DATE FILED: June 3, 2024
CASE NUMBER: 2023SC75

ADVANCE SHEET HEADNOTE
June 3, 2024

2024 CO 36

No. 23SC75, *People v. Austin*—Jury Selection—Peremptory Challenge—Batson—Clear Error—Examination of Jurors—Particular Groups, Inclusion or Exclusion—Race.

The supreme court concludes that the prosecutor's explanation that she used a peremptory strike to remove a potential juror because of the juror's activism to reform the Denver Police Department was facially race-neutral under *Batson v. Kentucky*, 476 U.S. 79 (1986). The supreme court also concludes, however, that the trial court's findings were insufficient for an appellate court to review whether the trial court had considered all the pertinent circumstances in concluding that that the strike was not made with a discriminatory purpose. Accordingly, the supreme court reverses the judgment of the court of appeals and remands the case for further proceedings.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 36

Supreme Court Case No. 23SC75
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA1355

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Sterling Dwayne Austin.

Judgment Reversed
en banc
June 3, 2024

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JUSTICE HOOD delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE GABRIEL**, and **JUSTICE BERKENKOTTER** joined. **JUSTICE MÁRQUEZ**, joined by **JUSTICE HART** and **JUSTICE SAMOUR**, specially concurred in the judgment.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 This opinion serves as a companion to *People v. Johnson*, 2024 CO 35, ___ P.3d ___ ("*Johnson II*"), which we also announce today. Because our decision in *Johnson II*, the lead case, contains a detailed discussion of the law governing equal protection and discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986), we do not repeat it here. *See Johnson II*, ¶¶ 9–22. And, consistent with our reasoning in *Johnson II*, we reverse the judgment of the court of appeals, which held that the prosecution violated Sterling Dwayne Austin's rights under *Batson*, *People v. Austin*, No. 19CA1355, ¶ 7 (Dec. 22, 2022), and remand the case for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶2 Austin was convicted of first degree murder for killing his girlfriend. He maintains that she died of a drug overdose.

¶3 Austin's first trial ended in a mistrial when the jurors were unable to reach a unanimous verdict. Before jury selection in the second trial resulting in the conviction at issue now, Austin asked the court to use a special questionnaire that included questions about implicit bias and race, "[d]ue to concerns of implicit and explicit bias affecting the outcome of this case." The court denied the request.

¶4 At the end of the attorneys' questioning of the potential jurors, the prosecutor used a peremptory strike to excuse Juror 32. Austin raised a *Batson* challenge to that strike, which the court denied. Juror 32 was excused.

¶5 On appeal, Austin raised four issues. *Austin*, ¶ 6. The division addressed only one of them, concluding that the trial court's erroneous denial of Austin's *Batson* challenge as to Juror 32 entitled Austin to a new trial. *Id.* at ¶ 7.

¶6 We agreed to review this decision.[1]

II. Analysis

¶7 As we explain in *Johnson II*, a criminal defendant's constitutional right to a fair trial before an impartial jury prohibits trial counsel from striking jurors based on race or gender.[2] ¶¶ 9–17. Accordingly, when one party objects to the other

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[1] We granted the prosecution's petition to review the following issue:

> [REFRAMED] Whether citing a non-white juror's participation in reform efforts designed to deter racial profiling by a police department constitutes a race-neutral justification for the purposes of *Batson*'s second step when witnesses from that police department might testify at trial.

[2] In his answer brief to this court, Austin asserts for the first time that "[s]triking a juror for reform work against racist policing also raises First Amendment considerations" because it challenges jurors' fundamental right "to freely associate and petition the government." Because this argument was not raised at trial or on direct appeal, it is reviewable only for plain error. *Johnson v. People*, 2023 CO 7, ¶ 28, 524 P.3d 36, 42. "An error is plain when it is obvious, substantial, and 'so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.'" *Id.* at ¶ 29, 524 P.3d at 42 (quoting

party's peremptory strike of a juror, the court must determine whether the strike was made with a discriminatory purpose under the three-step *Batson* framework. *Id.* at ¶¶ 18–20; *see Batson*, 476 U.S. 93–97.

A. *Batson*

¶8 Under *Batson*, the opposing party must make a prima facie showing that the strike was made with a discriminatory purpose. *See Johnson II*, ¶ 18; *People v. Madrid*, 2023 CO 12, ¶ 32, 526 P.3d 185, 193. The striking party can then rebut the inference of discrimination by providing a facially race- or gender-neutral reason for the strike. *See Johnson II*, ¶ 19; *Valdez v. People*, 966 P.2d 587, 590 (1998). Lastly, the trial court weighs "'all of the circumstances that bear upon the issue of' purposeful discrimination" to determine whether the objecting party has carried her burden of proving a discriminatory purpose. *Madrid*, ¶ 34, 526 P.3d at 193 (quoting *People v. Beauvais*, 2017 CO 34, ¶ 23, 393 P.3d 509, 517); *accord Johnson II*, ¶ 20.

People v. Rediger, 2018 CO 32, ¶ 48, 416 P.3d 893, 903). Freedom of association is a fundamental right entitled to heightened protections under the Equal Protection Clause. *E.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958). But it is not clear that *Batson* prohibits striking a juror based on her activism; that is, based on beliefs expressed through social and political associations. *See Starr v. QuikTrip Corp.*, 726 Fed. Appx. 692, 695 (10th Cir. 2018); *United States v. Prince*, 647 F.3d 1257, 1262–64 (10th Cir. 2011). Accordingly, any error in failing to excuse Juror 32 for this reason wasn't obvious and doesn't constitute plain error.

¶9 Each step of the *Batson* framework is subject to a separate standard of review. *People v. Rodriguez*, 2015 CO 55, ¶ 13, 351 P.3d 423, 429. We review steps one and two de novo. *People v. Owens*, 2024 CO 10, ¶ 79, 544 P.3d 1202, 1222. "But we review the trial court's ultimate step-three conclusion, regarding 'whether the objecting party proved purposeful discrimination by a preponderance of the evidence,' for clear error." *Johnson II*, ¶ 21 (quoting *Beauvais*, ¶ 2, 393 P.3d at 512). Accordingly, we will defer to the trial court's conclusion as to purposeful discrimination so long as the record (1) reflects that the trial court weighed all the pertinent circumstances and (2) supports the trial court's conclusion. *People v. Ojeda*, 2022 CO 7, ¶ 42, 503 P.3d 856, 865 ("*Ojeda II*").

¶10 If we conclude that the trial court erroneously denied the *Batson* challenge, we must reverse for a new trial. *See Owens*, ¶ 80, 544 P.3d at 1222. But if the record is insufficient to allow for appellate review, "the appropriate procedure is to remand the case for more detailed findings by the trial court." *Craig v. Carlson*, 161 P.3d 648, 654 (Colo. 2007); *Johnson II*, ¶ 22.

B. Additional Facts: Jury Selection at Austin's Trial

¶11 During voir dire, counsel engaged in three discussions with Juror 32: twice during the prosecutor's voir dire and once during defense counsel's. The prosecutor's first exchange with Juror 32 was about credibility:

[PROSECUTOR]: How do you determine somebody's credibility?

JUROR [32]: I would base it more on history. So based on the background maybe, based on what the acts were of that person. So I can't say, well, I know everything about the law because I have no history with studying the law. So I think history and background or who you are, who you present as you are as a person.

[PROSECUTOR]: So maybe some background information?

JUROR [32]: Yes.

[PROSECUTOR]: What they do, who they are?

JUROR [32]: Absolutely. Along with evidence as well. I mean, if the evidence showed that I was enrolled in law school and I'm saying that I went there, the evidence is there.

¶12 Later, the prosecutor and Juror 32 had a similar exchange about police officer credibility:

[PROSECUTOR]: When we're talking about police officers, can you judge their credibility as you would any other witness in this case?

JUROR [32]: Can you judge—no. So I guess if the question is can I be fair, yes. Again, I'm with [the previous juror]. Not every, you know, police officer is the same. However, if the evidence shows otherwise, then that's how I can go about judging my credibility with that police officer only.

So I would have to see evidence. You know, if your evidence is you are showing me—like in a traffic stop, if you are showing me that you believe otherwise, then, yes, I'm going to judge you because you are showing me. But if you are not showing me—there is no evidence, then, no. I

believe that everyone is a good person until proven otherwise.

[PROSECUTOR]: Okay.

JUROR [32]: Police officers are.

¶13 Later, defense counsel asked the jury panel if "anybody here ever felt like they were the victim of racial prejudice before?" Several jurors raised their hands. After calling on some of the other jurors, defense counsel turned to Juror 32:

[DEFENSE]: [Juror 32], tell us more about your experience.

JUROR [32]: Sure. About three years ago, I got stopped on Arapahoe Road with expired tags on my license plates. Once the officer came up and checked my driver's license and registration, he kept looking at my driver's license and saying, Are you sure you live around here when I was a block away from my house. And I said, yes, and he said, Is this your car, and I said, Yes, it's registered to me, that's my driver's license, this is me. And he just kept saying things to make me feel uncomfortable because of, you know, my obvious race.

[DEFENSE]: Okay.

JUROR [32]: He proceeded. He goes and sits in his car. I was a block away from my house, and I was going to my daughter's middle school at that time, and she had a performance. And I said, Okay, it's expired tags, I'm not aware, you know, I'm running late to the performance. He went and sat there for [thirty] minutes, came back, I was late.

When I got my tickets for expired plates, I was not fighting the fact that I didn't have expired plates, but I showed him on my ticket he checked the race was white. And I said, I'm not white, can you please, you know, correct it, and he kind of just gave me a dirty look and said, Here you go, I hope you're not late to your

daughter's performance, and kind of just walked away. And it made me feel like—well, one, it made me question why are they putting white on my ticket after not only do I have four names that should give it away that I'm, you know, that I am another race, and after the fact that I told him, you know, why were they not corrected, like what are they trying to hide by them checking white on a ticket. It just took me back to projects that I used to do in high school with racial profiling and the Denver Police Department ["DPD"].

[DEFENSE]: Okay. Okay.

JUROR [32]: But, I mean, it often happens to me where I'm always asked at my daughter's school as well, Are you sure you live here, are you sure, you know, you have this nice house and this nice car, because I live in a predominantly white neighborhood.

[DEFENSE]: Okay. . . . Tell us more about your experiences with you said projects in school as far as DPD goes and issues with race and law enforcement. Tell us more about that.

JUROR [32]: Sure. So back when I was in high school, I volunteered for an organization called Students for Justice, and the nonprofit that we worked with, again, it goes back to—back I want to say to the late 90s. The [DPD] was stopping people, mostly African-Americans and Hispanics. And they were checking white on their ticket because when the community brought it up to the [DPD], they said, well, no, according to statistics, we're stopping white people. And I said, no, and then we brought it up to the community, and everyone on their ticket had white checked. So that's why that—having that ticket and having the white checked on my race brought me back to, okay, this is exactly what we fought so much for in the [DPD]. But now I think it was sent to the Sheriffs, the Arapahoe Sheriff who stopped me. I'm back to fighting that again. We were able to change the law so if they

didn't give you a ticket, the [DPD], they have to give you their business cards. So I was part of that project.

¶14 At the end of voir dire, the prosecutor used her first peremptory strike to excuse Juror 32. Defense counsel objected under *Batson*:

[DEFENSE]: Juror [32] has talked extensively about facing prejudice and made it very clear that she was not white, few non-white members of this jury. Mr. Austin is a racial minority here, and we feel that the prosecution is attempting to excuse her based upon racial reasons. We think that we have made a prima facie case that that is based on racial reasons and that this meets a threshold to move to the second prong of *Batson*.

THE COURT: You want to address that?

[PROSECUTION]: Judge, first off, I would—I would argue that this is not a prima facie finding of a race-motivated reason. I will make the record that my reasoning is that she has had involvement with the [DPD], that she was a leader in, I guess, some reforms and some actions against the [DPD]. The [DPD] are witnesses in this case. Based on that reason, I have concerns that she is going to have bias against the [DPD] and would argue that is a race-neutral reason to release [Juror 32].

[DEFENSE]: The negative experiences that she had with the [DPD] were based on race and the [DPD] and her view of treatment of minorities by the [DPD] and her activism on that issue. If that's the ground to excuse her, it is in fact based on race.

[PROSECUTION]: Judge, it has to be for her race, not based on a racial reason. I think she's had [a] negative experience with the [DPD]. I do believe that's a race-neutral reason.

THE COURT: The challenge for cause[3] will be denied at this time. The records have been made. The People have set forth a race-neutral reason and—or at least not sufficiently controverted at this time to be able to be excused.

C. Application

1. Step One

¶15 The trial court skipped over *Batson*'s first step without making any findings; instead, the court simply asked the prosecutor if she wanted to respond to defense counsel's challenge. Accordingly, any objection to step one is moot. *See Johnson II*, ¶ 32.

2. Step Two

¶16 Moving to step two, we examine whether the prosecutor's stated reason for striking Juror 32 was race neutral. *See id.* at ¶¶ 35–36; *Hernandez v. New York*, 500 U.S. 352, 360–61 (1991). The prosecutor explained that she struck Juror 32 because she was concerned that Juror 32's reform work with the DPD, members of which would be testifying for the prosecution, might affect Juror 32's ability to consider the officers' evidence impartially.

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[3] Throughout the peremptory strike portion of voir dire, the court repeatedly referred to the peremptories as challenges for cause. This appears to have been a misstatement, and we do not believe the court was treating these as actual challenges for cause because, other than in response to *Batson* challenges, no explanations were given. *See* § 16-10-103(1), C.R.S. (2023) (providing a list of reasons why a juror should be excused for cause); *accord* Crim. P. 24(b).

¶17 The division concluded that this was not a race-neutral reason. *Austin*, ¶¶ 35–36. In reaching this conclusion, the division highlighted Juror 32's "negative experience" with getting pulled over—an experience "because of her race"—and her reform work with the DPD, which the division observed was "connected . . . directly with her more recent racially charged experience with law enforcement." *Id.* at ¶¶ 29–30. Comparing the situation to that in *People v. Johnson*, 2022 COA 118, 523 P.3d 992 ("*Johnson I*"), the division concluded that "Juror 32's personal experience with law enforcement that formed the basis for the prosecutor's rationale for excusing her was based on her race." *Austin*, ¶ 34. And because the "prosecutor's stated reason for striking Juror 32 focused entirely on Juror 32's description of her 'negative' experiences with law enforcement," which "were based on her race," the prosecutor failed to meet her step-two burden. *Id.* at ¶ 35.

¶18 The division's analysis misconstrues *Batson*. As we discuss in *Johnson II*, courts must keep the focus of this second step on the striking party's stated reasons for the strike, not on the source of the juror's bias. ¶ 42. If the striking party provides a reason that, on its face, is "based on something other than the race of the juror," she has met her step-two burden. *Id.* at ¶ 36 (quoting *Owens*, ¶ 77, 544 P.3d at 1222); *Hernandez*, 500 U.S. at 360 ("Unless a discriminatory intent is *inherent* in the prosecutor's explanation, the reason offered will be deemed race

neutral." (emphasis added)). And there is nothing inherently race-based or discriminatory in a strike based on a juror's bias against law enforcement (regardless of whether that bias is implied or expressly stated). *Johnson II*, ¶¶ 39–40; *see also id.* at ¶ 41 (collecting cases). "Although a juror's bias may derive from her experiences as a person of color—that is, a juror's experiences and biases may be closely linked to (or because of) her race or gender—that doesn't convert the striking party's reason for excusing her into a race- or gender-based reason." *Id.* at ¶ 42; *see also People v. Lewis & Oliver*, 140 P.3d 775, 812–13 (Cal. 2006), *as modified on denial of reh'g* (Nov. 1, 2006).

¶19 Here, the prosecutor didn't strike Juror 32 based on an assumption that, as a person of color, Juror 32 would inherently be biased against law enforcement (i.e., that all people of color are biased against law enforcement). *See People v. Ojeda*, 2019 COA 137M, ¶ 73, 487 P.3d 1117, 1132 ("*Ojeda I*") (Harris, J., specially concurring) ("The notion that jurors of a particular race or gender will be partial to one side or the other merely 'on account of' their race or gender is generally based on 'crude, inaccurate' stereotypes." (quoting *Batson*, 476 U.S. at 104 (Marshall, J., concurring))), *aff'd on other grounds by Ojeda II*. Nor did she comment in any way on Juror 32's or Austin's race or connect a bias against law enforcement to race. *See Johnson II*, ¶ 43. Rather, the prosecutor struck Juror 32 based on the life experiences she had shared and the prosecutor's concern that those

experiences might affect her ability to receive evidence from police officers impartially. *See id.* at ¶ 44; *see also People v. Hamilton*, 200 P.3d 898, 932 (Cal. 2009) ("[A] challenge based solely on the prospective juror's race is different from a challenge 'which may find its roots in part [in] the juror's attitude about the justice system and about society which may be race related.'" (alteration in original)).

¶20 We conclude that the prosecutor satisfied her step-two burden by providing a facially race-neutral reason for striking Juror 32. The division therefore erred by concluding otherwise. *See Johnson II*, ¶ 46. But that doesn't end our analysis. Once a race-neutral reason is given, the court should move to *Batson*'s third step.

3. Step Three

¶21 At step three, which we describe in greater detail in *Johnson II*, ¶¶ 47–49, the court decides whether the objecting party has met its burden of proving purposeful discrimination by weighing "'all of the circumstances that bear upon the issue of' purposeful discrimination," *Madrid*, ¶ 34, 526 P.3d at 193 (quoting *Beauvais*, ¶ 23, 393 P.3d at 517). *See also People v. Cerrone*, 854 P.2d 178, 191 (Colo. 1993); *Flowers v. Mississippi*, 588 U.S. 284, 301–02 (2019) (providing a list of factors courts may consider).

¶22 Here, because the division concluded that the challenge should have been sustained at step two, it didn't review the trial court's step-three analysis. In

denying Austin's *Batson* challenge, the trial court simply concluded that Austin hadn't "sufficiently controverted" the prosecutor's race-neutral reason.

¶23 A trial court need not make express findings as to all the circumstances it considered, but it must make findings sufficient to show that it did, in fact, consider all the relevant circumstances. *See Johnson II*, ¶¶ 47, 52, 54; *see also Beauvais*, ¶ 32, 393 P.3d at 519. From the record here, we cannot tell whether the trial court did so.

¶24 For example, although Juror 32 described a troubling traffic stop and the reform work she did in high school, she also said that she could be fair and that she would consider all the evidence in reaching a verdict. She expressly said that not all police officers are the same and that she believes officers are generally good people unless they prove otherwise. We have no indication that the court weighed these statements against the prosecutor's inference that Juror 32 would be biased against law enforcement. The record provides no information about counsels' or Juror M's demeanor during voir dire. Further, the trial court mischaracterized this peremptory strike as a challenge for cause, made no findings as to *Batson*'s first step, and only very minimal findings as to steps two and three. We conclude that the record is insufficient for our review and that a remand for further findings is appropriate. *See Johnson II*, ¶¶ 52, 54–56; *see also Rodriguez*, ¶ 2, 351 P.3d at 426; *cf. Beauvais*, ¶ 44, 393 P.3d at 521 (concluding that "the trial court's careful *Batson*

analysis indicates that it accounted for all of the prosecution's step-two reasons in concluding that Beauvais had failed to prove by a preponderance of the evidence that these reasons were pretextual").

III. Conclusion

¶25 We reverse the judgment of the court of appeals, and we remand the case to the court of appeals to address any remaining issues. If the division concludes a remand to the trial court for further step-three findings is necessary, it may do so.

JUSTICE MÁRQUEZ, joined by **JUSTICE HART** and **JUSTICE SAMOUR**, specially concurred in the judgment.

JUSTICE MÁRQUEZ, joined by JUSTICE HART and JUSTICE SAMOUR, specially concurring.

¶26 As in the lead companion case, *People v. Johnson*, 2024 CO 35, ___ P.3d ___ ("*Johnson II*"), I fully join the majority's analysis. However, for the reasons set forth in my separate opinion, *id.* at ¶¶ 64–88 (Márquez, J., specially concurring), I write separately to offer my observations about the possibility of eliminating peremptory challenges altogether.

¶27 As Justice Marshall predicted the day it was decided, *Batson* has failed to "end the racial discrimination that peremptories inject into the jury-selection process." *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring). But we should not abandon *Batson*'s effort to "eliminat[e] the shameful practice of racial discrimination in the selection of juries." *Id.* at 102. Nor should we "throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." *State v. Saintcalle*, 309 P.3d 326, 336 (Wash. 2013), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017).

¶28 Several states have begun to explore how this might best be done. *See Johnson II*, ¶ 75, (Márquez, J., specially concurring) (listing states that have begun reform efforts). Some states have amended their court rules governing the use of peremptory challenges. *See id.* at ¶¶ 76–79 (describing Washington's, California's,

Connecticut's, and New Jersey's rule changes). And, in 2021, Arizona became the first state to eliminate peremptory challenges altogether. Sup. Ct. of Ariz., No. R-21-0020, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (Aug. 30, 2021), https://aboutblaw.com/ZpS [https://perma.cc/742M-J6DN]).

¶29 As I indicated in my separate opinion in *Johnson II* today, given the inherent flaws with the *Batson* framework and the continued use of peremptory strikes to disproportionately remove people of color from juries, it may be time to consider new solutions. And perhaps, as Justice Marshall opined in his concurrence in *Batson*, the only way to end racial discrimination in the jury selection process is "by eliminating peremptory challenges entirely." 476 U.S. at 107 (Marshall, J., concurring).

¶30 I respectfully concur.