STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 KA 1565

STATE OF LOUISIANA

VERSUS

TROY MICHAEL JACKSON, JR.

TMH
whp

Judgment Rendered: OCT 12 2017

* * * * *

On Appeal from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Trial Court No. 656,389

Honorable John R. Walker, Judge Presiding

* * * * *

Bertha M. Hillman
Louisiana Appellate Project
Covington, LA

Attorney for Defendant-Appellant,
Troy Michael Jackson, Jr.

Joseph L. Waitz, Jr.
District Attorney
Ellen Daigle Doskey
Assistant District Attorney
Houma, LA

Attorneys for Appellee,
State of Louisiana

* * * * *

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

GH
Holdridge J. concurs for the reasons assigned

HIGGINBOTHAM, J.

Defendant, Troy Michael Jackson, Jr., was charged by amended grand jury indictment with first degree murder, a violation of La. R.S. 14:30(A)(1) (count one); obstruction of justice by tampering with evidence, a violation of La. R.S. 14:130.1(A)(1) (count two); and possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1 (count three). He pled not guilty. After a jury trial, defendant was found guilty as charged on all counts. Thereafter, the trial court denied defendant's post-trial motions for new trial and post-verdict judgment of acquittal. On count one, the trial court sentenced defendant to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence.[1] On count two, the trial court sentenced defendant to five years at hard labor. On count three, the trial court sentenced defendant to twenty-five years at hard labor, without the benefit of parole, probation, or suspension of sentence. The trial court ordered all three sentences to run concurrently. Defendant filed a motion for reconsideration of his sentences, which the trial court denied. Defendant now appeals, alleging one assignment of error.

FACTS

On the evening of February 23, 2013, Sergio Castellanos (the victim) went with his friends to a bar in Houma. While out at the bar, Castellanos met Ciegie Cheramie, who had gone to the bar with defendant and his girlfriend, Brandy Perdue. According to trial testimony, Cheramie, Perdue, and defendant went to the bar that

---

[1] Although the words "at hard labor" do not appear in the minutes or sentencing transcript concerning count one, and the record does not contain a commitment order, we note that at the sentencing hearing the trial court explicitly stated that defendant's sentence was "in accordance with law." Furthermore, at the hearing on reconsideration of the sentence for count one, the trial court recognized that it was a "mandatory life sentence" with no discretion to deviate from the "statutory sentence." Because the state did not seek a capital verdict, the mandatory statutory sentence on a conviction for first degree murder (count one) was "life imprisonment at hard labor without benefit of parole, probation or suspension of sentence." La. R.S. 14:30(C)(2). Thus, defendant's sentence on count one is determinate from the record and the failure of the trial court to state that it was to be served "at hard labor" is harmless error. See **State v. Norman**, 2005-794 (La. App. 5th Cir. 3/14/06), 926 So.2d 657, 661, writ denied, 2006-1366 (La. 1/12/07), 948 So.2d 145.

night for Cheramie to meet someone and convince them to give her money or for Cheramie to meet someone to have sex with her for money. Ultimately, Castellanos left the bar with Cheramie, Perdue, and defendant.

After leaving the bar, Cheramie drove Castellanos, Perdue, and defendant to at least one gas station and then around the Houma area. Castellanos was seated in the truck's passenger's seat, while defendant and Perdue sat in the truck's back seat. At some point as they drove, defendant pulled a gun and shot Castellanos three times, resulting in his death. The following morning, defendant directed Cheramie to call her brother, tell him she had shot someone, and ask for his help in disposing of the body. Cheramie's brother called the police after Cheramie came to his house and he observed something slumped in the passenger's seat of her vehicle. After visiting her brother, Cheramie dumped Castellanos's body in a grassy area on the side of Bayou Salle Road. Defendant took some clothing from the victim and the occupants of the truck, and he disposed of it in a waterway near Mechanicville.

Defendant did not testify at trial, but the state introduced a recorded interview that he gave to the police. In this statement, defendant admitted to shooting Castellanos, but stated that he did so in order to protect Cheramie and Perdue. The state also introduced evidence of defendant's September 7, 2005 felony conviction for molestation of a juvenile.

***BATSON* CHALLENGE**

In his sole assignment of error, defendant argues that the state improperly exercised peremptory challenges against two prospective jurors on the basis of race.

In **Batson v. Kentucky**, 476 U.S. 79, 93-98, 106 S.Ct. 1712, 1721-1724, 90 L.Ed. 2d 69 (1986), the United States Supreme Court adopted a three-step analysis to determine whether the constitutional rights of a defendant or prospective jurors have been infringed by impermissible discriminatory practices. First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the

burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. **State v. Handon**, 2006-0131 (La. App. 1st Cir. 12/28/06), 952 So.2d 53, 56. See also **Foster v. Chatman**, ___ U.S. ___, 136 S.Ct 1737, 1747, 195 L.Ed. 2d 1 (2016).

To establish a *prima facie* case, the defendant must show: (1) the defendant is a member of a cognizable group and the prosecutor exercised peremptory challenges to remove venire members of the defendant's race; (2) the challenge was peremptory rather than for cause; and (3) relevant circumstances sufficient to raise an inference that the prosecutor struck the venire person on account of his being a member of that cognizable group. See **Batson**, 476 U.S. at 96, 106 S.Ct. at 1723. Without an inference that the prospective jurors were stricken because they are members of the targeted group, the defendant is unable to make a *prima facie* case of purposeful discrimination, and his **Batson** challenge expires at the threshold. **State v. Sparks**, 88-0017 (La. 5/11/11), 68 So.3d 435, 468, cert. denied sub nom., **El-Mumit v. Louisiana**, 566 U.S. 908, 132 S.Ct. 1794, 182 L.Ed. 2d 621 (2012).

The trial court may "effectively collapse the first two stages of the **Batson** procedure, whether or not the defendant established a *prima facie* case of purposeful discrimination, and may then perform the critical third step of weighing the defendant's proof and the prosecutor's race-neutral reasons to determine discriminatory intent." **State v. Jacobs**, 99-0991 (La. 5/15/01), 803 So.2d 933, 941, cert. denied, 534 U.S. 1087, 122 S.Ct. 826, 151 L.Ed. 2d 707 (2002). 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 **State v. Duncan**, 99-2615 (La. 10/16/01), 802 So.2d 533, 545, cert. denied, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed. 2d 183 (2002).

The state, in presenting race-neutral reasons for its excusal of prospective jurors, need not present an explanation that is persuasive, or even plausible; unless a discriminatory intent is inherent in the state's explanation after review of the entire record, the reason offered will be deemed race neutral. **Handon**, 952 So.2d at 58. For a **Batson** 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** inquiry is upon the intent of the opposing party at the time he exercised his peremptory strikes. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 287. A reviewing court owes the trial court's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **Handon**, 952 So.2d at 58.

Defendant contends that three black prospective jurors were peremptorily stricken from the jury by the state: Alton Johnson, Jr., Bryson Scott, and Larri Harvey. Of these three prospective jurors, defendant admits that the state offered a race-neutral reason for excusing Mr. Johnson. However, he contends that the state's proffered race-neutral reason for excluding Mr. Scott and Ms. Harvey was pretextual.

Following voir dire of the first panel of jurors, the trial court first asked for any cause challenges. Defense counsel asked that prospective juror Gerard Ray be excused for cause based upon his friendship with police officers, and the trial court granted this cause challenge. Thereafter, the state exercised peremptory challenges against Mr. Johnson, Mr. Scott, and Ms. Harvey. After the state excused Ms. Harvey, defense counsel lodged a **Batson** challenge, stating that the state had stricken "all of the black potential jurors on the jury pool." The state first responded that it was incorrect to say it had stricken all of the black prospective jurors, as Mr. Ray was also black and challenged by the defense – over the state's objection – for cause.

In response to Mr. Johnson, the state said it excused him because of his prior service on a jury that had returned a not guilty verdict. Regarding Mr. Scott and Ms. Harvey, the state explained that they – as well as three other presumably non-black jurors (Ms. Pinell, Mr. Thibodeaux, and Ms. Lirette)[2] – were under the age of 35. The state expressed concerns that younger individuals might be familiar with some of the nightclubs that the people involved in the case went to, so the state was attempting to seat an older jury. The trial court denied the **Batson** challenge, noting that the state was correct regarding the ages of Mr. Scott (24) and Ms. Harvey (34). The trial court also noted that Mr. Johnson has a brother who was in prison for a drug conviction.

During the pendency of this appeal, this court ordered the trial court to hold a contradictory hearing to determine the age and race of each prospective juror. According to the findings set forth by the trial court, the parties stipulated to the name and age of each prospective juror. The trial court noted that there was no evidence in the record to indicate the race of the prospective jurors. However, the trial court's findings described an affidavit submitted by defendant's trial counsel, who indicated that three black jurors were peremptorily stricken from the first panel by the state. The trial court also set forth trial counsel's testimony that established the state as having accepted a black female juror on the second panel.

On appeal, defendant contends that the state's proffered race-neutral reason for striking Mr. Scott and Ms. Harvey – their age – was unpersuasive because the state did not strike several young white jurors despite having the opportunity to do so. Defendant highlights the statements from trial counsel's affidavit, which described that the state did not strike prospective jurors Paul W. Daugherty, a 33-year-old white male; Tabitha A. Bienvenu, a 26-year-old white female; and Brandon K. Thibodaux, a 25-year-old white male.

---

[2] At the time of this explanation, Ms. Lirette's name had not been called for acceptance, but she was peremptorily challenged by the state following the trial court's denial of the **Batson** challenge.

At the time defense counsel lodged the **Batson** challenge, one black prospective juror had been challenged for cause by defense counsel, and three black prospective jurors had been peremptorily challenged by the state. Of these three individuals excused by the state, defendant admits that Mr. Johnson's peremptory challenge was for a race-neutral reason. He takes issue with the challenges of Mr. Scott and Ms. Harvey because the state alleged their dismissals to be due to their relative youth, but the state later accepted several young white jurors.

After reviewing the record as a whole and considering the totality of the circumstances, we find that the state's race-neutral explanations were reasonable, and the proffered rationales had some basis in accepted trial strategy. See **Handon**, 952 So.2d at 59. Defendant challenges the state's dismissal of only two black prospective jurors. Notably, defendant himself challenged for cause a black prospective juror that the state wished to accept, and defendant does not challenge as discriminatory the dismissal of Mr. Johnson pursuant to a peremptory challenge. Defendant's proof, then, is the dismissal of two youthful, black prospective jurors and the state's later acceptance of three youthful, white prospective jurors. At the time of the **Batson** challenge, these white prospective jurors had not been accepted by the state, and defendant did not re-urge his **Batson** challenge to give the trial court a chance to address these circumstances.

Under these circumstances, it is apparent that the defendant failed to preserve his **Batson** claim, if any, concerning these prospective jurors. See La. Code Crim. P. art. 841; **State v. Williams**, 524 So.2d 746 (La. 1988) (per curiam) ("[t]he **Batson** decision suggested that the trial judge, if the objections are well founded, can correct the error either by denying the peremptory challenge and reinstating the challenged jurors or by dismissing the venire and selecting a new jury. This suggestion indicates that the ruling on the objections must be made at some time before the completion of the jury panel.)" [Footnotes omitted.]; **State v. Dominguez**, 2014-1 (La. App. 5th Cir. 8/28/14), 148 So.3d 648, 658, writ denied, 2014-2033 (La. 5/22/15), 170

So.3d 982 ("[t]he ruling, and thus the prerequisite **Batson** objection, must be made at a time when the trial court can correct any misuse of peremptory challenges. Although jurisprudence has indicated that **Batson** objections should at least be made 'at some time before the completion of the jury panel,' in order to fulfill the purpose of that principle, a defendant must make a **Batson** objection contemporaneously with the State's exercise of the allegedly racially biased peremptory challenges, or at the least, reasonably soon enough thereafter that the stricken jurors have not been dismissed from service."). [Citations omitted.] Thus, defendant's proof at the time of the **Batson** challenge, when weighed against the state's race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. See **Green**, 655 So.2d at 290.

Moreover, a review of the entire voir dire transcript indicates that at the time the state began to accept any youthful, white prospective jurors, it had already exercised ten peremptory challenges, seven of which were apparently exercised against non-black prospective jurors. At that time, only six jurors had been seated, and the state had exercised all but two peremptory challenges. Further, defendant admits that a black juror from the second panel was seated as a juror, despite the state holding a peremptory challenge. Therefore, the transcript does not reveal any evidence that the use of peremptory strikes by the prosecutor was motivated by impermissible considerations.[3] See **Handon**, 952 So.2d at 59. Accordingly, we find

---

[3] The fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination. The accepted juror may have exhibited other traits which the prosecutor could have reasonably believed would make him desirable as a juror. **State v. Lee**, 2010-2164 (La. App. 1st Cir. 6/10/11), 2011 WL 3427144, *6 (unpublished), writ denied, 2011-1440 (La. 12/16/11), 76 So.3d 1201; see also **State v. Elie**, 2005-1569 (La. 7/10/06), 936 So.2d 791, 800 ("[n]otwithstanding the appellate court's observation, the fact jurors of different races share a similar characteristic is not dispositive when deciding whether an explanation has been pretextual."); **State v. Drake**, 2010-1518 (La. App. 1st Cir. 3/25/11), 2011 WL 1103422, *7 (unpublished), writ denied, 2011-0838 (La. 11/18/11), 75 So.3d 450 ("[e]ven assuming, arguendo, that similar responses were given by other prospective jurors, the fact that some were accepted by the State and the [African-American] prospective jurors in question were excused by the State does not in itself show that the explanation for excusing the other prospective jurors were a mere pretext for discrimination.").

no abuse of discretion by the trial court in its denial of defendant's **Batson** challenge regarding these prospective jurors.

This assignment of error is without merit.

PATENT ERROR

Initially, we note that our review for error is pursuant to La. Code Crim. P. art. 920(2), which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

We note that defendant moved for, and was granted, the appointment of a sanity commission. Although two doctors' reports appear in the record, the trial court does not appear to have conducted a contradictory hearing or made a ruling on defendant's capacity to proceed to trial.

As a general matter, La. Code Crim. P. art. 642 allows "[t]he defendant's mental incapacity to proceed [to] be raised at any time by the defense, the district attorney, or the court." The article additionally requires that "[w]hen the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution . . . until the defendant is found to have the mental capacity to proceed." La. Code Crim. P. art. 642. Next, La. Code Crim. P. art. 643 provides, in pertinent part, "[t]he court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed." Last, if a defendant's mental incapacity has been properly raised, the proceedings can only continue after the court holds a contradictory hearing and decides the issue of the defendant's mental capacity to proceed. See La. Code Crim. P. art. 647; **State ex rel. Seals v. State**, 2000-2738 (La. 10/25/02), 831 So.2d 828, 832-33.

Questions regarding a defendant's capacity must be deemed by the court to be *bona fide* and in good faith before a court will consider if there are "reasonable grounds" to doubt capacity. Where there is a *bona fide* question raised regarding a

defendant's capacity, the failure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. **Seals**, 831 So.2d at 833. At this point, the failure to resolve the issue of a defendant's capacity to proceed may result in nullification of the conviction and sentence under **State v. Nomey**, 613 So.2d 157, 161-62 (La. 1993), or a *nunc pro tunc* hearing to determine competency retrospectively under **State v. Snyder**, 98-1078 (La. 4/14/99), 750 So.2d 832. **Seals**, 831 So.2d at 833.

In certain instances, a *nunc pro tunc* hearing on the issue of competency is appropriate "if a meaningful inquiry into the defendant's competency" may still be had. In such cases, the trial court is again vested with the discretion of making this decision as it "is in the best position" to do so. This determination must be decided on a case-by-case basis, under the guidance of **Nomey**, **Snyder**, and their progeny. The state bears the burden in the *nunc pro tunc* hearing to provide sufficient evidence for the court to make a rational decision. **Seals**, 831 So.2d at 833.

Because there is no indication in the record that the trial court held a contradictory hearing following its receipt of the physicians' reports in the record, we conditionally affirm defendant's convictions on counts one, two, and three and remand to the trial court for the purpose of determining whether a *nunc pro tunc* competency hearing may be possible. If the trial court believes that it is still possible to determine defendant's competency at the time of the trial on the charges, the trial court is directed to hold an evidentiary hearing and make a competency ruling. If defendant was competent, no new trial is required. If defendant is found to have been incompetent at the time of trial, or if the inquiry into competency is found to be impossible, he is entitled to a new trial. Defendant's right to appeal an adverse ruling is reserved. <u>See</u> **Snyder**, 750 So.2d at 855-56 & 863; **State v. Mathews**, 2000-2115 (La. App. 1st Cir. 9/28/01), 809 So.2d 1002, 1016, <u>writs denied</u>, 2001-2873 (La. 9/13/02), 824 So.2d 1191 & 2001-2907 (La. 10/14/02), 827 So.2d 412.

We also note patent sentencing error in this case. When a convicted felon is found guilty of possessing a firearm in violation of the provisions of La. R.S. 14:95.1, the sentence shall be imprisonment at hard labor for not less than ten nor more than twenty years without the benefit of probation, parole, or suspension of sentence and a fine of not less than one thousand dollars nor more than five thousand dollars. La. R.S. 14:95.1(B). In imposing the sentence on count three, the trial court sentenced defendant to twenty-five years at hard labor without the benefit of parole, probation, or suspension of sentence and failed to impose any fine. This sentence is illegally excessive in its term and illegally lenient in its failure to include the mandatory fine. See La. R.S. 14:95.1(B). An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A). When the amendment of a defendant's sentence entails more than a ministerial correction of a sentencing error, however, the decision in **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, 801-02, does not sanction *sua sponte* correction by the court of appeal on the defendant's appeal of his conviction and sentence. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Accordingly, we vacate the sentence imposed on count three and, in the event the defendant is found to have been competent at the time of trial, instruct the trial court to sentence him on that count in accordance with law.

CONVICTIONS ON COUNTS ONE, TWO, AND THREE CONDITIONALLY AFFIRMED; SENTENCES ON COUNTS ONE AND TWO CONDITIONALLY AFFIRMED; SENTENCE ON COUNT THREE VACATED; AND CASE REMANDED WITH INSTRUCTIONS.

STATE OF LOUISIANA

VERSUS

TROY MICHAEL JACKSON, JR.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 1565

HOLDRIDGE, J., Concurring.

I respectfully concur. I believe it was a Batson violation for the State to challenge two black prospective jurors because of their young age and then to later accept three white jurors of the same age group. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The defendant failed to preserve his Batson challenge by failing to re-urge it when the three youthful white jurors were seated. By failing to re-urge his challenge, the defendant did not allow the trial court an opportunity to correct the error. *See State v. Johnson*, 50,005 (La. App. 2 Cir. 8/12/15), 175 So.3d 442, 456, writ denied, 2015-1687 (La. 9/16/16), 206 So.3d 203.