SUMMARY
October 13, 2022

2022COA119

No. 20CA0143, *People v. Romero* — Juries — Peremptory Challenges — *Batson* Challenges

A division of the court of appeals considers whether the trial court's ultimate ruling denying a *Batson* challenge was clear error. The majority examines whether anything in the record supported the trial court's decision to credit the prosecution's proffered race-neutral reason (that the juror appeared disinterested) for the peremptory challenge. The majority concludes that the trial court's ruling was clear error because (1) there was nothing in the record supporting the trial court's decision to credit the prosecution's subjective assessment that the juror appeared disinterested, not even an identification of the juror's behavior that led the prosecution to believe he was disinterested; and (2) other parts of

the record tended to undermine the credibility of the prosecution's assessment that the juror appeared disinterested. The majority therefore reverses the judgment of conviction and remands for retrial.

The dissent disagrees, positing that the issue is not whether there is affirmative record support for the trial court's decision to credit the race-neutral reason. Instead, the issue is whether the record refutes the credibility of that reason. The dissent concludes that because the record did not refute the prosecution's assessment that the juror appeared disinterested, the trial court's ruling was not clear error.

COLORADO COURT OF APPEALS **2022COA119**

Court of Appeals No. 20CA0143
Weld County District Court No. 18CR881
Honorable Shannon D. Lyons, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Phillip Romero,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE PAWAR
Brown, J., concurs
Richman, J., dissents

Announced October 13, 2022

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¶ 1 Defendant, Phillip Romero, appeals the judgment of conviction entered on jury verdicts finding him guilty of various criminal offenses and the trial court's determination that he was guilty of five habitual criminal counts. We reverse and remand for retrial because we conclude that the trial court clearly erred by denying Romero's *Batson* challenge to a prospective juror.

I. Background

¶ 2 During jury selection, the prosecution used a peremptory challenge on Juror F, one of only two Hispanic jurors in the pool. Defense counsel raised a *Batson* challenge, arguing that the strike was based on Juror F's race.[1] The prosecution responded that it was striking Juror F because he appeared disinterested and did not seem particularly focused on the proceedings. The trial court ultimately overruled defense counsel's *Batson* challenge despite making findings that undermined the prosecution's proffered justification for the strike.

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[1] As noted in *People v. Ojeda*, 2022 CO 7, ¶ 1 n.1, bias based on Hispanic or Latino heritage is ethnicity-based, not race-based. But like the supreme court in *Ojeda*, we use the term "race" to encompass both biases. *Id.*

¶ 3 Romero appeals, arguing that the trial court erred by overruling the *Batson* challenge, among other things. We agree with his *Batson* argument, reverse for retrial, and therefore need not address his additional allegations of error.

II. *Batson*

¶ 4 A peremptory challenge cannot be used to strike a potential juror based on their race. *See People v. Beauvais*, 2017 CO 34, ¶ 20. In *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986), the Supreme Court laid out a three-step process for resolving allegations that a peremptory challenge was based on racial discrimination. First, the objecting party must make a prima facie showing that the strike was based on race. *Id.* Second, the burden shifts to the striking party to articulate a nondiscriminatory reason for the strike. *Id.* Third, the trial court must determine whether, in light of the proffered nondiscriminatory reason, the objecting party has met its burden to show purposeful discrimination by a preponderance of the evidence. *Id.* Although the burden remains on the *objecting* party at step three, the Supreme Court has described "the critical question" at this stage as whether the trial court believes the *striking* party's proffered nondiscriminatory

reason. *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) (At step three, "the critical question" is "the persuasiveness of the prosecutor's justification for his peremptory strike. . . . [T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

¶ 5 If a party fails to meet its burden at step one or two, the trial court need not proceed to the next step. However, if the trial court hears the prosecution's proffered nondiscriminatory reason and makes a step-three ruling, any challenge to the court's step-one ruling is moot. *See People v. Wilson*, 2015 CO 54M, ¶ 12.

¶ 6 A trial court's step-three ruling is one of pure fact. *See People v. Cerrone*, 854 P.2d 178, 191 (Colo. 1993). We therefore review it for clear error. *See Beauvais*, ¶ 2. This means that we will defer to the court's ultimate ruling on the *Batson* challenge as long as the record (1) reflects that the court weighed all of the pertinent circumstances and (2) supports the court's conclusion about whether the objecting party proved purposeful discrimination. *Id.*

¶ 7 A trial court's ultimate step-three ruling need not be supported by explicit findings on the credibility of the striking party's proffered nondiscriminatory reason. *Id.* at ¶ 32. Instead, to

survive clear error review, a step-three ruling must merely find some support in the record. *Id.* (When reviewing a step-three ruling for clear error, the "central inquiry" is "whether that ruling is without support in the record.").

¶ 8 With this law in mind, we turn to the facts of this case and conclude that the trial court made a step-three ruling that was unsupported by the record.

III. Juror F

¶ 9 Juror F's answers to questions during voir dire were unremarkable. When asked whether he agreed with the notion that evidence of domestic violence must include more than the "benefit of the doubt" given to alleged victims, Juror F responded, "Yeah." This exchange followed.

> Prosecutor: Okay. Is there anything else that you think makes us believe that domestic violence happens?
>
> Juror F: Well, I mean, I just feel like people get mad. Like, when people get mad, you know, they're capable of doing things that, you know, you wouldn't do when you're, like, calm. So just, you know, actions, you know.
>
> Prosecutor: Sure. Kind of that human nature, again, with our emotions that can come out.

Juror F: Yeah.

This was the extent of Juror F's questioning during voir dire.

¶ 10 At the end of voir dire, the prosecution used a peremptory challenge against Juror F, and defense counsel objected under *Batson*, arguing, "I would note that [Juror F] is a minority and part of a protected class. I don't remember him saying much of anything except that DV exists."

¶ 11 The prosecution immediately articulated a nondiscriminatory reason for the strike:

> [O]ur reason for striking [Juror F] was due to the fact that he appeared very disinterested and kind of had seemed to have a wandering mind at times when the Court was reading instructions or going over concepts, or that when we were asking questions of everyone, he just didn't seem particularly focused or interested in what was going on.

¶ 12 Defense counsel presented an immediate rebuttal:

> This is the very first time anyone's made any record at all about [Juror F] appearing disinterested. I don't — I mean, maybe someone else saw something, but I — I don't remember anything being brought up to the Court. I never saw him falling asleep or not paying attention, and I don't even know what that means, that someone appears disinterested. I mean, I'm sure this is kind of boring for all of them.

¶ 13 The trial court then ruled on the *Batson* challenge. The court first acknowledged that Juror F appeared to be of Latino heritage, had a Hispanic surname, and did not say anything during voir dire that could be the basis of a challenge for cause. The court then held that defense counsel had not made a prima facie showing that the strike was based on race under step one. But the court nevertheless proceeded to step two, holding that the prosecution had offered a nondiscriminatory reason for the strike. The court then assessed the credibility of that nondiscriminatory reason:

> It's one of those reasons that's hard to make an analysis on that, because it's based on nothing more than perception of whether or not somebody appears to be interested or not interested, and that's a very subjective kind of thing.
>
> I'll just simply say I have not seen him seem obviously disinterested. This isn't a situation where the person has fallen asleep or has been focused on a different part of the courtroom that had nothing to do with the trial. I just didn't see anything from Juror [F] that suggests that he was not adequately participating in the trial.
>
> . . . .
>
> And so to the extent that the Court needs to make a finding on the second step, I find

> they've offered a race-neutral reason, although it's — it's one that's really hard to analyze, because I wasn't paying attention to Juror [F]'s behavior for that kind of an assessment, and so I don't have an independent reading on whether he was truly disinterested or not.

With that, the trial court excused Juror F based on the prosecution's peremptory challenge.

¶ 14 Romero and the prosecution agree, as we do, that by evaluating the credibility of the prosecution's nondiscriminatory reason, the trial court mooted the step-one ruling and any challenge to it. *See Wilson*, ¶ 12. And we conclude that by evaluating the credibility of the nondiscriminatory reason and then excusing Juror F, the trial court made a complete step-three finding that defense counsel had failed to prove purposeful discrimination by a preponderance of the evidence. The question therefore becomes whether this ruling "is without support in the record." *Beauvais*, ¶ 32. We conclude that it is unsupported.

¶ 15 Again, the critical question at step three is "the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El*, 537 U.S. at 338-39. And the record is devoid of anything supporting the prosecutor's proffered reason or the trial court's

decision to credit it. Defense counsel argued that he had not observed Juror F exhibit any inattentive or disinterested behavior. Likewise, the trial court explicitly found that it "just didn't see anything from Juror [F] that suggests that he was not adequately participating in the trial."

¶ 16 Moreover, the prosecution did not identify Juror F's actual behavior that gave rise to the subjective impression that he was inattentive or disinterested. The prosecutor's statements that Juror F "appeared very disinterested and kind of had seemed to have a wandering mind" or "just didn't seem particularly focused or interested" are subjective interpretations of observed behavior. But at no point did the prosecution identify the behavior it observed that led to this interpretation. Nor does the record reflect the behavior.

¶ 17 We recognize that the trial court need not make specific findings to support its step-three ruling. Indeed, we may affirm a step-three ruling unsupported by specific findings by concluding that the trial court "implicitly credited" the proffered nondiscriminatory reason. *Beauvais*, ¶ 53. We also recognize that *Beauvais* requires us to defer to the court's ultimate step-three

ruling, not just the findings supporting it. *Id.* at ¶ 2. But, as the dissent notes, *Beauvais* also requires that a trial court's step-three ruling must be supported by the record. *Id.* at ¶ 32.

¶ 18 In this case, the only record support for the trial court's step-three ruling was the prosecution's step-two reason itself: the subjective impression that Juror F appeared inattentive and disinterested, a statement made with no additional explanation and no identification of the actual observed behavior on which it was based. Such an unexplained and unsupported subjective impression is enough to satisfy step two. But it cannot, by itself, constitute sufficient record support for a step-three ruling denying a *Batson* challenge — especially where all other relevant portions of the record tend to undermine the credibility of the unsupported and unexplained subjective impression. If it were sufficient, the satisfaction of step two in the trial court would necessarily insulate any step-three ruling from reversal on appeal. We do not read *Beauvais* or any other opinion from our supreme court as holding that the articulation of an unexplained and otherwise unsupported subjective impression that satisfies step two also constitutes record support for the trial court's decision to credit it.

¶ 19 The dissent suggests we are applying an incorrect legal standard. According to the dissent, whether a step-three ruling is clear error turns on "whether the record *refutes* the reasons offered by the prosecution." *Infra*, ¶ 37. We respectfully disagree. *Beauvais* commands that our step-three review turns on whether the record supports the court's step-three conclusion. *Beauvais*, ¶ 32 ("[W]e hold that an appellate court conducting a clear error review should defer to a trial court's ultimate *Batson* ruling so long as the record reflects that the trial court weighed all of the pertinent circumstances *and supports the court's conclusion as to whether the objecting party proved purposeful discrimination by a preponderance of the evidence*.") (emphasis added). Of course, if the record *only refutes* the prosecution's proffered step-two reason, there will be no record support for a trial court's ruling crediting it, resulting in clear error. But under *Beauvais*, the *mere absence* of anything in the record supporting the credibility of a prosecutor's subjective step-two reason also renders the trial court's decision to credit it clear error. *Id.* (The "central inquiry under a clear error review" is whether the step-three ruling "is without support in the record.").

¶ 20 We recognize, as Justice Márquez did in her dissent, some tension in *Beauvais* on this point. *Beauvais*, ¶ 66. On the one hand, *Beauvais* clearly holds that a step-three ruling must be supported by the record to survive clear error review. *Id.* at ¶ 32 (majority opinion). On the other hand, *Beauvais* also makes clear that a trial court's step-three ruling made without explicit credibility findings can survive clear error review because a trial court can make implicit findings at step three and the reviewing court must defer to the ultimate step-three ruling. *Id.* But implicit findings will never appear in the record. So what is a reviewing court to do if there are no explicit findings and nothing in the record either supports or refutes the trial court's decision at step three to credit a step-two reason? It seems that the reviewing court must choose between violating (1) the holding that a step-three ruling must be supported by the record or (2) the holding that we must defer to the court's step-three ruling if there are implicit findings supporting it.

¶ 21 Fortunately, that is not the case before us today. While there is nothing in the record supporting the trial court's decision to credit the prosecution's step-two reason, we do have defense counsel's argument and explicit findings from the trial court, all of

which tend to undermine the credibility of the step-two reason. *Beauvais* requires a conclusion of clear error under these circumstances.

¶ 22 We are not persuaded otherwise by the dissent's reliance on *People v. O'Shaughnessy*, 275 P.3d 687 (Colo. App. 2010), *aff'd*, 2012 CO 9, and *People v. DeGreat*, 2015 COA 101, *aff'd on other grounds*, 2018 CO 83. First, both are opinions from this court that predate the supreme court's opinion in *Beauvais*. *See People v. Vanderpauye*, 2021 COA 121, ¶ 24 n.2 (we are bound by decisions of our supreme court but not by decisions of other divisions of this court) (*cert. granted* July 25, 2022). And second, both are easily distinguished.

¶ 23 In *O'Shaughnessy*, when defense counsel made a *Batson* challenge, the prosecution explained that it moved to strike the prospective juror in question because "she was rolling her eyes, indicating that she wasn't too happy to be [in court]." 275 P.3d at 691. Despite not seeing the juror roll her eyes, the trial court credited the prosecutor's reason and denied the *Batson* challenge. *Id.* at 692. The division affirmed that ruling because "nothing in the record contradict[ed] the prosecutor's statements about [the juror's]

demeanor." *Id.* Unlike our case, there was something in the *O'Shaughnessy* record that supported the prosecutor's subjective impression that the juror was unhappy to be in court (the prosecutor's observation that the juror rolled her eyes). Also unlike our case, there was nothing in the record contradicting the prosecutor's objective or subjective statements about the juror's demeanor.

¶ 24 *DeGreat* is even less analogous. In that case, which involved self-defense, the juror stated during voir dire that he would "100 percent" use force to defend himself. *DeGreat*, ¶ 34. When the prosecution used a peremptory strike on the juror, defense counsel raised a *Batson* challenge. *Id.* at ¶ 24. The prosecution responded that it sought to strike the juror based on his "vociferous[]" and "bellicose" statement about self-defense. *Id.* at ¶ 26. Defense counsel agreed that the juror's self-defense statement was "strong." *Id.* at ¶ 27. The trial court denied the *Batson* challenge, and a division of this court affirmed because "nothing in the record here either clearly refutes or contradicts the prosecutor's demeanor-based explanation." *Id.* at ¶ 37.

¶ 25 Not only did the record in *DeGreat* clearly identify the juror's behavior that supported the proffered reason for the strike, but defense counsel at least partially agreed with the prosecution's subjective assessment of that behavior. This was clear record support for the trial court's decision to credit the prosecution's step-two reason. Again, in our case, the prosecutor did not identify, and the record does not otherwise indicate, what Juror F did that caused the prosecutor to subjectively believe he was inattentive. And not only did defense counsel state that he observed no inattentive or disinterested behavior, but the trial court made explicit findings that it "didn't see anything from Juror [F] that suggests that he was not adequately participating in the trial." Furthermore, our review of the record, including Juror F's answer to the only question he was asked during voir dire, reveals nothing suggesting that Juror F was inattentive and disinterested.

¶ 26 In sum, we conclude that the lack of record support for the trial court's step-three ruling, combined with the findings and argument that tended to refute it, overcomes the deference we must afford the ruling. A contrary conclusion would effectively vitiate any meaningful appellate review of step-three rulings rejecting *Batson*

challenges. We therefore conclude that the trial court clearly erred by overruling Romero's *Batson* challenge and excusing Juror F.[2]

IV. Reversal is Required

¶ 27 For the reasons articulated in *People v. Wilson*, 2012 COA 163M, ¶¶ 20-28, *rev'd on other grounds*, 2015 CO 54M, we further conclude that this error was structural and requires automatic reversal. *See also People v. Ojeda*, 2022 CO 7, ¶ 52 (concluding that erroneously overruled *Batson* challenge required reversal without conducting a harmlessness analysis). We therefore need not address Romero's additional appellate arguments.

V. Conclusion

¶ 28 The judgment of conviction is reversed, and the case is remanded to the trial court for retrial.

JUDGE BROWN concurs.

JUDGE RICHMAN dissents.

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[2] Of course, this conclusion does not mean the prosecutor harbored or was motived by race-based animosity or ill will. *See Ojeda*, ¶¶ 50-52 ("[A] finding of discriminatory purpose based on race is not the same thing as a finding that the proponent of the strike is racist.").

JUDGE RICHMAN, dissenting.

¶ 29 The majority concludes that the trial court erred by denying Romero's *Batson* challenge to Juror F, reverses his conviction, and remands the case for a new trial. I disagree that the trial court clearly erred by denying the *Batson* challenge. Therefore, I respectfully dissent from the majority and would affirm Romero's conviction, as I find his other grounds for reversal unavailing.

¶ 30 However, because the trial court did not consider the proportionality of Romero's consecutive sentences, and because the graveness and seriousness of his several prior convictions may depend on the particular facts and circumstances of the predicate offenses, I would remand the case to the trial court for further proceedings on Romero's request for a proportionality review.

I. The *Batson* Challenge

¶ 31 When the prosecutor used a peremptory challenge to strike Juror F, Romero's attorney objected that the strike was racially motivated because Juror F was the only remaining juror who appeared to be of Hispanic descent. As noted by the majority, the prosecutor explained that she had decided to strike Juror F because he appeared "very disinterested" and did not "seem

particularly focused or interested in what was going on." For ease of reference, these reasons are fairly characterized as "demeanor-based," as that phrase is used in other *Batson* cases.

¶ 32 Although proceeding to step three of the *Batson* procedure was not required in this case (the trial court found that Romero had not made a prima facie showing of discrimination), the trial court nonetheless made a step-three ruling and excused Juror F. As the majority notes, the trial court said,

> It's one of those reasons that's hard to make an analysis on that, because it's based on nothing more than perception of whether or not somebody appears to be interested or not interested, and that's a very subjective kind of thing.
>
> I'll just simply say I have not seen him seem obviously disinterested. This isn't a situation where the person has fallen asleep or has been focused on a different part of the courtroom that had nothing to do with the trial. I just didn't see anything from Juror [F] that suggests that he was not adequately participating in the trial.
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> And so to the extent that the Court needs to make a finding on the second step, I find they've offered a race-neutral reason, although it's — it's one that's really hard to analyze, because I wasn't paying attention to Juror [F]'s

> behavior for that kind of an assessment, and so I don't have an independent reading on whether he was truly disinterested or not.

¶ 33 The majority posits that this ruling is reversible error because the record must contain objective evidence to back up a prosecutor's subjective belief that a prospective juror has a certain demeanor, and in this case, there was no such objective evidence. While I agree that a trial court's step-three ruling regarding a prosecutor's demeanor-based reason for striking a prospective juror must be supported by the record, *People v. Beauvais*, 2017 CO 34, ¶ 32, I disagree that Colorado precedents require either a prosecutor to articulate a specific factual basis for a demeanor-based strike — e.g., "I think Juror X is disinterested *because he was staring at the ceiling during voir dire*" — or a trial court to affirmatively credit that factual basis — e.g., "the Court also saw Juror X staring at the ceiling during voir dire."

¶ 34 For example, in *People v. O'Shaughnessy*, 275 P.3d 687, 691 (Colo. App. 2010), *aff'd*, 2012 CO 9, the prosecutor moved to strike a prospective juror because "she was rolling her eyes, indicating that she wasn't too happy to be [in court]." The trial court said it did not see the prospective juror roll her eyes, but nonetheless

permitted the strike. *Id.* On appeal, a division of our court determined that the trial court did not err by allowing the strike, noting that "there is no question that the trial court's acceptance of the prosecutor's explanation is entitled to deference on review," that it was "immaterial" that the trial court did not see the prospective juror roll her eyes, and that "nothing in the record contradicts the prosecutor's statements about [the prospective juror's] demeanor." *Id.* at 692.

¶ 35 Similarly, in *People v. DeGreat*, 2015 COA 101, ¶¶ 26-28, *aff'd on other grounds*, 2018 CO 83, the prosecutor moved to strike a prospective juror because he had responded to a question with a "vociferous[]" answer, and the trial court allowed the strike. On appeal, a division of our court deferred to the trial court's ruling, stating that "[d]eference is due even where the trial court's credibility or demeanor determination is implicit, cannot be objectively verified, or was not directly observed by the trial court." *Id.* at ¶ 36.

¶ 36 Moreover, the division explained,

> To be sure, it is preferable for a trial court to make specific findings when possible — in particular, on the issues of credibility and

> demeanor — regarding its reasons for denying a *Batson* challenge. Such findings improve the appellate record and permit more meaningful review. *But because nothing in the record here either clearly refutes or contradicts the prosecutor's demeanor-based explanation,* we will not question the prosecutor's credibility or second-guess the trial court's finding that the prosecutor offered a good faith explanation.

Id. at ¶ 37 (emphasis added).

¶ 37 As both *O'Shaughnessy* and *DeGreat* counsel, it is not incumbent that the record contain evidence affirmatively supporting the prosecutor's demeanor-based reasons for striking a prospective juror; rather, the issue is whether the record *refutes* the reasons offered by the prosecution.

¶ 38 And I submit that my understanding of the case law finds further support in *Beauvais*, where our supreme court said,

> It is true that the trial court did not expressly find the demeanor-based reasons to be credible. But neither did Beauvais rebut these reasons or otherwise build a record on juror demeanor. Significantly, the trial court did not indicate that it thought the prosecution was being disingenuous in offering these reasons, *and there is nothing in the record to otherwise refute the prosecution's assessment of the challenged jurors' demeanor.* Therefore, we conclude in this case that the trial court did not clearly err in rendering its *Batson* ruling

> without also making express credibility findings as to the demeanor-based reasons.

Beauvais, ¶ 44 (emphasis added) (footnote omitted).

¶ 39 Again, the emphasized language suggests to me that it is not incumbent that the record contain evidence affirmatively supporting the prosecutor's demeanor-based reasons for striking a prospective juror; rather, the issue is whether the record *refutes* the reasons offered by the prosecutor.

¶ 40 Based on these cases, I must respectfully disagree with the majority that the prosecutor's reason for striking Juror F is so unsupported by the record that the trial court clearly erred by permitting the strike. Just as the record does not contain evidence — independent of the prosecutor's saying so, that is — that affirmatively supports the prosecutor's statement that Juror F was disinterested, neither does it contain any evidence refuting the prosecutor's assessment of Juror F's demeanor.

¶ 41 In allowing the prosecutor's strike, the trial court stated that although it did not see Juror F appear "obviously disinterested," it noted that it did not see anything that contradicted the prosecutor's reason "because I wasn't paying attention to Juror [F]'s behavior for

that kind of an assessment, and so I don't have an independent reading on whether he was truly disinterested or not." Defense counsel's response was similarly equivocal: "I don't — I mean, maybe someone else saw something, but I — I don't remember anything being brought up to the Court. I never saw him falling asleep or not paying attention . . . ." Nonetheless, the trial court found that the prosecutor had offered a race-neutral reason and, by permitting the strike, implicitly determined that the reason was not a pretext for purposeful discrimination.

¶ 42 This case highlights the difficulty of appellate review of a trial court's *Batson* step-three ruling. As the Supreme Court explained in *Hernandez v. New York*, 500 U.S. 352, 365 (1991), such a ruling largely amounts to a judgment call about whether the striking attorney's race-neutral explanation should be believed, and "[t]here will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the [striking] attorney." A transcript of the proceedings is no substitute for the real thing in this regard, and that is why "appellate courts afford trial courts great deference [when reviewing *Batson* step-three rulings] and will

only reverse under 'exceptional circumstances.'" *Beauvais*, ¶ 25 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)).

¶ 43 In conclusion, there is no denying that it would have been better for the trial court to have made more detailed findings about the circumstances of the strike in this case, and the court could well have probed the prosecutor to articulate with greater specificity the reasons why she thought Juror F was "disinterested," but based on the record we have, I would defer to the trial court's ruling.

II. Other Issues on Appeal

¶ 44 Romero also argues that the trial court erred by punishing him twice for the same assault in violation of the Double Jeopardy Clause, and by giving him consecutive sentences for the assaults even though they arose from the same incident.

¶ 45 Although framed as two separate issues, both can be resolved by deciding similar questions.

¶ 46 First, did Romero's conduct amount to two separate assaults or only one assault? To be sure, the testimony of the victim, the only witness to Romero's conduct, was less than crystal clear. But there was evidence that could be believed by the jury, and the trial court, to show that Romero assaulted and injured the victim in an

incident that occurred on the first floor of his home. In that incident, he hit her with his fists, and perhaps a board, causing bruising. This evidence supported the conviction for second degree assault. Following that incident, Romero and the victim apparently went upstairs to a different area of the home, where Romero assaulted the victim again, using a stick or a board, and he broke a bone in her leg. This evidence supported the conviction for first degree assault.

¶ 47 When distinct facts support a first degree assault and a second degree assault, they are treated as separate offenses, and they do not merge because they are separate acts. *See Quintano v. People*, 105 P.3d 585, 591 (Colo. 2005); *see also People v. Valera-Castillo*, 2021 COA 91, ¶ 55 (determining that although assaults occurred in the same location and close in time, there was evidence of a new volitional departure after a short break in the assaults); *People v. McMinn*, 2013 COA 94, ¶ 22 (noting the relevance of whether the victim was moved and whether there were volitional departures between one act and another). Romero was properly convicted of multiple assaults because he moved the victim between each assault and, after they went upstairs, he escalated the beating

to include blows forceful enough to break her leg, indicating a new volitional departure. These two assaults constituted distinct acts based on separate evidence. *People v. Espinoza*, 2020 CO 43, ¶ 10.

¶ 48 Sections 18-1.3-406(1)(a) and 18-1-408(3), C.R.S. 2022, limit a sentencing court's discretion in cases involving crimes of violence and identical evidence. Under section 18-1.3-406(1)(a), "separate crimes of violence" that arise "out of the same incident" must be sentenced consecutively. If two or more crimes of violence are not supported by identical evidence, they may be considered "separate" under section 18-1.3-406(1)(a). *Espinoza*, ¶ 10. Under section 18-1-408(3), two convictions supported by identical evidence must be sentenced concurrently.

¶ 49 Accordingly, the second question is: Were Romero's two convictions for first and second degree assault supported by identical evidence? The answer to this question is "no" — the convictions were not supported by identical evidence. The second degree assault occurred during the downstairs episode, and the first degree assault occurred during the upstairs episode. Because the offenses were not supported by identical evidence, I would affirm that consecutive sentencing was permissible here.

III. Proportionality Review

¶ 50 Romero asserts that his sentence of ninety-six consecutive years, based on the trial court's habitual criminal finding, is disproportionate given the nature of the predicate offenses that supported the habitual criminal finding. The trial court did not conduct a proportionality analysis.

¶ 51 He argues that we should conduct the abbreviated proportionality review and conclude that the predicate offenses are not grave and serious under the applicable case law, particularly after the supreme court's decision in *Wells-Yates v. People*, 2019 CO 90M. The People contend we should conclude that each of the predicate offenses remains grave and serious after *Wells-Yates*, and therefore affirm the sentence based on an abbreviated proportionality review.

¶ 52 However, in *Wells-Yates*, ¶ 75, the supreme court concluded that an abbreviated proportionality review of the challenged sixty-four-year sentence for the triggering offense required "an analysis of the facts and circumstances surrounding that offense and the facts and circumstances surrounding each of the three predicate offenses." Because we are not in a position to analyze the facts and

circumstances surrounding each of Romero's convictions for the predicate offenses, or the triggering offenses, I would remand the case for the trial court to conduct a proportionality review in accordance with the precepts of *Wells-Yates*.