NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 1069

STATE OF LOUISIANA

VERSUS

FREDERICK REED

Judgment Rendered: May 2, 2008

* * * * * *

On appeal from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Suit Number 423147

Honorable F. Hugh Larose, Presiding

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Hughes, Jr., concurs.

GUIDRY, J.

The defendant, Frederick Reed, was charged by bill of information with distribution of cocaine, a violation of La. R.S. 40:967(A)(1). The defendant pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant was sentenced to twenty (20) years imprisonment at hard labor. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

On March 23, 2005, shortly before midnight, Agent Henry Fraijo, with the Lafourche Parish Sheriff's Office, was working undercover in Morristown (the Raceland community) posing as a drug user. Agent Fraijo, along with two female confidential informants, drove to the defendant's residence. The confidential informants knew the defendant. Agent Fraijo's truck was equipped with a hidden camera. From a distance, Sergeant John Champagne, also with the Lafourche Parish Sheriff's Office, monitored an audio transmitter that Agent Fraijo had on his person.

When the defendant approached the truck, one of the confidential informants told him that they needed drugs. Agent Fraijo gave the defendant $60. The defendant went back to his residence briefly, returned to the truck, and handed Agent Fraijo three rocks of crack cocaine.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that he should be granted a new trial because review cannot be made of his Batson challenge of prospective juror Derrick Williams. Specifically, the defendant contends that since there are no jury questionnaires available for review, the State's reasons for excusing Mr. Williams cannot be verified. Further, the questionnaire responses of

Mr. Williams cannot be compared to those of other jurors to determine if he was singled out because of his race.[1]

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the 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. The second step of this process does not demand an explanation that is persuasive, or even plausible. At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995).

Louisiana has largely codified the Batson ruling in La. C.Cr.P. art. 795, which provides in pertinent part:

> C. No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.
>
> D. The court shall allow to stand each peremptory challenge exercised for a racially neutral reason either apparent from the examination or disclosed by counsel when required by the court. The

[1] The jury questionnaires were not made a part of the record. A motion to supplement the appellate record was filed (apparently by the defendant) in the 17th JDC to supplement the record with the jury questionnaires. The 17th JDC Clerk of Court informed this court by letter that he had researched and found that his office did not keep any jury questionnaires. Accordingly, there are no jury questionnaires for this court to review.

provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror.

E. The court shall allow to stand each peremptory challenge for which a satisfactory racially neutral reason is given. Those jurors who have been peremptorily challenged and for whom no satisfactory racially 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.

A trial judge's findings pertaining to purposeful discrimination turn largely on credibility evaluations; such findings ordinarily should be entitled to deference by a reviewing court. Reasons offered to explain the exercise of peremptory challenges should be deemed race neutral unless a discriminatory intent was inherent in those reasons. See State v. White, 96-0592, pp. 3-4 (La. App. 1st Cir. 12/20/96), 686 So. 2d 96, 98-99.

During voir dire, the State asked the third and final panel of prospective jurors if they or any close family member had been arrested or convicted of a crime. Derrick Williams, a prospective black juror, responded that his uncle, Brian Lawrence, had a pending drug charge in Lafourche Parish for which he had not pled guilty. Mr. Williams knew nothing else about his uncle's case.

Following voir dire of the third panel, a bench conference was held. The State used a peremptory challenge to strike Mr. Williams, and the following colloquy took place:

MR. STENTZ [defense counsel]:
I'm going to raise a challenge for that obviously.

THE COURT:
You're going to have to articulate a reason.

MR. ROUSSE [prosecutor]:
I'm assuming he's talking about [Batson].

MR. STENTZ:
Yes.

THE COURT:
Yes.

MR. ROUSSE:
It requires a showing that if there has been -

THE COURT:
Yes, it has to be a prima facia [sic] showing.

MR. ROUSSE:
Right. There has been none. This is the first African American stricken from the jury. The basis is he's single, he's young, he has no job and he owns no property. We would exercise a strike based on this.

THE COURT:
And if I also recall he has an uncle awaiting trial.

MR. ROUSSE:
Brian Lawrence is his uncle who has several charges in our computer.

MR. STENTZ:
He didn't even know what was going on with that.

THE COURT:
So, that's stricken. . . .

Following selection of all twelve jurors and the alternate juror, the following colloquy took place:

THE COURT:
All right, Mr. Stentz, you want to address the Court at this time?

MR. STENTZ:
Yes. Concerning the excusal of Mr. Derrick Williams. I asked Mr. Rousse to give me his reasons for his peremptory challenge. The reason for all of this is the [Batson] challenge. Mr. Williams is a minority. He's African American and I asked Mr. Rousse to give me his reasoning behind excusing him. There was no substantial enough - in my finding, there was [sic] no substantial enough reasons that would give rise for the cause. Therefore, I only saw the excusal of Mr. Williams as being racially based.

MR. ROUSSE:
Your Honor, first of all, there was no evidence that there was any striking of any jurors totally based on race. Mr. Williams happens to be African American. It's the first challenge used by the State on an individual who happens to be African American. The grounds for his striking are that his age, this is a drug case, his age, the fact that he's not married, the fact he has no children and he owned no

property. And in the State's opinion it was well within its authority to exercise a peremptory challenge based on those as well as the fact that he testified that his uncle had pending drug charges in Lafourche Parish at this time.

MR. STENTZ:
I get rebuttal?

THE COURT:
Yes, sir.

MR. STENTZ:
I think that you look at the large amount of the arrests that are made based on drugs in this parish, probably throughout the whole state, a lot of those people are very young between, you know, ages eighteen and probably thirty. They don't own any property. They do have a low education level and they're also black. So, that being just excludes the race, I think Mr. Williams is still fitting a profile that Mr. Rousse is looking for to exclude him. And the fact that he doesn't mention race, I think Mr. Williams is still part of that sector that Mr. Rousse is looking to exclude and race happens to be part of that.

In denying the defendant's Batson challenge, the trial court ruled in pertinent part:

> Let the record reflect that . . . the defendant had raised a challenge to . . . a peremptory exception exercised by the State of Louisiana to strike juror number three on the last panel.... A defendant's [Batson] challenge to a peremptory strike requires a three-step inquiry.
>
> First, the trial court must determine whether the defendant had made a prima facia [sic] showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made the burden then shifts to the prosecutor to present a race neutral explanation for striking the juror in question. The prosecutor must present a comprehensible reason. . . . Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination....
>
> ... In order to reach the third step, the Court must first be satisfied that the first two steps obviously have been met.
>
> The first step in this matter is that the defendant must make a prima facia [sic] showing that the prosecutor exercised a peremptory challenge on the basis of race. In this matter, the Court finds that the State has utilized two peremptory challenges; the first being against juror number eleven on panel number two, who was a white male; the second being on the final panel, number three on juror number three who was a black male. This does not in any way evidence to this Court any systematic striking based on race. The Court would also note for the record that there has been no showing that the District Attorney's Office in this Court has had a repeated basis such that of racial discrimination in exercise of its peremptory challenges so that I could look at other cases. There's been no argument. The only

> argument has been in this particular case. The motivation has been one of racial discrimination which in this particular case the State has used two exceptions, one against a whi[t]e male and the other against a black male. I make no such finding.
>
> ... So, I'm going to first of all find that the first part of [Batson] is not met. And for that reason, the motion is denied.

We agree with the trial court's ruling. The appropriate inquiry is whether the trial court committed clear error in finding the defendant failed to make a prima facie showing of discriminatory intent in the State's exercise of its peremptory challenge.[2] State v. Allen, 03-2418, p. 18 (La. 6/29/05), 913 So. 2d 788, 802, cert. denied, 547 U.S. 1132, 126 S.Ct. 2023, 164 L.Ed.2d 787 (2006). Johnson v. California, 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) makes clear that the burden of production on the first Batson step is squarely on the defendant. State v. Draughn, 05-1825, p. 26 (La. 1/17/07), 950 So. 2d 583, 603, cert. denied, __ U.S. __, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007). The combination of factors needed to establish a prima facie case are: (1) the defendant must demonstrate that the prosecutor's challenge was directed at a member of a cognizable group; (2) the defendant must then show the challenge was peremptory rather than for cause; and

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[2] In Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991), the Supreme Court stated: "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." After the trial court in the instant matter found that the defendant did not make a prima facie showing of discriminatory intent, it briefly touched on the second and third steps of the Batson analysis:

> I will, however, further discuss the fact that the State has in this Court's opinion expressed a plausible reason for the exercise of that challenge, demographics as to the fact that he's single, nonproperty owner and no children being excluded, the Court is much more persuaded by the fact that, that particular juror had an uncle, a close family member, who is presently undergoing prosecution for a drug related offense in this Court or in the 17th JDC. So, I'm going to first of all find that the first part of [Batson] is not met. And for that reason, the motion is denied. But, further, the Court would find if the challenge was plausible and as such would have difficulty ruling in favor of the defendant had it reached a third portion of the challenge.

Despite the State's offering a race-neutral explanation, the trial court did not reach the third step of the Batson analysis. Accordingly, the rule of Hernandez is inapplicable because there was no ruling on the ultimate question of intentional discrimination. See State v. Allen, 03-2418, pp. 17-18 (La. 6/29/05), 913 So. 2d 788, 802, cert. denied, 547 U.S. 1132, 126 S.Ct. 2023, 164 L.Ed.2d 787 (2006).

(3) finally, the defendant must show circumstances sufficient to raise an inference that the prosecutor struck the venire person on account of being a member of that cognizable group. State v. Givens, 99-3518, p. 5 (La. 1/17/01), 776 So. 2d 443, 449. Regarding this third factor, the defendant may offer any facts relevant to the question of the prosecutor's discriminatory intent to satisfy this burden. Such facts include, but are not limited to, a pattern of strikes by a prosecutor against members of a suspect class, statements or actions of the prosecutor (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 that is alleged to be the victim of purposeful discrimination. State v. Duncan, 99-2615, p. 14 (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).

While the first two factors were clearly met (Mr. Williams is black and the State peremptorily struck him), the defendant failed to offer any evidence that showed circumstances sufficient to raise an inference that the prosecutor struck Mr. Williams on account of his being a member of a particular race. In fact, the defendant offered no evidence at all, but merely alleged that a large amount of drug arrests made in Lafourche Parish, if not the whole state, involve young, uneducated black people who do not own property. From our review of the proceedings, it is quite apparent that the trial court found the peremptory strike exercised by the State to be proper because Mr. Williams had an uncle who was facing pending charges in the 17th Judicial District Court. The fact that a prospective juror has a close family member who is imprisoned and being prosecuted by the state is a sufficient basis for peremptorily excusing the prospective juror. State v. Heard, 40,284, p. 12 (La. App. 2d Cir. 12/14/05), 917 So. 2d 658, 666, writs denied, 06-0188 (La. 6/16/06), 929 So. 2d 1285 and 06-0781 (La. 10/6/06), 938 So. 2d 71

(citing State v. Manning, 03-1982 (La. 10/19/04), 885 So. 2d 1044, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005)); See also State v. Handon, 06-0131, p. 6 (La. App. 1st Cir. 12/28/06), 952 So. 2d 53, 58; State v. Anderson, 34,670, p. 8 (La. App. 2d Cir. 5/9/01), 786 So. 2d 917, 924.

Thus, we find it immaterial that the jury questionnaires have not been made a part of the appellate record, since the State's striking of Mr. Williams, the only black prospective juror struck by the State, because he had an uncle with pending drug charges in Lafourche Parish, was a valid race-neutral explanation. Hence, the trial court did not commit clear error in finding the defendant failed to make a prima facie showing of discriminatory intent in the State's exercise of its peremptory challenge of prospective juror Mr. Williams. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that the evidence was insufficient to support the conviction. Specifically, the defendant contends that the State failed to prove his identity as the suspect involved in the drug transaction with Agent Fraijo.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr. P. art. 821(B); State v. Ordodi, 06-0207, p. 10 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial,

for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 01-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. State v. Hughes, 05-0992, pp. 5-6 (La. 11/29/06), 943 So. 2d 1047, 1051.

The proper mechanism to challenge identification testimony is by way of a motion to suppress. State v. Sylvas, 558 So. 2d 1192, 1198 (La. App. 1st Cir. 1990). The defendant did not file a motion to suppress identification. Accordingly, the defendant is precluded from attacking the suggestiveness of the photographic lineup or the in-court identifications. See La. C.Cr. P. art. 703(F); State v. Naas, 409 So. 2d 535, 547 (La. 1981) (on rehearing), cert. denied, 457 U.S. 1119, 102 S.Ct. 2933, 73 L.Ed.2d 1332 (1982). We nevertheless address the sufficiency of the defendant's identification under the Jackson standard of review.

The defendant asserts that Agent Fraijo's identification of him was unreliable because he had only a brief time to view the subject "under very dark and adverse conditions." One of the confidential informants was upset because she wanted drugs and, according to the defendant, Agent Fraijo's attention was focused on keeping the confidential informants calm. The defendant further claims that when Agent Fraijo made the photographic identification, he knew that the defendant's picture would be included in the lineup. Also, according to the defendant, it was impossible for Sergeant John Champagne, the case agent for the

investigation, to make a positive identification because he only viewed the drug transaction on a "tape of very poor quality."[3]

Agent Fraijo testified that the two female confidential informants who were with him (Fraijo) when he made the drug buy knew the defendant from past drug deals and identified the defendant by name before they drove to the defendant's trailer. During the drug buy, Agent Fraijo was in the driver's seat. The defendant leaned through the passenger side window. One of the confidential informants told the defendant they needed drugs. Agent Fraijo gave the defendant $60. The defendant went back to his trailer, returned a short while later, and again leaned back into the vehicle. Agent Fraijo reached out his hand, and the defendant placed three rocks of crack cocaine into Agent Fraijo's hand. At this point, Agent Fraijo turned on the interior light of the vehicle to get a clear look at the defendant and to verify that the drugs were real.

Our review of the videotape also reveals that the defendant turned on a very bright, spotlight-type light on his trailer both times he approached Agent Fraijo's vehicle. As such, there was ample light to see the defendant's face. Also, immediately following the transaction, Agent Fraijo turned on his headlights before backing out of the driveway. The defendant began walking away, but then turned around to speak to one of the informants. At this point on the videotape, the defendant's facial features, while not entirely illuminated, were sufficiently clear to identify him.

Agent Fraijo identified the defendant in court as the person from whom he purchased the crack cocaine. Agent Fraijo was also shown a six-person photographic lineup of possible suspects five days after the drug transaction that

[3] This court's initial attempt to view this drug transaction, which was recorded on an 8mm tape (State Exhibit #1, Video Surveillance Tape) was unsuccessful. Pursuant to this court's order, the district court supplemented the record with a videotape copy (VHS tape) of the 8mm tape, designated as "Post Trial Stipulation #1."

included the defendant. Agent Fraijo identified the defendant as the person from whom he purchased the crack cocaine in the photographic lineup.

The drug transaction was videotaped by a hidden camera in the undercover vehicle and the videotape was played for the jury. Sergeant Champagne, who also testified at trial, stated that during the drug transaction, he was at a distance monitoring an audio transmitter that was attached to Agent Fraijo's person and that he viewed the videotape when it was removed from the undercover vehicle. In court, Sergeant Champagne identified the defendant as the person on the videotape who sold the crack cocaine to Agent Fraijo.

In finding the defendant guilty, it is clear the jury rejected the defense's theory of misidentification. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So. 2d 78, 83.

We find that the State's evidence negated any reasonable probability that the defendant was not properly identified as the person selling crack cocaine to Agent Fraijo. Agent Fraijo identified the defendant in court as the person who sold him drugs and from a photographic lineup. Furthermore, the guilty verdict returned in this case indicates that the jury believed the testimony of the State's witnesses. See State v. Andrews, 94-0842, p. 7 (La. App. 1st Cir. 5/5/95), 655 So. 2d 448, 453.

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's unanimous verdict. We are convinced that viewing the evidence in the light most favorable to

the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of distribution of cocaine.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant contends that the verdict sheet was improper because it was not signed by the foreman or the judge.[4] The defendant further argues that his conviction must be reversed because the verdict was not responsive to the bill of information. Specifically, the defendant contends that the guilty verdict did not clearly convey the intention of the jury.

Regarding the signing of the verdict sheet, we note that only a copy of the front of the verdict sheet is contained in the record. A copy of the back page of the verdict sheet has not been made a part of the record. Based on only the front of the verdict sheet, therefore, it is not possible to know whether or not the back of the verdict sheet was signed. Accordingly, the defendant's statement in his brief that the verdict sheet "was not signed by the foreman or the judge" appears to be a factual assertion not supported by the record before us. In any event, when the guilty verdict was announced, the deputy minute clerk read, in pertinent part, the following from the verdict form: "State of Louisiana versus . . . Frederick Reed, distribution of cocaine under Docket Number 423147, we the members of the jury find the defendant guilty, foreperson, Drew Rivet, dated September 27, 2006." Also, the record minutes indicate that the verdict form read, in pertinent part, as follows: "We the members of the jury, find the defendant guilty, signed by the foreperson Drew Rivet on September 27, 2006." Moreover, the jury was polled in

[4] When a verdict has been agreed upon, the foreman shall write the verdict on the back of the list of responsive verdicts given to the jury and shall sign it. There shall be no formal requirement as to the language of the verdict except that it shall clearly convey the intention of the jury. La. C.Cr. P. art. 810.

the presence of the defendant and defense counsel. Thus, we find the record clearly indicates that the foreperson signed the verdict sheet.

We further find that the guilty verdict clearly conveyed the intention of the jury. The verdict sheet read as follows:

DISTRIBUTION OF COCAINE

Under #423147, we, the members of the jury, find the defendant:

1. Guilty
2. Guilty of Attempted Distribution of Cocaine
3. Guilty of Possession of Cocaine
4. Guilty of Attempted Possession of Cocaine
5. Not Guilty

Choice number one read "Guilty," not "Guilty of Distribution of Cocaine." Accordingly, when a unanimous jury found the defendant "guilty," it clearly indicated guilty of the charged offense. Had the jury found the defendant guilty of a responsive verdict, then such a verdict would have been indicated as guilty plus the modifying language, as required by choices two, three, and four. The bill of information specifically charged the defendant with distribution of cocaine. The jurors were polled, and each indicated that his or her verdict was guilty. The jury was also provided with the applicable responsive verdicts. The jury's verdict was correct in form and responsive to the bill of information. Since the verdict returned clearly conveyed the intention of the jury, the trial judge did not err in accepting the verdict of "guilty." See La. C.Cr.P. arts. 810, 811 and 814(A)(48). See Sylvas, 558 So. 2d at 1200-01; State v. Louis, 496 So. 2d 563, 567 (La. App. 1st Cir. 1986). This assignment of error is without merit.

CONCLUSION

Thus, for the foregoing reasons, we find the jury's verdict to be correct and accordingly affirm Frederick Reed's conviction and sentence for the crime of distribution of cocaine in violation of La. R.S. 40:967(A)(1).

CONVICTION AND SENTENCE AFFIRMED.