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ADVANCE SHEET HEADNOTE
September 9, 2024

2024 CO 62

No. 22SC845, *People v. Romero*—*Batson* Challenges—Step Three—Clear Error—Peremptory Challenges—§ 16-10-104, C.R.S. (2023)—*Batson v. Kentucky*, 476 U.S. 79 (1986)—*People v. Beauvais*, 2017 CO 34, 393 P.3d 509—*People v. Wilson*, 2015 CO 54M, 351 P.3d 1126.

The supreme court considers whether a division of the court of appeals misapplied the clear error standard of review by failing to afford any deference to the trial court's ultimate ruling at step three of the analysis prescribed by *Batson v. Kentucky*, 476 U.S. 79 (1986). Because the division second-guessed the trial court's step-three decision to credit the prosecutor's race-neutral reason, the supreme court concludes that the division erred.

Relying on *People v. Beauvais*, 2017 CO 34, 393 P.3d 509, the division determined that the trial court's decision to credit the prosecutor's race-neutral reason—that Prospective Juror F appeared disinterested—was clear error because that reason was neither accompanied by a specific factual justification (such as identification of the actual observed behavior on which it was based) nor supported by objective evidence confirming that it was true or accurate. But

Beauvais does not support that proposition. Instead, *Beauvais* says that, to withstand clear error review at step three, the record both must reflect that the trial court considered all the relevant circumstances and must support (including possibly through implicit demeanor and credibility findings) the trial court's ultimate ruling regarding whether the objecting party has met the burden of showing purposeful racial discrimination. *Id.* at ¶¶ 32, 37, 393 P.3d at 519–20.

The division compounded its misapprehension of *Beauvais* by misconstruing the record. Contrary to the division's conclusion, the record is not devoid of support for the trial court's decision to credit the prosecutor's race-neutral reason. Rather, the record reflects that the trial court implicitly found the prosecutor credible and her race-neutral reason sincere.

Going a step further still, the division concluded that a comment by the trial court actually undermined the prosecutor's race-neutral reason. But the comment in question cannot be fairly characterized as an "explicit finding[]" (or any type of finding) undermining the prosecutor's race-neutral reason.

Inasmuch as the record both reflects that the trial court considered all the relevant circumstances and supports the ultimate *Batson* ruling at step three, the division incorrectly held that the trial court committed clear error. Accordingly the division's judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

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

2024 CO 62

Supreme Court Case No. 22SC845
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA143

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Phillip Romero.

Judgment Reversed
en banc
September 9, 2024

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

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 The clear error standard of review is highly deferential to trial courts, precluding second-guessing and making their rulings all the more consequential. The chief reason for such deference in appeals like this one is that trial courts are in a unique position to make firsthand observations related to demeanor and credibility. As one court colorfully put it, even a great transcript "is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried. It resembles a pressed flower." *Broad. Music, Inc. v. Havana Madrid Rest. Corp.*, 175 F.2d 77, 80 (2d Cir. 1949) (footnote omitted).

¶2 In this case, a division of the court of appeals correctly recognized that the clear error standard of review applied to the trial court's denial of the defendant's *Batson* challenge with respect to the prosecution's second peremptory strike during jury selection.[1] *People v. Romero*, 2022 COA 119, ¶ 6, 523 P.3d 1010, 1012.

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[1] Under Colorado law, a party may excuse a prospective juror in two ways: (1) by using a for-cause strike—i.e., by relying on any of the statutory bases providing cause to excuse a prospective juror (generally due to a conflict of interest or an inability to be fair and impartial); or (2) by using a peremptory strike, which permits the excusal of a prospective juror for any reason or no reason at all. *People v. Johnson*, 2024 CO 35, ¶ 11, 549 P.3d 985, 989; § 16-10-103 (1), C.R.S. (2023); § 16-10-104, C.R.S. (2023); Crim. P. 24 (b)(1), (d). Although there are "no questions asked" with peremptory strikes, *Flowers v. Mississippi*, 588 U.S. 284, 293 (2019), the exercise of such strikes is not without limits—it "is subject to the commands of the Equal Protection Clause," which forbids a party from striking prospective jurors on account of their race, *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), or gender, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). (Gender discrimination is not

But the division misapplied the clear error standard of review by failing to afford any deference to the trial court's ultimate ruling at step three of the *Batson* analysis.

¶3 After properly acknowledging both that the trial court had implicitly found credible the prosecution's race-neutral reason for striking Prospective Juror F and that Colorado law does not require such a finding to be explicit, the division second-guessed the trial court's credibility determination. Relying on our decision in *People v. Beauvais*, 2017 CO 34, 393 P.3d 509, the division concluded that the trial court should not have believed the prosecution's race-neutral reason—that Prospective Juror F seemed very "disinterested,"[2] was not particularly focused, and appeared to have a wandering mind.[3] *Romero*, ¶ 18, 523 P.3d at 1014.

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implicated here, so we limit our analysis to racial discrimination.) *Batson* established a three-step process for resolving an allegation by a party that a peremptory strike exercised by the opposing party was based on a prospective juror's race. *Batson*, 476 U.S. at 96–98. First, the objecting party bears the burden of making a prima facie showing that the strike was race-based. *Id.* at 96. Second, the striking party bears the burden of articulating a race-neutral reason for the strike. *Id.* at 97. And third, the trial court must determine whether the objecting party has met the burden of showing purposeful racial discrimination by a preponderance of the evidence. *Id.* at 98.

[2] We understand "disinterested," as used by the parties, the trial court, and the division, to mean lacking attention or care for the proceedings (i.e., uninterested) rather than lacking a personal motive or stake in the proceedings (i.e., unbiased). *See Beauvais*, ¶ 9 n.3, 393 P.3d at 514 n.3 (citing *Disinterested*, *Webster's Third New International Dictionary* (2002)). That is also how we use the term in this opinion.

[3] For brevity's sake, throughout this opinion, we generally describe the prosecution's race-neutral reason by referring simply to Prospective Juror F's disinterest or lack of attention.

According to the division, under *Beauvais*, the trial court's decision to credit the prosecutor's race-neutral reason was clear error because that reason was neither accompanied by a specific factual justification nor supported by objective evidence confirming that it was true or accurate. *Id.*

¶4 The division misunderstood our decision in *Beauvais*. Nowhere in *Beauvais* did we say that a trial court may credit a prosecutor's race-neutral reason for striking a prospective juror only if that reason is supported by the type of corroboration required by the division. What we said is that, to withstand clear error review at step three, the record both must reflect that the trial court considered all the relevant circumstances and must support (including possibly through implicit demeanor and credibility findings) the trial court's *ultimate ruling* regarding whether the objecting party has met the burden of showing purposeful racial discrimination. *Beauvais*, ¶¶ 32, 37, 393 P.3d at 519–20.

¶5 Nor does *Beauvais* stand for the proposition that *the prosecution* bears the burden of proving that its race-neutral reason for excusing a prospective juror is true, accurate, or otherwise believable. At step three, the burden of proof rests with, and never shifts from, *the objecting party*—here, the defendant. *Id.* at ¶ 24, 393 P.3d at 517. The objecting party must show by a preponderance of the evidence that the peremptory strike in question was motivated by purposeful racial discrimination. *Id.*

¶6 The division compounded its misapprehension of *Beauvais* by misconstruing the record. Contrary to the division's conclusion, the record is *not* devoid of support for the trial court's decision to credit the prosecutor's race-neutral reason. Rather, the record reflects that the trial court implicitly found the prosecutor credible and her race-neutral reason for excusing Prospective Juror F sincere.

¶7 The trial court at no point indicated, or even suggested, that it thought the prosecutor was being disingenuous or untruthful. Instead, having observed the prosecutor's demeanor firsthand and the promptness with which she uttered her race-neutral reason, and having considered all the other relevant circumstances along with the persuasiveness of the race-neutral reason in light of the rebuttal presented by the defense, the trial court necessarily concluded that the prosecutor had stated an appropriate basis for excusing Prospective Juror F.

¶8 The division went a step further still and determined that a comment by the trial court actually undermined the prosecution's race-neutral reason for striking Prospective Juror F. *Romero*, ¶ 18, 523 P.3d at 1014. We disagree. What the record shows is that the trial court simply acknowledged it had not been focused on Prospective Juror F's demeanor and was thus unable to independently say whether he was disinterested. This observation did nothing more than convey that the trial court could neither substantiate nor repudiate the prosecution's race-

neutral reason. Such a remark cannot be fairly characterized as an "explicit finding[]" undermining the prosecution's reason for excusing Prospective Juror F. *Id.* at ¶ 25, 523 P.3d at 1015. Just the opposite: Despite candidly sharing with the parties that it had not been paying close attention to Prospective Juror F's demeanor, the trial court ultimately found believable that the prosecution had excused him because he appeared to be disinterested.

¶9 It is uncontestable that the ultimate *Batson* ruling at step three, regarding whether the objecting party has shown purposeful racial discrimination, is a factual determination of the striking party's demeanor and credibility, which lies peculiarly within the trial court's province. It is equally axiomatic that such a determination deserves great deference on review because trial courts have access to the best (if not the only) evidence of the striking party's demeanor and credibility. Accordingly, appellate courts use clear error, a standard of review highly deferential to trial courts, to evaluate step-three *Batson* rulings, reversing only in exceptional circumstances.

¶10 Here, the record both reflects that the trial court considered all the relevant circumstances and supports the ultimate *Batson* ruling at step three. Therefore, the trial court did not clearly err.

¶11 Although intending to review for clear error, the division essentially conducted a de novo review, second-guessing the ultimate *Batson* ruling. Putting

itself in the trial court's shoes, it performed its own credibility assessment of the prosecution's race-neutral reason. Because the division's analysis does not conform with the clear error standard of review and cannot be squared with the record, we reverse the judgment.

I. Facts and Procedural History

A. Background

¶12 The defendant, Phillip Romero, threatened and attacked his romantic partner. The prosecution subsequently charged him with assault in the first degree, assault in the second degree, menacing, and false imprisonment. A jury returned guilty verdicts on all four charges, and the trial court then adjudicated him a habitual criminal and sentenced him to prison.

¶13 On appeal, Romero argued, as pertinent here, that the trial court had clearly erred in denying his *Batson* challenge, which he raised when the prosecution used a peremptory strike to excuse Prospective Juror F, one of two Hispanics in the jury pool. A division of the court of appeals agreed, reversed the judgment of conviction, and remanded for a new trial without addressing any other issues raised by Romero. *Romero*, ¶¶ 27–28, 523 P.3d at 1016. Thereafter, we granted the prosecution's petition for certiorari, which contained a single issue:

> Whether the court of appeals erroneously heightened the clear error standard of review in violation of this court's precedent, which mandates reversal of a trial court's factual findings only when they are so clearly erroneous as to find no support in the record.

Accordingly, we cabin our discussion to the division's conclusion that the trial court clearly erred by denying Romero's *Batson* challenge.

B. *Batson* Challenge

¶14 At the end of jury selection, the trial court held a bench conference to allow the prosecution and the defense to exercise their peremptory strikes outside the presence of the prospective jurors. The prosecution used its second peremptory strike to excuse Prospective Juror F. When the parties had exercised all of their peremptory strikes, the defense timely raised a *Batson* challenge, objecting to the prosecution's second peremptory strike as race-based. Defense counsel noted that Prospective Juror F was Hispanic and had said little during jury selection:[4]

> I would raise *Batson* at this point in time. I would note that [Prospective Juror F] is a minority and part of a protected class. I don't remember him saying much of anything except that [domestic violence] exists. So we're raising that.

¶15 Before the trial court could address whether the defense had made a prima facie showing of racial discrimination (and thus whether to proceed to step two of the analysis), the prosecutor immediately responded by explaining that she had stricken Prospective Juror F for a race-neutral reason:

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[4] Bias related to an individual's Hispanic identity is technically ethnicity-based, not race-based. *See People v. Ojeda*, 2022 CO 7, ¶ 1 n.1, 503 P.3d 856, 858 n.1. However, as we've done before, and in line with Supreme Court precedent, we use the term "race" here expansively to encompass both race and ethnicity. *Id.*

> So, Your Honor, our reason for striking [Prospective 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 [c]ourt was reading instructions or going over concepts, ... [W]hen we were asking questions of everyone, he just didn't seem particularly focused or interested in what was going on.

As an aside, the prosecutor added that, right after she used her second peremptory strike to excuse Prospective Juror F, defense counsel used his second peremptory strike to excuse "the only other protected-class individual" in the jury pool, who was also Hispanic.

¶16 Defense counsel asked the trial court if he could respond to the reason articulated by the prosecutor. The court obliged, inadvertently bumping the analysis to step three without first determining whether the prosecutor's reason was race-neutral.[5] In rebuttal, defense counsel protested that nobody had

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[5] Although *Batson* mandates that trial courts make a finding at the end of each of the first two steps before proceeding to the next step, a *Batson* colloquy sometimes unfolds as it did here: Before the court can get a substantive word in edgewise, the analysis has already proceeded to step three. In fairness to trial courts, *Batson*'s analytical framework feels unnatural for two reasons. First, it compels trial courts to make findings at steps one and two without requiring a response from the party not bearing a burden. Trial courts are not used to proceeding in that fashion; they generally don't rule on an issue until both sides have been heard on it. Second, the striking party may fail to resist the temptation to jump the gun at step one by conveying what that party believes is a race-neutral reason before the finding required of the court (regarding whether the objecting party has made the prerequisite prima facie case), while the objecting party may fail to resist the temptation to jump the gun at step two by responding to the striking party's alleged race-neutral reason before the finding required of the court (regarding

previously expressed concern over Prospective Juror F's lack of attentiveness. Beyond that, defense counsel remarked that he himself hadn't noticed that Prospective Juror F was "falling asleep or not paying attention."

¶17 In addressing the defense's *Batson* challenge, the trial court started by pointing out that there were two non-white prospective jurors in the pool, both Hispanic, and that each party had excused one of them with the second peremptory strike. Then, zeroing in on Prospective Juror F, the court acknowledged that it had not taken any notes during either counsel's examination of that prospective juror because nothing he said had raised red flags. Elaborating, the court explained that Prospective Juror F had not made any comment that "could, ultimately, be the basis for a challenge for cause." Instead, stated the court, whatever statements Prospective Juror F had made "were simply unremarkable." But the court hastened to add that the prosecution was not striking Prospective Juror F based "upon statements that he made; rather, they [were] basing it on their read of his body language, that he seemed to be disinterested."

¶18 Following those preliminary remarks, the trial court proceeded to apply *Batson*'s three-step framework. First, the court found that, at step one, the defense had failed to make "a prima facie case [that] the prosecutor struck a prospective

whether the striking party has come forward with a race-neutral reason for exercising the peremptory strike).

juror on the basis of race." But the court didn't end its analysis there. It went on to address step two in case an appellate court later held that the defense had made the requisite showing at step one. Regarding step two, the court found that the prosecution had proffered "a race-neutral reason for excusing [Prospective Juror F]." Thus, the court continued to step three.

¶19 At step three, the trial court discussed the difficulty of judging the prosecutor's race-neutral reason, adding that it could neither validate nor disavow that reason:

> It's one of those reasons that's hard to make an analysis on . . . 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 [Prospective Juror F] 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 [Prospective Juror F] that suggests that he was not adequately participating in the trial.

Having said that, the court was unpersuaded by the defense's contention that the prosecutor's race-neutral reason should not be believed because nobody had previously raised any concern regarding Prospective Juror F's attentiveness:

> That kind of observation that somebody seems disinterested is not the kind of thing that would need to be brought to the [c]ourt's attention unless they were actually sleeping during the proceedings. So that's something that the prosecution or the defense could simply note in their notes and . . . then use that later when it came to a preemptory [sic].

> So I don't . . . find that to be the kind of thing that needs to be raised and then brought to the [c]ourt's attention. . . . [I]t's really [a] subjective kind of observation that could be the basis for a valid preemptory [sic] challenge.

¶20 The trial court wrapped up its analysis by impliedly, but necessarily, crediting the prosecutor's race-neutral reason and concluding that Romero had failed to meet his burden of showing purposeful racial discrimination by a preponderance of the evidence. It thus denied the *Batson* challenge and released Prospective Juror F.

¶21 On appeal, Romero argued, among other things, that the trial court had clearly erred in denying his *Batson* challenge. In a split, published opinion, the division agreed, reversed his conviction on that ground, and remanded for a new trial.[6] *Romero*, ¶¶ 27–28, 523 P.3d at 1016.

¶22 The division acknowledged both that the trial court had implicitly found credible the prosecutor's articulated reason for excusing Prospective Juror F and that Colorado law does not require that such a finding be explicit. *Id.* at ¶ 17, 523 P.3d at 1014. But it concluded that the trial court shouldn't have believed the prosecution's race-neutral reason because, in the division's view, (1) that reason had no support in the record—i.e., there was neither a factual basis justifying it (such as "identification of the actual observed behavior on which it was based")

[6] Strictly for convenience, we refer to the division majority as "the division."

nor any objective evidence confirming its veracity or accuracy; and (2) the record tended to undermine the credibility of the prosecution's assertion that Prospective Juror F appeared disinterested. *Id.* at ¶¶ 18, 21, 523 P.3d at 1014–15. With respect to the latter point, the division specified that (1) defense counsel commented during the *Batson* colloquy that he had observed no behavior by Prospective Juror F indicative of being disinterested, and (2) the trial court thereafter made an "explicit finding[]" that it hadn't noticed Prospective Juror F acting disinterested. *Id.* at ¶ 25, 523 P.3d at 1015. According to the division, in light of these circumstances, the trial court's step-three ruling constituted clear error under *Beauvais*. *Id.* at ¶ 26, 523 P.3d at 1015–16.

¶23 Judge Richman dissented. He disagreed that (1) the prosecution needed to articulate a specific factual basis justifying its race-neutral reason, and (2) the record needed to contain objective evidence confirming the veracity or accuracy of that reason. *Id.* at ¶ 33, 523 P.3d at 1016–17 (Richman, J., dissenting). Judge Richman opined 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 prosecution." *Id.* at ¶ 37, 523 P.3d at 1017. And because he concluded that the record in this case did not refute the prosecution's demeanor-based reason for

excusing Prospective Juror F, he would have upheld the trial court's step-three ruling. *Id.* at ¶ 43, 523 P.3d at 1018.

¶24 The prosecution now contends that the division erred in holding that the trial court's step-three ruling was clearly erroneous. Romero counters that the division was spot-on. Before we get to our analysis, we pause just long enough to address a preliminary matter that took up an appreciable amount of time during oral arguments—why we continue to adhere to *Batson* despite its innate flaws, the difficulties inherent in its application, and the criticisms that have rained down on it over the years.

II. *Batson* Continues to Rule the Roost in Colorado

¶25 Perhaps tellingly, during her oral argument, Romero's appellate counsel didn't focus on defending the division's analysis as *Batson*-compliant. On the contrary, counsel spent a fair amount of time touting the division's approach as more effective than *Batson* in cases involving a demeanor-based step-two reason. In other words, acknowledging that there is some daylight between the division's framework and *Batson*'s, defense counsel urged us to choose the former over the latter to smoke out purposeful racial discrimination from jury selection in cases like this one. To be sure, we sympathize with counsel's concerns regarding *Batson*; as some of the questions we propounded reflect, we are keenly aware of the

frustrations that are part and parcel of its methodology. Still, we are bound by, and thus cannot sidestep, *Batson*.

¶26 While animated by laudable intentions of unassailable importance, this landmark decision has been difficult and unwieldy to apply both at trial and on review. Today's case is one more example of the challenges *Batson* presents for trial courts and appellate courts alike.

¶27 Given its ambitious (and perhaps unrealistic) goal, it is unsurprising that *Batson* came under siege from the moment of its inception. *See Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) (predicting that the decision, while a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries," would "not end" that practice, and opining that the goal "can be accomplished only by eliminating peremptory challenges entirely"). For the same reason, it is just as unsurprising that *Batson* has continued to stand in the line of fire for nearly forty years, as an ever-growing chorus of courts and commentators have exposed its troublesome flaws and validated Justice Marshall's dire prognostication that it would prove ineffective. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 266–67 (2005) ("*Miller-El II*") (Breyer, J., concurring) ("The only way to 'end the racial discrimination that peremptories inject into the jury-selection process' . . . [is] to 'eliminat[e] peremptory challenges entirely.'" (second alteration in original) (quoting *Batson*, 476 U.S. at 102–03

(Marshall, J., concurring))); *People v. Johnson*, 2024 CO 35, ¶¶ 64–74, 88, 549 P.3d 985, 998–1000, 1003 (Márquez, J., specially concurring) (discussing in detail *Batson*'s serious flaws, and observing that "[n]early forty years later, it appears Justice Marshall was correct" in predicting *Batson* would not end racial discrimination in jury selection); *see also generally* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809 (1997) (noting *Batson*'s shortfalls and calling for the abrogation of peremptory challenges).

¶28 Of course, states are free to extinguish peremptory strikes and thereby render *Batson* obsolete "without impairing the constitutional guarantee of an impartial jury and a fair trial." *Rivera v. Illinois*, 556 U.S. 148, 152 (2009) (quoting *Georgia v. McCollum*, 505 U.S. 42, 57 (1992)). In Arizona, for example, the state supreme court recently put *Batson* out of commission by abolishing peremptory strikes altogether—no peremptory strikes, no racial discrimination through such strikes, and no need for *Batson*. Sup. Ct. of Ariz. No. R-21-0020, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (Aug. 30, 2021), https://aboutblaw.com/Zps [https://perma.cc/742M-J6DN].

¶29 The no-peremptories model loomed at oral arguments in this case. Defense counsel posited that if we declined to endorse the division's methodology, the best

course of action would be to eradicate peremptory challenges once and for all. Advocating for a jury system without peremptories is not out of left field. In *Miller-El II*, Justice Breyer noted in his concurring opinion that such an arrangement was already receiving serious consideration in some quarters of the legal profession—that was almost twenty years ago. 545 U.S. at 272 (Breyer, J., concurring). And just a few weeks after oral arguments in the instant matter, some members of our court suggested that the time may be ripe for Colorado to follow Arizona's lead and put *Batson* out to pasture by vanishing peremptory strikes. *Johnson*, ¶¶ 64–74, 88, 549 P.3d at 998–1000, 1003 (Márquez, J., specially concurring). In Colorado, however, that decision lies squarely with our state legislature because peremptory strikes are provided by statute, not court rule (as was the case in Arizona). § 16-10-104, C.R.S. (2023).[7]

¶30 And, as long as our legislature continues to require that peremptory strikes be available—a policy decision that is its prerogative—we must continue applying *Batson*, regardless of whether its controversial framework is an effective colander to strain peremptory strikes for purposeful racial discrimination in jury selection. *Johnson*, ¶¶ 14, 17, 549 P.3d at 990 (acknowledging that some parties continue to use peremptory strikes "to cloak purposeful discrimination," but stating that we

[7] Crim. P. 24(d), titled "Peremptory Challenges," merely provides the procedural mechanism to implement the substantive right created by statute.

must still "adhere to the Supreme Court's three-step framework in *Batson* to reconcile peremptory strikes and the Equal Protection Clause."). So, we apply *Batson* once more.

III. Analysis

¶31 At the outset, we note that the trial court's determination that Romero failed to make the requisite prima facie showing at *Batson*'s step one is not before us. Because the trial court ruled on the ultimate issue of purposeful racial discrimination at step three, that "preliminary issue . . . bec[ame] moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion); *see also People v. Wilson*, 2015 CO 54M, ¶ 12, 351 P.3d 1126, 1131 (stating that the step-one question was mooted by the trial court's ruling on the ultimate *Batson* issue). Nor is *Batson*'s step two before us—Romero concedes that the prosecution offered a race-neutral reason for striking Prospective Juror F. But while our focus is on *Batson*'s step three, we believe it is helpful to briefly discuss steps one and two for context.

¶32 After donning our analytical fins and goggles, we snorkel over the first two steps before taking a deep dive into the third. Following our in-depth exploration of step three, we consider the controlling standard of review at that step—clear error—and describe how its highly deferential nature makes it so well-suited to review a trial court's ultimate *Batson* ruling. Against this backdrop, we examine what led the division astray—its understanding of our decision in *Beauvais* and its

construction of the record. And, having corrected the division's missteps, we end by concluding that the trial court did not commit clear error in denying Romero's *Batson* challenge and excusing Prospective Juror F.

A. *Batson*'s Steps One and Two

¶33 The step-one standard to determine whether an objecting party has satisfied the burden of making a prima facie showing that the challenged peremptory strike is race-based is "easily satisfied." *Craig v. Carlson*, 161 P.3d 648, 655 (Colo. 2007); *see also Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998) (characterizing the standard as "not a high one"). It suffices that the totality of the circumstances gives rise to an inference of racial motivation. *People v. Rodriguez*, 2015 CO 55, ¶ 10, 351 P.3d 423, 428–29.

¶34 If the objecting party meets the burden at step one, then at step two the burden shifts to the striking party to offer a race-neutral reason for the strike. *Johnson*, ¶ 19, 549 P.3d at 991. The striking party's reason "need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. Rather, a race-neutral reason simply means what it says: a reason that's based on something other than the race of the prospective juror. *Johnson*, ¶ 19, 549 P.3d at 991.

¶35 Importantly, the trial court may not consider the plausibility or persuasiveness of a stated reason at step two. *Id.* No, at this step, the court is limited to determining whether the striking party has advanced a reason that, "on

its face," is race neutral. *People v. Austin*, 2024 CO 36, ¶ 18, 549 P.3d 977, 983. This is a "low" burden for the striking party to meet. *Johnson*, ¶ 46, 549 P.3d at 995. The question simply is "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." *People v. Ojeda*, 2022 CO 7, ¶ 26, 503 P.3d 856, 863. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered [at step two] will be deemed race neutral." *Hernandez*, 500 U.S. at 360. Courts must be mindful not to fall into the trap of blending this step with step three. *Johnson*, ¶ 45, 549 P.3d at 995.

B. In-Depth Inspection of *Batson*'s Step Three

¶36 In the event the striking party proffers a race-neutral reason at step two, the analysis moves to step three. At this final step, the objecting party may present evidence or argument to rebut the striking party's stated reason for excusing the prospective juror in question. *People v. Madrid*, 2023 CO 12, ¶ 34, 526 P.3d 185, 193. The trial court must then consider the "persuasiveness" of the striking party's reason for the peremptory strike in light of any rebuttal offered. *Miller-El v. Cockrell*, 537 U.S. 322, 338–39 (2003) ("*Miller-El I*").

¶37 Further, as the court scrutinizes the race-neutral reason advanced, it must ponder all of the relevant circumstances "'that bear upon the issue of' purposeful discrimination." *Madrid*, ¶ 34, 526 P.3d at 193 (quoting *Beauvais*, ¶ 23, 393 P.3d at

517). The relevant circumstances include, but are not limited to, "the striking party's demeanor, the reasonableness of the proffered race-neutral explanation, . . . whether the rationales [advanced] are rooted in accepted trial strategy," *Id.*, 526 P.3d at 193–94, and "the plausibility of the striking party's non-discriminatory explanations," *Beauvais*, ¶ 23, 393 P.3d at 517.

¶38 Notably, although the trial court must evaluate all of the relevant circumstances, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Wilson*, ¶ 14, 351 P.3d at 1132 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). This is fair; after all, the opponent of the strike is the party alleging purposeful racial discrimination. *Batson*, 476 U.S. at 93.

¶39 The trial court must ultimately decide whether the objecting party has shown purposeful racial discrimination by a preponderance of the evidence. *Beauvais*, ¶ 21, 393 P.3d at 516. Resolution of this question requires trial courts to apply "a substantial-motivating-factor test; that is, if the court determines that a peremptory strike was 'motivated in substantial part by discriminatory intent,' the court may conclude that the strike was purposefully discriminatory under *Batson*." *Madrid*, ¶ 35, 526 P.3d at 194 (quoting *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019)).

¶40 "[A] trial court should sustain a *Batson* objection only if the objecting party proves by a preponderance of the evidence that the striking party's non-discriminatory reasons are sufficiently incredible that the "'discriminatory hypothesis' better fits the evidence."" *Beauvais*, ¶ 24, 393 P.3d at 517 (quoting *Wilson*, ¶ 14, 351 P.3d at 1132). An "implausible or fantastic" explanation for the strike should probably be found to be a pretext for purposeful racial discrimination. *Elem*, 514 U.S. at 768.

¶41 "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, 500 U.S. at 365. The problem is that there is "seldom . . . much evidence bearing on that issue." *Id.* Moreover, the credibility of a race-neutral reason is intrinsically difficult to assess because the exercise of peremptory strikes is often a matter of instinct, and even articulating the reason for a strike can be difficult. *See Miller-El II*, 545 U.S. at 252. As Justice O'Connor recognized, "often a reason for [striking a prospective juror] cannot be stated, for a trial lawyer's judgments about a [prospective] juror's sympathies are sometimes based on experienced hunches and educated guesses . . . ." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring).

¶42 The demeanor and credibility of the attorney exercising the peremptory strike frequently constitute the best evidence of whether the objecting party has

established purposeful racial discrimination. *Beauvais*, ¶ 23, 393 P.3d at 517 (citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). Indeed, the ruling at step three, regarding whether the objecting party has met the burden of establishing purposeful racial discrimination, is at its core a "determination[] of credibility and demeanor." *Id.* at ¶ 21, 393 P.3d at 516 (alteration in original) (quoting *Snyder*, 552 U.S. at 477). And this determination lies "peculiarly within a trial judge's province." *Id.* (quoting *Snyder*, 552 U.S. at 477). That's because a trial judge is in the best position to evaluate the striking party's demeanor and credibility, as well as the credibility of the race-neutral explanation articulated. *Id.* at ¶ 25, 393 P.3d at 517. And when the striking party's race-neutral explanation is predicated on the demeanor of a prospective juror, the trial judge is also best suited to assess that demeanor. *Id.* As we noted in *Beauvais*, the Supreme Court "has long recognized that trial courts are uniquely positioned" to judge the demeanor and credibility of both the attorney exercising the peremptory strike in question and the challenged prospective juror. *Id.* at ¶ 31, 393 P.3d at 519.

¶43 We echo what we said in *Beauvais*: The preferred practice is to have trial courts make *express* demeanor and credibility findings. *Id.* at ¶ 29, 393 P.3d at 518. Such findings are extremely helpful on appellate review. *Id.* Still, the Supreme Court has never required express demeanor and credibility findings. *Id.* (citing *Thaler v. Haynes*, 559 U.S. 43, 48 (2010) (per curiam) and *Miller-El I*, 537 U.S. at 347).

Nor have we. *Id.* Hence, while not ideal, implicit demeanor and credibility findings may suffice. *Id.*

¶44 Inasmuch as a step-three ruling is a determination of demeanor and credibility, appellate courts understandably afford such rulings great deference and reverse only under "exceptional circumstances." *Id.* at ¶ 25, 393 P.3d at 517 (quoting *Snyder*, 552 U.S. at 477). This level of deference reflects that trial courts can best discern "the presence or absence of discriminatory intent" at step three. *Id.* at ¶ 25, 393 P.3d at 517 (quoting *Wilson*, ¶ 23, 351 P.3d at 1134). It follows that an appellate court is precluded "from substituting its reading of a cold record for the trial court's in-the-moment and better-informed determination." *Id.* at ¶ 31, 393 P.3d at 519.

C. Standard of Review for the Ultimate *Batson* Ruling at Step Three: Clear Error

¶45 We review de novo a trial court's determinations at step one (regarding whether the objecting party made a prima facie showing that the challenged peremptory strike was race-based) and at step two (regarding whether the striking party gave a race-neutral reason for the strike). *Johnson*, ¶ 21, 549 P.3d at 991. But at step three, we review a trial court's ultimate conclusion, regarding "'whether the objecting party proved purposeful discrimination by a preponderance of the evidence,' for clear error." *Id.* (quoting *Beauvais*, ¶ 2, 393 P.3d at 512).

¶46 So, why use clear error review instead of de novo review at step three? Because "[f]orm follows function," meaning that the governing standard of review hinges on the function to be served. *Cf. Castro v. People*, 2024 CO 56, ¶ 65, 550 P.3d 1124, 1137 (making a similar observation with respect to the standard of reversal). The standard of review at step three must be capable of accommodating the deference due a trial court's findings related to demeanor and credibility. The clear error standard of review fits a step-three ruling to a T.

¶47 Whether the objecting party has met the burden of proof at step three is a finding of fact, *Beauvais*, ¶ 32, 393 P.3d at 519, and "factual findings will not be disturbed on appeal unless they are clearly erroneous," *City of Aspen v. Burlingame Ranch II Condo. Owners Ass'n*, 2024 CO 46, ¶ 23, 551 P.3d 655, 661. Under the clear error standard of review, an appellate court will set aside a trial court's findings of fact only if they are unsupported by the record. *Martinez v. People*, 2024 CO 6M, ¶ 34, 542 P.3d 675, 683; *People v. Platt*, 81 P.3d 1060, 1065 (Colo. 2004). This is precisely why we cautioned in *Beauvais* that a step-three ruling as to "[w]hether the challenging party has met its burden of proof . . . must find support in the record to survive clear error review." ¶ 32, 393 P.3d at 519. But such record support, while required, isn't sufficient. The record must also show that the ruling was made after the trial court considered all the relevant circumstances. *Id.* In short, then, appellate courts conducting clear error review of a step-three *Batson*

ruling should give deference to that ruling so long as the record (1) reflects that the trial court considered all the relevant circumstances and (2) supports (including possibly through implicit demeanor and credibility findings) the trial court's ruling as to whether the objecting party proved purposeful racial discrimination by a preponderance of the evidence. *Id.*

D. Where the Division Erred

¶48 The division faltered in two respects. First, it misunderstood our opinion in *Beauvais*. Second, it misconstrued the record. We take up each in turn as we course correct.

1. The Division's Understanding of *Beauvais*

¶49 Relying on *Beauvais*, the division declared that the absence "of anything in the record supporting the credibility of a prosecutor's subjective step-two reason . . . renders the trial court's decision to credit it [at step three] clear error." *Romero*, ¶ 19, 523 P.3d at 1014 (emphasis omitted). But *Beauvais* does not support this proposition.

¶50 The passage from *Beauvais* on which the division leaned simply establishes that "the central inquiry under a clear error review" of a *Batson* ruling is "whether that ruling is without support in the record." *Beauvais*, ¶ 32, 393 P.3d at 519. We do not read this statement as requiring the type of corroboration demanded by the

division. As we've underscored, the record support required for a step-three ruling may be in the form of *implicit* demeanor and credibility findings.

¶51 The division acknowledged that *Beauvais* teaches that implicit demeanor and credibility findings may suffice at step three, but it perceived that this lesson was in tension with a different lesson from that opinion—namely, that a step-three ruling must be supported by the record. *Romero*, ¶ 20, 523 P.3d at 1014–15. "[I]f there are no explicit findings and nothing in the record either supports or refutes the trial court's decision . . . to credit a step-two reason," asked the division, "what is a reviewing court to do?" *Id.*, 523 P.3d at 1014. The division's concern, while understandable, stemmed from equating a record that contains "no explicit findings" supporting or refuting a step-three ruling with a record that contains "nothing" supporting or refuting a step-three ruling. *Id.* Those two records, however, are not birds of a feather.

¶52 There is a difference between a record lacking express, *but containing implicit*, demeanor and credibility findings and one completely devoid of demeanor and credibility findings (express or implicit). Take this case, for instance. The trial court made no express demeanor and credibility findings. Yet, as we chronicle later, a review of the transcript of the discussion surrounding Romero's *Batson* challenge leaves zero doubt that the trial court implicitly found the prosecutor credible and her race-neutral reason sincere. Indeed, that the court made these

implicit findings is not disputed by the parties and was acknowledged by the division. *Id.* at ¶ 14, 523 P.3d at 1013. Thus, the fact that implicit findings, by definition, won't be expressly stated in the record doesn't necessarily mean that they can't be evaluated on review to determine whether they support a trial court's decision to credit the prosecutor's race-neutral reason.[8]

¶53 Based on its reading of *Beauvais*, the division faulted the trial court for crediting the prosecutor's race-neutral reason, observing that it was a "subjective impression" of Prospective Juror F and that it was unaccompanied by a factual basis justifying it, such as "identification of the actual observed behavior on which it was based." *Id.* at ¶ 18, 523 P.3d at 1014. And, added the division, no objective evidence in the record confirmed that the prosecutor's race-neutral reason was true or accurate. *Id.* Consequently, the division concluded that the trial court's

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[8] To be sure, determining whether a record contains implicit demeanor and credibility findings supporting a trial court's decision to credit the prosecutor's race-neutral reason is not an easy task—it is a context-intensive inquiry. But that doesn't mean it is impossible. On the flip side of the coin, not every record lacking express demeanor and credibility findings supporting a trial court's decision to credit the prosecutor's race-neutral reason should be construed as containing implicit demeanor and credibility findings supporting that decision. Here, had the trial court denied the *Batson* challenge without making any remarks and without considering any of the relevant circumstances or, worse, after directly questioning the prosecutor's credibility and negatively commenting on her demeanor, we'd likely be singing a different tune now. We're hard-pressed to imagine that such a record could be accurately described as containing implicit demeanor and credibility findings supporting the trial court's decision to credit the prosecutor's race-neutral reason for striking Prospective Juror F.

decision to credit the prosecutor's race-neutral reason could not survive clear error review. *Id.* According to the division, "an unexplained and otherwise unsupported subjective impression" of a prospective juror is enough to survive step two, but it can never suffice to survive step three. *Id.* As the division apparently saw it, regardless of any rebuttal an objecting party comes forward with at step three, that party will have met the burden of showing purposeful racial discrimination if the striking party's race-neutral reason is not accompanied by a factual basis and supported by objective evidence. *Id.* at ¶¶ 16–17, 523 P.3d at 1014. We disagree with the division's analysis because the trial court made implicit demeanor and credibility findings in support of the decision to credit the prosecutor's race-neutral reason.

¶54 Thus, rather than ask whether there was *affirmative corroboration* in the record for the prosecutor's race-neutral reason, the division should have asked whether there was *affirmative evidence* in the record *refuting* that reason. *Beauvais,* ¶ 44, 393 P.3d at 521–22. As Judge Richman rightly stated in his dissent, in this case, the issue is not whether there is "evidence affirmatively supporting the prosecutor's demeanor-based reasons"; it's "whether the record *refutes* the reasons offered by the prosecutor." *Romero*, ¶ 37, 523 P.3d at 1017 (Richman, J., dissenting).

¶55 By holding the prosecutor responsible for the absence of affirmative corroboration in the record supporting her race-neutral reason, the division for all

intents and purposes flipped the step-three burden. The division seemed to require *the prosecutor* to come forward with both a factual basis justifying her race-neutral reason and objective proof confirming the veracity or accuracy of that reason. *Romero*, ¶ 25, 523 P.3d at 1015 ("[I]n our case, the prosecutor did not identify, and the record does not otherwise indicate what [Prospective] Juror F did that caused the prosecutor to subjectively believe he was inattentive."); *see id.* ("[O]ur review of the record, including [Prospective] Juror F's answer to the only question he was asked during voir dire, reveals nothing suggesting that [Prospective] Juror F was inattentive or disinterested."). As we explained last term in *Johnson*, however, "the question at step three" in a criminal case in which the defendant makes a *Batson* challenge is whether the *defendant*, as the party bearing the burden of proof, has established by a preponderance of the evidence "that the *prosecutor* engaged in purposeful discrimination, not whether *the prosecutor* proved" that the race-neutral reason advanced is true. *Johnson*, ¶ 55, 549 P.3d at 997 (second emphasis added) (explaining that the prosecutor didn't have to prove that it was true that the prospective juror in question "harbored bias against law enforcement").

¶56 The Supreme Court has never required that a prosecutor's race-neutral reason be affirmatively corroborated by a factual basis or objective evidence. To the contrary, on more than one occasion, the Supreme Court has recognized that

the prosecutor's demeanor and credibility constitute the "best evidence" of whether a race-neutral reason should be believed. *Snyder*, 552 U.S. at 477; *Hernandez*, 500 U.S. at 365.

¶57 Like the Supreme Court, we haven't required the type of corroboration the division seemed to think was necessary. In *Beauvais*, we quoted *Snyder* for the proposition that "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." *Beauvais*, ¶ 23, 393 P.3d at 517 (alteration in original) (quoting *Snyder*, 552 U.S. at 477). Continuing, we pointed out that the Supreme Court has acknowledged that "the trial court may not—and need not—have observed the [prospective juror's] complained-of demeanor." *Id.* at ¶ 41, 393 P.3d at 521. In such a situation, the trial court may have nothing but the prosecutor's demeanor and credibility to consider in deciding whether to credit the proffered reason for the strike in question. *Id.* at ¶ 23, 393 P.3d at 517.

¶58 But doesn't this mean that a prosecutor's subjective impression of a prospective juror's demeanor, alone, will *always* suffice to overcome a *Batson* challenge? The division said it read *Beauvais* as it did because it feared that otherwise the answer to this question would be yes. *Id.* at ¶ 18, 523 P.3d at 1014. Fair enough. But the answer to the division's question is no, even reading *Beauvais* as we do.

¶59 Remember that at step three, the objecting party has an opportunity to present evidence or argument to rebut the striking party's race-neutral reason for excusing the prospective juror in question. *Madrid*, ¶ 34, 526 P.3d at 193. The trial court must then consider the persuasiveness, if any, of the striking party's race-neutral reason in light of any rebuttal offered. *Miller-El I*, 537 U.S. at 338–39. And the court must consider all the circumstances that bear upon the issue of purposeful racial discrimination, including the striking attorney's demeanor, the reasonableness of the proffered race-neutral explanation, whether the rationale put forth is moored to sensible trial strategy, and the plausibility of any non-discriminatory explanation provided. *Madrid*, ¶ 34, 526 P.3d at 193; *Beauvais*, ¶ 23, 393 P.3d at 517. Evidence refuting the prosecution's race-neutral reason would certainly militate against the trial court's crediting that reason.

¶60 In the final *Batson* analysis, the trial court is under no obligation to credit the prosecutor's reason for excusing a prospective juror with a peremptory strike. And in a typical *Batson*-challenge inquiry in which the court finds that the race-neutral reason put forth is not credible—i.e., that it is a pretext for discrimination—the court *should* hold that the objecting party has met the burden of showing purposeful racial discrimination by a preponderance of the evidence. *Hernandez*, 500 U.S. at 365.

¶61 In short, we conclude that the division misapprehended our decision in *Beauvais*. And, as we discuss next, the division exacerbated that miscue by misconstruing the record.

2. The Division's Construction of the Record

¶62 In evaluating the step-three ruling on Romero's *Batson* challenge, the division determined that there was "nothing in the record supporting the trial court's decision to credit the prosecution's step-two reason." *Romero*, ¶ 21, 523 P.3d at 1015. In our view, however, the record tells a different story. As in *Beauvais*, the trial court at no point stated, or even hinted, that it thought the prosecutor was being disingenuous or untruthful. *See Beauvais*, ¶ 44, 393 P.3d at 521–22. Rather, much like we stated in *Wilson*, "[h]aving observed the prosecutor's demeanor firsthand" and the promptness with which she uttered her race-neutral reason, and having considered all the other relevant circumstances along with the persuasiveness of the race-neutral reason in light of the rebuttal presented by the defense, "the trial court [necessarily] concluded that she [had] stated 'an appropriate basis' for excusing [the prospective juror]." ¶ 23, 351 P.3d at 1134. "The court thus implicitly found that the prosecutor was credible and that her race-neutral explanation . . . was sincere." *Id.*; *see also Beauvais*, ¶ 32, 393 P.3d at 519 (clarifying that, at step three, a trial court "need not make express findings" about the evidence or "how it contributes to the court's ultimate ruling").

¶63 But the division didn't merely perceive the record as barren of evidence supporting the trial court's decision to credit the prosecutor's race-neutral reason. It went a step further: It determined that parts of the record actually "tend[ed] to undermine the credibility of the step-two reason." *Romero*, ¶ 21, 523 P.3d at 1015. We part ways with the division on this score as well.

¶64 One part of the record the division viewed as undermining the prosecutor's step-two reason was what it characterized as the trial court's "explicit findings that it 'didn't see anything from [Prospective Juror F] that suggests that he was not adequately participating in the trial.'" *Id.* at ¶ 25, 523 P.3d at 1015 (second alteration in original).[9] To be sure, the trial court did share with the parties that it had not been focused on Prospective Juror F's demeanor and that it was thus unable to say whether he had been disinterested during the proceedings. But we do not consider this an "express finding[]" (or any type of finding) undermining the prosecution's race-neutral reason. At most, this remark communicated to the parties that the trial court was not in a position to independently confirm or repudiate the prosecution's race-neutral reason.

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[9] The other part of the record on which the division relied was defense counsel's comment that he didn't notice Prospective Juror F being disinterested. This was an accurate reflection of what defense counsel said. As we discuss later, however, while this assertion may have undermined the prosecutor's race-neutral reason, the trial court did not clearly err in concluding that it wasn't enough to carry the defense's burden of proof at step three.

¶65 Treating the aforementioned comment as expressly undermining the prosecution's race-neutral reason is especially unwarranted because the trial court eventually *credited* that reason. The finding actually made by the trial court (albeit impliedly) was that, despite not seeing anything itself related to Prospective Juror F's demeanor, the prosecutor's assertion that Prospective Juror F seemed disinterested was sincere.

E. The Trial Court's Ultimate *Batson* Ruling at Step Three Was Not Clearly Erroneous

¶66 We stress that, even in the absence of express demeanor and credibility findings, we defer to a trial court's ultimate *Batson* ruling at step three if the record (1) reflects that the trial court considered all the relevant circumstances and (2) supports that ruling. *Beauvais*, ¶¶ 32, 37, 393 P.3d at 519–20. Here, the record checks both boxes. Therefore, the division erred in failing to defer to the trial court's ultimate *Batson* ruling.

1. The Record Shows the Trial Court Considered All the Relevant Circumstances

¶67 Before denying Romero's *Batson* challenge, the trial court considered the following circumstances:

- There were only two prospective jurors in the jury pool who were members of a protected class (both Hispanic)—Prospective Juror F was one of them.
- The prosecutor exercised her second peremptory strike to excuse Prospective Juror F.

- Right after the prosecutor struck Prospective Juror F, defense counsel exercised his second peremptory strike to excuse the other Hispanic prospective juror.

- The court generally took detailed notes during jury selection when "a potential juror start[ed] to say something that could, ultimately, be the basis for a challenge for cause"; it took no notes related to Prospective Juror F because whatever statements he made were unremarkable.

- Having said that, the court recognized that the prosecutor didn't strike Prospective Juror F based on something he said; rather, she did so based on her "read of his body language"—i.e., "he seemed to be disinterested."

- This wasn't a situation where Prospective Juror F had obviously fallen asleep or had obviously been "focused on a different part of the courtroom that had nothing to do with the trial." By contrast, a different prospective juror had "taken leave of what was going on in the courtroom" in a way "that was obvious."

- Because this wasn't a situation involving a prospective juror who was *obviously* disinterested, it was difficult for the trial court to analyze the prosecutor's race-neutral reason for striking Prospective Juror F: The strike was "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." But while this was a subjective reason, the trial court realized it "could be the basis for a valid preemptory [sic] challenge."

- The trial court "wasn't paying attention to [Prospective Juror F's] [demeanor] for that kind of an assessment, and so [it didn't] have an independent reading on whether he was truly disinterested or not."

- Although nobody had previously raised any concern about Prospective Juror F's lack of interest in the proceedings—a point raised in rebuttal by defense counsel—this didn't move the needle for the trial court. Instead, the court reasoned that the observation "that somebody seems disinterested is not the kind of thing" that needs to be brought up before

the parties' exercise of peremptory strikes unless the prospective juror was "actually sleeping during the proceedings." Therefore, concluded the court, this was "something that the prosecution or the defense could simply note in their notes and . . . then use that later when it came to a preemptory [sic]."

- Defense counsel didn't notice Prospective Juror F being disinterested.
- During the entire exchange concerning Romero's *Batson* challenge, the trial court observed firsthand the prosecutor's demeanor.
- The trial court also observed firsthand that the prosecutor promptly uttered her race-neutral reason in response to the *Batson* challenge; in fact, she did so before the court could make the requisite finding at step one.

These were all relevant circumstances. And we cannot think of others the trial court failed to account for; nor did defense counsel point the court to any during the *Batson* colloquy.

2. The Record Supports the Trial Court's Ultimate Ruling at Step Three

¶68 The trial court ultimately ruled that Romero failed to satisfy his burden of proving that the prosecutor's peremptory strike vis-à-vis Prospective Juror F was motivated by purposeful racial discrimination. And we now conclude that this ruling is supported by the record.

¶69 To rebut the prosecutor's race-neutral reason, defense counsel complained that no one had previously raised any concerns about Prospective Juror F being disinterested. But the trial court didn't ascribe any significance to this contention, correctly explaining that the prosecutor was not required to alert it, before the

exercise of peremptory strikes, to Prospective Juror F's disinterest in the proceedings.

¶70 And so, one rebuttal assertion remained: Defense counsel stated that he himself had not seen Prospective Juror F being disinterested. We assume for purposes of our analysis that defense counsel was paying attention to Prospective Juror F, and we thus consider this contention to have undermined the prosecutor's race-neutral reason. Even so, the trial court was left with opposing views by the parties: The prosecutor had noticed that Prospective Juror F seemed disinterested; defense counsel had not. And, as mentioned, the trial court had admittedly not been paying close attention to Prospective Juror F's demeanor and was not in a position to break the tie. Consequently, the record was, at best, in equipoise as to whether Prospective Juror F had been truly disinterested. The problem for Romero is that *he* had the burden of showing by a preponderance of the evidence that the prosecutor had engaged in purposeful racial discrimination. Equipoise falls short of this burden.

¶71 Having considered all the relevant circumstances, as well as the persuasiveness of the prosecutor's race-neutral reason in light of the rebuttal arguments advanced, the trial court concluded that Romero had failed to meet his burden of proving purposeful racial discrimination. This finding is supported by

the record. Accordingly, the trial court did not clearly err in denying the *Batson* challenge and releasing Prospective Juror F.

F. A Final Word

¶72 Before putting a bow on this opinion, we take a moment to emphasize two points. First, we urge trial judges again to make explicit demeanor and credibility findings at step three. *See Beauvais*, ¶ 29, 393 P.3d at 518. While implicit findings may suffice, the best approach is to make explicit findings. *Id.*

¶73 Second, we reiterate that our opinion should not be read as supporting the notion that a subjective, demeanor-based reason at step two will always be enough to survive clear error review at step three. We expect that in many cases it won't be. Had the trial court here gone the other way and declined to credit the prosecutor's articulated reason at step two (viewing it instead as a pretext), and had it done so with record support (e.g., explicit or implicit demeanor and credibility findings) and based on all the relevant circumstances present, the *Batson* challenge would have been sustained and would have subsequently withstood clear error scrutiny in the event the prosecution could have appealed. And had the case eventually landed in our court, our ruling would have favored Romero (the polar opposite of today's decision) because the trial court's step-three ruling also would have favored Romero, and we would have deferred to that

ruling in reviewing for clear error. That's a byproduct of a standard of review that's highly deferential to trial courts.

¶74 The lesson here is that a trial judge's sound decision whether or not to credit a race-neutral reason is a rather consequential determination with critical importance upon review. A step-three *Batson* ruling grounded in all the relevant circumstances and supported by the record deserves great deference under the clear error standard of review.

IV. Conclusion

¶75 For the foregoing reasons, we reverse the division's judgment and remand with instructions to consider the other arguments Romero raised on appeal. On this record, the division should have affirmed the trial court's *Batson* ruling.