**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2010 KA 2164**

**STATE OF LOUISIANA**

**VERSUS**

**CHARLES R. LEE**

**Judgment Rendered:** JUN 10 2011

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 476107

Honorable William J. Crain, Judge Presiding

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**BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.**

**McCLENDON, J.**

The defendant, Charles R. Lee, was charged by bill of information with one count of unauthorized entry of an inhabited dwelling (count I), a violation of LSA-R.S. 14:62.3; and one count of aggravated battery (count II), a violation of LSA-R.S. 14:34; and pled not guilty on both counts. Following a jury trial, on count I, he was found guilty as charged; and on count II, he was found guilty of the responsive offense of simple battery, a violation of LSA-R.S. 14:35. Thereafter, in regard to count I, the State filed a habitual offender bill of information against the defendant alleging he was a sixth-felony habitual offender.[1] He moved for a new trial and for a post-verdict judgment of acquittal, but the motions were denied. Following a hearing, he was adjudged a fourth-felony habitual offender, and sentenced on count I, to twenty years at hard labor without benefit of probation, parole, or suspension of sentence. On count II, he was sentenced to six months in parish jail, to run concurrently with the sentence imposed on count I. He moved for reconsideration of sentence, but the motion was denied.

He now appeals, contending: (1) the trial court erred in failing to sustain his **Batson** objections to the State's use of peremptory challenges; (2) the trial court erred in failing to examine the reasons tendered for the peremptory challenges to see if they were discriminatory; (3) the trial court erred in failing to create a proper record of the races of the jurors; (4) the evidence is insufficient to support the conviction on count I; (5) the trial court erred in denying the motion for a post-verdict judgment of acquittal; (6) the trial court erred in denying the motion for new trial; and (7) the trial court erred by imposing an illegal sentence. For the following reasons, we affirm the conviction and habitual

[1] Predicate #1 was set forth as the defendant's January 25, 2005 guilty plea, under Twenty-second Judicial District Court Docket #404558, to possession of cocaine on September 27, 2005. Predicate #2 was set forth as the defendant's January 25, 2006 guilty plea, under Twenty-second Judicial District Court Docket #396367, to possession of cocaine on April 8, 2006. Predicate #3 was set forth as the defendant's August 12, 2002 guilty plea, under Twenty-second Judicial District Court Docket #310146, to possession of cocaine on September 16, 1999. Predicate #4 was set forth as the defendant's August 12, 2002 guilty plea, under Twenty-second Judicial District Court Docket #300803, to possession of cocaine on January 2, 1999. Predicate #5 was set forth as the defendant's August 12, 2002 guilty plea, under Twenty-second Judicial District Court Docket #294960, to possession of cocaine on April 14, 1998.

offender adjudication on count I, amend the sentence on count I, affirm sentence on count I as amended, and affirm the conviction and sentence on count II.

**FACTS**

Marlon Parker testified at trial. He had fathered a child with the defendant's sister, and referred to the defendant as his brother or brother-in-law. Parker was the boyfriend of Bonshelle Thomas and visited her at the home of the defendant's mother, on South Harrison Road in St. Tammany Parish (the home), where Thomas lived with her four children. Parker referred to the defendant's mother, Clara Lee, as his mother-in-law, and indicated she had given Thomas the right to live in the home. Parker had previously lived in the home with the defendant's sister, and the defendant's family treated him as though he was "their own son." Parker indicated he paid the bills for "the lights and everything" at the home, although the bills were not in his name. He conceded the bill for the satellite dish at the home was in the name of the defendant. Parker answered affirmatively when asked if the defendant had grown up in the home and if he had permission to go there. However, he indicated that neither he nor Thomas gave the defendant permission to enter the home on the night in question

At the time of the incident, the defendant lived with his sister, at 57400 John Smith Road, across the street from the home on South Harrison Road.

On July 12, 2009, at approximately 9:00 p.m., the defendant asked Parker for permission to use Thomas's car. Parker refused because he had to pay to get another car back after the defendant had driven it without a license and it had been towed away. Parker was also aware that the defendant had been drinking. The defendant took the car anyway and, after waiting approximately forty-five minutes to one hour, Parker called the police to find out where the defendant had taken the car. The police arrived at the same time as the defendant returned with the car. Parker told the police he did not want to press

charges against the defendant, but the defendant was furious that Parker had called the police and told Parker and Thomas that "it wasn't over."

Approximately fifteen minutes later, after the police had left the scene, the defendant, carrying a large stick, banged on the front door of the home, shouting, "[o]pen up the door." When no one let him in, he kicked in the door, shattering everything next to the door, and causing the children in the home to scream. He tried to strike Parker with the stick, but it hit the ceiling and broke into two pieces. Parker was able to take the part of the stick the defendant was holding away from him, but it cut him on the arm. Parker held onto the defendant and tried to calm him down. The defendant's cousin arrived at the home and also tried to calm the defendant down. Thereafter, the defendant left the home with his cousin.

Bonshelle Thomas also testified at trial. Thomas remembered that Parker was upset because the defendant had taken the car. Parker called the police and they and the defendant arrived at the home at the same time. The defendant was upset that Parker had called the police. Parker told the police that he did not want to press charges and they left. Thereafter, the defendant returned to the home, and knocked on the door, demanding that Parker come out. Parker refused to go outside, and locked the door to prevent the defendant from entering. The defendant kicked the door in and came at Parker with a stick, but Parker was able to disarm him after a struggle.

Thomas indicated that Parker paid the rent for the home and "utilities and all." She conceded the bill for the satellite dish at the home was in the name of the defendant, but indicated the defendant had given Parker permission to put the bill in the defendant's name. When asked if the defendant would always have permission to be at his mother's home, Thomas replied, "Yes. I would imagine." She indicated, however, the defendant did not have permission to break into the home, and she did not give the defendant permission to enter the home on the night in question.

## SUFFICIENCY OF THE EVIDENCE

In assignment of error number 4, the defendant argues there was insufficient evidence that his entry into his childhood home was unauthorized. In assignment of error number 5, he argues the trial court erred by denying the motion for post-verdict judgment of acquittal due to the alleged insufficient evidence. In assignment of error number 6, he argues the trial court erred in denying the motion for new trial due to the alleged insufficient evidence. He combines the assignments of error for argument. He does not challenge his conviction on count II.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," in order to convict, every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601, p.2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at p. 3, 730 So.2d at 487.

Unauthorized entry of an inhabited dwelling is the intentional entry by a person without authorization into any inhabited dwelling or other structure

belonging to another and used in whole or in part as a home or place of abode by a person. LSA-R.S. 14:62.3(A). The relevant question is not whether the defendant could generally enter the victim's residence, but whether this particular entry was authorized. **State v. Spain**, 99-1956, p.7 (La. App. 4 Cir. 3/15/00), 757 So.2d 879, 884.

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of unauthorized entry of an inhabited dwelling, and the defendant's identity as the perpetrator of that offense. The jury rejected the defendant's theory that he was authorized to enter the home on the night in question. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case. The verdict rendered against the defendant indicates the jury accepted the testimony offered against him, including the testimony that his entry into the home by kicking in the door was not authorized, and rejected his attempts to discredit that testimony. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. Furthermore, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Johnson**, 99-0385, pp.9-10 (La. App. 1 Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 00-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p.32 (La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Moreover, in reviewing the evidence, we cannot say that the jury's

determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207, p.14 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306, pp.1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

These assignments of error are without merit.

**BATSON**

In assignments of error numbers 1 and 2, the defendant argues the trial court erred in overruling his objections under **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), to the State's use of peremptory challenges against prospective jurors: Osi, Jones, and Mercadel.

Under **Batson**, an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. See also LSA-C.Cr.P. art. 795(C)-(E). If the defendant makes a prima facie showing of discriminatory strikes, the burden shifts to the State to offer racially-neutral explanations for the challenged members. The race-neutral explanation must be one which is clear, reasonable, specific, legitimate and related to the particular case at bar. If the race-neutral explanation is tendered, the trial court must decide, in step three of the **Batson** analysis, whether the defendant has proven purposeful discrimination. **State v. Elie**, 05-1569, p.5 (La. 7/10/06), 936 So.2d 791, 795. A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **Elie**, 05-1569 at p. 5, 936 So.2d at 795.

The **Batson** explanation does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. **Elie**, 05-1569 at p.5, 936 So.2d at 795-96.

In order to satisfy **Batson's** first step, a moving party need only produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. **Elie**, 05-1569 at p.6, 936 So.2d at 796. **Batson's** admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of panel members who expressed similar views or shared similar circumstances in their backgrounds. The one relevant circumstance for a trial judge to consider is whether the State articulated "verifiable and legitimate" explanations for striking minority jurors. **Id.**

The six-person jury and one alternate juror in this case were selected from one panel of prospective jurors. During voir dire, the State exercised four peremptory challenges in selecting the jury, resulting in the exclusion of three black prospective jurors (Osi, Jones, and Mercadel) and one white prospective juror (Ford). The State also used a fifth peremptory challenge to exclude another white juror as the alternate (Brundrett). Ultimately, the six jurors selected to serve on the jury were Kraus, Crain, Miller, Grossnickle, Lemoine, and Oswald.

The defense objected to the State's peremptory challenges against the black jurors under **Batson**. The trial court entertained the State's race-neutral reasons for the exclusions without making a finding of whether defendant had made a prima facie showing of purposeful racial discrimination. In this situation, the issue of whether the defense established a prima facie case of discrimination is moot. See **State v. Green**, 94-0887, p. 25 (La. 5/22/95), 655 So.2d 272, 288 (applying **Hernandez v. New York**, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) and concluding that once the trial court has demanded race-neutral reasons for the prosecutor's peremptory strikes, the issue of a prima facie case of discrimination becomes moot). Therefore, the analysis begins with **Batson's** second step in which any response will qualify as race-neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." **Hernandez**, 500 U.S. at 352, 111 S.Ct. 1859.

In regard to Osi and Jones, the State indicated it had challenged the jurors because, in response to a question asked by the defense, they had indicated they would rather free a guilty person than convict an innocent one. The defendant argues the disingenuousness of the prosecutor's statement was readily apparent because he accepted white jurors, Faciane, Brundrett, Stafford, Coates, Skrmetta, Grossnickle, and Oswald, who had given similar answers to Osi and Jones.[2]

However, the record reflects that the State challenged Faciane for cause, and said juror was dismissed without objection from the defense. With regard to Brundrett, the State did not accept this juror and used a peremptory challenge to exclude her when she was proposed as an alternate. Skremetta was challenged by the defendant and not selected to serve on the jury. With respect to Stafford and Coates, the State neither accepted nor rejected these jurors because the court had already seated a jury prior to the asking either the State or the defense if these jurors were acceptable.

Additionally, when the defendant raised the **Batson** challenge, the State pointed out that it also challenged Ford, a prospective white juror, for the same reason that she agreed that it would be better to allow a guilty man to go free rather than convict an innocent one. In response, the defense noted that the State had failed to challenge Grossnickle for holding that same belief.[3] The State replied it had not noted that Grossnickle had replied in that manner.[4] The court found the State had articulated a race-neutral reason for the challenges and overruled the defense objections to the challenges against Osi and Jones.

After the trial court overruled the above-referenced **Batson** challenge, the defense "put on the record" that "all the black jurors in the panel were cut by the State." Subsequently, in regard to Mercadel (the other excluded black juror), the

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[2] The first prospective juror questioned, Reese, indicated he would rather convict an innocent man than free a guilty man because "[h]e can have an appeal. The next victim never has an appeal." Kraus stated he could not "pick one way or the other." Crain, Miller, and Lemoine all indicated they would rather convict an innocent man than free a guilty man.

[3] The defense made no reference to Oswald's response when it raised the **Batson** challenge.

[4] The State concedes that the transcript discloses that the prosecutor's notes were in error.

State indicated it had challenged her because her uncle, who had been convicted of rape before she was born, was serving a life sentence.[5] After considering the explanation, the court denied the objection to the challenge against Mercadel. At that time, defendant failed to point out that other similarly situated jurors had not been challenged by the State.

On appeal, the defendant now makes the argument that other jurors who had "substantial connections to criminal activity" were not excused. The defendant contends that the prosecutor's explanation that it was bumping Mercadel because of her uncle's incarceration "reeks of afterthought." However, since the defendant did not make this challenge during voir dire, we cannot conclude that trial court erred in not considering this circumstance.

The trial court plays a unique role in the dynamics of a voir dire, for it is the court that observes firsthand the demeanor of the attorneys and venirepersons, the nuances of questions asked, the racial composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from a cold transcript. **State v. Myers**, 99-1803, p. 6 (La.4/11/00), 761 So.2d 498, 502.

Further, the fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination. The accepted juror may have exhibited other traits which the prosecutor could have reasonably believed would make him desirable as a juror. **State v. Collier**, 553 So.2d 815, 822 (La. 1989) [citing **People v. Young**, 128 Ill.2d 1, 131 Ill.Dec. 78, 538 N.E.2d 453 (1989)].

Considering the foregoing, we cannot conclude that the trial court's finding that the State did not have discriminatory intent in exercising peremptory challenges against Osi, Jones, and Mercadel was clearly erroneous.

These assignments of error are without merit.

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[5] We also note that Mercadel indicated that she would rather free a guilty person than convict an innocent one.

## LISTING OF RACE OF PROSPECTIVE JURORS

In assignment of error number 3, the defendant submits the issues raised in assignments of error numbers 1 and 2 can be adequately addressed on the basis of the comments of trial counsel and the trial court during voir dire, but argues if this court rejects the **Batson** claim because the record fails to include the race of every prospective juror, then the trial court should be held responsible for that failure rather than the defendant. Our resolution of assignments of error numbers 1 and 2 causes us to pretermit consideration of this assignment of error.

## ILLEGAL SENTENCE

In assignment of error number 7, the defendant argues the sentence imposed on count I is illegal because it includes the denial of parole. The State does not respond to the argument.

On count I, the trial court sentenced the defendant, as a fourth-felony habitual offender, to twenty years at hard labor without benefit of probation, parole, or suspension of sentence. The court noted it was imposing the minimum sentence allowed by law for a fourth-felony habitual offender. However, neither LSA-R.S. 14:62.3(B), LSA-R.S. 15:529.1(A)(1)(c)(i) (prior to amendment by 2010 La. Acts Nos. 911, § 1 and 973, § 2) nor LSA-R.S. 15:529.1(G) authorized the denial of parole.[6] This court may, however, correct the illegal sentence by amendment on appeal, rather than by remand for resentencing, because the trial court attempted to impose the minimum statutory sentence in this matter, and thus, no exercise of sentencing discretion is involved. See LSA-C.Cr.P. art. 882(A); **State v. Miller**, 96-2040, p.4 (La. App. 1 Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. Accordingly, we amend the sentence on count I to remove the parole restriction.

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[6] It is not a crime to be a habitual offender. The statute increases the sentence for a recidivist. The penalty increase is computed by reference to the sentencing provisions of the underlying offense. Similarly, the conditions imposed on the sentence are those called for in the reference statute. **State v. Bruins**, 407 So.2d 685, 687 (La. 1981).

**CONVICTION AND HABITUAL OFFENDER ADJUDICATION ON COUNT I AFFIRMED; SENTENCE ON COUNT I AMENDED AND AFFIRMED AS AMENDED; CONVICTION AND SENTENCE ON COUNT II AFFIRMED.**