not offer any evidence beyond what the State previously presented during its case-in-chief and did not cause Zackery to waive his right to close final argument.

SIGNIFICANCE

This case clarifies the application of Florida Rule of Criminal Procedure 3.250 when a defendant offers no new evidence, but merely duplicates or re-packages evidence already offered by the State. Such duplicative evidence does not violate the sandwich

rule and does not cause a defendant to waive his right to open and close final argument. A defendant must be careful, however, to ensure that any duplication or repackaging does not add to or enhance the State's evidence. Otherwise, a defendant will lose the sandwich and forfeit the right to close.

RESEARCH REFERENCES

- 15 Fla. Jur. 2d *Criminal Law* §§ 1777, 1778 (2001 & Supp. 2004).
- 75A Am. Jur. 2d *Trial* § 536 (West 2004).

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Trial Practice: Expert Witness Impeachment

***Goss v. Permenter*,**
827 So. 2d 285 (Fla. 5th Dist. App. 2002)

***Manhardt v. Tamton*,**
832 So. 2d 129 (Fla. 2d Dist. App. 2002)

An expert's statement is not a proper basis for impeachment purposes if the statement relates to an irrelevant or immaterial matter. Such irrelevant examinations are likely to deceive the jury as to the weight of the expert's testimony and should be excluded.

FACTS AND PROCEDURAL HISTORY

In medical malpractice cases in Collier and Lake counties, defense counsel questioned expert witnesses about their involvement in previous lawsuits.

In *Goss,* a cardiology expert signed an affidavit admitting that he had been disqualified as an expert witness in a previous case involving an emergency-room-physician's standard of care. On cross-examination, defense counsel asked the expert about his disqualification in an attempt to impeach the expert's veracity. Plaintiff's counsel objected, and the court sustained the objection. The defendants appealed the decision, and the Fifth District Court of Appeal agreed with the trial court, finding the impeach-

ment testimony improper because it related to irrelevant and immaterial matters.

Similarly, in *Manhardt*, defense counsel questioned an expert witness about his status as a defendant in a previous medical malpractice suit. Plaintiff's counsel asked for a mistrial, arguing that the question involved irrelevant and prejudicial matters. The trial court denied the motion, and the plaintiff appealed. On appeal, the Second District Court of Appeal agreed with the plaintiff and found the defense counsel's line of questioning to be improper because it related to matters irrelevant to the witness's expertise.

ANALYSIS

In both cases, the court found that questions regarding matters that were irrelevant or immaterial to the instant case constituted improper credibility attacks.

In *Goss,* the expert cardiologist had been disqualified from testifying as an expert in a previous case that did not concern his field of expertise, because he lacked "substantial professional experience" in that field. Fla. Stat. § 766.102(6)(a) (2002). With this information, the court found that the expert's disqualified testimony in the previous case had no relevance to the current case in which he was qualified to render an expert opinion. The court reasoned that a witness cannot be impeached based on collateral and immaterial issues. *Erp v. Carroll,* 438 So. 2d 31, 36 n. 5 (Fla. 5th Dist. App. 1983).

Similarly, in *Manhardt,* the court found it improper to cross-examine a medical expert about his or her own past medical malpractice claims. Because information concerning such prior lawsuits had no relevance to the current case, it would unfairly prejudice the jury as to the weight and credibility the jury should apply to the expert's testimony.

Both courts found that immaterial information is not relevant and should not be used to impeach an expert witness. Impeachment is reserved for matters that have a material effect on a case and will not serve to unfairly prejudice either side's representation.

SIGNIFICANCE

Although each case presents slightly different facts, both stand for the same rule—lawyers may not overreach when trying

to impeach expert witnesses on cross-examination. At issue in each case was whether the attempted impeachments involved matters relevant to, and therefore admissible in, the case. Each court applied similar rules in determining that a lawyer may not impeach an expert witness by inserting irrelevant matters into the litigation. Therefore, lawyers must stick to the relevant tightrope when attacking an expert's credibility. If they veer toward irrelevant matters, then they will lose their court-afforded balance. Once a lawyer loses this balance by presenting matters having no bearing on the case, he or she may not use those matters to impeach the expert's credibility.

RESEARCH REFERENCES

- 81 Am. Jur. 2d *Witnesses* § 816 (2004).
- 6 Am. Jur. *Trials* § 423 (2003).

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Trial Practice: Improper Arguments

***Doorbal v. State*,**
837 So. 2d 940 (Fla. 2003)

In the absence of a contemporaneous objection, a prosecutor's comments, made at trial, about a criminal defendant's right to remain silent, and a prosecutor's use of arguments violating the "Golden Rule" require fundamental error as a basis for reversal.

FACTS AND PROCEDURAL HISTORY

Noel Doorbal was convicted of five separate criminal charges, including two counts of first-degree murder. At trial, the State offered a large amount of physical and testimonial evidence to prove Doorbal's involvement in the murders. During the guilt phase of the trial, the prosecutor commented during closing argument on Doorbal's right to remain silent and asked jurors to place themselves in the victims' positions. However, Doorbal failed to make a contemporaneous objection to either error. The jury found Doorbal guilty of all charges and sentenced him to two consecutive death sentences.

Doorbal appealed his convictions and sentences to the Florida Supreme Court and claimed, *inter alia*, that both the prosecutor's impermissible comment on the defendant's right to remain silent and the prosecutor's impermissible "Golden Rule" argument constituted reversible error.

ANALYSIS

Without a contemporaneous defense objection, "the only possible basis for relief is fundamental error." *Doorbal*, 837 So. 2d at 956. A court may find fundamental error when the State's "comments 'reach[ ] down into the validity of the trial itself to the extent that a verdict of guilty [can] not [be] obtained without the assistance of the alleged error.'" *Id.* (quoting *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999)).

Right to Remain Silent

Because Doorbal failed to object contemporaneously when the prosecutor improperly commented on Doorbal's right to remain silent, later relief would be possible only if the prosecutor's comments amounted to fundamental error. Considering the great magnitude of the evidence against Doorbal, the Florida Supreme Court found that the prosecutor's comments "did not affect the jury's verdict." *Id.* at 957. Therefore, the Court declined Doorbal's request for relief. However, the Court "'caution[ed] prosecutors against making comments that may be interpreted as comments on the defendant's failure to testify or that impermissibly suggest a burden on the defendant to prove his or her innocence.'" *Id.* (quoting *Rodriguez v. State*, 753 So. 2d 29, 39 (Fla. 2000)).

"Golden Rule"

Doorbal also failed to object contemporaneously when the prosecutor requested that jurors place themselves in the victims' positions, which was an improper "Golden Rule" argument. Based upon this failure to object, the Florida Supreme Court considered only whether the comment constituted fundamental error. The Court found that the State could have obtained a guilty verdict without violating the "Golden Rule" because of the large amount of evidence against Doorbal. Therefore, the Court held that "no relief [was] warranted." *Id.* However, the Court warned prosecutors not to "walk the edge of reversible error" with regard to such

an important principle of law as the prohibition against "Golden Rule" arguments. *Id.* at 958.

SIGNIFICANCE

Doorbal reaffirms that the fundamental error standard, rather than the abuse-of-discretion or harmless-error standards, is the only basis for relief when a criminal defendant fails to object contemporaneously at trial to either a prosecutor's erroneous comments on the defendant's right to remain silent, or to a prosecutor's improper use of a "Golden Rule" argument. However, the Florida Supreme Court noted in both instances that, although neither error constituted reversible error in the present case, prosecutors should avoid encroaching upon a defendant's rights by making such errors.

RESEARCH REFERENCES

- Candice Tobin, Student Author, *Misconduct during Closing Arguments in Civil and Criminal Cases: Florida Case Law*, 24 Nova L. Rev. 35 (1999).

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Trial Practice: Peremptory Challenges

***Dorsey v. State*,**
868 So. 2d 1192 (Fla. 2003)

A potential juror's nonverbal conduct does not constitute a genuinely "race-neutral" reason upon which a peremptory challenge may be sustained when such behavior is not observed by the trial court, is unsupported by the record, and is disputed by opposing counsel.

FACTS AND PROCEDURAL HISTORY

The State prosecuted Dwayne Dorsey, an African-American, for resisting an officer, with violence. During voir dire, the State attempted to use one of its peremptory challenges to strike an African-American juror. The prosecutor alleged that the juror, Ms. George, appeared disinterested throughout the proceeding,

had been staring at the wall, and did not listen to anything that was going on. Defense counsel objected and stated that George appeared very attentive, smiled lightly when spoken to, and was the only person to respond affirmatively when counsel asked the jurors if they were happy to be on jury duty. In response to defense counsel's request for a race-neutral reason for the peremptory challenge, the prosecutor reiterated that George appeared disinterested. The trial court decided to accept the prosecutor's reasoning at face value and allowed the challenge. In reaching this decision, the court noted that the State used its first peremptory challenge against a Hispanic juror, and concluded that the prosecutor was, therefore, not trying to single out any particular group. The court excused George, and the final jury found Dorsey guilty. Dorsey appealed his conviction, alleging that the trial court erred when it allowed the State to exercise its peremptory challenge against George. The Third District Court of Appeal affirmed the trial court's decision. The Florida Supreme Court, however, held that the State never satisfied its burden to produce a race-neutral reason sufficient to sustain its peremptory challenge. The Court, therefore, quashed the district court's decision.

ANALYSIS

Judicial History

The Florida Supreme Court began its analysis by reviewing the history of peremptory challenges under Florida law. In *State v. Neil*, the Court held that the use of a peremptory challenge solely on the basis of race violates an individual's right to trial by an impartial jury, as provided in the Florida Constitution. 457 So. 2d 481, 486 (Fla. 1984). Two years later, in *Batson v. Kentucky*, the United States Supreme Court stated that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." 476 U.S. 79, 85 (1986). The *Batson* Court stated that a prosecutor could not justify a peremptory challenge simply by denying any discriminatory motive. Instead, a prosecutor "must articulate a neutral explanation related to the particular case. . . ." *Id*. at 98. The Florida Supreme Court relied on *Batson* in *State v. Slappy*, 522 So. 2d 18, 23 (Fla. 1988), when it articulated two factors for trial courts to consider when evaluating a proffered race-neutral explanation: whether the reason offered was "neutral and reason-

able," and whether the record supported both "the reasons given and the absence of pretext." This required the trial court to discern the credibility of both the attorney and the race-neutral explanation. Next, in *Floyd v. State*, the Florida Supreme Court stressed the need for support within the record of an attorney's explanation for using a peremptory challenge. 569 So. 2d 1225 (Fla. 1990). The Court held that, once the State offers a race-neutral reason, the defense must challenge the reason before a court is required to review the record and ascertain the truth of the State's assertion. A year later in *Wright v. State*, the Court concluded that "[p]eremptory challenges based on bare looks and gestures are not acceptable reasons unless observed by the trial judge and confirmed by the judge on the record." 586 So. 2d 1024, 1029 (Fla. 1991).

In *Purkett v. Elem*, 514 U.S. 765 (1995), the United States Supreme Court addressed its *Batson* decision and found that a proponent's explanation for a peremptory challenge "must be nondiscriminatory on its face and have record support." *Dorsey*, 868 So. 2d at 1198. One year later, in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), the Florida Supreme Court adopted guidelines for trial courts to follow when determining whether peremptory challenges are based on racial grounds:

> [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 venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. [2] If these initial requirements are met . . . the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. . . . [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 . . . .

Dorsey, 868 So. 2d at 1199 (citing *Melbourne*, 679 So. 2d at 764 (footnotes omitted)).

Dorsey's Majority Opinion

In *Dorsey*, the Florida Supreme Court concluded that *Wright* and *Melbourne* together create the principle that the proponent of a peremptory challenge based on nonverbal conduct may fulfill the second step of the *Melbourne* guidelines only if the trial court observes the behavior or the record supports it. By contrast, if the proponent does not present a basis beyond his or her perception to validate the juror's alleged bare looks and gestures, no foundation for the explanation exists, and the strike's proponent has not satisfied *Melbourne*'s second step. Applying these principles, the Florida Supreme Court found that the *Dorsey* trial court did not observe, nor did the record support, the prosecutor's explanation for striking George (i.e., her alleged lack of interest). Moreover, this assertion contradicted defense counsel's explanation of George's disposition, responses, and facial expression. As a result, the Court concluded that the trial court erred when it ruled in the State's favor without verifying the alleged lack of interest, and by ruling without discussing the reasons behind its choice to believe the representation of one attorney over the other. The Court stated that the trial court's acceptance of the prosecutor's word without record support constituted "exactly the type of good faith affirmation" that the United States Supreme Court in *Batson* and *Purkett* believed would render the Equal Protection Clause "vain and illusory." *Dorsey*, 868 So. 2d at 1203.

Dorsey's Dissent

The *Dorsey* dissent found the majority opinion unsound because it recedes from *Melbourne*. Specifically, it noted that *Melbourne* placed only a "burden of *production* (not persuasion)" on the strike's proponent to articulate an explanation that is race-neutral on its face. *Id.* at 1205 (Bell, Wells, & Cantero, JJ., dissenting) (emphasis in original). Moreover, *Melbourne* shifted the trial court's focus in its evaluation of the totality of the circumstances "from *reasonableness* to *genuineness*." *Id*. (emphasis in original). Most important, under *Melbourne*, the burden of persuasion to prove racial discrimination always rests with the strike's opponent.

The *Dorsey* dissent maintained that the State met its burden of production of a race-neutral explanation. It also found that the trial court acted appropriately and in compliance with *Melbourne*

when it assessed the prosecutor's credibility and noted the absence of pretext in the totality of the circumstances. According to the dissent, the record spoke to this conclusion by its silence. Nothing else in the record indicated a racial motive, and the defense counsel never sought further questioning of George to support his counterclaim regarding her demeanor. In the dissent's view, the *Dorsey* defense counsel did not meet his burden to establish racial discrimination. Because *Melbourne* specifically identified that "the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous[,]" and because the *Dorsey* trial court's decision was not clearly erroneous, the dissent would have affirmed the Third District's decision to uphold the peremptory challenge. *Id.* at 1206 (citing *Melbourne*, 679 So. 2d at 764–765 (footnote omitted)).

SIGNIFICANCE

This case reexamines the nonverbal juror conduct addressed in *Wright* in light of the Florida Supreme Court's *Melbourne* decision. It attempts to set a standard for determining whether a race-neutral reason given for the use of a peremptory challenge is genuine when based only upon a potential juror's looks and gestures observed during voir dire. The Court concludes that *Wright* is consistent with *Melbourne,* and that, taken together, the two cases hold that the proponent of a peremptory challenge, based on nonverbal conduct, may satisfy the burden of production under *Melbourne* only if the trial court observes the behavior or if the record otherwise documents such behavior. Counsel who proposes such a peremptory challenge, without ensuring that the record documents the nonverbal conduct and supports his or her lack of discriminatory intent, runs the risk of having the peremptory challenge overturned on appeal.

RESEARCH REFERENCES

- 33 Fla. Jur. 2d *Juries* §§ 226, 227, 228, 232 (2003 & Supp. 2004).
- Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. Miami L. Rev. 451 (2000).
- Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 Chi.-Kent L. Rev. 475 (1998).

- Jason Laeser, Student Author, *Jurors and Litigants Beware—Savvy Attorneys Are Prepared to Strike: Has* Purkett v. Elem *Signaled the Demise of the Peremptory Challenge at the Federal and State Levels?*, 52 U. Miami L. Rev. 635 (1998).

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