IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

QUENTIN WYCHE,

Defendant.
_____/

CASE NO: F10-9090

SECTION 15
JUDGE: MIGUEL M. DE LA O

OMNIBUS ORDER ON POST-TRIAL MOTIONS AND SENTENCING

THIS CAUSE came before the Court on three post-trial motions by Defendant, Quentin Wyche ("Wyche"), and for sentencing. For the reasons set forth, the motions are denied and Wyche is sentenced to twenty and a half years in State prison followed by 5 years of probation.

INTRODUCTION

This case is a tragedy. It is most obviously a tragedy for Kendall Berry ("Berry") and his family. It is also a tragedy for the Wyche family. These two families rightly believed they were living the American Dream. They guided their sons safely through childhood, saw their sons enroll at a world-class university, and believed – quite reasonably – that a college education would secure their sons' bright futures. They believed their sons were safe on FIU's tranquil campus, far from the perils that face aimless young men who are not enrolled in college seeking to obtain a higher education. But, young men, regardless of education, act impulsively and irrationally at times, fueled by bravado and a misplaced sense of manhood. So it was here. The Berry family has buried their son far too soon, and the Wyche family has lost theirs for far too long. A tragedy – in every sense of the word.

To summarize, because of a confrontation earlier in the day on March 25, 2010 between Wyche and Berry's girlfriend, Regina Johnson, Wyche and Berry appeared ready to have a consensual fist fight outside the FIU gym following some intramural basketball games. With numerous friends and onlookers present, Wyche and Berry "squared up" in preparation for their clash. Right before the fight began, Wyche ran away and Berry gave pursuit. The testimony is unclear as to whether Berry caught up to Wyche, or whether Wyche consciously stopped and re-engaged in physical confrontation with Berry. What is undisputed is that Wyche secured scissors from his backpack while fleeing from Berry and stabbed Berry as the two young men confronted each other in front of the gymnasium's door. Witnesses testified that following the stabbing, as Berry lay on the pavement mortally wounded, Wyche made various statements to Berry's friends:

"Better get your boy or I'm going to get him."[1]

"If he's not dead, I'm going to kill him."

"I got your homeboy laid out."

One witness testified he heard Wyche say to Berry after Berry lay bleeding: "That's what you get, that's what you get, you piece of shit." Another witness testified that he told Wyche not to stab Berry again when it looked like Wyche was getting ready to do so.

In the State's rebuttal case, a witness testified she heard Wyche say, prior to stabbing Berry: "I'm going to get him, I'm going to kill him."

The jury convicted Wyche of Murder in the Second Degree. Wyche timely filed the motions at issue.

[1] Although these statements are in quotes, the Court has drafted this Order based only on its trial notes, without aid of a transcript. Quoted statements may not be exactly verbatim, but the quotes reflect what the witnesses testified to in sum and substance during the trial.

I. MOTION FOR JUDGMENT OF ACQUITTAL (POST-CONVICTION REDUCTION OF CHARGE TO MANSLAUGHTER).[2]

Wyche asks this Court to grant a post-trial judgment of acquittal as to second degree murder and sentence him for the crime of manslaughter instead based on *Dorsey v. State*, 74 So. 3d 521 (Fla. 4th DCA 2011). Wyche made the same argument at the close of the State's case and again at the close of the evidence. The argument was persuasive then, and remains so today. The State introduced no evidence that Wyche had any ill will or hatred towards Berry prior to the evening of March 25, 2010.

If the only evidence before this Court consisted of Berry and Wyche's actions that fateful night, the Court would have granted a judgment of acquittal as to second degree murder during the trial. But the record consists of more than the actions of these young men, it consists also of Wyche's statements. Although reasonable people can disagree about the extent to which his statements immediately before and after the stabbing reveal Wyche's true state of mind at the time he armed himself with scissors, reasonable people must also agree that the interpretation and weight to be given these statements is solely within the province of the jury.

Based on the evidence presented during trial, the jury rejected Wyche's claim of self-defense. Notwithstanding the jury's rejection of Wyche's self-defense claim, this Court could nevertheless grant the motion for judgment of acquittal as to second degree murder based on *Dorsey*. The Court will not, however, because Wyche's statements, before and after stabbing Berry, are irreconcilable with a mere "impulsive overreaction to an attack." *See Dorsey*, at 524. Neither *Dorsey*, nor any of the cases upon which it relies, support a judgment of acquittal for

[2] Wyche asks, in the alternative, that the Court grant him a new trial if it does not grant the judgment of acquittal as to second degree murder. If the State's proof did not support a charge of second degree murder, Wyche's remedy would be a judgment of acquittal on that charge – not a new trial. Although Wyche's other motion for new trial does set forth various basis for a new trial, this motion does not.

second degree murder where the defendant is heard saying *before* the fatal stabbing: "I'm going to get him, I'm going to kill him." In light of this testimony, the Court cannot conclude – as Wyche asks it to do – that the State failed to introduce evidence of Wyche's depraved mind.

This Court has struggled mightily with this issue. The Court is cognizant that *Dorsey* relies on *Light v. State*, where the Second DCA noted that the "crime of second-degree murder. . . requires a more serious *mens rea*" than manslaughter. 841 So. 2d 623, 625 (Fla. 2d DCA 2003). Furthermore, *Light* holds that "[a]lthough exceptions exist, the crime of second-degree murder is normally committed by a person who knows the victim and has had time to develop a level of enmity toward the victim. Hatred, spite, evil intent, or ill will usually require more than an instant to develop." *Id.* at 626 (citations omitted). However, in *Light*, the court concluded that the State introduced *no* testimony of enmity at the time of the attack.

> The conditions inside the bar made it virtually impossible for any witness to provide testimony that Mr. Light demonstrated any enmity at the time of the incident, and no such testimony was provided. The circumstantial evidence in this case regarding Mr. Light's intent or state of mind is equally supportive of a theory that Mr. Light was simply guilty of a serious, momentary misjudgment concerning the amount of force that was permissible on the dance floor or that he reacted impulsively and excessively to being hit in the genitals. Such conduct fits within the definition of culpable negligence, which allows a homicide conviction, but only as manslaughter.

Id. The critical difference here is that the State introduced testimony of Wyche's enmity towards Berry by way of statements he made before and after the fatal stabbing.

Other cases also almost convinced this Court to grant the motion for judgment of acquittal as to second degree murder. In particular, this case is similar to *Poole v. State*, 30 So. 3d 696 (Fla. 2d DCA 2010).

> Newsome was unarmed, and it did not appear that he was aware that Poole had previously armed himself with a knife. Thus Poole's act of stabbing Newsome through the heart appears excessive, and the jury could reasonably reject his theory of self-defense. However, the State failed to prove that Poole acted out of ill will, hatred, spite, or an evil intent showing the depraved mind essential to establish second-degree murder. Instead, Poole stabbed Newsome because he "knew [Newsome] was fixing to get me." Thus the evidence showed an impulsive overreaction by Poole to Newsome's attack that warrants a conviction for manslaughter but not second-degree murder.

Id. at 699.[3] *See also Bellamy v. State*, 977 So. 2d 682, 684 (Fla. 2d DCA 2008) (defendant guilty of manslaughter, not second degree murder, for stabbing victim unknown to him during nightclub affray after defendant was pushed to the ground and someone stepped on his neck rendering him unable to breathe); *McDaniel v. State*, 620 So. 2d 1308, 1308 (Fla. 4th DCA 1993) (defendant guilty of manslaughter, not second degree murder, where evidence established that the victim initiated altercation with the defendant; although defendant's use of knife to ward off further attack may have been excessive, thereby negating a finding of self-defense, his acts did not evince depraved mind); *Borders v. State*, 433 So. 2d 1325, 1326 (Fla. 3d DCA 1983) (defendant guilty of manslaughter, not second degree murder, where evidence established she stabbed victim once after losing shoving match); *Pierce v. State*, 376 So. 2d 417, 418 (Fla. 3d DCA 1979) (defendant guilty of manslaughter, not second degree murder, where evidence established "that the homicide occurred only at the culmination of a fight which was started by the victim without justification and in which Pierce was only a reluctant participant"); *Martinez*

[3] *Poole* is distinguishable because the defendant did not make any statements contemporaneous with his stabbing the victim which evinced a depraved mind. Moreover, Poole remained on the scene "and awaited the arrival of law enforcement officers." *Poole*, at 698. Wyche did not. *See Bogart v. State*, 114 So. 3d 316, 318 (Fla. 4th DCA 2013) ("These facts are contrary to self-defense, as they suggest that appellant had a guilty conscience and the intent to flee after the fact, rather than a mind to call the police immediately to report the death and his version of the events.").

v. State, 360 So. 2d 108, 109 (Fla. 3d DCA 1978) ("[T]here was sufficient, although conflicting evidence adduced at trial upon which a jury could have reasonably rejected the defendant's claim of self-defense and concluded that the defendant used excessive force to defend himself or his daughter. The defendant killed the deceased with a firearm while the deceased was unarmed under circumstances which, under one reasonable view of the evidence, did not warrant the infliction of deadly force. As such, a classic case of manslaughter based on adequate legal provocation was therefore presented. The trial court should have accordingly reduced the charge from second degree murder to manslaughter upon the defendant's motion for judgment of acquittal made at the close of all the evidence in the case.").

Perhaps Wyche's post-stabbing statements alone would not suffice to support the jury's finding that Wyche acted with a depraved mind. *See, e.g.*, *Rayl v. State*, 765 So. 2d 917, 919 (Fla. 2d DCA 2000) ("fact that the defendant was standing with his arms folded when officers arrived was insufficient to prove ill will"). An argument could be made that the post-stabbing statements are equally consistent with post-fight, adrenaline-fueled bravado.[4]

However, these are not the only statements introduced by the State. A witness[5] also heard Wyche say "I'm going to get him, I'm going to kill him" *before* the fatal encounter. The statement demonstrates ill will, hatred, spite and an evil intent, and is inconsistent with a mere reaction – or, more properly, an overreaction – to an attack as discussed in *Dorsey*. Indeed, there

[4] Wyche's Counsel argued to the jury that the post-stabbing statements were merely an effort by Wyche to keep Berry's friends from attacking him. The jury appears to have rejected that interpretation, and this Court agrees that the post-stabbing statements were inconsistent with an effort by Wyche to hold Berry's friends at bay.

[5] It is important to note that Ms. Orji is a completely disinterested witness. She had no prior history, good or bad, with either Berry or Wyche. She was also a reluctant witness, obviously unhappy to have to testify. At all times, Ms. Orji was careful to be precise with her testimony in an apparent effort to be faithful to what she witnessed, regardless of which party it helped or hurt. In short, she was very credible.

is no evidence that Berry ever physically attacked Wyche.[6] There is no doubt Berry intended to have a physical confrontation with Wyche, but it is equally undisputed that Wyche did not shy away from this battle. Wyche approached Berry despite knowing Berry intended to retaliate for Wyche's treatment of Regina Johnson earlier in the day. Thus, Wyche's alleged "overreaction" stems from a consensual encounter, and his statements – before and after the stabbing – reveal that at some point during this consensual encounter, Wyche developed a strong desire to fatally injure Berry. There was also testimony that, after running away from their initial encounter, Wyche turned around to re-engage Berry after having armed himself with scissors. Therefore, the evidence before this Court supports the jury's conclusion that Wyche acted with a depraved mind and distinguishes this case from *Dorsey.*

To be clear, however, this Court would *not* impose a 20.5 year prison sentence on Wyche were it not mandated by the sentencing guidelines. This is not to say that the death of Berry would not, in a vacuum, justify such a sentence. It would justify a far harsher one. But this case does not exist in a vacuum; it is filled with nuance and shades of grey.[7] Nevertheless, this Court cannot (and will not) substitute its own subjective views of the facts for the jury's.

The jury considered the evidence and concluded that the State had proven beyond every reasonable doubt that Wyche committed "an act imminently dangerous to another and

---

[6] There was no evidence introduced at trial that, at the time Wyche made this statement, Berry had struck Wyche. One defense witness, Gib Jenkins, did testify that Wyche and Berry swung at each other prior to Wyche running away from Berry, and prior to the fatal stabbing. Mr. Jenkins was contradicted by numerous witnesses on this point, including the two other defense witnesses. Regardless, even Mr. Jenkins testified that neither Wyche nor Berry landed a blow prior to the stabbing.

[7] Among the many factors this Court would consider in not imposing a 20+ year prison sentence are: (1) Wyche has no criminal history, (2) Berry began the evening as the aggressor, and (3) there is no evidence that Wyche was looking for a confrontation with Berry that night (although he did not avoid it, either). In short, although Berry clearly did not deserve to be killed for his misguided chivalry, he did play a role in the events which transpired.

demonstrating a depraved mind without regard for human life." Their verdict is supported by the evidence.

> It gives us no pleasure to reach the result we think is clearly required by the law of our state. We are compelled by our oaths and by our office, however, to apply neutral and settled principles of law to the facts shown by the record.

Ruiz v. State, 388 So. 2d 610, 613 (Fla. 3d DCA 1980). The motion for judgment of acquittal as to second degree murder is denied.

II. MOTION FOR JUDGMENT OF ACQUITTAL (POST-CONVICTION).

Wyche argues – but cites no authority – that he is entitled to a post-conviction judgment of acquittal because his stipulation as to the identity of Berry was not entered into the record either orally or in writing. Wyche does not dispute that he stipulated to Berry's identity to avoid the emotional testimony of Berry's mother identifying her dead son before the jury.

Moreover, the Court's recollection is that Wyche's Counsel stated on the record during a sidebar that Wyche was stipulating to the Berry's identity in an effort to reduce or eliminate the number of autopsy photos the jury would be shown. Regardless, there is sufficient evidence in the record to support the jury's finding that the State proved beyond a reasonable doubt that Berry is dead. Various witnesses identified Wyche as the person who stabbed Berry, a medical examiner testified that Berry died of a stab wound, and defense counsel admitted all of this to the jury while arguing that Wyche acted in self-defense.

In *Brown v. State*, 940 So. 2d 609 (Fla. 4th DCA 2006), the Fourth DCA affirmed Brown's adjudication despite his argument that the State failed to offer evidence that he was previously convicted of a "sexual violent offense." The Fourth DCA affirmed the trial court because Brown stipulated he had been convicted of such an offense, the State accepted the

stipulation, and, although the stipulation itself was not read to the jury, the jury was made aware through testimony of the stipulation. Likewise, Wyche stipulated to Berry's identification, the State accepted the stipulation, and the jury was made aware of the stipulation because a number of witnesses (including the medical examiner) testified as to Berry's identity as the victim of a stabbing by Wyche.

Finally, any error is harmless in light of the fact that Wyche stipulated to Berry's identity – even if the stipulation was not entered in the record due to the State's oversight.

> We conclude that there is little to be gained from holding that a stipulation, which unarguably waives a defendant's right to require the government to produce any evidence regarding that stipulation, nevertheless fails to waive the defendant's right to require that stipulation to be read to the jury. Surely, the government's failure formally to read stipulations is not "wise trial practice." *Hardin*, 139 F.3d at 817. Even if a defendant cannot challenge that error, the potential for adverse consequences for the prosecution is great: the jury may become confused and acquit a defendant for lack of proof on a stipulated element, *see id.*, and a complete failure to enter the stipulations into the record at all will likely be fatal, *see James*, 987 F.2d at 650-51. Publishing stipulations to the jury or moving to reopen upon an inadvertent failure to do so is the proper course of action, one which produces a complete record. **However, nothing in either law or logic compels us to reverse a conviction when the defendant enters into a stipulation on an element and then seeks a windfall from the government's failure to formally read the stipulation to the jury.**

United States v. Harrison, 204 F.3d 236, 242 (D.C. Cir. 2000) (emphasis added).

The post-judgment motion for judgment of acquittal is denied.

III. MOTION FOR NEW TRIAL.

Wyche raises a number of issues which he claims warrant this Court granting a new trial. The issues are clustered in five general areas: Discovery, Voir Dire, Jury Strike Conference, Rebuttal Testimony, and Jury Instructions. None warrant a new trial.

A. DISCOVERY VIOLATIONS.

The Court found a number of discovery violations the morning of trial and held *Richardson* hearings as to each. Wyche complains only about the violations concerning witnesses Marquis Rolle and Stephan Varella, and to photographs of the scene. The Court concluded there was no prejudice to Wyche, either because he had deposed the witness (and the statement the State failed to provide was consistent with the witness's deposition), the statement was not a surprise to Wyche, and/or because Wyche had sufficient time to review the statement before the witness testified. The violation regarding photographs was found not to be substantial because the pictures consisted of the location where the stabbing occurred. None of the violations justify granting the motion for new trial.

B. VOIR DIRE ISSUES.

1. VIDEO RECORDING OF JURORS BY NEWS MEDIA.

Wyche complains the Court failed to strike the jury venire when a member of the news media pool stood by the courtroom door and video recorded the jurors as they entered the courtroom for voir dire. When Wyche objected to the filming of the jurors, the Court called the camera operator sidebar with all Counsel. The camera operator assured all parties that he was aware of, and understood, the Eleventh Judicial Circuit's Administrative Orders concerning cameras in the courtroom. He informed all parties that he had only filmed the feet of the jurors entering the courtroom.

During voir dire, the Court questioned the jurors about the effect the video camera had and would have on them. The Court assured the venire that camera operator who stood by the door of the courtroom had only recorded their feet as they walked into the courtroom. The Court, in addition, assured the jurors that the media would not record their faces.

Following the questions by the Court, the parties were also able to voir dire the jury on this and other issues. In addition, Wyche was then able to challenge jurors for cause and to exercise peremptory challenges to eliminate jurors who might have been negatively affected by the video recording at issue. There is no basis for granting a new trial due to the recording.

2. VOIR DIRE COMMENTS.

Wyche moves for a new trial because (1) a potential juror commented that "she would want and expect the defendant to testify in his own behalf" and (2) "jurors were told by the State that it was up to each individual juror to decide whether the burden of proof beyond a reasonable doubt was met without any discussion of their duty to deliberate and discuss the law and the evidence with all of the jurors during deliberation at the conclusion of all the evidence, argument of counsel and instructions on the law." Motion at 1-2.

The Court addressed the juror's comment about wanting to hear the defendant testify during voir dire. The Court informed all jurors that despite their desire to hear the defendant's side of the story,[8] the law does not require a defendant to testify. Any juror that indicated he or she could not follow the Court's instructions was excused. "A venire member's expression of an

[8] In the Court's experience as both lawyer and trial judge, this is a frequently expressed sentiment by potential jurors. All human beings want to hear both sides of a story. As a trial judge, this Court addresses the issue head on, acknowledging that it is an understandable human desire to hear "both sides" but strongly instructs the venire on the constitutional right of a defendant not to testify and explains that the burden of proof never leaves the State. Jurors who cannot accept the Court's instruction on this point are excused for cause.

opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel." *Johnson v. State*, 903 So. 2d 888, 897 (Fla. 2005).

In *Brower v. State*, 727 So. 2d 1026 (Fla. 4th DCA 1999), jurors made far worse comments than the lone, stray comment at issue here. The appellate court concluded the trial court did not commit error in refusing to strike the venire.

> We recognize that the conduct of the prospective jurors in question is not only shocking, but represents sad and cynical attitudes held and demonstrated by certain segments of our citizenry. Nevertheless, Appellant was not deprived of a fair trial by the trial court's decision to conduct an inquiry and proceed with those jurors who had not acted offensively and who Appellant has not shown were otherwise tainted. To hold otherwise would impose a *per se* reversal rule, undermine the trial court's discretion, and effectively impugn the integrity of the remaining jurors who were able to disregard their inadvertent exposure to the boorish and insolent antics of their fellow citizens.

Id. at 1027. *See United States v. Hernandez*, 84 F.3d 931, 935 (7th Cir.1996) ("[a]bsent any reasons [beyond speculation] to suspect as untrue the juror's claims of ability to remain impartial despite exposure to improper ... comment [from other jurors], the court should credit those responses.").

Wyche also moves for a new trial because the State told the jurors during voir dire that each juror had to decide for himself or herself whether the State met its burden of proof. The Court sustained the objection and contemporaneously corrected the error.

Following these comments during the Court and the State's voir dire, Wyche was able to voir dire the jury about these comments. Wyche was subsequently able to challenge jurors for cause and to exercise peremptory challenges to eliminate jurors who might have been negatively affected by the comments. There is no basis for granting a new trial due to these comments.

C. JURY STRIKE CONFERENCE.

This Court uses the traditional jury box selection method to choose jurors ("Traditional Jury Box").[9] The Court shuffles a deck of cards containing each venireperson's juror number. When the Court selects a potential juror's number from the shuffled pile, it invites cause challenges. If the juror is not excused for cause, the Court asks the State and Defense if they accept the juror or wish to exercise a peremptory challenge. When six jurors have been accepted by both sides, the Court asks if the parties tender the panel. Each stricken juror is replaced by the next randomly drawn venireperson. This process continues until both sides tender the petit jury.[10]

---

[9] Jury selection methods vary greatly as to their particular details, but are generally variants of either a "jury box" or a "jury struck" system.

> Peremptory challenges are generally exercised under either of two basic approaches. Under what might be called the "jury box" system, twelve members of the array are selected by lot to enter the jury box; counsel for each side then exercise challenges for cause and their allotted number of peremptory challenges, in some prescribed pattern of alternation, against those seated in the jury box and against those drawn to replace any of the first twelve who have been challenged. When both sides have either used or waived their allotted challenges, the twelve members of the venire then in the jury box become the petit jury. Under the "struck jury" system, an initial panel is drawn by lot from those members of the array who have not been challenged and excused for cause; the size of this initial panel equals the total of the number of petit jurors who will hear the case (twelve in a federal criminal trial), plus the combined number of peremptories allowed to both sides . . .. Counsel for each side then exercise their peremptory challenges, usually on an alternating basis, against the initial panel until they exhaust their allotted number and are left with a petit jury of twelve.

U.S. v. Blouin, 666 F.2d 796, 796-97 (2d Cir. 1981).

[10] The Court uses the same process to select alternates. However, if a party removes a member of the petit jury with a backstrike after an alternate(s) has been selected, the alternate does not move into the petit jury unless the jury has been sworn. Otherwise, the Traditional Jury Box method can be circumvented by using backstrikes after a party knows the identity of the alternate(s). This is not a concern after the jury is sworn because the parties can no longer strike jurors.

Most (but not all)[11] judges in Florida use a variant of the jury box method, which this Order will refer to as the Sequential Jury Box method. This method also assigns jurors to the jury box, and the parties challenge the jurors who will constitute the petit jury if not removed. However, the initial jury box members, and the replacements for stricken jurors, are *not* chosen randomly from the venire. Rather, each potential juror is assigned a number by the jury pool clerk, and the initial members of the jury box are selected in the sequence assigned by the jury pool. Consequently, the members of the petit jury are the first six persons on the jury pool's list (the first twelve in capital cases). Replacements are likewise chosen in numerical order based on the predetermined and known sequence.

The critical variation of the Sequential Jury Box is that the order in which jurors will be called into the jury box is known to the parties before they exercise any challenges. Thus, a party exercising a peremptory challenge knows *exactly* who will replace the stricken juror, and which jurors are next in the queue to join the petit jury. The Sequential Jury Box method is, therefore, similar in effect to the jury struck method because both allow parties to know who will serve on the jury depending on who the parties strike. In the jury struck method, everyone not stricken serves. By contrast, the Traditional Jury Box system does not allow a party to know who will serve because both the initial jurors and replacements are chosen randomly.

There is no freestanding state or federal constitutional right to exercise peremptory challenges. *See Hayes v. State*, 94 So. 3d 452, 459 (Fla. 2012). Peremptory challenges are creatures of court rules, statutes, and long-standing tradition. The Florida Rules of Criminal Procedure and the Florida Statutes neither dictate a sequential replacement scheme, nor forbid the non-sequential replacement method used by this Court. Therefore, so long as this Court's

[11] This Court is aware of at least three other judges in the Eleventh Judicial Circuit who use, or have used, the Traditional Jury Box method.

jury selection method does not run afoul of the U.S. or Florida Constitution, it is lawful and will not constitute grounds for a new trial.

Wyche complains that by preventing him from knowing the identity of jurors who would replace successfully challenged jurors, he was denied a fair and impartial jury, and – by extension – a fair trial. Wyche's motion cites no legal authority for his argument, nor could this Court find any. By contrast, there is strong precedent and legal support for the idea that the Traditional Jury Box is most likely to accomplish the goals set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its federal and state progeny.

1. THE PURPOSE OF PEREMPTORY CHALLENGES.

The Florida Supreme Court has recognized that the fundamental purpose of allowing a party to reject individual jurors through peremptory challenges is "the effectuation of the constitutional guaranty of trial by an impartial jury." *Meade v. State*, 85 So. 2d 613, 615 (Fla. 1956).

> It is the right to an impartial jury, not the right to peremptory challenges, that is constitutionally protected. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Neil*, 457 So. 2d at 486. Peremptory challenges merely are a "means of assuring the selection of a qualified and unbiased jury." *Batson*, at 91.

Jefferson v. State, 595 So. 2d 38, 41 (Fla. 1992). It follows, then, that the primary purpose of challenges is "to remove unfavorable jurors from the jury panel." *Hayes*, 94 So. 3d at 460. Cause and peremptory "challenges work in tandem to permit the removal of a potential juror in whom the striking party perceives a certain bias or hostility . . .." *Id.* Thus, to the extent court rules, statutes, and/or tradition confer upon a party a right to strike jurors, it "is not of itself a right to select, but a right to reject, jurors." *Pointer v. United States*, 151 U.S. 396, 412 (1894) (citation omitted).

Because a defendant has the right to reject (but not select) a particular juror, the Florida Supreme Court has recognized that the individual juror's right to serve trumps a defendant's free exercise of peremptory challenges – unless the juror is biased.

> The elimination of potential jurors by discriminatory criteria is an invalid exercise of peremptories and does not assist in the creation of an impartial jury. Such discrimination in the "selection of jurors offends the dignity of persons and the integrity of the courts." *Powers* [*v. Ohio*], 111 S. Ct. [1364,] 1366 [1990]. The discriminatory exclusion of potential jurors causes harm to the "excluded jurors and the community at large." *Id.* at 1368. Therefore, a party's right to use peremptory challenges can be subordinated to a venireperson's constitutional right not to be improperly removed from jury service.

Jefferson, 595 So. 2d at 41. Consequently, Wyche's argument that the Court's use of the Traditional Jury Box method minimized the strategic value of his peremptory challenges does not justify granting him a new trial.

2. DEFENDANTS HAVE NO RIGHT TO MAXIMIZE THE STRATEGIC VALUE OF PEREMPTORY CHALLENGES.

Wyche's argument is that he could obtain a more favorable jury if the replacement juror is known to him at the time he exercises a peremptory challenge. However, jurors have a right to serve. *See State v. Slappy*, 522 So. 2d 18, 20 (Fla. 1988) ("[O]ur citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws."). They should not be stricken based on the whim of a party who believes it can obtain a "better" juror. Simply stated, "[n]o one is entitled to a particular juror or a jury of any particular composition. The right is not one of selection; it is to reject jurors who are biased, prejudiced, or otherwise incompetent." 33 Fla. Jur 2d Juries § 90. *See North v. State*, 65 So. 2d 77, 79 (Fla. 1952), *aff'd, North v. Florida*, 74 S. Ct. 376 (U.S. 1954) ("A defendant in a criminal case is not entitled to any particular juror or jury."); *Newton v.*

State, 178 So. 2d 341, 345 (Fla. 2d DCA 1965) ("A defendant is entitled to have only qualified jurors but he is not entitled to have any particular juror serve.").

As a result, courts have upheld jury selection methods similar to the selection method employed by the Court here (*i.e.*, where the parties do not know the identity of jurors who will replace successfully challenged jurors). For example, in *Blouin*, the defendant complained that the trial court required him to exercise his tenth and final peremptory challenge before he knew which member of the venire replaced the juror the defendant had stricken with his ninth peremptory challenge. 666 F.2d at 797. The Second Circuit Court of Appeals held "that the jury selection procedures did not deny Blouin any protected right and affirm[ed] his conviction." *Id.* at 796. The court expressly rejected the idea that the defendant had a right to a jury selection procedure which afforded him a "more effective use of his peremptories." *Id.* at 798.

In *U.S. v. Delgado*, the trial court required the prosecution and the defense to exercise their peremptory challenges against the entire venire. After each side exercised all available challenges, the remaining jurors were randomly designated jurors or alternates. 350 F.3d 520, 523 (6th Cir. 2003). The defendants argued that trial court's jury selection system "in which jurors were not seated in a sequence – impaired the ability of defense counsel to exercise professional judgment when using peremptory challenges." *Id.* at 524. The Sixth Circuit Court of Appeals rejected the claim, concluding that "the inability of defendants to make maximum strategic use of their peremptory challenges does not invalidate a [] court's method of exercising peremptories." *Id.*

The most compelling holding in *Delgado* concerned the random selection of alternates. Ironically, the Federal Rules of Criminal Procedure require that alternate jurors must replace jurors, who are unable to serve or are disqualified, in the order seated. Although the trial court in

Delgado failed to comply with the rule, the Sixth Circuit nevertheless refused to reverse the defendants' convictions because "the drawing of alternates by lot was a neutral procedure that in no way advantaged the government." 350 F.3d at 526. Likewise, both the State and Wyche operated under the same jury selection rules used by this Court. There is no reason to believe that the jury selection method uniquely disadvantaged Wyche, if it disadvantaged either party at all. *See United States v. Patterson*, 915 F. Supp. 11, 13 (N.D. Ill. 1996) ("this method impacts the government and the defense equally"), *aff'd*, 215 F.3d 776 (7th Cir. 2000).

By contrast, one court has reversed a conviction because the prosecution was allowed to know the identity of potential jurors who would be seated on the jury if the prosecution exercised its remaining peremptory challenges. *See State v. Latham*, 569 P.2d 362 (Idaho 1977). In Idaho, the rules of criminal procedure *require* that replacements for stricken jurors be drawn randomly. *See* Rule 47(g), Idaho R. Crim. P. The Idaho Supreme Court explains that the purpose of this rule "is to ensure a fair trial by an impartial jury." *Id*. at 364. In *Latham*, the trial court employed the random method required by the Idaho rules as to the petit jury, but selected the two alternates before the State exercised its final peremptory challenges. *Id.* This allowed the State to know which jurors would join the petit jury if it exercised one or two of its remaining peremptory challenges, therefore the court reversed Latham's conviction. *Id.*

3. SEQUENTIAL REPLACEMENT ALLOWS LAWYERS TO MANIPULATE THE RACIAL COMPOSITION OF A JURY.

Jurors should certainly not be stricken because the victim or the defendant is of a particular race and the State or Defense wish to seat jurors of the same group. Wyche's argument that he was denied the ability to see the race of the juror(s) who would be seated if he exercised a peremptory challenge (*see* Motion for New Trial at 4-5) is *exactly* one of the reasons this Court employs the random selection method. A qualified juror is constitutionally entitled to

serve notwithstanding the juror's race or gender. *See Jefferson v. State,* 595 So. 2d 38, 40 (Fla. 1992) ("an individual venireperson has the constitutional right not to be excluded from jury service on the basis of race").

The Traditional Jury Box method is far superior at reducing the ability of parties to manipulate the racial composition of the jury.

> For example, under the "jury box" system 12 prospective jurors are seated and subjected to voir dire. When a party exercises any challenge – peremptory or for cause – a new juror is brought in [by random selection] to replace the excused juror. The jury box system, then, allows less manipulation of the entire composition of the jury than the struck jury system permits. *See* Bettina B. Plevan, *Jury Trial Issues, in Current Developments in Federal Civil Practice,* 706 PLI/Lit 443, 451-52 (2004).

United States v. Esparza-Gonzalez, 422 F.3d 897, 899 n.3 (9th Cir. 2005). The struck jury method is more susceptible to manipulation because – as with the Sequential Jury Box method – the parties know who will serve on the jury after they strike jurors.

> [T]the struck jury system has long been criticized for allowing the racial engineering of juries. *See, e.g., United States v. Blouin,* 666 F.2d 796, 798 (2d Cir. 1981) (noting that the struck jury system might "increase the opportunity to shape a jury along racial or other class lines"); James Oldham, *The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges,* 6 Wm. & Mary Bill Rts. J. 623, 668 (1998) ("It may be easier, however, to camouflage discrimination with the struck jury model because the demographics of the entire panel will be known from the start, making it easier to pick and choose."); Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 150 (1977) (observing that the "struck jury system[has been] employed to use [the peremptory challenge] power to eliminate entire races or classes of people from jury venires"). As the Second Circuit has noted, "[i]t is far from clear, however, that the right to challenge peremptorily should necessarily imply a right to shape a jury's profile" to the extent allowed by the struck jury system. *Blouin,* 666 F.2d at 798.

United States v. Esparza-Gonzalez, 422 F.3d 897, 902-03 (9th Cir. 2005).

The trial court in *U.S. v. Patterson* adopted a modified jury struck method in an effort to combat the inherent ability of parties to racially shape the petit jury using the jury struck method.

> The court adopted the modified strike method described above to make the selection process as fair as possible for all parties. Under the usual procedure in this district, the clerk shuffles all the cards with the names of the venire members prior to voir dire, thus creating an initial list with the names in random order. That order is maintained throughout jury selection so that the list of names remaining after for-cause excusals is in the same order as the venire members were called for individual questions and answers. When exercising peremptory challenges, therefore, a party would know that someone whose name was at the bottom of the list was unlikely to be empaneled. This makes more difficult the task of identifying any possibly improper exercise of peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and its progeny, because, for example, a racially imbalanced jury could be achieved if minority members happen to be low on the list. This potential problem was of particular concern to the court in the instant case, in which all of the nineteen defendants are African American and most of the government's principal witnesses are white.

United States v. Patterson, 915 F. Supp. 11, 12-13 (N.D. Ill. 1996), *aff'd*, 215 F.3d 775 (7th Cir. 2000).

In *State v. Echineque*, 828 P.2d 276 (Haw. 1992), the Supreme Court of Hawaii ordered a new trial where the judge used the struck jury method despite the fact that Hawaii law requires the jury box system. In *Echineque*, it was the defendant, ironically, who argued on appeal that the struck jury method was unfair because it is akin to "forum shopping; but with respect to the jurors, it looks like juror shopping. That is, I know I excused four. I know who the juror is who's going to replace that juror, and that type of knowledge I don't think was anticipated by the statute." *Id.* at 277.

One Colorado court described the racial manipulation of a petit jury made possible because the parties knew the sequence in which stricken jurors would be replaced.

> Because of the jury selection method employed, both counsel and the court knew the exact sequence of replacement jurors for those who were challenged either by use of peremptory challenges or challenges for cause. Thus, at the time the prosecutor here was set to exercise his first peremptory challenge, he knew that the lone black venireperson would replace his first challenged juror. And, although his challenge was to a white person, the effect of that act was to place the black venireperson in the second alternate seat. At best, this minimized, and at worst it eliminated, the possibility of her participation in the deliberations. Indeed, neither of the alternate jurors deliberated.

People v. Portley, 857 P.2d 459, 464 (Colo. Ct. App. 1992).

4. EVEN IF EMPLOYING THE TRADITIONAL JURY BOX METHOD IS ERROR, WYCHE CANNOT SHOW HE SUFFERED PREJUDICE THAT WARRANTS A NEW TRIAL.

Wyche asks this Court to set aside the jury's verdict and grant him a new trial because his lawyer could not anticipate which jurors would be called to serve prior to exercising peremptory challenges. Wyche claims he was prejudiced in two ways by the Court's use of the Traditional Jury Box: (1) the petit jury had no African-American jurors[12] because Wyche could not ensure that African-American jurors were seated (presumably through the intentional exclusion of Caucasian jurors who would precede the non-Caucasian jurors into the jury box), and (2) Wyche was denied the ability to exercise his final peremptory. *See* Motion at 5 ("Without the ability to

[12] The Court questions whether Wyche truly believes that not having an African-American member of the jury was prejudicial. First, Berry and all the fact witnesses, save one, were African-American. There was an African-American male who served as an alternate juror. During the trial, a member of the petit jury on several occasions appeared to fall asleep. After the last occasion, the Court brought the lawyers side bar and asked if either side was requesting that the Court dismiss the juror. Wyche's counsel not only declined to request the juror's removal, he objected to the Court *sua sponte* excusing the juror. Had this juror been removed, the African American alternate would have been seated in the petit jury. Consequently, Wyche's claim that he is entitled to a new trial because no African Americans served on the petit jury rings hollow.

determine which jurors would be next, it was impossible to determine if the use of a peremptory challenge would even allow such an individual [African-American] to be reached if challenges were used.").

The first ground is, of course, a wholly unlawful basis for complaining about the jury selection method in this case. Wyche is not entitled to a jury with any particular racial composition. While "petit juries must be drawn from a source fairly representative of the community," there is "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition . . .." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). *See Kibler v. State*, 546 So. 2d 710, 713 (Fla. 1989) ("It may often be that no members of a particular race will be on a given jury because of the racial composition of the community as reflected by the random section of the venire or because all members of that race will have been challenged for specific biases relating to the case. Parties are only constitutionally entitled to the assurance that peremptory challenges will not be exercised so as to exclude members of discrete racial groups solely by virtue of their affiliation."); *Rich v. State*, 807 So. 2d 692, 693 (Fla. 3d DCA 2002) ("The defendant objected to the composition of the jury panel and moved to strike it on the grounds that he is a Jewish person and there were no Jewish persons on the panel. Established case law rejects the proposition that a defendant is entitled to have a particular composition of jury.").

The second ground fares no better. The identical argument was raised, and rejected, in *U.S. v. Blouin*.

> Blouin was obliged to exercise his last challenge before knowing the identity of two members of the twelve-person jury, the persons who replaced his ninth and tenth challenges. Of course, in every case in which an alternating system of rounds is used, whoever has the last challenge will exercise it without knowing the identity of

> one member of the jury-the person who replaces the juror removed by that last challenge. Blouin apparently accepts that consequence, but contends that his ninth challenge should have been replaced before he exercised his tenth challenge, so that the number of jurors eventually empanelled whom he had not seen would have been only one instead of two. . . . As used in Blouin's case, Judge Coffrin's procedure afforded Blouin a reasonable opportunity to challenge replacements and was well within the allowable discretion of a District Court.

666 F.2d at 799-800.

Moreover, Wyche fails to demonstrate sufficient prejudice – if any – to warrant a new trial. Primarily, Wyche must show that the trial court actually seated an objectionable juror. *See Busby v. State*, 894 So. 2d 88, 96 (Fla. 2004). "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." *Kopsho v. State*, 959 So. 2d 168, 170 (Fla. 2007); *accord Matarranz v. State*, 2013 WL 5355117, *8-9 (Fla. 2013) (juror must possess "state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial"). Despite his numerous claims related to voir dire and the strike conference, Wyche has not identified a single objectionable juror that actually served on the final jury.

When a defendant believes an objectionable juror has been seated, he must object before the jury is sworn. If the defendant has exhausted all peremptory challenges, he must request sufficient additional challenges to remove all such jurors. "The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial." *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990). In *Trotter*, the defendant, "after exhausting his peremptory challenges, [] failed to object to any venireperson who ultimately was seated" and, therefore, failed to preserve his claim. *Id*.

In *U.S. v. Patterson*, the trial court used a jury selection method similar to this Court's: it "decided not to establish a priority within this pool. All 63 [potential jurors] had a chance to serve." 215 F. 3d 776, 778 (7th Cir.), *vacated in part on other grounds*, 531 U.S. 1033 (2000). Defendants objected for reasons similar to Wyche's.

> They wanted to know the sequence in which members of the pool would be called to sit on the jury, so that they could concentrate their challenges on those persons most likely to serve. As the district court organized matters, however, every member of the pool was equally likely to sit, so the defense could not target challenges strategically.

Id. at 779. The Seventh Circuit Court of Appeals found no error in the method used to select jurors, noting that:

> [Nothing about it] calls into question the impartiality of the jury eventually selected, which makes it hard to see why there is any real problem. *United States v. Martinez-Salazar*, --- U.S. ----, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), . . . stresses that peremptory challenges have served their purpose when the jury finally selected is impartial. *Martinez-Salazar* rejects any argument that a party is entitled to devote all peremptory challenges to strategic use such as eliminating unbiased jurors who a party believes may (perhaps *because* of their open minds) favor the other side.

Id. at 779. The court concluded:

> When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the *substantial* right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries.

Id. at 782.

It is unsurprising that no court has concluded that failure to maximize the strategic value of a peremptory challenge warrants ordering a new trial. The idea that lawyers are particularly adept at choosing jurors who are "better" or more favorable to their side lacks scholarly

foundation. "[S]tudies indicate that the evidence presented at the trial, not the composition of the jury, controls the outcome of the case." *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 Suffolk U.L. Rev. 463, 477 (1999). Studies show "that John Q. trial lawyer uses the same 'pop' psychology – applying stereotypes based on marital status, occupation, and appearance to predict, say, decisions in rape and murder trials – as your average college sophomore, with about the same success." M. Hutson, Unnatural Selection, Psychol. Today 11 (Mar. 2, 2007).

> Attorneys exercising the peremptory challenge are generally unsuccessful in reliably predicting jurors' tendencies, according to the numerous empirical studies conducted in this area. Those studies have overwhelmingly concluded that the nature and strength of the evidence are the most determinative factors in the outcome of the trial, rather than the jurors' characteristics. The studies also have established that there is little support for attorneys' beliefs that jurors' backgrounds (e.g. race, social class, education, gender), social and political attitudes, and personality characteristics are predictive of their verdict preferences in particular cases.

V. Montz & C. Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. Miami L. Rev. 451, 481 (2000). *See* H. Zeisel & S. Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court, 30 Stan. L. Rev. 491, 517 (1978) (after reviewing attorneys' predictions of bias with the verdicts of stricken jurors who were allowed to witness the trials, the authors concluded that "[t]he collective performance of the attorneys is not impressive."). *See also* Michael Saks, The Limits of Scientific Jury Selection: Ethical and Empirical, 17 Jurimetrics J. 3, 13 (1976) ("No evidence exists to support the apparently widely held belief that scientific jury selection is a powerful tool....").

> Extended attorney-conducted voir dire procedures are ineffective at winnowing out prejudiced jurors, subject to abuse by attorneys,

> lower public regard for the justice system, and are expensive. The only positive aspect about such procedures is that they may increase the defendant's belief that he or she received a fair trial. Contrary to the exaggerated claims by attorneys, however, evidence suggests that attorneys do not perform the jury selection function substantially above chance levels, so the defendant's increased satisfaction is based on an illusion of accuracy.

R. Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 Am. U.L. Rev. 703, 725-26 (1991). "To put it simply: lawyers use lots of absurdly facile models for excusing supposedly biased jurors, and none of them work. Racial and gender discrimination in jury selection are but symptoms of the larger problem of uninformed lawyers relying on woefully inadequate tools to spot bias." C. Wedel, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 Stan. J. Civ. Rts. & Civ. Liberties 293, 305 (2011).

None of this discussion is intended to denigrate the utility of voir dire – quite the contrary. Voir dire works best when used as intended, to weed out biased jurors to ensure an impartial jury. Where voir dire fails is when lawyers try to use it to game the jury by attempting to divine how particular jurors will vote or by stacking (or eliminating) members of a cognizable group.

In light of the abundance of precedent and legal principles supporting this Court's method of selecting jurors, and the absence of even a single case to which Wyche can cite to justify his motion for new trial, the Court denies the motion.

5. DENIAL OF ADDITIONAL PEREMPTORY CHALLENGES AND "LOOK AHEADS."

Wyche requested additional peremptory challenges in the abstract, as a means of alleviating the alleged prejudice the Traditional Jury Box system caused him. The request was premature because Wyche had not yet exhausted his peremptory challenges. Under Florida law,

"[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990) (quoting *Pentecost v. State*, 545 So. 2d 861, 863 n.1 (Fla. 1989)). In the end, Wyche did not use all his peremptory challenges. He cannot now complain the Court denied his premature request.

Wyche also complains the Court would not allow him "at least see the next one, two, three or four jurors before exercising a peremptory challenge." Motion at 4. The Court denied the request because granting it is contrary to the central point of the Traditional Jury Box. Allowing Wyche (and the State) to see the next juror to be called into the jury box would allow Wyche (or the State) to use peremptory challenges to shape the jury in a discriminatory manner. By asking to see even just the next one or two jurors who would be called into the jury box is the functional equivalent of scraping the Traditional Jury Box and using the Sequential Jury Box selection system.

D. REBUTTAL TESTIMONY OF CHIDIMMA ORJI.

Wyche raises two arguments regarding the rebuttal testimony of Chidimma Orji. First, he argues that the Court erred in allowing the State to call Ms. Orji, who testified in the State's case-in-chief, as a rebuttal witness because her testimony was not true rebuttal testimony. Second, Wyche argues that the Court should have granted a mistrial when the State read, during its re-direct, portions of Ms. Orji's sworn testimony, which she gave to the police the night of Berry's death and in a subsequent deposition.

1. APPROPRIATENESS OF REBUTTAL TESTIMONY.

Ms. Orji was recalled by the State to testify regarding a statement she heard Wyche make as he armed himself with a pair of scissors and *before* he stabbed Berry.[13] Wyche timely

[13] During the State's case-in-chief, Ms. Orji testified only about statements Wyche made *after* he stabbed Berry.

objected, arguing the proposed testimony was not proper rebuttal testimony. The Court overruled the objection and allowed Ms. Orji to testify as to the statement.

First, the Court's ruling was correct because Wyche called three witnesses who testified that they did not hear Wyche make *any* statements. Although the witnesses were not specific about whether they were referring to pre- or post-stabbing statements, the State was properly allowed to rebut the implication of their testimony that Wyche made no pre-stabbing statement.

Second, regardless of whether Ms. Orji's testimony was properly classified as rebuttal or not, the Court still did not err in allowing it.

> Rebuttal evidence explains or contradicts material evidence offered by a defendant. The testimony delivered by the state's rebuttal witness neither explained nor contradicted any evidence offered by Britton. Permitting the testimony, however, was not error: the order of presentation of evidence and witnesses is largely a function of the trial court's discretion; this discretion is broad enough to allow the state to introduce, after the defendant's case, evidence not strictly in rebuttal, so long as the evidence was admissible in the main case. *Williamson v. State*, 92 Fla. 980, 111 So. 124 (1926); *Davis v. State*, 44 Fla. 32, 32 So. 822 (1902).

Britton v. State, 414 So. 2d 638, 639 (Fla. 5th DCA 1982) (citations omitted). *See Quarrells v. State*, 641 So. 2d 490, 491 (Fla. 5th DCA 1994) (although testimony was not properly rebuttal "because it failed to explain or contradict material evidence offered by" the defendant, "the trial court did not commit reversible error in admitting [it] because the testimony was admissible during the state's case-in-chief, and the trial court had broad discretion to determine the order of presentation of evidence and witnesses."); *Gilbert v. State*, 547 So. 2d 246, 248 (Fla. 4th DCA 1989) ("trial court is granted broad discretion to allow the state to introduce evidence not strictly in rebuttal after the defendant's case so long as the evidence was admissible in the main case."). Wyche does not suggest that the State could not have introduced the testimony in question during its case-in-chief.

2. PRIOR CONSISTENT STATEMENTS.

After Ms. Orji's direct testimony during the State's rebuttal, Wyche's Counsel accused her, in various ways, of having recently fabricated her testimony that Wyche said "I'm going to get him, I'm going to kill him" as he armed himself with scissors. Wyche's Counsel persisted in his accusation of recent fabrication despite the State's "objection."[14] When defense counsel finished his cross-examination the State – over timely defense objection – introduced two prior consistent statements made by Ms. Orji: (1) her sworn statement on April 14, 2010, and (2) her deposition testimony on January 13, 2011. Ms. Orji's prior statements were consistent with her rebuttal testimony. "The record is clear that through impeachment, the defense was suggesting, either impliedly or expressly, that [the witness] had changed or fabricated his testimony. The prior consistent statement was necessary to rehabilitate him after his impeachment by the defense and was a recognized exception to the hearsay rule." *Griffith v. State*, 762 So. 2d 1022, 1023 (Fla. 3d DCA 2000); *accord Merrone v. State*, 116 So. 3d 589, 594 (Fla. 3d DCA 2013).

E. READING JURY INSTRUCTIONS PRIOR TO CLOSING ARGUMENTS.

The reading of jury instructions after or before closing arguments is not only wholly within the discretion of the Court, but is expressly provided for in the Florida Rules of Criminal Procedure. *See* Fla. R. Crim. P. 3.390(a) ("If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations."). This is the precise procedure used by the Court to instruct the jury.

[14] Defense counsel began his cross-examination of Ms. Orji's rebuttal testimony by asking if she "had a vision" following her testimony during the State's case-in-chief. The State objected to the question. During the sidebar conference precipitated by the State's objection, the State warned that defense counsel was opening the door to Ms. Orji's prior statements. The Court noted that the State's comment was not a proper objection, and the State withdrew their objection. Defense counsel then asked Ms. Orji the question.

Although Wyche complains that the jury was too tired by the time his Counsel began his closing argument, Wyche's Counsel did not request a break before he began his argument – nor did the jurors. Moreover, Wyche's Counsel did not object to the Court reading jury instructions prior to closing arguments until the Court was on the seventh page of the jury's instructions, and Counsel did not make reference to the rationale set forth in the Motion.

DONE and ORDERED in Miami-Dade County, Florida this 25th day of November, 2013.

Miguel M. de la O
Circuit Judge