No. 1-09-0930

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FIFTH DIVISION
February 4, 2011

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07CR21549
	)	
TASHAWN HAWKINS,	)	The Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Epstein concur in the judgment.

ORDER

HELD: (1) Aggravated battery of a police officer without a showing of great bodily harm or permanent disability or disfigurement is not a forcible felony for purposes of the armed habitual criminal statute; (2) evidence of a police radio call of "shots fired" is admissible at trial to show investigatory procedure; and (3) the trial court properly performed a 3-step *Batson* analysis and defense counsel was allowed but not required to rebut the State's explanation of race-neutral reasons for its peremptory challenges.

After a jury trial, defendant Tashawn Hawkins was convicted of one count of the offense of armed habitual criminal and one count of unlawful use of a weapon by a felon. Defendant was

sentenced to concurrent sentences of fourteen years and seven years' imprisonment, respectively. On appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt of being an armed habitual criminal; (2) the trial court erred in allowing the police radio dispatch into evidence via officer testimony because the dispatch was inadmissable hearsay; and (3) defendant was prejudiced where the trial court erred in determining, via a *Batson* hearing, that the State's peremptory challenges during jury selection were not discriminatory. For the following reasons, we affirm in part and reverse in part.

BACKGROUND

The facts of this cause are not in dispute. Defendant does not contest his conviction for unlawful use of a weapon by a felon. At trial, Chicago police officers Joseph Madden and Jared Nowak each testified that they responded to a radio call of "shots fired in the area of 54th and Morgan" on October 1, 2007. The officers were near the area in question when they first heard the call. As they drove toward the area, they saw defendant "jogging eastbound from the vicinity of the call of shots fired." Both officers testified that defendant had his hands in his sweatshirt pocket as he was jogging, and Officer Madden testified that defendant's pocket was "bounc[ing] up and down." These things led Officer Madden to believe that defendant had a handgun.

Officers Madden and Nowak exited their unmarked vehicle, announced their office, and ordered defendant to stop. Defendant fled. During a foot chase, Officer Madden saw defendant remove a handgun from somewhere in front of his body and throw it toward a wall between a residence and an adjacent building at 850 West 54th Place. No one else was nearby. The

officers continued to pursue defendant until other responding officers surrounded him at 931 West 54th Place and placed him in custody. Officer Madden immediately returned to the area where defendant had discarded the gun and, in the presence of another officer, retrieved the weapon from the exact location where he had seen defendant throw it to the ground. Nobody else was nearby. Officer Madden observed that the weapon was loaded with a live bullet in the "ready, fire" position.

At the end of the State's case, the parties discussed stipulations outside the presence of the jury. Both parties stipulated that defendant was convicted of aggravated battery of a police officer on August 1, 2005, and that he was convicted of aggravated unlawful use of a weapon on March 20, 2003. The State asked the court to find that both convictions were forcible felonies that qualified as predicates for the offense of armed habitual criminal. Defense counsel objected, arguing that aggravated battery to a police officer is not a forcible felony. The court disagreed, and found that the statute contemplates that aggravated battery to a police officer is a forcible felony. The court ruled that both convictions qualified as predicates.

The parties then stipulated that, prior to October 1, 2007, defendant was convicted, for purposes of the armed habitual criminal statute, of two qualifying forcible felonies: aggravated unlawful use of a weapon and aggravated battery of a police officer. The parties also stipulated that defendant was convicted of a qualifying offense for the unlawful use of a weapon by a felon charge. These stipulations were read to the jury.

After the State rested, defense counsel moved for a directed finding, in pertinent part, as to the armed habitual criminal count on the ground that aggravated battery of a police officer is

not a forcible felony and, therefore, not a qualifying offense. The court denied the motion without comment.

Alexzandra Enge, defendant's teenage neighbor, was defendant's sole witness. Enge testified that she was sitting outside on her porch with a friend on October 1, 2007, and she watched the police arrest defendant. She did not see defendant throw anything, but saw him get "immediately straight down on the ground" when ordered to do so. Enge did not see the police recover a weapon. On cross-examination, Enge admitted that she did not notice what occurred down the street and did not see from which direction defendant came.

The jury found defendant guilty of both charges. The court denied defendant's post-trial motion. Defendant was sentenced to concurrent sentences of fourteen years' imprisonment for the armed habitual criminal conviction and seven years' imprisonment for the unlawful use of a weapon by a felon conviction. Defendant appeals.

ANALYSIS

I. Aggravated Battery of Police Officer as a Forcible Felony

Defendant first contends that his armed habitual criminal conviction should be reversed because the aggravated battery of a police officer conviction underlying his armed habitual criminal conviction is not a forcible felony. We agree.

Initially, the State argues that defendant has waived this issue by failing to object at trial and failing to include it in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to properly preserve an alleged error by both an objection at trial and a written post-trial

motion constitutes a procedural default of that error on review). Our review of the record, however, shows that defendant both objected at trial and included this issue in his post-trial motion. At trial, defense counsel objected to the State's request to admit the aggravated battery of a police officer conviction as a predicate for the offense of armed habitual criminal. Defense counsel argued that this crime was not a forcible felony, but the court disagreed. Then, after the State rested, defense counsel moved for a directed finding, arguing in pertinent part that the armed habitual criminal count had not been proved because the aggravated battery of a police officer conviction was not a qualifying offense. The court denied that motion. Finally, defendant's post-trial motion for a new trial included claims that the State failed to prove defendant guilty beyond a reasonable doubt, that the State failed to prove every material allegation of the offense beyond a reasonable doubt, and that the court erred in denying defendant's motion for a directed verdict.

Next, the parties disagree as to the appropriate standard of review to be utilized here. Defendant argues that, because he asks us to interpret a statute to determine whether the predicate felony qualifies as a forcible felony, we should use a *de novo* standard of review. The State contends that we should use a reasonable doubt standard because we are considering this issue in terms of evidentiary sufficiency. We are considering here whether a particular crime fits the statutory definition of "forcible felony" for purposes of the armed habitual criminal statute. When interpreting a statute, the reviewing courts must ascertain and give effect to the legislature's intent. *People v. Jones*, 214 Ill. 2d 187, 193 (2005). The legislature's intent is best ascertained by examining the language of the statute itself. *People v. Belk*, 203 Ill. 2d 187, 192

(2003). Reviewing courts must construe the language of a penal statute in favor of the accused. *In re Jaime P.*, 223 Ill. 2d 526, 539 (2006). "In interpreting a statute, a court should 'consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought.' " *People v. Schmidt*, 392 Ill. App. 3d 689, 695 (2009), quoting *People v. Donoho*, 204 Ill. 2d 159, 171-72 (2003). The construction of a statute is a question of law and, accordingly, our review is *de novo*. *Belk*, 203 Ill. 2d at 192.

The Illinois Criminal Code of 1961 (Code) defines the crime of armed habitual criminal:

> "(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted of a total of 2 or more times of any combination of the following offenses:
>
> (1) a forcible felony as defined in Section 2-8 of this Code;
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm * * *; or
>
> (3) any violation of the Illinois Controlled Substances Act * * * that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7(a) (West 2008).

The effective date of this statute was August 2, 2005. See 720 ILCS 5/24-1.7(a) (West 2008).

The statute "demonstrates an unmistakable purpose to criminalize recidivist offenders

who subsequently receive, possess, sell, or transfer firearms. [*citation.*] Moreover, the statute evinces a clear intent that the crime apply to those offenders whose prior offenses were of a particular serious class or nature." *People v. Adams*, 404 Ill. App. 3d 405, 411 (2010). Both the prior convictions and the present conduct must be proved beyond a reasonable doubt. *Adams*, 404 Ill. App. 3d at 412.

Section 2-8 of the Code of Criminal Procedure of 1961 (Code) defines "[f]orcible felony" as "treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2008).

Additionally, section 12-4 of the Code provides that an aggravated battery can occur in several ways. Subsection (a) provides that a "person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery." 720 ILCS 5/12-4(a) (West 2008). Subsection (b) requires a defendant to have committed a simple battery accompanied by certain factors such as knowledge that the victim is a peace officer. 720 ILCS 5/12-4(b)(6) (West 2008). The aggravated battery of a police officer conviction which served as a predicate to defendant's armed habitual criminal conviction at issue here was charged under subsection (b) (6), that defendant had knowledge that the victim was a peace officer.

This court recently decided a similar issue to the one at bar in *Schmidt (Schmidt*, 392 Ill. App. 3d at 689). In *Schmidt*, we held, in relevant part, that the aggravated battery of a police officer without resulting great bodily harm or disability was not a forcible felony that could support a felony murder conviction. The *Schmidt* court noted that the forcible felony statute enumerates specific felonies, followed by a residual clause for "any other felony which involves the use or threat of physical force or violence against any individual," 720 ILCS 5/2-8 (West 2008); *Schmidt*, 392 Ill. App. 3d at 695, and found that, "by using the word 'other' after listing 14 specific felonies, the legislature clearly intended the residual category to refer to felonies not previously specified. Where the statute specifically enumerated aggravated battery resulting in great bodily harm or permanent disability or disfigurement, 'other felony' must refer to felonies other than aggravated battery." *Schmidt*, 392 Ill. App. 3d at 695.

The *Schmidt* court reasoned that the 1990 amendment to the forcible felony statute evidenced an intention by the legislature to exclude aggravated batteries that do not result in "great bodily harm or permanent disability or disfigurement" from the definition of a forcible felony. Specifically, the *Schmidt* court noted that, before 1990, the statutory definition of "forcible felony" included all aggravated batteries. In 1990, however, the legislature amended the statute by adding the phrase "resulting in great bodily harm or permanent disability or disfigurement."[1] The court found that "by enacting the 1990 amendment, the legislature expressed its intent to limit the number and types of aggravated batteries that would qualify as

[1]This phrase was added via Public Act 86-291 (Pub. Act 86-291, § 1, eff. January 1, 1990).

forcible felonies." *Schmidt*, 392 Ill. App. 3d at 696; accord *In re Rodney S.*, 402 Ill. App. 3d 272 (2009); *In re Angelique*, 389 Ill. App. 3d 430 (2009); but see *People v. Hall*, 291 Ill. App. 3d 411 (1997) and *People v. Jones*, 226 Ill. App. 3d 1054 (1992). Although *Schmidt* dealt with the definition of a forcible felony within the matrix of felony murder, we find it persuasive in the present context as well, and we adhere to its reasoning.

Here, both parties stipulated that defendant was convicted of the aggravated battery of a police officer and the aggravated unlawful use of a weapon. The conviction for aggravated unlawful use of a weapon is listed as a qualifying conviction in subsection (a)(2) of the armed habitual criminal statute. 720 ILCS 5/24-1.7(a)(2) (West 2008). We are concerned here only with the conviction for the aggravated battery of a police officer which, according to the State, falls under the subsection (1) category of "forcible felony." 720 ILCS 5/24-1.7(A) (West 2006).

The only aggravated battery offense listed in the forcible felony statute, however, is "aggravated battery resulting in great bodily harm or permanent disability or disfigurement." 720 ILCS 5/2-8 (West 2008). Absent a showing of great bodily harm or permanent disability, the aggravated battery of a police officer is not a forcible felony. There was no such showing in the case at bar. Accordingly, the trial court erred in determining that defendant's prior conviction for aggravated battery of a police officer qualified as a forcible felony for purposes of the armed habitual criminal charge here.

Because defendant's aggravated battery conviction is not a qualifying offense under the armed habitual criminal statute, the State failed to prove defendant had "two or more" qualifying offenses, and thus it did not prove every essential element of this crime beyond a reasonable

doubt. See 720 ILCS 5/24-1.7 (West 2008); *Adams*, 303 Ill. App. 3d at 412 (for an armed habitual criminal conviction, both the prior convictions and the present conduct must be proved beyond a reasonable doubt). Accordingly, we vacate defendant's conviction and sentence for armed habitual criminal.

II. The Radio Dispatch as Hearsay

Next, defendant contends that he was prejudiced by the admission of hearsay at trial. Specifically, defendant argues that the trial court erred by allowing testimony regarding a police radio dispatch via the testimony of two police officers who received the radio call who then testified to what they heard. We disagree.

Initially, the State argues that defendant has waived this issue by failing to include it in a written post-trial motion. However, defense counsel properly objected at trial and, after submitting a written post-trial motion which did not include this issue, made an oral amendment to include it for the court's consideration of the posttrial motion. Specifically, during the hearing on the post-trial motion, the court asked defense counsel if she wished to present arguments on the motion. Defense counsel stated:

> "[DEFENSE COUNSEL]: Yes, briefly, your honor. Your Honor, we also allege that the Court erred in * * * allowing that contents of the 911 tapes coming [*sic*]. Though, I understand that you are allowed the contents in just for what happened next, some of the jurors may have believed that was substantive evidence."

The State did not object to this oral amendment to the post-trial motion, stating that "all the other rulings that you made were accurate." The court denied the post-trial motion. The State cites *Enoch* for the proposition that this oral motion was "erroneous" and this issue was forfeited because a written post-trial motion was necessary. However, by not objecting to the oral motion below, the State waived any such forfeiture argument. *Enoch*, 122 Ill. 2d at 188 ("[t]his apparent circumvention of the requirement that the motion for a new trial be in writing and specify the grounds is based on the concept of waiver. Since the State failed to object to the oral motion, it has waived the requirements of the statute.")

To qualify as hearsay, an out-of-court statement must be offered to establish the truth of the matter asserted. See *People v. Rodriguez*, 312 Ill. App. 3d 920, 928 (2000). The contents of a police radio message are not hearsay if they are admitted for the limited purpose of explaining the reason and manner in which the police conducted their investigation. *People v. Banks*, 237 Ill. 2d 154, 180-81 (2010). A police officer may reconstruct the steps taken in the investigation of a crime and may describe the events leading up to the defendant's arrest. *People v. Trotter*, 254 Ill. App. 3d 514, 527 (1993); *People v. Simms*, 143 Ill. 2d 154, 174 (1991). Under the investigatory procedure exception, the officer's testimony must be limited to show how the investigation was conducted, and must not place into evidence the substance of any out-of-court statement or conversations for the purpose of establishing the truth of their contents. *Trotter*, 254 Ill. App. 3d at 527.

In the instant case, we address whether the statements elicited during the testimony of Madden and Nowak were properly admitted to explain the police investigation. Admissibility of

evidence is within the discretion of the trial court, and its ruling will not be reversed unless there has been an abuse of discretion. *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984).

Here, the State offered police testimony of a radio dispatch call of "shots fired" at "54th and Morgan." Defense counsel objected on the basis of hearsay. The court overruled the objection and admitted the testimony for the limited purpose of explaining police investigatory procedure. The officers' testimony in question was as follows:

> "[ASSISTANT STATE'S ATTORNEY]: And as you were there [in the area between 51st Street and 55th Street] did anything unusual occur?
>
> [OFFICER MADDEN]: We monitored an OEC [Office of Emergency Communications] call, a dispatched call of shots fired.
>
> * * *
>
> [ASSISTANT STATE'S ATTORNEY]: And when you say you monitored, what did you mean by that?
>
> [OFFICER MADDEN]: The call had come out over our radio. And I heard the call come out of our radio.
>
> [ASSISTANT STATE'S ATTORNEY]: And what did you hear?
>
> [OFFICER MADDEN]: There was a call of shots fired.
>
> [DEFENSE COUNSEL]: Objection to the hearsay, Your Honor.
>
> [THE COURT]: I will allow him just to show why he reacted.
>
> [ASSISTANT STATE'S ATTORNEY]: Go ahead.

[OFFICER MADDEN]: What I heard?

[ASSISTANT STATE'S ATTORNEY]: Yes.

[OFFICER MADDEN]: A call of shots fired in the vicinity of 54th and Morgan.

[ASSISTANT STATE'S ATTORNEY]: Okay. And so after that call came out, what did you and your partner do?

[OFFICER MADDEN]: We proceeded to that location.

* * *

[ASSISTANT STATE'S ATTORNEY]: And then as you were traveling there, did you see anyone you see in court today?

[OFFICER MADDEN]: Yes, I did. [Officer Madden identified witness in court.]

[ASSISTANT STATE'S ATTORNEY]: When you first saw the defendant, what was he doing?

[OFFICER MADDEN]: He was jogging eastbound from the vicinity of the call of shots fired running eastbound, jogging eastbound * * * and jogged directly in front of our vehicle. * * * His front pocket of his sweat shirt was bouncing up and down.

[ASSISTANT STATE'S ATTORNEY]: What was he doing with the pocket?

[OFFICER MADDEN]: He had his hands placed in front of his

stomach holding that area.

[ASSISTANT STATE'S ATTORNEY]: All right. Based on your experience as a Chicago police officer, what, if anything, did you conclude based on what you saw?

[DEFENSE COUNSEL]: Objection. Speculation.

[THE COURT]: Overruled.

[OFFICER MADDEN]: Based on the call of shots fired and the defendant–

[DEFENSE COUNSEL]: Objection to the relying on the hearsay as well as it is speculation, Your Honor.

[THE COURT]: All right. Just based on your own personal observation.

[ASSISTANT STATE'S ATTORNEY]: Based on your own observations, what did you conclude?

[OFFICER MADDEN]: I believed him to be armed with a handgun.

[ASSISTANT STATE'S ATTORNEY]: What did you do when [you] saw the defendant?

[OFFICER MADDEN]: We stopped our vehicle. I exited the vehicle. I announced my office and I had told [defendant] to stop."

Officer Nowak was also called to testify. His testimony which is at issue here was as follows:

> "[ASSISTANT STATE'S ATTORNEY]: And on that date at approximately 10:30, what, if anything, happened?
>
> [OFFICER NOWAK]: We received a call of shots fired in the area of 5400 South Morgan.
>
> * * *
>
> [ASSISTANT STATE'S ATTORNEY]: And once you got that call of shots fired, what, if anything, did you do?
>
> [OFFICER NOWAK]: Immediately drove to that area."

Defense counsel did not object to this testimony by Officer Nowak.

The officer testimony with which defendant takes issue is precisely the type of testimony regarding investigatory procedure that a court should allow. See *Trotter*, 254 Ill. App. 3d at 527 (a police officer may reconstruct the steps taken in the investigation of a crime and may describe the events leading up to the defendant's arrest). Officer Madden's testimony explained the reason he and his partner immediately responded to the scene. It also explained why he and his partner took notice of defendant jogging away from that area. The fact that they were summoned to the area regarding a possible weapons-related incident explained why they noticed that defendant's front sweatshirt pocket was bouncing up and down as defendant ran and why, in Officer Madden's experience, he thought it was a handgun. Without testimony regarding the radio call, the jury would have been unable to understand why the officers were present at a

particular place at a particular time and why an unknown individual caught their attention. The officers merely explained the steps taken in their investigation in order to give context to the course of their ensuing investigation.

Defendant also contends that the State relied on the radio call in opening statement and closing arguments "to prove that [defendant] was in the area where gunshots were fired." However, the State did not err where it did not use the "shots fired" information to prove or insinuate to the jury that defendant had discharged a weapon. The portion of the State's opening statement with which defendant takes issue is:

> "[ASSISTANT STATE'S ATTORNEY]: You are going to hear about two officers who were on patrol that evening * * *, when they received a dispatch of a shot fired in the area of 54th and Morgan. The officers did their duty and responded to that call. When they went to that area, they observed the defendant * * * jogging in the middle of the night, 10:30 at night on October 1st, 2007. Now, having just received a call of a shot being fired in that area, the officers wanted to interview the defendant. Then they stopped and try [*sic*] to get his attention and instead of stopping, he went from a jog to a full out sprint. So the officers gave chase. When they did so, the defendant continued to run."

Clearly, trial counsel referred to the "shots fired" message for the purpose of advancing the narrative of why the officers came to focus their attention on defendant. It gave context to the

course of the officers' investigation. Defense counsel did not object to this testimony at trial.

In closing argument, the State said:

> "[ASSISTANT STATE'S ATTORNEY]: You heard what happened on that evening from Officer Madden and Officer Nowak. They told you they are in the area, routine patrol. They were there and they heard the shots fired call in the area of 54th and Morgan. They were a very short distance away. They drove to that area, drove northbound on Peoria. As they were driving towards where that shots fired call came from, they encountered defendant."

Preceding these references, trial counsel summarized the evidence against defendant, including that defendant ran through the streets with a gun, which he discarded while Officer Madden gave chase. Counsel discussed the officers' eyewitness testimony and reminded the jury that Officer Madden personally observed defendant discard the gun. Trial counsel also reviewed for the jury the issues instructions for the crime of armed habitual criminal and unlawful use of a weapon by a felon. Counsel stressed that, to satisfy the element of knowing possession for the crime of unlawful use of a weapon by a felon, the State only had to show that defendant possessed the gun. Counsel stressed that Officer madden's eyewitness observation that defendant threw the gun on the ground satisfied the element of knowing possession. In counsel's discussion of circumstantial evidence, counsel did not mention the radio call or its contents. At the end of his argument, counsel reminded jurors:

> "[ASSISTANT STATE'S ATTORNEY]: The defendant is not charged with using the weapon at all. The charge is mere possession. If the defendant had the gun and the other elements are met, then the defendant is guilty. He does not have to be - - there needs to be no proof that the defendant fired it, bought it, sold it, transferred it, took - - all he needs to do is have it and the other conditions be met."

The references to the radio call were not used to convince the jury to find that defendant possessed a gun merely because he was in the vicinity of alleged gun fire. Any testimony about or reference to the radio call merely to showed the course of the investigation and nothing more. The content of the radio message was not hearsay, and the court did not abuse its discretion in permitting the officers to testify to what they heard.

Defendant relies heavily on *People v. Jura*, 352 Ill. App. 3d 1080 (2004), which we find inapposite to the case at bar. In *Jura*, this court held that the testimony admitted had the effect of proving the matter asserted, that the defendant was the individual who committed the offense, and that it failed to satisfy any other non-hearsay purpose. *Jura*, 352 Ill. App. 3d at 1088. In *Jura*, the defendant was accused of the unlawful use of a weapon by a felon. *Jura*, 352 Ill. App. 3d at 1080. The hearsay statements elicited by the state included testimony by three police officers that they responded to a radio dispatch call of a " 'person with a gun' " described as a male white with a tattoo of a teardrop on his face. *Jura*, 352 Ill. App. 3d at 1086. In addition, each officer testified that Jura "matched that description." *Jura*, 352 Ill. App. 3d at 1086. The

appellate court determined that the information about the type of crime reported and the offender's physical description was inadmissible as hearsay because it was an out-of-court statement tending to prove that Jura was the man who possessed the gun, the main controversy at trial. *Jura*, 352 Ill. App. 3d at 1088. In contrast, the testimony at issue here did not tend to prove the main controversy at trial, but only showed the course of the investigation.

III. The *Batson* Hearing

Next, defendant contends that the circuit court violated his right to equal protection under the Fourteenth Amendment to the United States Constitution when it failed to conduct a proper hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to determine whether the State exercised peremptory challenges to exclude three African American venire members from the jury on racial grounds. Specifically, defendant contends that the circuit court incorrectly applied the three-step procedure set forth in *Batson*. Defendant argues that the court erred where: (1) it failed to invite the defense to state why the State's race-neutral reasons for dismissing potential jurors were pretextual; and (2) the court improperly collapsed *Batson*'s first and third steps by considering "the totality of the circumstances" and "the totality of the venire," concerns relevant only to the *prima facie* case, in ultimately concluding that the State did not intentionally exclude the three African American venire members on the basis of their race. We disagree.

The tree-step *Batson* analysis requires the trial court to: (step one) determine whether the defendant made a *prima facie* showing that the State exercised a peremptory challenge on the basis of race; if yes, (step two) compel the State to articulate a race-neutral explanation for

excluding the venire member in question; and then (step three) determine whether the defendant met his burden of proving purposeful racial discrimination. *Batson*, 476 U.S. at 93-94; *People v. Rivera*, 221 Ill. 2d 481, 500 (2006). At step two, the trial court focuses on the facial validity of the State's race-neutral explanation, which need not be persuasive or even plausible; absent an inherent discriminatory intent in the State's explanation, the reason offered will be deemed race-neutral. *People v. Easley*, 192 Ill. 2d 307, 324 (2000). At step three, however, the persuasiveness of the State's explanation becomes relevant, and implausible or fantastic justifications may be found to be pretexts for purposeful discrimination. *Rivera*, 221 Ill. 2d at 500; *Easley*, 192 Ill. 2d at 324 (at step three, the trial court weighs the defendant's *prima facie* case, the State's reasons, and any rebuttal by defense counsel). "A reviewing court should not overturn a trial court's finding on the issue of discriminatory intent in the prosecution's use of peremptory challenges unless it is convinced that the trial court's determination was clearly erroneous." *People v. Martinez*, 297 Ill. App. 3d 328, 339 (1998). "Because the trial court's finding regarding discriminatory intent is a matter of fact and a question of credibility, the trial court's findings are afforded a great deal of deference on review." *Martinez*, 297 Ill. App. 3d at 339.

Defendant acknowledges that the court properly determined at the outset that he presented a *prima facie* case of racial discrimination (step one) and properly invited the State to articulate race-neutral reasons for their peremptory challenges (step two), but claims that the court incorrectly curtailed step two when it failed to afford him the opportunity to explain why the State's race-neutral explanations were a pretext for racial discrimination. Defendant argues that,

because the court did not elicit his rebuttal of the State's race-neutral reasons as part of its decision-making process at step three, it failed to consider defendant's reasons and, therefore, the court's ultimate conclusion that no purposeful discrimination occurred was invalid because it rested on an incomplete record.

During jury selection, the court excused five venire members for cause. The defense exercised four peremptory challenges against Caucasian venire members, and the State used three of its four peremptory challenges against African Americans. Eventually, one African American juror sat on the 12-member jury that convicted defendant. There is no record of the race of the two alternate jurors.

Once the parties selected the 12-person jury, but before the jury was sworn, the defense made a *Batson* motion challenging the State's use of peremptory challenges. The defense articulated its basis for a *prima facie* case to be that the State used three of the four peremptory challenges they exercised to strike three African-American venire members, which resulted in only one African American person sitting on an otherwise all-Caucasian 12-person jury. The court immediately ruled that the defense had stated a *prima facie* case of racial discrimination and instructed the State to articulate race-neutral reasons for their three challenged peremptory strikes. The court also noted that the defense had used its peremptory challenges to strike exclusively Caucasian venire members, and advised the parties of its intent to ask each side to state its race-neutral reasons for its respective challenges. The court observed that the defense did not contemporaneously object to the State's use of their peremptory challenges to strike African Americans.

The prosecutor responded that he struck the three venire members because he believed they could not be fair to the State for the following reasons: (1) Alfreda Johnson because she visits her brother and her baby's father in jail; (2) Roxie Williams because part of her work in a clinic requires her to work directly with prisoners in jail; and (3) Margo Holden-Bowens because she lives in the area where the instant crime occurred and indicated that she may not be able to be fair.

The court responded:

> "[THE COURT]: I find that there's race neutral reasons, and in the totality of the circumstances, having observed them in their answering, Miss Holden-Bowens did indicate she didn't know if she could be fair, that she would try; and the other people, the State has given reasons. In looking at the totality of the venire, I don't find that there is–in weighing all the *Batson* issues, I don't find that there is intentional discrimination."

Defendant's assertion that the court must, at the second stage of the *Batson* inquiry, invite the defense to rebut the State's race-neutral reasons by arguing pretext is incorrect. There is no such requirement. Rather, once the State articulates race-neutral reasons, the defendant *"may* then rebut the proffered explanation as pretextual." *Davis*, 231 Ill. 2d 349, 363 (2008), citing *People v. Williams*, 209 Ill. 2d 227, 244 (2004). Then, at the third stage of inquiry, the court must consider both parties' submissions to determine whether the State engaged in purposeful discrimination only when both parties have submitted arguments in this regard.

Davis, 231 Ill. 2d at 363. A defendant is allowed to, but is not required to, claim pretext after the State articulates its race-neutral reasons for exercising its peremptory challenges. See, *e.g.*, Williams, 209 Ill. 2d at 244 (after a *prima facie* showing has been made, the State must present race-neutral reasons for having exercised its peremptory challenges. "Defense counsel may then rebut the proffered explanation as pretextual."); *Hogan*, 389 Ill. App. 3d 91, 103 (2009) (the court "completed the second step in *Batson* by having the State provide race-neutral reasons for exercising its peremptory challenges" but then erred at step three by not considering the defendant's claims of pretext which it had argued). Defendant's failure to avail himself of the opportunity to rebut the State's presentation of its race-neutral reasons for making peremptory challenges is not error by the court. Defendant's claim here fails where the court has no *sua sponte* duty to invite or require defense counsel to rebut the State's presentation of its race-neutral reasons.

We are equally unpersuaded by defendant's claim that the court erred by "collapsing" the first and third *Batson* steps. A review of the court's final ruling on this issue shows that it properly performed the three-step *Batson* analysis where it: (step one) elicited and ruled on defendant's articulation of a *prima facie* case; (step two) elicited the State's race-neutral reasons for its peremptory challenges; and (step three) considered its own observations of the demeanor of the stricken jurors and the persuasiveness of the State's explanations in light of "the totality of the circumstances," "the totality of the venire," and "all the *Batson* issues" before concluding that the State did not engage in intentional discrimination.

At the third step of the *Batson* inquiry, the court must weigh the evidence from the *prima*

facie case, the parties' reasons for challenging the venirepersons, and any rebuttal offered to determine whether defendant has met his burden of proving intentional discrimination. *Easley*, 192 Ill. 2d at 324. At this step, the court also evaluates the prosecutor's credibility and the demeanor of the jurors in question. *Davis*, 231 Ill. 2d at 364. The trial court properly performed this inquiry here. It specifically found race neutral reasons for the peremptory challenge and noted that it had personally observed the jurors. It stated that juror Holden-Bowens had said she did not know if she could be fair and noted that the State had also provided reasons for its other peremptory challenges. The court stated it had weighed the *Batson* factors and found no intentional discrimination. Mindful of the deference to be accorded the trial court's findings, we perceive no error in the court's determination of no purposeful discrimination in the exclusion of potential jurors Johnson, Williams, and Holder-Bowens. Defendant suffered no equal protection violation.

CONCLUSION

For the foregoing reasons, we affirm defendant's conviction and sentence for the conviction of unlawful use of a weapon by a felon and reverse defendant's conviction for armed habitual criminal.

Affirmed in part; reversed in part.