NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1518

STATE OF LOUISIANA

VERSUS

SHAWN DRAKE

DATE OF JUDGMENT: MAR 2 5 2011

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 09-02-0168, SECTION 1, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE ANTHONY J. MARABELLA, JR., JUDGE

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.

Defendant, Shawn Drake, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (Count One), and felon in possession of a firearm, a violation of La. R.S. 14:95.1 (Count Two). Defendant entered a plea of not guilty and was tried before a jury. On Count One, the jury determined that defendant was guilty of the responsive offense of manslaughter, in violation of La. R.S. 14:31, and on Count Two, the jury returned a verdict of guilty as charged.

The State instituted habitual offender proceedings against defendant, seeking to have him adjudicated a second-felony habitual offender. Following a hearing, the trial court found defendant to be a second-felony habitual offender and sentenced defendant to a term of twenty years at hard labor for his conviction of manslaughter (Count One). The trial court also sentenced defendant to a term of ten years at hard labor without the benefit of probation, parole, or suspension of sentence, and a $1,000.00 fine, for his conviction of felon in possession of a firearm (Count Two), to be served consecutively with his manslaughter sentence.

In a prior appeal to this court, defendant argued in pertinent part (in his first counseled assignment of error), that the trial judge erred in not finding a pattern of racially-motivated peremptory challenges by the prosecutor when the prosecutor utilized eight of his peremptory challenges to excuse African-Americans from the jury.[1] This court found no merit in defendant's assignments of error and affirmed defendant's convictions and sentences. **State v. Drake**, 2008-0002 (La. App. 1st

[1] Defendant raised two additional counseled assignments of error and three pro se assignments of error that are not relevant to the instant appeal.

Cir. 5/2/08) (unpublished). Subsequently, defendant sought writs with the Louisiana supreme court. The supreme court granted writs, reversed this court's decision, and remanded the case to the trial court for the State to offer race-neutral reasons for exercising eight peremptory challenges to exclude African-American prospective jurors, and for the trial court to rule on the question of whether race played a role in the selection of the jury. **State v. Drake**, 2008-1194 (La. 1/30/09), 2 So.3d 416, 417 (per curiam). The supreme court denied the State's application for a rehearing. **State v. Drake**, 2008-1194 (La. 4/13/09), 5 So.3d 154. On remand, the trial court found the prosecutor's reasons to be non-discriminatory and concluded that race did not play a role in the selection of the jury.

Defendant now appeals, assigning error to the trial court's denial of the right to view the prosecutor's notes made during *voir dire* and the right to have the prosecutor state, under oath, the basis for peremptory challenges and be subject to cross-examination. Defendant further assigns error to the trial court's ruling that the reasons offered by the prosecutor for the excusal of prospective jurors did not demonstrate purposeful racial discrimination. For the following reasons, we affirm.

STATEMENT OF FACTS

On May 29, 2002, Ashley Lee and her boyfriend, Trey Brown, had an argument at the Suburban Apartments in Baton Rouge that escalated into a fight regarding Lee's activities with another man. Following this incident, Lee's brother, Lionel Douglas, arrived at the Suburban Apartments, and knocked on the door of an apartment where defendant was visiting an acquaintance. Douglas and

defendant left, but returned a short time later. When the two men returned, there were a good number of people milling about in a common area near the parking lot of the complex.

Tanisha Brown, the sister of Trey Brown, called to Lee from outside her first-floor apartment. Tanisha accused Lee of calling Douglas, her brother, to come over and fight Trey. According to Tanisha, Lee was standing on a second-floor balcony when she responded by cursing and threatening her. At that time, Douglas and Trenton Payne began arguing in the parking lot. Defendant was with Douglas.

The verbal argument escalated into a physical confrontation involving defendant and Marcus Ghoram, who had accompanied Payne to the complex. Lee and her sister, Nina, were also involved in this confrontation. At that same time, Douglas and Payne were also fighting.

Soon thereafter shots were fired. Witnesses saw defendant pointing a gun at the crowd. More shots were fired and Ghoram fell to the ground, while defendant fled. As a result of receiving a gunshot wound to his chest, Ghoram died. Defendant was subsequently charged with second degree murder.

Defendant did not testify at trial.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In the first assignment of error, defendant contends that the trial court erred in ruling that the trial prosecutor was not required to testify under oath or provide his *voir dire* notes to the defense. In that regard, defendant argues that race-neutral reasons given by the prosecutor should not have been considered credible because they were not reflective of his intent at the time of the peremptory strikes.

Defendant contends that without the right to cross-examination and access to the prosecutor's notes, the right to an inquiry into the prosecutor's use of peremptory challenges to exclude members of defendant's race from the jury was impeded by time and the right was, therefore, futile.

In the second assignment of error, defendant argues that the trial court erred in finding that the reasons offered by the prosecutor for the excusal of eight African-American prospective jurors by peremptory challenges did not demonstrate purposeful racial discrimination in the selection process. Defendant concludes that he and the prospective jurors were denied equal protection under the Equal Protection Clause. Though challenged below, on appeal defendant concedes that the responses of prospective jurors, Leonard Paige and Monica Atkins, showed a valid basis for a peremptory excusal by the prosecution and a lack of pretext, but he still contests the validity of the basis for the excusal of the other six African-American prospective jurors. Defendant contends that the responses of those African-American prospective jurors did not differ substantially from those of the Caucasian members of the venire. Defendant further notes that several of the prospective jurors had similar backgrounds and experiences. Defendant concludes that the prosecutor's reasons should have been found implausible by the trial court.

In **Batson v. Kentucky**, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986), the Supreme Court pronounced that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race…." If the defendant makes a prima facie showing of racial discrimination (step one), the burden shifts to the State to come forward with a non-racial

explanation for striking the juror (step two). **Id.**, 476 U.S. at 97, 106 S.Ct. at 1723. The explanation need not rise to the level of a challenge for cause; however, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character. **Hernandez v. New York**, 500 U.S. 352, 362-63, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395 (1991). The explanation must be clear, racially neutral, reasonably specific, legitimate, and related to the case at bar. **State v. Collier**, 553 So.2d 815, 820 (La. 1989). In the third step of a **Batson** inquiry, it is the trial court's task to evaluate "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." **Rice v. Collins**, 546 U.S. 333, 338, 126 S.Ct. 969, 974, 163 L.Ed.2d 824 (2006), quoting **Purkett v. Elem**, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam).

The trial court is in the best position to determine whether an attorney's explanation for exercising a peremptory challenge is non-racial. In its evaluation, the court must determine "whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." **State v. Williams**, 610 So.2d 991, 1002 (La. App. 1st Cir. 1992), writ denied, 617 So.2d 930 (La. 1993), quoting **Hernandez**, 500 U.S. at 359, 111 S.Ct. at 1866. The reasons offered to explain the exercise of the peremptory challenges should be deemed race-neutral unless a discriminatory intent is inherent in those reasons. **Hernandez**, 500 U.S. at 360, 111 S.Ct. at 1866. Once appropriate reasons are set out for the challenge, then the trial court must decide if the defendant has established purposeful discrimination.

Hernandez, 500 U.S. at 363, 111 S.Ct. at 1868. This largely consists of a ruling on the credibility of the attorney exercising the challenge. A trial judge who observed the questioning of the prospective jurors is in the best position to discern the truthfulness of the prosecutor's explanation. Thus, a trial court's decision on the issue of a prosecutor's intent is to be afforded great deference on appeal. **Hernandez**, 500 U.S. at 364, 111 S.Ct. at 1868-69.

In the instant case, the Louisiana supreme court granted defendant's writ application in part. After determining that a prima facie case of discrimination had been established, the court in turn remanded the case to the trial court to allow the State an opportunity to explain its reason for challenging the prospective African-American jurors. The Louisiana supreme court instructed the district court to provide "the state with the opportunity to offer race-neutral reasons for the exercise of eight of the state's peremptory challenges to exclude African-American jurors from the panel selected to try defendant's case and for a ruling by the trial court on the question of whether race played a role in the selection of defendant's jury." **Drake**, 2 So.3d at 417. Thus, on remand, the trial court was required to complete the three-step analysis set forth in **Batson**. Once the prosecutor provides an explanation for the challenges, then, as instructed by the supreme court, the trial court was required to complete the next part of the three-step **Batson** inquiry by weighing defendant's proof of discrimination against the prosecutor's stated reasons.

Following the supreme court's remand, defense counsel filed motions for the State to produce "all contemporaneous notes prepared by Jeff Traylor or any other assistant district attorney pertaining to jury selection in the matter of State of

Louisiana v. Shawn Drake, Docket Number 09-02-0168," and produce "any jury questionnaires pertaining to jury selection" in this matter. At the hearing on the motions, defense counsel orally moved for the court to order the prosecutor to take the stand and be subject to cross-examination. The prosecutor provided defense counsel with a copy of the jury questionnaires. The trial court denied the motion to produce the prosecutor's notes and the motion to have the prosecutor testify under oath. From those rulings, defendant sought review in this court, and this court denied defendant's writ application. **State v. Drake**, 2009-1718 (La. App. 1st Cir. 9/18/09). Further, the Louisiana Supreme Court and the United States Supreme Court denied defendant's corresponding writ applications. **State v. Drake**, 2009-2038 (La. 11/20/09), 25 So.3d 782, cert. denied, 130 S.Ct. 3324, 176 L.Ed.2d 1220 (2010).

Based on the following, we find that defendant's insistence on a full-blown evidentiary hearing in which the prosecutor would be examined and cross-examined misconstrues the appropriate **Batson** inquiry. **Batson** does not require this intrusion on the trial proceedings. **United States v. Garrison**, 849 F.2d 103, 106 (4th Cir.), cert. denied, 488 U.S. 996, 109 S.Ct. 566, 102 L.Ed.2d 591 (1988). See also **United States v. Clemons**, 941 F.2d 321, 324 (5th Cir. 1991) (finding a sidebar conference sufficient).

Although post-trial proceedings permit the court latitude less restricted by the pressure of time, it nevertheless remains within the sound judgment of the trial court to limit the extent of the **Batson** hearing. In **United States v. Tindle**, 860 F.2d 125, 128-32 (4th Cir. 1988), cert. denied, 490 U.S. 1114, 109 S.Ct. 3176, 104 L.Ed.2d 1038 (1989), the defendant's conviction was affirmed, but the case was

remanded for a decision concerning the defendant's claim that African-Americans had been systematically excluded from his jury. On appeal after remand, the trial court's procedure and findings were affirmed; specifically, it was determined that the prosecution had given neutral and non-pretextual reasons for challenging prospective African-American jurors, that no evidentiary hearing was necessary, and that the district court did not err in permitting an *in camera* submission of some materials by the prosecution (personal notes on the jury list) and in refusing the defense access to those materials.

In **Tindle**, 860 F.2d at 130, the defendant wanted to testify and call as witnesses the prosecutors, one of his defense counsel, a co-defendant and several others who were alleged to have been present during *voir dire*. The trial court decided that such an extended hearing was not necessary and that the matter could be decided upon the record. On appeal, the court declared that there is no absolute right to an evidentiary hearing and that the determination of whether such a hearing is needed is within the sound discretion of the district court. **Id.**

In the instant case, the original trial judge was the same judge who conducted the **Batson** inquiry, and thus he had personally observed the jury selection process. The judge also referred to the transcript of the entire *voir dire* proceedings. When dealing with the post-trial inquiry, it is within the sound discretion of the trial court to determine if a full-blown evidentiary hearing is necessary. Under the instant circumstances, there was no abuse of discretion in denying an additional evidentiary hearing. **Batson** does not require rebuttal of the government's explanation by defense counsel. Nor does **Batson** require the participation of defense counsel while the government's explanations are being

proffered. This is not to say that rebuttal and participation by a defendant in the neutral explanation phase of a **Batson** challenge are always inappropriate. To the contrary, the supreme court allowed the trial court to determine what role defendants were to play once the government proffered its reasons for African-American juror exclusion. **United States v. Davis**, 809 F.2d 1194, 1202 (6th Cir.), cert. denied, 483 U.S. 1007-08, 107 S.Ct. 3234-35, 97 L.Ed.2d 740 (1987). Unlike in **Davis**, herein defendant was present at the hearing. We find that the trial court complied with the supreme court's instructions and was not required to conduct a full-blown evidentiary hearing. The trial court did not err in denying defendant's request for the prosecutor's notes and to subject the prosecutor to cross-examination. Accordingly, the first assignment of error lacks merit.

As noted on appeal, defendant concedes that there was a lack of pretext for the State's challenges of Leonard Page and Monica Atkins. Thus, we will examine the basis for the excusal of the other six African-American prospective jurors. As to Charlene Butler, the prosecutor noted that she indicated that one of her hobbies was going to church and her favorite television programs included "Touched By An Angel" and gospel programs. The prosecutor indicated that he was afraid her spirituality would make her too forgiving and unwilling to condemn someone. The prosecutor further explained that Butler was "standoffish" and gave one-word answers until the defense counsel asked her about self-defense. The prosecutor concluded that Butler related to the defense better than to the State.

As to Shawanda Saunders, the prosecutor considered that she had an eight-month-old baby, noting that she approached the bench to inform the court that she was a nursing mother. The prosecutor further noted that Saunders indicated that

the life sentence aspect of the case bothered her and that she loved forensic television shows. The prosecutor contended that this would heighten her expectations regarding scientific evidence while the instant case was more testimonial in nature. Moreover, the prosecutor noted that Saunders was a victim in a previous case. In that regard, Saunders stated that she "dropped the charges," because "it was taking a long period of time before it was presented to the court," and she further stated that "maybe that person had connections in the system, knew someone." The prosecutor indicated that he had concerns about Saunders's views about the integrity of the system.

As to Cleo Washington, the prosecutor noted that Washington noted on his questionnaire the fact that he was not a good reader as something that could hinder his ability to serve as a juror. The prosecutor further noted that Washington approached the bench regarding his diabetic condition. The prosecutor also noted that Washington was reluctant to discuss police fairness and used uncertain terms in doing so. When asked if the life sentence aspect of the case bothered him, Washington stated, "No, not really."

Regarding the excusal of Joseph Sterling, the prosecutor noted that Sterling indicated that he would need to see the weapon in order to believe that it had been used. The prosecutor considered this an insurmountable obstacle because there was no weapon in evidence in the instant case. The trial judge noted that the prosecutor unsuccessfully attempted to challenge Sterling for cause on this basis. The prosecutor also noted that Sterling was vague on his questionnaire in that he responded, "I do not know" when asked to list the number, gender, ages and occupations of his children, if any.

The prosecutor noted that Jacqueline Bell was a special education teacher, who had issues about the gun. The prosecutor specified that Bell was skeptical regarding the use of a gun. Bell was also diabetic and indicated to the court that it was a concern for her. Moreover, since Bell was a special education teacher the prosecutor was concerned that she would be more sympathetic and hesitant to convict someone of second degree murder.

Finally, as to Ernestine Wade, the prosecutor noted that Wade spoke of a dear friend who had been convicted of the crime of felon in possession of a firearm and seemed to have questions about whether her friend had been treated fairly by the system. The prosecutor further noted that Wade had questions about the police possibly "shading" their testimony. Specifically, when asked if she was more or less inclined to believe the police or whether they are more likely to tell the truth than an ordinary person, Wade, in part, stated, "I don't think they tell the truth all the time. I think they shade certain things," conceding that they were like everyone else.

In rebuttal, defense counsel noted that Butler was asked several questions that led to single-word answers and that she did not indicate that her spirituality would affect her ability to be fair and impartial, and that she made it clear that she would do so. Defense counsel noted that Saunders made it clear that the police were helpful to her when she was a victim of stalking. While conceding that the life sentence aspect bothered Saunders, defense counsel noted that she clarified her response in adding, "But, if he did the crime, he should do the time." Regarding Washington, defense counsel argued the fact that a person cannot read well does not mean that person will not be a good juror and noted that when asked

if there was any reason he would not be able to sit on the jury Washington stated, "No, not really." Regarding the reasons provided for the excusal of Sterling, defense counsel conceded that Sterling indicated he needed to see a weapon, and further conceded that his argument in rebuttal was not as strong with respect to Sterling, as compared to some other prospective jurors, but contended that it was not a sufficient reason to strike him for cause. As to Bell, defense counsel argued that her responses as a whole made it clear that she would listen to the evidence and she had the potential to be a great juror. Defense counsel also noted that the trial judge was clear in offering accommodations for parties with medical needs. Finally, regarding Wade, defense counsel noted that as a mother of ten children, she would be able to judge people, follow the law, and understood that police officers were the same as non-police officers, but added, "She thinks everyone lies. The fact that...she's afraid the police officers shade the truth a little bit ... I don't think is a sufficient reason."

At the outset, we reiterate that the prosecutor's explanations need not rise to the level of a challenge for cause. Clearly, the reasons provided by the prosecutor were non-racial reasons. In evaluating the persuasiveness of the justification proffered by the prosecutor and determining that the defense failed to meet the burden of proving purposeful discrimination, the trial court conducted a "side-by-side analysis," citing **Miller-El v. Dretke**, 545 U.S. 231, 241, 125 S.Ct. 2317, 2325, 162 L.Ed.2d 196 (2005). If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at **Batson**'s third step. ***Id.*** Based on its side-by-side analysis of the

eight struck African-American jurors compared with the eleven Caucasian jurors who served, the trial court found that the State's proffered reasons for striking the African-American prospective jurors did not apply to the Caucasian accepted jurors.

While the defendant argues otherwise on appeal, we find that the prosecutor's proffered reasons for striking the African-American prospective jurors do not apply just as well to the otherwise-similar Caucasians permitted to serve. Even assuming, arguendo, that similar responses were given by other prospective jurors, the fact that some were accepted by the State and the 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. The accepted jurors may have exhibited traits that the prosecutor reasonably could have believed would have made these individuals desirable as jurors. See **State v. Collier**, 553 So.2d at 822; **State v. Leagea**, 95-1210 (La. App. 1st Cir. 5/10/96), 673 So.2d 646, 650, writ denied, 96-1507 (La. 11/22/96), 683 So.2d 287.

Moreover, our review of the *voir dire* discloses no questions or statements by the prosecutor in exercising his challenges that might support an inference of purposeful discrimination. Based on our review of the record, we can find nothing that undermines the determination of the trial court that the stated reasons for the exclusions in question were legitimate grounds for the exercise of peremptory challenges. There was no indication that racial animus adversely affected the *voir dire*. In view of the vast amount of discretion to be accorded to the findings of the trial court in assessing intent and judging credibility, we cannot say the trial court

erred in choosing to believe the race-neutral explanations offered by the State. Accordingly, we find defendant has failed to carry his burden of proving purposeful discrimination with regard to the excusal of the prospective jurors in question. Accordingly, assignment of error number two also lacks merit.

For these reasons, defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.