**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1974

STATE OF LOUISIANA

VERSUS

HERBERT JOSEPH CLAY, JR.

Judgment Rendered: May 3, 2012

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On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne,
State of Louisiana
Trial Court No. 558,001

Honorable David W. Arceneaux, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

**HIGGINBOTHAM, J.**

The defendant, Herbert Joseph Clay, Jr., was charged by amended bill of information with one count of theft (value more than $500),[1] a violation of La. R.S. 14:67, and pled not guilty.[2] Following a jury trial, he was found guilty as charged. He was sentenced to ten years at hard labor. He now appeals under **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), challenging the sufficiency of the evidence. He also questions the trial court's denial of his objections to the exercise of peremptory challenges against certain prospective jurors. For the following reasons, we affirm the conviction and sentence.

## FACTS

On November 28, 2009, Desiree Neville was working as a cashier at the Target store on Martin Luther King Drive in Terrebonne Parish. She saw the defendant come into the store, and then, approximately ten minutes later, saw Brandon Scott and Rufus Conley come into the store together. Thereafter, Scott, Conley, and the defendant went through Neville's checkout line with $2900 of merchandise, including multiple televisions, a playpen, and some blinds. The defendant was at the front of the group. The larger items were scanned by a manager with a hand scanner. Thereafter, Neville "voided" the televisions on her cash register. She indicated she did so to allow the men to get the televisions for free. She stated she also lowered the price on the playpen. The defendant "swiped" Conley's credit card in supposed payment of the items. She testified Target required customers with merchandise to have a receipt when exiting the store, so she rang up the lower valued items so the men would have a receipt. The defendant pushed the

[1] 2010 La. Acts, No. 585, § 1 amended the value requirement of La. R.S. 14:67 (B)(1) from "five hundred dollars or more" to "one thousand five hundred dollars or more."

[2] Rufus Conley, Warkameski Brandon Scott, and Desiree Danielle Neville were also charged by the same bill of information with the same offense.

cart of merchandise out of the store. Approximately five minutes after leaving the store, Conley and Scott returned to Neville's checkout line with more merchandise. Neville rang up the items, "voided" them, and rang up "something else." Conley and Scott paid for the items with $20. Neville testified she had spoken with Scott and Conley at a gas station prior to her shift. She pled guilty to theft (value over $500) in connection with the offense.

Conley testified he went to Target on the day of the offense, because the defendant called him and told him he knew someone at Target who was "gon hook [the defendant] up." According to Conley, the defendant explained he was going to get TVs for almost "free." Conley stated he wanted to get "hooked up too." He drove to Target with his friend, Scott. According to Conley, he, Scott, and the defendant went to the electronics department at approximately the same time and the defendant asked an employee to get the televisions and Blu-ray players for them. The men then went to Neville's register together with the televisions, and the defendant put some blinds on their cart before they got there. Conley stated the defendant told him "she was gon void it out and put it at a cheap price." The defendant spoke to Neville at her register. Thereafter, Neville rang up the items on the cart, "void[ed]" some of them, and Conley paid less than $100 for all of them. Conley indicated the defendant used Conley's bank card to pay for the items. He stated he returned to the store to get two more TVs and two Blu-ray players. He testified the defendant introduced him to Neville at Target on the day of the offense. Conley pled guilty to his involvement in the offense and was sentenced to two years of probation; he was ordered to pay $3500 in restitution to Target.

The defendant testified he had three prior convictions for drug offenses. He claimed he went to the register at Target with Conley and Scott and asked Neville why she had rung everything up together. He denied having any discussion with Conley or Scott about what would happen when they got to the register. The

defendant claimed he asked Conley to pay for his items, which were the blinds and the playpen, and promised to pay Conley back. He denied talking to Conley about what would occur at the store, and denied going there to meet anyone. He denied planning the offense and claimed he "never stole nothin' in [his] life."

## SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence was insufficient to convict him in this circumstantial case. He argues the case was based on circumstantial evidence and the testimony of a co-defendant who testified against him in exchange for a suspended sentence.

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. La. R.S. 15:438; **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 and 2000-0895 (La. 11/17/00), 773 So.2d 732.

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**, 730 So.2d at 487.

All persons concerned in the commission of a crime, whether present or

absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:24. However, the defendant's mere presence at the scene is not enough to "concern" him in the crime. Only those persons who knowingly participate in the planning or execution of a crime may be said to be "concerned" in its commission, thus making them liable as principals. A principal may be connected only to those crimes for which he has the requisite mental state. **State v. Neal**, 2000-0674 (La. 6/29/01), 796 So.2d 649, 659, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). However, "[i]t is sufficient encouragement that the accomplice is standing by at the scene of the crime ready to give some aid if needed, although in such a case it is necessary that the principal actually be aware of the accomplice's intention." **State v. Anderson**, 97-1301 (La. 2/6/98), 707 So.2d 1223, 1225 (per curiam) quoting 2 W. LaFave, A. Scott, *Substantive Criminal Law*, § 6.7, p. 138 (West 1996).

Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential. La. R.S. 14:67(A).

A thorough review of the record convinces us 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 theft and the defendant's identity as a perpetrator of that offense. The verdict rendered against the defendant indicates the jury rejected his claim that he was merely present during the theft of the merchandise from Target. When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence

presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). No such hypothesis exists in the instant case.

The verdict also indicates the jury accepted the testimony implicating the defendant as a principal to the theft at issue. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, 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**, 2006-0207 (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**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

## BATSON

The defendant also contends the trial court improperly denied his **Batson** challenge. He argues the State used peremptory challenges to strike prospective jurors Kwanza Trosclair Harod[3] and Debra A. Stovall to obtain an all-white jury.

**Batson**, 476 U.S. at 96, 106 S.Ct. at 1723, held an equal protection violation

[3] This juror was referred to in the record as Kwanza Trosclair, but she explained that her new married last name was "Harod," sometimes spelled as "Harold" in the record.

occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. See also La. Code Crim. 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 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 whether the defendant has proven purposeful discrimination. A reviewing court owes the trial court judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **State v. Elie**, 2005-1569 (La. 7/10/06), 936 So.2d 791, 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**, 936 So.2d at 795-96. To establish a *prima facie* case of purposeful discrimination as required by **Batson**, a moving party need only produce "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." **Elie**, 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 other minority jurors. **Id.** The failure of one or more of the State's articulated reasons for striking a prospective juror does not compel a trial judge to find that the State's remaining articulated race-neutral reasons necessarily cloaked discriminatory intent. **Id.**

Harod and Stovall were on the first panel of prospective jurors. Harod was

thirty years old, employed by Heaven Scents, and married to Lance Harod. During voir dire, she indicated she had a previous arrest for theft, specifically shoplifting at a Walmart. The State asked her if she had any additional arrests or charges for theft, and she replied negatively. However, when the State asked if she had appeared in front of another judge in 2001 for some thefts, she conceded she had been arrested for an additional shoplifting incident. Additionally, Harod indicated her nephew had charges pending against him for possession of a controlled dangerous substance, and her husband was incarcerated for a probation violation.

Stovall was fifty-one years old, employed by Walmart, and separated from her husband. During voir dire, the State commented that she had been quiet and asked her how she felt about sitting on a jury. Stovall stated, "It doesn't matter to me." She promised her undivided attention, but the State noted she had "been kind of like in another world every now and then when [the State was] talking." Stovall answered "Uh-huh" when asked if she had been paying attention, and answered affirmatively when asked if she could promise "us" a fair trial.

The defense objected under **Batson** to the State's exercise of peremptory challenges against Harod and Stovall. The trial court asked the State for race-neutral reasons for its use of peremptory challenges against Harod and Stovall. The State responded Harod was the only member of panel one who had ever been arrested for theft. The State pointed out the theft committed by Harod, a shoplifting from Walmart, was very similar in nature to the case before the court. Additionally, the State noted Harod had only conceded her additional shoplifting arrest after being "reminded" by the State. The State also noted Harod's husband was incarcerated on two charges of probation violation. The trial court accepted the State's explanation as sufficiently race-neutral to justify the peremptory challenge against Harod.

In regard to Stovall, the State responded she had not paid attention when she was questioned and had failed to respond when the panel was asked if the jury could

promise a guilty verdict if the State met its burden of proof. The State alleged Stovall had repeatedly looked at the ground and refused to establish eye contact. The State also pointed out Stovall was employed by Walmart, and the State did not want any employees of merchants on the jury. The trial court accepted the explanation as sufficiently race-neutral to justify the peremptory challenge against Stovall. The court stated, "In fact, I have every reason to believe that [the prosecutor] was accurate in his description of [Stovall's] responses and if that's the kind of person he doesn't want on the jury, that's what a peremptory exception is all about."

The trial court did not abuse its discretion in denying the **Batson** challenges against prospective jurors Harod and Stovall. The defendant failed to prove purposeful discrimination, and the State articulated verifiable and legitimate explanations for striking the minority jurors at issue.

This assignment of error is without merit.

For the foregoing reasons, the conviction and sentence of the defendant, Herbert Joseph Clay, Jr., are affirmed.

**CONVICTION AND SENTENCE AFFIRMED.**