NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1237

STATE OF LOUISIANA

VERSUS

BRIAN GUERIN

BJC
DHW

Judgment Rendered: February 9, 2007.

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On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 03-04-0809

The Honorable Todd Hernandez, Judge Presiding

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State of Louisiana

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Counsel for Defendant/Appellant,
Brian Guerin

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BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

JMM
McDonald, J. Agrees in affirming the convictions; Dissents as to the remand for resentencing.

CARTER, C.J.

The defendant, Brian Guerin, was originally charged by bill of information with attempted first degree murder (count one), a violation of LSA-R.S. 14:30 and 14:27, and illegal use of a weapon or dangerous instrumentality (count two), a violation of LSA-R.S. 14:94B. The defendant entered a plea of not guilty. Count one was amended to charge the defendant with attempted second degree murder, a violation of LSA-R.S. 14:30.1 and 14:27. A jury convicted the defendant of the responsive offense of attempted manslaughter (a violation of LSA-R.S. 14:31 and 14:27) on count one and as charged on count two. On count one, the defendant was sentenced to imprisonment at hard labor for eighteen years. The trial court suspended all but ten years of the sentence and ordered that the ten years be served without benefit of probation, parole, or suspension of sentence. On count two, the defendant received a sentence of five years at hard labor. The trial court ordered that the sentences be served concurrently. The defendant now appeals, urging the following assignments of error:

1. Trial counsel violated the defendant's constitutionally guaranteed right to effective assistance of counsel (Sixth Amendment).

2. The District Attorney failed to reveal **Brady** exculpatory material to the defense.

3. The trial court committed reversible error when it issued unconstitutional instructions to the jury.

4. The trial court committed reversible error when it refused to grant trial counsel's objection during voir dire to the systematic exclusion of African American female jurors and teachers.

5. The trial court committed reversible error by not sua sponte making a motion for "directed verdict" at the close of the state's case or a "judgment in arrest of verdict" at the close of the jury's conviction

We affirm the defendant's convictions; however, in light of sentencing errors discovered on both convictions, we vacate the sentences and remand the matter to the trial court for resentencing.

FACTS

On the night of March 11, 2004, at some time near midnight, Ross Barringer[1] and his friends, Chris Robert and Brent Balhoff, were admittedly riding around the streets of Baton Rouge "cutting up." Barringer, the driver, observed a trash can with a lot of trash on top of it and decided to knock it over with his vehicle. After hitting the trash can, Barringer continued down the street. Later, Barringer drove back up the same street to exit the neighborhood. As he passed the house with the knocked-over trash, Barringer observed an individual who he subsequently identified as the defendant walking toward the street and away from the house. The individual yelled, "y'all want to pick that stuff up?" Frightened, Barringer drove away. Moments later, Barringer, Robert, and Balhoff heard what was described as a loud bang or a crack sound. The rear window of the vehicle had been shattered, and Barringer had been hit in the shoulder with a bullet.

Barringer sought treatment for the injury at the Baton Rouge General Medical Center on Bluebonnet Boulevard. East Baton Rouge Parish Sheriff's officials were dispatched to the hospital to investigate. In response to police questioning, Barringer, Robert, and Balhoff initially fabricated the events that led up to the shooting, telling the officers that they accidentally knocked over the trash can. Later, however, all three young men admitted that they intentionally hit the trash can with the vehicle. Each of the young

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[1] In the transcript, "Barringer" is spelled "Baringer."

men described the shooter as a middle-aged, white male, with balding hair. They also accompanied the officers to the neighborhood, where they identified the defendant's Jolissaint Drive residence as the home from which the shooter came.

All three young men were shown a photographic lineup containing the defendant's picture. Barringer, who stated that he got a brief look at the individual under the light from the house, positively identified the defendant as the individual he saw exiting the residence. Neither Robert nor Balhoff were able to positively identify the defendant from the photographic lineup. All three young men positively identified the defendant in open court. While none of the young men actually saw the defendant fire the shot, they all testified that there was no one else on the street that night.

According to Detective Daniel Luckett of the East Baton Rouge Parish Sheriff's Office, the defendant admitted that he went outside on the night in question, but denied firing a weapon at the young men. The defendant claimed he heard the gunshot while outside investigating what he believed was a burglary attempt.

ASSIGNMENT OF ERROR #1
INEFFECTIVE ASSISTANCE OF COUNSEL

In his first assignment of error, the defendant argues he received ineffective assistance of counsel at trial. In support of this claim, the defendant recounts numerous instances in which he claims the failure of his trial counsel to properly represent him affected the outcome of his case. A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, if the record discloses the

evidence needed to decide the issue of ineffective assistance of counsel and that issue is raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Williams**, 632 So.2d 351, 361 (La. App. 1 Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So.2d 139.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient; and (2) the deficiency prejudiced him. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is prejudicial if it was so serious as to deprive the defendant of a fair trial or "a trial whose result is reliable." **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068; **State v. Felder**, 00-2887 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369-370, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

The defendant claims that his trial counsel was ineffective because he failed to recuse himself prior to the trial, failed to properly investigate the

case, failed to impeach Detective Daniel Luckett's credibility, and allowed a police officer to serve on the jury. These particular allegations of ineffective assistance of counsel cannot sufficiently be investigated from an inspection of the record alone. The issue of counsel's health involves circumstances outside of the instant record. Thus, there is no way for this court to review this claim. Each of the other allegations (failure to investigate, failure to impeach a witness, and failure to object to the police officer as a juror) involve matters of trial preparation or strategy. It is well settled that decisions relating to investigation, preparation, and strategy require an evidentiary hearing and cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond that contained in the instant record, could these allegations be sufficiently investigated.[2] Accordingly, these allegations are not subject to appellate review. **State v. Albert**, 96-1991 (La. App. 1 Cir. 6/20/97), 697 So.2d 1355, 1363-1364.

The remaining ineffective assistance of counsel claims, all of which involve instances of defense counsel's failure to object, can be reviewed on this record. First, the defendant claims his counsel should have objected during the voir dire when the prosecutor made prejudicial comments that created a favorable presumption regarding the credibility of police officers. Specifically, the defendant argues the prosecutor should not have been allowed to make remarks, such as: "the law says that every police officer that takes the stand is to be treated like every other witness[,] ... presumed to tell the truth until you hear their direct and cross examination and then you

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[2] The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 *et seq.* in order to receive such a hearing.

get to make a decision;" and "[are] my police officers starting off fairly with you?"

Upon review of the record, we do not find the prosecutor's comments to be prejudicial. Contrary to the defendant's assertions, the comments were not designed to create a presumption that police officers are more credible than other witnesses. The prosecutor's entire voir dire examination, these questions and comments included, was designed to elicit responses to indicate whether the prospective jurors harbored any bias against the police. The questions were designed to determine the qualifications of prospective jurors by testing their competency and impartiality, one of the main purposes of voir dire examination. See **State v. Stacy**, 96-0221 (La. 10/15/96), 680 So.2d 1175, 1178. Thus, there was no basis for counsel to object to such questioning. This argument lacks merit.

It is likewise clear why counsel did not object when the prosecutor urged prospective juror Woodring to advocate an acquittal should the state fail to meet its burden of proof at trial. The prosecutor was attempting to educate the jury on the various burdens of proof applicable during trial. It is difficult to see how this statement could have prejudiced the defendant in any way. Absent a showing of prejudice, an ineffective assistance of counsel claim must fall. This argument lacks merit.

Next, the defendant contends his counsel failed to assert the existence of a presumption of adverse testimony due to the state's failure to call all of the investigating police officers to testify. The defendant argues that the testimony of the other officers was under the control of the state and, when not produced, entitled the defense to the presumption that their testimony

would be adverse to the prosecution's interest. Thus, he contends, his counsel should have raised this presumption before the jury.

On the night of the shooting, Detective Luckett, Lieutenant Rice, crime scene investigator Kenny Kwan, and two uniform patrol officers went to the defendant's residence to investigate. At the trial, Detective Luckett provided testimony regarding the result of the investigation. He testified that in response to police questioning the defendant admitted that he armed himself with a weapon prior to exiting his residence but denied firing the weapon. None of the other law enforcement officers were called to testify regarding this particular statement. The defendant's argument on appeal seems to suggest that the testimony of the other officers would have been contrary to that of Detective Luckett.

The effects of legal presumptions are set forth in LSA-R.S. 15:432, which provides in pertinent part, "[a] legal presumption relieves him in whose favor it exists from the necessity of any proof... that evidence under the control of a party and not produced by him was not produced because it would not have aided him[.]" Control of a witness refers to the unavailability of the witness to the other party. Where the witness is equally available to the state and the defense, the evidence is not considered to be under the control of either party. **State v. Simms**, 381 So.2d 472, 476 (La. 1980).

The police officers in question were not under the state's exclusive control but were equally available to be called by the prosecution or the defense. Had the defense counsel felt that the officers were essential witnesses, he could have subpoenaed the witnesses himself. Consequently,

contrary to the defendant's assertions, he was not entitled to an adverse presumption instruction on the state's failure to call the officers as corroborating witnesses. The defendant's trial counsel was not ineffective in failing to assert this presumption. This argument lacks merit.

Next, the defendant argues that his trial counsel's performance fell below the necessary standard of care when he failed to object to the prosecutor's reference to the defendant's silence in response to police questioning. Specifically, the defendant cites the portion of Detective Luckett's testimony wherein he explained the events that transpired on the night of the shooting. Detective Luckett testified that he went to the defendant's residence to speak with him. The defendant told Detective Luckett that he had four guns in his home: a Colt revolver; a Glock pistol; a rifle; and a shotgun. However, Detective Luckett testified that the defendant remained silent when Detective Luckett asked if he had any other guns in the house.

In **Doyle v. Ohio**, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the use for impeachment purposes of petitioner's silence at the time of arrest and after receiving the **Miranda** warnings, violates the Due Process Clause of the Fourteenth Amendment. However, it is not every mention of the defendant's post-arrest silence that is prohibited by **Doyle**. As specified by the Louisiana Supreme Court in **State v. George**, 95-0110 (La. 10/16/95), 661 So.2d 975, 980, "*Doyle* condemns only 'the use **for impeachment purposes** of [the defendant's] silence at the time of arrest, and after receiving *Miranda* warnings....'" The prosecutor may not use the fact of an accused's exercise

of his constitutional right to remain silent, after he has been advised of this right, solely to ascribe a guilty meaning to his silence or to undermine by inference an exculpatory version related by the accused for the first time at trial. **State v. Arvie**, 505 So.2d 44, 46 (La. 1987).

As previously noted, **Doyle** protects the defendant from impermissible references to his post-arrest silence. The record in this case reflects that the questioning at issue here took place prior to the defendant's arrest. Detective Luckett testified that the defendant was not under arrest when he was initially questioned; the defendant was not even arrested that same night. Furthermore, the defendant did not remain silent; he gave a statement. Thus, there was no **Doyle** violation in this case. Defendant's trial counsel was not ineffective in recognizing that the testimony at issue was admissible. The defendant has suffered no prejudice. This argument lacks merit.

The defendant also argues that the trial counsel was ineffective in failing to object to the prosecutor's misstatement of the evidence during his closing argument. The defendant asserts that the prosecutor's reference to a .38 revolver constituted prosecutorial misconduct because there was no evidence of a .38 revolver introduced at trial.

It is well settled that closing arguments are confined to evidence admitted, lack of evidence, conclusions of fact the state or the defendant may draw therefrom, and the applicable law in the case. LSA-C.Cr.P. art. 774. In Louisiana, counsel is allowed wide latitude in choosing closing argument tactics. The trial judge has broad discretion in controlling the scope of closing argument. **State v. Casey**, 99-0023 (La. 1/26/00), 775

So.2d 1022, 1036, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

Throughout the trial of this case, the circumstantial evidence presented suggested the conclusion that the defendant owned a .38 revolver. The defendant was identified as the shooter who fired the shot that injured Barringer. Forensics expert, Jim Churchman, testified that the bullet found inside Barringer's vehicle was fired from a .38 revolver, a .357 revolver, or a 9-millimeter pistol. Investigator Kwan testified that he found .38 caliber bullets in the defendant's home. Considering the foregoing, we do not find that the prosecutor's reference to the defendant owning a .38 revolver exceeded the scope of cross-examination. However, assuming arguendo that the prosecutor erred in referring to the .38 revolver, we find the error to be harmless. The evidence in this case, although largely circumstantial, clearly proved that the defendant became enraged with the young men that ran over his trash can, armed himself with a weapon, and fired the shot that injured Barringer. Based upon the evidence presented, we are convinced that the guilty verdict rendered in this trial was surely not attributable to any reference to the .38 revolver by the prosecutor. This argument lacks merit.

The defendant argues that his trial counsel was ineffective in failing to object to the trial court's failure to provide complete instructions to the jury. Citing LSA-C.Cr.P. art. 804, the defendant argues the trial court should have instructed the jury that they were required to consider the lack of evidence in determining whether reasonable doubt existed. The defendant claims the trial court did not so instruct the jury.

Louisiana Code of Criminal Procedure article 804A(2) provides that the court shall instruct the jury that it is the jury's duty, "in considering the evidence and in applying to that evidence the law as given by the court, to give the defendant the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence in the case[.]" The record in the case reflects the trial court advised the jury to consider any lack of evidence on two separate occasions. Prior to the presentation of the evidence, in opening remarks, the trial court specifically explained to the jury that "reasonable doubt can arise from the ... lack of evidence." Later, when explaining reasonable doubt at the end of the trial, the trial court instructed the jury as follows:

> Reasonable doubt is doubt that is based on reason and common sense. It is present when, after you have carefully considered all of the evidence, you cannot say that you are firmly convinced of the truth of the charge. As to reasonable doubt, it is not a mere slight misgiving or possible doubt. You may say that it is self-defining. It is a doubt that a reasonable person can seriously entertain. It is a sensible doubt. And while it is true that the state must prove the guilt of the accused beyond a reasonable doubt, this does not mean that the state has to prove guilt of the accused to one hundred percent perfection on to an absolute certainty. The law recognizes that human nature, being what it is, that all human endeavor falls short of perfection. And, therefore, it is sufficient if after a full consideration of all of the evidence that you are convinced that the accused is guilty beyond a reasonable doubt. A reasonable doubt can arise from the evidence or the lack of evidence in this case.

Considering the foregoing, it is clear that the argument advanced by the defendant regarding incomplete jury instructions lacks merit. The trial court fulfilled the requirements of Article 804 on more than one occasion. Thus, the defendant's trial counsel was not ineffective in failing to argue incomplete or inaccurate jury instructions. This argument lacks merit.

The defendant argues his trial counsel was ineffective in failing to move for a "directed verdict" at the conclusion of the state's evidence. The defendant asserts that he was prejudiced by his counsel's failure to do so.

We note, as the state correctly asserts, the Louisiana Code of Criminal Procedure does not provide for such a motion. Louisiana Code of Criminal Procedure article 778 provides for a motion for a judgment of acquittal at the close of the state's case but only in a bench trial. A defendant is not entitled to a directed verdict of acquittal in a jury trial. See LSA-C.Cr.P. art. 778; **State v. Allen**, 440 So.2d 1330, 1332 (La. 1983); **State v. Parfait**, 96-1814 (La. App. 1 Cir. 5/9/97), 693 So.2d 1232, 1242, writ denied, 97-1347 (La. 10/31/97), 703 So.2d 20. In a jury trial, the jury is the fact finder, and it must consider all of the evidence and render the verdict. See LSA-C.Cr.P. arts. 802, 809-811. Thus, the defendant's trial counsel was not ineffective in failing to urge such a motion. This argument lacks merit.

Finally, the defendant argues his counsel was ineffective for failing to a file a motion for "judgment in arrest of verdict." Assuming the defendant is referring to a motion in arrest of judgment under LSA-C.Cr.P. art. 857, he has not alleged a valid ground upon which an arrest of judgment could have been based. The defendant's trial counsel did not err in failing to move for an arrest of judgment where valid grounds did not exist. This argument lacks merit.

ASSIGNMENT OF ERROR #2
BRADY VIOLATION

In this assignment of error, the defendant contends the state withheld or suppressed information favorable to him, in violation of open-file discovery and **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d

215 (1963). Specifically, the defendant asserts that the district attorney failed to advise the defendant that he was not a convicted felon. He argues that, although an affidavit prepared during the investigation of the offense indicated that the defendant had a prior conviction for second degree battery, his rap sheet reflected that the defendant had no prior convictions. The defendant argues the district attorney committed a **Brady** violation in failing to point out this weakness in its case to the defense. Instead, the district attorney merely provided the defendant with a copy of his rap sheet.

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the state's case against him in order to prepare his defense. If a defendant is lulled into a misapprehension of the strength of the state's case by the state's failure to fully disclose, such a prejudice may constitute reversible error. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1 Cir. 1986), writ denied, 501 So.2d 228 (La. 1987).

Under the United States Supreme Court decision in **Brady**, the state, upon request, must produce evidence that is favorable to the accused where it is material to guilt or punishment. This rule has been expanded to include evidence that impeaches the testimony of a witness, when the reliability or credibility of that witness may be determinative of guilt or innocence. **Giglio v. United States**, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Where a specific request is made for such information and the subject matter of such a request is material, or if a substantial basis for

claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the information to the trial judge for an in camera inspection. **United States v. Agurs**, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976); **State v. Cobb**, 419 So.2d 1237, 1241 (La. 1982).

The test for determining materiality was firmly established in **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) and has been applied by the Louisiana Supreme Court. See **State v. Rosiere**, 488 So.2d 965, 970-971 (La. 1986). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383.

First, the record reflects the state fulfilled all of its discovery obligations. As the defendant admits in his brief, the state did, in fact, provide the defendant with a copy of his rap sheet containing information regarding his criminal history. Furthermore, the defendant does not in anyway show how the information regarding his lack of a prior conviction was relevant or material. The defendant does not provide any argument or elaboration on how the alleged breach of discovery procedures by the state specifically prejudiced his case. The defendant was not charged with any offense that required, as an element, a prior conviction. Thus, there is no reasonable probability that, had the state "pointed" this information out to the defense, the result of the proceeding would have been different. Even if a discovery or **Brady** violation did occur, it would not constitute reversible

error without actual prejudice to the defendant's case. See **State v. Francis**, 00-2800 (La. App. 1 Cir. 9/28/01), 809 So.2d 1029, 1033. Furthermore, the record does not reflect any manner in which the defendant might have been lulled into a misapprehension of the strength of the state's case. Because the defendant has not shown any prejudice on this issue, we find that this assignment of error is without merit.

ASSIGNMENT OF ERROR #3
UNCONSTITUTIONAL JURY INSTRUCTIONS

In this assignment of error, the defendant contends the trial court erred in issuing unconstitutional, incomplete instructions to the jury. Specifically, the defendant contends the trial court erred in failing to instruct the jury that it must, or could, consider the lack of evidence.

Absent an objection during the trial, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. See LSA-C.Cr.P. arts. 801C & 841. In the present case, the record does not reflect that defendant made a contemporaneous objection to the jury charges on the basis of the alleged failures now asserted in this assignment of error. Accordingly, the issue raised in this assignment of error is not properly preserved for appellate review. **State v. Tipton**, 95-2483 (La. App. 1 Cir. 12/29/97), 705 So.2d 1142, 1147. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #4
BATSON CHALLENGE

In his fourth assignment of error, the defendant, a Caucasian male, contends the trial court erred in overruling his objection to the prosecutor's racially discriminatory use of peremptory challenges to exclude prospective

African-American jurors in violation of **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[3] More specifically, the defendant argues that the prosecutor was allowed to strike all of the "educated black people" from the jury. The defendant argues that the peremptory exclusion of black teachers proves a pattern of racial discrimination by the state. In response, the state avers that legitimate race-neutral reasons were provided for the exclusion of the prospective jurors in question, and thus, the trial court correctly denied the defendant's **Batson** challenge.

When a defendant makes a **Batson** challenge, claiming the state has used peremptory challenges in a manner that violates the Equal Protection Clause, the defendant must first make a prima facie case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on account of race. See **Batson**, 476 U.S. at 96, 106 S.Ct. at 1723; see also LSA-C.Cr.P. art. 795C. If the defendant fails to make such a showing, then the **Batson** challenge fails. However, if a prima facie case of discrimination is successfully established, the burden of production then shifts to the state to come forward with a race-neutral explanation for its peremptory challenges. This step need not demand an explanation that is persuasive or even plausible, and unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. **Purkett v. Elem**, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 1770-1771, 131 L.Ed.2d 834 (1995) (*per curiam*). Once a race-neutral explanation is

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[3] A white defendant has standing to challenge the use of peremptory challenges to exclude black jurors. **Powers v. Ohio**, 499 U.S. 400, 406, 111 S.Ct. 1364, 1368, 113 L.Ed.2d 411 (1991).

tendered, then the trial court must determine whether the defendant has established purposeful racial discrimination. **Purkett**, 514 U.S. at 768, 115 S.Ct. at 1771; **State v. Hobley**, 98-2460 (La. 12/15/99), 752 So.2d 771, 782, cert. denied, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed.2d 61 (2000). The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. See **Hernandez v. New York**, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991).

During voir dire in this case, two panels of prospective jurors were questioned. During the second panel, the defendant urged a **Batson** objection alleging that the state was utilizing its peremptory challenges in a discriminatory manner to exclude African Americans from the jury. In response, the trial court noted that the state exercised five peremptory challenges on the second panel. Of the five, three were against black females.

Thereafter, without a ruling on whether a pattern of racial discrimination had been established, the trial court asked the prosecutor to provide explanations for the peremptory challenges against the three black females. The prosecutor explained that he excluded each of the questioned jurors because they were educators and not based upon their race. He further noted that he also excluded other non-black educators. "The same way I bumped Ms. Longeway, because she was a teacher; and the same way I bumped Ms. Webb, because she's a teacher; the same way I'm going to bump Ms. Wiggins, because they're a teacher." As justification for the exclusion of educators, the prosecutor explained, "[t]hey are taught to rehabilitate as opposed to punish and I--I don't believe that they're a good

dynamic[.]" The trial court accepted the state's reasons as race-neutral justifications for the challenges and denied the **Batson** objection. No further **Batson** objections were urged.

Our careful review of the entire record of the voir dire proceedings fails to disclose any error in the trial court's ruling as to the **Batson** objection. Since the preliminary issue of whether the defendant made a prima facie showing is moot as the prosecutor offered race-neutral reasons for the peremptory challenges and the trial court ruled on the ultimate question of intentional discrimination, we will begin with the second step under the **Batson** analysis.

The reasons given by the state for exercising the peremptory challenges of the prospective jurors in question are facially race neutral. Thus, we find that the state sustained its burden of articulating race-neutral reasons for exercising the peremptory strikes at issue. In the third step of the **Batson** analysis, we must next determine whether the reasons are substantial and whether they are substantiated by the record. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 289. The proper inquiry in this final stage of the **Batson** analysis is not whether the state has disproved the existence of purposeful discrimination suggested by a defendant's prima facie case; rather, the question is whether a defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, is strong enough to persuade the trier-of-fact that such discriminatory intent is present. **State v. Woods**, 97-0800 (La. App. 1 Cir. 6/29/98), 713 So.2d 1231, 1235, writ denied, 98-3041 (La. 4/1/99), 741 So.2d 1281.

We reject the defendant's claim that the state's reasons for striking the jurors in question were not race neutral. The defendant cites the necessary factors to show a prima facie case of discrimination listed by the court in **State v. Royal**, 01-438 (La. App. 5 Cir. 1/15/02), 807 So.2d 962, 965, writ denied, 02-0532 (La. 1/10/03), 834 So.2d 436. We note the very first **factor** enumerated in **Royal**, that the prosecutor's peremptory challenges be directed at members of cognizable racial and gender groups, is lacking in this case. Teachers do not represent a cognizable racial or gender group. The fact that some African Americans were challenged, as part of the exclusion of all teachers, is insufficient to prove purposeful discrimination based upon race. It is apparent from the record before us that the trial court weighed the defendant's **Batson** claim against the state's race-neutral reason for excluding the prospective jurors in question and concluded that the peremptory challenges exercised against these jurors were not motivated by race. A trial judge's determination pertaining to purposeful discrimination rests largely on credibility evaluations, and so, his findings are entitled to great deference by the reviewing court. **Batson**, 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21; **State v. Neal**, 00-0674 (La. 6/29/01), 796 So.2d 649, 654, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). The trial court did not err in denying the defendant's **Batson** objection. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #5
TRIAL COURT'S FAILURE TO MOVE FOR DIRECTED VERDICT OR JUDGMENT IN ARREST OF VERDICT

In his final assignment of error, the defendant contends the trial court committed reversible error in failing to move, sua sponte, for a "directed

verdict" at the close of the state's case or for an arrest of judgment at the time of the conviction.

As previously noted, a trial court has no authority under LSA-C.Cr.P. art. 778 to grant a directed verdict in a criminal jury trial. The trial judge is allowed to enter a judgment of acquittal only in a criminal bench trial. This assignment of error clearly lacks merit. Furthermore, for the same reasons expressed earlier, the defendant's claim that the trial court should have moved for an arrest of judgment also lacks merit. The defendant has not asserted a ground under which he is entitled to an arrest of the judgment. Sufficiency of the state's evidence is not a ground for an arrest of the judgment. This argument lacks merit.

For all of the foregoing reasons, this assignment of error lacks merit.

SENTENCING ERRORS

As instructed by LSA-C.Cr.P. art. 920(2), a review has been made of the record in this case, and sentencing errors have been discovered. It is clear from the record that the trial judge deviated from the statutory penalties provided for both counts one and two.

On count one, the defendant was convicted of attempted manslaughter. The manslaughter statute provides for a sentence of not more than forty years of imprisonment at hard labor. See LSA-R.S. 14:31B. Pursuant to LSA-R.S. 14:27D(3), governing attempted offenses, the defendant was to be fined or imprisoned, or both, in the same manner as for the offense attempted, such fine or imprisonment not to exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both. Neither of the aforementioned statutes

authorized the trial judge to impose any part of the attempted manslaughter sentence without benefit of parole. Nevertheless, the record reflects that the trial judge ordered that the unsuspended portion (ten years) of the defendant's sentence on count one be served without benefit of parole.

The trial court also imposed an illegal sentence on count two. LSA-R.S. 14:94B provides that the offense of illegal use of a weapon is punishable by imprisonment at hard labor for not more than two years. Nevertheless, the trial court sentenced the defendant to five years on this count. Because the sentence imposed exceeds the statutory maximum for this offense, the sentence is illegal and must be vacated.

Correction of both of these sentences lies within the trial court's sentencing discretion; therefore, correction must be by remand for resentencing, rather than by an amendment by this court. Accordingly, we vacate the sentences imposed and remand this matter to the trial court for resentencing in accordance with law and the views expressed herein. See **State v. Haynes**, 04-1893 (La. 12/10/04), 889 So.2d 224, 224 (*per curiam*).

For the foregoing reasons, the defendant's convictions are affirmed. The sentences are vacated, and the matter is remanded to the trial court for resentencing.

CONVICTIONS AFFIRMED; SENTENCES VACATED; REMANDED FOR RESENTENCING.