SUMMARY
March 24, 2022

2022COA33

No. 19CA0340, *People v Clark* — Juries — Challenges for Cause — Juror Bias; Crimes — Sexual Assault

This case involves a Black man convicted of sexually assaulting a white woman. In this context, we consider whether the trial court erred in denying a challenge for cause to a prospective juror who made statements strongly suggesting an uncompromising racial bias. We conclude, as a matter of first impression, that the court erred in refusing to dismiss this challenged juror. Nevertheless, we decide that because the prospective juror was later removed and since no other biased juror sat on the panel, the error was ultimately harmless and therefore does not warrant automatic reversal.

Although concurring in the judgment that the error was harmless and does not warrant automatic reversal, Judge Dailey

disagrees that the trial court erred in denying the challenge for cause. In his view, prospective jurors are not automatically disqualified for expressing racial bias where, as here, the court gained assurances from the prospective juror that he could be fair, and the court determined that the prospective juror was credible.

Judge Schutz concurs that the court erred in denying the challenge for cause but dissents from the conclusion that the error was harmless. According to him, the error implicates the Equal Protection Clause and is structural error not subject to the outcome-determinative analysis outlined in *People v. Novotny*, 2014 CO 18, and therefore warrants reversal.

COLORADO COURT OF APPEALS **2022COA33**

Court of Appeals No. 19CA0340
Gilpin County District Court No. 17CR193
Honorable Dennis J. Hall, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Reginald Keith Clark,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE FOX
Dailey, J., concurs in the judgment
Schutz, J., concurs in part and dissents in part

Announced March 24, 2022

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Megan A. Ring, Colorado State Public Defender, Casey Mark Klekas, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Reginald Keith Clark, appeals his conviction for aggravated kidnapping and sexual assault on three separate grounds. We affirm.

I. Background

¶ 2 In the early hours of November 5, 2017, A.B., a woman experiencing homelessness, was walking through downtown Denver to catch a bus. Clark approached in a car and offered her a ride. Recognizing Clark from a nearby shelter, A.B. accepted.

¶ 3 A.B. asked to be driven to a nearby location, but Clark left Denver and drove into the mountains near Black Hawk. Clark stopped several times along the way to smoke methamphetamine, sexually assaulting A.B. during a stop. Shortly after the incident, A.B. ran away, eventually coming to rest on the side of a road where she was contacted by police. A.B. described the assault and her assailant to the officers, who soon spotted Clark driving in the vicinity, pulled him over, and arrested him.

¶ 4 Clark was charged with second degree kidnapping (a class 2 felony, § 18-3-301(1), (3)(a), C.R.S. 2021); sexual assault with a deadly weapon (a class 2 felony, § 18-3-402(1)(a), (5)(a)(III), C.R.S. 2021); sexual assault caused by threat of imminent harm (a class 3

felony, § 18-3-402(1)(a), (4)(b)); and sexual assault achieved through application of physical force (a class 3 felony, § 18-3-402(1)(a), (4)(a)).

¶ 5 The case proceeded to a jury trial. After deliberating for approximately seventeen hours over three days, the jury convicted Clark of second degree kidnapping and sexual assault caused by threat of imminent harm. The court sentenced Clark to eighteen years for the kidnapping conviction and twelve years to life for the sexual assault conviction, to be served consecutively in the custody of the Department of Corrections.

¶ 6 Clark raises three issues on appeal. We address each in turn.

II. Biased Prospective Juror

¶ 7 Clark first argues that the trial court abused its discretion by rejecting his challenge to remove an allegedly biased prospective juror. Judge Fox and Judge Schutz agree that the court abused its discretion in denying the challenge for cause, but Judge Fox and Judge Dailey do not believe that any error requires reversal.

A. Additional Background

¶ 8 During voir dire, defense counsel probed the jury about the fact that Clark was the only Black individual in the room. One

juror opined that the lack of diversity could undermine the fairness of the trial as a whole. Several minutes later, Prospective Juror K returned to the diversity topic:

> [PROSPECTIVE JUROR K]: You've said a lot, and I'm trying to think through each thing . . . I apologize for some of my thoughts.
>
> [DEFENSE COUNSEL]: Don't apologize.
>
> [PROSPECTIVE JUROR K]: The diversity and stuff, yes, it's obvious there's a [B]lack gentleman over there. This is Gilpin County. I moved to Gilpin County. I didn't want diversity. I want to be diverse up on top of a hill. That's -- I hear the things, that diversity makes us stronger and things like that. I don't quite believe it in life from what my personal experiences are. *And I can't change that.* I can look and judge what is being said by your side and their side and be fair, *but I can't change that* - - when I walked in here seeing a [B]lack gentleman here. And I can't say that the prosecutor has a leg up on this or something until I hear what's happened.

(Emphases added.)

¶ 9 After a bench conference, the court engaged with Prospective Juror K:

> [THE COURT]: So here's kind of the two-part bottom line . . . . If you're chosen as a juror in this case, and if you're back in the jury room and you think the prosecution hasn't proven

> its case, would you have any trouble finding this defendant to be not guilty?
>
> [PROSPECTIVE JUROR K]: Not at all.
>
> [THE COURT]: And the other side of that coin, what if you're back there and you say that prosecutor has proven his case, would you have any trouble finding the defendant to be guilty?
>
> [PROSPECTIVE JUROR K]: Again, the same answer. Not at all.

¶ 10 Defense counsel challenged Prospective Juror K for cause. The court denied the challenge for cause after an unrecorded bench conference. The court later explained why it denied the challenge, reasoning that,

> [h]e did say those things about – that he didn't think that diversity was a good thing, or something to that effect. But that's a political view, I think. That doesn't really answer the question of whether he can be a fair juror. And a person can certainly have offensive views and still apply the law. Those two things are really separate in my mind. . . . [R]egardless of his political views, I didn't see any bias in Mr. [K] that would have prevented him from being able to serve.

¶ 11 The court denied the challenge for cause, and defense counsel used one of his peremptory strikes to remove Prospective Juror K.

B. Law and Analysis

¶ 12 We first examine whether the court abused its discretion by denying the for-cause challenge to Prospective Juror K. Concluding that it did, we then analyze whether Clark's later use of a peremptory strike to remove Prospective Juror K amounts to structural error requiring reversal and determine that it does not.

1. Challenge for Cause

¶ 13 An impartial jury is an essential element of a defendant's constitutional right to a fair trial under the United States and Colorado Constitutions. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 25. To secure that right, Colorado law requires courts, upon a party's challenge, to remove jurors when particular circumstances implicate their ability to remain impartial. *See* § 16-10-103(1)(j), C.R.S. 2021. A court therefore must grant a challenge for cause to a prospective juror who "envinc[es] enmity or bias toward the defendant or the state," unless the court is satisfied that the prospective juror "will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." *Id.*; *People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 16.

¶ 14 To determine whether a prospective juror should be dismissed for cause, we analyze "whether the person would be able to set aside any bias or preconceived notion and render an impartial verdict based on the evidence adduced at trial and the instructions given by the court." *People v. Drake*, 748 P.2d 1237, 1244 (Colo. 1988).

¶ 15 We review a trial court's ruling on a challenge for cause to a prospective juror for an abuse of discretion. *People v. Clemens*, 2017 CO 89, ¶ 13. This standard defers to the trial court's assessment of the credibility of the prospective juror's responses, recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of the prospective juror, and discourages reviewing courts from second-guessing the trial court based on a cold record. *Id.* A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *Id.*

¶ 16 Several prospective jurors opined on the value of a diverse jury pool. Prospective Juror K, however, volunteered that he moved to Gilpin County because he "didn't want diversity" — the obvious inference being that he moved to Gilpin County to distance himself from nonwhite people. Although his opinion can theoretically be

framed as a political view, the glaring implication persists: his acknowledged bias against nonwhite people like defendant.[1] *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000) ("Actual bias encompasses beliefs . . . grounded in the juror's feelings regarding the race, religion, and ethnic or other group to which the defendant belongs."), *overruled on other grounds by People v. Novotny*, 2014 CO 18.

¶ 17 In denying the challenge for cause, the trial court pointed to Prospective Juror K's statements that (1) the prosecution did not have a "leg up," and (2) he would hold both sides to their respective burdens of proof. It denied the challenge despite Prospective Juror K's repeated acknowledgement that he could not change how he felt about diversity. In so doing, he made clear that he would not "set aside any bias or preconceived notion and render an impartial verdict" as he was required to do to avoid being stricken for cause. *Drake*, 748 P.2d at 1244; *People v. Cisneros*, 2014 COA 49, ¶ 94. Moreover, the limited rehabilitation the court performed focused on

[1] Although not controlling, the Attorney General conceded during oral argument that Prospective Juror K's statement evinced racial bias.

whether Prospective Juror K would apply the correct burdens of proof — not whether he could (or would) set aside his admitted bias.

¶ 18 It is true that we give great deference to the trial court's decision to grant or deny a challenge for cause. *Clemens*, ¶ 13. Consistent with this principle, the People contend that the court rationally relied on Prospective Juror K's assurances that he could render an impartial verdict. Embedded in this argument is the suggestion that when a juror agrees to perform his duties impartially, he *implicitly* disavows any previously expressed bias.

¶ 19 That is not the case here. Instead, Prospective Juror K volunteered his views and then preemptively clarified that he could not change those views. We recognize, of course, that trial courts do not need to secure affirmative statements from prospective jurors that they will set aside each and every bias to conclude that they can sit impartially. *Vigil v. People*, 2019 CO 105, ¶ 24 ("[I]t was unnecessary for the trial court to query the prospective juror in precise terms of bias and impartiality and to receive his express assurance that he was not biased and both could and would render an impartial verdict.").

¶ 20 But it is quite another thing where, as here, a prospective juror expresses a bias and then explicitly rejects the possibility of setting aside that bias. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719, 723-24 (1992) (concluding that where actual bias is stated, generalized affirmations that the juror will nonetheless apply the law impartially are insufficient to avoid disqualification of the potential juror); *State v. Jonas*, 904 N.W.2d 566, 571-74 (Iowa 2017) (collecting cases on this issue); *Leick v. People*, 136 Colo. 535, 570, 322 P.2d 67, 693 (1958) (Sutton, J., dissenting) (suggesting that judicial rehabilitation by "leading questions" designed to "give the answers desired by the state to qualify [the juror]" may amount to judicial advocacy). This conclusion is further compelled by the longstanding recognition that racial bias is anathema to our justice system. *See, e.g.*, *Georgia v. McCollum*, 505 U.S. 42, 58 (1992) ("[A] defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice.").

¶ 21 In our view, such bias falls squarely within the purview of section 16-10-103(1)(j), and later assurances of generalized impartiality do not obviate that bias. *See Drake*, 748 P.2d at 1244.

Accordingly, we conclude that the court's failure to grant the challenge for cause constitutes an abuse of discretion. This preliminary conclusion, however, does not end our inquiry.

2. Deprivation of Peremptory Strike

¶ 22 In addition to challenges for cause, Colorado law provides peremptory challenges that allow "the prosecution and the defense to secure a more fair and impartial jury by enabling them to remove jurors whom they perceive as biased." *Abu-Nantambu-El*, ¶ 18 (quoting *Vigil*, ¶ 19). Section 16-10-104, C.R.S. 2021, allows each party to exercise a certain number of peremptory challenges, depending on the circumstances of the case and the nature of the charge. Crim. P. 24(d) provides the mechanics and timing to exercise peremptory challenges.

¶ 23 Until 2014, the use of a peremptory strike to remove a prospective juror that should have been removed for cause qualified as structural error requiring automatic reversal if the defendant used all their peremptory strikes. *Novotny*, ¶¶ 1-2. Our state supreme court's *Novotny* decision abandoned the automatic reversal rule, instructing courts to perform "the proper outcome-determinative test" in evaluating whether to reverse following an

erroneous ruling on a challenge for cause. *Id.* at ¶ 27; *Vigil*, ¶¶ 16-18. Subsequent cases have clarified that a non-constitutional harmless error analysis applies in this context. *Vigil*, ¶ 17 (collecting cases).

¶ 24 The *Novotny* court drew heavily on a series of United States Supreme Court cases concluding that peremptory strikes are rooted in state law and thereby lack constitutional grounding. *Vigil*, ¶¶ 16-18. This unmooring of peremptory strikes from the Constitution was critical because the automatic reversal rule was based on the notion that peremptory strikes were necessary to ensure a fair trial under the Sixth Amendment and to guarantee due process under the Fourteenth Amendment. *Novotny*, ¶¶ 14-18. So, while peremptory strikes allow litigants to assist the court in securing the constitutionally required fair and impartial jury, "exercising the authorized number of peremptory challenges is all that the parties are [now] entitled to." *Vigil*, ¶ 16. Accordingly, absent bad faith or actual participation by a biased juror, the use of a peremptory challenge to cure an erroneous ruling on a challenge for cause *is* necessarily harmless. *Id.* at ¶ 17; *Abu-Nantambu-El*, ¶ 20.

¶ 25 In rewriting this standard, our state supreme court adopted a crucial aspect of the United States Supreme Court's reasoning — specifically, its repudiation of the idea that a defendant who is erroneously denied a challenge for cause is effectively "forced" to use a peremptory strike to remove the problematic juror. *United States v. Martinez-Salazar*, 528 U.S. 304, 313-14 (2000). Rather, in the Court's view, the defendant has simply made a "choice" to use the peremptory strikes allowed by state law and that, absent bad faith by the court, "he has received nothing less than that to which the rule entitled him." *Vigil*, ¶ 21 (citing *Martinez-Salazar*, 528 U.S. at 315).

¶ 26 On appeal, Clark advances two arguments for why the automatic reversal rule *Novotny* abandoned should still apply. Both are unavailing.

¶ 27 First, he claims that the *Novotny* court carved out an exception to its rule for those decisions made in "other than good faith." *Novotny*, ¶ 23. Clark relies on *Rivera v. Illinois*, where the Court rejected the contention that the trial court's misapplication of *Batson v. Kentucky*, 476 U.S. 79 (1986), amounted to a due process violation and noted that "there is no suggestion here that the trial

judge repeatedly or deliberately misapplied the law *or acted in an arbitrary or irrational manner*." 556 U.S. 148, 160 (2009) (emphasis added). Clark seizes on this last clause to argue that, if the court's ruling is "arbitrary or irrational," then it was made in bad faith and thereby is still subject to the automatic reversal rule.

¶ 28 We are unpersuaded. For one, such an expansive definition of "bad faith" directly undermines *Novotny*'s central holding by allowing all erroneous rulings on challenges for cause — which themselves require a showing that the court abused its discretion, *Clemens*, ¶ 13 — to remain subject to the automatic reversal rule repudiated by *Novotny*, ¶ 2. More to the point, Clark fails to explain how (or why) *Novotny* and its progeny reserve, in dicta, a seemingly all-encompassing exception to the automatic reversal standard. We decline the invitation to adopt such reasoning.

¶ 29 In addition to this argument, Clark also contends that we must apply the automatic reversal standard notwithstanding *Novotny* because the denial of his peremptory strike deprived him of equal protection. He argues the court's error implicates the Equal Protection Clause, since he was forced to use his peremptory strike

solely because of his race and that, as such, the abuse constitutes a structural error requiring reversal.

¶ 30 According to Clark, *Novotny* rested on the foundational assumption that peremptory strikes do not necessarily implicate the constitution, and that, as a result, the erroneous denial of a challenge for cause that effectively deprives the defendant of a peremptory strike does not require automatic reversal since there is no constitutional harm in the first place. This assumption, he posits, does not apply here since the court's deprivation of his peremptory strike was based wholly on his race. A white defendant would not have needed to use a peremptory strike to remove Prospective Juror K because the juror's bias would not affect him. In effect, Clark was provided one fewer peremptory strike than a similarly situated white defendant simply because he is Black. Accordingly, there is a constitutional harm — namely, violation of the Equal Protection Clause — and the application of the automatic reversal rule is warranted.

¶ 31 Although intuitively appealing, Clark's argument is foreclosed by a discrete yet crucial aspect of our supreme court's reasoning in *Vigil*. As discussed, the court in *Vigil* repudiated the idea that a

defendant who is erroneously denied a challenge for cause is effectively "forced" to use their peremptory strike to remove the problematic juror. *Vigil*, ¶ 21. Instead, the defendant simply made a "choice" to remove that juror — and that choice, or, more precisely, the ability to exercise the statutorily allotted peremptory strikes, is all the statute grants him. *Id.*; § 16-10-104. This reasoning short-circuits Clark's argument, since his theory is premised on the idea that the trial court "forced" him to use his peremptory strike because of his race, a presumption our state supreme court has overtly rejected.

¶ 32 Because Clark made a choice to exercise the statutorily allotted peremptory strikes, and since that is all the statute and the constitution provide him, the erroneous ruling on the challenge for cause alone does not amount to structural error. *Vigil*, ¶ 21. Moreover, Clark presents no evidence that another biased juror served on the jury after he removed Prospective Juror K with his peremptory strike. Absent such evidence, we must conclude the error was harmless. *Id.* at ¶ 17.

¶ 33 We are not persuaded otherwise by the partial dissent's repackaging of Clark's argument. Clark's argument to the trial

court and to this court did not suggest that Prospective Juror K's brief presence in the venire — from when the for-cause challenge was denied to when he was peremptorily stricken — infected the jury pool or the trial. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("In our adversary system . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); *see also Martinez v. People*, 2015 CO 16, ¶ 15 (recognizing that the trial court must be presented with "'an adequate opportunity to make findings of fact and conclusions of law' on the issue" before we will review it) (citation omitted). While it is impossible on a cold record to determine how long Prospective Juror K remained in the jury pool, the transcript of jury selection tells us that the defense's challenge to three jurors, including Prospective Juror K, occupies a mere six pages of transcript in a multi-day trial.

III. Judicial Authority

¶ 34 Clark next contends that the county court judge who received his jury verdict lacked the authority to do so, and therefore his conviction must be reversed. We disagree.

A. Additional Background

¶ 35 The First Judicial District includes Gilpin and Jefferson Counties. District court judges have responsibilities in both counties' courtrooms.

¶ 36 Clark was tried before a jury in Gilpin County with District Court Judge Dennis J. Hall presiding. Jury deliberations began late Thursday. On Friday morning, Judge Hall informed the jurors that if they continued their deliberations into the following Monday, he would not be present because he needed to be in Jefferson County to handle his criminal docket. Instead, County Court Judge David C. Taylor would sit, by assignment, in lieu of Judge Hall to answer any questions and to receive the verdict (if delivered). None of the attorneys objected.

¶ 37 Jury deliberations continued until Monday with Judge Taylor presiding. Judge Taylor reiterated Judge Hall's admonishment to not conduct independent research or deliberate without the entire jury present. He received the verdict later that day.

¶ 38 After the verdict, Clark appealed and then filed a motion for limited remand to the district court suggesting that Judge Taylor, as a county court judge, lacked the authority to preside over a

felony criminal matter. Our court granted the motion and remanded for the district court to address this threshold question.

¶ 39 Because Judge Hall had retired, District Court Judge Todd L. Vriesman conducted a hearing and, after entertaining argument from both sides, issued a written order concluding that Judge Taylor had the authority to receive the verdict. In reaching this conclusion, Judge Vriesman cited the District's then-Chief Judge L. Thomas Woodford's Directive 20-2, In the Matter of the Appointment of District Court Judges and Qualified Attorney County Court Judges to Sit as Both District Court and County Court Judges (Jan. 2000), https://perma.cc/3LPB-6ACU, that states, in relevant part, that "qualified county court judges of Gilpin and Jefferson counties shall be and hereby are appointed to sit as district court judges in both Gilpin and Jefferson counties to hear such matters as may come before them." The directive remains in effect.

B. Law and Analysis

¶ 40 In Colorado, district courts are courts of general jurisdiction, having original jurisdiction over any and all cases, civil and criminal, except for water cases. Colo. Const. art. VI, § 9. County

courts, by contrast, are courts of limited jurisdiction; they have concurrent original jurisdiction with district courts over civil matters where the amount in controversy does not exceed $15,000 and nonfelony criminal matters. Colo. Const. art. VI, § 17; § 13-6-104, C.R.S. 2021. The Colorado Constitution instructs that county courts "shall not have jurisdiction of felonies." Colo. Const. art. VI, § 17. Jurisdiction over felonies thus falls to the district courts. Colo. Const. art. VI, § 9.

¶ 41 Although county courts lack jurisdiction over felonies, in certain circumstances county court judges can be appointed to preside over matters in the district court. *People v. Sherrod*, 204 P.3d 466, 469 (Colo. 2009). Pursuant to section 13-6-218, C.R.S. 2021, the Chief Justice of the Colorado supreme court may assign any county judge who has been licensed to practice law in Colorado for five years "to perform judicial duties in any district court." *See* Colo. Const. art. VI, § 5(3) (The chief justice may "[a]ssign any county judge . . . temporarily to perform judicial duties in any county court if otherwise qualified under section 18 of this article, or assign, as hereafter may be authorized by law, said judge to any other court . . . ."). Chief Justice Directive 95-01 delegated this

assignment power to the chief judges of each district.[2] *See* Colo. Const. art. VI, § 5(4). Accordingly, "with the proper qualifications and assignment by the chief justice or a chief judge, a county judge may perform judicial duties in a district court." *Sherrod*, 204 P.3d at 469; *accord People v. Torkleson*, 971 P.2d 660, 662 (Colo. App. 1998) (remanding to district court to determine whether the county court judge was assigned "pursuant to constitution, statute, or chief justice directive").

¶ 42 Whether a judge has authority to preside over a proceeding involves a question of law that we review de novo. *Egelhoff v. Taylor*, 2013 COA 137, ¶ 27.

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[2] The parties appear to agree that, at the time of appeal, Chief Justice Directive 95-01, Authority and Responsibility of Chief Judges, section 4, reads, in relevant part,

> a. The chief judge has authority to assign district and county court judges in accordance with the following guidelines.
> . . . .
> ii. Qualified county judges may be assigned to any court in the district when necessary, pursuant to section 13-6-218, C.R.S. [2021];
> iii. A judge may be assigned by written order to a particular court, to a division within a court, to try a specific case, or to hear or decide all or any part of a case.

¶ 43 Clark argues that Chief Judge Woodward's Directive 20-2 is invalid for three reasons. He argues that the order is invalid because (1) it was issued in 2000 by a judge that was no longer the chief judge when Clark's trial occurred; (2) Judge Taylor could not be assigned since he was not an attorney at the time the 2000 order was issued; and (3) it did not expressly name the county court judge and the assigned case. None of these arguments hold water.

¶ 44 The assignment requirements are relatively straightforward: (1) the judge must have the proper qualifications, and (2) there must be an assignment by the Chief Justice or chief judge. *Sherrod*, 204 P.3d at 469. The "proper qualifications" are simply that the assigned judge has been licensed to practice law in Colorado for five years. *Id.*; § 13-6-218.

¶ 45 It is undisputed that Judge Taylor possessed these qualifications when he presided in this case. It is also uncontested that Chief Judge Woodward's Directive 20-2 was validly issued pursuant to the assignment power delegated to him by the Chief Justice. *See* Colo. Const. art. VI, § 5(3); § 13-6-218. Absent support in statute or precedent, we decline Clark's invitation to create additional requirements that such directives are valid only if

the new chief judge re-issues them when she assumes the office, that the assigned county court judge must possess these qualifications when the administrative order is issued, or that such directives must specify the exact county court judge and case assigned. *Sherrod*, 204 P.3d at 469, 472.

¶ 46 Accordingly, because Judge Taylor held the proper qualifications and was presiding by assignment from the chief judge of the district, we conclude that he possessed authority to sit in lieu of Judge Hall.

IV. Juror Affidavit

¶ 47 Clark last asserts that a juror's post-trial affidavit detailing an aspect of jury deliberations constitutes "extraneous prejudicial information" under CRE 606(b), and therefore he is entitled to an evidentiary hearing to determine whether that information posed a reasonable possibility of prejudice. We conclude otherwise.

A. Additional Background

¶ 48 After the verdict, Clark filed a motion for a new trial based on Juror LL's affidavit. That affidavit described how the jury had been split on whether to convict and that this deadlock persisted until

the third day of deliberations. Juror LL alleged that on that third day, another juror

> mentioned a previous jury they [sic] she served on, in which the jury was told by the judge "I don't want a hung jury, and I want you guys to stay as long as you need to become unanimous." That juror stated that she was told in the previous trial by the judge that the jury must deliberate until a unanimous verdict was reached. . . . The original juror who referenced her previous jury service, presented that information as the factual information about the law that the jury was required to reach a unanimous verdict.

¶ 49 Juror LL claimed that this statement sparked fears amongst other jurors about the ramifications protracted deliberations would have on their personal and professional lives, and that, as a result, many jurors — including her — voted guilty to avoid those issues.

¶ 50 Based on this information, Clark requested a new trial or, alternatively, an evidentiary hearing. The court denied both requests, concluding (without explanation) that the affidavit did not constitute "extraneous prejudicial information" for purposes of CRE 606(b).

B. Law and Analysis

¶ 51 Jurors are generally prohibited from testifying about any "matter or statement occurring during the course of the jury's deliberations" or about "the effect of anything upon his or any other juror's mind or emotions." CRE 606(b); *Kendrick v. Pippin*, 252 P.3d 1052, 1063 (Colo. 2011), *abrogated on other grounds by Bedor v. Johnson*, 2013 CO 4. Nor may a court receive an "affidavit or evidence of any statement by [a] juror" concerning as much. CRE 606(b). This rule seeks to "promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion," and thus "strongly disfavors any juror testimony impeaching a verdict." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005); *see also Kendrick*, 252 P.3d at 1063. Despite these limitations, CRE 606(b) contains a narrow exception whereby jurors may testify as to "whether extraneous prejudicial information was improperly brought to the jurors' attention."

¶ 52 Jurors may only consider "the evidence admitted at trial and the law as given in the trial court's instructions." *Kendrick*, 252 P.3d at 1063-64 (quoting *Harlan*, 109 P.3d at 624). Thus, "any information that is not properly received into evidence or included

in the court's instructions is extraneous and improper for juror consideration." *Id.* (quoting *Harlan*, 109 P.3d at 624). Our courts have interpreted "extraneous prejudicial information" to consist of "(1) 'legal content and specific factual information' (2) 'learned from outside the record' (3) that is 'relevant to the issues in a case.'" *People v. Newman*, 2020 COA 108, ¶ 15 (quoting *Kendrick*, 252 P.3d at 1064).

¶ 53 Consistent with the overarching purpose of CRE 606(b), *Harlan*, 109 P.3d at 624, we construe the third element narrowly to only include statements of law that "relate[] to the definition or elements of the crime," or "any other issue before the jury," *Newman*, ¶ 40.

¶ 54 "When a party seeks to impeach a verdict based on an allegation of juror misconduct, the party has a limited right to an evidentiary hearing on those allegations." *Kendrick*, 252 P.3d at 1063. Thus, before granting such a hearing, "the court must first conclude that the party alleging misconduct has presented competent evidence that extraneous prejudicial information was before the jury." *Id.* at 1063-64 (citing *Harlan*, 109 P.3d at 624).

¶ 55 Whether extraneous prejudicial information was before the jury presents a mixed question of law and fact. *Id.*; *People v. Holt*, 266 P.3d 442, 444 (Colo. App. 2011). We review de novo the trial court's conclusions of law but defer to the court's findings of fact if they are supported by competent evidence in the record. *Harlan*, 109 P.3d at 624.

¶ 56 The court denied Clark's motion for an evidentiary hearing based on Juror LL's affidavit. We perceive no error in this conclusion.

¶ 57 The statement Clark asserts is "extraneous prejudicial information" is the unnamed juror's statement that another judge told her that juries must deliberate until they reach a unanimous verdict. Even if we assume that this statement qualifies as a "legal statement" coming from "outside the record" for purposes of CRE 606(b), the statement does not concern an element of the charged crimes or implicate an issue the jury was tasked with deciding. *Newman*, ¶¶ 15, 40. Rather, the statement relates to an aspect of jury procedure — specifically, how to handle protracted deliberations. And whether juries must deliberate until reaching a unanimous verdict was neither an issue the jury needed to decide,

nor relates to one. *Cf. id.* at ¶¶ 46-49 (concluding that a lawyer-juror's independent definition of character evidence implicated the credibility of the defendant, and thereby related to an issue before the jury).

¶ 58 We recognize that Juror LL's statement broadly relates to how juries handle protracted deliberations, which could affect their conclusions on the issues before it. But given that construing "issue" in this manner would be inconsistent with both the underlying purpose of CRE 606(b) and the precedent that interprets this prong narrowly, we decline to adopt such a broad reading. *Kendrick*, 252 P.3d at 1064; *Holt*, 266 P.3d 445.

¶ 59 We therefore conclude that because the affidavit does not constitute "extraneous prejudicial information" as contemplated by CRE 606(b), Clark is not entitled to an evidentiary hearing to explore it.

V. Conclusion

¶ 60 For the reasons stated, the judgment is affirmed.

JUDGE DAILEY concurs in the judgment.

JUDGE SCHUTZ concurs in part and dissents in part.

JUDGE DAILEY, concurring in the judgment.

¶ 61 I agree with Judge Fox that, under *People v. Novotny*, 2014 CO 18, and its progeny, any error committed by the trial court by denying Clark's challenge for cause would not warrant a new trial.

¶ 62 But I disagree with my colleagues' conclusion that the trial court erred in not granting Clark's challenge for cause to begin with.

¶ 63 Clark is a Black man accused of sexually assaulting a white woman. And according to my colleagues, in these circumstances the trial court was required to remove for cause Prospective Juror K, based on his comments:

> The diversity and stuff, yes, it's obvious there's a [B]lack gentleman over there. This is Gilpin County. I moved to Gilpin County. I didn't want diversity. I want to be diverse up on top of a hill. That's -- I hear the things, that diversity makes us stronger and things like that. I don't quite believe it in life from what my personal experiences are. And I can't change that. I can look and judge what is being said by your side and their side and be fair, but I can't change that — when I walked in here seeing a [B]lack gentleman here. And I can't say that the prosecutor has a leg up on this or something until I hear what's happened.

¶ 64 I assume, for purposes of this appeal, that one could infer, from Prospective Juror K's remarks, a racial bias, i.e., a prejudice against nonwhite people.[1] But unlike my colleagues I do not agree with the defense's position that courts are required "to excuse for cause a prospective juror who expresses *any* racial bias." (Emphasis added.)

* * * *

¶ 65 Section 16-10-103(1)(j), C.R.S. 2021, requires a trial court to sustain a challenge for cause if a juror's state of mind evinces enmity or bias toward the defendant or the state. Similarly, Crim. P. 24(b)(1)(X) requires disqualification of a juror if his or her

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[1] When pressed at oral argument for a simple "yes" or "no" answer to whether he "agree[d] . . . that Juror K's comments constituted an expression of racial bias," the Assistant Attorney General answered, "Yes -- I believe that there is a racial bias there. . . ."

I was the one who asked the Assistant Attorney General the question. I realize now that the question may not have been as susceptible to a simple "yes" or "no" answer as I thought. Does one's failure to appreciate — or even one's opposition to — "diversity" necessarily imply an impermissible racial bias or prejudice? Should it?

Can, for instance, people move not because of the color of their neighbor's skin but because of the political views held by those neighbors? Would that necessarily evidence racial bias or prejudice towards their former neighbors?

state of mind manifests a bias for or against either side, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and instructions of the court. *See Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *People v. Shreck*, 107 P.3d 1048, 1057 (Colo. App. 2004).

¶ 66 Actual bias is a state of mind that prevents a juror from deciding the case impartially. It encompasses beliefs grounded in personal knowledge or a personal relationship, as well as beliefs grounded in the juror's feelings regarding the race, religion, and ethnic or other group to which the defendant belongs. *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000), *overruled by People v. Novotny*, 2014 CO 18.

¶ 67 A prospective juror who makes a statement that may evince bias may sit on the jury so long as he or she agrees to set aside any preconceived notions and decide the case based on the evidence and the court's instructions. *Carrillo v. People*, 974 P.2d 478, 487 (Colo. 1999); *see State v. Axton*, No. 1 CA-CR 19-0634, 2020 WL 7585927, at *21 (Ariz. Ct. App. Dec. 22, 2020) (unpublished opinion) ("The threshold issue in deciding whether a court must excuse a juror is not whether that juror personally holds prejudicial

views. Instead, it is whether that juror can set aside those views and render an impartial verdict.").

¶ 68 We give great deference to the trial court's determination of a challenge based on actual bias "because such decisions turn on an assessment of the [potential] juror's credibility, demeanor, and sincerity in explaining his or her state of mind." *Shreck*, 107 P.3d at 1057; *see People v. Sandoval*, 733 P.2d 319, 321 (Colo. 1987) ("[T]he trial judge is the only judicial officer able to assess fully the attitudes and state of mind of a potential juror by personal observation of the significance of what linguistically may appear to be inconsistent or self-contradictory responses to difficult questions."); *People v. Oliver*, 2020 COA 97, ¶ 11 ("In determining whether a potential juror can set aside any preconceived notions and render an impartial verdict, the trial court may consider a juror's assurances that he or she can serve fairly and impartially. If the court is reasonably satisfied that the prospective juror can render an impartial verdict, the juror should not be disqualified.") (citation omitted).

¶ 69 Because the trial court is in a better position to evaluate these factors than a reviewing court, we generally will not overturn a trial

court's decision on a challenge for cause unless it is affirmatively shown that the court abused its discretion. *Shreck*, 107 P.3d at 1057. An abuse of discretion, in this context, is shown by the absence of evidence in the record supporting the court's decision. *People v. Richardson*, 58 P.3d 1039, 1042 (Colo. App. 2002); *see also Carrillo*, 974 P.2d at 486 (appellate court must examine the entire voir dire of the prospective juror).

¶ 70 Ordinarily, "it is the trial court's prerogative to give considerable weight to the juror's assurance that he can fairly and impartially serve on the case." *People v. Russo*, 713 P.2d 356, 362 (Colo. 1986).[2]

¶ 71 Here, Prospective Juror K assured the court that he could be fair to Clark. Initially, he said that his opposition to diversity

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[2] Rarely will an appellate court intrude upon that prerogative. *Beeman v. People*, 193 Colo. 337, 565 P.2d 1340 (1977), presented just such a case. In *Beeman*, a sexual assault case, a juror informed the trial court that she might know the defendant, that he had visited and upset her pregnant daughter, and that a knife missing from her daughter's home may have been used in the crime before the court. The supreme court held that the juror should have been removed, despite her assurances she could be fair, because "we are not dealing with an opinion or abstract belief in the defendant's guilt or innocence. Rather, we are faced with factors relating to a personal and emotional situation concerning the juror and the accused." *Id.* at 340, 565 P.2d at 1342 (citation omitted).

should not be viewed as giving the prosecutor "a leg up" in the case: he could "look and judge what is being said by your side and their side and be fair[.]" And in follow-up questioning by the court he was asked if he'd have "any trouble finding this defendant" (1) "not guilty," if he thought the prosecution hadn't proven its case; or (2) "guilty," if he thought the prosecution had proven its case. "Not at all," he answered, in each instance.

¶ 72 This record should've sufficed to uphold the trial court's decision denying the challenge for cause. But my colleagues appear persuaded that courts must (as the defense puts it) "excuse for cause a prospective juror who expresses *any* racial bias." (Emphasis added.)

¶ 73 I do not agree.

¶ 74 As the Fifth Circuit Court of Appeals has noted,

> jurors who are "incapable of confronting and suppressing their racism" should be removed from the jury. That is not the same thing as saying any juror who has expressed even strong opposition to interracial marriage cannot be seated in a case involving a defendant who did marry someone of a different race if the person indicates an ability to confront and suppress those opinions.

Thomas v. Lumpkin, 995 F.3d 432, 444-46 (5th Cir. 2021) (citation omitted) (quoting *Georgia v. McCollum*, 505 U.S. 42, 58 (1992)); *see also State v. Munson*, 631 P.2d 1099, 1102 (Ariz. Ct. App. 1981) (declining to excuse for cause prospective jurors who expressed racial bias but assured the court they could set that bias aside); *People v. Jackson*, 920 P.2d 1254, 1271 (Cal. 1996) (declining to excuse for cause prospective juror who admitted that he was raised with racial prejudices but said that he had "grown out of" those prejudices, and who said he believed, based on media, that Black people committed more crimes than white people); *People v. Williams*, 472 N.E.2d 1026, 1026-28 (N.Y. 1984) (declining to excuse two prospective jurors who, though they said that they did not associate with Black people and did not approve of interracial marriage, assured the court that their feelings would not affect their ability to fairly decide the case).

¶ 75 "[W]hen . . . a potential juror's statements compel the inference that he or she cannot decide crucial issues fairly, a challenge for cause must be granted in the absence of rehabilitative questioning or other counter-balancing information." *People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007).

¶ 76 According to the majority, by saying twice that he could not change how he felt about "diversity," Prospective Juror K "made clear that he would not 'set aside any bias or preconceived notion and render an impartial verdict.'" *Supra* ¶ 17 (quoting *Drake*, 748 P.2d at 1244).

¶ 77 I do not share the view that a person's opposition to diversity necessarily reflects "intractable racism," *infra* ¶ 105, automatically disqualifying him or her from serving as a juror in cases like the present one. And I would resist attributing an automatically disqualifying bias to anyone who holds any degree (however slight) of racial prejudice or bias.[3] Other jurisdictions do not attribute a disqualifying bias, regardless of its nature or extent, *see* Sheldon R. Shapiro, Annotation, *Racial or Ethnic Prejudice of Prospective Jurors as Subject of Inquiry or Ground of Challenge on Voir Dire in State Criminal Case*, 94 A.L.R.3d 15, §§ 1, 8 (1979), and neither should ours. In the end, the ultimate question should not be does one have a bias (racial or otherwise), but, rather, can one put that bias aside and fairly and impartially decide the case. The trial court

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[3] Racial bias or prejudice can, after all, be implicit as well as explicit, unconscious as well as conscious.

determined that Prospective Juror K could do so; we should not second guess its decision based on the cold record before us. This is particularly so since the state of the record was not such as would compel an inference of enmity against Clark or bias in favor of the prosecution.[4]

[4] The trial court did not simply question Prospective Juror K about generic matters related, say, to his willingness and ability to follow the instructions or the law. It questioned him, instead, about his ability to be fair to both parties. The court should not, in my view, be faulted for not inquiring in greater detail about a subject that the parties themselves addressed in only a "generalized" manner.

JUDGE SCHUTZ, concurring in part and dissenting in part.

¶ 78 For the reasons articulated well by Judge Fox, I agree with the conclusion that Prospective Juror K's voir dire responses, particularly when viewed in the context of the contemporaneous responses from other jurors, evince racial bias towards Clark.[1] I also agree with Judge Fox that the trial court's exchange with Prospective Juror K did not effectively rehabilitate, or even meaningfully address, Prospective Juror K's self-acknowledged intractable racial biases. *See People v. Merrow*, 181 P.3d 319, 323 (Colo. App. 2007) (Webb, J., specially concurring) ("[A]nswers to [leading] questions may suggest overt acquiescence in the trial

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[1] When considering Prospective Juror K's racially biased statements, it is significant to note the factual context of this case. Clark, a Black man, was convicted of sexually assaulting A.B., a white woman. The historical racial prejudice associated with cases involving this factual dynamic is well documented. *See generally* Jane Dailey, White Fright: The Sexual Panic at the Heart of America's Racist History (2020). Unfortunately, these same underlying biases have historically made their way into the courtroom. *See, e.g.*, *Jackson v. City & Cnty. of Denver*, 109 Colo. 196, 197-98, 124 P.2d 240, 241 (1942) (upholding vagrancy conviction of an interracial couple who "liv[ed] together as though married" because vagrancy definition included "lead[ing] an . . . immoral . . . course of life"), *abrogated by LaFleur v. Pyfer*, 2021 CO 3; *Pumphrey v. State*, 47 So. 156, 158 (Ala. 1908) (permitting jurors to presume a white woman would not consent to sex with a Black man).

court's efforts to elicit a commitment to neutrality. But bias remains if the prospective juror tells the court only what it wants to hear, while covertly holding on to the previously articulated views that precipitated the challenge."); *People v. Jonas*, 904 N.W.2d 566, 571-72 (Iowa 2017) (citing cases and journal articles addressing the risks of judicial attempts to rehabilitate, through leading and generalized questions, a juror who has expressed racial bias).

¶ 79 But I disagree with the majority's conclusion that the presence of Prospective Juror K can or should be evaluated under an outcome-determinative standard. Instead, I conclude the trial court's tolerance of the continued presence of a racially biased juror constitutes structural error requiring reversal of the resulting conviction. For these reasons, I dissent from the majority opinion applying an outcome determinative analysis and the resulting conclusion.

I. The Parameters and Limits of *Novotny*'s Outcome-Determinative Test

¶ 80 For decades prior to our supreme court's decision in *People v. Novotny*, 2014 CO 18, Colorado followed a bright-line rule that required automatic reversal of a criminal conviction when the trial

court wrongfully denied any challenge for cause and the defendant thereafter exhausted all of their peremptory challenges after using a peremptory to strike the juror in question. *Id.* at ¶ 14. This rule was predicated upon federal and state law that held that the right to "shape the jury" through the use of peremptory challenges was grounded in the Sixth Amendment right to a jury trial and the Fifth and Fourteenth Amendment guarantees to due process of law. *Id.* at ¶¶ 14-16. By wrongfully denying a challenge for cause, these cases reasoned, a trial court deprives a defendant of the right to fully exercise his peremptory challenges because it forces the defendant to use one of those challenges to correct the trial court's error. *See, e.g.*, *People v. Macrander*, 828 P.2d 234, 243 (Colo. 1992), *overruled by Novotny*, ¶ 27.

¶ 81 Over time, the United States Supreme Court moved away from this rule of automatic reversal. *See, e.g.*, *United States v. Martinez-Salazar*, 528 U.S. 304, 308 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 86 (1987). These cases held that absent independent constitutional error, bad faith, or arbitrary or irrational conduct by the judicial officer, the Constitution does not guarantee a defendant the right to exercise peremptory challenges unburdened by the trial court's

error in failing to grant a challenge for cause. Drawing from this federal precedent, *Novotny* held that the long established "automatic reversal rule" no longer applies to all cases in which a trial court has wrongfully denied a challenge for cause. *Novotny*, ¶ 27.

¶ 82 The trial court's error in *Novotny* was the failure to excuse for cause a prospective juror who was employed as an Assistant Attorney General and was thus a compensated employee of a law enforcement agency. *Novotny*, ¶ 3; § 16-10-103(1)(k), C.R.S. 2021 ("The court shall sustain a challenge . . . [if] [t]he juror is a compensated employee of a public law enforcement agency or a public defender's office."). Similarly, in the more recent case of *Vigil v. People*, the challenge for cause was directed at a prospective juror who stated he could not be fair and impartial to the defendant because of his personal and business relationships with the victim's family. 2019 CO 105, ¶ 5; § 16-10-103(j) (The court shall grant a challenge for cause against a juror "evincing enmity or bias toward the defendant or the state."). In these circumstances, the supreme court concluded automatic reversal was inappropriate, and therefore a defendant's conviction would stand unless they could

demonstrate the wrongful denial of the challenge for cause resulted in the eventual seating of a juror who was biased against them. *See Vigil*, ¶ 25. Because the defendants in *Novotny* and *Vigil* had used one of their peremptory challenges to exclude the challenged juror and failed to demonstrate that any of the jurors who served at trial were biased against them, the supreme court held they failed to satisfy the outcome-determinative test and therefore their convictions must stand.

¶ 83 The majority concludes the same outcome-determinative test articulated in *Novotny* and *Vigil* applies to the present circumstance, in which the trial court failed to grant a challenge for cause against a juror who had demonstrated racial bias towards Clark. While I agree the intended scope of *Novotny* is broad, I do not share my colleagues' perspective that it applies to the present circumstance.

¶ 84 At various points, *Novotny* acknowledges the outcome-determinative test is subject to exception. For example, the court stated:

> While we do not imply today that every violation of our statutes and rules prescribing the use of peremptory challenges must be

> disregarded as harmless, we are nevertheless unwilling to conclude that such violations of state law, *as distinguished from an actual Sixth Amendment violation or those committed in other than good faith*, rise to the level of structural error.

Novotny, ¶ 23 (emphasis added) (citation omitted). The footnote that appears at the end of this sentence provides that "[n]othing in our conclusion on the question of remedy [automatic reversal versus an outcome-determinative test] jettisons the distinctions we have made in our case law between the right to exercise peremptory challenges and the Sixth Amendment right to a fair and impartial jury." *Id.* at ¶ 23 n.1. The opinion concludes with the following summary of its holding:

> For these reasons, we overrule our prior holdings to the contrary and conclude that reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate or an appropriate case specific, outcome-determinative analysis, can no longer be sustained; and further, that allowing a defendant fewer peremptory challenges than authorized, or than available to and exercised by the prosecution, does not, in and of itself, amount to structural error.

Id. at ¶ 27.

¶ 85 Thus, the supreme court expressly noted the outcome-determinative analysis contemplated by *Novotny* does not apply to all situations.

¶ 86 This case presents one of those situations. More specifically, the trial court's error in permitting a juror with an admitted racial bias against Clark to continue participating in the jury selection process constitutes structural error to which an outcome-determinative analysis cannot be applied.

II. The Tolerance of Racial Bias in the Jury Selection Process Creates Structural Error

¶ 87 During oral argument, counsel for both parties acknowledged they were not aware of any Colorado or federal precedent that has applied *Novotny*'s outcome-determinative test to circumstances in which a trial court wrongfully refused to excuse a prospective juror who evinced racial bias against the defendant. Nor has our research revealed such precedent.

¶ 88 The United States Supreme Court cases cited in support of *Novotny*'s outcome-determinative test, however, are instructive on the issue. As the Supreme Court stated in *Rivera v. Illinois*:

> The automatic reversal precedents [the defendant] cites are inapposite. One set of

> cases involves *constitutional* errors concerning the qualification of the jury . . . . In *Batson*, for example, we held that the unlawful exclusion of jurors based on race requires reversal because it "violates a defendant's right to equal protection," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice."

556 U.S. 148, 161 (2009) (quoting *Batson v. Kentucky*, 476 U.S. 79, 86, 87 (1986)). Similarly, in *Martinez-Salazar*, the Supreme Court underscored that, "[u]nder the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." 528 U.S. at 315. Thus, the very cases that underlie the *Novotny* decision recognize that the Equal Protection Clause of the Fourteenth Amendment continues to prohibit racial discrimination in the jury selection process and a violation of this guarantee requires automatic reversal.

¶ 89 *Batson* arose in the context of prosecutors using peremptory challenges to exclude Black citizens from serving as jurors in the trial of a Black defendant. In the decades that followed, courts have consistently reaffirmed and extended the equal protection concerns articulated in *Batson* to a variety of circumstances in which racial

discrimination has contaminated the jury selection process. *See, e.g.*, *Georgia v. McCollum*, 505 U.S. 42, 48 (1992) (the Equal Protection Clause is violated when a Black defendant uses peremptory challenges to exclude white jurors). The guarantee of equal protection also requires trial court judges to exclude prospective jurors who acknowledge racial bias towards a defendant. *See, e.g.*, *State v. Witherspoon*, 919 P.2d 99, 101 (Wash. Ct. App. 1996) (reversing conviction of Black defendant based upon trial court's failure to grant challenge for cause against juror who admitted they were "a little bit prejudiced" against Black people based upon general newspaper coverage of Black people dealing drugs. These principles remain vital from the commencement of the jury selection process through the completion of the trial. Thus, a jury verdict that is tainted by the racial bias of one or more jurors expressed during deliberations must also be overturned. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017) (invalidating a jury verdict when a juror expressed racial bias and stereotypes against the defendant during jury deliberations, because racial discrimination in the deliberative process threatens the integrity of the jury system).

¶ 90 In light of these authorities, it is not surprising that the "overwhelming majority of courts in other jurisdictions to consider the issue have held that a *Batson* violation constitutes structural error requiring automatic reversal." *People v. Wilson*, 2012 COA 63M, ¶ 22 (collecting cases), *rev'd on other grounds*, 2015 CO 54M. In *Wilson*, a division of this court presaged the tension between trial error and structural error in the context of racial bias during the jury selection process:

> *Batson* violations clearly fall within the category of structural errors that affect "the framework within which the trial proceeds," and for which the consequences are "unquantifiable and indeterminate." This is because a *Batson* violation infects the entire trial process through an "overt wrong, often apparent to the entire jury panel, [that] casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."
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> . . . .
>
> In *Rivera*, the Supreme Court held that the erroneous denial of a defendant's peremptory challenge does not require automatic reversal under federal law. The Court concluded there is no constitutional right to peremptory challenges, and therefore states may withhold them altogether without implicating constitutional guarantees. However, the Court distinguished its holding from cases

> "involv[ing] *constitutional* errors concerning the qualification of the jury or judge," including *Batson* violations.

Wilson, ¶¶ 25-26 (citations omitted).

¶ 91 Based upon these authorities, the *Wilson* division concluded the trial court erred by failing to find the dismissal of a Black potential juror was predicated upon racial bias, and, further, that the presence of such racial bias in the jury selection process constituted structural error. *Id.* at ¶ 28.

¶ 92 Ultimately, the Colorado Supreme Court reversed the appellate court's decision in *Wilson*. But it did so based upon its conclusion that the appellate court had erred in concluding the juror was excused on the basis of race. *Wilson*, 2015 CO 54M, ¶ 9. Having concluded racial bias did not taint the jury selection process, the supreme court expressly declined to address the division's determination that a *Batson* violation constitutes structural error. *Id.* at ¶ 8 n.1.

¶ 93 The Colorado Supreme Court recently addressed a trial court's erroneous grant of a peremptory challenge against a Hispanic juror who the prosecution argued would be unduly sympathetic toward the Hispanic defendant. *People v. Ojeda*, 2022 CO 7. Because the

prosecution offered a race-based reason for excluding the prospective juror, the supreme court concluded that the challenge violated Ojeda's right to equal protection of the law and affirmed the decision from a division of the court of appeals, which had reversed Ojeda's conviction and remanded the case for a new trial. *Id.* at ¶¶ 49, 53. Although the supreme court's opinion does not expressly refer to structural error created by the *Baston* violation, it affirmed the reversal of Ojeda's conviction without conducting an outcome-determinative analysis.

¶ 94 As in *Ojeda*, *Batson* structural error typically occurs when a party exercises a peremptory challenge to excuse a prospective juror on the basis of race. The equal protection violation is based upon the fact that the party exercising the peremptory challenge — whether the prosecution or the defendant — is acting upon the racially biased assumption that the excused prospective juror would not be capable of resolving the charges against the defendant free of racial bias. The injection of this assumed racial bias of the prospective juror is antithetical to the guarantees of the Equal Protection Clause. And the trial court, "[b]y enforcing a discriminatory peremptory challenge, . . . 'has . . . elected to place

its power, property and prestige behind the [alleged] discrimination.'" *McCollum*, 505 U.S. at 52 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991)).

¶ 95 While the structural error created by *Batson* typically arises through the exercise of a peremptory challenge, the equal protection violation is even more pronounced in the context of a trial court's failure to grant a challenge for cause against a juror who has confirmed his racial bias against a defendant. In such situations, racial bias in the jury selection process need not be assumed, it has been openly acknowledged to the court, the parties, and the public. If the injection of assumed bias into the jury selection process through the exercise of a peremptory challenge creates structural error, then surely the trial court's tolerance of a prospective juror's express racial bias after that bias has been brought to the court's attention through a challenge for cause also constitutes structural error.

¶ 96 As repeatedly noted by *Batson* and its progeny, racial discrimination in the jury selection process creates multifaceted constitutional concerns: "*Batson* 'was designed "to serve multiple ends,"' only one of which was to protect individual defendants from

discrimination in the selection of jurors." *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986)). Indeed, *Batson* instructs that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." 476 U.S. at 87. Thus, the presence of racial bias in the jury selection process raises the possibility of at least three constitutional defects: (1) it deprives a defendant of equal protection of the law; (2) it deprives excluded jurors of their constitutional right to be free of discrimination on the basis of race; and (3) it erodes the public's confidence in the rule of law and the jury system itself. *McCollum*, 505 U.S. at 48-50.

III. The Failure to Excuse a Racially Biased Juror Created Structural Error

¶ 97 In this case, *McCollum*'s second concern is not present because Prospective Juror K was not dismissed for cause and instead was allowed to continue in the jury selection process. But the first and third concerns are clearly implicated. Clark was subjected to a trial in which a prospective juror with acknowledged racial bias against him was allowed to continue on the panel as a prospective juror. Clark heard Prospective Juror K admit his racial

bias. Clark knew his counsel asked to have Prospective Juror K excused so racial bias did not infect the trial. And Clark heard the trial court reject that challenge for cause, thus placing the court's "power, property and prestige behind the [alleged] discrimination." *McCollum*, 505 U.S. at 52 (quoting *Edmonson*, 500 U.S. at 624). Because of these circumstances, the proceedings below failed to "impress upon the criminal defendant" that the trial and resulting verdict would be reached through a process that was free of demonstrated bias against him. *Id.* at 49 (quoting *Powers*, 499 U.S. at 413).

¶ 98 But the decision to allow a racially biased prospective juror to continue serving had a ripple effect beyond Clark's individual rights. It undermined the public's confidence that the entire trial process would be conducted in a manner to ensure that racial bias would not be tolerated in the courtroom. The decision to permit a racially biased prospective juror to continue on the panel spoke not only to Clark, but also to the greater community. *Ojeda*, ¶ 20 ("The harm from discriminatory jury selection reaches beyond that inflicted on the defendant and the excluded juror to touch the entire community."). The message sent was that a prospective juror could

sit in judgment of a person against whom he had an acknowledged racial bias. This result "undermine[s] the very foundation of our system of justice — our citizens' confidence in it." *McCollum*, 505 U.S. at 49-50 (quoting *State v. Alvarado*, 534 A.2d 440, 442 (N.J. 1987)).

¶ 99 It is because of these intolerable outcomes that structural error necessarily results when intractable racial bias infects the jury selection process. That structural error mandates automatic reversal of any resulting conviction without the need to demonstrate outcome-determinative prejudice. Neither *Novotny*, nor any other cited precedent, permits a contrary result.

IV. The Majority Fails to Address the Structural Error Created by the Equal Protection Violation

¶ 100 The majority recognizes that the failure to excuse Prospective Juror K raises equal protection concerns. But the majority then subjects the equal protection violation to *Novotny*'s outcome-determinative test, rather than finding structural error, and frames the outcome-determinative test by asking whether the failure to grant the challenge for cause "forced" Clark to use the peremptory challenge to remove the racially biased juror. Drawing from *Vigil*,

the majority concludes the trial court did not force Clark to exercise a peremptory challenge against Prospective Juror K, but, instead, Clark "chose" to use one of his peremptory challenges to eliminate Prospective Juror K. Because Clark was allowed to exhaust his allotted peremptory challenges, the majority concludes, *Novotny* and *Vigil* indicate there was no prejudice to him and no resulting constitutional error whether predicated upon the Sixth Amendment right to a jury trial or the Fourteenth Amendment guarantee of equal protection.

¶ 101 I believe the majority's conclusion conflates two separate constitutional analyses implicated by the trial court's actions. I share the majority's perspective that *Novotny* establishes that a defendant's Sixth Amendment right to a fair trial and the guarantee of due process embodied in the Fourteenth Amendment are not necessarily violated solely because he is required to exercise a peremptory challenge to correct the trial court's erroneous denial of some challenges for cause, such as those at issue in *Novotny* and *Vigil* because the Equal Protection Clause was not implicated in either of those cases.

¶ 102 But disparate treatment of a defendant on the basis of race lies at the very heart of what the Equal Protection Clause proscribes. When a trial court wrongfully permits a racially biased prospective juror to continue to remain on the panel, a defendant is denied equal protection of the law. That constitutional violation exists independent of whether the trial court's error "forces" the defendant to exercise a peremptory challenge to excuse that juror or the defendant simply "chooses" to do so. The constitutional wrong is created not by whether or how the defendant ultimately exercises his peremptory challenges, but rather by the trial court's decision to tolerate the ongoing participation of a prospective juror with acknowledged racial bias against the defendant. *Novotny* did not alter this outcome dictated by the Fourteenth Amendment's guarantee of equal protection.

V. There Is No Acceptable Level of a Juror's Intractable Racism

¶ 103 Finally, I acknowledge that Prospective Juror K did not communicate his racism in a manner that was as direct or inflammatory as trial courts sometimes hear. But I resist the suggestion that trial courts should be burdened with trying to assess the "degree of racism" articulated by a prospective juror and

then marry their prejudice analysis to the perceived quantum of expressed racism.

¶ 104 In the first place, such a paradigm places trial courts in an untenable position of applying their own subjective assessment of what constitutes an "acceptable" level of racial bias in the jury selection process. Such an inquiry would inherently lead to unpredictable results and undermine the parties' and the public's confidence in the judicial process.

¶ 105 But more fundamentally, I reject the notion that racism can be meaningfully analyzed along a continuum that accepts some types of intractable racism but not others. Either a juror has demonstrated racial bias that they cannot set aside, or they have not. If, as here, the prospective juror acknowledges the presence of racial bias they are unable to overcome, they must be dismissed. If they are allowed to serve, the trial is structurally tainted, and any resulting conviction must be reversed.

VI. Conclusion

¶ 106 For the reasons stated, I conclude the trial court's tolerance of the admittedly racially biased prospective juror violated Clark's guarantee of equal protection of the law. Accordingly, I would

reverse Clark's conviction, decline to address the remaining issues, and remand this case for a trial free of racial bias.