NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 KA 0765

STATE OF LOUISIANA

VERSUS

GEORGE WRIGHT

Judgment Rendered: NOV 0 1 2017

* * * * * * * *

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 08-14-0118

The Honorable Michael R. Erwin, Judge Presiding

* * * * * * * *

Lieu T. Vo Clark
Mandeville, Louisiana

Counsel for Defendant/Appellant
George Wright

Hillar C. Moore, III
District Attorney
Dylan C. Alge
Assistant District Attorney
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

* * * * * * * *

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McClendon, J. Concurs and Assigns Reasons.

THERIOT, J.

The defendant, George Wright, was charged by grand jury indictment with aggravated rape, a violation of Louisiana Revised Statutes 14:42 (prior to its revision by 2015 La. Acts No. 184, §1 and No. 256, §1) (count one); armed robbery, a violation of Louisiana Revised Statutes 14:64 (count two); and possession of a firearm by a person convicted of certain felonies, a violation of Louisiana Revised Statutes 14:95.1 (count three).[1] He entered a plea of not guilty and, following a jury trial, was found guilty as charged on counts one and three. On count two, the defendant was found guilty of the responsive offense of simple robbery, a violation of Louisiana Revised Statutes 14:65. On count one, the defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. On count two, the defendant was sentenced to seven years at hard labor, to run consecutively with the sentence imposed on count one. On count three, the defendant was sentenced to twenty years at hard labor without the benefit of probation, parole, or suspension of sentence, to run consecutively with the sentences imposed on counts one and two. The defendant now appeals, challenging the ruling made by the trial court on the State's **Batson** challenge.[2] For the following reasons, we affirm.

FACTS

On April 18, 2014, around 2:00 a.m., the victim, M.J.,[3] left her residence on Brady Street in Baton Rouge and began walking to her sister's house on Birch Street. According to the victim, as she walked past a

---

[1] The parties stipulated that on May 28, 1997, the defendant was convicted of first degree robbery under Nineteenth Judicial District Court docket number 11-96-0526 and was on parole for that offense at the time of the instant offenses.

[2] **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

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

carwash on Scenic Highway, she heard the defendant ask her to come over toward him. The victim responded that she was "good" and continued walking. The defendant again tried to get the victim to come toward him, grabbed her arm, and held a gun to her head. The victim stated, "Don't do this to me, I've got four kids." The defendant told the victim to "shut the f*** up," forced her to walk behind the carwash with him, made her remove her clothing, and vaginally raped her. The defendant then forced the victim to perform oral sex on him and inserted his fingers into her rectum. Thereafter, the defendant demanded money from the victim. The victim informed the defendant that she did not have any money with her but that there was some at her sister's house. The defendant told the victim that if there was no money at her sister's house, he would kill everyone in the house. The two began walking down Scenic Highway. The defendant forced the victim to walk with her head down. At one point, the victim looked up and saw a marked police unit. She ran into the middle of the road and frantically screamed, "He raped me." The police officer jumped out of his vehicle and apprehended the defendant, who attempted to flee and discard his weapon. After he was placed under arrest, the police officers searched the defendant. The officers found the victim's food stamp card and cellular telephone on his person. Additionally, the handgun discarded by the defendant was located one block from the carwash.

Following police intervention, the victim was taken to Woman's Hospital for an examination. During this examination, DNA reference samples were taken from both the victim and the defendant. A DNA profile obtained from the sperm fraction of the victim's vulva swab was consistent with being a mixture of two individuals, and the victim and the defendant could not be excluded as contributors. Further, the sperm fraction of the

victim's vaginal swab was consistent with being a mixture of two individuals including a major and minor contributor. The victim could not be excluded as the major contributor, and the defendant could not be excluded as the minor contributor.

Additionally, a DNA profile obtained from the victim's rectal swab was consistent with being a mixture of two individuals including a major and a minor contributor. The defendant could not be excluded as the major contributor, and a DNA profile could not be obtained for the minor contributor because it was present at a low concentration. A DNA profile obtained from a swab taken of the victim's shoulder contained a mixture of two individuals including a major and a minor contributor. The victim could not be excluded as the major contributor to the profile, and the defendant could not be excluded as the minor contributor.

Finally, the DNA profile obtained from the magazine of the handgun found near the carwash was tested and contained a mixture of at least two individuals. The victim and the defendant could not be excluded as contributors to the mixture. The swab taken from the handgun contained a DNA profile with a mixture of two individuals. The defendant could not be excluded as the major contributor, and the victim could not be excluded as the minor contributor.

The defendant was interviewed by detectives and gave a recorded statement. According to the defendant's statement, while he was walking down the street, the victim, who he referred to as, "Angela," told him that her vehicle was broken down. The defendant claimed that he did not know the victim, but asked for her number. The defendant maintained that he did not have a gun.

At trial, the defendant gave a different version of the events. According to his testimony, on the night of the incident, the defendant was at a club on Plank Road when the victim called and asked him to come see her at Istrouma High School. The defendant claimed that he left the club, went home to check on his wife and children, and then returned to the club before driving to Istrouma High School to meet the victim. Once the victim got inside of his truck, he drove her to Walnut Street. According to the defendant, the victim became angry and jumped out of his truck when she found out that he was married. He claimed that he followed her. The defendant stated that he was intoxicated at the time and admitted having sexual intercourse with the victim, but stated that it was consensual. He explained that he ran from the police officer because he was on parole at the time and was in possession of a gun.

ASSIGNMENTS OF ERROR

1. The trial court erred in its application of the three-step **Batson** analysis.

2. The trial court erred in granting the state's reverse-**Batson** objection and reseating jurors previously excused by the defense's peremptory challenges.

DISCUSSION

Reverse-Batson Objection

In two-related assignments of error, the defendant argues that the trial court erred in granting the State's reverse-**Batson** objection and reseating jurors who had been excused pursuant to the defendant's peremptory challenges. Specifically, the defendant contends that the trial court "never required that the [S]tate meet [its] burden of persuasion that there was purposeful discrimination exercised by the defense via step three of the [**Batson**] analysis." The defendant argues that the court combined steps two

and three of the **Batson** analysis and "impermissibly [shifted] the burden to the defense to provide that they did not engage in purposeful discrimination."

In **Batson**, 476 U.S. at 89, 106 S.Ct. at 1719, the United States Supreme Court held that the use of peremptory challenges to exclude persons from a jury based on their race violates the Equal Protection Clause. The holding in **Batson** was initially adopted by the Louisiana Supreme Court in **State v. Collier**, 553 So.2d 815 (La. 1989), and has been codified by the legislature in Louisiana Code of Criminal Procedure article 795(C) and (D).

While **Batson** discussed a prosecutor's use of peremptory challenges, its holding is equally applicable to criminal defendants. "[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." **Georgia v. McCollum**, 505 U.S. 42, 59, 112 S.Ct. 2348, 2359, 120 L.Ed.2d 33 (1992). Further, the State may invoke **Batson** where a black criminal defendant exercises peremptory challenges against white prospective jurors. **State v. Knox**, 609 So.2d 803, 806 (La. 1992) (per curiam). An accusation by the State that defense counsel has engaged in such discriminatory conduct has come to be known as a "reverse-**Batson**" challenge. **State v. Nelson**, 2010-1724 (La. 3/13/12), 85 So.3d 21, 28.

In **Batson**, the court outlined a three-step test for determining whether a peremptory challenge was based on race. Under **Batson** and its progeny, the opponent of a peremptory strike must first establish a prima facie case of purposeful discrimination. Second, if a prima facie showing is made, the burden shifts to the proponent of the strike to articulate a race-neutral explanation for the challenge. Third, the trial court then must determine if

the opponent of the strike has carried the ultimate burden of proving purposeful discrimination. **Batson**, 476 U.S. at 93-98, 106 S.Ct. at 1721-24. See also **Foster v. Chatman**, __U.S.__, __, 136 S.Ct. 1737, 1747, 195 L.Ed.2d 1 (2016).

During voir dire, the State asserted a reverse-**Batson** objection and argued that all of the defendant's peremptory challenges, eleven in total, were used on white jurors. The State further noted that ten of the defendant's eleven peremptory challenges were used on females.[4] The trial court found that defense counsel engaged in a systematic pattern of discrimination against white jurors, noting that it was "the most blatant jury selection, **Batson**-type deal that [it] ever encountered[.]" The court then instructed defense counsel to provide race-neutral reasons for the challenged jurors. After defense counsel noted that it excluded mostly women because of the nature of the offenses, the State requested that defense counsel also provide gender-neutral reasons for the challenged jurors. The trial court instructed defense counsel to provide a specific reason for its challenge of each juror. The court accepted some reasons provided by defense counsel, but granted the State's motion as to seven of the eleven challenged jurors and reseated them. One of the seven was subsequently excused by the court.

The defendant contends that the trial court impermissibly combined steps two and three of the **Batson** analysis and impermissibly shifted the burden to the defense. In step three of the **Batson** analysis, the court must determine whether the objecting party has carried his burden of proving purposeful discrimination. **Batson**, 476 U.S. at 98, 106 S.Ct. at 1724. This final step involves evaluating "the persuasiveness of the justification"

---

[4] 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).

proffered by the striking party, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." **Purkett v. Elem**, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam).

In his brief, the defendant argues that the trial court skipped over the third step of the **Batson** standard and effectively refused to accept the defense's race neutral reasons for excluding potential jurors. The defendant specifically challenges the reseating of six jurors: Thecla Lero, Nicole Butler, Charlotte Tragresser, Karen Rush, Skyler Bourgeois, and Mary Viccello. Although not mentioned in the defendant's brief, a seventh potential juror, Donna Ferguson, was also peremptorily struck by the defendant and later brought back in as an alternate juror.

According to defense counsel, the first potential juror, Thecla Lero, was challenged by the defense because she was "hesitant to realize that" she would have to rely on her feelings, rather than evidence, when deciding the credibility of a witness.

In regard to the second potential juror, Nicole Butler, defense counsel argued that Ms. Butler was challenged because she "seemed aloof and not interested in the process." In response, the trial court opined that Ms. Butler answered the questions, understood the law, and did not give any indication that she was biased against the defendant.

For the third potential juror, Charlotte Tragresser, defense counsel explained that he struck Ms. Tragresser because members of her family were victims of crime. The trial court responded that other potential jurors also had family members who were victims of crime and were not challenged by the defense.

As to the fourth potential juror, Karen Rush, defense counsel explained that she served on a jury, returned a "verdict zero," and "[he did not] want her to think about zeroing [the defendant] when she went back there." When the trial court opined that defense counsel's reason was not race-neutral, defense counsel argued that members of Ms. Rush's family were burglarized. The court again noted that other potential jurors kept by the defense were victims of crime.

The fifth potential juror was Skyler Bourgeois. According to defense counsel, when he mentioned rape, Ms. Bourgeois "seemed emotional." The court refused to accept that reason and stated that most of the potential jurors seemed emotional.

In regard to the sixth potential juror, Mary Viccello, defense counsel argued that he struck Ms. Viccello because she previously served on a jury during a rape trial. As noted by the court, an African-American juror who served on a rape trial was kept by the defense. Defense counsel acknowledged that he did keep that juror, and the court responded, "The only reason you struck [Ms. Viccello] then that I can see is because she was white." Defense counsel then argued that Ms. Viccello was also emotional and "a little too excited to get on another jury and find the client guilty." The court stated that Ms. Viccello had answered the questions, said that she could understand the law, and did not seem any more anxious to serve on a jury than the other potential jurors.

Finally, as to the seventh potential juror, Donna Ferguson, defense counsel argued that he removed her from the jury because she was robbed at gunpoint. In response, the court pointed out that Ms. Ferguson said that the robbery would not affect her ability to be fair and impartial.

The trial court ultimately found that there was no basis to strike Ms. Lero, Ms. Butler, Ms. Tragresser, Mr. Rush, Ms. Bourgeois, or Ms. Viccello. Accordingly, each was reseated on the jury, with Ms. Viccello designated as an alternate juror. In regard to Ms. Ferguson, the trial court noted that Ms. Ferguson was the fourteenth potential juror and was therefore not needed. However, Ms. Ferguson was later brought back in as an alternate juror, because Ms. Butler was ultimately excused by the court.

Contrary to the defendant's assertions, the trial court did not impermissibly shift the burden to the defense. The court considered the defendant's proffered explanations and rejected those explanations as to seven of the eleven challenged jurors. Finding no basis to strike Ms. Lero, Ms. Tragresser, Ms. Rush, Ms. Bourgeois, Ms. Viccello, Ms. Butler, and Ms. Ferguson, the court reseated them. Herein, the trial court's denial of the State's motion on four of the challenged jurors makes it clear that the trial court carefully considered the jurors' responses and the arguments advanced by each side in determining whether the reasons given by the defense were supported by the record and whether the State carried its burden of proving purposeful discrimination on each challenged juror. See **State v. Collins**, 2012-2048 (La. App. 1 Cir. 9/13/13), 2013 WL 11253329 (unpublished), writ denied, 2013-2384 (La. 3/21/14), 135 So.3d 619.

A reviewing court owes the trial court's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **State v. Handon**, 2006-0131 (La. App. 1 Cir. 12/28/06), 952 So.2d 53, 58. Considering the record before us in its entirety and the deference to be accorded to the findings of the trial court judge in this context, we conclude that the trial court correctly applied the **Batson** test and did not abuse its discretion in granting the State's reverse-**Batson** challenge

with respect to the reseated jurors. Accordingly, the defendant's assignments of error are without merit.

Sentencing Error

Under Louisiana Code of Criminal Procedure article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error. Whoever is found guilty of violating the possession of a firearm by a convicted felon provision shall be imprisoned at hard labor for not less than ten nor more than twenty years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars. La. R.S. 14:95.1B. The record, including the minutes, reveals that the trial court failed to impose the mandatory fine. Accordingly, the defendant's sentence on count three is illegally lenient. However, because the sentencing error is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See **State v. Price**, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTIONS AND SENTENCES AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0765

STATE OF LOUISIANA

VERSUS

GEORGE WRIGHT

****

McCLENDON, J., concurs.

While the trial court clearly erred in not imposing the legislatively mandated fine, given the state's failure to object and in the interest of judicial economy, I concur with the majority opinion.