SUMMARY
October 13, 2022

2022COA118

No. 19CA0768, *People v. Johnson* — Constitutional Law — Fourteenth Amendment — Equal Protection; Juries — Peremptory Challenges — *Batson* Challenges — Per Se Approach

As a matter of first impression, a division of the court of appeals holds that when the proponent of a peremptory challenge offers both a race-based and a race-neutral explanation in response to a *Batson* challenge, the trial court must apply the "per se" approach and uphold the challenge because once a discriminatory reason has been offered, this reason taints the entire jury selection process. Applying that approach here, the division reverses the defendant's convictions and remands for a new trial. Because it may arise on remand, the division addresses, and rejects, the challenge to the admission of the generalized expert testimony.

The partial dissent concludes that the prosecutor provided a race-neutral reason at step two of the *Batson* analysis and would remand the case for further findings under step three.

COLORADO COURT OF APPEALS **2022COA118**

Court of Appeals No. 19CA0768
Arapahoe County District Court No. 18CR1540
Honorable Ben L. Leutwyler III, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Raeaje Resshaud Johnson,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE FREYRE
Lipinsky, JJ., concurs
Berger, J., concurs in part and dissents in part

Announced October 13, 2022

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¶ 1 Defendant, Raeaje Resshaud Johnson, appeals his multiple convictions, asserting his trial contained an error under *Batson v. Kentucky*, 476 U.S. 79 (1986), erroneous jury instructions, improper expert testimony, prosecutorial misconduct, and an erroneous sentence. As a matter of first impression, we hold that when a prosecutor offers both a race-based and a race-neutral explanation in response to a *Batson* challenge, the trial court must apply the "per se" approach and uphold the challenge because once a discriminatory reason has been provided, this reason taints the entire jury selection process. Applying that approach here, we conclude that the trial court erred by denying Johnson's attorney's *Batson* challenge, reverse his convictions, and remand for a new trial. Because it may arise on remand, we address and reject Johnson's challenge to the admission of the expert's testimony. But we need not address his remaining issues.

I. Background

¶ 2 Johnson and the victim were in a romantic relationship, despite an April 2018 protection order that precluded him from contacting her. On May 19, 2018, the two made dinner plans for 9

p.m. at the victim's apartment. Johnson arrived late and intoxicated at 1 a.m.

¶ 3 The victim let Johnson inside and angrily accused him of cheating on her. The argument became physical when the victim scratched and punched Johnson, and Johnson took her to the ground. The victim eventually pushed Johnson out of the apartment and closed and locked the door. They continued yelling through the door, while Johnson pounded on it. Ultimately, Johnson kicked the door open. He grabbed the victim, threw her to the floor, grabbed her by her hair, and threw her onto a couch. He then slapped her with an open hand. The victim scratched and bit Johnson to get away, fled the apartment, and called 911. She watched Johnson throw some of her personal property from her apartment's third floor balcony to the parking lot. Fearing Johnson would come to the parking lot, the victim drove Johnson's car from the lot and met the police at a nearby intersection.

¶ 4 The victim told the police about the altercation, but by the time officers reached the apartment, Johnson was gone. An officer encountered Johnson while en route to another call and arrested him. Johnson had the victim's keys at the time of arrest. The

People charged Johnson with first degree burglary, third degree assault, four counts of violation of a protection order, two counts of violation of bond conditions, witness tampering, and attempting to influence a public servant. A jury acquitted him of attempting to influence a public servant but convicted him of the remaining charges. The trial court sentenced him to three years in the custody of the Department of Corrections, followed by a four-year sentence to probation.

II. *Batson*

¶ 5 Johnson first contends that the trial court erroneously denied his attorney's *Batson* challenge to Juror M, the only Black juror on the panel. He argues that the court erred at several points in *Batson*'s three-step inquiry for evaluating claims of racial discrimination in jury selection. Specifically, he argues that the trial court erred by (1) finding that he failed to establish a prima facie case of racial discrimination; (2) finding that the prosecutor provided a race-neutral reason for the challenge; and (3) concluding that there was no purposeful discrimination at step three. We first conclude that any error at step one is moot because the court immediately proceeded to step two.

¶ 6 Next, we conclude that the court erred at step two by finding that the prosecutor's reliance on Juror M's questionnaire response was race neutral and sufficient on its own to deny the *Batson* challenge. But we also conclude that the prosecutor's alternative basis for opposing the challenge — Juror M's response during voir dire to a question concerning domestic violence — constitutes a race-neutral explanation.

¶ 7 Finally, we adopt the "per se" approach to resolving a *Batson* challenge when the party opposing it offers both race-based and race-neutral reasons, and conclude that the court erred by denying the challenge. In doing so, we acknowledge, but respectfully disagree with, the "substantial motivating factor" approach followed by Judge Fox in *People v. Ojeda*, 2019 COA 137M, ¶ 23 (*Ojeda I*), *aff'd on other grounds*, 2022 CO 7 (*Ojeda II*).

A. Additional Facts

¶ 8 Before jury selection began, all potential jurors completed a written questionnaire. As relevant here, question number eight asked, "Have you, a member of your family, or a close friend had a particularly good or bad experience with a police officer? If yes, describe." Juror M responded, "Yes. Many cases where cops are

disrespectful due to certain racial identities." Question number ten asked, "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons." Juror M responded, "No, I would be great." Neither the court nor the parties asked Juror M about her response to question eight.

¶ 9 During voir dire, the prosecutor asked the jurors about alcohol use and its role in domestic violence. One juror explained his belief that alcohol causes an intoxicated person to act like a different person from their sober self. The prosecutor followed up by asking, "So, do you think that if you heard evidence that someone had assaulted another person, and that they were drunk when they did it, . . . in your mind, would that person be less responsible than if they were sober?" The juror responded no.

¶ 10 The prosecutor then asked Juror M the same question, and the following colloquy occurred:

> JUROR M: Just kind of what he said, as well, because, you know, if domestic violence is still happening sober, and it just worsens when there is alcohol involved, they are both still responsible. Like, if it doesn't happen, and then there is alcohol involved now, that might — I don't know — trigger the domestic violence or whatever.

> PROSECUTOR: Okay. What if you were told that you were not going to know about anything in the past, and you had to look at what happened right here? Would that be difficult for you?
>
> JUROR M: Yeah, definitely.
>
> PROSECUTOR: Okay. So, understanding we all want to know everything about the whole context, but . . . when it's a criminal trial, you get to hear about what happened on this day. Would you be able to look at something in isolation and not wonder or speculate about things that happened before if you were given the law that told you that you had to do that?
>
> JUROR M: I mean, I will definitely wonder, but I'll try to think of the present.

¶ 11 Later, the prosecutor used a peremptory strike to excuse Juror M and defense counsel raised a *Batson* challenge:

> DEFENSE COUNSEL: Judge, I'm raising Batson as to [Juror M]. . . . [S]he is the only juror that was in the presumptive panel that looked to be of African-American in nature and ethnically speaking.
>
> Additionally, . . . I guess that I am alleging a case of racial prejudice and racial bias.
>
> PROSECUTOR: I guess as a threshold question this is tantamount to an accusation of picking jurors based on race.
>
> *I think it is clear, based on her questionnaire alone — Ms. [M] talked about how law*

enforcement was disrespectful. She talked about how people of different races were treated differently in her experience with law enforcement. She also talked a lot about how she would want to know about the past, and it's a matter of wondering, and how the past is relevant in terms of talking about domestic violence. I think because of her answers in her questionnaire, there is more than enough reason for the People to have dismissed her.

DEFENSE COUNSEL: I have [Juror M's] questionnaire in front of me. She says that she is a member of the Black Students Alliance. She says that in her answer to question eight that there are many cases where police officers are disrespectful to certain people due to their racial identities.

It's clear, based on her questionnaire, that she's experienced racism in the past. I believe she's experiencing racism as a juror by taking her off this panel for Mr. Johnson, who is an African-American male.

I saw nothing she said to the District Attorney or to me during our jury selection that would indicate that she would not be fair to the Prosecution. It's quite the opposite. She actually mentioned things that would perhaps be prejudicial to Mr. Johnson, and that she understood why people would make things up in a domestic violence case.

She was agreeing with the woman who was sitting next to her, saying the same things, and that person just happens to be not African-American, so I am alleging a case of purposeful discrimination.

THE COURT: You said that she said the same things as a Juror sitting right next to her?

I assume you are referring to Juror No. 5, and I don't recall at all, in terms of [Juror M's] comments about wanting to know what happened in the past.

So are there different statements that you are saying they had similar remarks regarding?

DEFENSE COUNSEL: Yes. So she was essentially saying that she was agreeing with the juror next to her that . . . domestic violence cases are complicated, and that she would perhaps want to get a broader picture of what happened.

And then instead of questioning her further and perhaps trying to establish a challenge for cause or something like that, [the prosecutor] actually said — but, you know, you are okay with not knowing those things, and the juror, essentially, agreed with her.

Based on what everybody else said, I don't think that there is — this juror stands out or she was saying anything negatively about [the prosecutor's] case.

THE COURT: Follow-up from the People.

PROSECUTOR: Your Honor, if the Court remembers at that point that we were talking about when I made a caveat and explained the charges in this case — the evidence you are going to hear are based only on the charges in this case, and you don't get to hear about what

> happened; and that's because it's about the charges here today, that was in response to [Juror M's] statement, and I asked her if that was going to be a problem for her, and she said I would want to know about the past, and it's a matter of wondering, and that was in the context of wanting to know about how to assess credibility.
>
> This is a domestic violence situation and whether or not a victim would be telling the truth in the context of two stories, one on the scene and one later, there was — the motivation — the decision to dismiss this juror had nothing to do with race.

(Emphasis added.)

¶ 12 The trial court confirmed that Juror M was the only person among the first twenty-five jurors who appeared to be Black, but then found, based on "the totality of the facts presented," that Johnson had not established a prima facie case of discrimination at step one. Nevertheless, the court said that even if a prima facie case had been established, the prosecutor satisfied her burden at step two by offering a race-neutral justification for the strike:

> THE COURT: My point is the People's offered explanation is race neutral, and that is that [Juror M] has experience with — in her perception, that law enforcement has, themselves, discriminated against people based on their racial or ethnic identity, and this case clearly involves Mr. Johnson, an

African-American man and law enforcement, and the fact that credibility of witness is always an issue, and you have law enforcement dealing with African-American citizens, raises the question for the Prosecution of whether she can be fair.

Admittedly, her statement on the jury questionnaire later says she can be fair, but the People have offered an adequate race neutral reason for exercising that peremptory challenge.

In that case, then, the third step the Court must go to is decide whether the opponent of the strike has proved purposeful racial discrimination, and in that case, I cannot find that the Defense has met that burden.

So the Court will deny the challenge under Batson as to the peremptory challenge of [Juror M].

And then, with that, we will bring our jury back in.

PROSECUTOR: And, Your Honor, may I just briefly supplement the record?

THE COURT: Yes.

I'm sorry, you mentioned, and I considered this in my decision, her answer regarding your questions that related to domestic violence, and she volunteered she would want to know about things that happened before.

I note that she ultimately said she would be able to follow the instruction that she might

not know; that she would wonder, but she couldn't consider it.

But go ahead with your record.

PROSECUTOR: Thank you.

I have a couple of additional things. First, I want to note, and importantly in this case, is this is a domestic violence case, and the named victim in this case is African-American. I think that is incredibly important.

The second thing I want to note, . . . [w]hen looking at my notes and making a decision, I am looking at the notes taken by my co-counsel. It was absolutely not readily apparent that [Juror M] was African-American, and I just want that to be supplemented on the record, because on appeal these types of observations are not necessarily apparent.

THE COURT: Thank you.

DEFENSE COUNSEL: And Judge, I'm sorry, I need to supplement that.

[Juror M] says she is a member of the Black Students Alliance. She identifies as black, obviously. She looks black to me. I spoke with my co-counsel, and he agreed with me.

For all intents and purposes, she appears to be African-American, and she also identifies that way, and so I object to any characterization that she is not — she could be of mixed race, and that is fair, but she clearly identifies as black.

> Secondly, it is not a race neutral reason to cite racial discrimination and the fact that she has experienced it in the past as a reason to remove her from this panel.

B. Standard of Review and Law

¶ 13 The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution precludes a juror challenge based on race. *Batson*, 476 U.S. at 89. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86. Moreover, equal protection ensures that litigants' and jurors' rights in the jury selection process are "free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Ojeda II*, ¶ 19 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)).

¶ 14 *Batson* provides a three-step process for evaluating claims of racial discrimination in jury selection. *Ojeda II*, ¶ 21. First, the opponent of a peremptory strike (here the defendant) must make a prima facie showing that the proponent (here the prosecution) used the strike against a potential juror because of race. *Id.* at ¶ 22; *People v. Collins*, 187 P.3d 1178, 1184 (Colo. App. 2008) ("The

striking of a single potential juror for a discriminatory reason violates the Equal Protection Clause even where jurors of the same race as the stricken juror are seated."). If the opponent establishes a prima facie case, "[t]he burden of production then shifts to the proponent of the strike." *Ojeda II*, ¶ 23. At step two, the proponent "must come forward with a race-neutral explanation 'related to the particular case to be tried.'" *Id.* (quoting *Batson*, 476 U.S. at 98). This step turns on the facial validity of the proponent's explanation; the striking party only needs to "provide any race-neutral justification for the strike, regardless of implausibility or persuasiveness." *Id.* at ¶ 24.

¶ 15 If the proponent meets its burden, then the analysis proceeds to step three. *Id.* The opponent may rebut the proponent's explanation, and the court must determine "[w]hether the objecting party has established purposeful [racial] discrimination." *Id.* at ¶ 27. The decisive question at step three is whether counsel's race-neutral explanation should be believed. *Collins*, 187 P.3d at 1182. "In assessing the credibility of the proponent of the strike, the court may consider a number of factors, including the proponent's demeanor, how reasonable or improbable the proponent's

explanations are, and whether the proffered rationale has some basis in accepted trial strategy." *Id.*

¶ 16 The ultimate burden of persuasion rests with the opponent of the strike, *Purkett v. Elem*, 514 U.S. 765, 767 (1995), and, for a *Batson* challenge to succeed, the court must "find by a preponderance of the evidence that one or more potential jurors were excluded because of race," *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998).

¶ 17 Each step of the *Batson* analysis is subject to a separate standard of review. *Ojeda II*, ¶ 30. We review step one de novo — whether the opponent established a legally sufficient prima facie case that a juror was excluded based on race — though we defer to the trial court's underlying factual findings (e.g., credibility determinations and whether the juror was a member of a cognizable racial group). *Id.* We also review the proponent's explanations at step two de novo. *Id.* And at step three, the trial court's final determination as to the existence of racial discrimination is an issue of fact that we review for clear error. *Id.*; *see also Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained

unless it is clearly erroneous."); *Batson*, 476 U.S. at 98 n.21 ("Since the trial judge's findings in the context under consideration [at step three] largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."). We defer to the trial court's step-three ruling "so long as the record reflects that the trial court weighed all of the pertinent circumstances and supports the court's conclusion" regarding purposeful discrimination. *Ojeda II*, ¶ 42 (quoting *People v. Beauvais*, 2017 CO 34, ¶ 32).

¶ 18 When a court erroneously denies a *Batson* challenge, the remedy is to reverse the conviction and remand for a new trial. *Flowers v. Mississippi*, 588 U.S. ___, ___, 139 S. Ct. 2228, 2251 (2019); *People v. Madrid*, 2021 COA 70, ¶ 11 (*cert. granted* Mar. 28, 2022).

C. "Per Se" Approach

¶ 19 Three approaches have emerged in cases like this where multiple justifications, some race based and others race neutral, for a peremptory strike are given — the mixed-motive approach, the substantial motivating factor approach, and the per se approach.

See Ojeda I, ¶ 17. Neither the United States nor the Colorado Supreme Court has adopted a governing approach. *Id.*

¶ 20 Courts adopting the mixed-motive approach have held that once the opponent of the peremptory strike has shown an improper motive (discriminatory reason), the proponent may then provide a nondiscriminatory reason to show that they would have taken the same action in the absence of the improper motive. *Id.* at ¶ 19. In other words, the nondiscriminatory reason offsets the discriminatory reason and may save the strike. *See United States v. Tokars*, 95 F.3d 1520, 1544 (11th Cir. 1996) (applying the mixed-motive analysis to a *Batson* challenge and collecting cases that have done the same); *see also Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993); *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995); *United States v. Darden*, 70 F.3d 1507, 1531-32 (8th Cir. 1995); *Wallace v. Morrison*, 87 F.3d 1271, 1274-75 (11th Cir. 1996).

¶ 21 Under the substantial motivating factor approach, which Judge Fox followed in *Ojeda I* (a case that generated three separate opinions), the trial court must determine "whether the prosecutor was 'motivated in substantial part by discriminatory intent.'" *Ojeda I*, ¶ 20 (quoting *Cook v. LaMarque*, 593 F.3d 810, 814-15 (9th Cir.

2010)).[1] To do so, the court must evaluate the "'persuasiveness of the justification[s]' offered by the prosecutor." *Id.* (quoting *Cook*, 593 F.3d at 814-15). The inquiry includes "'side-by-side comparisons' of the African American panelists who were struck and the white panelists who were allowed to serve." *Cook*, 593 F.3d at 815. And if a proffered reason for striking a Black juror applies to a non-Black juror who served, then this evidence tends to prove purposeful discrimination in step three. *See 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.").

¶ 22 Courts adopting the per se approach (also called the tainted approach) have held that a discriminatory explanation for a peremptory strike cannot be saved by an accompanying nondiscriminatory explanation. They reason that, even though one

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[1] In her special concurrence in *People v. Ojeda*, 2019 COA 137M (*Ojeda I*), Judge Harris focused solely on the prosecutor's explanation for the challenge and did not consider the trial court's proffered race-neutral reason. In doing so, she found that the prosecutor failed to meet her burden at step two and would not have proceeded to step three. *Id.* at ¶ 37. In his dissent, Judge Hawthorne found the record insufficient for appellate review and would have remanded the case for further findings. *Id.* at ¶ 80.

nondiscriminatory reason is given, the discriminatory reason undermines the legitimacy of the entire jury selection process. *See, e.g.*, *Robinson v. United States*, 890 A.2d 674, 681 (D.C. 2006) (holding that, even where the exclusion of a potential juror is "motivated in substantial part by constitutionally permissible factors . . . , the exclusion is a denial of equal protection and a *Batson* violation if it is partially motivated as well by the juror's race"); *see also Rector v. State*, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994) (finding that a juror's gold tooth was not a race-neutral reason for the strike and holding that a *Batson* violation results from a race-based reason, even if it is accompanied by a race-neutral reason); *Clayton v. State*, 797 S.E.2d 639, 645 (Ga. Ct. App. 2017) (same); *Payton v. Kearse*, 495 S.E.2d 205, 208 (S.C. 1998) (applying per se approach and finding term "redneck" was race based); *Moore v. State*, 811 S.W.2d 197, 200 (Tex. App. 1991), *abrogated by Guzman v. State*, 85 S.W.3d 242 (Tex. Crim. App. 2002); *United States v. Greene*, 36 M.J. 274, 280 (C.M.A. 1993) (finding strike based on juror's alleged Latino "macho type of attitude" was race based and justified challenge even though antagonism against government was race neutral).

¶ 23 We agree with Judge Fox's observation that the per se approach is the "most faithful to the principles outlined in *Batson*." *Ojeda I*, ¶ 21. But we are not convinced that the United States Supreme Court's reluctance to adopt this approach should guide our decision. *See id.*; *see also Snyder*, 552 U.S. at 485; *Tharpe v. Sellers*, 583 U.S. ___, ___, 138 S. Ct. 545, 547-53 (2018) (Thomas, J., dissenting). In fact, striking a juror on the basis of race independently violates the due process clause of the Colorado Constitution. *See Dean v. People*, 2016 CO 14, ¶ 11 ("Although the Colorado Constitution contains no equal protection clause, we have construed the due process clause of the Colorado Constitution to imply a similar guarantee."). Furthermore, at its core, the Equal Protection Clause and *Batson* ensure that criminal defendants have a "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86. Moreover, "[a]ctive discrimination . . . during t[he] process [of jury selection] condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers v. Ohio*, 499 U.S. 400, 412 (1991).

Indeed, "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991).

¶ 24 Finally, we conclude that the per se approach is easier to apply consistently than the substantial motivating factor approach. Not every case will contain sufficient facts to allow for a "side-by-side" comparison of the panelists who were struck and subject to the *Batson* challenge and the panelists who served. And we find that the task of determining which of several offered reasons is the "substantial motivating one" is dubious and fraught with inconsistency. Therefore, we adopt the per se approach and next apply it to the facts of this case.

D. Analysis

¶ 25 We begin by noting that the prosecutor's immediate reaction to the *Batson* challenge here was to perceive it as an accusation of racism, which we acknowledge is a natural, human reaction. But we reiterate that a conclusion that the proponent exercised a peremptory challenge on the basis of race is not a declaration that the proponent is a racist, a bigot, or an immoral person who harbors ill will toward an individual juror, the defendant, or a racial

or ethnic group. *See Ojeda II*, ¶¶ 50-52. That misinterpretation of *Batson* substantially undermines its purpose, raises the burden on the objecting party, and incentivizes courts to improperly ignore less blatant race-based strikes. *Id.*

¶ 26 Concerning step one, we conclude that the trial court erred in finding that Johnson had not established a prima facie case of racial discrimination, because the record shows that Johnson is Black, and Juror M was the only Black juror on the panel. It is well settled that a peremptory challenge "used to strike the only venire member of a cognizable racial group may be sufficient for a prima facie showing of racial discrimination." *People v. Hogan*, 114 P.3d 42, 52 (Colo. App. 2004); *see also Valdez*, 966 P.2d at 590 ("The prima facie standard is not a high one; . . . the defendant must present evidence sufficient to raise *an inference* that discrimination occurred.") (emphasis added). However, because the trial court proceeded to step two, the issue is moot. *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (finding that the prima facie showing at step one becomes moot when the prosecutor offers a race-neutral reason for the challenge and the court rules on the ultimate question of discrimination).

¶ 27 We next conclude that the trial court erred, in part, at step two. Specifically, we find error in the court's conclusion that Juror M's questionnaire response to question eight constituted "an adequate race neutral reason" for the peremptory challenge. As the court acknowledged, Juror M's response evidenced that she, a family member, or a close friend had been disrespected by law enforcement "*due to certain racial identities*." (Emphasis added.) In our view, a Black juror's personal experience with law enforcement that is race based is not, on its face, a race-neutral explanation and, instead, constitutes a race-based explanation. As well, nothing in the record shows that Juror M's experience constituted a bias against law enforcement generally or that Juror M would evaluate law enforcement officers' credibility any differently than that of non-law enforcement witnesses, as found by the court. Nor could it because no one questioned Juror M about her response. Therefore, absent the elicitation of further information concerning this response, it simply does not pass the facial validity test. We therefore disagree that, standing alone, the questionnaire response raised the question of whether Juror M could be fair to the prosecution. And we note that, while more relevant to a step three

analysis, which we do not reach here, such an inference is directly refuted by Juror M's response to question ten, where she said she could be a fair and impartial juror. Accordingly, we conclude that this explanation is impermissible because race-based "discriminatory intent is inherent in the prosecutor's explanation" and in the court's ruling. *Id.* at 360; *Purkett*, 514 U.S. at 768; *Ojeda II*, ¶ 24.

¶ 28 We reach a different conclusion as to the domestic violence reason proffered by the prosecutor and agree that it is race neutral. Indeed, Johnson does not contest this position on appeal, so we do not address it further.

¶ 29 Nevertheless, applying the per se approach, we conclude that reversal is required because "[t]o excuse such obvious prejudice because the challenged party can also articulate [a] nondiscriminatory reason[] for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection." *Payton*, 495 S.E.2d at 210; *see Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (mem.) (Marshall, J., dissenting) ("I would find that this Court's requirement that a prosecutor provide a 'neutral' explanation for challenging an Afro-American juror means just what

it says — that the explanation must not be tainted by *any* impermissible factors. Requiring anything less undermines an already underprotective means of safeguarding the integrity of the criminal jury selection process.").

¶ 30 We acknowledge that many potential jurors of color will undoubtedly report having experienced racism by law enforcement on questionnaires like the one used here. We do not suggest, however, that such a questionnaire response alone would be sufficient to sustain a *Batson* challenge. Rather, it is the prosecutor's proffered reason for the strike that determines the existence of discriminatory intent and whether the strike violates *Batson*. Indeed, had the prosecutor here proffered only Juror M's responses to the domestic violence questions as the basis for the strike, the record might have supported an order denying the *Batson* challenge. But the prosecutor's initial stated reason for striking Juror M focused on Juror M's response that "people of different races were treated differently in her experience with law enforcement."

¶ 31 Justice Liu's dissent from the California Supreme Court's denial of the petition for review in *People v. Triplett*, 267 Cal. Rptr.

3d 675 (Ct. App. 2020) (*review denied* Aug. 31, 2020), brings into sharp focus the racial bias inherent in the prosecutor's stated reason for striking Juror M:

> Is it truly race-neutral to strike a Black juror for saying that because of "[j]ust growing up in L.A.," she knew people who had been treated badly by the police or the courts, and that as "[a] Black woman in L.A. with young Black brothers," she had experienced harassment by police? The fact that these everyday experiences of Black Americans are considered legitimate grounds for a peremptory strike — even when a juror unequivocally says she will be fair and follow the law, and even when there is no basis to remove the juror for cause — goes a long way to explaining why *Batson* "has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection." It may also help explain why a substantial majority of Americans believe the criminal justice system treats Blacks less fairly than whites.
>
> No great sociological inquiry is needed to understand the problematic nature of the strike at issue here. Countless studies show that Black Americans are disproportionately subject to police and court intervention, even when they are no more likely than whites to commit offenses warranting such coercive action.

Id. at 688-89 (citations omitted).[2] He criticized the practice of excusing minorities from juries "based on ostensibly race-neutral justifications that mirror the racial faultlines in society. This approach is not dictated by high court precedent, and it is untenable if our justice system is to garner the trust of all groups in our communities and to provide equal justice under law." *Id.* at 692. Exercising a peremptory strike to remove a Black juror because of her personal experience that police officers act "disrespectful[ly] due to certain racial identities" improperly mirrors a racial faultline.

¶ 32 For these reasons, we hold that the Equal Protection Clause of the United States Constitution and the due process clause of the

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[2] A four-justice majority of the California Supreme Court denied review of this issue because the supreme court's Jury Selection Working Group was examining and due to report on issues of discrimination and inclusivity in the selection and composition of juries in California courts. *People v. Triplett*, 267 Cal. Rptr. 3d 675, 682 (Ct. App. 2020) (*review denied* Aug. 31, 2020). Justice Liu, joined by Justice Cuéllar, stated, "Although this issue is on the radar of the Legislature and our recently appointed jury selection working group, it remains an important doctrinal issue that this court should revisit." *Id.* at 684 (Liu, J., dissenting from denial of review). Justice Kruger voted to grant the petition. None of the justices in the majority disagreed with Justice Liu's opinion on the merits.

Colorado Constitution are violated when a prosecutor strikes a Black juror solely because they or someone close to them have had a negative experience with law enforcement because of their race.

¶ 33 Accordingly, we reverse Johnson's convictions and remand the case for a new trial. Because it is likely to arise on remand, we address Johnson's challenge to the prosecution's domestic violence expert. However, we do not address his remaining issues.

III. Generalized Expert Testimony

¶ 34 Johnson contends that the court abused its discretion by admitting generalized domestic violence expert testimony because the testimony did not fit the facts of his case and was more prejudicial than probative. We disagree.

A. Additional Facts

¶ 35 At trial and over the defense's relevance objection, the prosecutor elicited testimony from Jennifer Walker, a domestic violence expert qualified to opine on victim and offender behavior in domestic violence relationships. Walker explained that she knew nothing about the facts of this case and did not know the parties involved. Walker's testimony addressed power and control dynamics in domestic violence relationships, male privilege,

coercion and threats, intimidation, abusing pets, emotional abuse, re-bonding, and victim minimizing, denying, and blaming.

B. Standard of Review and Law

¶ 36 A trial court's decision to admit expert testimony is reviewed for an abuse of discretion and will only be reversed if it is manifestly erroneous. *People v. Cooper*, 2021 CO 69, ¶ 44. In deciding whether expert testimony is relevant and reliable under CRE 702, the trial court must determine whether the testimony's probative value is outweighed by the danger of unfair prejudice under CRE 403. *Cooper*, ¶¶ 46-47. When reviewing the trial court's decision, appellate courts must presume the maximum probative value and the minimum prejudicial effect of the evidence. *People v. Webster*, 987 P.2d 836, 840 (Colo. App. 1998). We review a preserved error under the harmless error standard and will disregard the error if there is no reasonable probability that it contributed to the conviction. *Hagos v. People*, 2012 CO 63, ¶ 12.

¶ 37 Generalized experts provide general context to educate the jury in complex cases and often know little or nothing about the case facts, have never met the victim, and have not performed any case-related analyses or examinations. *Cooper*, ¶¶ 49-53. While

generalized expert testimony must fit the case, "the fit need not be perfect," and "it is almost inevitable that parts of such testimony will not be logically connected to the case." *Id.* at ¶ 53. Thus, so long as "the generalized expert testimony's logical connection to the factual issues is sufficient to be helpful to the jury without running afoul of CRE 403, the testimony fits the case." *Id.*; *see also People v. Coons*, 2021 CO 70, ¶ 42.

C. Analysis

¶ 38 Johnson primarily challenges Walker's testimony about emotional abuse, male privilege, pet abuse, intimidation, coercion and threats, and using family members and children against victims because those things did not occur here. But, as our supreme court explained, a generalized expert's testimony does not need to perfectly fit the facts of a case. *Cooper*, ¶ 53; *Coons*, ¶ 43. In *Cooper*, the court found that a generalized expert in domestic violence could testify about common features of domestic violence relationships even though some of those features "had no logical connection" to the facts of the case. *Cooper*, ¶¶ 84-85. And in *Coons*, it concluded that, although there were no allegations that the defendant attempted or threatened to kill the victim or to kill or

harm a pet or child, it was not error for the generalized expert to testify about such common behavior, in addition to other general features of domestic violence relationships. *Coons*, ¶ 53.

¶ 39 In neither *Cooper* nor *Coons* did the supreme court establish a per se rule that generalized domestic violence expert testimony is admissible merely because the defendant is accused of domestic violence. As the supreme court stated in *Coons*, ¶ 51 n.7, the law does not permit "generalized expert testimony on domestic violence whenever there is evidence that a defendant has been both kind and violent." Trial courts must still "exercise their discretion in deciding whether to permit all, some, or none of the proffered testimony under the fit standard." *Cooper*, ¶ 54.

¶ 40 Applying the supreme court's standard here, we conclude that Walker's testimony sufficiently fit the case facts to satisfy the admissibility requirements of CRE 702 and 403. Walker described common power dynamics in domestic violence relationships, as well as common abuser and victim behavior that might seem counterintuitive to jurors, like re-bonding. And, contrary to Johnson's assertion, the recordings of phone conversations between

Johnson and the victim reflect emotional abuse, intimidation, and the male privilege power dynamic.

¶ 41 When Walker described emotional abuse, she said that offenders often use put-downs, name-calling, or humiliation to make victims feel responsible for the abuse, or to make them "think that they are crazy." Here, the recorded phone calls show Johnson belittling the victim, mocking her, telling her that he was always right and she was always wrong, and swearing at her. In one call, Johnson tried to convince the victim that she had lied to the police about him kicking in her door, but then apologized when she confronted him with evidence. This evidence logically fit Walker's testimony about offenders' minimizing, denying, and blaming behavior, as well as making victims think they are crazy.

¶ 42 Walker also testified that some male offenders see themselves as having a "traditional male role in the relationship," so a woman should be subservient to him and her needs are secondary to his. The recorded calls reflect Johnson berating the victim multiple times for not saying what he had told her to say, and telling the victim to do things that placed his well-being above hers, like lying to the prosecutor and the court about the altercation. As well,

Walker testified that offenders may try to intimidate victims by destroying their possessions. The victim testified that Johnson threw her personal property over the apartment's balcony onto the ground after she escaped his assault. In short, there is ample record support to demonstrate the logical connection between Walker's testimony and this case. *See Cooper*, ¶ 52. Accordingly, we discern no abuse of discretion in its admission.

IV. Conclusion

¶ 43 The judgment is reversed, and the case is remanded for a new trial.

JUDGE LIPINSKY concurs.

JUDGE BERGER concurs in part and dissents in part.

JUDGE BERGER, concurring in part and dissenting in part.

¶ 44 Understandably, prosecutors do not want jurors who harbor distrust or animus against the police. Police officers play a critical role in virtually every criminal prosecution, and it is the rare criminal case in which one or more police officers do not testify.

¶ 45 A juror who harbors distrust or animus against the police, and applies it against the prosecution or the police, for whatever reason, is not a fair and impartial juror. *See, e.g.*, *People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 14.

¶ 46 In the world of jury selection, peremptory challenges are often made based on inarticulable hunches and sometimes false stereotypes. *See Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("It is true that peremptories are often the subjects of instinct" and that "it can sometimes be hard to say what that reason is." (citing *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring))); *see also People v. Lenix*, 187 P.3d 946, 965-66 (Cal. 2008) (as to "hunches and idiosyncratic reasons").

¶ 47 In this context, it is not unreasonable for a prosecutor to infer that a person who has had unfavorable experiences with the police,

or heard about such experiences from others, may harbor such distrust or animus against the police.

¶ 48 I am unaware of any court decision that holds that a prosecutor's peremptory challenge based on an inference or belief that a juror harbors distrust or bias against the police violates *Batson*. To the contrary, the law is replete with cases that hold to the contrary.[1]

¶ 49 This case presents the difficult question of whether a peremptory strike based on a juror's possible distrust or bias against the police, which is premised on direct or indirect experiences informed by race, violates the equal protection rights of both the defendant and potential jurors. *Batson*, 476 U.S. at 99; *People v. Ojeda*, 2022 CO 7, ¶¶ 19, 20 (*Ojeda II*).

¶ 50 Given the difficulties inherent in the inquiry, it is not surprising to me that judges will come to differing answers. That is the case here. In my view, the majority's holding and reasoning

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[1] *See People v. Winbush*, 387 P.3d 1187, 1215-16 (Cal. 2017); *People v. Lenix*, 187 P.3d 946, 965-66 (Cal. 2008); *State v. Jose A.B.*, 270 A.3d 656, 675 (Conn. 2022); *State v. Rollins*, 321 S.W.3d 353, 367 (Mo. Ct. App. 2010); *State v. McQueen*, 790 S.E.2d 897, 905 (N.C. Ct. App. 2016); *State v. Austin*, 642 A.2d 673, 677-78 (R.I. 1994).

prevent a prosecutor from striking a Black juror any time that juror may have (or a prosecutor reasonably could infer that the juror has) distrust or animus against the police because of perceptions, accurate or not, that the police mistreat all or some Black persons. Thus, perhaps unwittingly, the majority has essentially repealed the ordinary, time-honored rule that distrust or animus against the police is a proper basis to exercise a peremptory challenge in general, at least with respect to specific racial groups. This, in my view, is both inappropriate and untenable.

¶ 51 To begin, I agree with the majority that the trial court erred in initially concluding that Johnson did not make a prima facie case of a discriminatory strike under step one of *Batson*. I therefore move to *Batson* step two, on which the majority decides this case.

¶ 52 The inquiry under *Batson* step two is limited. "All the striking party must do is provide any race-neutral justification for the strike regardless of implausibility or persuasiveness." *Ojeda II*, ¶ 24. "Nothing more is required for the inquiry to proceed" to step three. *Id.* "But if a discriminatory purpose is 'inherent in the [proponent's] explanation,' the reason offered cannot be deemed race-neutral." *Id.* at ¶ 25 (quoting *Hernandez v. New York*, 500 U.S. 352, 360

(1991)). "In evaluating the race neutrality of the proponent's explanation," a court must decide whether, "assuming the proffered reason for the peremptory challenge is true, the challenge is based on something other than race, or whether it is race-based and, therefore, violates the Equal Protection Clause as a matter of law." *Id.* at ¶ 26.

¶ 53 A determination that the striking party has offered a race-neutral reason for the strike does not, however, end the inquiry. At step three, the court must decide the ultimate question of "[w]hether the objecting party has established purposeful discrimination." *Id.* at ¶ 27. "It is at this stage that 'implausible or fantastic [step-two] justifications may (and probably will) be found to be pretexts for purposeful discrimination.'" *Id.* at ¶ 28 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). Thus, a strike that survives *Batson* step two may still violate *Batson*.

¶ 54 The relevant question is whether a party exercised a peremptory challenge because of race. In this case, the record regarding the peremptory challenge as to Juror M is remarkably

sparse.[2] A questionnaire that the court required all prospective jurors to complete asked the following question: "Have you, a member of your family, or a close friend had a particularly good or bad experience with a police officer?"

¶ 55 Juror M answered, "Yes. Many cases where cops are disrespectful due to certain racial identities."

¶ 56 There was no voir dire follow-up by the parties or the trial court as to Juror M.[3] Instead, on this meager record, the prosecutor exercised a peremptory challenge as to Juror M.

¶ 57 Defense counsel immediately objected to the strike, claiming it violated *Batson* because the challenge was race based. The prosecutor strenuously objected to this claim, stating, in relevant part:

> I think it is clear, based on her questionnaire alone — [Juror M] talked about how law enforcement was disrespectful. She talked about how people of different races were treated differently in her experience with law

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[2] As I discuss more fully below, the sparseness of the record and the lack of follow-up questioning may have consequences at *Batson* step three. But in my view, that sparseness is irrelevant at *Batson* step two.

[3] The record strongly suggests that Juror M was Black. The trial court and the majority assumed that Juror M is Black. I make the same assumption.

> enforcement. She also talked a lot about how she would want to know about the past, and it's a matter of wondering, and how the past is relevant in terms of talking about domestic violence. I think because of her answers in her questionnaire, there is more than enough reason for the People to have dismissed her.

¶ 58 The trial court accepted the prosecutor's step two reason, stating,

> My point is the People's offered explanation is race neutral, and that is that [Juror M] has experience with — in her perception, that law enforcement has, themselves, discriminated against people based on their racial or ethnic identity, and this case clearly involves Mr. Johnson, an African-American man and law enforcement, and the fact that credibility of witness is always an issue, and you have law enforcement dealing with African-American citizens, raises the question for the Prosecution of whether she can be fair.
>
> Admittedly, her statement on the jury questionnaire later says she can be fair, but the People have offered an adequate race neutral reason for exercising that peremptory challenge.

¶ 59 The majority rejects the trial court's ruling and holds that, on its face, the prosecutor's explanation was inherently based on race and, therefore, was not race neutral.

¶ 60 Because the record is so sparse, there are not a lot of words to parse. Juror M used the words "certain racial identities," so I

cannot fault the majority for being concerned about whether race played a role in the removal of Juror M. But my analysis of Juror M's questionnaire answer and, more to the point, the prosecutor's proffered reason for his strike of Juror M leads to my conclusion that the prosecutor's explanation, at least viewed through the lens of step two, was race neutral.

¶ 61 It is critical to ask the right question: "Whether the *prosecutor* actually struck the potential juror based on race." *Ojeda II*, ¶ 44 (emphasis added). The question is not whether the *juror* is racially prejudiced or whether the juror's distrust of the police had anything to do with the juror's race. The proper question under *Batson* is whether the party exercising the strike — here the prosecutor — made a race-based strike that violates the United States and Colorado Constitutions. *Id.*

¶ 62 In *Ojeda II*, the prosecutor's purportedly race-neutral explanation at step two included that the "defendant is a Latino male" and the challenged juror, as a Hispanic male, might "steer the jury towards a race-based reason why" the defendant was charged in that case. *Id.* at ¶ 12. The supreme court concluded that the prosecutor's own words established that the reason for the

strike was racially discriminatory. "[T]he thread that runs through the prosecution's lengthy explanation was its overtly race-based concern that Juror R.P. — a polished, educated, persuasive Hispanic man, who the prosecution said voiced concern about racial profiling — might look to Ojeda who, like him, was a Hispanic man, and 'steer the jury towards a race-based reason why' Ojeda was 'charged in this case.'" *Id.* at ¶ 46. "At base, part of the prosecution's explanation boiled down to the suggestion that Juror R.P. might not give the prosecution a fair shake because of his race." *Id.* at ¶ 47.

¶ 63 Here, in justifying the strike, the prosecutor said that "[Juror M] talked about how law enforcement was disrespectful. She talked about how people of different races were treated differently in her experience with law enforcement."

¶ 64 The prosecutor's first sentence, on its face and standing alone, is a race-neutral explanation. I read the prosecutor's second sentence as an explanation of how Juror M's opinion of law enforcement came to be, not the basis upon which the prosecutor was exercising the challenge.

¶ 65 The prosecutor said nothing similar to what the prosecutor said in *Ojeda II*, ¶ 8. The prosecutor did not say, in words or substance, that "I don't want Black people on my jury." The prosecutor also did not say, in words or substance, that "I am dismissing Juror M because I am afraid that she will persuade other jurors that the police discriminate against Black persons, and therefore they should acquit Johnson."

¶ 66 For these reasons, I believe that the prosecutor satisfied *Batson* step two. I also believe that this record presents a substantial question under *Batson* step three whether the reason given at step two was pretextual. But that inquiry lies, again, at step three, not step two.

¶ 67 As the majority highlights, the prosecutor made the strike without ever questioning Juror M during voir dire. The lack of voir dire questions by the striking party is relevant to the question of whether the reason given for the strike was pretextual. *People v. Gabler*, 958 P.2d 505, 508 (Colo. App. 1997). In another portion of the questionnaire, when asked whether there was any reason she could not be a fair and impartial juror, Juror M stated, "No, I would be great."

¶ 68 In spite of that affirmation, the prosecutor struck Juror M. It is also uncontested that Juror M was the only member of the venire who was Black. And it is undisputed that Johnson is Black.

¶ 69 While an appellate court must defer, for a variety of good reasons, to a trial court's determination at step three, that deference is warranted only "so long as the record reflects that the trial court weighed all of the pertinent circumstances and supports the court's conclusion" regarding "purposeful discrimination." *People v. Beauvais*, 2017 CO 34, ¶ 32. The entirety of the trial court's step three ruling was:

> In that case, then, the third step the Court must go to is decide whether the opponent of the strike has proved purposeful racial discrimination, and in that case, I cannot find that the Defense has met that burden.
>
> So the Court will deny the challenge under Batson as to the peremptory challenge of [Juror M].

¶ 70 Extensive findings are not required under *Batson* step three. But the trial court's ruling nevertheless must "reflect[] that the trial court weighed all of the pertinent circumstances." *Id.* Given the trial court's clearly erroneous determination under step one and the court's very summary determination under step three, I do not have

confidence that "the trial court weighed all of the pertinent circumstances." *Id.*

¶ 71 Many thoughtful persons, including the late Justice Thurgood Marshall, have long believed that *Batson*'s protocol does not achieve its goal — elimination of racial discrimination in jury selection. *Batson*, 476 U.S. at 106 (Marshall, J, concurring).[4]

¶ 72 At least one jurisdiction has sought to remedy these perceived deficiencies in *Batson* through the rule-making authority of the highest court in the state. *See* Wash. R. Gen. Application 37. Another state made similar changes to the jury selection process by statute. *See* Cal. Civ. Proc. Code § 231.7 (West 2022).

¶ 73 Last year, the Colorado Supreme Court Committee on the Rules of Criminal Procedure, by split vote, recommended to the supreme court the adoption of implicit bias rules, which, if adopted, would fundamentally change the process of jury selection in criminal cases. Kevin McGreevy, Colo. Rules of Crim. Proc. Comm.,

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[4] Included in this illustrious group is California Supreme Court Justice Goodwin H. Liu, whom the majority quotes at length from his opinion dissenting from the denial of review in *People v. Triplett*, 267 Cal. Rptr. 3d 675, 688 (Ct. App. 2020) (*review denied* Aug. 31, 2020).

Majority Report for the Adoption of Crim. P. 24(d)(5) Addressing the Exercise of Peremptory Challenges During Jury Selection (Mar. 5, 2021), https://perma.cc/2V8A-49P5. Of particular note for present purposes is proposed rule 24(d)(5)(E), which, if adopted, would render the following reasons for a peremptory challenge "presumptively invalid":

- having prior contact with law enforcement officers;
- expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; and
- having a close relationship with people who have been stopped by law enforcement, arrested, or convicted of a crime.

¶ 74 These proposals are relevant to the case before us for two reasons. First, the inclusion of these presumptively prohibited bases for a peremptory challenge at least implicitly recognizes that, under current law, these *are* permitted bases for the exercise of a peremptory challenge. Second, on April 22, 2021, the Colorado Supreme Court rejected the committee's implicit bias proposal.

¶ 75 I fear that the majority opinion will reasonably be read by lawyers and lower court judges for the proposition that once a

prospective juror expresses the belief (held by many) that police do not treat minority persons equally, the prospective juror becomes immune to a peremptory challenge on the basis of bias or prejudice against the police (and, by logical extension, the prosecution). In essence, the majority has adopted, through its adjudicatory authority, precisely what the Colorado Supreme Court has so far rejected. Whether the changes to the jury selection system adopted in Washington and California constitute sound public policy is not a question properly before this court. This court is not a policy-making court and does not have rule-making authority.

¶ 76 Accordingly, like the majority, I would reverse the judgment, but I would remand for a redetermination under *Batson* step three. If, on remand, the trial court, applying the correct legal principles, again finds no racial discrimination in the strike of Juror M, the judgment should be affirmed. If, however, the trial court finds that the strike of Juror M was racially motivated or based, then Johnson is entitled to a new trial.[5] I respectfully dissent from the majority's contrary conclusions and disposition.

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[5] In all other respects, including the majority's adoption of the per se approach under *Batson*, I join the majority's opinion.