NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0014

STATE OF LOUISIANA

VERSUS

LEE D. BLANCHARD

DATE OF JUDGMENT: JUL - 8 2010

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 23,795, DIVISION B, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE THOMAS J. KLIEBERT, JR., JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.

The defendant, Lee D. Blanchard, was charged by grand jury indictment with four counts of molestation of a juvenile (counts I – IV), violations of La. R.S. 14:81.2, and he pled not guilty. The State dismissed count I prior to the presentation of opening statements. Following a jury trial on counts II, III, and IV, the defendant was found guilty of the responsive verdicts of indecent behavior with a juvenile where the victim is under the age of thirteen, violations of La. R.S. 14:81. He was sentenced on each count to twelve years at hard labor, with three years to be served without benefit of parole, probation, or suspension of sentence. Five years of each sentence was suspended to be served on supervised probation. The trial court ordered that the sentences would run concurrently. The defendant now appeals, designating the following assignments of error:

> 1. The trial court erred in not requiring the State to establish a *prima facie* case of gender discrimination in the defense exercise of peremptory challenges.
>
> 2. The trial court erred in its ruling that the defense failed to meet its burden of coming forward with gender-neutral reasons as to prospective jurors Trisha Skal, Shanda Delmore, Bonnie Hurley, and Tammie Downing.
>
> 3. The trial court erred in failing to hold the prosecution to its burden of establishing purposeful gender discrimination.
>
> 4. The trial court erred in the reseating of challenged jurors and, under the circumstances of the case, violated the defendant's right to a fair trial, to a fair and impartial jury, and to peremptory challenges.
>
> 5. The trial court erred in violating the defendant's right to a fair trial and to an impartial jury in refusing to dismiss juror Skal based on her exposure to a prejudicial incident outside the courtroom prior to trial.
>
> 6. The trial court erred in accepting a verdict returned by a non-unanimous jury, violating the defendant's right under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2 and 16 of the Louisiana Constitution.

For the following reasons, we affirm the convictions and sentences on counts II, III, and IV.

FACTS

The victim, K.C.,[1] testified at trial. Her date of birth was September 13, 1994. She identified the defendant in court as her baby-sitter's husband. The victim stayed at her baby-sitter's home after school until her mother picked her up after work. She indicated that on August 25, 2006, the defendant repeatedly put his hands in her pants and under her underwear and put his finger inside of her. The first incident occurred when the victim was sitting between the defendant's legs at the computer, looking for games for the defendant's daughter to play. The defendant's daughter was approximately four or five years old. The victim indicated the defendant put his finger in her vagina, which she called her "too-too." The baby-sitter was outside during the incident. The second incident occurred when the defendant's daughter was sitting on the defendant's leg, and the victim was sitting between the defendant's legs at the computer, looking at games on "Barbie.com." The victim indicated that during that incident, the defendant put his finger in her "too-too." The victim got up and left the room. The victim indicated that when the defendant "did it" a third time that day, she started crying and her baby-sitter walked in and asked what had happened. The victim indicated the defendant looked at her and whispered, "Please don't tell." The defendant told the victim's baby-sitter that the victim must have scratched her leg on the computer, and the victim agreed. The victim indicated the only other time the defendant put his finger in her "too-too" was approximately three weeks before the

[1] The victim is referenced herein only by her initials. See La. R.S. 46:1844(W).

incidents she had described. The victim also indicated the defendant had taken her hand and made her rub his "pee-pee" on more than one occasion. The victim stated she delayed telling anyone about the incidents because she was scared of what the defendant might do to her.

Dr. John David Knapp also testified at trial. The defense and the State stipulated that he was an expert in the field of internal medicine and pediatrics. He examined the victim on August 30, 2006. She had marked redness in her vaginal area, and her hymen was not completely intact.

The 44-year-old defendant testified he was at the computer with the victim and his daughter on August 25, 2006, for fifteen to twenty minutes, looking at "Barbie.com." According to the defendant, the victim was sitting between his legs, and was sliding off the chair, so he "grabbed her around her legs and probably her butt maybe a little bit." The defendant claimed he eventually got up because his computer kept crashing, and the victim cried because she hurt herself on the desk. He denied putting his hands under the victim's clothing. He claimed if he touched the victim's vaginal area, it was unintentional. He denied putting his finger in the victim's vagina. He denied taking the victim's hand and putting it on his penis.

DEFENSE COUNSEL'S USE OF PEREMPTORY CHALLENGES

In assignment of error number one, the defendant argues the trial court erred in finding a *prima facie* showing of gender discrimination in the defense's exercise of peremptory challenges, because the State failed to meet the threshold requirements for such a showing. In assignment of error number two, the defendant argues the trial court erred in finding the explanations provided by the defense for

its peremptory challenges were not gender neutral. In assignment of error number three, the defendant argues the trial court erred in failing to require the State to prove purposeful gender discrimination.

In **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held an equal protection violation occurs when a party exercises a peremptory challenge to exclude a prospective juror on the basis of race. The scope of a **Batson** claim has been extended to other "suspect classifications," such as gender. See **J.E.B. v. Alabama ex rel. T.B.**, 511 U.S. 127, 141-42, 114 S.Ct. 1419, 1428, 128 L.Ed.2d 89 (1994). If the challenger makes a *prima facie* showing of discriminatory strikes, the burden shifts to the opposing party to offer racial/gender-neutral explanations for the challenged juror. If a race/gender-neutral reason is given, the trial court must then decide whether the challenger has proven purposeful discrimination. Whether there has been intentional racial or gender discrimination is a question of fact. The decisive question in the analysis is whether the race/gender-neutral reason should be believed. A reviewing court owes the trial court's evaluations of discriminatory intent great deference and should not reverse unless the evaluations are clearly erroneous. See **State v. Scott**, 2004-1312, pp. 44-45 (La. 1/19/06), 921 So.2d 904, 937, cert. denied, 549 U.S. 858, 127 S.Ct. 137, 166 L.Ed.2d 100 (2006), overruled on other grounds, **State v. Dunn**, 2007-0878 (La. 1/25/08), 974 So.2d 658 (per curiam).

In order to make a *prima facie* showing the opposing party has exercised peremptory challenges on an impermissible basis, the challenger may offer any facts relevant to the question of the opposing party's discriminatory intent. Such facts

include, but are not limited to, a pattern of strikes by the opposing party against members of a suspect class, statements or actions of the opposing party during *voir dire* which support an inference that the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination. See **State v. Duncan**, 99-2615, p. 14 (La. 10/16/01), 802 So.2d 533, 544-45, cert. denied, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002). The challenger need only produce evidence sufficient to permit the trial judge to draw an inference that a prohibited discrimination has occurred. Further, **Batson's** admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of panel members who expressed similar views or shared similar circumstances in their backgrounds. **State v. Elie**, 2005-1569, p. 6 (La. 7/10/06), 936 So.2d 791, 796.

No formula exists for determining whether the challenger has established a *prima facie* case of a purposeful, prohibited discrimination. A trial judge may take into account not only whether a pattern of strikes against a suspect class of persons has emerged during *voir dire* but also whether the opposing party's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. See **Duncan**, 99-2615 at p. 14, 802 So.2d at 545.

For a **Batson**-type challenge to succeed, it is not enough that a discriminatory result be evidenced; rather, that result must ultimately be traced to a prohibited discriminatory purpose. Thus, the sole focus of the **Batson**-type inquiry is upon the

intent of the opposing party at the time he exercised his peremptory strikes. See **State v. Green**, 94-0887, pp. 23-24 (La. 5/22/95), 655 So.2d 272, 287. The same three-step, burden-shifting framework outlined in **Batson** is utilized regardless of whether the challenge is based on race or gender. **Duncan**, 99-2615 at p. 11, 802 So.2d at 543.

In the instant case, panel one consisted of twenty-one people – twelve men and nine women. Seven of the men had children who were the same age as, or younger than, the victim, who was eleven years old at the time of the alleged offenses. Defense counsel used five of his peremptory challenges to exclude four women (Skal, Dana Teepell, Delmore, and Donna Wescott) and one man, an employee of the Ascension Parish Sheriff's Office, on the first panel. Panel two consisted of twenty-one people – five men and sixteen women. After defense counsel used his next three peremptory challenges to exclude women (Hurley, Downing, and Melissa Gisclair), the State objected under **Batson** "on women." The court sustained the objection, noting that it had noticed a pattern of systematically excluding women.

Defense counsel argued he had legitimate reasons for the peremptory challenges he had exercised. He claimed he had challenged Gisclair because she had a five-year-old child similar in age to the victim, and because she was a teacher. The State pointed out that the only female juror, Cynthia Case, of the nine jurors selected at that time was also an educator.[2] Defense counsel replied that he had other reasons for choosing Case. Defense counsel asserted that he had challenged Downing because she had two children, four grandchildren, was an accountant, and

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[2] Case actually indicated she was a "retired educator."

was "prosecution oriented." Defense counsel claimed Downing would not be fair to the defendant because of how she had answered questions, how she had looked at the defendant, and how she had folded her arms. The State countered that all eight of the male jurors chosen at that time had children. Defense counsel replied he found mothers with small children to be "a potential problem."

Defense counsel further claimed he had challenged Hurley because she had a two-year old daughter, was fairly reserved, and was "prosecution oriented." Defense counsel asserted he had challenged Wescott because she worked for the Office of Community Services (OCS), which dealt with child abuse cases. The State replied that Wescott had indicated she was only an administrative coordinator with OCS, and Wescott did not deal directly with the cases. Defense counsel claimed he had challenged Delmore because she seemed particularly friendly to the prosecution, she had a seventeen-year old daughter, and she was a claims adjuster for Blue Cross Blue Shield. The prosecutor indicated she did not know Delmore, and Delmore did not know her. Defense counsel claimed he had challenged Teepell because she had testified that she had been physically attacked and she explained that she could not put that out of her mind, and her husband was a retired Air Force colonel. Lastly, defense counsel claimed he had challenged Skal because she had three children (ages 6, 10, and 18 years), worked for doctors, and he did not like the way she had answered his questions.

The State responded noting that defense counsel's main premise for exclusion in each instance was that the prospective female juror had children. The State further noted that many of the males who had been accepted by defense counsel also had children.

The court accepted defense counsel's explanations for the challenges against Teepell, Wescott, and Gisclair, but rejected the explanations for the challenges against Skal, Delmore, Hurley, and Downing. The court ordered Skal, Delmore, and Hurley to be seated as jurors and ordered Downing to be seated as an alternate juror. Defense counsel objected to the court's ruling, and the next day, he moved for a mistrial on the basis of that ruling. The court denied the motion for mistrial.

In the instant case, the record establishes that the pattern of peremptory strikes by defense counsel against female jurors was evident and supported the tacit finding by the trial court that the prosecution had met its burden of going forward. **State v. Green**, 94-0887 at p. 24, 655 So.2d at 288. Once the defense offered gender-neutral explanations for its peremptory challenges, and the trial court ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the State had made a *prima facie* showing became moot. See **Hernandez v. New York**, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991); **State v. Green**, 94-0887 at p. 25, 655 So.2d at 288.

Whether or not there was intentional gender discrimination was a question of fact. The trial court considered the explanations for the peremptory challenges offered by the defense and found some of the explanations credible, while finding some of them not credible. The decisive question in the **Batson**-type analysis is whether the gender-neutral explanation should be believed. See **State v. Tyler**, 97-0338, p. 12 (La. 9/9/98), 723 So.2d 939, 946-47, cert. denied, 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999). The trial court apparently did not believe defense counsel's gender-neutral explanations for its peremptory challenges against Skal, Delmore, Hurley, and Downing. It apparently rejected defendant's

contentions that Delmore, Hurley, Downing, and Skal appeared either "prosecution-oriented" or adverse to the defense as pretextual reasons for peremptorily challenging these prospective jurors. Further, in explaining his use of peremptory challenges to exclude Skal, Delmore, Hurley, and Downing, defense counsel indicated he found mothers, but not fathers, with small children to be "a potential problem." The trial court correctly rejected this gender-specific reason for the exercise of peremptory challenges by the defense, and thus found the State had proven purposeful discrimination in regard to the peremptory challenges used by the defense to exclude these prospective jurors.

On the other hand, the judge concluded that the defendant had legitimate gender-neutral reasons for challenging Teepell, Wescott, and Gisclair, and thus found the State had not proven purposeful discrimination in regard to the peremptory challenges used by the defense to exclude those prospective jurors. See **Purkett v. Elem.**, 514 U.S. 765, 769, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (*per curiam*). The judge sustained the challenge against Teepell, who said she was once attacked by a man and who also stated that it was hard to imagine that someone charged with child molestation was actually innocent. The court also upheld a challenge against Wescott, who worked for a state agency dealing with abused children. Finally, the challenge against Gisclair, a teacher, was apparently upheld on the grounds that defense counsel stated that he always struck teachers unless other factors militated toward including them. The judge's findings that these peremptory strikes were made for purposes beyond any gender discriminatory intent shows that the trial judge determined that defense counsel had a "legitimate reason" for exercising the challenges. **Batson**, 476 U.S. at 98 n. 20, 106 S.Ct. at 1724 n. 20.

A "legitimate reason" is not a reason that necessarily makes sense but a reason that does not deny equal protection. **Purkett**, 514 U.S. at 769, 115 S.Ct. at 1771. After a thorough review of the record, we find no clear error in the court's evaluations of gender discriminatory intent.

These assignments of error are without merit.

SEATING OF PREVIOUSLY-REJECTED JURORS

In assignment of error number four, the defendant argues the trial court mismanaged the jury venire by allowing challenged jurors to return to the audience, while segregating selected jurors, and then reseated previously rejected jurors who were aware they had been rejected and "could have harbored hostility toward defense counsel." He claims the record does not indicate whether or not the rejected jurors knew which side had excluded them, but argues even if they were unaware of this information, "the inevitable speculation that would have arisen from the unexplained reseating" was enough to deprive him of an impartial jury.

Initially, we note that the record indicates the State and the defense exercised their peremptory challenges in chambers. La. Code Crim. P. art. 795(E) provides:

> The court shall allow to stand each peremptory challenge for which a satisfactory racially neutral or gender neutral reason is given. Those jurors who have been peremptorily challenged and for whom no satisfactory racially neutral or gender neutral reason is apparent or given may be ordered returned to the panel, or the court may take such other corrective action as it deems appropriate under the circumstances. The court shall make specific findings regarding each such challenge.

There was no error. The trial court followed the procedure set forth under La. Code Crim. P. art. 795(E), and the defendant's claims of prejudice are speculative.

This assignment of error is without merit.

MOTION TO DISMISS JUROR SKAL

In assignment of error number five, the defendant argues the trial court erred in denying the defense motion to dismiss juror Skal after she was approached by a man in the parking lot.

Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. **Smith v. Phillips**, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982). The ultimate inquiry is: Did the intrusion affect the jury's deliberations and thereby its verdict? See **United States v. Olano**, 507 U.S. 725, 739, 113 S.Ct. 1770, 1780, 123 L.Ed.2d 508 (1993).

Following the completion of jury selection, the trial court adjourned court for the day, but questioned the jury in chambers. The following colloquy occurred between the court and juror Skal:

> [Court]: And I understand yesterday leaving the courtroom something happened. I don't know the story so tell me what happened.
>
> [Skal]: I left. Everybody got dismissed around I think it was 1:00 o'clock and I was walking to my car, and I saw a guy, a man, talking to one of the other jurors asking him a question and I kind of noticed him 'cause he had on a red hoodie sweatshirt. And I just passed him up and started walking to my car and there was a truck parked next to me and his door was open. And I said, excuse me, 'cause I was trying to get in my car. And he was like, oh okay. And he shut his door. And I went

to unlock my door to get in and I saw out of the corner of my eye this guy like not running like at full speed but, you know, trotting real fast across the parking lot and he was looking at me. So I knew he was like coming towards me. And he came faster and faster, and I jumped in my car and I shut the door and locked it real quick. And he started hitting my window and I was, you know, scared and whatever and I cranked my car real quick. And there was not a car parked in front of me – there was a parking spot but not a car in front of me so I went forward and I went around. I just started honking the horn and honking the horn. And I was parked here and I went all the way around to this entrance, and as I was going I looked in my rearview mirror and he was running. Like I was going fast out of the parking lot and he was running after me so I just laid my hand on the horn and started honking the horn, honking the horn. And as I got to the exit a car – a truck was in front of me and so I couldn't go, and I stopped and I saw him in my window and he started hitting the window again, screaming, screaming, and just screaming. And he got like in front of my windshield and was hitting on my – and I couldn't go so I just kept honking the horn and was crying and hysterical, of course, whatever. And so the truck left and I pulled out and I was on this side road where the library's on or whatever. I don't know what the street is but I pulled out and then one of the other guys was going – he's a juror. He pulled beside me and he said, are you okay, and he just mouthed to me, and I said no, and I was crying. And I pulled in the civic center I think down there. And he said we need to find an officer 'cause I saw everything that happened but I couldn't do anything or whatever. So at that time a police officer passed and he flagged him down and I got in the Durango with him and we came back here and he said if you see him point him out. We did so they got him and took him in and talked to him, and he said his phone was in my car. I'm like my car was locked the whole time 'cause my phone was in there because I couldn't bring it in the courthouse. So they went search the car and his phone wasn't in there. And he said his phone was in my car, which it wasn't, so I don't know if he was trying to steal something out of my car, or was trying to get in the car with me, or I don't know.

[Court]: My question is do you think that would affect you today as a juror?

[Skal]: No, I don't think so. I was upset yesterday of course.

[Court]: Well sure, I can imagine.

[Skal]: Yeah, nothing like that's ever happened, you know. I'm fine.

[Court]: Okay.

[Skal]: I'm kind of nervous about coming here this morning and the family because their family was upset and, you know, I passed them and they saw me as the officers were talking to me. The family saw me but I was kind of nervous coming but an officer came –

[Court]: His family?

[Skal]: His aunt I think was – yeah. But I think they were with a different trial or something. I think it finished yesterday. But I was fine – I mean I'm fine.

[Court]: Okay.

The court then individually asked each of the other jurors and the alternate jurors if the incident in the parking lot would affect their service on the jury. All jurors and alternates indicated the incident in the parking lot would not affect their service on the jury.

At the beginning of court the next day, defense counsel moved that juror Skal be dismissed on the basis of the incident in the parking lot. The court denied the motion, and defense counsel objected to the ruling of the court.

There was no error in denying the motion to dismiss juror Skal. The trial court carefully questioned her and every other juror including the alternate jurors and determined that the incident in the parking lot would not affect the service of any juror or alternate.

This assignment of error is without merit.

CONSTITUTIONALITY OF NON-UNANIMOUS VERDICTS

In assignment of error number six, the defendant argues the convictions for counts II and III must be reversed because the verdict on those counts was not unanimous and the Louisiana scheme allowing non-unanimous verdicts in felony cases (La. Code Crim. P. art. 782(A)) violates the federal and state constitutions.

It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized. **State v. Hatton**, 2007-2377, pp. 13-14 (La. 7/1/08), 985 So.2d 709, 718-19.

In the instant case, the defendant failed to properly raise his constitutional challenge to La. Code Crim. P. art. 782(A) in the trial court. Accordingly, we pretermit consideration of this assignment of error.[3]

DECREE

For these reasons, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.

[3] Nonetheless, Article 782 withstands constitutional scrutiny. **State v. Bertrand**, 2008-2215, p. 8 (La. 3/17/09), 6 So.3d 738, 743; **State v. Caples**, 2005-2517, pp. 15-16 (La. App. 1st Cir. 6/9/06), 938 So.2d 147, 157, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684.