COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 13, 2013 7:51 PM
Appeal from the District Court of Arapahoe County Division 207, Honorable Judge Marilyn Antrim Case No. 10CR1193	▲ **COURT USE ONLY** ▲
THE PEOPLE OF THE STATE OF COLORADO, **Plaintiff-Appellant,** **v.** **ADRIAN DEON LARKINS,** **Defendant-Appellee.**	Case Number: **11CA1029**
Prosecuting Attorney(s), 18th Judicial District: L. ANDREW COOPER, Chief Deputy, for GEORGE H. BRAUCHLER, District Attorney 6450 S. Revere Parkway Centennial, CO 80111 Phone: (720) 874-8500 Fax: (720) 874-8501 Atty. Reg. #(s): Brauchler 25910, Cooper 23036	
REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 3,960 words.

The brief complies with C.A.R. 28(k).

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.___, p.__), not to an entire document, where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

August 13, 2013
Date

BY: s/ *L. Andrew Cooper*
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STANDARD OF REVIEW

The district court concluded, at step two of its *Batson* analysis, that the prosecutor's explanation of the preemptory challenge was not facially valid. Step two of a *Batson* analysis presents a question of law that is reviewed *de novo*. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998).

Although step three of a *Batson* analysis typically involves a credibility determination and is reviewed for clear error, *see id.*, here the People maintain that, to the extent the district court reached step three, it applied the wrong legal standard. A court commits clear error where it applies incorrect legal standards. *See United States Welding, Inc. v. B & C Steel, Inc.*, 261 P.3d 513, 517 (Colo. App. 2011); *United States v. Kimbrel*, 532 F.3d 461, 465-466 (6th Cir. 2008) ("a mistake of law generally satisfies clear-error, de-novo or for that matter abuse-of-discretion review"). Whether a court applied the correct legal standard is a question of law subject to *de novo* review. *See People v. Guthrie*, 286 P.3d 530, 533 (Colo. 2012).

REPLY ARGUMENT

I. This appeal is proper under C.R.S. § 16-12-102(1): it is an appeal of a question of law.

A. The People acknowledge that, if the court had applied correct legal standards and sustained the *Batson* challenge on a credibility determination, they could not appeal under C.R.S. § 16-12-102(1).

Batson established a three-step process for evaluating claims that a prosecutor has used a preemptory challenge in a manner violating the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79 (1986). First, the defendant must make a *prima facie* showing that the prosecutor exercised a preemptory challenge on the basis of race. *Id*. at 96-97. Second, if that *prima facie* showing is made, the burden shifts to the prosecutor to articulate a race neutral explanation for striking the juror in question. *Id*. at 97-98. Third, the court determines whether the defendant has carried his burden of proving purposeful discrimination. *Id*. at 98.

If, at the second step, the prosecutor articulates a race neutral explanation for striking the juror, the determination in the third step will largely turn on an evaluation of the prosecutor's credibility. *Id*., at 98, n. 21. But if, at the second step, the prosecutor fails to articulate a race neutral explanation for striking the juror, the determination in the third step will largely turn on the fact that the defendant's *prima facie* showing of discrimination has not been rebutted. *See, e.g.*, *State v. Walker*, 453 N.W.2d 127, 135-136 (Wis. 1990) (reversing conviction

where prosecutor failed to articulate race neutral explanation, leaving "an unrebutted prima facie case of purposeful discrimination.")

The defendant argues that this appeal should be dismissed on the theory that the district court sustained the *Batson* challenge based on a credibility determination concerning the prosecutor's motives, and that this appeal therefore does not present a question of law under C.R.S. § 16-12-102(1). (Answer Brief, p. 5.) That argument should be rejected because the record does not support the theory that the court made such a credibility determination. Instead, as will be discussed, the court concluded that the explanation given by the prosecutor at step two of the *Batson* analysis did not, on its face, constitute a race neutral reason for striking the juror.

But before discussing the court's rationale in detail, the People will make this concession: if the Court of Appeals concludes that the district court applied the correct legal standard at each step of its *Batson* analysis, and—while applying the correct legal standard—sustained the defendant's *Batson* challenge based on a credibility determination about the prosecutor's motives, then this appeal would not raise a question of law under C.R.S. § 16-12-102(1), the Court of Appeals would lack jurisdiction to hear the appeal, and the appeal indeed should be dismissed. The reality, however, is that the district court did not make such a credibility determination. That reality will be discussed next.

B. The court did not engage in a credibility determination: it sustained the *Batson* challenge on the mistaken view that the prosecutor's explanation at step two was not facially race neutral.

Contrary to the defendant's argument, there is little if anything in the record to suggest that the district court, in sustaining the defendant's *Batson* challenge, made a determination that the prosecutor was not credible. Here is what the record shows.

On questions 5, 8 and 10 of her juror questionnaire, Juror Number 5 gave the following answers:

> **5. Have you, a member of your family, or a close friend ever been a victim of a crime?** Yes
>
> **If yes, please state who, when, where and what:** Brother, 1994 or 1995? Aurora, CO Felony possession of a firearm.
>
> **8. Have you, a member of your family, or a close friend had a particularly good or bad experience with a police officer?** Yes
>
> **If yes, describe:** husband was arrested for defending himself against racial threats
>
> **10. Do you believe there is any reason why you cannot be a fair and impartial juror?** unsure
>
> **If yes, please give your reasons:** depends on how much I can relate situations to my life

(R. Envelope #5, questionnaire of Juror Number 5.)

When questioned by the judge out of the presence of the other jurors, Juror Number 5 made the following admissions about her potential bias:

> THE COURT: You mentioned you had a brother in the -- who had a felony, and you thought you might have some bias --
>
> POTENTIAL JUROR: Not just necessarily his experience, but just -- I have an issue with sometimes the unfair number of African Americans that are brought to trial.
>
> I will admit that I'm biased to that.
>
> A lot of times I feel that it's skewed, and I feel it's unfair.
>
> I do admit that I look forward to taking part in the process because I would like to see that change, and I feel I can be part of that. However, I would be being dishonest if I did not say I was not influenced by that.

(4/26/11, p. 75/CD p. 637 lines 8-24.) In response to several additional questions by the judge, Juror Number 5 indicated that, despite her bias, she could be fair to both sides. (4/26/11, p. 75/CD p. 637 line 25, p. 76/CD p. 638 lines 1-18.)

When questioned by the prosecutor, Juror Number 5 reiterated that she could be fair, but also indicated that she would be questioning the defendant's guilt or innocence based on her feelings about the unfair or unequal prosecution of African Americans:

> MS. MC CALLIN: Just briefly.
>
> And I appreciate your honesty and candor with this.
>
> Obviously the Defendant is the person who is charged with this, and he is African American. You indicated in your questionnaire, and

even when the judge asked you earlier a question, you talked about trying to be fair, with situations like this, sometimes jurors, because of opinions, biases, as you mentioned, may not necessarily be the best juror for a particular case.

Do you think, given what you feel and the unfair prejudice towards or unequal, perhaps, prosecution of African Americans, do you think that you are going to have that mindset going into this trial and be questioning his guilt or innocence based on that sort of predisposition you have?

POTENTIAL JUROR: In all honesty, yes.

(4/26/11, p. 76/CD p. 638 lines 21-25, p. 77/CD p. 639 lines 1-14.)

When questioned by defense counsel, Juror Number 5 agreed with the presumption of innocence, agreed that she would render a verdict based on whether the evidence proved the defendant's guilt beyond a reasonable doubt, agreed that she could not acquit the defendant because of her outside feelings, and agreed that she would not vote for acquittal to send a message. (4/26/11, p. 78/CD p. 640 lines 18-25, p. 79/CD p. 641 lines 1-25, p. 80/CD p. 642 lines 1-8.) But she agreed with those propositions only after reiterating that there were issues of race that could affect her:

MR. KARBACH: Briefly.

You just mentioned when Ms. McCallin was talking to you a moment ago that you come in here with the notion that maybe there is over prosecution or there's issues of race that could affect you.

POTENTIAL JUROR: Yes.

(4/26/11, p. 78/CD p. 640 lines 12-17.)

The prosecutor asserted a challenge for cause, noting that Juror Number 5 "went back and forth":

> MS. MC CALLIN: I would move to strike this juror for cause. She kind of went back and forth. She initially -- while I appreciate her honesty, she showed an indication of concern for unfair prosecution of African Americans or the numbers is unequal.
>
> She began to say she would take that into consideration, and that she wouldn't be the best juror. She then said she would be fair, but I don't know -- I don't believe she was rehabilitated.
>
> I think she's made it very clear she has certain biases, which is the word she used going into this, and I don't believe she can be a fair juror in this case.

(4/26/11, p. 80/CD p. 642 lines 14-24, p. 81/CD p. 643 line 1.)

The court denied the challenge for cause because the court was satisfied that the juror, despite her bias, would render an impartial verdict based on the evidence:

> THE COURT: I'm going to deny your challenge for cause. Before either of you questioned her, I asked her -- I told her that we understood that everyone has a bias and that she had to put it in the back of her mind, and if she believed that at the conclusion of the trial that you had proven your case beyond a reasonable doubt, could she vote guilty, and she said she could, and that's all we can ask. So, I'm denying your challenge for cause.

(4/26/11, p. 81/CD p. 643 lines 18-25, p. 82/CD p. 644 lines 1-2.)

The People have not challenged that ruling on appeal, because under Crim. P. 24, a court should deny a challenge for cause based on bias if *the court* is satisfied that the juror will render an impartial verdict:

> (1) The court shall sustain a challenge for cause on one or more of the following grounds …
>
> (X) The existence of a state of mind in a juror manifesting a bias for or against the defendant, or for or against the prosecution or the acknowledgement of a previously formed or expressed opinion regarding the guilt or innocence of the defendant shall be grounds for disqualification of the juror, *unless the court* is satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court.

Crim. P. 24(b)(1)(X) (emphasis added). The court's denial of a challenge for cause, however, does not preclude a party from striking the same juror through a preemptory challenge. *See* Crim. P. 24(d) (granting both the prosecution and the defense five preemptory challenges in trials of non-capital felonies).

Here, the prosecutor exercised a preemptory challenge against Juror Number 5, and in response to the court's *Batson* inquiry, stated her concern about the juror's statements:

> I challenged her for cause previously and for the reasons she's indicated on her questionnaire. She was unsure if she could be fair. She said it would depend on how she would -- how she could relate to her situation in life.
>
> She came in here and said that she had a bias because she thinks too many African Americans are being prosecuted, that there is an unequal number.
>
> She indicated -- when I asked her during a break if this was the right case for her and she said that it was not, she said that her husband was arrested for apparently defending himself against racial threats. This is a topic that she has reiterated several times.

> For all of those reasons -- Your honor, I initially thought it was for cause, but those are the reasons I am using any preemptory.

(4/26/11, p. 223/CD p.785 lines 12-24.)

The court precluded the prosecutor from exercising the preemptory challenge under *Batson*. In doing so, the court said nothing about credibility, but instead agreed with defense counsel's argument that the prosecutor had failed to articulate an explanation for the strike that was facially race neutral:

> MS. GUESNO: All the reasons asserted by Ms. McCallin are race reasons as to why she is excusing this juror. These are not race neutral. These are specifically talking about race.
>
> The Prosecution has to establish a race neutral reason. We would ask to have Juror Number 5 be reseated.
>
> THE COURT: *Yeah, there is no reason -- neutral reason here.* This juror came in and spoke to us privately during the lunch hour, and indicated that she could be fair; that if you met your burden she would find the Defendant guilty. Even though he is African-American, you have not stated a race neutral reason that I can support.

(4/26/11, p. 224/CD p.786 lines 3-16.)

There is little if anything in the court's ruling to support the defendant's claim that the court, in making its ruling, engaged in a credibility determination about the prosecutor's motives. To the contrary, the court was expressly agreeing with the argument defendant's counsel had advanced—that the prosecutor's explanation for the strike was not race neutral on its face.

C. Whether the prosecutor's explanation at step two was facially race neutral—and whether the court applied the correct legal standard at each step of its analysis—are questions of law.

Because the court did not engage in a credibility determination about the prosecutor's motives, and did not deem the prosecutor's explanation of the strike to be a pretext for purposeful discrimination—but instead sustained the *Batson* challenge on the view that the prosecutor's explanation was not, on its face, race neutral—this is an appeal of a question of law properly brought under C.R.S. § 16-12-102(1). Whether a prosecutor's explanation at step two of a *Batson* analysis is facially race neutral is a question of law. *See Valdez*, 966 P.2d at 590. Whether a court applies the correct legal standard also is a question of law. *See Guthrie*, 286 P.3d at 533. Under C.R.S. § 16-12-102(1), the prosecution is authorized to appeal "any question of law." This is an appeal of a question of law under C.R.S. § 16-12-102(1) and the defendant's request that the appeal be dismissed should be rejected.

II. The prosecutor's explanation at step two was facially race neutral, and the court, in addressing step three, applied the wrong legal standard.

A. Colorado should recognize that, at step two of a *Batson* analysis, a juror's statements reflecting racial bias constitute a facially race neutral reason for a preemptory challenge.

When asked to state a race neutral reason for the preemptory challenge of Juror Number 5, the prosecutor expressed a concern that the juror's statements indicated the juror could be racially biased. (4/26/11, p. 223/CD p.785 lines 12-24.) The defendant argues that this explanation by the prosecutor was insufficient on its face because it was "tied to the juror's race" and was "not race neutral but race-based." (Answer Brief, p. 10.) Likewise, at trial the defendant argued that "All the reasons asserted by Ms. McCallin are race reasons as to why she is excusing this juror. These are not race neutral. These are specifically talking about race." (4/26/11, p. 224/CD p.786 lines 3-6.) The district court agreed. (4/26/11, p. 224/CD p.786 lines 10-16.)

But a juror's *opinions* about race constitute an explanation for exercising a preemptory challenge that is facially race neutral. *See United States v. Fike*, 82 F.3d 1315, 1320 (5th Cir. 1996) (race neutral explanation where prosecutor said strike was based on black juror's opinion about all-white juries); *Tolbert v. Gomez*, 190 F.3d 985, 989 (9th Cir. 1999) (race neutral explanation where prosecutor said strike was based on black juror's opinion about racial prejudice);

United States v. Steele, 298 F.3d 906, 914 (9th Cir. 2002) (race neutral explanation where prosecutor said strike was based on black juror's opinion that minorities are discriminated against by criminal justice system); *Akins v. Easterling*, 648 F.3d 380, 389 (6th Cir. 2011) (race neutral explanation where prosecutor said strike was based on black juror's statement that, if she were a lawyer in the case, she would want to know how a juror felt about blacks and crimes, their thoughts about blacks, and whether they had ever been robbed by a black person).

Here, the prosecutor's explanation for the preemptory challenge was that the juror's own statements indicated that the juror could be racially biased—in part because she believed too many African Americans are prosecuted, and her husband had been arrested in connection with racial threats:

> I challenged her for cause previously and for the reasons she's indicated on her questionnaire. She was unsure if she could be fair. She said it would depend on how she would -- how she could relate to her situation in life.
>
> She came in here and said that she had a bias because she thinks too many African Americans are being prosecuted, that there is an unequal number.
>
> She indicated -- when I asked her during a break if this was the right case for her and she said that it was not, she said that her husband was arrested for apparently defending himself against racial threats. This is a topic that she has reiterated several times.
>
> For all of those reasons -- Your honor, I initially thought it was for cause, but those are the reasons I am using any preemptory.

(4/26/11, p. 223/CD p.785 lines 12-24.) This explanation, at the second step of the *Batson* analysis, was facially race neutral: "*Batson* does not forbid striking a juror who holds a particular opinion about the U.S. justice system. Rather, it forbids striking jurors based on their race." *Fike*, 82 F.3d at 1320. *See also Steele*, 298 F.3d at 914 (striking juror because of her view that racial discrimination may taint the criminal justice system "is a race neutral reason because it is a view not based on the race of the prospective juror and it is not linked to any racial group"); *Tolbert*,190 F. 3d at 989 (rejecting argument that striking juror on the basis of his opinions on race was equivalent to striking him on the basis of his race).

Colorado should recognize that, at step two of a *Batson* analysis, a juror's statements reflecting racial bias constitute a facially race neutral reason for exercising a preemptory challenge.

B. The court erred in failing to recognize that the prosecutor's explanation was facially race neutral. It compounded the error by conflating steps two and three, and applying the wrong standard at step three.

In sustaining the defendant's *Batson* challenge, the district court failed to recognize that the prosecutor's explanation was facially race neutral. (4/26/11, p. 224/CD p.786 lines 3-16.) The court compounded that error by conflating steps two and three: to the extent it reached step three at all, it did so in the same breath as its resolution of step two. (4/26/11, p. 224/CD p.786 lines 3-16.) Combining

steps two and three violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *Kimbrel*, 532 F.3d at 468.

And the court, at step three, also applied the wrong legal standard. Rather than addressing whether the prosecutor's explanation was a pretext for purposeful discrimination, the court instead reiterated the basis for its rejection of the prosecutor's challenge for cause—that the juror had indicated she could be fair:

> THE COURT: Yeah, there is no reason -- neutral reason here. This juror came in and spoke to us privately during the lunch hour, and indicated that she could be fair; that if you met your burden she would find the Defendant guilty.

(4/26/11, p. 224/CD p.786 lines 10-166.) It was proper for the court to deny the earlier challenge for cause, because the court was satisfied that the juror would render an impartial verdict. *See* Crim. P. 24(b)(1)(X). But the court's own conclusion that the juror would be fair does not mean that the prosecutor's concern about the juror's fairness was a mere pretext for discrimination. At step three of *Batson*, the question is whether the court can find by a preponderance of the evidence that a party is seeking to strike a juror because of the juror's race. *Valdez*, 966 P.2d at 590. The court did not properly address that question here.

C. The rule advocated by the defense would prevent defendants and prosecutors alike from exercising preemptory challenges against racially biased jurors.

Although this case involves a *Batson* challenge asserted by a criminal defendant against a prosecutor, it is well established that prosecutors likewise can assert *Batson* challenges against defendants. *See Georgia v. McCollum*, 505 U.S. 42, 46-59 (1992); *Valdez*, 966 P.2d at 589, n. 7. Private litigants in civil cases, too, can assert *Batson* challenges. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 631 (1991); *Valdez*, 966 P.2d at 589, n. 7. And *Batson* challenges can be asserted even where a party has exercised preemptory strikes against white jurors. *See, e.g., Government of Virgin Islands v. Forte*, 865 F.2d 59, 64 (3rd Cir. 1989) (recognizing that white defendant accused of raping black woman could assert *Batson* challenges against prosecutor who sought to strike whites from jury); *United States v. Allen-Brown*, 243 F.3d 1293, 1298-1299 (11th Cir. 2001) (recognizing that prosecutor could assert *Batson* challenges against black defendant who sought to strike whites from jury).

Given the far-reaching applicability of the *Batson* decision, it is important to contemplate the implications of the rule advocated by the defense here. The defendant in this case is African-American. Suppose that, in this trial, white jurors had expressed racial bias against African-Americans, but stated that they could be fair. If defense counsel had sought to exercise preemptory strikes against those

jurors, the strikes could give rise to a *prima facie* showing that jurors were being excluded on the basis of race, and defense counsel would presumably then explain that he struck the jurors because they had expressed a racial bias that jeopardized the defendant's right to a fair trial. But under the rule advocated by the defense in this appeal, that explanation would be insufficient at step two of the *Batson* analysis, as the juror's acknowledged racial bias would not be deemed a facially race neutral reason for exercising a preemptory challenge. The *Batson* challenge would then be sustained, and the defense would be precluded from striking the biased jurors, either on the ground that the prosecutor's *prima facie* showing of discrimination had not been rebutted, or (under the district court's approach) on the ground that the jurors had, after all, assured everyone that they could be fair.

Preemptory challenges, whether exercised by the prosecution or the defense, have long been recognized as a means of assuring the selection of a qualified and unbiased jury. *Batson*, 476 U.S. at 91; *see also* Crim. P. 24(d). The notion that statements reflecting an individual juror's racial bias cannot constitute a facially race neutral reason for exercising a preemptory strike—such that a party, whose right to a fair trial could be harmed by such bias, is precluded from striking the juror—is illogical and wrong. To ensure that prosecutors, criminal defendants, and private litigants can all continue to exercise preemptory strikes against jurors whose statements reflect a racial bias that could render the trial unfair, Colorado

should recognize that, at step two of the *Batson* analysis, a juror's statements reflecting racial bias constitute a facially race neutral explanation for a preemptory strike.

CONCLUSION

The district court's ruling on the defendant's *Batson* challenge was erroneous as a matter of law and should be DISAPPROVED.

Respectfully submitted,

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District Attorney

August 13, 2013
Date

BY: s/ *L. Andrew Cooper*
L. ANDREW COOPER, #23036
Chief Deputy District Attorney

Original signature on file in
the Office of the District Attorney

CERTIFICATE OF SERVICE

On August 13, 2013, I served a copy of the above REPLY BRIEF via Integrated Colorado Courts E-Filing System (ICCES) to the following:

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