17CA0336 Peo v Robinson 04-08-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 17CA0336
Arapahoe County District Court No. 15CR26
Honorable Natalie T. Chase, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Derek Ramon Robinson,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE NAVARRO
J. Jones, J., specially concurs
Yun, J., dissents

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 8, 2021

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¶ 1 Defendant, Derek Ramon Robinson, appeals the judgment of conviction entered on jury verdicts finding him guilty of attempted first degree murder and first degree assault. He contends that the district court erred by denying his challenges raised pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to three of the prosecutor's peremptory strikes of potential jurors — all people of color. As to two prospective jurors, we agree and reverse.

I. Background

¶ 2 The prosecution presented evidence that Robinson and his girlfriend, M.K., were involved in a domestic dispute on January 5, 2015. The argument ended with Robinson shooting her in her jaw. She survived.

¶ 3 Robinson was charged with attempted first degree murder and first degree assault. A jury found him guilty of both charges and made crime of violence and domestic violence findings. The district court sentenced him to forty-eight years in prison.

II. Robinson's *Batson* Challenges

¶ 4 Robinson argues that the district court erred at step three of the *Batson* analysis by (1) considering a race-neutral reason for striking a prospective juror that the court provided sua sponte and

(2) crediting the prosecutor's proffered race-neutral reason for striking two prospective jurors because it was pretextual. We disagree that the first issue requires reversal but agree that the second issue does.

A. Additional Facts

¶ 5 The following took place during jury selection.

1. Voir Dire and Jury Selection

¶ 6 The prosecutor asked the venire, "What . . . makes a fair juror?" The responses varied but focused mainly on being able to put aside one's prejudices and biases. Continuing with this line of questioning, the prosecutor asked Juror N:

> [Prosecutor]: . . . I want to test you about the [previous prospective juror's response], which is setting prejudices and biases aside. What does that mean to you when you come into this room? I know it's a bit of a hard question.
>
> Let me give you a slightly less hard question. First, I'll ask a broad question. There's certain hot-button issues in society: Gun control — we had somebody talking about being an NRA member, how that might cause them difficulties in a case involving a gun; you know, abortion, what's going on with police and police shootings, all of those issues. Those are out there. How do you go about setting those aside?

> [Juror N]: Listen to the evidence. What took place.
>
> [Prosecutor]: And judge this case solely by the evidence; is that fair?
>
> [Juror N]: Yes.

This was the only exchange between the prosecutor and Juror N.

¶ 7 Later, the prosecutor engaged a group of prospective jurors — including Juror V — in a discussion regarding whether they would be comfortable finding a defendant guilty even if they still had questions at the end of the prosecution's case. After another juror said she would be comfortable, the prosecutor asked, "And [Juror V], what about you?" Juror V responded by saying it was a juror's job to "listen and absorb everything that's going on" and keep an open mind. The prosecutor then asked Juror V:

> [Prosecutor]: [W]hen we have to prove something, there are certain things . . . elements that we have to prove. Let's say it's a speeding case. We have to prove that there was a guy or woman — there's a person who was in a car, speed limit was 45. They were doing 55. Let's say we prove all those things, but you really want to know what the color of the car was, but that's not something we have to prove — but we never answer that question for you — and the judge tells you all we have to do is prove those four things beyond a reasonable doubt and you have to find him

> guilty, but you really want to know what the color of the car is. Are you comfortable finding that defendant guilty?
>
> [Juror V]: Hmm, I would have to — the color has to be kind of close. (Laughs.)
>
> [Prosecutor]: What if that's not something we have to prove? [An o]fficer gets up, says, "Hey, that's the guy." You find the officer credible. Shows you a photo of the stop sign, maybe like a dash cam video. The car going past, but it's going so fast you can't tell what color it is. It's just a blur.
>
> [Juror V]: Yeah. I don't know. I don't know on that one.
>
> [Prosecutor]: You don't know?
>
> [Juror V]: I'm not too sure on that one.

The prosecutor then moved on.

¶ 8 Toward the end of his voir dire, the prosecutor asked a group of potential jurors — including Juror S — about how they would judge a witness's credibility. Juror S responded that he would "study body language and [listen] to the person intently." The prosecutor then asked Juror S questions aimed at gauging how the prosecution should prove a defendant's mental state. One question asked, "Are you comfortable judging what's going on in someone's

mind by looking at their actions?" The following exchange then took place:

> [Juror S]: Yeah. If the evidence is strong enough and it's presented to me in a well manner and I feel that it's overwhelmingly supporting that claim, absolutely.
>
> [Prosecutor]: What do you mean by "overwhelmingly supporting?"
>
> [Juror S]: If it's to the point where — someone had mentioned earlier they might have a little bit of doubt. Always. But if it's, you know, overwhelming enough — overwhelmingly evident enough to the point where my doubt isn't so strong that it's kind of wearing on me, thinking, okay, you know, how strong is my doubt, is it just a — some things that are minor that don't really relate to the case or is it something that really is weighing on my mind, and saying, okay, what — do I really have a lot of doubt about this, if the evidence is overwhelmingly supporting that, you know, the evidence to the contrary, then I would be comfortable with that.
>
> [Prosecutor]: That's an interesting statement right now. The overwhelmingly supporting is overwhelming the doubt in your mind and how you judge that. One of the interplays in reasonable doubt and the definition that the Court will give you at the end of this trial and has already given you is this notion that it can't be something which is vague, speculative, or imaginary. So when you say overcoming that doubt, you know, when the judge is saying that it can't be, you know, like

> a vague feeling in the pit of your stomach, that's not reasonable doubt. That's exactly what they're saying, isn't it? Are — is that what you're referring to? Can you give me a little more in what [you're] talking about?
>
> [Juror S]: . . . [F]or example, they were talking about the color of the car earlier.
>
> [Prosecutor]: Yeah.
>
> [Juror S]: I mean, if it had absolutely nothing to do with proving the crime —
>
> [Prosecutor]: Um-hum.
>
> [Juror S]: — then — and the question's not answered, you know, I would be okay with it not being answered. But if it — if knowing the color of the car was really a necessary fact, in knowing . . . the facts of the case, then I would not be very comfortable with not knowing that fact.
>
> [Prosecutor]: Okay. What if it is not something that the judge tells you we have to prove, but it's really necessary to you; are you comfortable putting that aside and holding us to only proving what the judge tells us we have to prove?
>
> [Juror S]: If I feel it's something that's necessary to really provide facts for the case, then no, I wouldn't be comfortable with that.

¶ 9 Later, at the peremptory strikes phase, the prosecutor excused Jurors N, V, and S.

2. Robinson's *Batson* Challenges and Ruling

¶ 10 After the parties finished with peremptory strikes, defense counsel challenged the strikes to Jurors N, V, and S under *Batson*, alleging racial discrimination. In making a prima facie case, defense counsel pointed out that these three jurors were persons of color. Counsel explained that Juror N appeared to be of "Asian descent," Juror V appeared to be of "Hispanic descent," and Juror S appeared to be of "Indian descent." The district court found that the defense had established a prima facie case under *Batson* step one.

¶ 11 The court continued:

> But I will note for the record that No. 1, [Juror S], had you guys asked for a for-cause challenge. He did not — he was not willing to follow the reasonable-doubt standard. In fact, he made several statements that I even highlighted in here about reasonable doubt and that he would not follow the law and take — if he thought that fact was necessary he would not follow the beyond-a-reasonable-doubt instruction and use that in the jury room. So I will note . . . that for [Juror S]. But let's go to the second [*Batson*] step.

¶ 12 The prosecutor then gave race-neutral reasons for the peremptory strikes. As to Juror S and the court's expressed

concern, the prosecutor said, "I'll adopt the Court's record. That was going to be my record, as well." He continued, "I asked [Juror S] if there's something you feel is necessary but is not something we have to prove, should it have been are you going to hold us to that, and he unequivocally said yes."

¶ 13 As to Juror V, the prosecutor gave the same reason:

> [M]y concern was, in using the example on speeding, I — it was the same thing essentially as [Juror S]. I asked him repeatedly about the color of the car and he said he didn't know in terms of color, even if it was an element [sic], he didn't know if he could find [a defendant] guilty if the color of the car wasn't proven.

¶ 14 The prosecutor said he struck Juror N because, in light of Juror N's difficulty responding to a question, he was concerned that "it's a language issue, and we have concerns about [Juror N] being able to understand the trial."

¶ 15 In response, defense counsel argued that Juror N simply had difficulty understanding the prosecutor's broad question as opposed to difficulty understanding English. As for Jurors S and V, defense counsel argued that neither potential juror would make the prosecution prove facts beyond the elements of the crime charged. Rather, defense counsel continued, their responses indicated

merely that they would hesitate to find someone guilty if they still had questions about an important detail of the case.

¶ 16 In implicitly crediting the prosecutor's proffered race-neutral reasons, the court explained:

> So the Court is finding that the *Batson* challenge has not been met, and here's why. For [Juror S], like I previously stated, had either side asked for a for-cause challenge I would have granted it. It was highlighted on my sheet he was not able to follow reasonable doubt. I'm seeing that there is a race-neutral reason.
>
> As for [Juror N], . . . the Court does see the hesitation that the People have [regarding language-barrier issues], and the Court had originally the same hesitation, and so the Court finds that that's a race-neutral reason.
>
> As for [Juror V], with the car example, he had a really hard time with the car example on the color — and so did some other jurors, I will give you that. But he also didn't know about reasonable doubt. He kept saying he didn't know, and I wrote that down. So the Court is finding that there is a race-neutral reason for that.

B. *Batson*, Standard of Review, and Comparative Juror Analyses

¶ 17 "The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster v. Chatman*, 578 U.S. ___, ___, 136 S. Ct. 1737, 1747 (2016) (citation omitted). In

particular, the Equal Protection Clause forbids prosecutors from challenging potential jurors on account of their race. *Batson*, 476 U.S. at 89; *People v. Beauvais*, 2017 CO 34, ¶ 20.

¶ 18 When a defendant raises a *Batson* challenge based on race, a three-step analysis applies. *People v. Wilson*, 2015 CO 54M, ¶ 10. First, the defendant must make a prima facie case showing that the prosecutor struck a prospective juror on the basis of race. *Id.* Second, if the defendant does so, the burden shifts to the prosecution to proffer a race-neutral reason for excusing the prospective juror. *Id.* Third, the district court assesses the prosecutor's subjective intent and the plausibility of the prosecutor's race-neutral explanations to determine whether the defendant has carried the burden to establish purposeful discrimination. *People v. Rodriguez*, 2015 CO 55, ¶ 12; *see also Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

¶ 19 The applicable standard of review for a *Batson* challenge depends on which step of the analysis is challenged on appeal. *People v. Friend*, 2014 COA 123M, ¶ 8, *aff'd in part and rev'd in part*, 2018 CO 90. We review de novo *Batson* steps one and two. *Rodriguez*, ¶ 13. The district court's ruling at step three, however,

is a factual finding to which "an appellate court should defer, reviewing only for clear error." *Id.* Only the third step is at issue here.

¶ 20 At step three, the critical question is the persuasiveness of the prosecutor's justification for the peremptory strike. *Wilson*, ¶ 14. The district court must gauge the prosecutor's credibility by evaluating the prosecutor's demeanor, how reasonable or improbable the proffered explanations are, and whether the proffered rationale has some basis in accepted trial strategy. *Id.* In addition, the district court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers v. Mississippi*, 588 U.S. ___, ___, 139 S. Ct. 2228, 2244 (2019); *see also Snyder v. Louisiana*, 552 U.S. 472, 485 (2008); *People v. Collins*, 187 P.3d 1178, 1182-84 (Colo. App. 2008). As the Court in *Miller-El* explained:

> If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than [the pre-*Batson* framework]. Some stated reasons are false, and although some false reasons are

> shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand.

545 U.S. at 240. The prosecutor's proffer of a pretextual explanation "naturally gives rise to an inference of discriminatory intent." *Snyder*, 552 U.S. at 485.

¶ 21 A defendant may argue various kinds of evidence to support a *Batson* claim. For instance, a defendant may point to "side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case" to show that the prosecutor exercised peremptory challenges on the basis of race. *Flowers*, 588 U.S. at ___, 139 S. Ct. at 2243. If a proffered reason for striking a panelist of color applies just as well to an otherwise-similar panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination. *Foster*, 578 U.S. at ___, 136 S. Ct. at 1754.

¶ 22 Although it is the preferred course, a defendant is not required to present a comparative juror analysis in the district court before raising the comparison on appeal. *See Beauvais*, ¶ 52. "[A]ppellate courts may conduct comparative juror analyses despite an objecting party's failure to argue a comparison to the trial court, but only

where the record facilitates a comparison of whether the jurors are similarly situated." *Id.* An empaneled juror is similarly situated to a dismissed potential juror for the purposes of an appellate court's comparative juror analysis if the empaneled juror shares the same characteristics for which the striking party dismissed the potential juror. *Id.* at ¶ 57.

¶ 23 When a comparative juror analysis is properly before us, evidence of disparate treatment revealing that a prosecutor's proffered race-neutral reason for striking a juror was pretextual — and thus unconvincing — may establish a *Batson* violation. *See Snyder*, 552 U.S. at 478 ("[T]he explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error."); *People v. Gabler*, 958 P.2d 505, 508 (Colo. App. 1997) ("A prosecutor's disparate treatment of prospective jurors who, but for their race, have similar and allegedly objectionable experiences, is pretextual."); *State v. Curry*, 447 P.3d 7, 15 (Or. Ct. App. 2019) (concluding that "[w]hen the trial court's [*Batson*] ruling is considered through the lens of the comparative juror analysis employed in *Snyder* and *Miller-El*, it is clearly erroneous"); *State v. Stewart*, 775 S.E.2d 416, 421 (S.C. Ct.

App. 2015) (concluding that a trial court's *Batson* ruling was clearly erroneous using comparative juror analysis alone); *Hopkins v. Commonwealth*, 672 S.E.2d 890, 893 (Va. Ct. App. 2009) (same as *Stewart*).

C. Analysis

¶ 24 Applying the above principles, we conclude that the district court clearly erred by crediting the prosecutor's proffered race-neutral reason for striking Jurors S and V at *Batson* step three.[1] A comparative juror analysis of the record shows that the proffered reason was pretextual and thus raised an adverse inference of discrimination that was not overcome by any other race-neutral reason. *See Collins*, 187 P.3d at 1182-83.[2]

¶ 25 We first agree with Robinson that the district court erred by offering, sua sponte, its own race-neutral reason for the strike to Juror S before requiring the prosecutor to proffer his reason. *See Valdez v. People*, 966 P.2d 587, 592 n.11 (Colo. 1998). While we

[1] The People do not dispute that Robinson established a prima facie case of racial discrimination at *Batson* step one.

[2] Given our conclusion about Jurors S and V, we need not reach Robinson's *Batson* challenge to Juror N.

recognize that the court offered its reason while discussing a theoretical challenge for cause the parties did not raise, the effect of the court's offer was to give a reason for the peremptory strike that was the prosecutor's alone to give.

> A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the [prosecutor's] stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El, 545 U.S. at 252.

¶ 26 Still, the prosecutor then explicitly adopted the court's reason — i.e., Juror S "would not follow the law" in that "if he thought that fact [the car's color] was necessary[,] he would not follow the beyond-a-reasonable-doubt instruction." The prosecutor agreed, explaining that Juror S said "unequivocally" that he would hold the prosecution to proving a fact that "is not something we have to prove" if the juror felt it was necessary to know.[3] This explanation

[3] To the extent Robinson argues that the district court's given race-neutral reason to strike Juror S differed from the prosecutor's, we disagree. In context, the court's concern about whether Juror S would properly apply the reasonable doubt standard was based on the juror's saying that he might require the prosecution to prove

satisfied the prosecutor's step-two burden as to Juror S. *See id.* at 239 ("[T]he prosecutor must give a clear and reasonably specific explanation of his legitimate reasons . . . .") (citations omitted).

¶ 27 Indeed, as to both Juror S and Juror V, the prosecutor gave the same reason for striking them — both said that, in some circumstances, they might require the prosecution to prove facts beyond the elements of the crime charged. The People argue that this was plainly a race-neutral reason with record support. True, "[o]n the face of it, the explanation is reasonable from the State's point of view, but its plausibility is severely undercut by the prosecution's failure to object to [an]other panel member[] who expressed views much like" those of Jurors S and V. *Id.* at 248.

¶ 28 As Robinson points out, Jurors S and V gave responses to the prosecutor's speeding car hypothetical similar to the response of another potential juror — Juror D — who is white and whom the prosecutor accepted.

¶ 29 The prosecutor first posed the speeding car hypothetical to Juror V. In response to the prosecutor's statement that the car was

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facts beyond the elements of the offense. That was also the prosecutor's stated concern.

going so fast that it showed up as a "blur" on an officer's dash cam video and the color could not be discerned, Juror V said he did not know if he could find a defendant guilty. Later, in response to a different question from the prosecutor, Juror D referenced the speeding car hypothetical and gave a similar answer.

¶ 30 Before setting forth Juror D's statements, we note that, immediately before her statements, the prosecutor asked another prospective juror to consider a situation where two people remember the details of the same event differently. The prosecutor gave a wedding as an example. Using himself to illustrate, the prosecutor asked whether it would be "a big deal" if he, unlike his wife, did not remember the color of the bride's shoes ("Does that mean that we didn't go to a wedding and the wedding didn't happen?"). The prospective juror answered "no," noting that not remembering a little detail like the color of someone's shoes would not be a big deal in that situation.

¶ 31 The prosecutor and Juror D then had the following exchange:

> [Prosecutor]: What about you, [Juror D]? What do you think?
>
> [Juror D]: It depends on the detail.

> [Prosecutor]: Okay.
>
> [Juror D]: I agree that it — you know, some details are a whole lot more important than others.
>
> [Prosecutor]: Okay.
>
> [Juror D]: You know, maybe even the color of the car. . . . [I]f I see a film where I can't tell, in a blur, you know, which car that was in road rage then it might be very important to know, to find out what color the car was.
>
> [Prosecutor]: Do you think memories change over time?
>
> [Juror D]: I do. Yes.

¶ 32 Juror D's response was also similar to Juror S's, who (like Juror D) referred to the speeding car hypothetical in response to a different question from the prosecutor. Juror S expressed the same point as Juror D that the color of the car could be an important fact depending on the case. (Juror S also qualified his hesitation by stating, "[I]f [the color of the car] had absolutely nothing to do with proving the crime . . . and the question's not answered, you know, I would be okay with it not being answered.")

¶ 33 Moreover, Juror D's statements followed the questioning of Jurors S and V, in which the prosecutor had asked those

prospective jurors whether they might require the prosecution to prove a fact that was not an element of the offense — i.e., the color of the car in a car-related offense. On her own initiative, Juror D referred back to those discussions of the possible importance of the car's color, and she emphasized that the car's color "might be very important to know" when considering a car-related offense ("road rage"). While Juror D's comments on this issue were not as extensive as those of Jurors S and V, that flows from the fact that the prosecutor — unlike with Jurors S and V — did not ask follow-up questions of Juror D regarding her response to the car-color hypothetical. Instead, the prosecutor changed the subject. Such "disparate questioning can be probative of discriminatory intent." *Flowers*, 588 U.S. at ___, 139 S. Ct. at 2247.

¶ 34 To reiterate, "[c]omparing prospective jurors who were struck and not struck can be an important step in determining whether a *Batson* violation occurred." *Id.* at ___, 139 S. Ct. at 2248. Because the prosecutor gave only one, non-demeanor-based reason for striking Jurors S and V, and the record permits review of that reason, we have no trouble conducting a comparative juror analysis on appeal. Indeed, the People do not argue that the record is

inadequate to conduct a comparative juror analysis on appeal. And, regardless of whether Jurors S and V differed from Juror D in respects not mentioned by the prosecutor below or by the People on appeal, "a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent." *Id.* at ___, 139 S. Ct. at 2249. The disparate treatment between Jurors S and V, on the one hand, and Juror D, on the other, is concerning because the prosecutor identified no other race-neutral reason for striking Jurors S and V. Therefore, the adverse inference of racial discrimination raised by the prosecutor's disparate treatment was not overcome by another race-neutral explanation. *See Collins*, 187 P.3d at 1182-83.

¶ 35 Furthermore, although we normally defer to a district court's step-three *Batson* ruling if it has record support, we defer only if "the record reflects that the [district] court weighed all of the pertinent circumstances . . . ." *Beauvais*, ¶ 2. The disparate treatment of the similarly situated prospective jurors at issue here was a pertinent circumstance that the district court did not weigh.

¶ 36 Finally, it is irrelevant that the prosecutor did not strike any potential juror who was the same race as Robinson, who is Black.

"A defendant of any race may raise a *Batson* claim, and a defendant may raise a *Batson* claim even if the defendant and the excluded juror are of different races." *Flowers*, 588 U.S. at ___, 139 S. Ct. at 2243. Nor is a finding of *Batson* violation precluded by the fact that the prosecutor did not strike one prospective Black juror — Juror H — who was ultimately empaneled. *See Miller-El*, 545 U.S. at 250 ("[A] decision to accept a black panel member . . . does not . . . neutralize the . . . decision to challenge a comparable venireman."); *see also Flowers*, 588 U.S. at ___, 139 S. Ct. at 2246 (recognizing that the Court has "skeptically viewed the State's decision to accept one black juror" and explaining that a prosecutor might do so in an attempt to obscure a pattern of opposing black jurors). That is, "the refusal to strike one potential juror does not foreclose the possibility of a discriminatory motive in striking another similar juror." *Collins*, 187 P.3d at 1183-84. And "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers*, 588 U.S. at ___, 139 S. Ct. at 2241.

¶ 37 In sum, we conclude that the record reveals a *Batson* violation.[4] Therefore, we reverse Robinson's convictions and remand for a new trial. *See Collins*, 187 P.3d at 1184; *Gabler*, 958 P.2d at 509.

III. Robinson's Remaining Contentions

¶ 38 We do not resolve Robinson's other contentions of error because they might not recur on retrial and, even if so, they are unlikely to recur under the same circumstances presented here.

IV. Conclusion

¶ 39 The judgment of conviction is reversed, and the case is remanded for a new trial.

JUDGE J. JONES specially concurs.

JUDGE YUN dissents.

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[4] Concluding that a peremptory strike was based on a discriminatory purpose is not the same as concluding that the strike was motivated by racial animus or prejudice on the prosecutor's part. *See People v. Ojeda*, 2019 COA 137M, ¶¶ 72-77 (Harris, J., specially concurring) (*cert. granted* Aug. 17, 2020). Rather than showing invidious bigotry, a lawyer's reliance on stereotypes to select sympathetic jurors more often reflects a professional effort to fulfill the lawyer's obligation to help his or her client. *Id.* at ¶ 73. We do not conclude that the prosecutor's strikes here were based on racial animus. "Nevertheless, the outcome in terms of jury selection is the same as it would be were the motive less benign." *Id.* at ¶ 75 (citation omitted).

JUDGE J. JONES, specially concurring.

¶ 40 I agree with the majority's analysis and resolution of the *Batson* issue. But I write separately to make two points.

¶ 41 First, I think this is a very close case. The dissent rightly explains that under *People v. Beauvais*, 2017 CO 34, we must be very careful when considering a comparative juror argument that the defendant raises for the first time on appeal: the cold record must clearly be sufficient to properly assess such claim. I am persuaded — barely — that the record is sufficient in this case.

¶ 42 Second, I want to emphasize that, as indicated in footnote 4 of the majority opinion, when an appellate court concludes that the district court clearly erred at step three of the *Batson* analysis, that doesn't mean that the appellate court has concluded that the prosecutor necessarily acted out of racial animus. In addition to the possible reasons indicated in footnote 4, a prosecutor's decision to exclude one juror for a particular reason but not another juror who could have been excluded for the same reason may be a result of nothing more than imperfect memory. Or the prosecutor may have had other legitimate reasons for excluding the particular juror that he didn't express because he believed the single reason he

expressed was sufficient. There may be other innocent explanations as well. The fact is, however, that the *Batson* three-step test puts us in something of an analytical box. If the prosecutor's use of the peremptory challenge fails at step three of the test, we must reverse. Whether the prosecutor was actually motivated by, for example, racial animus is often impossible to know, depending, as it does, on what the prosecutor was thinking. But the *Batson* test creates guardrails deemed necessary to ensure that prospective jurors aren't excluded for impermissible reasons; it seeks to ensure equal protection of the laws. It is an attempt to create a workable means of accomplishing that goal; it is not an attempt to see into the mind of the prosecutor.

JUDGE YUN, dissenting.

¶ 43 The majority concludes that "the district court clearly erred by crediting the prosecutor's proffered race-neutral reason for striking Jurors S and V" under the third step of the *Batson v. Kentucky*, 476 U.S. 79 (1986), analysis because "[a] comparative juror analysis of the record shows that the proffered reason was pretextual and thus raised an adverse inference of discrimination that was not overcome by any other race-neutral reason." *Supra* ¶ 24. Because I disagree that the record is sufficiently developed to conduct a comparative analysis between Jurors S and V, on the one hand, and Juror D, on the other, I respectfully dissent.

¶ 44 *Batson* requires a three-step process for determining when a peremptory strike is discriminatory:

> First, the objecting party must make a prima facie showing that the striking party exercised a peremptory challenge on the basis of race or gender. Second, if the objecting party makes out a prima facie case, then the striking party must offer a non-discriminatory reason for striking each potential juror in question. Finally, "in light of the parties' submissions, the trial court must determine whether the [objecting party] has shown purposeful discrimination" by a preponderance of the evidence.

People v. Beauvais, 2017 CO 34, ¶ 21 (citing and quoting *Foster v. Chatman*, 578 U.S. ___, ___, 136 S. Ct. 1737, 1747 (2016)). Because a district court's step-three determination regarding the existence of purposeful discrimination involves issues of fact, "[w]e set aside [its] factual findings only when they are so clearly erroneous as to find no support in the record." *Id.* at ¶ 22. Given this deferential standard, reversing a district court's factual determination that the strike was not motivated by discriminatory animus is justified only under "exceptional circumstances." *Id.* (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)).

¶ 45 In reviewing a district court's analysis under the third step, "appellate courts may conduct comparative juror analyses despite an objecting party's failure to argue a comparison to the trial court, but only where the record facilitates a comparison of whether the jurors are similarly situated." *Id.* at ¶ 48. "An empaneled juror is similarly situated to a dismissed potential juror for the purposes of an appellate court's comparative juror analysis if the empaneled juror shares the same characteristics for which the striking party dismissed the potential juror." *Id.* However, the supreme court has warned that "[c]omparing jurors . . . must be done carefully" and

"[a] retrospective comparison of jurors based on a cold appellate record is inherently limited and prone to error." *Id.* at ¶ 47. It thus explained that

> [u]nargued juror comparisons can be appropriate tools for discovering discriminatory animus, but their use should be limited to instances in which the reviewing court can make an informed comparison. Appellate courts can only make an informed comparison — i.e., accurately and reliably compare jurors on unargued traits — where the record is otherwise developed as to the material circumstances bearing on whether they are similarly situated. . . . *But without a record that facilitates a complete and meaningful comparison, appellate courts have no basis to review and reverse* Batson *rulings based on unargued comparisons.*

Id. at ¶ 52 (emphasis added).

¶ 46 In my view, the record in this case is not sufficient to conduct a meaningful comparison of whether the dismissed Jurors S and V were similarly situated or shared similar views as the empaneled Juror D. The prosecutor had the following colloquy with Juror V about a hypothetical case:

> [Prosecutor]: [W]hen we have to prove something, there are certain things . . . elements that we have to prove. Let's say it's a speeding case. We have to prove that there was a guy or woman — there's a person who

> was in a car, speed limit was 45. They were doing 55. Let's say we prove all those things, but you really want to know what the color of the car was, but that's not something we have to prove — but we never answer that question for you — and the judge tells you all we have to do is prove those four things beyond a reasonable doubt and you have to find him guilty, but you really want to know what the color of the car is. Are you comfortable finding that defendant guilty?
>
> [Juror V]: Hmm, I would have to — the color has to be kind of close. (Laughs.)
>
> [Prosecutor]: What if that's not something we have to prove? [An o]fficer gets up, says, "Hey, that's the guy." You find the officer credible. Shows you a photo of the stop sign, maybe like a dash cam video. The car going past, but it's going so fast you can't tell what color it is. It's just a blur.
>
> [Juror V]: Yeah. I don't know. I don't know on that one.
>
> [Prosecutor]: You don't know?
>
> [Juror V]: I'm not too sure on that one.

Thus, Juror V stated that he did not know or was not sure whether he would be comfortable reaching a guilty verdict if the prosecution could not prove the color of the vehicle even if that was not an element of the crime.

¶ 47 Juror S expressed similar concerns as Juror V regarding the hypothetical:

> [Juror S]: . . . [F]or example, they were talking about the color of the car earlier.
>
> [Prosecutor]: Yeah.
>
> [Juror S]: I mean, if it had absolutely nothing to do with proving the crime —
>
> [Prosecutor]: Um-hum.
>
> [Juror S]: — then — and the question's not answered, you know, I would be okay with it not being answered. But if it — if knowing the color of the car was really a necessary fact, in knowing . . . the facts of the case, then I would not be very comfortable with not knowing that fact.
>
> [Prosecutor]: Okay. What if it is not something that the judge tells you we have to prove, but it's really necessary to you; are you comfortable putting that aside and holding us to only proving what the judge tells us we have to prove?
>
> [Juror S]: If I feel it's something that's necessary to really provide facts for the case, then no, I wouldn't be comfortable with that.

Accordingly, Juror S, like Juror V, stated that he would not be comfortable rendering a guilty verdict if the car's color was necessary to understand the facts of the case — even if the judge told him it was not something the prosecution had to prove.

¶ 48 But Juror D's statement about the color of the car was made in a different context. Before the prosecutor questioned Juror D, the prosecutor had the following colloquy with another prospective juror:

> [Prosecutor]: Let's assume that my wife and I go to a wedding. After the wedding she asks me, "What did you think about the bride's shoes and about the color?"
>
> . . . .
>
> Do you think I would remember what the bride's shoes looked like?
>
> [Prospective Juror]: Probably not.
>
> [Prosecutor]: Probably not. Does that mean that we didn't go to a wedding and the wedding didn't happen?
>
> [Prospective Juror]: No. It still happened.
>
> [Prosecutor]: Why? I didn't remember what the bride's shoes looked like.
>
> [Prospective Juror]: I mean, you showed up, so you would know that it happened, so —
>
> [Prosecutor]: But there's that little detail which is different between her memory and my memory. Is that a big deal?
>
> [Prospective Juror]: For certain things I would say no; but remembering the color of someone's shoes, no.

¶ 49 The prosecutor then turned to Juror D and asked:

> [Prosecutor]: What about you, [Juror D]? What do you think?
>
> [Juror D]: It depends on the detail.
>
> [Prosecutor]: Okay.
>
> [Juror D]: I agree that it — you know, some details are a whole lot more important than others.
>
> [Prosecutor]: Okay.
>
> [Juror D]: You know, maybe even the color of the car. If — if I see a film where I can't tell, in a blur, you know, which car that was in road rage then it might be very important to know, to find out what color the car was.
>
> [Prosecutor]: Do you think memories change over time?
>
> [Juror D]: I do. Yes.

¶ 50 On this record, I cannot determine whether the empaneled Juror D shared similar views as the dismissed Jurors S and V, especially because similarities were not developed or argued during jury selection. The prosecutor's proffered reason for excusing Jurors S and V was that they expressed concerns about finding a defendant guilty if the prosecution did not prove the car color — even if that was not an element of the crime. *See Beauvais*, ¶ 57

("[C]ourts should tailor comparative juror analyses to the striking party's reasons for striking a challenged juror."). In contrast, Juror D responded to a hypothetical question concerning the credibility of two individuals who remember the details of an event differently. After stating that "some details are a whole lot more important than others," Juror D gave an example of an important detail: "if I see a film where I can't tell, in a blur, you know, which car that was in road rage then it might be very important to know, to find out what color the car was."

¶ 51 Based on this fleeting comment, I find it difficult to conduct a meaningful comparison because the prosecutor did not ask, and Juror D did not express any opinion, about whether she would have difficulty reaching a guilty verdict if the prosecution did not prove the color of the car or whether she would have difficulty following the court's instructions regarding the elements of a crime. To the contrary, she later agreed that she would follow the law as instructed by the court. Accordingly, the record is not sufficiently complete or clear to conduct a meaningful side-by-side comparison of Juror D's statements with those of Jurors S and V. *Cf. id.* at ¶ 50 ("[A]n appellate court's review of a cold record can be especially

'misleading when alleged similarities were not raised at trial.'" (quoting *Snyder*, 552 U.S. at 483)).

¶ 52 Because "a highly deferential standard of review precludes an appellate court from substituting its reading of a cold record" for the district court's step-three determination, *id.* at ¶ 31, and because the record in this case is not sufficiently developed to conduct comparative juror analyses between Jurors S and V, on the one hand, and Juror D, on the other, I respectfully dissent.