APPENDIX

[PUBLIC COPY – SEALED MATERIALS REDACTED]

TABLE OF CONTENTS

APPENDIX A

SUPREME COURT OF COLORADO

2024 CO 55

REGINALD KEITH CLARK,

Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Certiorari to the Colorado Court of Appeals,
Court of Appeals Case No. 19CA340

July 1, 2024

Rehearing Denied August 19, 2024

EN BANC

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

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 Racial discrimination, while detestable in any context, is "especially pernicious" in the criminal

justice system. *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). "[S]uch discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' " *Id.* at 556, 99 S.Ct. 2993 (quoting *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940)). Criminal defendants have the right to an impartial jury, U.S. Const. amend. VI; Colo. Const. art II § 16, which includes the right to be tried by jurors who can consider the case without the influence of racial animus. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). The jury, after all, is meant to be "a criminal defendant's fundamental 'protection of life and liberty against rac[ial] . . . prejudice.' " *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 223, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)).

¶2 Procedures for preventing biased jurors from serving are critical to the protection of the defendant's right to an impartial jury. *McCollum*, 505 U.S. at 58, 112 S.Ct. 2348. In Colorado, judges must dismiss for cause jurors who "evince[e] enmity or bias toward the defendant or the state." § 16-10-103(1)(j), C.R.S. (2023). Where a trial court's erroneous denial of a challenge for cause results in seating a juror who is biased against the defendant, the defendant's Sixth Amendment right to an impartial jury is violated, and the conviction must be reversed. *People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 29, 454 P.3d 1044, 1050.

¶3 If, however, a juror evinces racial bias during voir dire but does not ultimately serve on the jury, no Sixth Amendment violation has occurred. These are the circumstances we are presented with today.

¶4 Reginald Keith Clark, a Black man, was charged with multiple crimes arising from his alleged sexual assault of A.B., a white woman. He faced trial in Gilpin County, an area that is predominantly white.[1] During voir dire, a venire member made comments that Clark believed evinced racial bias. Clark moved to strike the juror for cause, but the trial court denied the challenge, concluding that the juror's statements expressed a political view and did not indicate that he could not be fair. Clark later removed the juror using a peremptory challenge. Thus, the juror did not sit on the jury. Clark was convicted and appealed on multiple grounds.

¶5 In a divided opinion, the court of appeals affirmed Clark's conviction. *People v. Clark*, 2022 COA 33, ¶ 1, 512 P.3d 1074, 1076. In its discussion of the trial court's ruling on the challenge for cause, the division's lead opinion focused its analysis on the Sixth Amendment. *Id.* at ¶¶ 22-32, 512 P.3d at 1079-80. Judge Schutz's partial dissent included a discussion of the Equal Protection Clause, particularly within the context of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct.

---

[1] As of the 2020 Census, 5,077—or about 87.41%—of Gilpin County's 5,808 residents where "[w]hite alone." U.S. Census Bureau, *Race and Ethnicity: Gilpin County, Colorado*, https://data.census.gov/profile/Gilpin_County_Colorado?g=050XX00US08047#race-and-ethnicity [https://perma.cc/XA8B-MRQU].

1712, 90 L.Ed.2d 69 (1986), and its progeny. *Clark*, ¶¶ 89-102, 512 P.3d at 1089-92 (Schutz, J., concurring in part and dissenting in part). We granted Clark's petition for certiorari review of two issues.[2]

¶6 First, we consider whether the trial court's denial of Clark's for-cause challenge may be analyzed for harmlessness or instead constitutes structural error requiring reversal. In light of Supreme Court and Colorado precedent, we conclude that, because any error by the trial court was made in good faith and because the juror never actually sat on the jury, Clark's Sixth Amendment right to an impartial jury was not violated. Accordingly, the trial court's erroneous denial of the challenge for cause in this case did not result in structural error and automatic reversal is not required. And because no state actor purposefully discriminated against Clark (or anyone else) on the basis of race, no equal protection violation occurred either.

¶7 Second, we separately conclude that a juror's comment about her previous jury experience recalling a judge's alleged statement that the jury must deliberate until it reached a unanimous verdict does

---

[2] 1. [REFRAMED] Whether the trial court's erroneous denial of a defendant's for-cause challenge to a juror who expressed racial bias was harmless or structural error.

2. Whether a juror's comments during deliberations, that she learned from a judge in prior jury service that jurors must deliberate indefinitely until a unanimous verdict is reached, constitute "extraneous prejudicial information" under CRE 606(b).

not constitute "extraneous prejudicial information" under CRE 606(b).

¶8 Accordingly, we affirm the judgment of the court of appeals and uphold Clark's conviction.

I. Facts and Procedural History

¶9 In November 2017, Clark approached A.B. in his car as she was walking through downtown Denver to catch a bus. Clark offered A.B. a ride. A.B., who recognized Clark, accepted. A.B. asked Clark to take her to a nearby location, but Clark instead drove into the mountains near Black Hawk.

¶10 During the drive, Clark stopped and sexually assaulted A.B. Shortly after this, A.B. ran away. Police officers later contacted her on the side of the road. A.B. told them about the assault and described her assailant. Soon after, the officers spotted Clark driving in the vicinity and arrested him.

¶11 Clark was charged in Gilpin County with second degree kidnapping, § 18-3-302(1), (3), C.R.S. (2023); sexual assault with a deadly weapon, § 18-3-402(1)(a), (5)(a)(III), C.R.S. (2023); sexual assault caused by threat of imminent harm, § 18-3-402(1)(a), (4)(b); and sexual assault achieved through the application of physical force, § 18-3-402(1)(a), (4)(a). The case proceeded to a jury trial.

A. Voir Dire

¶12 During voir dire, defense counsel raised the issue of race, noting that Clark was the only Black individual in the courtroom. One potential juror commented that if she were in Clark's position, she might doubt the fairness of the trial and "would like to see a little more diversity" in the courtroom. Other

potential jurors agreed that some people in Gilpin County might have stereotypes about Black men. Soon after, the conversation moved away from the topic of diversity. A few minutes later, defense counsel asked Juror K about his thoughts related to the presumption of innocence, inquiring whether he thought the prosecution "start[ed] off . . . with a little bit of a lead," given that Clark was charged with a crime. Juror K responded by returning to the topic of diversity, saying:

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

¶13 At a bench conference, Clark challenged Juror K for cause. As Clark later explained,[3] his basis for

---

[3] Because the courtroom where voir dire was held was not equipped to record bench conferences, the record of the conversation the parties had with the judge during the bench conference was made by the judge after the fact. After the parties had finished exercising their peremptory challenges, the bailiff took the jurors to the jury room and the judge

the challenge was that Juror K's statements about diversity were unprompted and reflected "actual bias and prejudice." Following this challenge, the court asked Juror K additional questions:

> Court: So here's kind of the two-part bottom line .... If you're chosen as a juror in this case, and if you're back in the jury room and you think the prosecution hasn't proven its case, would you have any trouble finding this defendant to be not guilty?
>
> Juror K: Not at all.
>
> Court: And the other side of that coin, what if you're back there and you say that [the] prosecutor has proven his case, would you have any trouble finding the defendant to be guilty?
>
> Juror K: Again, the same answer. Not at all.

¶14 The court denied the challenge, and later provided its reasoning that Juror K's statements "that he didn't think that diversity was a good thing" expressed "a political view" and did not "answer the question of whether he can be a fair juror." The judge observed that "a person can certainly have offensive views and still apply the law. Those two things are really separate in my mind."

¶15 After his challenge for cause was denied, Clark exercised all of his allotted peremptory strikes, using his first to remove Juror K. Juror K was excused and did not sit on the jury.

---

summarized for the record the parties' for-cause challenges and the judge's rulings on them.

B. Statements Made During Jury Deliberations

¶16 After deliberating for approximately seventeen hours over three days, the jury convicted Clark of second degree kidnapping and sexual assault caused by threat of imminent harm. The court sentenced Clark to eighteen years for the kidnapping conviction and a consecutive term of twelve years to life for the sexual assault.

¶17 Following the verdict, Clark filed a motion for a new trial based on an affidavit from Juror LL. The affidavit explained that the jury was deadlocked for the first two days of deliberations. Juror LL alleged that on the third day of deliberations, another juror

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

¶18 Juror LL further alleged that the other juror's statement sparked fears among the other jurors about the impact that protracted deliberations would have on their personal and professional lives, and, as a result, many jurors—including her—voted guilty to avoid those ramifications.

¶19 Based on this information, Clark requested a new trial or, alternatively, an evidentiary hearing. As relevant here, Clark argued that Juror LL's affidavit was admissible under the extraneous prejudicial information exception to CRE 606(b). The court disagreed, concluding that the affidavit did not allege the introduction of "extraneous prejudicial information" for purposes of meeting the exception to CRE 606(b), which otherwise prohibits a juror from testifying as to any statements made during jury deliberations. Consequently, the court concluded it could not consider the statements in the juror's affidavit. It therefore denied Clark's motion.

C. The Court of Appeals' Decision

¶20 Clark appealed his conviction, and in a divided opinion, the court of appeals affirmed. *Clark*, ¶ 1, 512 P.3d at 1076.

¶21 With respect to the challenge for cause, the division split three ways. Judges Fox and Schutz agreed with Clark that the trial court erred when it denied Clark's challenge for cause of Juror K. *Id.* at ¶ 21, 512 P.3d at 1079; *id.* at ¶ 78, 512 P.3d at 1086-87 (Schutz, J., concurring in part and dissenting in part). Judge Dailey would have given more deference to the trial court's ruling and thus disagreed that the trial court erred in this case. *Id.* at ¶ 62, 512 P.3d at 1084 (Dailey, J., concurring in the judgment).

¶22 Regarding the remedy, the lead opinion, authored by Judge Fox, concluded that, under this court's decision in *People v. Novotny*, 2014 CO 18, 320 P.3d 1194, the trial court's erroneous denial of Clark's for-cause challenge did not amount to structural error. *Clark*, ¶ 26, 512 P.3d at 1079. Judge Fox disagreed

with Clark's argument that the trial court's error fell within *Novotny*'s exception for errors made in "other than good faith." *Id.* at ¶¶ 27-28, 512 P.3d at 1080. Judge Fox also rejected Clark's argument that the trial court's error forced him to use a peremptory challenge to remove Juror K and thus deprived him of equal protection of the law. *Id.* at ¶¶ 29-32, 512 P.3d at 1080. Judge Fox reasoned that this argument was foreclosed by this court's decision in *Vigil v. People*, 2019 CO 105, 455 P.3d 332. *Clark*, ¶ 31, 512 P.3d at 1080. Accordingly, Judge Fox concluded that the trial court's error should be analyzed for harmlessness and, because Juror K did not actually participate in the jury, the error was necessarily harmless. *Id.* at ¶ 32, 512 P.3d at 1080. Judge Dailey concurred in the judgment. He agreed that under *Novotny*, any error by the trial court in denying the for-cause challenge did not warrant a new trial. *Id.* at ¶ 61, 512 P.3d at 1084 (Dailey, J., concurring in the judgment).

¶23 In a partial dissent, Judge Schutz agreed with Clark that the error was structural and required automatic reversal. *Id.* at ¶ 79, 512 P.3d at 1087 (Schutz, J., concurring in part and dissenting in part). In his view, this case presented an exception to *Novotny*'s outcome-determinative analysis. *Id.* at ¶¶ 85-86, 512 P.3d at 1088.

¶24 According to Judge Schutz, the trial court's "tolerance" of Juror K's express racial bias amounted to structural error, not because it violated Clark's right to an impartial jury, but because it violated his right to equal protection. *Id.* at ¶ 95, 512 P.3d at 1090. In reaching this conclusion, Judge Schutz drew comparisons to the Supreme Court's opinion in

Batson, a case addressing racial bias in the jury selection process through the discriminatory use of peremptory challenges:

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

Id. at ¶ 95, 512 P.3d at 1090.

¶25 Judge Schutz further reasoned that *Batson* was designed to serve multiple ends, including circumstances like this where, as he saw it, the trial court's error sent a message that racial bias may be tolerated in the criminal justice system. *Id.* at ¶¶ 96, 98, 512 P.3d at 1090-91. Whereas Judge Fox's opinion evaluated the challenge-for-cause error through a Sixth Amendment lens, Judge Schutz viewed the issue as implicating a defendant's Fourteenth Amendment right to equal protection because the juror's bias against the defendant was based on race. *Id.* at ¶¶ 100-02, 512 P.3d at 1091-92. In other words, Judge Schutz equated *Batson*'s reference to "racial

bias in the jury selection process" with a potential juror's expression of racial bias against the defendant during voir dire. *See id.* at ¶¶ 95-102, 512 P.3d at 1090-92.

¶26 As for Juror LL's affidavit, the majority decided that the trial court correctly determined that the statements it contained did not constitute extraneous prejudicial information and therefore did not meet the exception to CRE 606(b).[4] *Id.* at ¶ 59, 512 P.3d at 1084 (majority opinion). Relying on *People v. Newman*, 2020 COA 108, 471 P.3d 1243, the division majority concluded that "extraneous prejudicial information" consists of (1) legal content and specific factual information (2) learned from outside the record (3) that is relevant to the issues in a case. *Clark*, ¶ 52, 512 P.3d at 1083. The majority declined to construe the phrase "relevant to the issues in a case" so broadly as to include a general statement about how juries handle protracted deliberations. *Id.* at ¶ 58, 512 P.3d at 1084. Such a broad construction, the majority reasoned, would be inconsistent with the purposes of CRE 606(b) and Colorado precedent. *Id.*

¶27 We granted Clark's petition for certiorari review on these two issues and now address them in turn.

II. Analysis

---

[4] Because he would have reversed Clark's conviction based on his resolution of the challenge-for-cause issue, Judge Schutz declined to address the remaining issues. *Id.* at ¶ 106, 512 P.3d at 1092 (Schutz, J., concurring in part and dissenting in part).

¶28 We first address Clark's argument that the trial court's denial of his for-cause challenge to Juror K amounted to structural error and required automatic reversal. Applying our precedent, we conclude that any error by the trial court was made in good faith, and because Juror K did not actually serve on the jury, the court's error was harmless.

¶29 We then turn to the second issue before us—whether the statements in Juror LL's affidavit constitute "extraneous prejudicial information" for purposes of CRE 606(b). We conclude that the juror's comment recounting a judge's statement about jury deliberations during a past jury experience was not legal content relevant to Clark's case. Accordingly, we hold that the information was not extraneous prejudicial information for purposes of the exception to Rule 606(b).

A. The Erroneous Denial of a For-Cause Challenge to a Biased Juror Is Harmless When It Is Cured Through the Use of a Peremptory Strike

¶30 The division determined that the trial court's denial of Clark's for-cause challenge to Juror K was an abuse of discretion. *Clark*, ¶ 21, 512 P.3d at 1079. The People do not challenge this ruling. We therefore assume for the purpose of our analysis that the trial court erred when it denied the challenge for cause to Juror K. The question is whether this error is structural and requires automatic reversal or instead is subject to harmless-error analysis.

¶31 Clark's primary argument, mirroring Judge Schutz's partial dissent, is that our decisions in *Novotny* and *Vigil* do not apply because the trial

court's erroneous denial of his for-cause challenge to Juror K implicated his rights to equal protection under the Fourteenth Amendment. Alternatively, Clark argues that the trial court's error falls outside the general rule in *Novotny* and *Vigil*.

¶32 We begin with a discussion of the applicable standard of review. Next, we review the distinction between structural error requiring automatic reversal and trial error that is analyzed for harmlessness. We then describe Supreme Court and Colorado precedent, including *Novotny* and *Vigil*, regarding the standard of reversal that applies to errors impacting the use of peremptory challenges. Consistent with that precedent, we conclude that the trial court's error is subject to harmless-error analysis. We also reject Clark's argument that the error amounted to a violation of his equal protection rights. Accordingly, applying the harmless-error standard of reversal, we determine that any error by the trial court was harmless and does not warrant reversal.

1. Standard of Review

¶33 The determination of the proper standard of reversal to be applied in a case is a question of law that we review de novo. *See A.R. v. D.R.*, 2020 CO 10, ¶ 37, 456 P.3d 1266, 1276 (identifying de novo review as the proper standard of review for the determination of the proper legal standard to apply); *Abu-Nantambu-El*, ¶ 23, 454 P.3d at 1050 (reviewing de novo which standard of reversal applies when a trial court erroneously denies a challenge for cause and the juror ultimately serves on the jury).

2. Structural Errors and the Sixth Amendment

¶34 "Certain constitutional rights are so basic to a fair trial that their violation can never be harmless." *Abu-Nantambu-El*, ¶ 27, 454 P.3d at 1050 (citing *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987)). Such errors have been deemed "structural errors" because they are not "'simply an error in the trial process itself,'" but rather "affect the 'framework within which the trial proceeds'"—that is, the very structure of the trial itself. *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004) (quoting *Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998)). Whereas ordinary errors in the trial process may be deemed harmless, structural errors are incompatible with harmless error analysis. *Id.*

¶35 We have held that when a trial court's error results in the seating of a juror who is biased against the defendant, the error is structural. *Abu-Nantambu-El*, ¶ 30, 454 P.3d at 1050 (first citing *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); then citing *Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988); and then citing *Morrison v. People*, 19 P.3d 668, 670 (Colo. 2000)). Such an error violates the defendant's right to "[a] fair and impartial jury[, which] is a key element of a defendant's constitutional right to a fair trial under both the United States and Colorado Constitutions." *Id.* at ¶ 14, 454 P.3d at 1047 (first citing U.S. Const. amends. V, VI, XIV; then citing Colo. Const. art. II, §§ 16, 25; then citing *Vigil*, ¶ 9, 455 P.3d at 334; and then citing *People v. Russo*, 713 P.2d 356, 360 (Colo. 1986)).

¶36 Both for-cause and peremptory challenges serve as means of securing this right. First, Colorado law

requires a court, upon a party's challenge, to remove a juror for cause when particular circumstances implicate the juror's ability to remain impartial. *Id.* at ¶ 15, 454 P.3d at 1048. Relevant here, section 16-10-103(1)(j) requires a trial court to excuse a juror who "evinc[es] enmity or bias toward the defendant or the state." Second, section 16-10-104, C.R.S. (2023), permits both parties to exercise peremptory challenges, which allow the removal of "jurors whom they perceive as biased." *Abu-Nantambu-El*, ¶ 18, 454 P.3d at 1048 (quoting *Vigil*, ¶ 19, 455 P.3d at 337). The number of peremptory challenges available depends on the circumstances of the case and the nature of the charge.

¶37 Prior to *Novotny* and *Vigil*, Colorado precedent required automatic reversal when a defendant used a peremptory strike to remove a prospective juror who should have been removed for cause and the defendant otherwise exhausted their peremptory challenges. *People v. Macrander*, 828 P.2d 234, 243 (Colo. 1992), overruled by *Novotny*, ¶ 27, 320 P.3d at 1203. We changed course in *Novotny* and *Vigil* in recognition of jurisprudential developments in the understanding of trial error and structural error that followed our decision in *Macrander*. *See Novotny*, ¶ 27, 320 P.3d at 1203 (concluding "that allowing a defendant fewer peremptory challenges than authorized, or than available to and exercised by the prosecution, does not, in and of itself, amount to structural error" and overruling prior holdings to the contrary); *Vigil*, ¶ 22, 455 P.3d at 338 ("For virtually the same reasons we found it important and justified in *Novotny* to partially overturn this line of our own

prior holdings, we consider it similarly justified to now overturn them in full. To the extent that our prior rationale was based on pre-harmless error holdings, the constitutional significance of peremptory challenges, and even federal due process implications of violating state peremptory challenge law, those premises have now all been independently swept away by developments in the jurisprudence of the Supreme Court which we have either already adopted or by which we are constitutionally bound.").

¶38 *Novotny* also relied on Supreme Court case law recognizing that peremptory strikes are rooted in state law, not the federal constitution. ¶¶ 14-17, 320 P.3d at 1199-1200 (citing, *inter alia*, *Rivera v. Illinois*, 556 U.S. 148, 157, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009)) (explaining that "the United States Supreme Court has now expressly rejected the understanding we, and a substantial number of other jurisdictions, had of the federal due process implications of" a state court depriving a defendant of a state law granted peremptory challenge); *see also Martinez-Salazar*, 528 U.S. at 311, 120 S.Ct. 774 ("[U]nlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension."). Our decision in *Vigil* likewise emphasized that "neither the prosecution nor the defendant is granted any right in this jurisdiction, by constitution, statute, or rule, to shape the composition of the jury through the use of peremptory challenges," thus a "defendant could not [be] harmed by the deprivation of any such right." *Vigil*, ¶ 25, 455 P.3d at 339.

¶39 Accordingly, *Vigil* rejected the notion that a defendant who uses a peremptory strike to remove a juror for whom the trial court erroneously denied a for-cause challenge was effectively "forced" to use their peremptory strike. ¶ 21, 455 P.3d at 337-38 (citing *Martinez-Salazar*, 528 U.S. at 314-15, 120 S.Ct. 774); *see also Ross*, 487 U.S. at 90-91, 108 S.Ct. 2273 ("As required by [state] law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory challenges to use in his unfettered discretion. But he received all that [state] law allowed him, and therefore his due process challenge fails.").

¶40 Our decision in *Novotny* acknowledged that, aside from "an actual Sixth Amendment violation," there may be some circumstances in which an erroneous denial of a for-cause challenge does rise to the level of structural error, requiring automatic reversal. ¶¶ 23, 27, 320 P.3d at 1202-03. Citing *Martinez-Salazar*, the court acknowledged that such reversible errors include violations of state law "committed in other than good faith." *Id.* at ¶ 23, 320 P.3d at 1202 (citing *Martinez-Salazar*, 528 U.S. at 316-17, 120 S.Ct. 774). In *Martinez-Salazar*, the Supreme Court held "that a defendant's exercise of peremptory challenges . . . is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause." *Martinez-Salazar*, 528 U.S. at 317, 120 S.Ct. 774. But in so doing, the Court noted that the case before it did not involve any assertion that the trial court "deliberately misapplied the law in order to force the defendants to use a peremptory

challenge to correct the court's error." *Id.* at 316, 120 S.Ct. 774 (citation omitted) (citing *Ross*, 487 U.S. at 91 n.5, 108 S.Ct. 2273).

¶41 *Novotny* thus contemplated two ways an erroneous denial of a for-cause challenge might rise to the level of structural error: (1) where the error resulted in a Sixth Amendment violation because the biased juror actually served on the jury, and (2) where the error involved a deliberate misapplication of the law intended to disadvantage the defendant.

¶42 The law in Colorado following *Novotny* and *Vigil* is clear: when a defendant uses a peremptory challenge to correct a trial court's erroneous denial of a challenge for cause, "so long as the defendant receives both an impartial jury and the number of peremptory challenges specified by state statute, the defendant's constitutional rights remain unaffected." *Abu-Nantambu-El*, ¶ 20, 454 P.3d at 1049; *see also Novotny*, ¶¶ 23, 27, 320 P.3d at 1202-03. Absent bad faith, any such error that does not result in the biased juror actually participating on the jury is necessarily harmless. *Abu-Nantambu-El*, ¶ 20, 454 P.3d at 1049.

¶43 Here, Clark was permitted to use his statutorily allotted number of peremptory challenges. Juror K did not serve on the jury for Clark's trial, and Clark does not allege that any biased juror otherwise evaded removal. Under *Novotny* and *Vigil*, any error by the trial court in denying the challenge for cause to Juror K was harmless.

¶44 Clark nevertheless argues that the trial court's error deprived him of a peremptory challenge because he was forced to use one to cure the trial court's error. But as Judge Fox noted below, this argument is

foreclosed by our reasoning in *Vigil* and the Supreme Court's decision in *Martinez-Salazar*, which expressly rejected this argument. *Clark*, ¶ 31, 512 P.3d at 1080; *Vigil*, ¶ 21, 455 P.3d at 337; *Martinez-Salazar*, 528 U.S. at 314-15, 120 S.Ct. 774. Clark's choice to exercise a peremptory challenge against Juror K was an exercise of the full guarantee of what he was granted by statute.

¶45 Clark also argues that the trial court's error was not made in good faith and thus *Novotny* and *Vigil*'s general rule for peremptory challenges does not apply. But nothing in the record indicates that the court deliberately misapplied the law in order to force Clark to sacrifice a peremptory challenge, and Clark alleges no facts that indicate the trial court otherwise acted in bad faith.

¶46 In sum, any error by the trial court in this case did not result in a biased juror participating in Clark's trial, and Clark has not shown that any error was otherwise deliberate or made in bad faith.

3. The Trial Court's Error Did Not Violate Clark's Right to Equal Protection

¶47 Mirroring Judge Schutz's partial dissent, Clark argues that because Juror K expressed *racial* bias against him, the trial court's denial of Clark's for-cause challenge violated Clark's right to equal protection under the Fourteenth Amendment, and that the court's error amounted to structural error. Because Clark cannot establish a violation of his right to equal protection, we disagree.

a. Bias in Jury Selection and the Equal Protection Clause

¶48 The Equal Protection Clause of the Fourteenth Amendment prohibits the state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The "central purpose" of the Equal Protection Clause is "the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Accordingly, proof of an equal protection violation requires a showing of (1) *purposeful* discrimination, (2) attributable to the *state*. *Id.*; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

¶49 Beginning with *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Supreme Court has issued several decisions concerning the application of the Equal Protection Clause in the context of jury selection. Perhaps most notably, in *Batson*, the Court held that the Constitution forbids racial discrimination in jury selection—specifically, the state may not exercise peremptory challenges to purposefully or deliberately exclude persons from participating in a jury on account of their race. *Batson*, 476 U.S. at 84, 106 S.Ct. 1712 (citing *Swain*, 380 U.S. at 203-04, 85 S.Ct. 824). *Batson* established a three-step analysis designed to determine whether a peremptory strike reflected purposeful discrimination. *People v. Ojeda*, 2022 CO 7, ¶ 21, 503 P.3d 856, 862; *see also Batson*, 476 U.S. at 93, 106 S.Ct. 1712 ("As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.'") (quoting

Whitus v. Georgia, 385 U.S. 545, 550, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967)).

¶50 Although Clark leans into the *Batson* framework to argue against racial bias in the jury trial context, he fails to articulate how the *Batson* framework applies to the challenge for cause to Juror K. The *Batson* framework addresses racial bias in the jury selection process by prohibiting the discriminatory use of peremptory challenges to remove jurors on the basis of race. Clark's argument focuses on a completely different kind of "racial bias in the jury selection process"—namely, a potential juror's expression of racial bias during voir dire. But the *Batson* framework was not designed to address the issue of *juror* bias, which implicates the defendant's Sixth Amendment right to an impartial jury. Instead, *Batson* and its progeny rest on the defendant's "right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Powers v. Ohio*, 499 U.S. 400, 404, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

¶51 In his separate opinion, Judge Schutz noted that the *Batson* framework "was designed to serve multiple ends,' only one of which was to protect individual defendants from discrimination in the selection of jurors." *Clark*, ¶ 96, 512 P.3d at 1090 (Schutz, J., concurring in part and dissenting in part) (quoting *Powers*, 499 U.S. at 406, 111 S.Ct. 1364). But the Supreme Court's *Batson* cases all focus on the harms that derive from the discriminatory use of peremptory challenges. *See Powers*, 499 U.S. at 406, 111 S.Ct. 1364. For example, a defendant is denied equal protection of the laws when tried by a jury from which

members of the defendant's race have been purposefully excluded. *Id.* at 404, 111 S.Ct. 1364. In addition, the discriminatory use of peremptory challenges harms the excluded jurors and the community at large. *Id.*; *see also McCollum*, 505 U.S. at 48-49, 112 S.Ct. 2348 (acknowledging that the harm that flows from discriminatory jury selection also undermines public confidence in the integrity of the criminal justice system). But the various harms addressed by *Batson* all stem from discrimination in the selection of jurors—specifically, discrimination in the discretionary exercise of peremptory challenges. Because Clark's argument does not concern purposeful discrimination in the selection of jurors, his reliance on the *Batson* framework is misplaced.

¶52 Even aside from the obvious factual distinctions between *Batson* cases and the circumstances here, Clark fails to allege any equal protection violation. As explained above, the Equal Protection Clause prohibits *state actors* from *purposefully* discriminating on the basis of race. Clark argues that, by "tolerating" Juror K's continued presence on the jury despite his racially biased comments, the court denied Clark equal protection of the law.

¶53 To support his contention that the tolerance of racial bias constitutes an equal protection violation, Clark cites *McCollum*. In *McCollum*, the Court addressed whether to extend the *Batson* framework to apply to a criminal defendant's "*purposeful racial discrimination* in the exercise of peremptory challenges." 505 U.S. at 46-48, 112 S.Ct. 2348 (emphasis added). The issue of whether purposeful discrimination occurred was not at issue—in fact, that

issue would be determined, if the framework applied, through the *Batson* analysis itself. *Id.* at 59, 112 S.Ct. 2348.

¶54 Accordingly, the *McCollum* Court's analysis began with the question of whether the purposefully discriminatory exercise of peremptory challenges by the *defense* causes the same kind of harm addressed by *Batson*. The Court concluded that it did, stating: "'[B]e it at the hands of the State or the defense,' if a court allows jurors to be excluded because of group bias, '[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.'" 505 U.S. at 49-50, 112 S.Ct. 2348 (alterations in original) (quoting *State v. Alvarado*, 221 N.J.Super. 324, 534 A.2d 440, 442 (N.J. Super. Ct. Law Div. 1987)).

¶55 Clark relies on this language to support his contention that a court's tolerance of racial bias is, standing alone, sufficient to establish an equal protection violation. But the quote from *McCollum* provides no such support. Whether conduct was purposefully discriminatory was not at issue in *McCollum*; thus, the quoted language has no relevance to that element of an equal protection violation claim. The language is likewise irrelevant to the determination of whether there was state action. In fact, the court immediately followed the quoted language by saying:

> The fact that a defendant's use of discriminatory peremptory challenges harms the jurors and the community *does not end our equal protection inquiry*. Racial discrimination, although repugnant in all contexts, *violates the Constitution only when it*

> *is attributable to state action*. Thus, the second question that must be answered is whether a criminal defendant's exercise of a peremptory challenge constitutes state action for purposes of the Equal Protection Clause.

505 U.S. at 50, 112 S.Ct. 2348 (citation omitted) (emphases added).

¶56 To the extent Clark contends that the trial court's ruling unnecessarily required him to use a peremptory challenge on the basis of his race, we disagree. Clark analogizes the trial court's ruling to a hypothetical statute that provides Black defendants with one less peremptory challenge than white defendants. While such a statute would surely violate the Equal Protection Clause, no comparable purposeful discrimination occurred here. As discussed above, nothing in the record suggests that the trial court purposely denied Clark's challenge for cause to force Clark to expend a peremptory challenge. Were that true, the court's error would not have been made in good faith and would therefore be excepted from *Novotny*'s general rule.

¶57 Finally, Clark contends that the trial court's denial of his challenge for cause to Juror K amounts to structural error because the impacts of the error reflect the concerns articulated by the Supreme Court in *Weaver v. Massachusetts*, 582 U.S. 286, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). There, the Court articulated three broad rationales for deeming an error structural, namely where (1) the right at issue protects some interest other than preventing the defendant's erroneous conviction; (2) "the effects of the error are simply too hard to measure," making it

"almost impossible" for the government to prove the error was harmless beyond a reasonable doubt; or (3) the error always results in fundamental unfairness and thus any effort by the government to show harmlessness "would be futile." *Id.* at 295-96, 137 S.Ct. 1899.

¶58 As we have explained, structural errors are a narrow class of constitutional errors. Because Clark has not established a constitutional violation, any error by the trial court cannot be deemed structural. Regardless, the error here did not result in the type of harm contemplated by *Weaver*. Clark focuses on the impact of the judge's decision on the potential jurors' perception of the judiciary, saying that the denial "sent an intolerable message." As a factual matter, this claim is unsupported.

¶59 Crucially, there is no evidence that the jury was aware of the challenge, let alone the court's ruling or its reasoning. The challenge and the ruling were made during a bench conference, out of the potential jurors' hearing. And when the trial court provided its reasoning on the record after the fact, all of the jurors had been dismissed from the room. Ultimately, the only events the jurors witnessed were Juror K's comments during voir dire and Juror K's subsequent dismissal. If there was any reasonable conclusion to draw about the permissibility of racial bias in the courtroom, it was that such expressions of bias result in dismissal, not that they are tolerated or welcomed.

¶60 Clark has thus failed to prove any cognizable harm, much less a constitutional error that rises to the level of structural error.

4. The Trial Court's Erroneous Denial of Clark's For-Cause Challenge of Juror K Was Harmless and Does Not Require Reversal

¶61 Because *Novotny* and *Vigil* govern the analysis here, we review the trial court's error for harmlessness to determine whether reversal is required. "Under this standard, reversal is required only if the error affects the substantial rights of the parties. That is, we reverse if the error 'substantially influenced the verdict or affected the fairness of the trial proceedings.'" *Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116, 119 (citations omitted) (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)).

¶62 Juror K did not actually serve on the jury in Clark's trial. Therefore, the trial court's denial of Clark's challenge to remove Juror K for cause did not substantially influence the verdict or affect the fairness of the trial proceedings. As explained above, the court's denial of his for-cause challenge did not "force" Clark to use one of his peremptory challenges or otherwise deprive him of the full allotment of peremptory challenges granted by statute to criminal defendants.

¶63 To hold that an erroneous denial of a challenge for cause to a potential juror who has expressed racial bias is not structural error is not to say it is unimportant or inconsequential. However, where, as here, the defendant's use of a peremptory challenge to remove the juror ensured that the biased juror did not ultimately sit on the jury, reversal of the defendant's conviction is not required because there was no violation of the right to an impartial jury or the right to equal protection. Where a good faith error does not

end up impacting the defendant's trial, reversal is unwarranted.

B. Juror LL's Affidavit

¶64 Clark argues that Juror LL's affidavit describing statements made by another juror during deliberations constituted "extraneous prejudicial information" under CRE 606(b), and that he is therefore entitled to an evidentiary hearing to determine whether that information posed a reasonable possibility of prejudice. After setting forth the applicable standard of review, we discuss CRE 606(b) and the requirements for a new trial based on a claim that the jury was exposed to extraneous prejudicial information. Applying this framework, we conclude that the statements mentioned in Juror LL's affidavit did not constitute "extraneous prejudicial information."

1. Standard of Review

¶65 Whether the statements in Juror LL's affidavit constituted "extraneous prejudicial information" under CRE 606(b) is a legal question we review de novo. *See People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005).

2. CRE 606(b)

¶66 In order to promote "finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion," *id.*, Colorado law strongly disfavors any juror testimony impeaching a verdict, *Kendrick v. Pippin*, 252 P.3d 1052, 1063 (Colo. 2011) (citing *Harlan*, 109 P.3d at 624), *abrogated on other grounds by Bedor v. Johnson*, 2013 CO 4, 292 P.3d 924. With certain exceptions not relevant here, *see*

Pena-Rodriguez, 580 U.S. at 225, 137 S.Ct. 855, such testimony is generally prohibited, "even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard," *Harlan*, 109 P.3d at 624 (citing *Hall v. Levine*, 104 P.3d 222, 225 (Colo. 2005)).

¶67 CRE 606(b) codifies this general prohibition on inquiries into the validity of a verdict, stating that:

> a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

Rule 606(b) nevertheless allows inquiry into three narrow matters: "(1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form." *Id.* Under the Rule, a trial court may not receive a juror's affidavit concerning anything other than these three matters. *Id.* ("A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.").

¶68 To set aside a verdict because of extraneous prejudicial information improperly brought to the jurors' attention, "a party must show both that extraneous information was improperly before the jury and that the extraneous information posed the

reasonable possibility of prejudice to the defendant." *Kendrick*, 252 P.3d at 1063.

¶69 The evaluation of whether the extraneous prejudicial information exception to CRE 606(b) applies proceeds in two steps. *Harlan*, 109 P.3d at 629.

¶70 At step one, the court must determine whether the party alleging misconduct has presented competent evidence alleging that extraneous prejudicial information was improperly before the jury. *Kendrick*, 252 P.3d at 1063-64. At this step, the trial court must determine as a matter of law whether the alleged information before the jury constitutes prejudicial extraneous information. *See Newman*, ¶ 14, 471 P.3d at 1250. If the information does not constitute prejudicial extraneous information, the court may properly dismiss the motion for a new trial without a hearing.

¶71 If the information does constitute extraneous prejudicial information, the court must determine at step two (often following a hearing) whether there is a reasonable possibility that the extraneous prejudicial information influenced the verdict to the detriment of the defendant. *Kendrick*, 252 P.3d at 1063. The test at the second step applies an objective standard—the relevant question is whether there is a reasonable possibility of such impact. *Harlan*, 109 P.3d at 625.

¶72 During the second step, the court should consider those factors articulated in our prior cases: (1) how the extraneous information related to critical issues in the case; (2) the degree of authority represented by the extraneous information; (3) how the information was acquired; (4) whether the

information was shared with other jurors in the jury room; (5) whether the information was considered before the jury reached its verdict; and (6) whether there is a reasonable possibility that the information would influence a typical juror to the defendant's detriment. *Id.* at 630-31.

¶73 Clark argues that consideration of whether the extraneous information relates to an issue before the jury pertains only to the prejudice analysis at step two and has no bearing on whether the information is "extraneous" at step one. We disagree.

¶74 At step one, the court must determine whether the information qualifies as "extraneous prejudicial information." This step requires the court to determine if the information was "prejudicial" (and not merely extraneous). By contrast, at step two, the inquiry is whether there is a reasonable possibility that the extraneous prejudicial information affected the jury's verdict to the detriment of the defendant. While the determination of whether the information is prejudicial at step one overlaps with the determination of whether there is a reasonable possibility that the information prejudiced the defendant at step two, the burden on the defendant at each step is different. At step one, "the party seeking impeachment must produce competent evidence to attack the verdict," that is, evidence admissible under CRE 606(b) that calls into question the validity of the verdict. *People v. Garcia*, 752 P.2d 570, 583 (Colo. 1988). However, at step two, "the party must establish adequate grounds to overturn the verdict." *Id.*

3. What Constitutes Extraneous Prejudicial Information?

¶75 "[E]xtraneous prejudicial information consists of (1) 'legal content and specific factual information' (2) 'learned from outside the record' (3) that is 'relevant to the issues in a case.'" *Newman*, ¶ 15, 471 P.3d at 1250 (quoting *Kendrick*, 252 P.3d at 1064). Like the division below, we find the thorough analysis of our case law provided in the court of appeals' opinion in *Newman* helpful.

a. Legal Content

¶76 Extraneous prejudicial information can take the form of legal content or factual information. Clark argues that the statements at issue here introduced extraneous legal content.

¶77 In evaluating what constitutes "legal content," *Newman* evaluated four of our decisions for guidance. First, in *Alvarez v. People*, 653 P.2d 1127, 1131 (Colo. 1982), this court held that it is improper for a juror to consult a dictionary definition of "reasonable" in order to "assist in understanding legal terminology in the court's instructions" on the reasonable doubt standard.

¶78 Similarly, in both *Niemand v. District Court*, 684 P.2d 931, 932 n.1 (Colo. 1984), and *Wiser v. People*, 732 P.2d 1139, 1141 (Colo. 1987), this court determined that a juror's consultation of a dictionary to assist in understanding of elements of a crime was improper. In *Niemand*, the juror consulted Black's Law Dictionary to review the definitions of terms relevant to the second degree murder and manslaughter charges the defendant faced, including "malice," "premeditation," and "second degree murder." 684 P.2d at 932. Similarly, in *Wiser*, the juror looked up the definition of "burglary," one of the

crimes with which the defendant was charged. 732 P.2d at 1140. In both cases, we noted that "[j]urors are required to follow only the law as it is given in the court's instructions; they are bound, therefore, to accept the court's definitions of legal concepts and to obtain clarifications of any ambiguities in terminology from the trial judge, not from extraneous sources." *Niemand*, 684 P.2d at 934; *Wiser*, 732 P.2d at 1141 (quoting *Niemand*, 684 P.2d at 934).

¶79 Finally, in *Harlan*, this court found that the Bible scripture improperly considered by the jury during the death penalty phase of the case could be viewed as an improper "legal instruction, issuing from God, requiring a particular and mandatory punishment for murder." 109 P.3d at 632.

¶80 As *Newman* articulated, our prior decisions make clear that "legal content" means a statement of law. ¶23, 471 P.3d at 1252.

b. Outside the Record

¶81 "Extraneous" information is information gleaned from outside the record or information not included in the court's instructions to the jury. Determining whether information was introduced from outside the record is straightforward when the juror conducts an independent investigation into either the facts or the law. *See id.* at ¶ 32, 471 P.3d at 1253 (first citing *People v. Wadle*, 97 P.3d 932, 937 (Colo. 2004); and then citing *Wiser*, 732 P.2d at 1140). The question becomes much more difficult, however, when a juror instead relies on their prior knowledge and experience. *See Kendrick*, 252 P.3d at 1066 ("The line between a juror's application of her background . . . to the record evidence and a juror's introduction of

legal content or specific factual information learned from outside the record can be a fine one."). Still, jurors may properly "rely on their professional and educational expertise to inform their deliberations so long as they do not bring in legal content or specific factual information learned from outside the record." *Id.* at 1065.

¶82 In *Kendrick*, we held that "the juror's use of her background in engineering and mathematics to calculate [the defendant]'s speed, distance, and reaction time and the sharing of those calculations with the other jurors did not constitute 'extraneous' information within the meaning of CRE 606(b)." *Id.* at 1066. We reasoned that, by performing and sharing those calculations, the juror "did not introduce any specific facts or law relevant to the case learned from outside of the judicial proceeding but, rather, merely applied her professional experience and preexisting knowledge of mathematics to the evidence admitted at trial." *Id.*

¶83 In sum, to be permissible, the experience used by the juror in deliberations must be part of the juror's background, "gained before the juror was selected to participate in the case and not as the result of independent investigation into a matter relevant to the case" and, though the information may be relevant to the matter at hand, it must not include "extra facts or law, not introduced at trial, that are specific to parties or an issue in the case." *Id.*

¶84 Because the line between past experience and extraneous information is a fine one, the admonition that we "err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the

expense of possibly allowing irresponsible juror activity"—is important. *Garcia v. People*, 997 P.2d 1, 7 (Colo. 2000) (quoting *United States v. Thomas*, 116 F.3d 606, 623 (2d Cir. 1997)). Permitting reliance on personal experience "furthers the purposes of CRE 606(b) by promoting the finality of verdicts and protecting jurors from harassment." *Kendrick*, 252 P.3d at 1065.

4. The Unnamed Juror's Statement Did Not Constitute Extraneous Prejudicial Information

¶85 Here, the unnamed juror's statement during deliberations that, during a prior jury service, the judge told the jury that it must deliberate until they come to a unanimous decision did not constitute extraneous prejudicial information.

¶86 First, the juror's statement was not "legal content." The retelling of a prior jury experience, even the specific recollection of a judge's alleged statement about jury deliberations, is not a "statement of law." Second, the fact that the juror's statement is based on prior experience and was not the result of independent investigation further compels us to find that the statement was not extraneous. After all, "[a]s a practical matter, it is impossible to select a jury free of preconceived notions about the legal system or to prevent discussion of such information in the jury room." *People v. Holt*, 266 P.3d 442, 446 (Colo. App. 2011).

¶87 Third, even if we concluded that the juror's statement was extraneous legal content, unlike in *Niemand* and *Wiser*, it was not relevant to the jury's decision. The statement did not concern any definition or element of the crimes with which Clark had been

charged. But even beyond that, the statement did not relate to any other matter the jury was charged with deciding. How long the jury was required to deliberate did not have anything to do with whether the prosecution had met its burden of proof.

¶88 Therefore, the trial court correctly determined that the statement described in Juror LL's affidavit did not constitute "extraneous prejudicial information" under CRE 606(b).

III. Conclusion

¶89 We conclude that the erroneous denial of a for-cause challenge to a juror who evinces racial bias against the defendant is not structural error where the error was made in good faith and the biased juror did not actually participate in the jury. In addition, we conclude that a juror's statement during deliberations recalling a judge's alleged comment during her prior jury service was not extraneous prejudicial information under CRE 606(b). Accordingly, we affirm the judgment of the court of appeals.

JUSTICE HOOD, joined by JUSTICE GABRIEL, dissented.

JUSTICE HOOD, joined by JUSTICE GABRIEL, dissenting.

¶90 This is a difficult and troubling case (at many levels) in which the division below and the majority here claim, in so many words, that obedience to doctrine forces us to swallow a bitter procedural pill. Despite declaring that racial bias is detestable in any

context, Maj. op. ¶ 1, the majority, no doubt reluctantly, leaves unremedied the district court's failure to denounce racial bias during jury selection. Instead, it essentially says that we have little choice but to throw up our hands and concede, "no harm, no foul."

¶91 But the district court's error in excusing overt, in-court racism [1] as nothing more than legitimate political opinion, produced at least two harms, both of which are difficult to quantify but unmistakably real. First, a criminal defendant like Reginald Keith Clark—to whom our state and federal constitutions pledge rights to equal protection and a fair trial—suffered the risk that some remaining venire members were emboldened to act on similar but unvoiced biases. Second, and no less important, the whole unseemly exercise leaves our system of criminal justice diminished in the eyes of the public.

¶92 Even so, the majority concludes that (1) *People v. Novotny*, 2014 CO 18, 320 P.3d 1194, contemplates only two kinds of structural error arising from an erroneous denial of a for-cause challenge (i.e., the explicitly biased juror sat or the court acted in bad faith), Maj. op. ¶¶ 40-41; and (2) equal protection principles are relevant to our structural error analysis in this context only when the record reflects intentional discrimination by the court, *id.* at ¶¶ 48-

---

[1] We agree with the division majority that there was a "glaring implication" that Juror K harbored an "acknowledged bias against nonwhite people like defendant." *People v. Clark*, 2022 COA 33, ¶ 16, 512 P.3d 1074, 1078. This inference now seems undisputed.

55. But because I believe fidelity to precedent doesn't leave us powerless to address the harm inflicted here, I respectfully dissent.

I. Structural Error

¶93 Our basic legal yardstick is straightforward. Structural errors "defy analysis by 'harmless-error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). There are "at least three broad rationales" for "[t]he precise reason why a particular error is not amenable to [harmless-error] analysis—and thus the precise reason why the Court has deemed it structural," *Weaver v. Massachusetts*, 582 U.S. 286, 295, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017):

> [1] errors concerning rights protecting some interest other than the defendant's interest in not being erroneously convicted; [2] errors the effects of which are too hard to measure, in the sense of being necessarily unquantifiable and indeterminate; and [3] errors that can be said to always result in fundamental unfairness,

Howard-Walker v. People, 2019 CO 69, ¶ 25, 443 P.3d 1007, 1011 (quoting *James v. People*, 2018 CO 72, ¶ 15, 426 P.3d 336, 339).

¶94 Denying a party's for-cause challenge of a potential juror who expressed racial bias implicates the first two of these rationales. *See Weaver*, 582 U.S. at 296, 137 S.Ct. 1899 ("[M]ore than one of these rationales may be part of the explanation for why an error is deemed to be structural."). As noted, this error harms the defendant albeit in ways hard to measure. And the error implicates a public interest that extends

beyond a defendant's interest in not being erroneously convicted.

II. The Harm to Clark

¶95 Let's start with the harm to Clark. Over thirty years ago, the Supreme Court warned that the presence of racial discrimination during voir dire is "often apparent to the entire jury panel, [and] *casts doubt over the obligation* of the parties, *the jury*, and indeed the court to adhere to the law." *Powers v. Ohio*, 499 U.S. 400, 412, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (emphases added). By failing to release Juror K after he expressed racial bias, the court tacitly allowed the remaining venire members to cling to similar prejudices while deciding Clark's fate.

¶96 As Judge Schutz explained in his separate opinion below: The district court's decision broadcasted to all who remained "that a prospective juror could sit in judgment of a person against whom he had an acknowledged racial bias." *People v. Clark*, 2022 COA 33, ¶ 98, 512 P.3d 1074, 1091 (Schutz, J., concurring in part and dissenting in part). The district court placed an aura of legitimacy around Juror K's racial bias by failing to condemn it, and in turn, introduced the risk that sitting jurors may have felt comfortable—or worse, empowered—to make judgments rooted in bias against the only "[B]lack gentleman" in the room—Clark.

¶97 The majority dismisses this reality by claiming that "there is no evidence that the jury was aware of the challenge, let alone the court's ruling or its reasoning." Maj. op. ¶ 59. This argument suffers from a false premise: namely, that jurors lack the capacity to understand what is unfolding around them during

our court proceedings. In my experience, however, jurors aren't as naive as my colleagues in the majority suggest.

¶98 On the contrary, there are at least three reasons why the prospective jurors here undoubtedly understood the district court to affirm Juror K's ability to serve despite his racial bias. First, the court had already explained to prospective jurors the mechanics of the for-cause-dismissal stage of voir dire, so everyone knew that the court was determining whether prospective jurors were eligible to serve. Second, the prospective jurors had witnessed the court remove a juror whose impartiality it had found wanting. And third, the district court asked Juror K follow-up questions—something it had only done when a prospective juror's answers gave it some pause—before confirming that Juror K could serve. It's of no moment that the court's justification was given out of earshot of the prospective jurors. The ruling itself was clear: Even after expressing racial bias, Juror K was fit to serve.

¶99 The majority is equally wrong that "the only events the jurors witnessed were Juror K's comments during voir dire and Juror K's subsequent dismissal," which would've left them with the impression that "bias result[s] in dismissal." *Id.* Again, jurors are sharper than that. The court explained that the peremptory-challenge phase of voir dire was distinct from the for-cause stage. The court also emphasized that peremptory challenges don't require a reason and were attributable to the attorneys—not the court-so prospective jurors shouldn't "take any offense" at removal. The majority glosses over these facts,

perhaps because they establish that no reasonable juror would have equated the defense's use of a peremptory strike with state condemnation of Juror K's racial bias.

¶100 The district court's error thus goes to the very foundation of our criminal justice system—the impartiality of the criminal jury, the body responsible for determining a defendant's innocence or guilt. "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Because these errors threaten the "right to an impartial adjudicator, be it judge or jury," they " 'can never be treated as harmless.' " *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); *accord People v. Abu-Nantambu-El*, 2019 CO 106, ¶ 27, 454 P.3d 1044, 1050.

¶101 Here, any bias Juror K introduced into the proceeding during voir dire lingered in the background of the entire trial. *See Powers*, 499 U.S. at 412, 111 S.Ct. 1364 ("The influence of the voir dire process may persist through the whole course of the trial proceedings."). To what effect, we don't know exactly. But that doesn't mean we should ignore the possibility that the error tainted the remaining venire. This difficulty is precisely why the error is structural: "the effects of the error are simply too hard to measure." *Weaver*, 582 U.S. at 295, 137 S.Ct. 1899.

Indeed, it is "because a review of the record could not reveal the impact of the defect" that the error is structural. *United States v. Iribe-Perez*, 129 F.3d 1167, 1172 (10th Cir. 1997); *see also Vasquez*, 474 U.S. at 263-64, 106 S.Ct. 617 (concluding that discrimination in the grand jury selection was "not amenable to harmless-error review" because of "the difficulty of assessing [the] effect on any given defendant").

¶102 The district court's error in refusing to excuse Juror K when Clark challenged him for cause jeopardized Clark's right to a fair trial by giving judicial approval to Juror K's racial bias in front of the remaining venire members: "[A] defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). Because that constitutional right is of paramount importance and because the effect of the district court's error evades an outcome-determinative analysis, the district court's error was structural.

III. The Harm to the Integrity of the Justice System

¶103 The error was also structural because it impugned the integrity of the justice system. Racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 224, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017).

¶104 I agree with Judge Schutz that what occurred during voir dire offends Clark's equal protection right to be free from state-approved racial discrimination.

See Clark, ¶¶ 93-96, 102, 512 P.3d at 1090-91, 1092 (Schfutz, J., concurring in part and dissenting in part). "By its inaction," the district court "made itself a party to" and "place[d] its power, property[,] and prestige behind" Juror K's racial bias. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Time and again the Supreme Court has acknowledged that similar inaction "undermine[s] public confidence in the fairness of our system of justice." *Rivera v. Illinois*, 556 U.S. 148, 161, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) (alteration in original) (quoting *Batson v. Kentucky*, 476 U.S. 79, 87, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)); *accord Peña-Rodriguez*, 580 U.S. at 225, 137 S.Ct. 855; *McCollum*, 505 U.S. at 49-50, 112 S.Ct. 2348; *People v. Ojeda*, 2022 CO 7, ¶ 20, 503 P.3d 856, 861-62. For that reason, "[n]o surer way could be devised to bring the processes of justice into disrepute" than "to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors." *Aldridge v. United States*, 283 U.S. 308, 315, 51 S.Ct. 470, 75 L.Ed. 1054 (1931) (emphasis added). Yet that is the message the district court's error sends.

¶105 This is an affront to basic equal protection principles and does great harm to the public's perception of the justice system. *See Mistretta v. United States*, 488 U.S. 361, 407, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *McCollum*, 505 U.S. at 49-50, 112 S.Ct. 2348 ("[T]he very foundation of our system of justice [is] our citizens' confidence in it.").

¶106 The majority concludes that the district court's error wasn't structural because the error wasn't constitutional. Maj. op. ¶ 58. To the contrary, the underlying error in this case violated Clark's Sixth Amendment right to an impartial jury. "[I]f a trial court error results in the seating of a juror who is actually biased against the defendant, the defendant's right to an impartial jury is violated, the error is structural, and reversal is required." *Abu-Nantambu-El*, ¶ 30, 454 P.3d at 1050. There is no Sixth Amendment violation "so long as the jury that sits is impartial." *United States v. Martinez-Salazar*, 528 U.S. 304, 305, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)). But I cannot say as much on these facts. Here, the district court's error invited similarly biased jurors to sit on Clark's jury. Thus, even without a formal equal protection violation, the court is still confronted with a constitutional error. And from there, the nub of the issue is simply whether the effects of that error "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309, 111 S.Ct. 1246.

¶107 As discussed above, the error here fits that bill. The district court's error produced harms that (1) cannot be measured and thus defy an outcome-determinative analysis and (2) concern interests other than the defendant's right to a sound verdict; namely, protection of the public's faith in the judiciary. Accordingly, the district court's error is structural and, in my opinion, entitles Clark to a new trial. *See People v. Madrid*, 2023 CO 12, ¶ 60, 526 P.3d 185, 198. Thus, I respectfully dissent.

APPENDIX B

COLORADO COURT OF APPEALS, Div. I

2022 COA 33

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner-Appellee

v.

REGINALD KEITH CLARK,

Defendant-Appellant.

Court of Appeals Case No.19CA340

Announced March 24, 2022

OPINION BY JUDGE FOX

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

I. Background

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

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

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

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

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

II. Biased Prospective Juror

¶7 Clark first argues that the trial court abused its discretion by rejecting his challenge to remove an

allegedly biased prospective juror. Judge Fox and Judge Schutz agree that the court abused its discretion in denying the challenge for cause, but Judge Fox and Judge Dailey do not believe that any error requires reversal.

A. Additional Background

¶8 During voir dire, defense counsel probed the jury about the fact that Clark was the only Black individual in the room. One juror opined that the lack of diversity could undermine the fairness of the trial as a whole. Several minutes later, Prospective Juror K returned to the diversity topic:

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

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

> [THE COURT]: So here's kind of the two- part bottom line . . . . If you're chosen as a juror in this case, and if you're back in the jury room and you think the prosecution hasn't proven its case, would you have any trouble finding this defendant to be not guilty?
>
> [PROSPECTIVE JUROR K]: Not at all.
>
> [THE COURT]: And the other side of that coin, what if you're back there and you say that prosecutor has proven his case, would you have any trouble finding the defendant to be guilty?
>
> [PROSPECTIVE JUROR K]: Again, the same answer. Not at all.

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

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

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

B. Law and Analysis

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

1. Challenge for Cause

¶13 An impartial jury is an essential element of a defendant's constitutional right to a fair trial under the United States and Colorado Constitutions. U.S. Const, amends. V, VI, XIV; Colo. Const, art. II, §§ 16, 25. To secure that right, Colorado law requires courts, upon a party's challenge, to remove jurors when particular circumstances implicate their ability to remain impartial. *See* § 16-10-103(1)(j), C.R.S. 2021. A court therefore must grant a challenge for cause to a prospective juror who "envinc[es] enmity or bias toward the defendant or the state," unless the court is satisfied that the prospective juror "will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." *Id.*; *People v. Abu-Nantambu-El*, 2019 CO 106, 11 16, 454 P.3d 1044.

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

¶15 We review a trial court's ruling on a challenge for cause to a prospective juror for an abuse of

discretion. *People v. Clemens*, 2017 CO 89, T 13, 401 P.3d 525. This standard defers to the trial court's assessment of the credibility of the prospective juror's responses, recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of the prospective juror, and discourages reviewing courts from second-guessing the trial court based on a cold record. *Id.* A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *Id.*

¶16 Several prospective jurors opined on the value of a diverse jury pool. Prospective Juror K, however, volunteered that he moved to Gilpin County because he "didn't want diversity" — the obvious inference being that he moved to Gilpin County to distance himself from nonwhite people. Although his opinion can theoretically be framed as a political view, the glaring implication persists: his acknowledged bias against nonwhite people like defendant.[1] *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000) ("Actual bias encompasses beliefs . . . grounded in the juror's feelings regarding the race, religion, and ethnic or other group to which the defendant belongs."), *overruled on other grounds by People v. Novotny*, 2014 CO 18, 320 P.3d 1194.

¶17 In denying the challenge for cause, the trial court pointed to Prospective Juror K's statements that (1) the prosecution did not have a "leg up," and (2) he would hold both sides to their respective burdens of

---

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

proof. It denied the challenge despite Prospective Juror K's repeated acknowledgement that he could not change how he felt about diversity. In so doing, he made clear that he would not "set aside any bias or preconceived notion and render an impartial verdict" as he was required to do to avoid being stricken for cause. *Drake*, 748 P.2d at 1244; *People v. Cisneros*, 2014 COA 49, 11 94, 356 P.3d 877. Moreover, the limited rehabilitation the court performed focused on whether Prospective Juror K would apply the correct burdens of proof — not whether he could (or would) set aside his admitted bias.

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

¶19 That is not the case here. Instead, Prospective Juror K volunteered his views and then preemptively clarified that he could not change those views. We recognize, of course, that trial courts do not need to secure affirmative statements from prospective jurors that they will set aside each and every bias to conclude that they can sit impartially. *Vigil v. People*, 2019 CO 105, 11 24, 455 P.3d 332 ("[I]t was unnecessary for the trial court to query the prospective juror in precise terms of bias and impartiality and to receive his express assurance that he was not biased and both could and would render an impartial verdict.").

¶20 But it is quite another thing where, as here, a prospective juror expresses a bias and then explicitly rejects the possibility of setting aside that bias. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 723-24, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (concluding that where actual bias is stated, generalized affirmations that the juror will nonetheless apply the law impartially are insufficient to avoid disqualification of the potential juror); *State v. Jonas*, 904 N.W.2d 566, 571-74 (Iowa 2017) (collecting cases on this issue); *Leick v. People*, 136 Colo. 535, 570, 322 P.2d 674, 693 (1958) (Sutton, J., dissenting) (suggesting that judicial rehabilitation by "leading questions" designed to "give the answers desired by the state to qualify [the juror]" may amount to judicial advocacy). This conclusion is further compelled by the longstanding recognition that racial bias is anathema to our justice system. *See, e.g., Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) ("[A] defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice.").

¶21 In our view, such bias falls squarely within the purview of section 16-10-103(l)(j), and later assurances of generalized impartiality do not obviate that bias. *See Drake*, 748 P.2d at 1244. Accordingly, we conclude that the court's failure to grant the challenge for cause constitutes an abuse of discretion. This preliminary conclusion, however, does not end our inquiry.

2. Deprivation of Peremptory Strike

¶22 In addition to challenges for cause, Colorado law provides peremptory challenges that allow "the

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

¶23 Until 2014, the use of a peremptory strike to remove a prospective juror that should have been removed for cause qualified as structural error requiring automatic reversal if the defendant used all their peremptory strikes. *Novotny*, ¶¶ 1-2. Our state supreme court's *Novotny* decision abandoned the automatic reversal rule, instructing courts to perform "the proper outcome-determinative test" in evaluating whether to reverse following an erroneous ruling on a challenge for cause. *Id.* at ¶ 27; *Vigil*, ¶¶ 16-18. Subsequent cases have clarified that a non-constitutional harmless error analysis applies in this context. *Vigil*, ¶ 17 (collecting- cases).

¶24 The *Novotny* court drew heavily on a series of United States Supreme Court cases concluding that peremptory strikes are rooted in state law and thereby lack constitutional grounding. *Vigil*, ¶¶ 16-18. This unmooring of peremptory strikes from the Constitution was critical because the automatic reversal rule was based on the notion that peremptory strikes were necessary to ensure a fair trial under the Sixth Amendment and to guarantee due process under the Fourteenth Amendment. *Novotny*, ¶¶ 14-18. So, while peremptory strikes allow litigants to

assist the court in securing the constitutionally required fair and impartial jury, "exercising the authorized number of peremptory challenges is all that the parties are [now] entitled to." *Vigil*, ¶ 16. Accordingly, absent bad faith or actual participation by a biased juror, the use of a peremptory challenge to cure an erroneous ruling on a challenge for cause is necessarily harmless. *Id.* at ¶ 17; *Abu-Nantambu-El*, ¶ 20.

¶25 In rewriting this standard, our state supreme court adopted a crucial aspect of the United States Supreme Court's reasoning — specifically, its repudiation of the idea that a defendant who is erroneously denied a challenge for cause is effectively "forced" to use a peremptory strike to remove the problematic juror. *United States v. Martinez-Salazar*, 528 U.S. 304, 313-14, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). Rather, in the Court's view, the defendant has simply made a "choice" to use the peremptory strikes allowed by state law and that, absent bad faith by the court, "he has received nothing less than that to which the rule entitled him." *Vigil*, ¶ 21 (citing *Martinez-Salazar*, 528 U.S. at 315, 120 S.Ct. 774).

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

¶27 First, he claims that the *Novotny* court carved out an exception to its rule for those decisions made in "other than good faith." *Novotny*, ¶ 23. Clark relies on *Rivera v. Illinois*, where the Court rejected the contention that the trial court's misapplication of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), amounted to a due process

violation and noted that "there is no suggestion here that the trial judge repeatedly or deliberately misapplied the law *or acted in an arbitrary or irrational manner*." 556 U.S. 148, 160, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) (emphasis added). Clark seizes on this last clause to argue that, if the court's ruling is "arbitrary or irrational," then it was made in bad faith and thereby is still subject to the automatic reversal rule.

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

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

¶30 According to Clark, *Novotny* rested on the foundational assumption that peremptory strikes do not necessarily implicate the constitution, and that, as

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

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

¶32 Because Clark made a choice to exercise the statutorily allotted peremptory strikes, and since that

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

¶33 We are not persuaded otherwise by the partial dissent's repackaging of Clark's argument. Clark's argument to the trial court and to this court did not suggest that Prospective Juror K's brief presence in the venire — from when the for-cause challenge was denied to when he was peremptorily stricken — infected the jury pool or the trial. *See Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008) ("In our adversary system . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); *see also Martinez v. People*, 2015 CO 16, ¶ 15, 344 P.3d 862 (recognizing that the trial court must be presented with " 'an adequate opportunity to make findings of fact and conclusions of law' on the issue" before we will review it) (citation omitted). While it is impossible on a cold record to determine how long Prospective Juror K remained in the jury pool, the transcript of jury selection tells us that the defense's challenge to three jurors, including Prospective Juror K, occupies a mere six pages of transcript in a multi-day trial.

Judicial Authority

¶34 Clark next contends that the county court judge who received his jury verdict lacked the authority to

do so, and therefore his conviction must be reversed. We disagree.

A. Additional Background

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

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

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

¶38 After the verdict, Clark appealed and then filed a motion for limited remand to the district court suggesting that Judge Taylor, as a county court judge, lacked the authority to preside over a felony criminal matter. Our court granted the motion and remanded for the district court to address this threshold question.

¶39 Because Judge Hall had retired, District Court Judge Todd L. Vriesman conducted a hearing and, after entertaining argument from both sides, issued a

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

B. Law and Analysis

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

¶41 Although county courts lack jurisdiction over felonies, in certain circumstances county court judges can be appointed to preside over matters in the district court. *People v. Sherrod*, 204 P.3d 466, 469 (Colo. 2009). Pursuant to section 13-6-218, C.R.S. 2021, the Chief Justice of the Colorado supreme court

may assign any county judge who has been licensed to practice law in Colorado for five years "to perform judicial duties in any district court." *See* Colo. Const, art. VI, § 5(3) (The chief justice may "[assign any county judge . . . temporarily to perform judicial duties in any county court if otherwise qualified under section 18 of this article, or assign, as hereafter may be authorized by law, said judge to any other court . . . ."). Chief Justice Directive 95-01 delegated this assignment power to the chief judges of each district.[2] *See* Colo. Const, art. VI, § 5(4). Accordingly, "with the proper qualifications and assignment by the chief justice or a chief judge, a county judge may perform judicial duties in a district court." *Sherrod*, 204 P.3d at 469; *accord People v. Torkelson*, 971 P.2d 660, 662 (Colo. App. 1998) (remanding to district court to determine whether the county court judge was assigned "pursuant to constitution, statute, or chief justice directive").

---

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

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

¶42 Whether a judge has authority to preside over a proceeding involves a question of law that we review de novo. *Egelhoff v. Taylor*, 2013 COA 137, H 27, 312 P.3d 270.

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

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

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

county court judge and case assigned. *Sherrod*, 204 P.3d at 469, 472.

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

Juror Affidavit

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

A. Additional Background

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

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

that the jury was required to reach a unanimous verdict.

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

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

B. Law and Analysis

¶51 Jurors are generally prohibited from testifying about any "matter or statement occurring during the course of the jury's deliberations" or about "the effect of anything upon his or any other juror's mind or emotions." CRE 606(b); *Kendrick v. Pippin*, 252 P.3d 1052, 1063 (Colo. 2011), *abrogated on other grounds by Bedor v. Johnson*, 2013 CO 4, 292 P.3d 924. Nor may a court receive an "affidavit or evidence of any statement by [a] juror" concerning as much. CRE 606(b). This rule seeks to "promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion," and thus "strongly disfavors any juror testimony impeaching a verdict." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005); *see also Kendrick*, 252 P.3d at 1063. Despite these limitations, CRE 606(b) contains a narrow exception whereby jurors may testify as to "whether extraneous

prejudicial information was improperly brought to the jurors' attention."

¶52 Jurors may only consider "the evidence admitted at trial and the law as given in the trial court's instructions." *Kendrick*, 252 P.3d at 1063-64 (quoting *Harlan*, 109 P.3d at 624). Thus, "any information that is not properly received into evidence or included in the court's instructions is extraneous and improper for juror consideration." *Id.* (quoting *Harlan*, 109 P.3d at 624). Our courts have interpreted "extraneous prejudicial information" to consist of "(1) 'legal content and specific factual information' (2) 'learned from outside the record' (3) that is 'relevant to the issues in a case.' " *People v. Newman*, 2020 COA 108, T 15, 471 P.3d 1243 (quoting *Kendrick*, 252 P.3d at 1064).

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

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

¶55 Whether extraneous prejudicial information was before the jury presents a mixed question of law

and fact. *Id.*; *People v. Holt*, 266 P.3d 442, 444 (Colo. App. 2011). We review de novo the trial court's conclusions of law but defer to the court's findings of fact if they are supported by competent evidence in the record. *Harlan*, 109 P.3d at 624.

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

¶57 The statement Clark asserts is "extraneous prejudicial information" is the unnamed juror's statement that another judge told her that juries must deliberate until they reach a unanimous verdict. Even if we assume that this statement qualifies as a "legal statement" coming from "outside the record" for purposes of CRE 606(b), the statement does not concern an element of the charged crimes or implicate an issue the jury was tasked with deciding. *Newman*, ¶¶ 15, 40. Rather, the statement relates to an aspect of jury procedure — specifically, how to handle protracted deliberations. And whether juries must deliberate until reaching a unanimous verdict was neither an issue the jury needed to decide, nor relates to one. *Cf. id.* at ¶¶ 46-49 (concluding that a lawyer-juror's independent definition of character evidence implicated the credibility of the defendant, and thereby related to an issue before the jury).

¶58 We recognize that Juror LL's statement broadly relates to how juries handle protracted deliberations, which could affect their conclusions on the issues before it. But given that construing "issue" in this manner would be inconsistent with both the underlying purpose of CRE 606(b) and the precedent that interprets this prong narrowly, we decline to

adopt such a broad reading. *Kendrick*, 252 P.3d at 1064; *Holt*, 266 P.3d at 445.

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

Conclusion

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

JUDGE DAILEY concurs in the judgment.

JUDGE SCHUTZ concurs in part and dissents in part.

JUDGE DAILEY, concurring in the judgment.

¶61 I agree with Judge Fox that, under *People v. Novotny*, 2014 CO 18, 320 P.3d 1194, and its progeny, any error committed by the trial court by denying Clark's challenge for cause would not warrant a new trial.

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

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

> The diversity and stuff, yes, it's obvious there's a [B]lack gentleman over there. This is Gilpin County.

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

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

---

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

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

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

* * * *

¶65 Section 16-10-103(1)0), C.R.S. 2021, requires a trial court to sustain a challenge for cause if a juror's state of mind evinces enmity or bias toward the defendant or the state. Similarly, Crim. P. 24(b)(l)(X) requires disqualification of a juror if his or her state of mind manifests a bias for or against either side, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and instructions of the court. *See Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *People v. Shreck*, 107 P.3d 1048, 1057 (Colo. App. 2004).

¶66 Actual bias is a state of mind that prevents a juror from deciding the case impartially. It encompasses beliefs grounded in personal knowledge or a personal relationship, as well as beliefs grounded in the juror's feelings regarding the race, religion, and ethnic or other group to which the defendant belongs. *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000), *overruled by People v. Novotny*, 2014 CO 18, 320 P.3d 1194.

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

¶68 We give great deference to the trial court's determination of a challenge based on actual bias "because such decisions turn on an assessment of the [potential] juror's credibility, demeanor, and sincerity in explaining his or her state of mind." *Shreck*, 107 P.3d at 1057; *see People v. Sandoval*, 733 P.2d 319, 321 (Colo. 1987) ("[T]he trial judge is the only judicial officer able to assess fully the attitudes and state of mind of a potential juror by personal observation of the significance of what linguistically may appear to be inconsistent or self-contradictory responses to difficult questions."); *People v. Oliver*, 2020 COA 97, ¶ 11, 474 P.3d 207 ("In determining whether a potential juror can set aside any preconceived notions and render an impartial verdict, the trial court may consider a juror's assurances that he or she can serve fairly and impartially. If the court is reasonably satisfied that the prospective juror can render an impartial verdict, the juror should not be disqualified.") (citation omitted).

¶69 Because the trial court is in a better position to evaluate these factors than a reviewing court, we generally will not overturn a trial court's decision on a challenge for cause unless it is affirmatively shown that the court abused its discretion. *Shreck*, 107 P.3d at 1057. An abuse of discretion, in this context, is shown by the absence of evidence in the record supporting the court's decision. *People v. Richardson*, 58 P.3d 1039, 1042 (Colo. App. 2002); *see also Carrillo*, 974 P.2d at 486 (appellate court must examine the entire voir dire of the prospective juror).

¶70 Ordinarily, "it is the trial court's prerogative to give considerable weight to the juror's assurance that

he can fairly and impartially serve on the case." *People v. Russo*, 713 P.2d 356, 362 (Colo. 1986).[2]

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

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

---

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

¶73 I do not agree.

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

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

Thomas v. Lumpkin, 995 F.3d 432, 444-46 (5th Cir. 2021) (citation omitted) (quoting *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)); *see also State v. Munson*, 129 Ariz. 441, 631 P.2d 1099, 1102 (1981) (declining to excuse for cause prospective jurors who expressed racial bias but assured the court they could set that bias aside); *People v. Jackson*, 13 Cal.4th 1164, 56 Cal.Rptr.2d 49, 920 P.2d 1254, 1271 (1996) (declining to excuse for cause prospective juror who admitted that he was raised with racial prejudices but said that he had "grown out of' those prejudices, and who said he believed, based on media, that Black people committed more crimes than white people); *People v. Williams*, 63 N.Y.2d 882, 483 N.Y.S.2d 198, 472 N.E.2d 1026, 1026-28 (1984) (declining to excuse two prospective jurors who, though they said that they did not associate with Black people and did not approve of interracial marriage, assured the court that their feelings would not affect their ability to fairly decide the case).

¶75 "[W]hen . . . a potential juror's statements compel the inference that he or she cannot decide

crucial issues fairly, a challenge for cause must be granted in the absence of rehabilitative questioning or other counter-balancing information." *People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007).

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

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

---

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

the state of the record was not such as would compel an inference of enmity against Clark or bias in favor of the prosecution.[4]

JUDGE SCHUTZ, concurring in part and dissenting in part.

¶78 For the reasons articulated well by Judge Fox, I agree with the conclusion that Prospective Juror K's voir dire responses, particularly when viewed in the context of the contemporaneous responses from other jurors, evince racial bias towards Clark.[1] I also agree

---

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

[1] When considering Prospective Juror K's racially biased statements, it is significant to note the factual context of this case. Clark, a Black man, was convicted of sexually assaulting A.B., a white woman. The historical racial prejudice associated with cases involving this factual dynamic is well documented. *See generally* Jane Dailey, White Fright: The Sexual Panic at the Heart of America's Racist History (2020). Unfortunately, these same underlying biases have historically made their way into the courtroom. *See, e.g., Jackson v. City & Cnty. of Denver*, 109 Colo. 196, 197-98, 124 P. 240, 241 (1942) (upholding vagrancy conviction of an interracial couple who "liv[ed] together as though married" because vagrancy definition included "lead[ing] an ... immoral ... course of life"), *abrogated by LaFleur v. Pyfer*, 2021 CO 3, 469 P.3d 869; *Pumphrey v. State*, 156 Ala. 103, 47

with Judge Fox that the trial court's exchange with Prospective Juror K did not effectively rehabilitate, or even meaningfully address, Prospective Juror K's self acknowledged intractable racial biases. *See People v. Merrow*, 181 P.3d 319, 323 (Colo. App. 2007) (Webb, J., specially concurring) ("[A]nswers to [leading] questions may suggest overt acquiescence in the trial court's efforts to elicit a commitment to neutrality. But bias remains if the prospective juror tells the court only what it wants to hear, while covertly holding on to the previously articulated views that precipitated the challenge."); *People v. Jonas*, 904 N.W.2d 566, 571-72 (Iowa 2017) (citing cases and journal articles addressing the risks of judicial attempts to rehabilitate, through leading and generalized questions, a juror who has expressed racial bias).

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

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

¶80 For decades prior to our supreme court's decision in *People v. Novotny*, 2014 CO 18, 320 P.3d

---

So. 156, 158 (1908) (permitting jurors to presume a white woman would not consent to sex with a Black man).

1194, Colorado followed a bright-line rule that required automatic reversal of a criminal conviction when the trial court wrongfully denied any challenge for cause and the defendant thereafter exhausted all of their peremptory challenges after using a peremptory to strike the juror in question. *Id.* at ¶ 14. This rule was predicated upon federal and state law that held that the right to "shape the jury" through the use of peremptory challenges was grounded in the Sixth Amendment right to a jury trial and the Fifth and Fourteenth Amendment guarantees to due process of law. *Id.* at ¶¶ 14-16. By wrongfully denying a challenge for cause, these cases reasoned, a trial court deprives a defendant of the right to fully exercise his peremptory challenges because it forces the defendant to use one of those challenges to correct the trial court's error. *See, e.g., People v. Macrander*, 828 P.2d 234, 243 (Colo. 1992), *overruled by Novotny*, ¶ 27.

¶81 Over time, the United States Supreme Court moved away from this rule of automatic reversal. *See, e.g., United States v. Martinez-Salazar*, 528 U.S. 304, 308, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). These cases held that absent independent constitutional error, bad faith, or arbitrary or irrational conduct by the judicial officer, the Constitution does not guarantee a defendant the right to exercise peremptory challenges unburdened by the trial court's error in failing to grant a challenge for cause. Drawing from this federal precedent, *Novotny* held that the long established "automatic reversal rule" no longer applies to all cases in which a

trial court has wrongfully denied a challenge for cause. *Novotny*, ¶ 27.

¶82 The trial court's error in *Novotny* was the failure to excuse for cause a prospective juror who was employed as an Assistant Attorney General and was thus a compensated employee of a law enforcement agency. *Novotny*, ¶ 3; § 16-10-103(l)(k), C.R.S. 2021 ("The court shall sustain a challenge . . . [if] [t]he juror is a compensated employee of a public law enforcement agency or a public defender's office."). Similarly, in the more recent case of *Vigil v. People*, the challenge for cause was directed at a prospective juror who stated he could not be fair and impartial to the defendant because of his personal and business relationships with the victim's family. 2019 CO 105, ¶ 5, 455 P.3d 332; § 16-10-103(j) (The court shall grant a challenge for cause against a juror "evincing enmity or bias toward the defendant or the state."). In these circumstances, the supreme court concluded automatic reversal was inappropriate, and therefore a defendant's conviction would stand unless they could demonstrate the wrongful denial of the challenge for cause resulted in the eventual seating of a juror who was biased against them. *See Vigil*, ¶ 25. Because the defendants in *Novotny* and *Vigil* had used one of their peremptory challenges to exclude the challenged juror and failed to demonstrate that any of the jurors who served at trial were biased against them, the supreme court held they failed to satisfy the outcome-determinative test and therefore their convictions must stand.

¶83 The majority concludes the same outcome-determinative test articulated in *Novotny* and *Vigil*

applies to the present circumstance, in which the trial court failed to grant a challenge for cause against a juror who had demonstrated racial bias towards Clark. While I agree the intended scope of *Novotny* is broad, I do not share my colleagues' perspective that it applies to the present circumstance.

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

> While we do not imply today that every violation of our statutes and rules prescribing the use of peremptory challenges must be disregarded as harmless, we are nevertheless unwilling to conclude that such violations of state law, *as distinguished from an actual Sixth Amendment violation or those committed in other than good faith*, rise to the level of structural error.

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

> For these reasons, we overrule our prior holdings to the contrary and conclude that reversal of a criminal conviction for other than structural error, in the absence of express legislative mandate or an appropriate case specific, outcome-determinative analysis, can no longer be sustained; and further,

> that allowing a defendant fewer peremptory challenges than authorized, or than available to and exercised by the prosecution, does not, in and of itself, amount to structural error.

Id. at ¶ 27.

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

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

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

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

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

> The automatic reversal precedents [the defendant] cites are inapposite. One set of cases involves *constitutional* errors concerning the qualification of the jury . . . . In *Batson*, for example, we held that the unlawful exclusion of jurors based on race

> requires reversal because it "violates a defendant's right to equal protection," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice."

556 U.S. 148, 161, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) (quoting *Batson v. Kentucky*, 476 U.S. 79, 86, 87, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). Similarly, in *Martinez- Salazar*, the Supreme Court underscored that, "[u]nder the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." 528 U.S. at 315, 120 S.Ct. 774. Thus, the very cases that underlie the *Novotny* decision recognize that the Equal Protection Clause of the Fourteenth Amendment continues to prohibit racial discrimination in the jury selection process and a violation of this guarantee requires automatic reversal.

¶89 *Batson* arose in the context of prosecutors using peremptory challenges to exclude Black citizens from serving as jurors in the trial of a Black defendant. In the decades that followed, courts have consistently reaffirmed and extended the equal protection concerns articulated in *Batson* to a variety of circumstances in which racial discrimination has contaminated the jury selection process. *See, e.g., Georgia v. McCollum*, 505 U.S. 42, 48, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (the Equal Protection Clause is violated when a Black defendant uses peremptory challenges to exclude white jurors). The guarantee of equal protection also requires trial court judges to exclude prospective jurors who acknowledge racial

bias towards a defendant. *See, e.g., State v. Witherspoon*, 82 Wash. App. 634, 919 P.2d 99, 101 (1996) (reversing conviction of Black defendant based upon trial court's failure to grant challenge for cause against juror who admitted they were "a little bit prejudiced" against Black people based upon general newspaper coverage of Black people dealing drugs. These principles remain vital from the commencement of the jury selection process through the completion of the trial. Thus, a jury verdict that is tainted by the racial bias of one or more jurors expressed during deliberations must also be overturned. *See, e.g., Pena-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 197 L.Ed.2d 107 (2017) (invalidating a jury verdict when a juror expressed racial bias and stereotypes against the defendant during jury deliberations, because racial discrimination in the deliberative process threatens the integrity of the jury system).

¶90 In light of these authorities, it is not surprising that the "overwhelming majority of courts in other jurisdictions to consider the issue have held that a *Batson* violation constitutes structural error requiring automatic reversal." *People v. Wilson*, 2012 COA 63M, ¶ 22, 411 P.3d 11 (collecting cases), *rev'd on other grounds*, 2015 CO 54M, 351 P.3d 1126. In *Wilson*, a division of this court presaged the tension between trial error and structural error in the context of racial bias during the jury selection process:

> *Batson* violations clearly fall within the category of structural errors that affect "the framework within which the trial proceeds," and for which the consequences are "unquantifiable and

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

Wilson, ¶¶ 25-26 (citations omitted).

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

¶92 Ultimately, the Colorado Supreme Court reversed the appellate court's decision in *Wilson*. But it did so based upon its conclusion that the appellate court had erred in concluding the juror was excused on the basis of race. *Wilson*, 2015 CO 54M, ¶ 9, 351 P.3d 1126. Haring concluded racial bias did not taint the jury selection process, the supreme court

expressly declined to address the division's determination that a *Batson* violation constitutes structural error. *Id.* at ¶ 8 n.l.

¶93 The Colorado Supreme Court recently addressed a trial court's erroneous grant of a peremptory challenge against a Hispanic juror who the prosecution argued would be unduly sympathetic toward the Hispanic defendant. *People v. Ojeda*, 2022 CO 1, 503 P.3d 856. Because the prosecution offered a race based reason for excluding the prospective juror, the supreme court concluded that the challenge violated Ojeda's right to equal protection of the law and affirmed the decision from a division of the court of appeals, which had reversed Ojeda's conviction and remanded the case for a new trial. *Id.* at ¶¶ 49, 53. Although the supreme court's opinion does not expressly refer to structural error created by the *Baston* [sic] violation, it affirmed the reversal of Ojeda's conviction without conducting an outcome-determinative analysis.

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

elected to place its power, property and prestige behind the [alleged] discrimination.' " *McCollum*, 505 U.S. at 52, 112 S.Ct. 2348 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)).

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

¶96 As repeatedly noted by *Batson* and its progeny, racial discrimination in the jury selection process creates multifaceted constitutional concerns: "*Batson* 'was designed "to serve multiple ends," ' only one of which was to protect individual defendants from discrimination in the selection of jurors." *Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (quoting *Allen v. Hardy*, 478 U.S. 255, 259, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986)). Indeed, *Batson* instructs that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire

community." 476 U.S. at 87, 106 S.Ct. 1712. Thus, the presence of racial bias in the jury selection process raises the possibility of at least three constitutional defects: (1) it deprives a defendant of equal protection of the law; (2) it deprives excluded jurors of their constitutional right to be free of discrimination on the basis of race; and (3) it erodes the public's confidence in the rale of law and the jury system itself. *McCollum*, 505 U.S. at 48-50, 112 S.Ct. 2348.

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

¶97 In this case, *McCollum*'s second concern is not present because Prospective Juror K was not dismissed for cause and instead was allowed to continue in the jury selection process. But the first and third concerns are clearly implicated. Clark was subjected to a trial in which a prospective juror with acknowledged racial bias against him was allowed to continue on the panel as a prospective juror. Clark heard Prospective Juror K admit his racial bias. Clark knew his counsel asked to have Prospective Juror K excused so racial bias did not infect the trial. And Clark heard the trial court reject that challenge for cause, thus placing the court's "power, property and prestige behind the [alleged] discrimination." *McCollum*, 505 U.S. at 52, 112 S.Ct. 2348 (quoting *Edmonson*, 500 U.S. at 624, 111 S.Ct. 2077). Because of these circumstances, the proceedings below failed to "impress upon the criminal defendant" that the trial and resulting verdict would be reached through a process that was free of demonstrated bias against him. *Id.* at 49, 112 S.Ct. 2348 (quoting *Powers*, 499 U.S. at 413, 111 S.Ct. 1364).

¶98 But the decision to allow a racially biased prospective juror to continue serving had a ripple effect beyond Clark's individual rights. It undermined the public's confidence that the entire trial process would be conducted in a manner to ensure that racial bias would not be tolerated in the courtroom. The decision to permit a racially biased prospective juror to continue on the panel spoke not only to Clark, but also to the greater community. *Ojeda*, ¶ 20 ("The harm from discriminatory jury selection reaches beyond that inflicted on the defendant and the excluded juror to touch the entire community."). The message sent was that a prospective juror could sit in judgment of a person against whom he had an acknowledged racial bias. This result "undermine[s] the very foundation of our system of justice — our citizens' confidence in it." *McCollum*, 505 U.S. at 49- 50, 112 S.Ct. 2348 (quoting *State v. Alvarado*, 221 N.J.Super. 324, 534 A.2d 440, 442 (1987)).

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

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

¶100 The majority recognizes that the failure to excuse Prospective Juror K raises equal protection concerns. But the majority then subjects the equal protection violation to *Novotny*'s outcome-

determinative test, rather than finding structural error, and frames the outcome-determinative test by asking whether the failure to grant the challenge for cause "forced" Clark to use the peremptory challenge to remove the racially biased juror. Drawing from *Vigil*, the majority concludes the trial court did not force Clark to exercise a peremptory challenge against Prospective Juror K, but, instead, Clark "chose" to use one of his peremptory challenges to eliminate Prospective Juror K. Because Clark was allowed to exhaust his allotted peremptory challenges, the majority concludes, *Novotny* and *Vigil* indicate there was no prejudice to him and no resulting constitutional error whether predicated upon the Sixth Amendment right to a jury trial or the Fourteenth Amendment guarantee of equal protection.

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

¶102 But disparate treatment of a defendant on the basis of race lies at the very heart of what the Equal Protection Clause proscribes. When a trial court wrongfully permits a racially biased prospective juror

to continue to remain on the panel, a defendant is denied equal protection of the law. That constitutional violation exists independent of whether the trial court's error "forces" the defendant to exercise a peremptory challenge to excuse that juror or the defendant simply "chooses" to do so. The constitutional wrong is created not by whether or how the defendant ultimately exercises his peremptory challenges, but rather by the trial court's decision to tolerate the ongoing participation of a prospective juror with acknowledged racial bias against the defendant. *Novotny* did not alter this outcome dictated by the Fourteenth Amendment's guarantee of equal protection.

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

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

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

¶105 But more fundamentally, I reject the notion that racism can be meaningfully analyzed along a

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

VI. Conclusion

¶106 For the reasons stated, I conclude the trial court's tolerance of the admittedly racially biased prospective juror violated Clark's guarantee of equal protection of the law. Accordingly, I would reverse Clark's conviction, decline to address the remaining issues, and remand this case for a trial free of racial bias.

APPENDIX C

SUPREME COURT OF COLORADO

DATE FILED: August 19, 2024
CASE NUMBER: 2022SC313

REGINALD KEITH CLARK,

Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Certiorari to the Colorado Court of Appeals, 2019CA340

District Court, Gilpin County, 2017CR193

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 ORDER that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 19, 2024.

JUSTICE HOOD and JUSTICE GABRIEL would grant the petition.

APPENDIX D
[PUBLIC COPY – SEALED MATERIALS REDACTED]

DISTRICT COURT
COUNTY OF GILPIN
STATE OF COLORADO
2960 DORY HILL ROAD
BLACK HAWK, COLORADO 80422

COURT USE ONLY
Case No. 17CR193
Division G

PEOPLE OF THE STATE OF COLORADO,

v.

REGINALD CLARK,

Defendant.

REPORTER'S TRANSCRIPT

This matter came on for Jury Trial, commencing on Tuesday, October 9, 2018, before the HONORABLE DENNIS J. HALL, Judge of the District Court.

[pp. 137:3 – 162:23]

APPEARANCES

FOR THE PEOPLE: Matthew Gold, Reg No. 46145
Attorney at Law
FOR THE DEFENDANT:
Alex Taufer, Reg No. 49902
Deputy State Public Defender
Lindsay Stone, Reg. No. 51199
Deputy State Public Defender

WENDY M. LIND, RPR
Official Court Reporter
First Judicial District, Jefferson County
State of Colorado

---

* * *

MS. TAUFER: Okay. I'm going to ask now what's probably the most uncomfortable question that I'm going to ask, outside of some of the individual things that I asked you. But did anyone notice in here that Mr. Clark is, in fact, the only person of African-American descent? Did anyone notice that.

(Multiple hands were raised.)

MS. TAUFER: So I see most of the hands there. And I know this is a really hard subject to deal with and talk about, but my question is, did anyone have any thoughts about that when they first saw that Mr. Clark was essentially the only black man sitting here?

Ms. P[redacted].

PROSPECTIVE JUROR: Not at all. Everyone is equal here, and everyone should be treated with a fair trial, no matter the color of their skin or anything like that.

MS. TAUFER: Do you think that there are maybe other people who have stereotypes about black men specifically?

PROSPECTIVE JUROR: There could be. It's Gilpin County. But I don't.

MS. TAUFER: I know this is really awkward and uncomfortable. No one wants to have a discussion about this and, again, in front of everyone. But did anyone else have any thoughts about it?

(Multiple hands were raised.)

MS. TAUFER: I see -- that's Ms. M[redacted] -- I'm sorry, Ms. L[redacted].

PROSPECTIVE JUROR: I'll respond to both, I guess. I don't know how to put this exactly. Yes, I did notice that, and I felt like if I were put in someone else's shoes, such as his shoes, I would probably look over here and be like, uh-huh, fair trial, hmm. I mean, I personally would have liked to have seen a little more -- it's the luck of the draw up here of what you get, but I would like to see a little more diversity. But I understand that you can still be -- I plan on and will be objective. But if I look at it from someone else's shoes, I can see how I would think, a bunch of middle-aged white people, that's great.

MS. TAUFER: Why would you want to see more diversity?

PROSPECTIVE JUROR: I just would. I don't know why I would. I just feel like if I were in someone else's shoes, I would like to see that. Like, if I were in another country and I was a Caucasian and I was on trial and it was nothing but Indian men or something like that, you know, all in there, do I think that I would get a fair trial? I don't know. I might have some reservations.

MS. TAUFER: Do you think it would be fair to say that the reservations come from the fact that there are still stereotypes that people hold?

PROSPECTIVE JUROR: Correct.

MS. TAUFER: Is that something -- who would agree with that, that there still exists stereotypes about certain people that people still hold?

(Multiple hands were raised.)

MS. TAUFER: So I see a general nod of assent. Okay.

So, Ms. L[redacted] -- and I'm sorry for getting your name wrong earlier. I want to ask you specifically -- and I'm sorry, I should have asked this sooner -- but you are a therapist for a specific trauma group for women.

PROSPECTIVE JUROR: I'm a therapist in general, but I do run a trauma group. I'm a co-therapist who leads the group, yes.

MS. TAUFER: You said that that does involve some victims of sexual assault.

PROSPECTIVE JUROR: Mm-hmm. It has in the past, yeah.

MS. TAUFER: Okay. So I know that the district attorney asked you about this, but my question is based on your experience. Based on hearing those stories, do you think that you would be able to separate out your professional assessment of someone, if they were testifying, separate from your experience with that group?

PROSPECTIVE JUROR: I kind of understand your question. But, I mean, I'm usually not using a judgment or a bias in those groups anyways. So I would do the same, where it's just really listening as opposed to putting a judgment behind the listening.

MS. TAUFER: And that judgment behind the listening, it is -- and please correct me if I'm wrong - it's a common thing in therapy for specific trauma to engage in a discourse of belief with a victim, right?

PROSPECTIVE JUROR: Correct.

MS. TAUFER: And so my real question is, having that professional background, will you be able to separate that out and independently judge the credibility of any witnesses that you see here if you are a juror?

PROSPECTIVE JUROR: Absolutely. I've also seen the other side. I've also worked with men who have been supposedly wrongly accused, so it kind of weighs itself out.

MS. TAUFER: So I know that we all can see that there are a lot of people here today. This is a very charged kind of charge, kind of allegation, right? This is one of those hot-button issues now, and I think

always. So my question is, when you all walked in here and you sat down and you saw someone sitting here at the defense table, who thought to themselves, something must have happened for us to get here to be at trial with a person sitting there at the defense table?

PROSPECTIVE JUROR: Could you repeat that? I'm sorry.

MS. TAUFER: Sure. Who thought that something must have happened for us to get here to this spot of having a trial, having a person sitting here accused of this type of issue?

(Multiple hands were raised.)

MS. TAUFER: And so let's see.

Ms. K[redacted], you said that we wouldn't be here if that wasn't the case -- if it wasn't the case that something had happened.

PROSPECTIVE JUROR: Correct.

MS. TAUFER: And that's just by -- because you are here present in a courtroom. And we're having a trial.

PROSPECTIVE JUROR: Correct.

MS. TAUFER: Okay. So let's say you were to go back -- let's say you were chosen as a juror and you go back in the jury room and you had to decide now, innocent or guilty, what would your vote be?

PROSPECTIVE JUROR: I don't have enough information for that.

MS. TAUFER: Okay. You said that something had to have happened. Let's say that -- really, I think what I'm asking is if, in your mind, something must have happened for us to get to this point, does the district attorney -- does the prosecutor start off already with a little bit of a lead in this case?

PROSPECTIVE JUROR: Mm-hmm.

MS. TAUFER: And I'm sorry. Is that a yes? We have to preserve it for the record.

PROSPECTIVE JUROR: I'm sorry. Yeah.

MS. TAUFER: Okay. Mr. K[redacted], how do you feel about that? Is it similar?

PROSPECTIVE JUROR: You've said a lot, and I'm trying to think through each thing. Yes, of course. I apologize for some of my thoughts.

MS. TAUFER: Don't apologize.

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

MS. TAUFER: And, Mr. K[redacted], I appreciate you sharing those thoughts because I know it's not easy to say it. And thank you. Don't be sorry for your thoughts at all. That's exactly what we're doing here today is getting to those thoughts. Don't be sorry. Thank you for sharing that.

Did anyone else have the same kind of feeling that Ms. K[redacted] did of -- that we're here today, something happened to get us here, and therefore the prosecution starts off with a little bit of a leg up right out the gate?

Mr. T[redacted].

PROSPECTIVE JUROR: I think it's the way that you're framing the question. Clearly, we're all here for some reason, but we have no idea what it is. We've heard no evidence whatsoever. We've already gotten the instruction from Judge Hall that he's presumed innocent until proven guilty. So I think the only answer that anyone can come up with, in my mind, if we were to all go into the jury room right now, he would be innocent because we have nothing else to base it on.

MS. TAUFER: And you are clearly more precise with your language than I am. But what I'm really getting at is that, because we're here, because there is an accusation, maybe there's the idea that he did something already. And that's really what I'm asking. Certainly, there's the presumption of innocence.

And, Mr. T[redacted], I know -- the reason why I ask these questions is because some of the rules of law don't necessarily jibe with human experience; for example, the right to remain silent. I think we would all stand

up and say, I didn't do it, if I didn't do it. That's human nature. So we ask these questions to see if you can apply those rules of law, because they are kind of illogical with how we perceive things sometimes.

So that's really what I'm asking, is if anyone had that feeling that Mr. Clark had done something because he's here. So does anyone else feel that way? Okay.

And, Your Honor, I will be complete now.

THE COURT: Let me see the lawyers at the bench, please.

(A discussion was had with the Court and the attorneys at the bench out of the hearing of the prospective jurors and off the record.)

(The following proceedings were conducted in the presence and hearing of the prospective jurors:)

THE COURT: Thank you, Counsel.

Based on my conversation with the lawyers here at the bench, I just had a couple of questions for some of you.

Ms. K[redacted], I had a couple of questions for you about some of the things that you were asked by Ms. Taufer. A number of years ago -- let me give you kind of a preface to my question. A number of years ago, I was picking a jury in a murder case down in Jefferson County. And one of the lawyers wasn't as well-spoken as the lawyers here in this trial, and this lawyer really got into it with one of the jurors and tempers got kind of high there. And the juror finally said to this lawyer,

Well, I don't think the police are out there just arresting people at random. And, of course, that's right. And that brings me to my question here.

When lawyers in criminal cases ask whether something happened, well, of course something happened, otherwise we wouldn't be here. But that really isn't what we're concerned about. And what we're concerned about here is something that I said really early on. And I said that in a criminal case, the jury stands between the government and an individual charged with a crime, and I really meant that. And when I said that it's the jury system that keeps us free, I meant that too. So one of the things the jurors have got to keep in mind here is that it doesn't matter what the police think. What matters is what you think. That's what matters.

Now, putting aside whether something happened that causes us all to be here Ms. K[redacted], do you understand what I mean by the jury standing between the government and a person charged with a crime?

PROSPECTIVE JUROR: Yes.

THE COURT: The jury's job then is to decide whether the prosecution has proven the defendant's guilt beyond a reasonable doubt, and that's how you do what juries do. That's how you keep us free.

Now, understanding that something happened here -- and we aren't quite sure what yet because we haven't heard the evidence. But would you be able to do that?

PROSPECTIVE JUROR: Yes.

THE COURT: And if the prosecution doesn't prove its case beyond a reasonable doubt, would you have any trouble finding the defendant to be not guilty?

PROSPECTIVE JUROR: I don't have a problem with that.

THE COURT: All right. Now, Mr. K[redacted], same kind of questions for you. I know it sounds like you've had some bad experiences with the justice system over the years, but do you understand what I mean, that the jury system stands between --

PROSPECTIVE JUROR: Absolutely. I 100 percent understand you there, sir.

THE COURT: And do you understand that it doesn't matter what the police think? If you're on the jury, what matters is what you think. Does that make sense to you too?

PROSPECTIVE JUROR: Yes. And what they say to get me to that position, both sides.

THE COURT: All right. So here's kind of the two-part bottom line to that. If you're chosen as a juror in this case, and if you're back in the jury room and you think the prosecution hasn't proven its case, would you have any trouble finding this defendant to be not guilty?

PROSPECTIVE JUROR: Not at all.

THE COURT: And the other side of that coin, what if you're back there and you say that prosecutor has proven his case, would you have any trouble finding the defendant to be guilty?

PROSPECTIVE JUROR: Again, the same answer. Not at all.

THE COURT: All right. And finally, Ms. W[redacted], just a couple of questions for you. I know you had some concern about not hearing from both sides. It's certainly human nature to hear from both sides. I know -- you know, if I were in trouble, back when I was a kid, my dad sure would have heard both sides from me, I'll tell you. But the justice system is kind of counter to human experience that way, and it's because of what I've told you early on. It's the Fifth Amendment. And that's a constitutional right that makes our system different than almost other systems. And so remember that instruction I read to you about not holding the defendant's silence against him?

PROSPECTIVE JUROR: Correct. But the explanation I'd like to give is just because he's not talking -- I don't have to hear him. I would like to at least listen to the facts from his defense. That's what I was trying to make clear. So if I don't hear the facts from the defense, I can't make a decision.

THE COURT: Well, let me tell you something about that. In all cases, this case and all cases, there are only so many people who know anything about what happened. And generally speaking, if one side calls them, the other side doesn't. But if the district attorney calls a witness, the defense will have the opportunity to cross-examine that witness, and that's how the other side generally comes out. Does that make sense to you?

PROSPECTIVE JUROR: It makes absolute sense to me.

THE COURT: So in the sense that you're going to hear cross-examination of all the prosecution's witnesses, you do hear both sides. Does that make sense?

PROSPECTIVE JUROR: Correct.

THE COURT: So the final questions are the ones I asked of Ms. K[redacted] and Mr. K[redacted]. If the prosecution proves its case, would you have any trouble finding the defendant -- let me start over. If the prosecution proves its case, would you have any trouble finding the defendant to be guilty?

PROSPECTIVE JUROR: I would not have a problem at all.

THE COURT: And if you're back in the jury room and you've got a reasonable doubt about whether he's guilty, would you have any trouble finding him to be not guilty?

PROSPECTIVE JUROR: I would not have a problem finding him not guilty. Either way.

THE COURT: Thank you all.

I think, based upon the jurors' answers to those questions then, we can proceed to the exercise of the peremptory challenges.

So let me explain to the jury how this works. First of all, in this case, we are going to have one alternate juror, and that means the jury is going to be made up

of 13 people. So you may be wondering, if the jury is made up of 13 people, why are there 25 chairs up here?

Well, the answer is this: In criminal cases, each side has the right to excuse, in a case like this one, up to six jurors without stating a reason. Those are what are called peremptory challenges. If you're excused as a result of a peremptory challenge, don't take any offense at that. That's just the way the system works. So if you start with 13, which is the number of people on the jury, and then you add 6 plus 6, you get 25, and that's why there are 25 chairs up here.

So at this point now, we go to the exercise of the peremptory challenges. And as I said, each side has the right to excuse up to six of you without stating a reason. Here's how it works: Right now, the jury is made up of Jurors 1 through 13. If the district attorney were to exercise his first peremptory challenge as to Juror No. 1, then the jury would be made up of Jurors 2 through 14. The easy way to keep it straight is that the jury is always made up of the 13 jurors with the lowest numbers.

So with that explanation, Mr. Gold, do the People have a first peremptory challenge as to Jurors 1 through 13?

MR. GOLD: The People thank and excuse Mr. P[redacted].

THE COURT: Mr. P[redacted], you're excused with our thanks, free to go about your business.

Ms. Taufer, does the defense have a first peremptory challenge as to Jurors 1 through 14?

MS. TAUFER: Yes, Your Honor. The defense would thank and excuse Mr. K[redacted].

THE COURT: Mr. K[redacted], you're excused with our thanks, free to go about your business.

PROSPECTIVE JUROR: Thank you.

THE COURT: Mr. Gold, do the People have a second peremptory challenge as to Jurors 1 through 15?

MR. GOLD: The People would thank and excuse Ms. P[redacted].

THE COURT: Ms. P[redacted], you're excused with our thanks, free to go about your business.

Does the defendant have a second peremptory challenge as to Jurors 1 through 16?

MS. TAUFER: Yes, Your Honor. The defense would thank and excuse Ms. K[redacted].

THE COURT: Ms. K[redacted], you're excused with our thanks, free to go about your business.

Mr. Gold, that brings us to 1 through 17.

MR. GOLD: The People would thank and excuse Mr. F[redacted].

THE COURT: Mr. F[redacted], you're excused with our thanks, free to go about your business.

Ms. Taufer, we are to 1 through 18.

MS. TAUFER: If I may have just a moment, Your Honor?

THE COURT: Mm-hmm.

(Pause in the proceedings.)

MS. TAUFER: Your Honor, thank you. The defense will thank and excuse Mr. G[redacted].

THE COURT: Mr. G[redacted], you're excused with our thanks, free to go about your business.

Mr. Gold, we are to 1 through 19.

MR. GOLD: Your Honor, the People would accept the panel.

THE COURT: Do the People waive the exercise of any further peremptory challenges then as to Jurors 1 through 19?

MR. GOLD: Yes, Your Honor.

THE COURT: Ms. Taufer, does the defense have a fourth peremptory challenge as to Jurors 1 through 19?

MS. TAUFER: If we may have just a moment, Your Honor?

THE COURT: Mm-hmm.

(Pause in the proceedings.)

MS. TAUFER: Your Honor, the defense will thank and excuse Ms. E[redacted].

THE COURT: Ms. E[redacted], you're excused with our thanks, free to go about your business.

Do the People have a fourth peremptory challenge as to Juror No. 20?

MR. GOLD: No, Your Honor.

THE COURT: Does the defense have a fifth peremptory challenge as to Jurors 1 through 20?

MS. TAUFER: Thank you, Your Honor. The defense will thank and excuse Mr. B[redacted].

THE COURT: Mr. B[redacted], you're excused with our thanks, free to go about your business.

Mr. Gold, do the People have a fourth peremptory challenge as to Juror No. 21?

MR. GOLD: No, Your Honor.

THE COURT: Does the defense have a sixth and final peremptory challenge as to Jurors 1 through 21?

MS. TAUFER: Yes, Your Honor. We would thank and excuse -- actually, I apologize, Your Honor. May we have just one moment?

THE COURT: Mm-hmm.

(Pause in the proceedings.)

MS. TAUFER: Your Honor, the defense will thank and excuse Ms. D[redacted].

THE COURT: Ms. D[redacted], you are excused with our thanks, free to go about your business.

Mr. Gold, do the People have a fourth peremptory challenge as to Juror No. 22?

MR. GOLD: No, Your Honor.

THE COURT: All right. Counsel, double-check your notes with me then to make sure that we all have the same people on our seating chart. I show that the 13 jurors will be Ms. R[redacted], Ms. K[redacted], Ms. S[redacted], Mr.

A[redacted], Mr. L[redacted], Ms. K[redacted] and Mr. W[redacted], Mr. T[redacted], Mr. P[redacted], Ms. D[redacted], Ms. M[redacted], Ms. P[redacted] and Ms. L[redacted].

Mr. Gold, is that what your notes reflect as well?

MR. GOLD: Yes, Your Honor.

THE COURT: Ms. Taufer, is that what your notes reflect as well?

MS. TAUFER: Yes, Your Honor.

THE COURT: All right. What that means is that Mr. M[redacted], Mr. Y[redacted], and Ms. W[redacted], and then all of you in the back of the courtroom, we won't be needing you. I don't know if this is a relief or a disappointment to you, but we couldn't do this without you. I sure don't want you to think that you wasted your time, because you haven't. This obviously is a significant case, and we want to make sure that the defendant is given a fair trial here, and we do it by the process that you all just saw.

So except for the 13 whose names I mentioned as the jury, then all the rest of the potential jurors are excused. You're free to go about your business, and thank you very much for coming in.

(Pause in the proceedings.)

THE COURT: For those of you who are up here, Caitlin will take you back to the jury room. We need to get rid of these chairs here.

And, Caitlin, I think we need to take these chairs back to the jury room.

So you may want to take your chairs with you. So the jury room is right through that door. Caitlin will take you back there. I need to get a couple of things arranged here in the courtroom, and then I'll bring you back here. I think it will only be five minutes or so.

All please rise as we excuse the jury.

(Prospective jurors exited the courtroom at 1:56 p.m., and the following proceedings were had:)

THE COURT: You can all be seated. Thank you.

We're in the courtroom here with the lawyers and the defendant. The jurors are back in the jury room.

As I explained earlier this morning, the Gilpin County district court courtroom is not equipped to record bench conferences. And as I explained, we keep hoping that we're going to get that equipment installed up here, but it keeps not happening. So we're not able to record the conferences. So at the bench here, I asked the district attorney if he had any challenges for cause, and he told me that he didn't.

Is that right, Mr. Gold?

MR. GOLD: Yes, Your Honor.

THE COURT: And then I asked the defense if they had any challenges for cause, and the defense challenged for cause Jurors K[redacted], W[redacted], and K[redacted].

Is that right, Ms. Taufer?

MS. TAUFER: That is correct, Your Honor.

THE COURT: Any record you wanted to make on the challenges for cause as to those three jurors?

MS. TAUFER: Yes, Your Honor. Thank you.

Your Honor, for Mr. K[redacted], there were two separate challenges for cause. One, I think, just to make the record entirely clear, Mr. Clark is African-American. And in the context -- after a conversation with the rest of the jury about who noticed that Mr. Clark is, in fact, the only African-American in the room. With the full panel seated, also Mr. K[redacted] later said that he moved up to Gilpin County to get away from diversity after -- and that was not a solicited response from Mr. K[redacted]. And, in fact, it had been a response that he made after the conversation of recognition that there are biases and prejudices in the context of race -- that he then made that statement sort of a spontaneous utterance that he wanted -- it seemed like he wanted to get off his chest. So, Your Honor, I think, in the circumstances, under this case, that is actual bias and prejudice that was articulated.

The separate challenge for cause was that Mr. K[redacted] agreed with what Ms. K[redacted] had said, that in order to get to this point of a trial, something must have happened to get, essentially, Mr. Clark here into this courtroom. So, Your Honor, that is the presumption of innocence under both the Colorado and U.S. constitutions.

And, Your Honor, turning now to Ms. K[redacted]. The basis of that was the challenge for presumption -- the inability to apply the presumption of innocence, and also, Your Honor, to apply the burden of proof in this

case. Ms. K[redacted] said that just based on the -- just based on having -- being here in this process, with Mr. Clark sitting there, that something would have happened.

And I think, most importantly, Your Honor, that was not addressed in the rehabilitation by the Court, was that Ms. K[redacted] said that she would give the prosecution a leg up, starting from a position of a leg up. That is both presumption of innocence and the burden of proof.

Finally, Your Honor, my last challenge was Ms. W[redacted]. And, Your Honor, I would like to articulate for the record that when Ms. W[redacted] was answering the question about -- in the context of the district attorney asking her about any personal experience with sexual assault, she said, Yes, but I don't want to talk about it, but I can be fair.

And so, Your Honor, I think there's actual bias and prejudice there, and Ms. W[redacted] would not articulate what that was. Her body language that I observed while she was making the statement was guarded, and she was clearly uncomfortable in answering that question.

Separately from that, Your Honor, the actual bias that was articulated -- Your Honor, Ms. W[redacted] said specifically that she would want to hear from the defense, something. She didn't have to hear from Mr. Clark, but she had to hear from the defense.

Your Honor, I think the biggest issue there is not the right to remain silent, particularly -- although that was at play -- but the basis for the for-cause challenge

was the burden of proof in that the defense is, of course, not required to make any showing at trial, and Ms. W[redacted] articulated that she would have wanted to hear from the defense. She wanted to hear our facts. And I think in the rehabilitation, that was involving cross-examination, which the defense has no burden to cross-examine and could choose to not cross-examine. So I think that's under shifting the burden of proof, right to a fair trial, under both the Colorado and United States constitutions.

THE COURT: Any record the People wanted to make on the three defense challenges for cause?

MR. GOLD: No, Your Honor.

THE COURT: All right. The Court's reason here is as follows: Both Ms. K[redacted] and Mr. K[redacted] essentially said that they thought that there must be a reason that the defendant is here. And, of course, I've seen this kind of questioning before many times over the years, and I think it's a matter of common sense that there's something that happened here that causes the defendant to be sitting in a courtroom. Otherwise, we would have the police out there arresting people at random, and we all know that that isn't what happened. So the fact that a juror in a criminal case thinks that something must have happened or else the defendant wouldn't be here is just common sense, and that doesn't indicate any kind of bias, in my view. It just kind of indicates a common sense with the process.

I think the legal standard is the standard that I asked Ms. K[redacted] about. I explained to her that, as the

juror, she stood between the government and an individual charged with a crime, and that what mattered is what she thought, not what the police thought. And then I asked her if she were back in the jury room and had a reasonable doubt about the defendant's guilt, whether she would have any hesitation in voting not guilty, and she said no. And I asked her the converse, and she said if she didn't have a reasonable doubt, that she would vote guilty.

So I think that the question is kind of a misleading one because it confuses common sense and the law, and it doesn't accurately reflect whether a juror does or does not have a bias.

Ms. K[redacted], I thought, was a bright lady. She understands the principles here very well. And I don't think that she had any misunderstanding about the law or the presumption of innocence, and I think she could have applied those things easily.

And, Mr. K[redacted], I think, is in the same situation -- although I'll note that Mr. K[redacted], from his answers here, is no friend of the police. He gave the criminal justice system an F-minus grade, so it's hardly a situation here where he is some kind of a police fan. He's not. And he did say those things about -- that he didn't think that diversity was a good thing, or something to that effect. But that's a political view, I think. That doesn't really answer the question of whether he can be a fair juror. And a person can certainly have offensive views and still apply the law. Those two things are really separate in my mind.

And I asked Mr. K[redacted] the same questions that I asked of Ms. K[redacted], and he clearly understood the role of a juror. He seemed quite eager to stand between the police and the defendant, and he answered the ultimate questions, I thought, sincerely. He said if he thought he had a reasonable doubt, he wouldn't hesitate to find the defendant not guilty. I don't know what his political views are. I don't think it's appropriate for me to inquire into those things. But I think that regardless of his political views, I didn't see any bias in Mr. K[redacted] that would have prevented him from being able to serve.

In fact, he said to me that -- early on, that a close friend of his had been kidnapped and raped a number of years ago, and he remembered it, but he thought that he could be fair here. So I don't think that any bias was shown on Mr. K[redacted].

Finally, as to Ms. W[redacted]. I think Ms. W[redacted] didn't say that she would hold it against the defendant if the defendant didn't testify. She acknowledged that he had that right and told me that she wouldn't hold it against him. What she said was, If the defense doesn't put on any evidence, I couldn't make a decision. And I interpreted that to mean that if she didn't hear from both sides, in some sense, that she simply wouldn't have enough information to decide the case. She clearly said that she understood that the defendant had the right to remain silent, and I didn't think that her answers were anything more than just common sense.

And in saying that, I also understand from my involvement in the pretrial motions hearing, that the

jury is going to hear in this case from the defense, because the defendant made a lengthy statement to the police. And I would certainly anticipate that the prosecution is going to play that for the jury, so I think it's not really true in this case that the jurors will not hear from the defendant himself. They will.

So based upon that reasoning, I don't think that the grounds for a challenge for cause were made out as to those three jurors, and it's for that reason that the Court denied the challenges.