No. 24-_____

IN THE

Supreme Court of the United States

SIR MARIO OWENS,

Petitioner,

v.

THE STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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

2024 CO 10

Supreme Court Case No. 08SA402
Certiorari to the District Court
Arapahoe County District Court Case No. 06CR705
Honorable Gerald J. Rafferty, Judge

Plaintiff-Appellee:

The People of the State of Colorado,

v.

Defendant-Appellant:

Sir Mario Owens.

Judgment Affirmed
en banc
February 20, 2024

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE SAMOUR did not participate.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 Pursuant to the capital defendants' unitary review process then in effect, Sir Mario Owens directly appealed to this court his convictions of two counts of first-degree murder after deliberation, one count of conspiracy to commit first-degree murder after deliberation, three counts of witness intimidation, and one count of accessory to a crime, which convictions resulted in a death sentence. Thereafter, our General Assembly abolished the death penalty, and Governor Jared Polis commuted Owens's sentence to life in prison without the possibility of parole. Although we consequently determined that the unitary review process no longer applied in this case, we chose to retain jurisdiction over this appeal.

¶2 Owens now presents six issues for our determination: (1) whether the trial court constitutionally erred in preventing him from conducting voir dire on racial issues and in prohibiting him from informing the jury of the race of one of the victims; (2) whether the trial court reversibly erred in rejecting his challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), after the prosecution consecutively struck two death-qualified prospective Black jurors; (3) whether the trial court abused its discretion in admitting, under the res gestae doctrine and CRE 404(b), allegedly excessive evidence of prior, related shootings that occurred in Lowry Park; (4) whether the trial court erroneously refused to declare a mistrial following a witness's outbursts and her repeated declarations from the stand that Owens

was guilty; (5) whether the trial court's exclusion of extrinsic evidence to impeach that same witness constituted an abuse of discretion and prevented Owens from presenting a complete defense; and (6) whether Owens was denied a fair trial under the cumulative error doctrine.

¶3 We now conclude that the trial court (1) did not prevent Owens from conducting voir dire on potential racial bias and did not constitutionally err in declining to inform the jury of the race of one of the victims; (2) properly overruled Owens's *Batson* challenges; (3) properly admitted evidence of the Lowry Park shootings under CRE 404(b) and CRE 401–403; (4) properly denied Owens's mistrial motions; and (5) allowed sufficient cross-examination and impeachment of the prosecution's key witness while reasonably excluding extrinsic evidence of collateral matters. Having thus determined that Owens has not established any individual errors warranting reversal, we further conclude that he has not established reversible cumulative error.

¶4 Accordingly, we affirm the judgment of conviction.

I. Facts and Procedural History

¶5 To address the issues that Owens raises in this appeal, we must first describe the Lowry Park shootings, which Javad Marshall-Fields, one of the victims in this case, had witnessed. Marshall-Fields intended to testify to what he had witnessed, but he was shot and killed to prevent him from doing so. Vivian Wolfe,

Marshall-Fields's girlfriend, was with him at the time and was also shot and killed. These later shootings, which the parties refer to as the Dayton Street shootings, resulted in the charges and convictions now before us.

A. The Lowry Park Shootings

¶6 On July 4, 2004, Owens fatally shot Gregory Vann following an altercation at a concert in Lowry Park. Owens tried to flee by getting into the passenger seat of his best friend's, Robert Ray's, Suburban. Ray had also attended the concert and had been part of the melee that resulted in Vann's death. When Elvin Bell, who was Vann's brother, and Marshall-Fields tried to pull Owens out of the vehicle, Ray exited and walked around to the passenger side and shot them. (Both Bell and Marshall-Fields survived these shootings.) Owens and Ray then left the park in Ray's vehicle.

¶7 After leaving the park, Ray yelled at Owens for shooting Vann and asked why he did not just shoot in the air. Owens apparently did not respond.

¶8 Thereafter, Owens and Ray sought to conceal their involvement in these shootings, and with the help of Ray's wife, Latoya Sailor Ray ("Sailor"), they disposed of certain evidence (e.g., the Suburban, guns, and clothes) that might have connected them with the shootings.

¶9 Over the days following the shootings, Owens and Ray hid in motels and in friends' houses. During this period, the two learned from television broadcasts

that several witnesses had provided descriptions of them and of Ray's vehicle. At least some of these descriptions also noted Owens's braids. Owens thus changed his appearance by shaving his head.

¶10 In the meantime, with the help of Askari Martin, who had recognized Ray from high school, and Marshall-Fields, the police identified Ray as the driver of the Suburban. The police thus arrested Ray, charged him as an accessory to the Lowry Park shootings, and continued looking for the second shooter.

¶11 Ray was eventually released on bond, and while he was preparing for his trial, he was able to review a discovery packet that his attorney had provided to him. He, Sailor, and Owens went through this packet and learned that it was Martin and Marshall-Fields who had given statements to the police identifying Ray as the driver. Owens and Ray further learned that neither witness had identified Owens by name. Owens then told Ray that he was going to take care of Marshall-Fields so that Ray would not go to prison. Owens also told Sailor, or said in her presence, "Snitches, shit, they need to die."

¶12 Several months later, Sailor saw Marshall-Fields at a club in downtown Denver. When Sailor informed Owens that she had seen Marshall-Fields, Owens asked why she did not set him up or get him alone so that Owens could come down and "do something to him." Owens told Sailor to call him the next time that she saw Marshall-Fields.

¶13 Although Owens wanted to confront Marshall-Fields in person, Ray took a different approach. Ray told one of his friends, Jamar Johnson, that he was trying to offer Martin and Marshall-Fields $10,000 to prevent them from testifying but if that did not work, then Ray would pay Johnson $10,000 to kill them. Several months later, Ray again offered Johnson $10,000, this time to kill only Marshall-Fields, because by that time, Ray believed that Martin "ain't no more" or "was gone."

¶14 Ray's belief that he no longer had to worry about Martin appears to have derived from (or, at least, was confirmed by) a conversation that Ray had with Martin after a court hearing that Martin had attended. During this conversation, Martin told Ray that he did not want to "snitch" and that although the prosecution was attempting to force him to do so, he was not going to do it. After this interaction, Ray told Sailor that he was not too worried about Martin's testifying anymore, and Martin never appeared in court again.

¶15 Ray continued to be concerned, however, about Marshall-Fields's identifying him as the driver, and in June 2005, while Sailor was attending a barbecue, Ray called her to ask if she had seen Marshall-Fields there. Sailor responded that she had. Ray arrived shortly thereafter, and Johnson met him there. The two saw Marshall-Fields leave, and Ray told Johnson that he (Ray)

believed that Marshall-Fields was still planning to testify against him and that he would "take things into his own hands."

¶16 At some point after that, Sailor received a call telling her that Owens had been arrested and later released. After Owens was released, he told Sailor that the police had seized from the backseat of the car that he was driving t-shirts that Owens and Ray had purchased after the Lowry Park shootings. These t-shirts said, "[S]top snitching, rest in peace."

¶17 Apparently the same day that Owens was released, an acquaintance of his, Parish Carter, approached Marshall-Fields at a sports bar and told him, "[T]hey looking for you on the street homey." The next day, which was a week before Ray's Lowry Park trial was to begin, Marshall-Fields and Wolfe were killed in a drive-by shooting on Dayton Street in Aurora.

¶18 In the weeks that followed, witnesses identified Owens as the person who had shot and killed Vann at Lowry Park. Witnesses also provided the police with information about the Dayton Street shootings. With this information, the People charged Owens in connection with the Lowry Park shootings and separately in connection with the Dayton Street shootings.

¶19 Owens went to trial for the Lowry Park shootings first, and he was convicted and sentenced to life plus sixty-four years in prison. He then faced trial on, as pertinent here, two counts of first-degree murder after deliberation, one count of

conspiracy to commit first-degree murder after deliberation, three counts of witness intimidation, one count of accessory to a crime, and one count of aggravated intimidation of a witness arising from the Dayton Street shootings.

B. The Dayton Street Trial

¶20 Before the Dayton Street trial began, Owens filed two motions in which he sought (1) extended individual voir dire on the issues of hardship, bias, exposure to publicity and other community commentary, race-related issues (including racial bias), and opinions concerning capital punishment (including death qualification of the jury); and (2) individually sequestered voir dire. In these motions, Owens argued, among other things, that he was entitled to know if his "ethnicity or race or that of the victim [was] an issue with or source of bias for any prospective juror," citing *Turner v. Murray*, 476 U.S. 28 (1986).

¶21 The prosecution agreed that questioning concerning exposure to publicity, hardship, and views on the death penalty should be done individually and outside the presence of other jurors. The prosecution did not agree, however, that the questioning of all jurors on all issues needed to be conducted outside the presence of the other jurors. For example, although the prosecution did not oppose Owens's request to question prospective jurors on racial issues, it did not believe that such questioning necessarily had to be done individually.

¶22 During a subsequent pre-trial hearing, Owens clarified that his above-described motions sought individual voir dire on the life and death qualification issue, any hardship issue, publicity, and "issues of bias that arise from the questionnaires," specifically, "things that may be inappropriate to discuss in front of the whole panel such as personal experiences or specific bias issues that come to light from the questionnaire itself." The court responded that it did not think that it had heard anyone disagree with that. The court then characterized Owens's last request as concerned with "unusual responses on the questionnaire." Owens's counsel replied, "I think that's a fair way to characterize it," and the prosecution stated that it did not disagree. The court thus ruled that the issue was "moot by agreement" and stated that everyone understood that "we're going to do that individual sequestered voir dire on those topics," i.e., life and death qualification, possible hardship, publicity, and unusual responses on the juror questionnaires related to personal experiences or specific bias issues.

¶23 Thereafter, both Owens and the prosecution presented draft jury questionnaires to the court. Owens's draft questionnaire included only one question on race, which asked prospective jurors to state their racial or ethnic background "for purposes of obtaining a fair cross section of the community." When the trial court later inquired as to the purpose for this question, Owens explained that it was to make a record as to the racial makeup of the venire itself,

as well as of the jury that would ultimately be seated, and also to make a record of the prospective jurors' race or ethnicity, in the event that *Batson* challenges might arise in which the parties disagreed on the jurors' race or ethnicity.

¶24 The court responded:

> I anticipate[d] that's why you wanted it but I am not going to ask that question in the questionnaire. . . . I do not believe [injecting] race is appropriate in the questionnaire. If there is a *Batson* challenge based on someone's name or on their skin color, we will have to sort that out with the particular juror. I do not believe the questionnaire should be used to force the person to identify race.

¶25 Ultimately, the jury questionnaire contained no questions directly addressing race or racial biases. As pertinent here, however, in prospective Juror C.W.'s jury questionnaire, he responded to the question, "Have you ever had a pleasant or unpleasant experience involving law enforcement?" by circling "Yes" and writing, "DWB (Driving while Black)." In addition, he responded to the question asking whether he had ever witnessed a crime by indicating that he had witnessed "the illegal firing of U.S. Attorneys by the current administration." He further listed the news programs that he watched on television or listened to on the radio. And he indicated that he believed that the death penalty was appropriate in some cases of first-degree murder and that he could return a verdict of death if he believed it to be the appropriate penalty in this case.

¶26 Based on the foregoing responses, the court allowed individual voir dire of Juror C.W. During this voir dire, the parties and the court focused primarily on

Juror C.W.'s views regarding the death penalty. Specifically, in response to questioning by the court, Juror C.W. stated that he followed the death penalty "quite some bit" and that he was concerned about reports that he had read regarding people who had been convicted and served lengthy prison terms, after which it turned out that they were actually innocent. Juror C.W. said that if he were to hear something like that, he was on a jury, and he was borderline on his decision as to guilt, then that could sway him and he could not say that he would be certain to vote for a death sentence. He stated, however, that he would be able to turn off media coverage concerning criminal cases during the trial of this case and that he could be fair to both sides. The court then allowed the parties to question Juror C.W.

¶27 Among other things, the prosecution addressed Juror C.W.'s experience with law enforcement, asking whether Juror C.W.'s unpleasant experience with police officers related to a specific agency or to police officers in general. Juror C.W. replied, "In general." The prosecution also asked Juror C.W. how he had witnessed the "illegal firing of the U.S. Attorneys by the current administration." Juror C.W. clarified that he had simply seen news reports on television. And the prosecution inquired further regarding Juror C.W.'s ability to impose the death penalty in an appropriate case. After initially indicating that he could do so if there were a video, Juror C.W. indicated that the strength and weight of the

evidence could convince him beyond a reasonable doubt that the death penalty is appropriate.

¶28 Owens's counsel then questioned Juror C.W. Counsel's examination focused principally on Juror C.W.'s views of the beyond a reasonable doubt standard and his ability to consider all of the factors determining whether a death sentence would be proper in a given case.

¶29 Another prospective juror, Juror J.C., had indicated in her jury questionnaire that although she believed that the death penalty was appropriate in some cases, because of her "religious background," she could never vote to impose it herself. In light of this response, the court allowed individual voir dire of her, as well.

¶30 During this individual voir dire, Juror J.C. changed her position on the death penalty somewhat, stating, in response to questioning by the court, that she could consider the two possible punishments, life in prison without the possibility of parole and the death penalty, and make her own decision about what she thought was the correct punishment.

¶31 The court again allowed the parties to inquire, and in response to questioning by Owens's counsel regarding the death penalty, Juror J.C. stated that she would lean toward a life sentence, stating, "I just don't agree with the death penalty." She further stated, however, that she could consider both a life and a death sentence, although she did not want to impose a death sentence unless she

really had to do so, and it would be "very, very difficult" for her to make that decision.

¶32 The prosecution followed up regarding Juror J.C.'s ability to vote for a death sentence, and Juror J.C. continued to express her hesitancy, although she also said that she could conceive of a circumstance in which a death sentence was appropriate and that she could so vote in such a case.

¶33 The prosecution then indicated that it had another question, which it "sincerely hope[d] . . . [would] not be offensive in any way":

> Over the years talking to lots of jurors of various races, genders, defendants of different races, different genders, et cetera, it's been interesting to me that people in the black community have a wide variety of attitudes and feelings when it comes to the prosecution of a case of a black defendant. I've talked to some jurors who feel that they are biased against the defendant and in favor of the prosecution because they think that a black defendant engaging in criminal behavior is an embarrassment to the community. Keeps the negative image, things of that nature. I've had other jurors who voiced a bias in favor of the defendant because they feel that the black community is not treated fairly by the system. There are some unproportionate [sic] number of blacks who are convicted of crimes, and things of that nature. And then there are people who are all over in the middle.
>
> Do you have any concerns for yourself, or do you have any feelings one way or another about the fact that Mr. Owens is a young black man charged with a very serious crime looking at a very significant penalty? We're asking for the death penalty in this case. Do you have any feelings about that?

Juror J.C. responded that she "could still be fair."

¶34 Upon completion of the individual questioning of Juror J.C., the prosecution made a record of what it perceived to be Juror J.C.'s demeanor while she was being questioned. The prosecution noted that when Owens's counsel asked Juror J.C. if she could vote for the death penalty, "she crinkled up her face. There was a very long pause, and then she said I guess there would be some hesitation for me, or words to that effect." The prosecution further noted that when it had asked a similar question, there was again a long hesitation, after which Juror J.C. "shook her head back and forth in the negative" before giving an answer that the prosecution characterized as "reluctant."

¶35 The court acknowledged that it saw the same reactions, but the court interpreted them as indicating that Juror J.C. had changed her view during voir dire and that she stated that she could sign the death certificate.

¶36 Thereafter, the court entertained peremptory challenges. As pertinent here, the prosecution exercised a peremptory strike on Juror C.W., and the court immediately dismissed him, without giving Owens a chance to raise a *Batson* objection, which Owens promptly did. Apparently recognizing its erroneous haste, the court sent a law clerk to search for Juror C.W. In the meantime, the prosecution replied to the *Batson* objection, stating:

> This is a gentleman when asked if he had any experiences with law enforcement, he said, yes, driving while black. He believes that he has witnessed the firing of the US [sic] Attorneys. That's something

that he's seen on television not witnessed. He thinks that's a crime and that is not a crime. That's perhaps a civil matter.

In addition he has done reading on the death penalty. He told the court he has read the two most recent reports about [the] death penalty so he has recent information about the topic. He told us he is aware of wrongful[ly]-accused defendants in jail for many, many years before they're finally freed and that if he read about something like that close in time to which he was trying to make a decision that would sway him and plus lead towards [a] not guilty verdict leaving aside the fact that the court asked him and he agreed not to do any reading and research during the trial.

The reality is that is part of his knowledge and experience in life. And so it is for those reasons having absolutely nothing to do—the driving while black has a racial overtone. That indicated a distrust of police and police are wrongfully targeting people of that race and obviously Mr. Owens' race. And the other issues are issues that we would challenge any juror notwithstanding race, gender, religion.

¶37 The court asked Owens's counsel to respond, and counsel stated:

On the—as far as the research of the death penalty, I don't believe that was [Juror C.W.]. I believe that was a different juror that the court instructed not to do the research on.

. . . .

As far as the driving while black, he is black. He's an African American. He's one of the few on the panel that would bring that aspect to this case. He doesn't indicate that he would vote against the prosecution or the police, and we don't believe it's a sufficient reason—sufficient neutral reason.

¶38 The court then rejected Owens's *Batson* challenge. The court began by noting that it was required to evaluate the prosecution's credibility regarding its reasons for the peremptory challenge and that the prosecution had listed a number

of issues that raised concern and that the court found to be race neutral because they were circumstances that would give a prosecutor "some cause." Regarding the "Driving while Black" issue, the court agreed that it had "a racial overtone to it," but that statement also gave the prosecution a reason to be concerned.

¶39 After the court had ruled, the prosecution provided two additional reasons, for purposes of the record. First, the prosecution observed that Juror C.W. had said that he could be convinced to vote for the death penalty, but only if the prosecution presented irrefutable proof of the crime. Second, Juror C.W. listened to "a very liberal talk radio show."

¶40 Immediately after the foregoing challenge and ruling, the prosecution struck Juror J.C. Owens again raised a *Batson* challenge, noting that Juror J.C. was the second Black person in a row that the prosecution had struck. The court asked the prosecution to explain its challenge, and the prosecution responded that it had struck Juror J.C. because she had stated in her questionnaire that she could not impose the death penalty. On this point, the prosecution acknowledged that Juror J.C. had had a change of heart and that the court had found this change of heart to be genuine and credible, but the prosecution observed that it was not bound by that finding for peremptory strike purposes.

¶41 The parties then argued as to whether the prosecution had been consistent in striking jurors who had indicated on their questionnaires that they would have

difficulty imposing the death penalty. Owens's counsel argued that the prosecution had not struck white jurors who had expressed that concern, but the prosecution responded that it had struck every juror who had said on their questionnaires that they could not impose the death penalty and then changed their position.

¶42 The court ultimately found that the prosecution's explanation was credible and race-neutral and overruled Owens's objection.

¶43 After jury selection was complete, the trial proceeded to opening statements and the presentation of evidence. The prosecution's theory of the case was that Ray planned to kill Marshall-Fields to prevent him from testifying against Ray at the Lowry Park trial and that Ray convinced Owens and Carter to carry out the murder. To support this theory, the prosecution moved to admit, as res gestae, evidence of (1) the facts and circumstances of the Lowry Park shootings; (2) Owens's and Ray's flight from the scene of those shootings; (3) Owens's and Ray's efforts to avoid detection and apprehension; (4) the police investigation of those shootings; and (5) the filing of charges against Owens and Ray arising from the Lowry Park shootings, as well as the court hearings and dates relating to that case.

¶44 Owens objected to most of this proffered evidence, arguing that it was not admissible as res gestae, not relevant, and inadmissible under CRE 403 and

CRE 404(b). The court overruled Owens's objections and determined that the Lowry Park evidence was, in general, admissible as res gestae. The court, however, ordered the prosecution to advise the court when this type of evidence was about to be introduced so that, if Owens so requested, the court could give a limiting instruction.

¶45 At trial, Owens again raised concerns regarding the Lowry Park evidence that the prosecution sought to admit, asserting that the prosecution was not introducing the evidence as res gestae, as it said it would do, but that it was introducing the evidence as CRE 404(b) evidence, despite not having provided notice or complying with the other procedural prerequisites for admitting evidence under that rule. The court found, however, that the evidence was admissible as res gestae and, after conducting a CRE 404(b) analysis, under that rule as well, concluding that the evidence met the four-prong test set forth in *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990), for determining the admissibility of other acts evidence under CRE 404(b). In accordance with this ruling, the court agreed to give a limiting instruction before the introduction of evidence regarding the Lowry Park shootings, stating that the evidence was "being offered for the purpose of establishing background, motive, relationships between individuals and identification of the defendant" and that the jury was only to consider the evidence "for those purposes." The limiting instruction further advised the jury,

"The defendant is entitled to be tried for the crimes charged in this case and no other. Mr. Owens is not charged in this trial with any offenses at Lowry Park on July 4, 2004."

¶46 The prosecution thereafter spent over a week of the approximately ten-week trial presenting evidence of the Lowry Park shootings, including a thirty-three-minute video of the altercations leading up to the Lowry Park shootings, photos of the crime scene (including photos of Vann's deceased body and gunshot wounds), nearly a dozen 911 calls, and extensive evidence regarding the investigation into the Lowry Park shootings. The court read the above-quoted limiting instruction approximately thirty times during the presentation of this evidence.

¶47 During the second week of the evidentiary portion of the trial, Ray's wife, Sailor testified as one of the prosecution's key witnesses. (Notably, Sailor had pleaded guilty to being an accessory to Vann's murder, had received a deferred judgment in connection with that plea, and had agreed to make herself available for interviews, to honor subpoenas at subsequent hearings, and to testify truthfully at those hearings.) Sailor had substantial knowledge of Owens's and Ray's actions leading up to the Dayton Street shootings, given her role in protecting Owens and Ray after the Lowry Park shootings and her close relationship with the two men.

¶48 As pertinent to the issues now before us, during the prosecution's direct examination of Sailor, one of the jurors requested an urgent break, apparently for medical reasons. The court called a recess, and as the jurors were exiting through the backdoor of the courtroom, Sailor bolted out of that same door, slammed the door against the wall in the hallway, became verbally emotional, and threw her handbag against the wall in frustration, which caused a bracelet that she was wearing to break, scattering beads throughout the hallway. Sailor then sat on the steps leading to the bench and sulked, all apparently in front of the jurors.

¶49 After this outburst, Owens expressed concern as to whether Sailor's conduct could affect the jury's ability to be unbiased and impartial. Owens thus asked the trial court to conduct an individual inquiry of each juror and moved for a mistrial. The court denied Owens's motion, principally reasoning that Sailor's emotional outburst went to her credibility. The court nonetheless ordered the prosecution to ask Sailor, when her testimony resumed, what had happened and why she had reacted as she had, and the court indicated that Owens would be permitted to inquire further on cross-examination. The trial court then recessed the trial until the next morning.

¶50 The next morning, pursuant to the court's order of the prior afternoon, the prosecution began by asking Sailor if she could explain why she had become upset or emotional the previous day. Sailor replied, "This is just hard for me, you know,

I'm just tired of all this," and, "I just blame myself for a lot of stuff and it's just hard for me."

¶51 Given Sailor's importance to the prosecution's case, Owens's counsel conducted a vigorous cross-examination of her. Among other things, counsel questioned Sailor's credibility by suggesting that she had a motive for testifying against Owens because she blamed Owens for what had happened to her family. Counsel also showed Sailor photos taken at her and Ray's wedding and at her baby son's funeral, apparently in order to show their familial relationships. On seeing these photos, Sailor again became emotional and asked why counsel was showing them to her.

¶52 Thereafter, defense counsel questioned Sailor about uncorroborated statements that she had made to the police regarding things that Owens had allegedly told her implicating himself in the Lowry Park shootings. Counsel asked, "The truth of the matter is that you're lying . . . and that [Owens] never said those statements, did he?" Sailor replied:

> You know what, this is your job to do this. [Owens] knows. I know. [Ray] knows. He killed them kids, and we know he did. So what, he ain't come straight out and tell me, "I killed them kids." It all points to him. I was around him the whole time.

Counsel pressed on, asking Sailor, "You have no problem with telling—not telling the truth, do you?" Sailor responded, "No, I got no problem." And counsel continued, "You got no problem with lying to people?" Sailor replied, yelling:

> But I ain't going to just lie to get somebody sent to jail for life or in prison. I'm not going to do that. . . . And I sure won't sit up here and lie for [Owens], and never talk to my family. And you need to stop making it seem like that. . . . You need to quit defending somebody who's guilty, and you know he's guilty. You need to quit that.

¶53 Counsel then sought to impeach Sailor's testimony that she would not lie on the stand and never talk to her family by asking whether she said the same thing when she had testified against her cousin, Sheneekah White, in a trial in Michigan. Sailor again became emotional, denying that she had testified against her cousin and calling counsel an "ass hole" [sic] for bringing that up. Sailor then volunteered, "He's [i.e., Owens's] a guilty ass person. You know he's guilty," after which the trial court called a recess.

¶54 In light of the foregoing testimony, Owens again moved for a mistrial. The court denied the motion, however, reasoning that Sailor's testimony included several long diatribes, which included her statements about Owens's guilt, and that these statements, like her earlier outburst, went to her overall credibility, which the jury would need to assess. The court did, however, instruct the jury to disregard Sailor's opinions as to the guilt or innocence of anyone involved in this matter, her opinion not being evidence.

¶55 During the recess that followed, the court asked defense counsel for a proffer as to what the Michigan matter was about. Counsel explained that before Sailor had moved to Colorado, she was involved in a case in Michigan concerning

the death of a child. In that case, Sailor's cousin, White, was charged with the death of her infant child. White said that she had left Sailor alone in the apartment with the baby and that when she returned, Sailor was gone, and the baby was dead. In contrast, when interviewed by the police, Sailor said that she had left White alone in the apartment with the baby. During the Michigan trial, a witness named Michelle Harris, with whom Sailor had been incarcerated, told the police that Sailor had told her that she (Sailor) had been left alone with the child, that she dropped the child, and that when the child would not move, Sailor fled. White was subsequently acquitted.

¶56 After providing that background, counsel explained that he wanted to use the foregoing to impeach Sailor's testimony that she would not testify against a family member and that she would not lie in a matter of this importance.

¶57 The court ultimately allowed Owens to ask Sailor three questions regarding the Michigan trial: (1) did you testify against a family member? (2) did you testify that the family member was responsible for the baby's injury? and (3) have you ever said anything contrary to what you testified at the trial? The court cautioned Owens's counsel, however, that if Sailor denied saying anything contrary to what she had testified to at the Michigan trial, then Owens could show Sailor the testimony that Harris had given at that trial but if Sailor denied talking to Harris, then Owens was stuck with her answer. The court also prohibited Owens from

asking whether Sailor became a suspect in the Michigan case after White was acquitted, noting that such evidence would violate CRE 404(b).

¶58 Sailor's cross-examination proceeded, and she admitted to testifying against her cousin and to stating that she was not present when the baby was injured and that White was the only adult remaining in the home when Sailor had left. When asked about Harris's testimony, Sailor denied talking to, or even knowing, Harris, and she added that she had passed three lie detector tests regarding this accusation. Defense counsel then tried to present Sailor with Harris's statements, but Sailor responded that she did not want to see the statements and that she had not spoken to Harris.

¶59 Counsel then sought leave to impeach Sailor's statement that she had taken three lie detector tests and passed them all. He proffered that Sailor had taken only one lie detector test and that the results were, in fact, inconclusive. The court determined that, in fairness, it had to let counsel ask that, but it made clear that after that line of inquiry, the questioning needed to stop.

¶60 Counsel inquired consistent with the court's ruling, and Sailor maintained that she had passed the test and that "[o]f course" the police were going to say things like "[t]he results were inconclusive." The court then prohibited further inquiry.

¶61 A week later, the prosecution called White as a witness, and Owens's counsel was permitted to establish on cross-examination that White had grown up with Sailor, that Sailor was a "drama queen," and that she, and a lot of the family, thought that Sailor was a liar. Counsel also established that White had been charged with a serious crime in Michigan and that Sailor had testified against her in that case.

¶62 Ultimately, the jury found Owens guilty of two counts of first-degree murder after deliberation, one count of conspiracy to commit first-degree murder after deliberation, three counts of witness intimidation, and one count of accessory to a crime, and Owens was subsequently sentenced to death. Thereafter, Owens appealed his conviction and sentence under our capital defendants' unitary review process, §§ 16-12-201 to -210, C.R.S. (2023); Crim. P. 32.2. While this appeal was pending, however, our General Assembly repealed the death penalty in Colorado, and Governor Polis commuted Owens's sentence to life in prison without the possibility of parole. In light of these developments, we subsequently concluded that the unitary review process no longer applied to this case. Nonetheless, we retained jurisdiction over Owens's direct appeal, and the direct appeal is now before us.

II. Analysis

¶63 We address Owens's six contentions in turn. For each contention, we begin by setting forth the applicable standards of review and pertinent legal principles, and then we apply those principles to the facts before us.

A. Inquiry Into Race-Related Issues During Voir Dire

¶64 Owens first contends that the trial court unconstitutionally abused its discretion by preventing him from inquiring into prospective jurors' attitudes on race and by failing to do the same on its own during voir dire. He further argues that the trial court constitutionally erred in declining to inform the jury of Wolfe's race. We are not persuaded.

1. Standard of Review

¶65 We review a trial court's decisions regarding the limits of voir dire of prospective jurors for an abuse of discretion. *People v. Collins*, 730 P.2d 293, 300 (Colo. 1986). A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, unfair, or based on an incorrect understanding of the law. *People v. Gutierrez*, 2018 CO 75, ¶ 11, 432 P.3d 579, 581.

¶66 Because parties do not have a constitutional right to voir dire, a court's decision to impose limits on voir dire does not implicate constitutional error. *People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996); *see also People v. Garcia*, 2022 COA 144, ¶ 18, 527 P.3d 410, 416 (noting that "voir dire is not itself a constitutional

right"). Accordingly, we review alleged errors in a trial court's decisions imposing limits on voir dire, if preserved, for nonconstitutional harmless error. *Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116, 119. Under this standard, we will reverse a judgment only if the error substantially influenced the jury's verdict or affected the fairness of the trial proceedings. *Id.*; *see also Rosales-Lopez v. United States*, 451 U.S. 182, 191 (1981) (concluding that a failure to honor a defendant's request to allow inquiry into racial or ethnic prejudice "will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury").

2. Applicable Law

¶67 A criminal defendant has a constitutional right to a trial by an impartial jury. *See* U.S. Const. amend. VI; Colo. Const. art. II, § 16. To ensure that this right is protected, a trial court must excuse prospective jurors if voir dire establishes that they harbor actual bias against a party. *People v. Rhodus*, 870 P.2d 470, 473 (Colo. 1994). Sufficient voir dire is thus essential in ensuring a criminal defendant's right to a fair trial. *See People v. Harlan*, 8 P.3d 448, 462 (Colo. 2000), *overruled in part on other grounds by People v. Miller*, 113 P.3d 743, 748–49 (Colo. 2005); *see also People v. Drake*, 748 P.2d 1237, 1243 (Colo. 1988) ("A defendant in a criminal proceeding has a fundamental right to a trial by jurors who are fair and impartial; to ensure that right is protected, the trial court must exclude prejudiced or biased persons from

the jury."). There is, however, "no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups," although in certain "special circumstances," the constitution requires inquiry into racial bias. *Rosales-Lopez*, 451 U.S. at 189–90.

¶68 Specifically, the Supreme Court has held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36–37. In addition, when racial issues are inextricably bound up with the conduct of a trial and there are "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case," a trial court abuses its discretion if it denies a defendant's request to examine the jurors' ability to deal with racial or ethnic issues impartially. *Rosales-Lopez*, 451 U.S. at 189–90. When neither of these special circumstances is present, trial courts retain their discretion to determine the need for such inquiry, *id.* at 190, as well as the form and number of questions on the subject and whether to question the venire individually or collectively, *Turner*, 476 U.S. at 37.

3. Application

¶69 As an initial matter, we address and reject the People's argument that Owens waived or invited the error about which he complains and is therefore precluded from raising this issue on appeal. Waiver is the intentional

relinquishment of a known right or privilege, whereas the invited error doctrine prevents a party from complaining on appeal of an error that the party invited or injected into the case. *People v. Rediger*, 2018 CO 32, ¶¶ 34, 39, 416 P.3d 893, 901–02. Here, Owens specifically requested extended individual voir dire on, among other issues, race and bias, and he construes the trial court's ruling as having rejected that request, at least in part. In these circumstances, we perceive neither a waiver nor invited error.

¶70 Turning to the merits, we will assume without deciding that racial issues were inextricably bound up with the conduct of the trial in this case such that racial and ethnic prejudice could possibly have affected the jurors. We, however, reject Owens's contention that the trial court prevented him from inquiring into prospective jurors' attitudes on race. Although the court precluded Owens from asking prospective jurors in the jury questionnaire to identify their race (a question that Owens acknowledged was intended to make a record of the racial composition of the venire, not to ferret out potential racial bias), the court in no way precluded group voir dire on the issue of racial bias. Moreover, to the extent that Owens requested individual voir dire on issues of racial bias arising from the prospective jurors' jury questionnaires, the court clarified (and Owens agreed) that Owens sought individual voir dire on "unusual responses on the questionnaire," including issues of racial bias, and the court indicated that it would *allow* such

individual voir dire. Indeed, the record reflects that the court, in fact, allowed such individualized inquiry, as the questioning of Juror C.W. shows. Owens points to no questioning on race during voir dire that he was precluded from pursuing, and our review of the record reveals none.

¶71 We likewise are unpersuaded by Owens's argument that the court should independently have raised the issue of racial bias during its voir dire of prospective jurors. Owens does not develop this argument; the Supreme Court has imposed no such obligation, *Turner*, 476 U.S. at 37 n.10 ("[W]e in no way require or suggest that the judge broach the topic [i.e., of racial prejudice] *sua sponte*."); and the two cases on which Owens relies do not support his claim, as the courts in those cases discussed the parties', not the court's, obligations, *see Maes v. Dist. Ct.*, 503 P.2d 621, 625 (Colo. 1972) (noting that it was counsel's duty to make diligent inquiry into the existence of potential racial prejudice); *People v. Baker*, 924 P.2d 1186, 1191 (Colo. App. 1996) (noting that under the Colorado Constitution, defense counsel had a right and obligation to inquire into the racial views of the prospective jurors in the interest of ensuring a fair and impartial jury).

¶72 Lastly, for several reasons, we perceive no reversible error in the trial court's preventing Owens from informing the prospective jurors of Wolfe's race. First, because *Turner*'s holding that a defendant accused of an interracial crime is entitled to have the prospective jurors informed of the victim's race was limited to

capital cases and this case is no longer a capital case (even though it was at the time of trial), it is unclear that *Turner* still applies. *See Turner*, 476 U.S. at 36–37. Second, it is likewise unclear that this case would satisfy the *Turner* court's definition of an interracial crime because, of the two victims, one was the same race as Owens and the other partially shared Owens's race. In other words, it is unclear whether this case would satisfy the *Turner* court's definition of an interracial crime. Finally, even if the trial court here erred in refusing to inform the prospective jurors of Wolfe's race, Owens presents no persuasive argument as to how this error might possibly have contributed to his conviction. Thus, any error in this regard was harmless beyond a reasonable doubt. *See Hagos*, ¶ 11, 288 P.3d at 119.

¶73 Accordingly, we conclude that the trial court properly permitted Owens to conduct voir dire on racial bias, did not err in not raising issues of racial bias itself, and did not reversibly err when it did not inform the jury of Wolfe's race.

B. *Batson* Challenges

¶74 Owens next contends that the trial court reversibly erred when it overruled his *Batson* challenges to the prosecution's use of back-to-back peremptory strikes on Juror C.W. and Juror J.C., two death-qualified prospective Black jurors. We disagree.

1. Standard of Review and Applicable Law

¶75 The Equal Protection Clause of the Fourteenth Amendment prohibits purposeful discrimination in the selection of a jury. *Batson*, 476 U.S. at 86. In *Batson*, the Supreme Court outlined a three-step process for determining whether a peremptory challenge was purposefully discriminatory. *Id.* at 95–98.

¶76 First, the objecting party must make a prima facie showing that the striking party exercised a peremptory challenge based on race or gender. *Foster v. Chatman*, 578 U.S. 488, 499 (2016); *People v. Beauvais*, 2017 CO 34, ¶ 21, 393 P.3d 509, 516. To establish such a prima facie case, the objecting party may rely on all of the relevant circumstances, including, for example, any pattern of strikes against a cognizable racial group (a pattern of strikes is not necessary, however, to establish a prima facie case because the Constitution forbids striking even a single prospective juror for a discriminatory purpose). *People v. Ojeda*, 2022 CO 7, ¶ 22, 503 P.3d 856, 862.

¶77 Second, if the objecting party establishes a prima facie case, then the striking party must offer a non-discriminatory (here, a race-neutral) reason for the strike. *Foster*, 578 U.S. at 499; *Beauvais*, ¶ 21, 393 P.3d at 516; *see also Ojeda*, ¶ 24, 503 P.3d at 862 ("All the striking party must do is provide any race-neutral justification for the strike, regardless of implausibility or persuasiveness."). The trial court may not, however, provide "its own plausible reasons behind the peremptory strikes at issue." *Valdez v. People*, 966 P.2d 587, 592 n.11 (Colo. 1998). A neutral

explanation in this context is "an explanation based on something other than the race of the juror." *Hernandez v. New York*, 500 U.S. 352, 360 (1991); *accord Ojeda*, ¶ 24, 503 P.3d at 862. An explanation is not race-neutral, however, when, for example, the striking party attempts to rebut the objecting party's prima facie case "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." *Batson*, 476 U.S at 97.

¶78 Third, after the objecting party has been given an opportunity to rebut the striking party's race-neutral explanation, the trial court must decide whether the objecting party has established purposeful discrimination. *Id.* at 98; *accord Ojeda*, ¶ 27, 503 P.3d at 863. A peremptory strike is purposely discriminatory for purposes of step three if the strike was "motivated in substantial part by discriminatory intent." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019) (quoting *Foster*, 578 U.S. at 513); *accord Ojeda*, ¶ 27, 503 P.3d at 863. At this step, the persuasiveness of the proffered justification becomes pertinent. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Other evidence that may be relevant to a *Batson* third-step determination includes (1) a prosecutor's use of peremptory strikes against Black, as compared to white, prospective jurors; (2) disparate questioning and investigation of Black and white jurors in a case; (3) side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were

not; and (4) misrepresentations of the record in defending strikes during a *Batson* hearing. *See Flowers*, 139 S. Ct at 2243.

¶79 The three steps of a *Batson* analysis are subject to separate standards of review on appeal. *People v. Rodriguez*, 2015 CO 55, ¶ 13, 351 P.3d 423, 429. In step one, we review de novo whether the objecting party has established a legally sufficient prima facie case. *Id.* Step two addresses the facial validity of the reasons articulated by the striking party, and the reviewing court likewise reviews de novo the trial court's determination at this step. *Id.* Finally, the trial court's step-three determination presents an issue of fact to which an appellate court defers, reviewing only for clear error. *Id.*

¶80 If a reviewing court establishes that a *Batson* violation has occurred, then the remedy is automatic reversal. *Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017).

2. Juror C.W.

¶81 Beginning with Owens's contentions regarding Juror C.W., we initially address and reject the People's argument that Owens did not properly preserve his *Batson* claim because his counsel's challenge occurred after Juror C.W. had exited the courtroom.

¶82 Notwithstanding the People's assertions to the contrary, Owens did not improperly delay in raising his *Batson* challenge here, and *People v. Valera-Castillo*, 2021 COA 91, 497 P.3d 24, on which the People rely, is distinguishable. There, the

defendant waited to raise a *Batson* challenge until after the court had read the names of the selected jurors and sent home the rest of the venire, including the juror whose strike the defendant was challenging. *Id.* at ¶¶ 19–20, 497 P.3d at 32.

¶83 Here, in contrast, the court excused Juror C.W. as soon as it ruled on the prosecution's peremptory strike without giving Owens an opportunity to raise a *Batson* challenge. Owens nonetheless asserted a *Batson* challenge immediately following Juror C.W.'s dismissal, and the court, seemingly realizing its erroneous haste in excusing Juror C.W., informed the parties that it had already sent a clerk to retrieve him. Although the record is unclear as to whether Juror C.W. returned to the courtroom, on these facts, we conclude that Owens properly preserved his *Batson* challenge.

¶84 Turning then to the merits of Owens's *Batson* challenge regarding Juror C.W., Owens contends that the prosecution did not satisfy its obligation to offer a race-neutral reason at step two of *Batson* because, under *Ojeda*, ¶¶ 46–49, 503 P.3d at 865–66, the prosecution's partial reliance on Juror C.W.'s "Driving while Black" comment made its justification overtly race-based. Owens further asserts that even if the prosecution's justification could be deemed race-neutral, the peremptory strike failed step three of *Batson* under both the so-called "*per se* approach"—which a division of the court of appeals followed in *People v. Johnson*, 2022 COA 118, ¶¶ 23–24, 523 P.3d 992, 1001–02, *cert. granted in part*, No. 22SC852,

2023 WL 3587455 (May 22, 2023), and which provides that a discriminatory explanation for a strike cannot be saved by an accompanying non-discriminatory explanation—and the above-described substantial motivating factor test set forth in *Flowers*. We are unpersuaded.

¶85 As to Owens's first point, we note that the prosecution offered a number of reasons supporting its peremptory strike, namely, Juror C.W.'s reading and views about the death penalty and wrongfully convicted defendants who had spent many years in prison, his allegedly having "witnessed" the firing of U.S. Attorneys (which he erroneously viewed as a crime), and his distrust of the police. Owens does not contend that the first and second reasons were inappropriate or unsupported by the record. Accordingly, the prosecution offered several indisputably race-neutral reasons for its strike of Juror C.W.

¶86 We need not—and do not—decide whether merely quoting a prospective juror's own statement that he had had an unpleasant experience with law enforcement, which the juror deemed, "DWB (Driving while Black)," necessarily violates *Batson*'s step two. On the specific facts now before us, we conclude that the prosecution offered sufficient race-neutral reasons for its peremptory strike of Juror C.W.

¶87 *Ojeda*, on which Owens relies, is distinguishable. In *Ojeda*, ¶ 12, 503 P.3d at 860, the prosecution attempted to justify its peremptory strike of a Hispanic juror

by stating, among other things, that "the defendant is a Latino male"; the juror at issue, as a Hispanic male, had discussed his concerns about being racially profiled; and the juror thus might "steer the jury towards a race-based reason why" the defendant had been charged in the case. We concluded that this justification was "overtly race-based" and amounted to a suggestion that the juror at issue might not be fair to the prosecution because of his race. *Id.* at ¶¶ 46–47, 503 P.3d at 865–66. Here, in contrast, the prosecution offered several race-neutral explanations to strike Juror C.W. and did not advance an overtly race-based challenge.

¶88 We likewise are unpersuaded by Owens's argument that, by simply referring to Juror C.W. as a "news junky," the trial court had offered its own race-neutral explanation for the prosecution's strike, thereby undermining a conclusion that the prosecution's proffered justification was not race-neutral. When read in context, the trial court appears to have used that description to refresh its own recollection of Juror C.W.'s responses during individual voir dire. Moreover, the court's reference to Juror C.W. as a "news junky" appears to have been connected to the prosecution's concerns regarding Juror C.W.'s reading about the death penalty and wrongfully convicted defendants and to his statement that he had "witnessed" the improper firing of U.S. Attorneys, which he clarified

he had "witnessed" through the news media. Accordingly, we do not agree that the court's comment reflected an independent race-neutral justification.

¶89 For these reasons, we conclude that the prosecution provided race-neutral justifications for striking Juror C.W., and we proceed to the trial court's application of *Batson*'s step three, which Owens challenges on both procedural and substantive grounds.

¶90 As a threshold matter, Owens claims that the court's ruling was procedurally insufficient because it was based solely on a finding that the prosecutor was credible and lacked any reference to the credibility of the prosecutor's explanation. Because Owens raised this argument only in his reply brief and it is well-settled that an appellate court will not consider arguments raised for the first time in a reply brief, we need not address it here. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990), *abrogated in part on other grounds by Rojas v. People*, 2022 CO 8, ¶¶ 32, 41, 504 P.3d 296, 305, 307. Even were we to do so, however, the record shows that in ruling at step three of *Batson*, the trial court stated that it did not question the prosecutor's credibility *and* that the reasons the prosecution had proffered to justify the strike were race-neutral because they included "a number of issues that raise concern" and that "would give a prosecutor some cause." Accordingly, the record does not support Owens's contention that the trial court did not make a proper ruling at *Batson*'s step three.

¶91 Substantively, Owens asserts that the trial court clearly erred in overruling his *Batson* objection because the prosecution's peremptory strike of Juror C.W. failed both the *per se* and the substantial motivating factor tests. We address only the substantial motivating factor test because Owens raised the applicability of the *per se* approach only in his reply brief, and, again, we will not consider arguments raised for the first time in a reply brief. *Id.*

¶92 Owens contends that the prosecution (1) did not question white jurors who had expressed negative experiences with law enforcement; (2) provided post hoc justifications, namely, Juror C.W.'s consumption of what the prosecution labeled very liberal media and his position on the death penalty, to justify the strike of Juror C.W.; and (3) misrepresented Juror C.W.'s position on the death penalty. In Owens's view, these purported facts demonstrate that the prosecution's strike of Juror C.W. was substantially motivated by race. For three reasons, we disagree.

¶93 First, the jury questionnaire asked all jurors to state whether they had ever had "a pleasant or unpleasant experience involving law enforcement" and, if so, to describe that experience. We perceive no suggestion of bias in the fact that the prosecution questioned Juror C.W. regarding his asserted negative experience with law enforcement. Moreover, Owens's reliance on side-by-side comparisons of white jurors who reported negative experiences with law enforcement is unpersuasive. The prospective jurors on whom Owens relies reported receiving

traffic tickets, which would likely be a negative experience for most people. Such experiences obviously are not comparable to Juror C.W.'s response, "DWB (Driving while Black)," and thus, they do not support a claim of disparate treatment by the prosecution. *See Beauvais*, ¶ 56, 393 P.3d at 524 (noting that isolated similarities between and among prospective jurors do not automatically render the jurors similarly situated for *Batson* purposes and that trial courts are better positioned to credit or ignore individual reasons in conducting comparisons).

¶94 Second, we perceive nothing in the prosecution's alleged post hoc justifications for striking Juror C.W. that suggests a racial motivation for the strike. To the contrary, the prosecution's concerns regarding jurors' views of the death penalty (as potentially influenced by the media that they consume) comprised much of the prosecution's voir dire, not just of Juror C.W. but of all of the prospective jurors.

¶95 Finally, although mischaracterization of a prospective juror's voir dire testimony can suggest pretext, we see no basis for concluding that the prosecution's asserted justifications were pretextual here. As an initial matter, although Owens asserts that the prosecution mischaracterized Juror C.W.'s view regarding the death penalty when it asserted that he had expressed the need for irrefutable proof before he would vote for such a sentence, as noted above, at one

point during voir dire, Juror C.W. said that he could vote for the death penalty if there were a video. It is not clear to us that construing such a statement as expressing a need for irrefutable proof was, in fact, a mischaracterization of what Juror C.W. said. Even if the prosecution's statement could arguably be construed as a mischaracterization, however, in light of the prosecution's indisputably and record-supported race-neutral reasons for its strike, which the trial court credited, we cannot conclude that the trial court clearly erred in finding that the strike at issue was not substantially motivated by race.

3. Juror J.C.

¶96 Owens also asserts that the prosecution peremptorily struck Juror J.C. based on her race and that the prosecution's justification for striking Juror J.C. was pretextual in violation of *Batson*'s step three. In support of this argument, Owens points to (1) the trial court's finding that Juror J.C.'s change of heart was credible and genuine; (2) the prosecution's failure to scrutinize white prospective jurors who expressed the same level of hesitation as Juror J.C.; (3) the prosecution's racially-charged questioning about the Black community's perception of Black defendants facing the death penalty; (4) the fact that the prosecution struck Juror C.W. and Juror J.C. back-to-back; and (5) the prosecution's remark that Owens had struck Black prospective jurors as well. We address and reject each of these arguments in turn.

¶97 With respect to the trial court's finding that Juror J.C.'s change of heart was credible and genuine, we note that this finding came in the context of the prosecution's attempt to make a record of Juror J.C.'s demeanor after she had answered the parties' and the court's questions about her change of heart. Owens cites no law suggesting that the trial court's finding in that context is binding on a party for purposes of a subsequent peremptory challenge. To the contrary, a party exercising a peremptory strike may do so for any non-discriminatory reason or combination of non-discriminatory reasons that further the party's litigation strategy. *Beauvais*, ¶ 57, 393 P.3d at 524.

¶98 Owens does not dispute that a juror's inability to impose, or strong aversion to, the death penalty constitutes a valid, race-neutral reason to exercise a peremptory strike in what was, at the time, a capital case. Here, Juror J.C. initially indicated that she could never impose the death penalty because of her religious background. Although she changed her position somewhat during individual voir dire and stated that she could impose the death penalty in certain circumstances, her responses still consistently suggested an aversion to the death penalty. In our view, this provided a proper basis for a peremptory strike, notwithstanding the trial court's finding that the change of heart was credible and genuine, which would arguably have foreclosed a challenge for cause.

¶99 With respect to Owens's contention that the prosecution did not scrutinize white jurors who had expressed hesitation about imposing the death penalty as strongly as it did Juror J.C., the record shows otherwise. Specifically, the record reveals that the prosecution engaged in a thorough voir dire of those jurors, and any differences in the questioning was attributable to the extent and nature of those jurors' hesitation to impose the death penalty. Moreover, the record shows that the prosecution consistently struck jurors who had expressed opposition to the death penalty or difficulty in imposing it. Accordingly, we perceive no error, much less clear error, in the trial court's determination that race was not a substantial motivating factor in striking Juror J.C.

¶100 As for the prosecution's questioning about the Black community's perception of Black defendants facing the death penalty, the prosecution did not rely on that colloquy in exercising a peremptory strike on Juror J.C., and we cannot say that the fact that the prosecution asked a non-race neutral question necessarily rendered its record-supported, race-neutral reason for its strike pretextual.

¶101 For similar reasons, we do not agree that the prosecution's back-to-back strikes of prospective Black jurors established pretext. Although, standing alone, such facts can, depending on the circumstances, suggest pretext, we cannot consider the back-to-back strikes in isolation, but rather we must examine the record as a whole. Doing so here, we perceive no grounds that would allow us to

conclude that the trial court clearly erred in finding that the prosecution's strike of Juror J.C. was not substantially motivated by race.

¶102 Lastly, Owens does not cite, nor have we seen, any persuasive authority to support his contention that a prosecutor's remark that the defense also struck Black jurors establishes pretext.

¶103 For the foregoing reasons, we conclude that the trial court did not err in rejecting Owens's *Batson* challenges as to Juror C.W. and Juror J.C.

C. Lowry Park Evidence

¶104 Owens next contends that the trial court reversibly erred by allowing the prosecution to present excessive evidence of the Lowry Park shootings under both the res gestae doctrine and in violation of CRE 404(b). We are not persuaded.

1. Standard of Review

¶105 We review a trial court's evidentiary rulings for an abuse of discretion. *Rojas*, ¶ 16, 504 P.3d at 302. As noted above, a trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, unfair, or based on an incorrect understanding of the law. *Gutierrez*, ¶ 11, 432 P.3d at 581.

2. Applicable Law

¶106 In *Rojas*, ¶ 41, 504 P.3d at 307, we abolished the res gestae doctrine. Under that doctrine, evidence of other acts that were not extrinsic to the charged offense but were part of the criminal episode or transaction with which the defendant was

charged was admissible to give the fact finder "a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred." *People v. Quintana*, 882 P.2d 1366, 1373 (Colo. 1994), *abrogated in part by Rojas*, ¶¶ 32, 41, 504 P.3d at 305, 307. In *Rojas*, ¶¶ 19, 24, 37, 504 P.3d at 303–04, 306, however, we observed that, over time, res gestae had morphed from what was primarily a hearsay exception to "a catchall for admitting all sorts of misdeeds and character evidence—no matter how attenuated in time, place, or manner—without carefully considering whether it was intrinsic or extrinsic to the charged crime." Noting that the res gestae doctrine thus had created grounds for confusion, inconsistency, and unfairness, we concluded that the adoption of the Colorado Rules of Evidence rendered that doctrine obsolete and that the Rules would govern the admissibility of evidence, with uncharged misconduct evidence that meets certain requirements being addressed in accordance with CRE 404(b). *Id.* at ¶ 3, 504 P.3d at 300–01.

¶107 We then turned to the question of how to decide when CRE 404(b) applies, and we ultimately adopted a framework that turned on whether the proffered evidence was intrinsic or extrinsic. *Id.* at ¶¶ 42–52, 504 P.3d at 307–09. Specifically, we held:

> [I]n evaluating whether uncharged misconduct evidence triggers Rule 404(b), a trial court must first determine if the evidence is intrinsic or extrinsic to the charged offense. Intrinsic acts are those (1) that directly prove the charged offense or (2) that occurred

> contemporaneously with the charged offense and facilitated the commission of it. Evidence of acts that are intrinsic to the charged offense are exempt from Rule 404(b) because they are not "other" crimes, wrongs, or acts. Accordingly, courts should evaluate the admissibility of intrinsic evidence under Rules 401–403. If extrinsic evidence suggests bad character (and thus a propensity to commit the charged offense), it is admissible only as provided by Rule 404(b) and after a *Spoto* analysis. Conversely, if extrinsic evidence does not suggest bad character, Rule 404(b) does not apply and admissibility is governed by Rules 401–403.

Id. at ¶ 52, 504 P.3d at 309.

¶108 Evidence is relevant and admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401–402. Relevant evidence may nevertheless be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403.

¶109 Under CRE 404(b)(1), evidence of other crimes, wrongs, or acts is "not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Such evidence may be admissible, however, if it is offered for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." CRE 404(b)(2).

¶110 To determine whether evidence is admissible for a permitted purpose under CRE 404(b), we apply the four-part test that we outlined in *Spoto*, 795 P.2d at 1318. First, the evidence must relate to a material fact, that is, "a fact 'that is of consequence to the determination of the action.'" *Id.* (quoting CRE 401). Second, the evidence must be logically relevant, meaning that it must have some tendency to make the existence of a material fact more or less probable than it would be without the evidence. *Id.* Third, the logical relevance must be "independent of the intermediate inference, prohibited by CRE 404(b), that the defendant has a bad character, which would then be employed to suggest the probability that the defendant committed the crime charged because of the likelihood that he acted in conformity with his bad character." *Id.* Finally, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Id.*

¶111 Notably, CRE 404(b)(3) requires that in criminal cases, a prosecutor seeking to introduce CRE 404(b) evidence must generally provide pretrial written notice of any such evidence, so that a defendant has a fair opportunity to address it, and this notice must specify the permitted purpose for which the prosecution intends to offer the evidence and the reasons supporting that purpose. *See also People v. Rath*, 44 P.3d 1033, 1039 (Colo. 2002) (requiring the prosecution to articulate a "precise evidential hypothesis" as a condition to admissibility under CRE 404(b)).

In addition, if the trial court determines that the evidence proffered under CRE 404(b) is admissible, then the court must, on request, "contemporaneously instruct the jurors of the limited purpose for which the evidence may be considered." *Rojas*, ¶ 27, 504 P.3d at 305; *see also* CRE 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

3. Application

¶112 Turning to the merits, we initially note that on direct appeal, we generally apply the law in effect at the time of appeal, absent manifest injustice. *Henderson v. United States*, 568 U.S. 266, 271 (2013); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Martinez v. Angel Expl., LLC*, 798 F.3d 968, 977 n.5 (10th Cir. 2015); *see also People v. Stellabotte*, 2018 CO 66, ¶ 3, 421 P.3d 174, 175 (holding that ameliorative, amendatory legislation applies to convictions pending on direct appeal, unless the amendment contains language indicating that it applies only prospectively). (We note that the *Henderson* court went on to conclude that an appellate court assesses plain error at the time of appeal, *Henderson*, 568 U.S. at 279, an issue that we have yet to decide and that is pending before us in another case. By citing *Henderson* for a different point here, we express no opinion on the plain error question.) Accordingly, although we cannot fault the trial court for not

foreseeing that we would abolish the res gestae doctrine long after the trial in this case, we are bound to conclude that the trial court erred to the extent that it admitted any of the Lowry Park evidence under the res gestae doctrine.

¶113 Notwithstanding the foregoing, as noted above, the court performed a *Spoto* analysis and ultimately admitted much of the Lowry Park evidence in accordance with most of the procedural protections required by CRE 404(b), including a limiting instruction. On this point, although we acknowledge that the prosecution did not strictly comply with CRE 404(b)'s notice requirement, the record demonstrates that Owens was fully on notice of this evidence. We thus perceive no prejudice from any failure of the prosecution to provide the advance written notice that CRE 404(b) requires.

¶114 The question thus becomes whether the trial court reversibly erred in admitting the Lowry Park evidence under CRE 404(b).

¶115 In answering this question, we begin by rejecting the People's argument that the Lowry Park evidence was intrinsic and, thus, exempt from CRE 404(b). The Lowry Park shootings did not directly prove, nor did they occur contemporaneously with, the Dayton Street shootings. *Rojas*, ¶ 52, 504 P.3d at 309. Accordingly, we believe that CRE 404(b) applied to much of the evidence at issue here.

¶116 Having so determined, we further conclude that the trial court acted well within its discretion in admitting evidence of the Lowry Park shootings to establish motive and identity under CRE 404(b). The court performed a complete *Spoto* analysis on the record. Specifically, the court determined that the Lowry Park evidence was relevant to motive and identification, which the court deemed material facts, and that without a contextual understanding of why Owens had targeted Marshall-Fields, the jury would be left with the impression that his killing was simply a random act of violence. The court further concluded that motive and identification were important purposes for the prosecution and that the probative value of the evidence was strong enough to overcome any bad inference as to Owens's propensity to commit bad acts.

¶117 We cannot say that these conclusions were manifestly arbitrary, unreasonable, or unfair. Although the Lowry Park evidence was, to some degree, prejudicial, it was not unfairly prejudicial because a good amount of this evidence was necessary to establish the prosecution's theory of its case. And although we might have reached a different conclusion than the trial court were we deciding in the first instance how much of the Lowry Park evidence to admit, the trial court had substantial discretion to decide this issue, and we perceive no abuse of discretion in its determination.

¶118 This leaves the evidence that the trial court admitted to show "background" and "relationships between individuals"—purposes not expressly permitted under CRE 404(b). Such evidence, however, was not other acts evidence falling within the ambit of CRE 404(b). Rather, it was simply evidence that the court determined was relevant under CRE 401 and 402 and not excluded by CRE 403. As to the court's decision to admit such evidence, we perceive no abuse of discretion, particularly given that on appeal, we must afford such evidence "the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected." *Rath*, 44 P.3d at 1043.

¶119 For these reasons, we conclude that the trial court did not abuse its discretion in admitting the evidence of the Lowry Park shootings here at issue.

D. Denial of Mistrial

¶120 Owens contends that the trial court erroneously denied his two mistrial motions, which were based on Sailor's outbursts and her repeated declarations that Owens was guilty. Again, we disagree.

1. Invited Error

¶121 As an initial matter, we reject the People's contention that Owens had invited the error about which he now complains, thus precluding our review.

¶122 As noted above, under our invited error doctrine, parties are prevented from complaining on appeal of errors that they have invited or injected into the

case because parties must abide the consequences of their acts. *Rediger*, ¶ 34, 416 P.3d at 901.

¶123 Here, the alleged error is the refusal of the trial court to grant Owens's mistrial motions after Sailor's outbursts. Owens did nothing to invite what he contends were erroneous rulings on his mistrial motions. Nor did he do anything to invite Sailor to state repeatedly in front of the jury that he was guilty. It is not uncommon for witnesses to be emotional in response to cross-examination. Vigorous cross-examination, however, does not justify improper conduct by a witness, and we reject the People's contention that Owens is responsible for Sailor's conduct here.

¶124 Accordingly, we see no invited error, and we will proceed to the merits of Owens's contentions.

2. Standard of Review

¶125 A trial court has broad discretion to grant or deny a mistrial motion, and an appellate court will not disturb its decision absent a gross abuse of discretion and prejudice to the defendant. *Collins*, 730 P.2d at 303. "A mistrial is the most drastic of remedies." *Id.* Accordingly, it is warranted only when the prejudice to the defendant is too substantial to be remedied by other means. *Id.*

3. Applicable Law

¶126 Whether a mistrial is required following a witness's emotional outburst depends, in part, on whether the outburst was unexpected, the steps taken by the trial court to address the outburst, and how quickly those steps were undertaken. *See People v. Ned*, 923 P.2d 271, 276 (Colo. App. 1996) (perceiving no error in the trial court's ruling denying a mistrial after a witness had an emotional outburst during cross-examination, given that the trial court had removed the witness from the courtroom approximately thirty seconds after her outburst began, called a recess, and found that the outburst was not "necessarily out of place" or provoked by anything other than the circumstances surrounding the death of her son).

¶127 In addition, under Colorado law, "a witness cannot testify that he believes that the defendant committed the crime at issue." *People v. Penn*, 2016 CO 32, ¶ 31, 379 P.3d 298, 305. A mistrial is not always required when a witness so testifies, however, because, in general, "an error in the admission of evidence may be cured by withdrawing the evidence from the jury's consideration and instructing the jury to disregard it." *Vigil v. People*, 731 P.2d 713, 716 (Colo. 1987).

¶128 We presume that the jury understands and will follow a trial court's curative instructions, absent evidence to the contrary. *Bloom v. People*, 185 P.3d 797, 805 (Colo. 2008). A curative instruction is inadequate only when the evidence at issue "is so highly prejudicial . . . it is conceivable that but for its exposure, the jury may

not have found the defendant guilty." *People v. Goldsberry*, 509 P.2d 801, 803 (Colo. 1973).

4. Application

¶129 Here, Owens maintains that the trial court abused its discretion in denying his mistrial motions because, in his view, Sailor's emotional outbursts and repeated declarations that he was guilty rendered the trial fundamentally unfair. Owens further asserts that because the curative instruction provided by the trial court was insufficient to remove the prejudice of Sailor's declarations, the trial court's denial of his mistrial motions was not harmless.

¶130 Owens, however, does not show sufficient prejudice to support a determination that the trial court grossly abused its discretion when it denied his motions for a mistrial. The trial court, which was in the best position to judge the potential prejudice of Sailor's outbursts and declarations, determined that her conduct did not unduly prejudice Owens so as to warrant a mistrial because her outbursts were part of several long diatribes that went to her overall credibility. Moreover, the court employed several curative measures, including recessing the proceeding for the remainder of the afternoon, ordering the prosecution to ask Sailor the next morning to explain why she had been emotional, allowing Owens to cross-examine her on that issue, and instructing the jury to disregard Sailor's opinions as to Owens's guilt. Although Owens claims that these remedies were

insufficient, he has not presented any evidence of specific prejudice or that the jury did not follow the court's instruction.

¶131 The division's opinion in *Ned*, 923 P.2d at 276, is instructive on these points. In *Ned*, the defendant's ex-wife, who was the victim's mother, cried, thrashed about on the witness stand, screeched, screamed, and stamped her feet during cross-examination. *Id.* The trial court removed the witness from the courtroom approximately thirty seconds after her outburst began, called a recess, and subsequently found that the outburst was not "necessarily out of place" or provoked by anything other than the circumstances surrounding the death of her son. *Id.* The court thus denied the defendant's motion to declare a mistrial due to the witness's outburst. *Id.*

¶132 The defendant was convicted, and he appealed, arguing that the trial court had abused its discretion in not declaring a mistrial. *Id.* The division, however, disagreed, reasoning that the defendant had pointed to no specific prejudice resulting from the witness's outburst, and the division's review of the record revealed none. *Id.* The division further observed that it could not speculate as to how the witness's outburst may have affected the jury, and the division would not second-guess the trial court's determination regarding the prejudice, if any, resulting from the witness's outburst. *Id.* at 276–77.

¶133 In our view, the same reasoning applies here. Like the division in *Ned*, we will not second-guess the trial court's determination regarding the prejudice, if any, from Sailor's outbursts, particularly given the court's prompt actions to cure any such prejudice, its curative instruction, and the absence of any specific prejudice identified by Owens or disclosed by the record.

¶134 Accordingly, we conclude that the trial court acted within its discretion when it denied Owens's mistrial motions.

E. Impeachment of Sailor

¶135 Owens argues that he was denied his constitutional rights to confrontation and a complete defense when the trial court precluded him from impeaching Sailor with extrinsic evidence arising from the prosecution of her cousin, White, for the death of White's baby in Michigan, a case in which Sailor was a witness and, it appears, eventually a suspect. Owens specifically contends that the trial court abused its discretion in excluding (1) the testimony of Harris, with whom Sailor had been incarcerated in Michigan, about Sailor's role in the baby's death; and (2) the results of a lie detector test that Sailor took regarding her involvement, which Owens claims were admissible to show specific contradiction, bias, and prior inconsistent statements.

¶136 We discern no abuse of discretion by the trial court.

1. Standard of Review

¶137 "[T]rial courts have broad discretion in controlling the mode and extent of the presentation of evidence," *People v. Cole*, 654 P.2d 830, 832 (Colo. 1982), and we will not disturb a trial court's evidentiary rulings absent an abuse of discretion, *Davis v. People*, 2013 CO 57, ¶ 13, 310 P.3d 58, 61–62. Again, a court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, unfair, or based on an incorrect understanding of the law. *Gutierrez*, ¶ 11, 432 P.3d at 581.

2. Applicable Law

¶138 The Sixth Amendment guarantees to criminal defendants the right to confront the witnesses against them. U.S. Const. amend. VI. To protect this right, a defendant must be given an opportunity for effective cross-examination. *Merritt v. People*, 842 P.2d 162, 166 (Colo. 1992). Effective cross-examination, however, does not mean unlimited cross-examination. *Id.*; *accord Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). A trial court thus has wide latitude to place reasonable limits on cross-examination, based on concerns regarding, among other things, harassment, prejudice, confusion of the issues, waste of time, and marginal relevance. *Van Arsdall*, 475 U.S. at 679; *Merritt*, 842 P.2d at 166. Nonetheless, "it is constitutional error to limit excessively a defendant's cross-examination of a witness regarding the witness' credibility, especially cross-examination

concerning the witness' bias, prejudice, or motive for testifying." *Merritt*, 842 P.2d at 167.

¶139 The Constitution also guarantees to criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). We have stated that this guarantee entitles a criminal defendant to "all reasonable opportunities to present evidence that might tend to create doubt as to the defendant's guilt." *People v. Elmarr*, 2015 CO 53, ¶ 26, 351 P.3d 431, 438. The right to present a defense, however, is not absolute. *People v. Salazar*, 2012 CO 20, ¶ 17, 272 P.3d 1067, 1071. The Constitution requires only that the defendant be allowed to introduce all relevant and admissible evidence. *Id.*

¶140 As noted above, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. Relevant evidence may nevertheless be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403.

¶141 Criminal defendants are denied their constitutional right to call witnesses and present a complete defense only when they were denied virtually their "only

means of effectively testing significant prosecution evidence." *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009).

3. Application

¶142 Here, Owens contends that the trial court deprived him of his constitutional rights to confront the witnesses against him and to present a complete defense when it prohibited him from introducing extrinsic evidence from the Michigan trial to impeach Sailor, one of the prosecution's key witnesses. Owens maintains that the trial court "gutted" his defense by preventing him from introducing Harris's statements and the results of the lie detector tests to (1) contradict Sailor's testimony from the Michigan trial and thus undermine her credibility and (2) show her motivation and bias. He further argues that the trial court's error was not harmless.

¶143 Contrary to Owens's assertions, the trial court did not prohibit him from presenting a complete defense because it did not excessively or unreasonably limit his ability to test the prosecution's evidence. Owens impeached Sailor on almost every issue he wished, including Sailor's testimony that she (1) would not lie just to put somebody in jail; (2) would not lie for Owens and never talk to her family; (3) had not testified against her cousin, White, in the Michigan trial; and (4) had not said anything contrary to the testimony that she gave at that trial. Specifically, on cross-examination, Owens established that Sailor did not have a problem with

"not telling the truth" and that, in fact, she had testified against her cousin and had told the jury that her cousin had been alone with the baby when the baby was injured. Similarly, when Sailor testified that she did not know Harris, had never said that she had been the one who had hurt the baby, and had taken and passed three lie detector tests in response to that accusation, the trial court allowed Owens to impeach Sailor by confirming that she had taken only one lie detector test and that the results were inconclusive. And Owens impeached Sailor's credibility with White's testimony that Sailor was a "drama queen" and that White, and a lot of the family, thought that Sailor was a liar.

¶144 In addition to the foregoing, the trial court also gave Owens ample opportunity to question Sailor's motivation and bias. For example, at trial, Owens established that Sailor was the wife of Owens's best friend and co-conspirator, Ray, had protected Owens and Ray from being identified as the Lowry Park shooters, and had testified against Owens in accordance with her plea agreement and deferred sentence.

¶145 Last, although the trial court placed some limits on how far it would allow Owens to go in re-litigating the Michigan case, which was collateral to the issues presented here, we conclude that in imposing such limits, the trial court properly exercised its discretion in order to avoid a substantial detour into facts having nothing to do with this case.

¶146 Accordingly, we conclude that the trial court did not abuse its discretion in determining the extent to which it would allow Owens to cross-examine Sailor regarding the Michigan trial. Nor did it abuse its discretion in precluding Owens from admitting certain extrinsic evidence from the Michigan case to impeach her. To the contrary, the trial court struck a reasonable balance between Owens's right to confront the witnesses against him and to put on a complete defense, on the one hand, and the court's duty to avoid substantial detours into collateral matters, confusion of the issues, misleading the jury, and undue delay and waste of time, on the other.

F. Cumulative Error

¶147 Finally, Owens argues that, when viewed in the aggregate, the foregoing errors deprived him of a fair trial.

¶148 Under the cumulative error doctrine, although an individual error, when viewed in isolation, may be harmless, reversal is required when the cumulative effect of multiple errors and defects substantially affected the fairness of the trial or the integrity of the fact-finding process. *Howard-Walker v. People*, 2019 CO 69, ¶ 24, 443 P.3d 1007, 1011.

¶149 Here, because we have determined that the trial court did not commit any individual errors, we conclude that Owens has not established cumulative error requiring reversal.

III. Conclusion

¶150 For these reasons, we conclude that the trial court (1) did not prevent Owens from conducting voir dire on potential racial bias, nor did it act unconstitutionally in not informing the jury of Wolfe's race; (2) properly overruled Owens's *Batson* challenges; (3) properly admitted evidence of the Lowry Park shootings under CRE 404(b) and CRE 401–403; (4) properly denied Owens's mistrial motions; and (5) allowed sufficient cross-examination and impeachment of Sailor, while reasonably excluding extrinsic evidence of collateral matters. Having so determined, we further conclude that Owens has not established reversible cumulative error.

¶151 Accordingly, we affirm the judgment of conviction.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 25, 2024 CASE NUMBER: 2008SA402
Appeal from the District Court Arapahoe County, 06CR705	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Sir Mario Owens.	Supreme Court Case No: 2008SA402
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 25, 2024.
JUSTICE SAMOUR did not participate.

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Court address: Arapahoe District Court
Division 407
7325 South Potomac Street
Centennial, Colorado 80112

THE PEOPLE OF THE STATE OF COLORADO

v.

SIR MARIO OWENS

Defendant

COURT USE

Case No:
06CR705

COURT REPORTER'S TRANSCRIPT

The proceedings in this matter commenced at 8:09 a.m., on Thursday, March 20, 2008, before the HONORABLE GERALD J. RAFFERTY, Judge of the District Court.

This is a complete transcript.

A P P E A R A N C E S

FOR THE PEOPLE:	JOHN A. HOWER, ESQ. Registration No: 10946
	ANN B. TOMSIC, ESQ. Registration No: 19393
FOR THE DEFENDANT:	DANIEL B. KING, ESQ. Registration No: 26129
	LAURIE R. KEPROS, ESQ. Registration No: 30963

the courtroom.)

THE COURT: Good afternoon, Mr. Washington.

POTENTIAL JUROR WASHINGTON: Good afternoon.

THE COURT: Sir, could I ask you to move into the front row where -- the front row, sir. I'm sorry. I'm confusing you. Anywhere you're comfortable there, and then could I ask you to raise your right hand.

(Whereupon, Potential Juror Washington was duly sworn by the Court.)

THE COURT: Thank you. Please be seated.

Mr. Washington, let me start with a thank you. Thank you for coming back. Thank you for answering your juror summons and returning a second time. We acknowledge we have taken you now twice from your personal and professional commitments but are grateful that you honor your civic duty.

Did you have a chance to watch the DVD where I explained the four-step process that's involved in a sentencing hearing if a sentencing hearing is ever necessary?

POTENTIAL JUROR WASHINGTON: I do.

THE COURT: I want to point out to you that in front of you is a flowchart of that four-step process. It's an effort to reduce the 17-minute video down to a flowchart. I imagine the attorneys might have questions about the

flowchart when they speak with you, and I just wanted to point it out to you.

POTENTIAL JUROR WASHINGTON: Okay.

THE COURT: Secondly, did you have a chance to go over your questionnaire?

POTENTIAL JUROR WASHINGTON: Yes, I did.

THE COURT: I have a few remarks for you -- well, I should say, one question, a few remarks, and then another couple of questions. Then I turn it over to one attorney from each table. They have a set amount of time to ask questions of you.

POTENTIAL JUROR WASHINGTON: All right.

THE COURT: You indicated on your questionnaire that if you were selected to serve on this jury that you do not believe it would cause hardship, and I am looking to confirm that; is that correct?

POTENTIAL JUROR WASHINGTON: That's correct.

THE COURT: I have another question for you: You are the chief tech for the simulator out at the old Stapleton?

POTENTIAL JUROR WASHINGTON: Yes.

THE COURT: I have to share a personal note with you. Counsel, please forgive me. I was a pilot in the Air Force, and I was always grateful when the simulator was broken. It was many years ago.

I wanted to give you some feeling for where we are in this situation, and then I want to ask you a couple of questions.

You're a citizen who has been summoned as a juror. As a citizen, you have the right to know the following: We're all here about to ask you questions, but you have every right to ask us questions. And so I want you to know, at least don't hesitate to say, I don't understand your question, restate your question, or any other substantive questions that you want answered, we have an obligation to answer.

Do you understand that, sir?

POTENTIAL JUROR WASHINGTON: I understand, yes.

THE COURT: Next, I have to note the following: What do we ask of jurors? We bring people from the community by way of their juror summons, and then we subject them to all this questioning, and then we put them in a jury.

In a criminal trial we put twelve of them in the jury box and we ask them to listen to the evidence, to follow the law the judge gives the jury in the instructions of law at the end of the trial. And lastly, we ask the jury to use their common sense to decide in a criminal case whether the government has proven its case. Regardless of the criminal charge, has the government proven its case

beyond a reasonable doubt? Those twelve people have to decide, and they all have to agree, yes, that they have proved the case. We ask from the jurors one other thing: we ask that they be fair to both sides.

What do I mean by fair? In essence, I mean the jurors promise that they will not let any type of outside influences influence them in deciding whether or not the government has proven the case.

Let me give you a couple of examples. In a case of this length, it would be normal for your family, your friends, your coworkers to realize you're a juror on this case. No one pretends that this case might not attract some media publicity, and so it would not be unusual. It has happened where four or five weeks into the trial you're at a barbecue or something and somebody has a opinion about the case, knowing that you're a juror. Fairness requires that you tell that person, please don't talk to me. And fairness more requires that you say, I will not let that person, their opinion, in any way influence me in deciding whether or not the government has proven its case.

Do you understand what we ask of jurors?

POTENTIAL JUROR WASHINGTON: I do.

THE COURT: Sir, do you believe you can be fair as I've outlined it?

POTENTIAL JUROR WASHINGTON: To be honest with

you, I've followed the death penalty quite some bit, and I've read, like, the report that came out. Actually, the last two reports that came out. And to be honest with you, I'm not sure -- like just recently, I saw this one case where the guy served, like, I guess it was 26 or 27 years in prison, and it turned out that he was actually innocent and the two attorneys that knew the truth. If I hear of something like that and I'm on a jury, I can't say honestly that I'll be a 100 percent certain to say that the guy deserves death.

THE COURT: Understood. Let me start with a couple of points --

POTENTIAL JUROR WASHINGTON: But as far as the family, if it's, like, some cook-out or something and it's a family thing, I can ignore that part, yes.

THE COURT: Put all that aside?

POTENTIAL JUROR WASHINGTON: Right.

THE COURT: So you're telling me, as a citizen you're aware there are a number of cases where it's resulted -- that it's been determined, primarily, as I understand it, by scientific evidence, that the person is not responsible for the crime that they were convicted of.

POTENTIAL JUROR WASHINGTON: That's correct.

THE COURT: And you're saying if you had any feeling like that -- let me start over: If you were

selected as a juror in this case and you had any feeling like that in this case, you would -- you could not be objective in deciding whether or not the government has proved its case. Am I stating it correctly?

POTENTIAL JUROR WASHINGTON: I say if I felt like I'm at the borderline, say I'm 50/50 undecided --

THE COURT: Okay. We have to stop for a moment. 50/50 at the trial or 50/50 at the sentencing hearing?

POTENTIAL JUROR WASHINGTON: Towards the sentencing.

THE COURT: So you're talking about the sentencing hearing?

POTENTIAL JUROR WASHINGTON: Yeah. Like say if it reaches the day of, you know, giving you a verdict, and say if it was where I was watching C-Span or something or Democracy Now, because I stated in here I follow -- I try to follow politics closely, and if I'm, like, borderline, if I'm 50/50 on my decision, not decided if he's guilty or innocent, if I'm still struggling with that answer and if I was to see something like that, that's what I'm saying, that could sway me.

THE COURT: Now, I think I understand your point. Let me give you my little speech that I give to the jurors who are selected.

POTENTIAL JUROR WASHINGTON: Okay.

THE COURT: The jurors take an oath -- let me set the scene for you -- so the twelve people selected to try the case, they take an oath. It's different from the oath I just gave you. The oath says, I swear that I will decide the case on the evidence and the law and nothing else.

And so then after they take that oath, I tell them the following: Ladies and gentlemen, we live in the age of information. We're bombarded by information: radio, television, newspapers, Internet, magazines. You have been selected and you have just sworn that you will be fair. And so -- and this is what I say to them -- so I respectfully suggest the following: In order to be sure you're fair, if you see, hear, read or listen to anything remotely connected with this type of case, not the case, this type of case, I would respectfully suggest -- I can't order you to do this, but I would respectfully suggest you shouldn't pay any attention to it. Turn the channel, turn the page on the newspaper, move on from whatever web page you have open that you might be reading in order to ensure that you will not allow those outside influences to influence you.

You as a citizen have every right to know about all these things, ladies and gentlemen, but the question is, is it fair for you to consider them when you're considering -- when you're involved as a juror in deciding whether or not the government can prove its case, and you

have to decide it fairly and objectively.

So that's what I tell people. And that's what I would tell you, Mr. Washington, is that you have every right to listen to that stuff, but we appreciate your candor. You're telling us that stuff -- and I don't mean stuff in a bad way; I mean legitimate information about what's going on in politics and the criminal justice system in this country. But I'm just respectfully saying it's probably not fair to both sides to read or listen to that type of material while you're a juror, just so you can say, I'm just going to do this job and when it's -- of course, when it's done, you can save it all up and read it.

But some people don't feel comfortable doing that. And, as I repeat, I can never order any of the jurors to do that, I just have to ask you what do you think about that, about doing that? We appreciate your concern and we're grateful that you acknowledge it, but it's really kind of up to you to tell us.

POTENTIAL JUROR WASHINGTON: The problems is, I was pretty much raised on politics and to shy away from it for ten weeks, I don't know. I think it's part of my life.

THE COURT: Yes, sir.

POTENTIAL JUROR WASHINGTON: Just trying to picture turning it off for ten straight weeks, it's almost like a smoker or a alcoholic. That's the way I am.

MR. KING: May we approach the bench?

THE COURT: That means they want to talk to me without you hearing. So let me talk to them for a moment.

(There was a discussion at the bench held out of hearing of the juror that was not recorded.)

THE COURT: I think I overstated. That's what they just told me. I think I overstated my point.

I'm not saying don't read about politics. I'm reminded it's a presidential election year. It's a big year. It's a very big year, I would note. I'm not saying that. I'm saying material related to this type of case. That's what I'm saying, stuff about criminal cases and stuff about -- you know --

POTENTIAL JUROR WASHINGTON: That I can turn off.

THE COURT: That you can turn off?

POTENTIAL JUROR WASHINGTON: Yes.

THE COURT: Okay. If you did that -- if you did that, do you believe it would give you comfort in being objective at the point in time where you have to make your own decision? Now, when I say objective, I mean when you get to the sentencing process here -- the lawyers are going to explain it to you in better detail than I did on the DVD -- but it's your own decision. So I just mean, do you believe if you did that, if you stayed away from reports about criminal cases for the next ten weeks, that you could

be fair to both sides when you reach this process?

POTENTIAL JUROR WASHINGTON: That I can do.

THE COURT: Sorry. I did overstate it.

You indicated to us, and I just want to confirm once again, that you have some memory of the local news coverage about the incidents that led to the case that we have before us now. Am I correct?

POTENTIAL JUROR WASHINGTON: Yes, sir.

THE COURT: From March 5 when I last saw you in that big room with all those people until today, any exposure to any media records about the case?

POTENTIAL JUROR WASHINGTON: No. Just one time I returned home from work and my wife had told me how -- she had mentioned that they showed the jurors going to the courthouse and it was when the media was outside. And that was it.

THE COURT: That was it?

POTENTIAL JUROR WASHINGTON: Yes.

THE COURT: And I know we have just been over this, but let me ask: Can you commit to both sides that you would continue to follow my instructions and any reports about this case in any type of media, newspaper, Internet, that you would turn away from it immediately, turn the page --

POTENTIAL JUROR WASHINGTON: Yes.

THE COURT: -- hit the down page on the computer or whatever, you would do that to be fair?

POTENTIAL JUROR WASHINGTON: I would.

THE COURT: We're at the point where I'm about to turn it over to the attorneys. And they each have a set amount of time. I just want to ask one last question.

Wait. No. I think I have a few more things I have to tell you. After -- yes, there is one -- two more things I have to tell you. I'm sorry.

We are in an unusual situation, as we have talked to you this afternoon, for the following reason: We are talking about possible punishments in a case when there's been no jury selected. There's been no evidence offered. There's been no instructions from the Court as guidelines for the jury. And there's been no deliberation of the jury to reach a verdict. We don't know in this case if the government can prove its case at the trial. That's what we call the guilt/innocent part. We don't know. And yet we're talking about possible punishments.

I tried to explain on the DVD, but let me be a bit more direct here. The law in Colorado recognizes that when the government brings a charge of first-degree murder after deliberation against a fellow citizen of yours and mine, that person, if they are convicted of that charge, if the government can prove that charge beyond a reasonable

doubt to the satisfaction of the twelve jurors, Colorado law says the jury must decide what the punishment is. All other times the judge decides. But in this case, the jury would decide if the government can prove its case beyond a reasonable doubt.

I tell you that for the following: Colorado law also says that citizens of this country have strong views about these penalties, when they're appropriate, if they are appropriate, that type of thing. And so the law recognizes that we can talk to each of you individually so that your views don't influence another juror's views. That's why we need to talk to you individually.

Do you understand that, sir?

POTENTIAL JUROR WASHINGTON: Yes.

THE COURT: Finally, most importantly, because we're talking about possible punishments where nothing of substance has happened in this case, it is most important that we all presume Mr. Owens to be innocent until and unless the government can prove its case. That would happen at trial. But now as we talk about possible punishments, can you presume Mr. Owens to be innocent until and unless the government can prove its case?

POTENTIAL JUROR WASHINGTON: Yes.

THE COURT: Now I can ask my question. Here's the hypothetical before I ask the question: If you were

selected to be on this jury, if you and the eleven other jurors were satisfied beyond a reasonable doubt that the government had proved that charge, murder in the first degree, murder after deliberation, if you and the other jurors then went through the sentencing process, the four-step process that's on the board here, if you made it all the way through that process, you would be at Step 4, and that's where I want to ask my question. Those are all big ifs.

But if you found yourself at Step 4, do you believe, Mr. Washington, you could look at these two possible penalties, life without any possibility of parole or the death penalty, fairly and equally at the start of your determination, then can you make your own decision about what you think would be the correct punishment between those two?

POTENTIAL JUROR WASHINGTON: I believe I can.

THE COURT: Then we're going to start the questioning with the Prosecution. This is Ms. Warren.

MS. WARREN: Thank you, Your Honor. Can I also talk to him a little bit about some of the answers on Page 2?

THE COURT: Yes.

MS. WARREN: Okay.

Hi, Mr. Washington. My name's Emily Warren. I'm

one of the deputy DAs prosecuting this case.

POTENTIAL JUROR WASHINGTON: Okay.

MS. WARREN: The first thing I wanted to talk to you about is simply the death penalty sentencing process in Colorado. Before you came in to fill out your questionnaire and Judge Rafferty gave you a small explanation of the sentencing process and then before you watched the video that provides a much more detailed description, did you know much about how the sentencing process works in Colorado when the death penalty is being sought?

POTENTIAL JUROR WASHINGTON: No.

MS. WARREN: Okay. That is not unusual. We have yet to have somebody who says yes.

What did you think about the process when you heard it described in detail on the video?

POTENTIAL JUROR WASHINGTON: That it was more involved than I thought it was.

MS. WARREN: More involved than you thought that it was. Did it sound like a good process? A bad process? A reasonably careful process? Something else?

POTENTIAL JUROR WASHINGTON: Sounded like it was a reasonable process.

MS. WARREN: Okay. Did it seem to you to be a process that made efforts to be fair to the defendant?

POTENTIAL JUROR WASHINGTON: Yes.

MS. WARREN: Do you think that's important?
POTENTIAL JUROR WASHINGTON: Yes.
MS. WARREN: Explain why.
POTENTIAL JUROR WASHINGTON: Well, again it's where -- pretty much my determining the death penalty it's where I -- I look at it as a lot of avenues that can be more fair to the victims or the -- actually both sides, I should say.
MS. WARREN: So it seems as though it's a fair process for both sides?
POTENTIAL JUROR WASHINGTON: I believe so.
MS. WARREN: In Colorado every person who's convicted of murder in the first degree is not automatically eligible for the death penalty. Did you understand that?
POTENTIAL JUROR WASHINGTON: Right.
MS. WARREN: The way that Mr. Owens is charged with first-degree murder, there's a variety of different ways a person can commit that crime in Colorado. But the way it's charged in this case, first-degree murder is after deliberation with the intent to cause the death of another person causes the death of anybody.
So murder in the first degree requires that the defendant act both intentionally and that he act after deliberation. Before you even get to the sentencing process, the jury would have to find Mr. Owens guilty of

first-degree murder. It wasn't an accident. There was no self-defense. There was no legal justification. No insanity. No heat of passion. Nothing like that. Do you understand that?

POTENTIAL JUROR WASHINGTON: I understand.

MS. WARREN: In Colorado, the only way that a person is eligible for the death penalty is if the District Attorney's Office can prove to the jury unanimously beyond a reasonable doubt that at least one aggravating factor exists. And I think that was talked about on the video as well.

Some of the aggravating factors -- there's a long list of possible aggravating factors. Some of them have something to do with the defendant. Has he killed before? What's his criminal history? Things like that. Some of them have to do with the status of the victim: the victim was a child; the victim was a peace officer engaged in the performance of his or her duties; the victim was -- there were more than one victim in a given murder. Things like that. And some of them have to do with the way in which the crime is committed.

Before the jury even gets to consider whether or not to impose the death penalty, this is the first thing the jury has to determine.

Does that makes sense to you?

POTENTIAL JUROR WASHINGTON: Yes, it does.

MS. WARREN: If the jury is not unanimous that the District Attorney's Office has met that burden, then it's a default sentence to life.

What do you think about that; that there's a default for life if the jury is not unanimous?

POTENTIAL JUROR WASHINGTON: I was under the impression that the jury would first decide if the person is guilty or not guilty.

MS. WARREN: Right. You've already done that. So assume you have already found Mr. Owens guilty of murder in the first degree. Next step is, have we proven something more? Let me give you a little bit more explanation, because I may have leapt ahead too fast.

The evidence is presented at the trial initially. The jury deliberates on whether or not Mr. Owens is guilty. If the jury determines he is guilty of murder in the first degree, at least one count, then you come back in here, we present more evidence to you. And then you return to consider these things.

So the first step is, has the District Attorney's Office proven that it's a more serious crime -- aggravated murder is a very serious crime, but a more aggravated crime than just the simple elements of murder?

POTENTIAL JUROR WASHINGTON: I understand now.

MS. WARREN: Okay. The second step requires each juror, him or herself, to consider mitigating information. Mitigating information is a reason to impose a life sentence. It could be things about the defendant's background, his character, his history; it could be a sense of compassion or mercy for the defendant. But each juror him or herself determines whether mitigation exists in the evidence that was presented, and, if so, what that mitigation is.

Do you think you could do that?

POTENTIAL JUROR WASHINGTON: It would be my own decision.

MS. WARREN: Your own decision. Okay.

At Step 3 the jury has to evaluate the mitigating information and the aggravating factors that have been proven, sort of assign a value to each of those things and weigh them against each other. Every juror has to be unanimous that mitigation is not more significant for the jury to move on to Step 4. So again, there's a default out for life. If eleven jurors say mitigation does not outweigh aggravation and one juror says, I disagree, Mr. Owens gets a life sentence. Deliberations are over.

Does that make sense?

POTENTIAL JUROR WASHINGTON: Yes.

MS. WARREN: And then finally, at Step 4 each

juror makes a decision about whether or not he or she believes, based on the aggravating factors, the mitigation that you found to exist, and any other information that's been presented to you -- that could be additional information about the victim, the defendant, things like that -- makes a decision about whether death is the appropriate penalty. Okay?

THE COURT: Two minutes.

MS. WARREN: Thank you, Your Honor.

Do you think you could do that? Decide that somebody should die because of the aggravation, the mitigation -- notwithstanding the mitigation, and any other information? Do you think you could, knowing, you know, what you know about reading these death problems reports -- problems with the death penalty and problems with convictions, things of that nature, do you think you would be able to do that, make that kind of a final decision?

POTENTIAL JUROR WASHINGTON: I believe I could.

MS. WARREN: I wanted to ask you, you said on your questionnaire that you have had some less than fantastically pleasant experiences with police officers. Any agency in particular, or just police officers in general?

POTENTIAL JUROR WASHINGTON: In general.

MS. WARREN: And then on the issue of have you

ever witnessed a crime, you said you had witnessed illegal firing of the U.S. attorneys by the current administration. Is that stuff you have read about, watched news reports about, or were you somehow working at a U.S. attorney's office? I just was confused by that.

POTENTIAL JUROR WASHINGTON: No. That was just from watching, like, video footage.

MS. WARREN: Okay. Okay.

POTENTIAL JUROR WASHINGTON: C-Span, they showed --

MS. WARREN: Got it. I understand. I was a little confused. I looked at it and went, wait a minute, what does he do for a living? And then I was -- I just had a disconnect for myself.

I wanted to ask you about your comment, I have three kids who deserve a violence-free society. Tell me a little bit more about what motivated you to include that in the questionnaire.

POTENTIAL JUROR WASHINGTON: Well, as you can see in there, it's, like, from far back to like say the '60s, things where I saw the violence. And at that time, from my experience, it was more of just people wanting to live a decent life. And yes, there was more police officials and government officials. They all were just -- this was back in the '60s with the riots and all.

MS. WARREN: Okay.

POTENTIAL JUROR WASHINGTON: And to this day I look at it, for individuals to commit crimes of any sort, it burns me up because I look at it as more of it's a waste. It's like my mother and all they fought for civil rights and all. And to still see some of the violence that you see, I don't like it.

MS. WARREN: Okay.

POTENTIAL JUROR WASHINGTON: I tell my kids if they ever get in trouble with the law, don't call me unless you're innocent. But --

MS. WARREN: But if they've done something, they're --

POTENTIAL JUROR WASHINGTON: They're on their own.

MS. WARREN: Let me ask you just one last question about -- you said that you read the most recent death penalty reports and concern about defendants being convicted. How is that going to play into a decision that you might make concerning life or death?

I mean, do you think you could ever be convinced beyond a reasonable doubt that death was the right sentence?

POTENTIAL JUROR WASHINGTON: I mean, in some instances where you see video, for instance, of someone committing a crime, I look at it as -- to me it's definitely

beyond a reasonable doubt.

MS. WARREN: Okay.

POTENTIAL JUROR WASHINGTON: So something like that, it's no question.

MS. WARREN: What if we don't have video footage? Are you going to ever be able to say, you know what, I'm convinced that that is the right sentence, knowing what I know and knowing what I've learned and knowing about the evidence in the case?

POTENTIAL JUROR WASHINGTON: Something like that, I would base it on is there -- if there is a number of, say, witnesses and evaluate if they are saying the same thing. That could convince me beyond a reasonable doubt.

MS. WARREN: So the strength and weight of the evidence could convince you beyond a reasonable doubt that death is appropriate?

POTENTIAL JUROR WASHINGTON: (The potential juror nodded.)

MS. WARREN: I'm sorry. You're nodding, but the court reporter can't write down your nod. That's why --

POTENTIAL JUROR WASHINGTON: Yeah.

MS. WARREN: Okay. Thank you very much.

THE COURT: Now the other side has an opportunity to ask you questions. It will be from Mr. King.

MR. KING: Good afternoon, Mr. Washington.

POTENTIAL JUROR WASHINGTON: Good afternoon.

MR. KING: My name's Dan King. I'm one of Mr. Owens' attorneys, who is this young man sitting right here.

Mr. Washington, I wanted to ask you some questions about how you feel about this sentencing. But first I wanted to -- you're very concerned about being convinced beyond a reasonable doubt. You're very concerned about convicting someone that's innocent. Is that fair?

POTENTIAL JUROR WASHINGTON: Yes, that's fair.

MR. KING: And can you see why I might be a little bit troubled about the fact that Mr. Owens has pled not guilty, there's been not a shred of evidence presented against him, and we're talking about penalties here?

POTENTIAL JUROR WASHINGTON: I'm aware of that.

MR. KING: Can you see why that would be somewhat concerning to me?

POTENTIAL JUROR WASHINGTON: Yes.

MR. KING: Does the fact that we're engaging in this process in any away suggest to you that Mr. Owens is guilty?

POTENTIAL JUROR WASHINGTON: Well, I was kind of getting the impression. But then Your Honor, at the end, he parted up about being not guilty until proven innocent.

MR. KING: You seem like the type of person to me

that can presume someone to be innocent, and I just want to check that with you.

POTENTIAL JUROR WASHINGTON: Oh, yes.

MR. KING: And you understand, then, all of this stuff that we're talking about here only happens if you and the other jurors are convinced beyond a reasonable doubt of guilt?

POTENTIAL JUROR WASHINGTON: Right.

MR. KING: So if you had a reasonable doubt about whether the person was guilty or not, none of this would happen.

POTENTIAL JUROR WASHINGTON: I understand.

MR. KING: And so what I want to do is I kind of want to bring you to that point. And please bear with me. I'm not saying Mr. Owens is guilty, but we have to get there in order to talk about this stuff, because it would never happen otherwise.

POTENTIAL JUROR WASHINGTON: Right.

MR. KING: If you could hypothetically imagine yourself on another murder case, and you sit through the whole case, and you hear the argument of the lawyers and hear all the evidence, the testimony of the witnesses, the scientific evidence, everything that's presented. You go to the jury room with the other jurors and you deliberate. And you have plenty of time to hash everything out. And then

when it's all come down to it, you and the other jurors together are convinced beyond a reasonable doubt that the person is guilty of the murder.

Now, I don't know what that's going to take to convince you, but assume for me that you are convinced, whatever it takes, a videotape, DNA evidence, whatever's going to convince you beyond a reasonable doubt you have seen in the courtroom. And you're convinced beyond a reasonable doubt that the killing didn't happen in self-defense. It's not an accident. The person wasn't forced to do it at gunpoint. They're not crazy. Okay. There's just no justification. There's no excuse. It's an intentional, deliberate murder, meaning the person intended to kill a person, they thought about it, and they did it; and they knew what they were doing and they knew it was wrong.

Understanding that that's -- it may take you a lot to be convinced of that, if you were convinced of that and you decided in your heart of hearts that the person was guilty of that kind of intentional murder, where are you at that point between the two penalties, the penalty of life without parole and the penalty of death? At that point, have you -- do you think one is appropriate, or are you still undecided?

POTENTIAL JUROR WASHINGTON: I mean, first off, I

would look at life in prison.

MR. KING: Okay. So that's kind of your jumping-off place?

POTENTIAL JUROR WASHINGTON: Yeah. I mean, answering your question where would I start off.

MR. KING: Knowing only that?

POTENTIAL JUROR WASHINGTON: Yeah.

MR. KING: And it's important that you know, and Ms. Warren pointed out that the State of Colorado is always satisfied with the life without parole verdict. There's no case that requires the death penalty, unless that's what you think is right. You being the people in the jury.

And that's why, at every step, there's a kind of default to life. Life is kind of the starting place for the law too. So the law is kind of in conjunction with the way you think about this, it sounds to me.

If -- because -- well, you're going to start with life, but at that point you're still willing to listen to the rest of the process, go through the process, and you're still considering the death penality, I imagine.

POTENTIAL JUROR WASHINGTON: (The potential juror nodded.)

MR. KING: Is that a yes?

POTENTIAL JUROR WASHINGTON: Yes. Yes.

MR. KING: And you said that you could conclude

the aggravating factor here, beyond a reasonable doubt, and that's something that makes that crime even worse, killing for money, killing more than one person, killing a baby. There's a whole list of things and you just have to decide, has it been proven to me beyond a reasonable doubt. And it sounds to me like you could do that.

POTENTIAL JUROR WASHINGTON: Yes.

MR. KING: At Step 2, the process kind of changes a little bit, because at the guilty verdict in Step 1, it's kind of an A plus B equals C. It's kind of a look at it, you analyze it, and you render your verdict. Step 2 you have to decide what's mitigation to you, where each individual juror has to look at the facts of the case, perhaps the background of the individual, your own moral compass, your own sense of mercy, or whatever it may be, is all relevant at that point. And the only definition is whatever to you may be a reason to give a life sentence.

And you, as a juror, have the right to find mitigation in anything you want. It may come out of my mouth. It may come out of somebody else's mouth, or it may just come out of your own mind.

POTENTIAL JUROR WASHINGTON: Okay.

MR. KING: Okay. Do you think you could do that? Do you think that you would want to consider all those things before making this kind of a serious decision?

POTENTIAL JUROR WASHINGTON: Yes.

MR. KING: How about things about the defendant? Would you want to take into consideration -- understanding you can get it whatever way you want to, right, would you at least want to hear and take into consideration the upbringing of the defendant, the schooling of the defendant, emotional problems or something that they may have, things along those lines?

POTENTIAL JUROR WASHINGTON: As far as considering the life imprisonment or . . .

MR. KING: Sure. In your determination of which is the appropriate sentence?

POTENTIAL JUROR WASHINGTON: Yes.

MR. KING: And you, as a juror, have the right not only to find mitigation whenever you want, but you have the right to assign whatever weight or value to that mitigation that you want. In other words, you can say this one thing is extremely important to me, and you may give it all of the weight in the world. It's entirely up to you.

If you go down through -- after you do the weighing and you get to Step 4 here, and I want to focus on this a little bit, Steps 1, 2, and 3, we call -- "we" being the lawyers, I guess -- call the eligibility phase. It's to determine whether the crime is eligible for the death penalty.

Step 4 is what's called the selection phase. This is the phase where the jury actually determines what sentence is appropriate. Okay. At this stage, what we have is an independent moral choice that each juror makes about which is the appropriate sentence.

And you can pay attention to what happened before or not. The law calls it a reasoned moral decision on the part of each juror. You can discuss with the other jurors what you think. But when the rubber hits the road, it's all about Mr. Washington and what he thinks and what his moral code thinks is appropriate.

THE COURT: Pardon me. Two minutes.

MR. KING: Two minutes? Thank you.

Do you think that -- and I think you said that you could make that kind of serious decision if you had all of the information that you thought you needed?

POTENTIAL JUROR WASHINGTON: Yes.

MR. KING: And it seems to me like that's something you're going to take very seriously.

POTENTIAL JUROR WASHINGTON: No doubt.

MR. KING: But you would consider it your duty and you would do that?

POTENTIAL JUROR WASHINGTON: I believe I can, yes.

MR. KING: Ms. Warren asked you about the death

verdict down here. I want to ask you a little bit about the life verdict as well.

In the State of Colorado, it takes twelve people. Every juror has to think death is the appropriate sentence in order for that to be the punishment. If one juror says no, I think life is right, that's what the penalty is. Is that fair to you that it can come --

POTENTIAL JUROR WASHINGTON: I believe it is.

MR. KING: Does it seem fair to you that one juror may have a different moral viewpoint and there's that default to life again?

POTENTIAL JUROR WASHINGTON: I believe so.

MR. KING: In your mind is life without the possibility of parole, which is what it means in Colorado, never get out of prison, is that a serious penalty?

POTENTIAL JUROR WASHINGTON: Yes, it is.

MR. KING: Yeah. If you were down here and you were the one juror who felt, based upon whatever it is, your sense of mercy, whatever it may be, that life is the appropriate sentence, if you're not convinced death is appropriate beyond a reasonable doubt, are you going to be able to stick to your guns and tell the other people in the jury, this is what I think, you need to respect my decision?

POTENTIAL JUROR WASHINGTON: I believe I would.

MR. KING: Okay. If you were on the other side;

if you were one of eleven people that thought death was the appropriate penalty and there was one person there who said, I don't think it's right; I can't really point to one reason why I don't think it's right, but I don't think it's right; could you respect that person's opinion?

POTENTIAL JUROR WASHINGTON: I believe I could, yes.

MR. KING: Would you try to bully that person out of their position or would you accept that moral judgment?

POTENTIAL JUROR WASHINGTON: I would respect that person's decision.

MR. KING: Thank you, sir. I don't have any more questions, Judge. Thank you.

THE COURT: Mr. Washington, can I ask you to step outside for a couple of minutes. Let me talk to the attorneys and I'll get you back as quickly as possible.

POTENTIAL JUROR WASHINGTON: Okay.

(Whereupon, Potential Juror Washington exited the courtroom.)

THE COURT: For the Prosecution?

MS. WARREN: No, Your Honor.

THE COURT: For the Defense?

MR. KING: No, thank you.

THE COURT: Can I have Mr. Washington back.

(Whereupon, Potential Juror Washington entered

the courtroom.)

THE COURT: Mr. Washington, you don't even have to sit down. I'm going to ask you to return on April 2.

On March 5, I told you I was going to hold a group questioning on March 26, but I have had to push that back to April 2.

POTENTIAL JUROR WASHINGTON: Okay.

THE COURT: April 2 at 8:30, I'm going to ask you to report downstairs to the jury commissioner's office.

And on behalf of everyone, thank you for your patience with us. Thank you for coming back this afternoon.

POTENTIAL JUROR WASHINGTON: Okay.

THE COURT: The young man's going to give you a green sheet of paper. There's a phone number on there. And after March 24, they will be updating the phone number as to whether or not I can hold the date of April 2. So please call that number after next Monday.

POTENTIAL JUROR WASHINGTON: Okay.

THE COURT: And then, finally -- I hesitate, I'm only kidding, you -- your media -- can I say you're a media addict, right, if I'm understanding you?

POTENTIAL JUROR WASHINGTON: As far as politics, yes.

THE COURT: As far as politics, right. But as far as this case, would you please follow my instructions as

you have already, not listen, read, or watch any media reports about this case?

POTENTIAL JUROR WASHINGTON: Yes.

THE COURT: Thank you, sir.

POTENTIAL JUROR WASHINGTON: Okay. Thank you.

(Whereupon, Potential Juror Washington exited the courtroom.)

THE COURT: Next we have Juror 4389.

MR. HOWER: Sopwith Camels had flight simulators?

THE COURT: Pardon me?

We're off the record.

(Whereupon, there was a discussion held off the record.

(Whereupon, Potential Juror Lynch entered the courtroom.)

THE COURT: Good afternoon, sir.

POTENTIAL JUROR LYNCH: Good afternoon.

THE COURT: Can I ask you to raise your right hand before you sit down.

POTENTIAL JUROR LYNCH: Yes, sir.

(Whereupon, Potential Juror Lynch was duly sworn by the Court.)

THE COURT: Please be seated, sir.

Mr. Lynch, I want to start with a thank you. Thank you for coming back. We understand we have taken you

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Court address: Arapahoe District Court
Division 407
7325 South Potomac Street
Centennial, Colorado 80112

COURT USE ONLY

THE PEOPLE OF THE STATE OF COLORADO,

v.

SIR MARIO OWENS,

Defendant.

Case No: 06CR705

COURT REPORTER'S TRANSCRIPT

The hearing in this matter commenced on Monday, April 7, 2008, before the HONORABLE GERALD RAFFERTY, Judge of the District Court.

Ms. Roth, can I have you fill that seat. Thank you so much. Thank you.

Now we're at the thirteenth for the defense.

MR. KING: The defense would thank and excuse Ms. Obendorf.

THE COURT: Thank you. You are excused. Mr. Washington, thank you, sir. We're at the twelfth peremptory for the prosecution as to certain seats.

MS. WARREN: Judge, the People would thank and excuse Mr. Washington.

THE COURT: With regard to Mr. Washington, thank you, sir. You are excused. And that means Mr. Lynch is heading there.

That was the twelfth peremptory for the prosecution. Takes me to the fourteenth. Ladies and gentlemen, I have to ask you to please stand for a minute or two and talk. We'll take a stretch here. I need to talk to the attorneys. Counsel approach.

(Whereupon, a bench conference was held and the following proceedings were had:)

THE COURT: Yes.

MR. MIDDLETON: We're going to make a Batson challenge with respect to Mr. Washington. As the court can see, there's very few African persons on this panel. The only one currently in the first 20 is the alternate seat.

Mr. Washington was the first one who made it into actual non-alternate seat, and the prosecution challenged it.

MS. WARREN: I'm a little troubled by the timing of this. They waited until Mr. Washington was out of the courtroom.

THE COURT: I sent my law clerk to retrieve --

MS. WARREN: I think the court recalls Mr. Washington. This is a gentleman when asked if he had any experiences with law enforcement, he said, yes, driving while black. He believes that he has witnessed the firing of the US Attorneys. That's something that he's seen on television not witnessed. He thinks that's a crime and that is not a crime. That's perhaps a civil matter.

In addition he has done reading on the death penalty. He told the court he has read the two most recent reports about death penalty so he has recent information about the topic. He told us he is aware of wrongful-accused defendants in jail for many, many years before they're finally freed and that if he read about something like that close in time to which he was trying to make a decision that would sway him and plus lead towards not guilty verdict leaving aside the fact that the court asked him and he agreed not to do any reading and research during the trial.

The reality is that is part of his knowledge and experience in life. And so it is for those reasons having

absolutely nothing to do -- the driving while black has a racial overtone. That indicated a distrust of police and police are wrongfully targeting people of that race and obviously Mr. Owens' race. And the other issues are issues that we would challenge any juror notwithstanding race, gender, religion.

THE COURT: Response please.

MR. MIDDLETON: On the -- as far as the research of the death penalty, I don't believe that was Mr. Washington. I believe that was a different juror that the court instructed not to do the research on.

MS. WARREN: No. Different topic. Sorry.

MR. MIDDLETON: As far as the driving while black, he is black. He's an African American. He's one of the few on the panel that would bring that aspect to this case. He doesn't indicate that he would vote against the prosecution or the police, and we don't believe it's a sufficient reason -- sufficient neutral reason.

THE COURT: Well, in the end, I'm required to evaluate the prosecutor's credibility on this. Prosecutor has listed a number of issues that raise concern, and I find them to be race neutral. And I do not question the prosecutor's credibility. These are -- these are circumstances that would give a prosecutor some cause. The driving while black, I agree it has a racial overtone to it but it is a reason for

the prosecutor to be concerned.

The other points of -- I do remember -- Mr. Washington, the gentleman who said news junky?

MS. WARREN: Into politics. You asked him not to do anything with politics. It would be like alcoholic not to drink.

THE COURT: I know.

MS. WARREN: That's what he said.

THE COURT: It was -- well, with regard to it, I have to note for the record in fairness that Mr. Middleton's assessment is correct with regard to African-American population currently on the jury. Those are race-neutral positions from my perspective.

MS. WARREN: I have two more reasons for purposes of the record. He said he could be convinced of death penalty appropriately but only if irrefutable proof of the crime. That's what he said in his questionnaire and I think when he was individually questioned. But in addition one of the things that he links is Air America which is a very liberal talk radio show. Those are two additional reasons.

THE COURT: He passed death qualification so that would not be appropriate reason I don't think.

MS. WARREN: He did, but I don't think that rose to the level for challenge for cause.

THE COURT: I see, for peremptory?

MS. WARREN: Right, right.
THE COURT: Understood. Any further record for the defense?
MR. MIDDLETON: No.
THE COURT: Thank you. Noted.
(Whereupon, the bench conference was concluded.)
THE COURT: Ladies and gentlemen, please be seated.
Mr. Lynch was last substitute, and I believe that puts us at the defense table with regard to the fourteenth peremptory.
MR. KING: Thank and excuse Ms. Farrel in seat number 17.
THE COURT: Ms. Farrel, thank you. You are excused. Ms. Canada, can I ask you to take that seat. Thank you, Ms. Canada.
That was the fourteenth peremptory by the defense. It takes us to the thirteenth peremptory by the prosecution.
MS. WARREN: The People thank and excuse Ms. Canada.
THE COURT: The People thank and excuse Ms. Canada. Can I ask you to hold. Let me talk to the attorneys. Ladies and gentlemen, please stand, talk about anything but don't talk about the case. Let me talk to the attorneys.
(Whereupon, there was a bench conference and the following proceedings were had:)
THE COURT: We're at the side bar. Mr. Middleton.

DISTRICT COURT
ARAPAHOE COUNTY
COLORADO
7325 S. Potomac Street
Centennial, CO 80112

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

SIR MARIO OWENS,

Defendant.

FOR COURT USE ONLY
06CR705
Division 407

FOR THE PEOPLE:
John Hower, Deputy District Attorney
Ann Tomsic, Deputy District Attorney
Emily Warren, Deputy District Attorney

FOR THE DEFENDANT:
Daniel King, Deputy State Public Defender
Laurie Kepros, Deputy State Public Defender
Jason Middleton, Deputy State Public Defender

The matter came on for jury selection Friday, March 21, 2008, before the HONORABLE GERALD J. RAFFERTY, Judge of the District Court, and the following proceedings were had.

I believe you know this. We had late arrivals for the nine o'clock hour. Juror 4664 is probably within five minutes or so of completing the video. And then the other two jurors arrived after her, and they will watch the video once we bring juror 4664 here. Probably about five minutes out. So we're off the record.

Good morning, Ms. Canada.

(Juror Canada sworn by the Court.)

THE COURT: Please be seated.

Ms. Canada, thank you. Thank you for coming back. We acknowledge we've taken you from your personal and professional commitments for two days in a row. We're grateful that you honored your civic duty and have returned here today.

Did you have a chance to watch the DVD where I explained the sentencing hearing and the process involved, namely, the four-step process? I would quickly add, if a sentencing hearing is ever necessary. Did you watch that?

JUROR CANADA: Yes, I did.

THE COURT: Just so you know, this placard displayed in front of you, that's an effort to take that oral explanation and reduce it to a flowchart. I expect the attorneys, when they have their turn to

speak with you, will refer you to that particular chart.

Did you have a chance to go over your questionnaire?

JUROR CANADA: Yes, I did.

THE COURT: What I would like to tell you is -- here's what we're going to do. I'm going to make some statements to you just to set the situation of where we find ourselves. I'll ask you a couple questions, and then I'll turn it over, noting that each attorney has a set amount of time. And I look at my chart, I believe the defense table has the opportunity to go first this morning.

So let me start with the obvious. Ms. Canada, you're a citizen who has been summoned for jury duty. As a citizen, I want to quickly note that you have every right to ask us questions. We're all geared up to ask you questions, but it's not a one-way street. It's a two-way street. If you don't understand our questions, don't hesitate to say, I don't know what you want, or what are you asking me. Okay? Also any substantive questions, we have an obligation to answer your questions.

Do you understand that?

JUROR CANADA: Yes.

THE COURT: Let me next go to the topic of what do we expect of jurors. We expect jurors to come to the courtroom without any training. That's our system. People who are not trained in the law, but by their common sense. At the trial, through the efforts of the attorney and the approval of the judge, evidence is given to the jury. That evidence is then used by the jury, together with instructions of law. Instructions of law are like guidelines, legal guidelines that the attorneys and the judge work on for that particular case. Then the jury goes back to the jury room with their common sense, instructions of law and the evidence that they've heard, and they decide in a criminal case, all 12 of them, whether or not the government has proven its case beyond a reasonable doubt. I want to demonstrate, beyond a reasonable doubt is the highest standard of proof in our system of justice. In a criminal case, all 12 people have to agree that the government has met that burden of proof.

We ask one other thing of jurors. We ask them to be fair. What do I mean by fair? In essence, I mean that the jury -- and, by the way, let me take a step back. Those 12 people who are selected to hear the trial take a second oath. In

that second oath they swear as follows: I promise I will decide the case on the evidence and the law and nothing else. So that's what I mean by fair. What what do I mean by "and nothing else?" Primarily we're talking about outside influences. Could be newspapers, could be public opinion, could be friends or relatives who know you're on a trial of this length, and have their own opinions about what should be the correct verdict.

When the jurors take that second oath, they promise both sides they will never let any of those outside influences influence them; that they will only make their decision on their common sense, the evidence they received in the courtroom, and the instructions of law, or the guidelines.

That's sort of a summary of what we ask of jurors. Do you understand what we ask of jurors?

JUROR CANADA: Yes.

THE COURT: Lastly, this is an unusual proceeding or hearing that we're in because no jury has been selected, no evidence has been offered, no legal guidelines have been given to the 12 jurors. And, most importantly, no verdict has been reached, yet we're talking about possible punishments. We do this for the following reason. In this type of case

under Colorado law -- and let me set it for you. I talked about it on the DVD, but let me reset it.

When the government charges a fellow citizen of yours and mine with murder in the first degree - after deliberation, if -- it's a big if -- if 12 jurors decide that the government has proved that charge beyond a reasonable doubt, the law says those 12 jurors, not a judge, those 12 jurors must make the decision about the appropriate punishment. Those possible punishments available to the jury are life without any possibility of parole, or the death penalty. The law recognizes citizens have strong opinions about these severe penalties. And because citizens have strong opinions about these penalties, the law allows us to talk to each of you individually. Going back to the fairness, so your views don't influence another juror's views. Do you understand why we get to talk to you in private?

JUROR CANADA: Yes. Totally.

THE COURT: I'm sorry?

JUROR CANADA: Totally understand.

THE COURT: Finally, my last topic, and then I'll have a couple of questions. Because we're talking about possible punishment, to explore your views, it is most important that you understand, as a

citizen you have an absolute right to your views. No one here in this room has any right, nor would they ever -- these are very fine people -- nor would they ever criticize your views. They just want to talk to you about your views. In essence, to find out if this would be an appropriate trial for you.

But because we're talking about punishment, because we're talking about your views about these possible punishments, it is most essential for fairness that Mr. Owens, who faces this serious charge, that he be presumed innocent of these charges. No evidence has been offered, no verdict has been reached. In other words, nothing has happened. And so the way we do this is, we always presume someone charged with a crime in our system to be innocent, and that way we know the government starts at zero. And then those 12 people selected to try the case, they decide whether the government can prove its charge beyond a reasonable doubt.

But even when we're not engaged in trial, to assure that the government is at zero, we presume the person to be innocent.

Can you presume Mr. Owens to be innocent while we talk about these circumstances that we find ourselves in?

JUROR CANADA: Yes.

THE COURT: Okay.

You indicated on your questionnaire that if selected to serve on this trial, which is a long trial, ten weeks, that you would not suffer hardship. I just want to confirm that. Is that correct?

JUROR CANADA: Correct.

THE COURT: With regard to your opinions about these possible punishments, I'm going to give you a hypothetical, and then I'm going to ask you a question. But I'm only opening the conversation. Then I'm going to turn it over to these attorneys. And they each have a set amount of time to explore your opinions. Okay?

If we assume that you were selected to be on this jury; if we assume that after the trial you and 11 other jurors decided that the government had proven the charge of murder in the first degree - after deliberation beyond a reasonable doubt to all of your satisfaction; if we then assume, as the law requires, that you engage in this four-step process at a sentencing hearing to decide what is the appropriate punishment; if we assume you got all the way through that process, you and the other 11 other jurors, these are all very big assumptions, but just

assume for me for my question, that would put you at step No. 4 in the four-step process. At step No. 4, that's called the selection step. That's where each juror makes their own individual selection of what they think is the correct punishment between these two alternatives. My question to you, Ms. Canada, is as follows: If all of those ifs fell into place, and you found yourself at step four, do you believe you could look at these two alternative punishments fairly and equally, and then based on all you've heard, make your own decision about what you think is the correct punishment?

JUROR CANADA: Yes, I could.

THE COURT: We're going to turn you over to the defense to start. Is this Mr. King?

MR. KING: Yes.

Good morning, ma'am.

JUROR CANADA: Good morning.

MR. KING: Ma'am, I wanted to ask you just some questions about your opinions about these punishments so that we can see where you come down. It sounds to me like -- you put in your questionnaire that -- it sounds to me because of your religious background that you have a certain reverence for life. Is that fair?

JUROR CANADA: That's fair.

MR. KING: And that doesn't preclude you from being a juror necessarily in a case like this. And different people with different religious beliefs tend to shake out a little different.

I want to walk you through the process a little bit. The law in the State of Colorado never requires a death penalty sentence. Okay. There's no specific case where that's mandated, unless the jurors believe beyond a reasonable doubt that that's what it should be.

What did you think of this process that you saw in the videotape, the way the law works in the State of Colorado? And that's what this board is up here, kind of trying to make that into a little chart there.

JUROR CANADA: I think it's fair. It's pretty self-explanatory. It's not hard to understand.

MR. KING: Right. Did you think -- is this somewhat reassuring, that there's a process --

JUROR CANADA: Yes.

MR. KING: -- that the jury has to go through in order to make this incredibly difficult decision?

JUROR CANADA: Yes.

MR. KING: And you understand -- and you put in your questionnaire, too, a couple of times that you believe in innocence until proven guilty. And can you see how it's a little bit concerning that here we are and there's been no evidence, right?

JUROR CANADA: Right.

MR. KING: Nothing has been proven, yet we're talking about penalties.

JUROR CANADA: Already.

MR. KING: The Judge has instructed you that Mr. Owens has to be presumed innocent. Sounds like you're going to really make a real effort to do that if you're selected. And I appreciate that.

All that being said, all of this stuff, this whole entire process will never happen unless there's a guilty verdict. Okay? Unless all 12 jurors are convinced beyond a reasonable doubt that Mr. Owens is guilty. But we're forced to talk about this. So forgive me, but I'm forced to talk about something I really don't want to.

After that guilty verdict at step one, what has to be proven is what's called an aggravating factor, one or more. The prosecution has to prove this to the jury's satisfaction beyond a reasonable

doubt. So it's very much a similar standard to what the trial standard is. And, likewise, in the trial, the jury deliberates together and there has to be a unanimous verdict. Do you think that you could do that? Most things are, it's something that makes that murder even worst. There's a whole list of them in the statute. Killing a baby, killing a police officer. There's a whole different list of things. Do you think that you could deliberate with the other jurors and determine whether that had been proven beyond a reasonable doubt?

JUROR CANADA: Yes, I could.

MR. KING: Okay. If that's the case, it moves to step two here. Did you notice that at every step virtually, except step two, if the answer is no to the question, there's a default to a life sentence. What do you think about that? How does that strike you? Is that appropriate or --

JUROR CANADA: Well, life sentence, it would be something that I would lean more towards.

MR. KING: Towards a life sentence? Would that be kind of your jumping off place, that you would begin with anyway?

JUROR CANADA: I just don't agree with the death penalty.

MR. KING: Okay. And, like I said before, the law never requires you to impose the death penalty. What the law does require you to do is consider it; to be fair and to consider the death penalty as a viable option.

So let's go down the process here. So would you agree with me the law in Colorado, the way this is set up, is kind of similar to the way you think, in that, life is like the baseline sentence, and then in order to get to death, more has to be proven to all the jurors?

JUROR CANADA: Yes. That's a good summary, yes.

MR. KING: Do you think that's fair to do it that way, if we're going to talk about killing somebody?

JUROR CANADA: That's fair.

MR. KING: Okay. Step two, this is a little different than what the jury has done up to this point. Step two, each individual juror has to determine what they feel is mitigation in the case. That's just defined as anything that would make the individual juror think that a life sentence was the more appropriate sentence.

So it could be things about the

defendant's background or upbringing. It could be things about the case, right? It could be even things from your own moral code, or sense of mercy. It's virtually anything that you, as an individual, think is a reason that a life sentence should be imposed. Could you look at all the case and inside yourself and decide what is mitigating for yourself?

JUROR CANADA: I could.

MR. KING: You have a right as a juror to find mitigation in anything that you see fit. And you have a right as a juror to place the amount of weight that you feel is appropriate on that mitigation. You can weigh that however you see fit.

At step three, we proceed here where you have to do that weighing process, the mitigation you found, against the aggravating factor that's been proven beyond a reasonable doubt. Do you think you could do that?

JUROR CANADA: Yes.

MR. KING: If you decided that the mitigation outweighs the aggravation, again, we default to a life sentence. And only if you conclude that it does not outweigh the aggravation do we go to step four. And step four is where the rubber really hits the road. In step four, it comes down to Ms.

Canada, really, because each juror is to make an individual moral choice about what the appropriate penalty should be. If you've gotten to step four, I think you told the Judge you could be fair and consider at that point both the life sentence and the death sentence.

JUROR CANADA: Yes, I could.

MR. KING: If you believed that the death sentence was not proven to be appropriate beyond a reasonable doubt, could you render a verdict of life without the possibility of parole?

JUROR CANADA: Yes, I could.

MR. KING: You understand that means the person never gets out of prison.

JUROR CANADA: Yes, I do.

MR. KING: I don't know what would get you there. It sounds like to me you don't really want to impose a death sentence unless you absolutely have to. Is that fair?

JUROR CANADA: Yes. Very fair.

MR. KING: I don't know what would get you there. And we're not asking you to predict what you're going to do in the future on this case. That wouldn't be fair. You don't know anything about this case.

The question that I need you to answer, though, is, if after seeing all of this, and searching your own conscience and soul, if you -- and discussing it with the other jurors, you're called on, then, to make an individual moral choice, and you said if you chose the life sentence as more appropriate, you could impose that sentence.

If you were convinced in your heart of hearts after seeing everything that the death penalty was the appropriate sentence -- I don't know what would get you there -- but if you were there, and you were convinced, could you sign the form for death verdict?

JUROR CANADA: There would be some hesitation for me as an individual.

MR. KING: It would be very, very difficult to make that decision?

JUROR CANADA: Yes.

THE COURT: Two minutes.

MR. KING: Thank you, sir.

And what we need to know is, if you would be fair, examine both penalties, and impose the one, whichever one you are convinced is right. Could you do that?

JUROR CANADA: I could do it.

MR. KING: Okay. Thank you.

Thank you, Judge. No other questions.

THE COURT: For the prosecution.

MS. WARREN: Good morning, Mrs. Canada. My name is Emily Warren. I'm one of the deputy district attorneys prosecuting Mr. Owens.

Before you came to court on this jury summons, did you know anything about Colorado's death penalty sentencing process?

JUROR CANADA: No.

MS. WARREN: Okay. And it's kind of unfair because we ask people what their opinion about this is. We don't tell you what the law is. We tell you a few things about the law in the questionnaire, but you don't really have a lot of information from which to make a decision.

Have your thoughts at all changed over the two, two-and-a-half weeks since you filled out your questionnaire?

JUROR CANADA: As far as --

MS. WARREN: Knowing this is a death penalty case, your attitude toward death penalty. Been thinking about it?

JUROR CANADA: I was trying to avoid thinking about it, to be very honest.

MS. WARREN: Why have you tried to avoid thinking about it?

JUROR CANADA: I'm not really for the death penalty. I just don't feel I should have anything to do with that. I don't think I should -- I'm not comfortable.

MS. WARREN: Having anything to do with the death penalty decision?

JUROR CANADA: Correct.

MS. WARREN: You indicated that same position on your questionnaire. There's a question that asks you about your opinion about the death penalty. You basically said it's appropriate in some cases. "I could never impose it because of my personal values and beliefs," which everyone in this room respects. And then there's a second question that talks about how -- basically asking if you could follow Colorado law and impose the death penalty if you thought it was appropriate. And you had said no, you could not do that because of your background, religious background, belief system, things of that nature; is that correct?

JUROR CANADA: That's correct.

MS. WARREN: You understood why we are talking about this in private, because people have

very different feelings about the death penalty. If people think that every defendant should get the death penalty, probably not an appropriate juror, given they have to be fair to the defendant and the process; and people who feel it's never appropriate, there's potentially a problem because the law requires if you think it's appropriate, that you can impose it. Okay.

You voiced some hesitation and concern about whether if you got to step four you could actually impose a death sentence, a death verdict. So I want to talk to you about that. There's a bit of a disconnect between what's in the questionnaire and some of the answers you gave Mr. King and other answers. As you sit here, we're having an intellectual discussion, but I want you to really consider being on a jury, making a determination the defendant is guilty, working your way through the sentencing process and getting to step four.

If you thought that the death penalty was appropriate, would you be able to vote for a death sentence knowing that as a consequence of your decision another person is going to lose his life? A person is going to be executed? Incredibly significant, awesome penalty. How do you think you

would react in a situation like that?

JUROR CANADA: I wish I could do it, but there would still be some hesitation just based on thinking it out, deep in my soul.

MS. WARREN: Everybody has to look deep down inside their heart and make a decision they feel is appropriate. You said you thought that the death penalty was appropriate in some cases. Did you have any particular kind of case in mind when you said that, or was it just a general statement?

JUROR CANADA: Because it was more general, to be honest.

MS. WARREN: Is it fair to say you can conceive of a circumstance where you would think that the death penalty was, in fact, an appropriate and necessary punishment?

JUROR CANADA: Yes.

MS. WARREN: Okay. So imagine the circumstance where you think that. And you have other jurors in the jury room deliberating. And 11 people have voted for the death penalty, and it comes down to you. Assume -- just assume for the moment that you believe death is the appropriate penalty. Just assume that for the moment.

JUROR CANADA: Okay.

MS. WARREN: Are you going to be able to live with the decision? Are you going to be able to make a decision to vote for death knowing that you have to live the rest of your life having made that kind of a decision about somebody else's life?

JUROR CANADA: I can do it.

MS. WARREN: Okay.

I want to ask you another question. And I sincerely hope this will not be offensive in any way. Over the years talking to lots of jurors of various races, genders, defendants of different races, different genders, et cetera, it's been interesting to me that people in the black community have a wide variety of attitudes and feelings when it comes to the prosecution of a case of a black defendant. I've talked to some jurors who feel that they are biased against the defendant and in favor of the prosecution because they think that a black defendant engaging in criminal behavior is an embarrassment to the community. Keeps the negative image, things of that nature. I've had other jurors who voiced a bias in favor of the defendant because they feel that the black community is not treated fairly by the system. There are some unproportionate number of blacks who are convicted of crimes, and things of that nature.

And then there are people who are all over in the middle.

Do you have any concerns for yourself, or do you have any feelings one way or another about the fact that Mr. Owens is a young black man charged with a very serious crime looking at a very significant penalty? We're asking for the death penalty in this case. Do you have any feelings about that?

JUROR CANADA: I could still be fair. I'm a pretty fair person.

MS. WARREN: You would be fair for Mr. Owens, and you would be fair to the prosecution as well?

JUROR CANADA: Absolutely.

MS. WARREN: Thank you very much.

THE COURT: Ms. Canada, may I ask you to step out of the courtroom for a moment and let me talk to the attorneys. I'll get you back as quickly as I can.

(Juror Canada left the courtroom.)

THE COURT: Any challenge for the defense?

MR. KING: No. Thank you.

THE COURT: For the prosecution?

MS. WARREN: No, Your Honor.

THE COURT: We'll have Ms. Canada back.

(Juror Canada present in the courtroom.)

THE COURT: Ms. Canada, you don't have to put your stuff down. I just have to give you a couple of points.

Thank you for returning. Two, we're going to ask you to return one last time, April 2nd at 8:30 in the morning. If you would report downstairs. And let me clear that up. You might have been confused. My fault. When I saw you on March 5th, I said we were going to try to have the group questioning on March 26th, but I had to push that back to April 2nd, April 2nd at 8:30 in the morning. We're going to give you a bright green piece of paper. I don't know why it's green, but there's a phone number on there. The phone number will be available with a message as of Monday as to whether or not I can maintain April 2nd. So if I can't, the message will say that we have to move it to another date. But these attorneys are working very hard, and we have a great deal of confidence we'll be ready for that group questioning.

The last thing I want to tell you. Group questioning will be the final day. That's the day we choose the jury. Those not selected will be done with us and not have to come back. Could you follow my instructions from March 5th with regard to any

viewing media reports about this case? In fact, I forgot to ask you. Have you heard any media reports since March 5th?

JUROR CANADA: No.

THE COURT: Would you continue to avoid if you see an article that remotely looks like the case or hear something, turn off the radio or turn the page?

JUROR CANADA: (Nods.)

THE COURT: Thank you for your patience. We'll see you April 2nd.

JUROR CANADA: Okay.

(Juror Canada left the courtroom.)

MS. WARREN: The People wanted to make a record of Mrs. Canada's physical demeanor while she was being questioned. When Mr. King asked her if she could vote for the death verdict, she crinkled up her face. There was a very long pause, and then she said I guess there would be some hesitation for me, or words to that effect.

When I asked her a similar question, putting it to her that her decision would have a consequence on whether or not another person lived or died, again there was a very long hesitation. She shook her head back and forth in the negative. And

then I would characterize her answer as reluctant. I'm sure I could do it. She again shook her head in the negative -- what she stated was that she could do it when I asked a second time a little bit later. I just wanted to put that in the record.

THE COURT: I would note I saw the same, but I have a different interpretation of what she was doing. I saw the shaking of the head in the negative to be not an indication of no, to me.

Let me put this this way. Initially, I thought it was a case of no. And then I believe it was an indication it's a very difficult decision for her. And, you're right when you describe her answer with regard to Mr. King. But I was looking at Wainwright v. Witt, 469 U.S. 412, 419 to 421. And I'm just going to take a snippet out of that page. Talking about veniremen. " . . . because their acknowledgement that the possible imposition of the death penalty would or might 'affect' their deliberations was meant only to indicate that they would be more emotionally involved, or would view their task 'with greater seriousness and gravity.'" The rest said did not disqualify them. The Court reasoned such affect did not demonstrate the jurors were unwilling or unable to obey their oaths.

That's what I saw from Ms. Canada. Her answers did contradict the question under potential punishment, where she said as to death penalty she could not follow the law. In my view she changed here while talking, and the change seemed sinister to me. She is obviously concerned with the seriousness and the gravity of her decision, but she said several times I can. That's all she said, very deliberate, I can, with regard to whether she could sign the death certificate. That's my record.

MS. WARREN: We were not challenging her for cause. I just wanted to make a record so we have her physical demeanor on the record as well when we come to the position of general voir dire, if it's needed.

THE COURT: Noted.

MR. KING: Judge, just for what it's worth, I agree with the Court's interpretation of her demeanor. And I would just put in the record that there were pauses where she -- clearly she was trying to work through the process that she just learned about and how this would come down. When she finally gave her answers, there was not hesitancy in the answer itself. She pretty firmly said she could do it, both in answer to my questions and Ms. Warren's.

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Court address: Arapahoe District Court
Division 407
7325 South Potomac Street
Centennial, Colorado 80112

COURT USE ONLY

THE PEOPLE OF THE STATE OF COLORADO,

v.

SIR MARIO OWENS,

Defendant.

Case No: 06CR705

COURT REPORTER'S TRANSCRIPT

The hearing in this matter commenced on Monday, April 7, 2008, before the HONORABLE GERALD RAFFERTY, Judge of the District Court.

MS. WARREN: Right, right.
THE COURT: Understood. Any further record for the defense?
MR. MIDDLETON: No.
THE COURT: Thank you. Noted.
(Whereupon, the bench conference was concluded.)
THE COURT: Ladies and gentlemen, please be seated.
Mr. Lynch was last substitute, and I believe that puts us at the defense table with regard to the fourteenth peremptory.
MR. KING: Thank and excuse Ms. Farrel in seat number 17.
THE COURT: Ms. Farrel, thank you. You are excused. Ms. Canada, can I ask you to take that seat. Thank you, Ms. Canada.
That was the fourteenth peremptory by the defense. It takes us to the thirteenth peremptory by the prosecution.
MS. WARREN: The People thank and excuse Ms. Canada.
THE COURT: The People thank and excuse Ms. Canada. Can I ask you to hold. Let me talk to the attorneys. Ladies and gentlemen, please stand, talk about anything but don't talk about the case. Let me talk to the attorneys.
(Whereupon, there was a bench conference and the following proceedings were had:)
THE COURT: We're at the side bar. Mr. Middleton.

MR. MIDDLETON: We're making a Batson Challenge with respect to Ms. Canada. She is the second African American in the row placed in the jury where it's not an alternate and the People exercised peremptory against her.

THE COURT: Please.

MS. WARREN: I assume that you're finding I have to explain myself?

THE COURT: Yes.

MS. WARREN: Ms. Canada indicated on her questionnaire with respect to her feeling on the death penalty she answered, I think the death penalty is appropriate in some cases but because of my personal feelings and belief I would never be able to impose it myself. And while she did have a change of heart verbally, I made a record concerning her demeanor when these questions were asked of her. The court decided that -- I was not making a challenge for cause. But the court said on the record that it found her change of heart to be genuine and credible but respectfully that's not something that the People have to stick with.

I mean this is the person who had serious doubts about her ability -- not rising to the level of cause. I don't think the person changes feelings about the death penalty in two week's time particularly when feelings are based in part on religion. When asked about whether or not she could impose the death penalty, she said I really don't

want to do it unless I have to. And as this court knows because defense made this point over and over, there's never a situation where someone would have to unless they believe that is the right penalty. So there's not a circumstance where she would -- I mean the People have a grave concern about her ability to impose the death penalty in this case. It has nothing to do with her race. Mr. Knipmeyer was our first challenge. He is a white man. He also said with respect to his opinion on the death penalty and we challenged him for the same reason.

THE COURT: Mr. Middleton.

MR. MIDDLETON: I believe that her record with respect to the individual voir dire speaks to her opinion in these matters. I think there are a number of white Caucasian jurors who have expressed their doubts about the death penalty and their difficulty with imposing it and the fact that it's difficult is part of the process. I don't believe that's sufficient, race-neutral reason for the People to be excusing this juror.

THE COURT: I have to agree. Ms. Canada passed with regard to a challenge for cause. There were other jurors who said that they were changing their opinion -- let me finish.

MS. WARREN: Okay.

THE COURT: Changing their opinions with regard to how they view the death penalty and we accepted them. So far

I've only heard reasons with regard to her views of the death penalty. Are there any other reasons?

MS. WARREN: Judge, her views with regard to the death penalty are part of this jury selection process.

THE COURT: Yes.

MS. WARREN: So is the court saying that's not a race-neutral view because it has to do with the death penalty?

THE COURT: I agree it's race neutral. It's just that you're saying -- I guess here's the question under the law. You are saying that you can offer -- let me start over. We have death qualified this person?

MS. WARREN: Right.

THE COURT: With regard to questioning and they come up for peremptory challenge and you're saying in essence that you are not accepting the person's statements with regard to a change of heart and at least indicating to my satisfaction that they could impose the death penalty under the appropriate circumstances?

MS. WARREN: Right, what I'm saying --

THE COURT: Let me finish. So they passed the death qualification and come up and so -- I agree it's race neutral. Your point is that you can raise it a second time if you wish.

MS. WARREN: I'm not raising as a challenge for cause.

THE COURT: I understand.

MS. WARREN: For a peremptory reason. I can tell you every single person, assuming we don't run out of peremptories, who put D on the questionnaire and said orally, no, I guess I can do, we are challenging.

THE COURT: I understand. I had to work the logic through. It does seem it's a race-neutral position. Now, you to me are in essence saying what I've already said for you and that is that there are other jurors who change their minds and accept them for death qualifications. Be that as a given, the issue here is whether or not this is a -- is race neutral and two is the prosecutor credible in raising it?

MR. MIDDLETON: Part of what I'm raising is sort of referred to as comparative analysis which is to the extent there are jurors of another race who have indicated qualms about death penalty and, you know, it's one thing to put on the questionnaire and rethink it and come in and talk about things on individual questioning and some people who put a different answer on questionnaires and said they have difficulty in imposing the death penalty. So the D on the questionnaire is one thing. It's the individual question and comparatively speaking it's our position that persons that are not African-Americans who expressed similar difficulties with imposing the death penalty who have not been excused are still on the panel at this time.

THE COURT: Well noted. But I'm at the point where

they appear to me to be raising a race-neutral reason. Either of you have the right based on what you heard at the death qualification phase to decide as long as it's race neutral. That's why I'm doing it. The questionnaire I have to note your point there. I've relied on the questionnaire many times in assessing people with regard to whether or not they're death qualified. Their answers there are important. People like Ms. Canada have changed their mind and have convinced me that they would do it but nevertheless I believe the people do have this right as I think about it as long as they can establish to me that they're credible and race neutral. And I find the prosecution is credible in raising this so I'm going to allow it.

MS. WARREN: I think there's a real difference between someone who say I would have difficulty, this would be a difficult decision. I mean it should be. And the person who said on questionnaire D I could never do it and was somehow convinced to take a different position we challenged Ms. Jerrold. She's a white woman. We challenged Mr. Knipmeyer. He's a white man. We are not challenging Ms. Canada because of race but what she said on the questionnaire and change of opinion in individual voir dire.

THE COURT: Mr. Middleton, let me allow you to make any further record.

MR. MIDDLETON: None.

THE COURT: Thank you.
(Whereupon, the bench conference was concluded.)
THE COURT: Ladies and gentlemen, please be seated. Ms. Canada, with my thanks -- thank you. You are excused. Ms. Watkins, thank you. Thank you, Ms. Watkins. For the record that was the prosecution's thirteenth peremptory and the defense are now at their fifteenth peremptory.
MR. KING: The defense would thank and excuse Mr. Schell in number three.
THE COURT: I'm sorry.
MR. KING: Mr. Schell in seat number three.
THE COURT: Mr. Schell, thank you, sir. You are excused. Ms. Diehl, can I ask you to take seat number three. Thank you, Ms. Diehl.
We're at the fourteenth peremptory for the prosecution please.
MS. WARREN: The People would thank and excuse Ms. Roth.
THE COURT: Ms. Roth, thank you very much. You are excused with the People's fourteenth peremptory. Ms. Light, thank you. If you would start heading that way. We're at the sixteenth peremptory for the defense please.
MS. KEPROS: Can we approach?
THE COURT: You may. Ladies and gentlemen, I apologize. Please stand and speak. Don't speak about the