NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 2047

STATE OF LOUISIANA

VERSUS

KENDRICK CHRISTMAS

Judgment rendered June 8, 2012.

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Appealed from the
18th Judicial District Court
in and for the Parish of Iberville, Louisiana
Trial Court No.669-09
Honorable William C. Dupont, Judge

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KENDRICK CHRISTMAS

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

Defendant, Kendrick Christmas, was charged by grand jury indictment with one count of second degree murder (count one), a violation of La. R.S. 14:30.1, and two counts of attempted second degree murder (counts two and three), violations of La. R.S. 14:27 and 14:30.1. After a trial by jury, defendant was found guilty as charged on all counts. The trial court denied defendant's motions for postverdict judgment of acquittal and new trial. On count one, defendant was sentenced to the mandatory term of life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence. For counts two and three, defendant was sentenced to fifty years at hard labor, without the benefit of parole, probation, or suspension of sentence. Defendant's sentences were ordered to be served concurrently. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's convictions and sentences.

FACTS

On May 30, 2009, Lennard White, Quinton Mitchell, Torray Collins, and Nicholas Mims were at Maringouin Park in Iberville Parish when they observed a black Monte Carlo circle the park several times. White recognized the driver of the car as Nathaniel Wessinger, the deceased victim, and the passengers of the car as Cedric Vonido and Chris Brown, the surviving victims. When the vehicle stopped near the park, White called his cousin, defendant, and asked him to come out to the park. Shortly after Wessinger, Vonido, and Brown entered the park, a fight erupted between them and White, Mitchell, and Collins. At trial, there was conflicting testimony about which party began the altercation.

As the parties fought, defendant arrived at the park with at least one other individual, Roderick Thompson. At trial, eyewitness testimony conflicted about whether defendant fired an initial gunshot into the air upon exiting his vehicle. Around this time, the physical altercation began to subside. Some eyewitnesses testified at trial that the fight broke up because Brown pulled a chrome nine-millimeter semiautomatic handgun from Wessinger's pocket and began to aim it around the park. However, Vonido and

Brown both testified that the fight stopped when they saw defendant approach with his own nine-millimeter semiautomatic handgun after White, Mitchell, and Collins had backed away. Defendant neared an area close to where the fight had been ongoing, and he fired at least eight shots in the direction of Wessinger, Vonido, and Brown. Vonido and Brown were able to run to shelter inside a bathroom at the park, but Wessinger was shot at least five times, and he died of his wounds shortly thereafter. After the shooting, defendant briefly returned home, but he soon turned himself in to the Iberville Parish Sheriff's Office and admitted to his involvement in the shooting.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant argues that the trial court erred when it failed to grant defendant's **Batson**[1] challenge on the grounds that the State used five of its peremptory challenges to strike African-American females from the jury.

In **Batson**, 476 U.S. at 96-98, 106 S.Ct. at 1723-1724, the United States Supreme Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. **State v. Mitchell**, 99-0283, p. 7 (La. App. 1 Cir. 6/22/01), 808 So.2d 664, 669. Under **Batson**, a defendant must first establish a prima facie case of discrimination by showing facts and relevant circumstances which raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on account of their race. **State v. Tilley**, 99-0569, p. 4 (La. 7/6/00), 767 So.2d 6, 12, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001). 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 (3) finally, the defendant must show circumstances sufficient to raise an inference that the prosecutor struck the prospective juror on account of race. **State v. Myers**, 99-1803, p. 4 (La. 4/11/00), 761 So.2d 498, 501.

[1] **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The defendant may offer any facts relevant to the question of the prosecutor's discriminatory intent. 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 that support an inference that the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empanelled, and any other disparate impact upon the suspect class that is alleged to be the victim of purposeful discrimination. **State v. Rodriguez**, 2001-2182, p. 6 (La. App. 1 Cir. 6/21/02), 822 So.2d 121, 128, writ denied, 2002-2049 (La. 2/14/03), 836 So.2d 131.

No formula exists for determining whether the defense has established a prima facie case of purposeful discrimination. A trial judge may take into account not only whether a pattern of strikes against African-American prospective jurors has emerged during voir dire, but also whether the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. **Rodriguez**, 2001-2182 at 6-7, 822 So.2d at 128.

If the requisite showing has been made by the defendant, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. The second step of this process does not demand an explanation that is persuasive, or even plausible. At the second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. **Mitchell**, 99-0283 at 7, 808 So.2d at 669-670. This is a burden of production, not one of persuasion. **State v. Harris**, 2001-0408, p. 4 (La. 6/21/02), 820 So.2d 471, 473.

Faced with a race-neutral explanation, the defendant then must prove to the trial court purposeful discrimination. The proper inquiry in this final stage of the **Batson** analysis is whether the defendant's proof, when weighed against the prosecutor's proffered race-neutral reasons, is sufficient to persuade the trial court that such discriminatory intent is present. Thus, the focus of the **Batson** inquiry is upon the intent of the prosecutor at the time he exercised his peremptory strikes. **Tilley**, 99-

0569 at 5, 767 So.2d at 12. The ultimate burden of persuasion is on the defendant. **State v. Young**, 551 So.2d 695, 698 (La. App. 1 Cir. 1989). The trial court should examine all of the available evidence in an effort to discern patterns of strikes and other statements or actions by the prosecutor during voir dire that support or reject a finding of discriminatory intent. **Tilley**, 99-0569 at 5, 767 So.2d at 12-13.

In the instant case, defense counsel urged a **Batson** objection alleging that the State was using its peremptory challenges in a discriminatory manner to exclude five African-American females[2] from defendant's jury. We note first that outside of defendant's **Batson** objection, the record contains no information regarding the race of any prospective jurors. Although defendant states in his brief with this court that the trial court found that the defense had satisfied its prima facie case of discrimination, we recognize no such finding by the trial court in the record. Instead, before the trial court could rule on whether defendant had demonstrated a prima facie case of racial discrimination, the assistant district attorney stated his reasons for peremptorily challenging each of the at-issue prospective jurors.

First, the prosecutor stated that he had peremptorily challenged Lorella Pierce because she had a master's degree in criminal justice, which he feared would cause her to believe that she knew more about criminal law than most people; because she worked as a security guard at the Louisiana Correctional Institute for Women; and because he discredited her degree, which she had obtained from the University of Phoenix. With respect to Glinder Young, the prosecutor stated that he peremptorily challenged her because she responded during voir dire that she was chosen previously to serve on a civil jury for a paternity suit, but that the person ultimately "took a plea." The prosecutor stated in his race-neutral reasoning that he challenged Ms. Young because there was "no such thing as a paternity suit to establish paternity." The prosecutor argued that he peremptorily challenged Dawn Tate because defense

[2] The five African-American females who were peremptorily challenged by the state were Lorella Pierce, Glinder Young, Dawn Tate, Tonneshia Jackson, and Deadria Anderson.

counsel, during voir dire, had chastised her for laughing with the prosecutor during his questioning of the panel, and the prosecutor did not want her to "think that [he] made a fool out of her and this system." The prosecutor stated that he peremptorily challenged Tonneshia Jackson because he had asked her three or four questions during voir dire, and she had "no appreciation of the concepts of what [he] explained to her." Finally, the prosecutor stated that he peremptorily challenged Deadria Anderson because she had given confusing responses to questions asking about her previous jury service in a civil case. The prosecutor noted that Ms. Anderson initially stated that her jury awarded money in that earlier case, but her response later changed to say that the jury had voted for the civil defendant, a doctor.

The trial judge denied defendant's **Batson** challenge, noting specifically that he understood the reasoning that the prosecutor gave with respect to Ms. Tate and Ms. Pierce. Further, the trial judge stated, "It leaves several other ones that he's given his explanation. If you take them as a whole I don't see a pattern, I think it just falls that way. So your challenges, your objection is noted though."

Considering the record as a whole, we cannot conclude that the trial court erred in denying defendant's **Batson** objection. Before the trial judge could determine whether defendant even stated a prima facie case of racial discrimination, the State offered race-neutral reasons for striking each challenged juror. Defendant did not offer any specific evidence of purposeful discrimination outside of his contention that the State had peremptorily challenged all of the African-American prospective jurors who were female. However, the Louisiana Supreme Court has noted that a defendant's "reliance on bare statistics to support a prima facie case of ... race discrimination is misplaced." **State v. Duncan**, 99-2615, p. 22 (La. 10/16/01), 802 So.2d 533, 550, cert. denied, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002). From the record, it is clear that defendant offered no further support for his **Batson** challenge other than mere statistics, and the State offered race-neutral reasons that the trial court found to be persuasive. Consequently, we reject defendant's claim that the trial court erred in ruling that defendant failed to establish a pattern of racial discrimination under **Batson**.

This assignment of error is without merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, defendant argues that the evidence to support his conviction is insufficient. Specifically, defendant argues that the State failed to prove beyond a reasonable doubt that he did not act in self-defense.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after 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. See **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson** standard of review, incorporated in Article 821(B), 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 fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Second degree murder is defined in pertinent part as the killing of a human being when the offender has the specific intent to kill or inflict great bodily harm. La. R.S. 14:30.1(A)(1). Specific criminal intent is the state of mind that exists when the circumstances indicate the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. **State v. Herron**, 2003-2304, p. 4 (La. App. 1 Cir. 5/14/04), 879 So.2d 778, 782. It has long been recognized that specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Hoffman**, 98-3118,

p. 48 (La. 4/11/00), 768 So.2d 542, 585, opinion supplemented by 2000-1609 (La. 6/14/00), 768 So.2d 592 (per curiam), cert. denied, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000).

In accordance with La. R.S. 14:27(A), any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended. It shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. An attempt to commit second degree murder requires that the offender possess the specific intent to kill and commit an overt act tending toward the accomplishment of that goal. **Herron**, 2003-2304 at 5, 879 So.2d at 783. See also La. R.S. 14:27(A) & 14:30.1(A)(1).

When a defendant claims self-defense in a homicide case, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. See **State v. Fisher**, 95-0430, p. 3 (La. App. 1 Cir. 5/10/96), 673 So.2d 721, 723, writ denied, 96-1412 (La. 11/1/96), 681 So.2d 1259. A homicide is justifiable when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger. La. R.S. 14:20(A)(1); **State v. Lilly**, 552 So.2d 1036, 1039 (La. App. 1 Cir. 1989).

However, La. R.S. 14:21 provides that a person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw from and discontinue the conflict. For appellate purposes, the standard of review of a claim of self-defense is whether a rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could find beyond a reasonable doubt that the homicide was not committed in self-defense or the defense of others. See **Lilly**, 552 So.2d at 1039.

At trial, eyewitness testimony established that defendant was called to Maringouin Park by his cousin and that, upon his arrival, he exited his vehicle with a

nine-millimeter semiautomatic handgun already in his hand. Eyewitness testimony differed as to whether one of the victims pulled a gun prior to defendant beginning to shoot. Cedric Vonido testified that he never saw Nathaniel Wessinger with a gun while at the park. Chris Brown testified that he knew that Wessinger had a gun in his pocket, but Brown stated that he did not remove the gun from Wessinger's pocket until Wessinger had fallen to the ground after being shot. Lennard White testified for the defense that he saw either Brown or Wessinger pull a gun and fire an initial shot in his direction. Nicholas Mims testified for the defense that Brown grabbed a gun from Wessinger, accidentally shot it one time and hit Wessinger in the foot, and then began shooting it around the park. Lacey Johnson testified for the defense that Brown pulled a gun from Wessinger's left waist area and pointed it at her. Brown testified that the gun he retrieved from Wessinger's pocket was a revolver that he later turned in to the police. However, White, Mims, and Roderick Thompson all testified that they saw one of the victims with a semiautomatic pistol. Defendant did not testify at trial.

Through Dr. Alfredo Suarez, a certified expert in the field of forensic pathology, the State presented evidence from Wessinger's autopsy. Dr. Suarez testified that due to the angle of entry of the bullet that fatally hit Wessinger, it was his conclusion that Wessinger was running at the time he was struck. Further, Dr. Suarez testified that at least four of the five bullets that struck Wessinger made entry through his back side, causing him to conclude that Wessinger was running away with his back to defendant at the time he was shot.

Detective Eric Ponson of the Iberville Parish Sheriff's Office testified that he found eight nine-millimeter bullet casings in a group near where the initial altercation took place. Charles Watson, an expert in the field of firearm examination, matched the eight bullet casings to the gun that defendant gave to the police when he voluntarily surrendered. Watson also matched bullets pulled from a wall and from Wessinger's foot to defendant's gun.

The guilty verdict in this case indicates that the jury rejected the defendant's claim that he shot Wessinger in self-defense. The testimony presented during trial

established that Wessinger was shot in the back as he ran away from defendant. There was conflicting evidence presented at trial regarding whether one of the victims pulled a weapon and began shooting. However, as the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, 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. Richardson**, 459 So.2d 31, 38 (La. App. 1 Cir. 1984). 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 fact finder's determination of guilt. **State v. Taylor**, 97-2261, p. 6 (La. App. 1 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. Further, a reviewing 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, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). The jury apparently weighed the testimony of the witnesses presented at trial and concluded that defendant did not act in self-defense. 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 which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). In reviewing the evidence, we cannot say that the unanimous jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 2006-0207 at 14, 946 So.2d at 662.

Considering the testimony presented in the light most favorable to the prosecution, we conclude that a rational juror could have found that the State

established beyond a reasonable doubt that defendant did not act in self-defense.[3] Thus, we find no error in the jury's rejection of defendant's claim of self-defense.

This assignment of error is without merit.

For the foregoing reasons, we affirm defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.

[3] We note that with respect to defendant's convictions for attempted second degree murder, Louisiana law is unclear as to who has the burden of proving self-defense. However, because the evidence sufficiently established, under either standard, that defendant did not act in self-defense, we need not decide in this case who has the burden of proving (or disproving) self-defense. See **Taylor**, 97-2261 at 4, 721 So.2d at 931.