IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA

LYNETTE MARIA PEREZ,
Appellant,

APPELLATE CASE NO: 2017-AP-13
Lower Case No: 2016-MM-2854

v.

STATE OF FLORIDA,
Appellee.
_____________________________/

Appeal from the County Court
for Osceola County, Florida,
Carol E. Draper, County Judge

Sarah Jordan and Brian Johnson,
Assistant Public Defender, for Appellant.

Carol Levin Reiss,
Assistant State Attorney, for Appellee.

Before CALDERON, STROWBRIDGE, and WEISS, J.J.

PER CURIAM.

Appellant was tried and convicted for misdemeanor prostitution. At trial on May 1, 2017, Defense Counsel objected to two peremptory strikes made by the State during the voir dire process. Appellant asserts that that the Trial Court did not adhere to the requirements of the *Neil* inquiry for two challenged jurors. The Trial Court's decision to uphold a peremptory challenge is reviewed for abuse of discretion. *Truehill v. State*, 211 So. 3d 930, 942 (Fla. 2017).

The law governing the process for a Neil inquiry is well-defined. Our analysis begins with the initial presumption that peremptory challenges are exercised in a nondiscriminatory manner. *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984). However, upon objection that a peremptory challenge is being used in a discriminatory manner, the trial court must conduct a *Neil* inquiry. *State v. Johans*, 613 So. 2d 1319, 1322 (Fla. 1993). The *Neil* court provided the guidelines to

determine whether a preemptory challenge is used in a discriminatory manner, requiring a party to make a timely objection to the peremptory challenges, demonstrate on the record that the challenged persons are members of a distinct racial group, and that there is a strong likelihood that they have been challenged solely because of their race. *Neil* at 486.

Neil's progeny further clarified and solidified the test. The Supreme Court in *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996) detailed the steps necessary for the *Neil* inquiry, holding that a party must first make a timely objection to the other side's use of a peremptory challenge on alleged racial grounds, show that the prospective juror is a member of a distinct racial group, and request that the court ask the striking party its reason for the strike (i.e. conduct a *Neil* inquiry). If these initial requirements are met, the *Melbourne* procedure next requires the trial court to ask the proponent's purpose for the strike, which shifts the burden to the proponent to provide a race neutral reason. *Hayes v. State*, 94 So. 3d 452, 461 (Fla. 2012). Finally, the trial court must ascertain the genuineness of the reason. Compliance with each step is not discretionary, and the proper remedy when the trial court fails to abide by its duty under the *Melbourne* procedure is to reverse and remand for a new trial. *Welch v. State*, 992 So. 2d 206, 212 (Fla. 2008).

In this case, Defense Counsel made a timely objection to the State's peremptory strike of Juror Number Six, stated on the record that the juror was Hispanic, and requested that the Trial Court inquire as to the State's race neutral reason for the strike. Defense Counsel met the initial burden, which required the Trial Court to inquire as to a race neutral reason for the strike. Upon request by Defense Counsel, the Trial Court responded, "[b]eing Hispanic is not a race, it's a nationality." However, it is clear that Hispanics are considered an ethnic group for the purposes of a *Neil* inquiry. *State v. Alen*, 616 So. 2d 452, 455 (Fla. 1993). Nonetheless, the State independently proffered a race neutral reason for the strike, indicating that the juror should be

stricken because she would require more physical evidence. At this point, the record is devoid of any indication that the Trial Court engaged in a judicial assessment of the genuineness of the reason given for the strike of Juror Number Six, which is grounds for a new trial.[1]

Furthermore, Defense Counsel also met the initial burden with regard to Juror Number Two when he objected to the State's peremptory strike, stated that the juror was Hispanic, and requested that the Trial Court inquire as to what the State's race neutral reason was for the strike. The Trial Court again responded, "Spanish is a nationality, not a race." The Trial Court did not satisfy the second step of the *Melbourne* procedure when it refused to inquire as to a race neutral reason for the State's peremptory strike of Juror Number Two. The Trial Court's failure to make the requisite inquiry warrants a new trial.

Accordingly, we conclude that the Trial Court erred in failing to hold a *Neil* inquiry and not following the *Melbourne* procedure for the two challenged jurors. Because a new trial is granted as to this issue, we do not consider the merits of Appellant's other arguments.

REVERSED AND REMANDED FOR A NEW TRIAL.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this _______ day of September, 2019.

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LUIS F. CALDERON
Presiding Circuit Judge

STROWBRIDGE and WEISS, J.J., concur.

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[1] When there is no genuineness analysis, Florida courts have consistently held that a new trial is warranted. *Hayes* at 464 (footnote omitted).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was furnished on this _____ day of September, 2019, to the following: **Carol Levin Reiss, Assistant State Attorney**, at creiss@sao9.org and PCF@sao9.org; **Sarah Jordan, Assistant Public Defender**, at sjordan@circuit9.org.

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Judicial Assistant