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**REPORTER'S RECORD  
VOLUME 1 OF 1 VOLUMES  
TRIAL COURT CAUSE NO. 1469519  
COURT OF APPEALS NO.**

O'BRYANT HIGHTOWER ) IN THE DISTRICT COURT  
Appellant )  
Vs. ) HARRIS COUNTY, TEXAS  
THE STATE OF TEXAS )  
Appellee ) 184TH JUDICIAL DISTRICT

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**TRIAL ON MERITS**

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On the 27th day of February, 2017, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable JAN KROCKER, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

**CYNTHIA J. LEE  
OFFICIAL COURT REPORTER  
184TH DISTRICT COURT  
HARRIS COUNTY, TEXAS**

11:43:10 1 until 1:00 so we can take this up again. Twenty  
11:43:13 2 until 1:00.

3 **(Recess taken)**

11:48:12 4 **THE COURT:** So, Mr. Morgan, what is  
11:48:14 5 the issue you want to bring to my attention?

11:48:16 6 **MR. MORGAN:** Your Honor, it was just  
11:48:17 7 reported to me from a member of the audience that  
11:48:21 8 Officer Sims was talking to Mr. Simons in front of  
11:48:24 9 Deputy Gonzales. I asked Mr. Simons if it was true.  
11:48:29 10 He said that he was talking to Deputy Sims about the  
11:48:35 11 location issue and that Officer Gonzales was present  
11:48:38 12 during the conversation.

11:48:40 13 **THE COURT:** Okay. Do you want to  
11:48:44 14 clarify for the record?

11:48:46 15 **MR. SIMONS:** Yes, Your Honor. The  
11:48:46 16 officer was distraught about picking his kids up and  
11:48:50 17 we were talking about the logistics on picking his  
11:48:55 18 kids up, and I -- he was talking about what his  
11:48:58 19 location had to do with this. And I said, like, were  
11:49:00 20 you at a different location than what you're saying  
11:49:01 21 on the stand?

11:49:02 22 And he said, I remember being parked  
11:49:08 23 inside.

11:49:08 24 That's what we talked about. Deputy  
11:49:08 25 Gonzales, I didn't ask her any questions. She said

11:49:10 1 she doesn't remember where they parked.

11:49:13 2 **THE COURT:** Okay. You understand you  
11:49:14 3 violated the Rule when you talked to two witnesses  
11:49:17 4 each in the presence of the other? You understand  
11:49:20 5 you can't do that once the Rule is invoked. You do  
11:49:23 6 that in trial preparation, but you can't do it once  
11:49:26 7 the Rule is invoked.

11:49:27 8 **MR. SIMONS:** Yes, Your Honor.

11:49:28 9 **THE COURT:** Because that is forcing  
11:49:30 10 the witnesses to violate the Rule, right?

11:49:32 11 So, the fact that they are not talking  
11:49:35 12 to each other, they are talking to you in each  
11:49:37 13 other's presence is nonetheless a violation to the  
11:49:41 14 Rule. So, I guess the -- is that all that was said?

11:49:47 15 **MR. SIMONS:** Yes, Your Honor.

11:49:48 16 **THE COURT:** It was just a second ago  
11:49:49 17 we recessed, so it couldn't have been a very lengthy  
11:49:53 18 conversation --

11:49:54 19 **MR. SIMONS:** No, Your Honor.

11:49:54 20 **THE COURT:** And who heard the  
11:49:56 21 conversation? Is that person here?

11:49:57 22 Come on up, please, ma'am.

11:49:58 23 **MR. MORGAN:** And, Your Honor --

11:49:59 24 **THE COURT:** Do you know her?

11:50:00 25 **MR. MORGAN:** Yes. That is

11:50:42 1 but you just gave them the instruction.

11:50:45 2 **THE COURT:** Well, they can talk about  
11:50:46 3 other things.

11:50:47 4 **THE WITNESS:** Correct.

11:50:48 5 **THE COURT:** They can have lunch  
11:50:49 6 together or whatever. So, you were just assuming  
11:50:52 7 they are talking about the case?

11:50:53 8 **THE WITNESS:** Well, actually, I was  
11:50:55 9 just going by what you told him not to do. I don't  
11:50:57 10 know what they were discussing.

11:50:58 11 **THE COURT:** Okay.

11:50:59 12 **THE WITNESS:** But the instruction that  
11:50:59 13 you gave them about talking about the case, and I  
11:51:01 14 can't say that they weren't talking about the case.

11:51:03 15 **THE COURT:** I understand that. So,  
11:51:04 16 I'm just saying you didn't actually hear what was  
11:51:06 17 said?

11:51:06 18 **THE WITNESS:** No, because --

11:51:07 19 **THE COURT:** I'm just letting you know  
11:51:09 20 so in case you see this again.

11:51:10 21 **THE WITNESS:** Uh-huh (affirmative.)

11:51:11 22 **THE COURT:** That's why I'm explaining  
11:51:12 23 this. They can talk about picking his kids up from  
11:51:15 24 school, they can talk about working the same shift.  
11:51:17 25 They can talk about anything, but not the case.

11:51:21 1 However, the prosecutor admits that he was talking  
11:51:23 2 about the case in the presence of both witnesses, and  
11:51:26 3 I guess the one witness was -- responded, right?

11:51:31 4 **MR. SIMONS:** That is correct, Your  
11:51:31 5 Honor.

11:51:31 6 **THE COURT:** Okay. So, you may ask --  
11:51:34 7 I don't see -- it was such a short conversation, I  
11:51:36 8 don't see that there is any harm. But, obviously,  
11:51:39 9 Mr. Simons, you cannot violate the Rule.

11:51:41 10 **MR. SIMONS:** Yes, Your Honor. The  
11:51:42 11 State apologizes for our actions.

11:51:44 12 **MR. MORGAN:** Your Honor --

11:51:45 13 **THE COURT:** Don't do that anymore.  
11:51:45 14 And certainly you may cross-examine the witnesses  
11:51:50 15 about that.

11:51:50 16 **MR. MORGAN:** Yes, Your Honor. For  
11:51:51 17 purposes of the record, it was just informed to me  
11:51:53 18 from Ms. Detoto that the witnesses are still together  
11:51:55 19 right now.

11:51:56 20 **THE COURT:** Well, that doesn't violate  
11:51:58 21 the Rule unless they are talking about the case.  
11:52:00 22 Will you ask them to come in? Let me clarify that on  
11:52:03 23 the record.

11:52:03 24 **THE WITNESS:** May I be able to say  
11:52:04 25 anything?

11:52:05 1                   **THE COURT:** Yes, Ms. Hill.

11:52:08 2                   **THE WITNESS:** It's hearsay. I guess

11:52:11 3 they can say they weren't talking about anything, but

11:52:13 4 this is going to affect other lives. So --

11:52:16 5                   **THE COURT:** Ma'am -- ma'am, it's your

11:52:18 6 lawyer's job to argue that.

11:52:19 7                   **THE WITNESS:** I understand. I

11:52:20 8 apologize.

11:52:21 9                   **THE COURT:** You may have a seat in the

11:52:22 10 audience.

11:52:23 11                   **THE WITNESS:** Thank you.

12                   **(Witnesses enter courtroom)**

11:52:29 13                   **THE COURT:** Hello. Mr. Simons

11:52:41 14 admitted that he was talking to the two of you about

11:52:44 15 the case -- or talking to one of you in the other's

11:52:47 16 presence. That's a violation of the Rule. He has

11:52:50 17 apologized. He shouldn't have done that. He should

11:52:53 18 only talk to you about the case, sir, but when it's

11:52:56 19 just you and him or an investigator or something. He

11:52:58 20 can't talk to you about the case in front of another

11:53:00 21 witness.

11:53:01 22                   And he can't talk to you about the

11:53:03 23 case, ma'am, in front of any other witnesses. That

11:53:06 24 violates the Rule. And I don't know if he didn't

11:53:08 25 understand that or what the problem is exactly.

11:53:11 1 What were y'all talking about, sir, in  
11:53:14 2 her presence?

11:53:16 3 **THE WITNESS:** I was talking about how  
11:53:17 4 am I going to get my kids.

11:53:19 5 **THE COURT:** Yeah. But what else?

11:53:19 6 **THE WITNESS:** That the witnesses --

11:53:21 7 **THE COURT:** About the --

11:53:21 8 **THE WITNESS:** Nothing. I said it was  
11:53:21 9 he was going longer than I expected, I was going to  
11:53:25 10 get my kids.

11:53:26 11 **THE COURT:** Okay. And, ma'am, what do  
11:53:27 12 you remember talking about?

11:53:29 13 **THE WITNESS:** His kids.

11:53:31 14 **THE WITNESS:** And my cell phone won't  
11:53:33 15 go through.

11:53:33 16 **THE COURT:** Mr. Simons has already  
11:53:34 17 said he was talking to you about the location. Do  
11:53:37 18 you not remember that? Are you just trying not to  
11:53:40 19 get Mr. Simons in trouble?

11:53:42 20 **THE WITNESS:** At this point, ma'am,  
11:53:42 21 no. I'm more concerned about my kids right now,  
11:53:50 22 because they are out. I have no one to pick him up.

11:53:52 23 **THE COURT:** When you come to court, I  
11:53:52 24 can't guarantee that you're going to be out of here  
11:53:53 25 by 1:30.

11:53:54 1                   **THE WITNESS:** I understand. I  
11:53:54 2 understand that. I just -- I didn't know I was going  
11:53:55 3 to be here all day.

11:53:56 4                   **THE COURT:** Over the lunch hour, I  
11:53:58 5 would hope you can call somebody.

11:53:59 6                   **THE WITNESS:** That's what I'm trying  
11:54:00 7 to do now.

11:54:01 8                   **THE COURT:** So, let me explain this  
11:54:02 9 clearly.

11:54:03 10                   **THE WITNESS:** Okay.

11:54:03 11                   **THE COURT:** Okay. You cannot discuss  
11:54:05 12 the case with anyone except the lawyers or someone  
11:54:09 13 working for the lawyers. If you talk in the presence  
11:54:11 14 of somebody, it's the same as talking to them. You  
11:54:15 15 follow me? Because the idea is we want to know what  
11:54:17 16 you remember happened, and we don't want you to be  
11:54:20 17 influenced by what somebody -- another witness has to  
11:54:23 18 say.

11:54:23 19                   So, I'm going to instruct you you're  
11:54:26 20 not to talk or be together anymore. You know,  
11:54:30 21 normally, talk -- you can go to lunch, you can talk  
11:54:33 22 about your kids, talk about your work. But since  
11:54:37 23 this has gotten to be a problem, I'm going to order  
11:54:39 24 you-all not to talk to each other until the trial is  
11:54:42 25 over. Okay? Because it looks bad to people who see



11:54:45 1 you doing that.

11:54:45 2 **THE WITNESS:** Okay.

11:54:46 3 **THE COURT:** And that way we won't have  
11:54:47 4 to worry about whether or not you were talking about  
11:54:50 5 the case or something else.

11:54:52 6 **THE WITNESS:** Okay.

11:54:53 7 **THE COURT:** Okay.

11:54:53 8 **THE WITNESS:** Okay.

11:54:54 9 **THE COURT:** All right. Make sure  
11:54:56 10 you're testifying the truth when you're asked a  
11:54:58 11 question.

11:54:58 12 **MR. MORGAN:** Your Honor, at this point  
11:54:59 13 I would like to make a motion, considering the fact  
11:55:03 14 that the Officer Sims and Officer -- Mr. Simons have  
11:55:08 15 conflicting testimony, the fact that Officer Sims  
11:55:12 16 wasn't able to corroborate the admission that Daniel  
11:55:15 17 Simons has made, we only wonder what else has been  
11:55:21 18 talked about, what else is being withhold.

11:55:23 19 **THE COURT:** It was such a short period  
11:55:25 20 of time.

11:55:26 21 **MR. MORGAN:** I --

11:55:26 22 **THE COURT:** Just -- you-all had just  
11:55:27 23 left. I just excused the court reporter. So, it  
11:55:30 24 couldn't have been a very lengthy conversation.

11:55:32 25 **MR. MORGAN:** Your Honor --

11:55:33 1 **THE COURT:** What is it you want me to  
11:55:34 2 do?

11:55:34 3 **MR. MORGAN:** Your Honor, I move for a  
11:55:35 4 mistrial at this point due to a violation of the  
11:55:38 5 Rule. I understand that it was short; but the fact  
11:55:41 6 that Officer Sims is withholding evidence from the  
11:55:44 7 Court in an effort to try to cover Mr. Simons, we can  
11:55:48 8 only -- we can only ask if there is -- and for  
11:55:50 9 purposes of the record, Officer Sims seems to be  
11:55:53 10 upset with the fact that I'm even hinting that he is  
11:55:56 11 withholding even more evidence. And I move for a  
11:55:58 12 mistrial due to the fact that there was a withheld  
11:56:02 13 admission.

11:56:03 14 **THE COURT:** I'm very disappointed this  
11:56:04 15 happened, very disappointed; but I don't think it  
11:56:07 16 rises to the level of a mistrial.

11:56:10 17 So, that motion is denied. And, of  
11:56:12 18 course, you may ask them on the witness stand about  
11:56:15 19 it.

11:56:15 20 Okay. Thank you.

11:56:17 21 **MR. SIMONS:** Thank you, Your Honor.

22 **(Recess taken)**

13:15:53 23 **THE COURT:** Are you O'Bryant  
13:15:54 24 Hightower?

13:15:55 25 **THE DEFENDANT:** Yes, I am, Your Honor.