NOT DESIGNATED FOR PUBLICATION

No. 124,894

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JARYL LAWRENCE WILSON SR.,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; DAVID B. DEBENHAM, judge. Opinion filed March 17, 2023. Affirmed.

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, P.J., HURST and COBLE, JJ.

PER CURIAM: After a confrontation with his former girlfriend turned violent, a jury convicted Jaryl Lawrence Wilson Sr. of aggravated battery stemming from that incident, and indecent liberties with a child, criminal sodomy, and aggravated indecent liberties with a child. Wilson appeals his convictions raising two issues: that the State committed prosecutorial error by shifting the burden of proof during its closing argument, and that the district court erred by denying his challenge to the removal of the only juror of color under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed 2d 69 (1986). For the reasons articulated below, Wilson's claims of trial errors fail, and we affirm his convictions.

FACTUAL AND PROCEDURAL BACKGROUND

In his appeal, Wilson makes claims only related to actions occurring during his criminal trial. As a result, we briefly recount the facts pertinent to Wilson's underlying criminal charges.

Wilson and J.F. were in a five-year relationship, and during that time, they were living together in Topeka with J.F.'s two daughters. One of her daughters, the victim, was a minor during most of the time they lived with Wilson. While Wilson and J.F. lived together, Wilson engaged in a clandestine relationship with the victim, including sexual contact when she was a minor. After J.F. discovered that relationship in May 2020, she and her daughter left Wilson's home.

Over the months following, the victim gradually told her mother more about the relationship between she and Wilson. Wilson and J.F. continued to communicate via phone calls and text messages. On the evening of January 29, 2021, J.F. asked to meet with Wilson to confront him about the sexual relationship he had with her daughter. J.F. drove to Wilson's home and a fight ensued inside her truck. After J.F. slapped Wilson, she recalled that he hit her with a pistol and then she realized she had been shot. After driving herself to the hospital, J.F. was treated for a gunshot wound to her chest and a laceration to her forehead.

Following the incident, the State charged Wilson with one count of attempted second-degree murder, one count of aggravated battery, one count of indecent liberties with a child, one count of criminal sodomy, and one count of aggravated indecent liberties with a child.

Wilson's case proceeded to trial. During voir dire, the State exercised its peremptory strike to exclude juror A.B. Wilson raised a *Batson* objection in response to

the State's strike, arguing that the last juror the State excluded was the only juror of color on the panel. See *Batson*, 476 U.S. 79. In response to the district court's inquiry about the basis of the challenge, defense counsel stated, "I mean, she didn't really say anything favorable—[or] disfavorable to either side, she had a pretty normal job. So we're not sure—there was no reason articulated." The State's prosecutor responded, "The race neutral reasons the State has, number one, she's a social worker. Number two, she works for [Department for Children and Families] DCF, and works with adults that have disabilities. And those are two of our race neutral reasons." The district court found that the reasons presented by the State were sufficiently race neutral and denied Wilson's *Batson* challenge.

Then, during closing arguments, the State commented on the evidence containing multiple text messages between Wilson and J.F. The State's prosecutor commented, "[A]nywhere in these text messages is he denying it?" Wilson objected to the State's comment, arguing it was shifting the burden of proof and was pointing out his failure to testify and his remaining silent. The district court overruled the objection finding that the statement by the prosecutor was based only on the text messages and that it did not shift the burden or comment on Wilson's silence or his failure to testify. Following the district court's denial of Wilson's objection, the State continued to address in its closing that Wilson "never denie[d] having sex with [the victim]" in the text messages.

Wilson was convicted by a jury of aggravated battery, indecent liberties with a child, criminal sodomy, and aggravated indecent liberties with a child. The jury was unable to reach a unanimous verdict on the attempted second-degree murder charge. The district court sentenced Wilson to 143 months in prison.

Wilson timely appeals.

THE PROSECUTOR'S STATEMENTS WERE NOT MADE IN ERROR.

Wilson first argues that the State committed prosecutorial error in its closing argument by shifting the burden of proof to Wilson and improperly attacking his right not to testify and to remain silent. Wilson contends that he was prejudiced by the State's closing argument because it improperly compelled the jury to find the State's witness testimony to be true.

Standard of Review

The appellate court uses a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

> "To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' We continue to acknowledge that the statutory harmlessness test also applies to prosecutorial error, but when 'analyzing both constitutional and nonconstitutional error, an appellate court need only address the higher standard of constitutional error.' [Citations omitted.]" *Sherman*, 305 Kan. at 109.

See *State v. Blansett*, 309 Kan. 401, 412, 435 P.3d 1136 (2019) (restating *Sherman*'s two-step process to evaluate claims of prosecutorial error). But even if the prosecutor's actions are egregious, reversal of a criminal conviction is not an appropriate sanction if the actions are determined to satisfy the constitutional harmless test. *Sherman*, 305 Kan. at 114.

The State's closing argument did not shift the burden of proof.

Wilson argues that the State shifted the burden of proof to him by urging the text messages show that he never denied the acts with the victim. Wilson claims that this comment deprived him of a fair trial by requiring him to affirmatively deny the allegations and prove his innocence at trial. He also contends that the State violated his right to remain silent and not testify.

A prosecutor may not attempt to shift the burden of proof to the criminal defendant or misstate the legal standard about the applicable burden of proof. *State v. Williams*, 299 Kan. 911, 939, 329 P.3d 400 (2014). And a prosecutor cannot suggest that a defendant must disprove the State's case. 299 Kan. at 939. Similarly, it is improper for a prosecutor to argue facts that are not in the evidence. *State v. Ly*, 277 Kan. 386, Syl. ¶ 4, 85 P.3d 1200 (2004). But a prosecutor may properly discuss the weaknesses of the defense case by pointing to a lack of evidence supporting the defendant's theory of the case. *Williams,* 299 Kan. at 940; *State v. Duong*, 292 Kan. 824, 832-33, 257 P.3d 309 (2011). When the jury has been properly instructed on the burden of proof, a prosecutor may argue inferences based on the balance or lack of evidence. *State v. McKinney*, 272 Kan. 331, 346, 33 P.3d 234 (2001), *overruled on other grounds* by *State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006).

The State referenced several text messages between Wilson and J.F. that were submitted into evidence without objection:

- "'. . . I fucked majorly up. And I can promise you it will never ever happen again.'"
- "'I know what I did was totally wrong and I'm sorry. Please believe me. Yeah, I'm stupid. I know.'"
- "'I wish I should have thought about the consequences. I'm a dumb ass for that, I know.'"
- "'. . . but I let my dick override what was right and that was fucked up of me.'"
- "'I'm stupid, got greedy and never thought about anything. I'm so sorry that I taken you for granite [*sic*].'"
- "'I was satisfied and content with the relationship. You make me happy. I enjoyed being around you. I took advantage of a situation I shouldn't have.'"
- "'It's how she was touching me that made me. It's like all my good judgment went out the door and it shouldn't.'"

The State proffered these text messages to corroborate the victim's testimony about her relationship with Wilson. The State then emphasized that these text messages between Wilson and J.F. strongly inferred that Wilson conceded to having a sexual relationship with the victim but, conversely, did not show Wilson denying any of the allegations.

Wilson argues that the prosecutor's comment, "[A]nywhere in these text messages is he denying it?" was not used to merely point out the weakness or the lack of evidence in support of the defense. He maintains the comment improperly shifted the burden of proof to Wilson and punished him for not testifying or presenting contrary evidence.

Wilson suggests his case is comparable to *State v. Tosh*, 278 Kan. 83, 91 P.3d 1204 (2004). There, our Supreme Court held that the prosecutor's comment during its closing argument, """[I]s there any evidence that it didn't happen? Is there any evidence that the things she told you didn't happen?""" was an improper attempt to shift the burden of proof to the defendant because of the cumulative effect of the prosecutor's comments. 278 Kan. at 92. But this case is distinct from *Tosh* because there, the court considered several improper comments made during the State's closing argument and the compound

effect of the comments. 278 Kan. at 90-91. Here, the prosecutor asked the single question, "[A]nywhere in these text messages is he denying it?", then reiterated it, only within the context of corroborating the victim's testimony by use of the text messages.

Wilson also relies on this court's ruling in *State v. Bartell*, No. 117,870, 2019 WL 847674 (Kan. App. 2019) (unpublished opinion), in support of his claim that the prosecutor's closing argument improperly shifted the burden of proof. In *Bartell*, a panel of this court found that the State made improper comments in its closing argument:

> "'You've heard no testimony that suggests that he didn't set a truck on fire on July 4th of last year. . . . There has been no evidence by the Defense that Mr. Bartell didn't light this fire. There has been no evidence that he isn't the one that did it. There has been no evidence that he was acting in any way other than trying to get retribution on Mr. Battles for having this flag displayed on his pickup truck.'" 2019 WL 847674, at *10.

A panel of this court found the prosecutor's comments improper because they were not made in rebuttal of the defendant's closing argument, which was yet to be given, nor were they a general question on Bartell's failure to rebut the State's witnesses during trial. 2019 WL 847674, at *11.

But Wilson's case is distinguishable from *Bartell*. Here, the prosecutor's comments were made specifically about the text messages that were submitted into evidence without objection. The prosecutor asked the jury unambiguously about the lack of Wilson's denial about the sexual relationship with the victim in the text messages. Unlike the State in *Bartell*, the prosecutor here did not state multiple times that Wilson generally failed to produce any evidence showing he was not guilty. Wilson also fails to note that this court in *Bartell* ultimately found the State's error was harmless. 2019 WL 847674, at *11.

Again, prosecutors are generally afforded a wide latitude in crafting closing arguments to address the weaknesses of the defense. *State v. Watson*, 313 Kan. 170, 176,

484 P.3d 877 (2021). Even though this latitude permits the prosecutor to make reasonable inferences based on the evidence, it does not permit the arguing of facts not in evidence. *State v. Killings*, 301 Kan. 214, 228, 340 P.3d 1186 (2015). But the prosecutor may point out a lack of evidence to support a defense or to corroborate a defendant's argument regarding holes in the State's case. *State v. Martinez*, 311 Kan. 919, 923, 468 P.3d 319 (2020); see also *Williams*, 299 Kan. at 940 ("[A] prosecutor does not shift the burden of proof by pointing out a lack of evidence to support a defense . . . ."); *State v. Stone*, 291 Kan. 13, 17-19, 237 P.3d 1229 (2010) (holding prosecutor did not attempt to shift burden of proof by arguing the defendant had significant "obstacles to overcome"). In fact, our Supreme Court has explained a prosecutor may also fairly comment on the believability of and the evidence underlying the defense theory. See *State v. Butler*, 307 Kan. 831, 868, 416 P.3d 116 (2018).

And we do not consider a prosecutor's statement in isolation, because context matters when evaluating the closing arguments. "Often the line between permissible and impermissible argument is context dependent." *Martinez*, 311 Kan. at 923 (citing *Blansett*, 309 Kan. at 412-13).

Applying context to the issue, the prosecutor's comment did not generally attack Wilson's failure to testify during trial or argue that Wilson had to prove that the allegations of sexual relationship with the victim were false. Rather, the comment by the prosecutor merely addressed what was present and what was absent in the specific text messages. In response to Wilson's objection, the prosecutor responded, "I'm speaking directly about this piece of evidence [text messages]." The record supports the State's claims, as the prosecutor read the text messages to the jury and immediately used them to corroborate the victim's testimony. The prosecutor's comments accurately spoke to the weakness of Wilson's defense and supported the testimony of the State's witnesses. Accordingly, we find the State did not improperly shift the burden of proof to Wilson.

Wilson also argues, in the alternative, that the prosecutor's comments were improper because they attacked his right to remain silent and not testify at trial. Wilson contends the prosecutor's inquisition during the closing argument punished him for exercising his rights and failing to deny his allegations. In support, Wilson relies on *State v. McWilliams*, No. 83,364, 2000 WL 36745955, at *3 (Kan. App. 2000) (unpublished opinion), where this court found the State's closing argument stating that the defendant never denied the charges was "an impermissible comment on [defendant's] exercise of her Fifth Amendment privilege against self-incrimination."

Again, though, we find this case distinguishable from *McWilliams*. Here, the State's comments did not attack Wilson's silence, generally, or the fact that he did not testify during trial. As noted above, the prosecutor's comments were made directly in reference to the text messages and merely demonstrated the weakness in Wilson's defense.

The comments by the prosecutor did not fall outside the wide latitude of fair argument afforded to the prosecutor, nor did they impinge on Wilson's right to remain silent at trial. We find that the State did not commit prosecutorial error by shifting the burden of proof to the defense.

Finding no error, it is unnecessary for us to determine whether any such error may have been harmless. See *Sherman*, 305 Kan. at 109 ("*If error is found*, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial.") (Emphasis added.).

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE *BATSON* CHALLENGE.

Wilson next argues that the district court erred when it failed to properly consider his challenge against the State's peremptory strike to remove the only juror of color from the panel. He claims that the district court erred by finding that the State's reason was race neutral because the State used the juror's occupation as a pretext to mask the State's discriminatory intent. Wilson contends that his right to a fair trial under the Equal Protection Clause under the Fourteenth Amendment of the United States Constitution was violated because the district court denied his objection.

Standard of Review

It has been long held that an exercise of a peremptory strike from the jury panel solely based on the juror's race violates the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution. *State v. Dupree*, 304 Kan. 43, 57, 371 P.3d 862 (2016); *State v. Kettler*, 299 Kan. 448, 461, 325 P.3d 1075 (2014). Such exercise of the peremptory strike violates a defendant's right to a jury of his or her peers and to "purposefully exclude [minority] persons from juries undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. A challenge to the State's use of a peremptory challenge during jury selection under *Batson* is analyzed in three distinct steps, with different standards of review for each step. *State v. Gonzalez-Sandoval*, 309 Kan. 113, 121, 431 P.3d 850 (2018).

The first step requires the defendant to make a prima facie showing that the prosecutor's challenge was made on the basis of race, and appellate courts exercise unlimited review over the district court's rulings on this showing. 309 Kan. at 121.

If a prima facie showing is made, the second step requires the prosecution to produce a neutral, nondiscriminatory explanation for exercising the peremptory strike.

The race-neutral explanation must be facially valid even if it is not necessarily plausible or persuasive. 309 Kan. at 123. Although the burden of production switches, the burden of persuasion never shifts from the opponent of the strike, and the reviewing court must give significant deference to the district court's factual rulings. 309 Kan. at 124.

Once the second step is met, the third step of the *Batson* analysis requires the defendant to show pretext on the part of the prosecution, which requires the district court to assess the plausibility of the race-neutral reason in light of all the evidence. *Gonzalez-Sandoval*, 309 Kan. at 126. The district court evaluates plausibility as a factual matter and because the decision hinges on credibility determinations, a reviewing court should give those findings great deference. 309 Kan. at 126. Appellate courts review the decision for abuse of discretion. 309 Kan. 113, Syl. ¶ 7.

A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021).

Discussion

Wilson adequately raised his objection after the peremptory strikes were submitted during trial. His counsel objected that the last juror stricken by the State was the "only juror of color . . . on either panel." The district court noted that, as the party bringing a *Batson* objection, Wilson bore "the primary evidence burden."

Defense counsel then argued the juror "didn't really say anything favorable—[or] disfavorable to either side, she had a pretty normal job. So we're not sure—there was no reason articulated." As noted above, the State responded that the juror was a social worker and works for DCF with adults with disabilities. Those were the State's two race

neutral reasons. The district court denied the *Batson* challenge, finding that the State provided sufficient race-neutral reasons.

Wilson argues on appeal that the State's articulated reason for the strike was insufficient to show a race-neutral reason and that it was a pretextual reason to cover the State's discriminatory intent. We examine Wilson's arguments using the three-step *Batson* analysis.

1. *Prima Facie Case by Wilson*

The first step of our inquiry, over which we exercise unlimited review, is to determine whether Wilson made a prima facie showing that the prosecutor's challenge was made on the basis of race. *Gonzalez-Sandoval*, 309 Kan. at 121. Following the defense challenge, the district court did not explicitly find that Wilson established a prima facie case of the prosecutor's discriminatory intent. Instead, the State implicitly accepted Wilson's prima facie showing by immediately responding to his challenge with its race-neutral reasoning, without giving the district court the opportunity to decide whether Wilson had in fact established a prima facie case.

But a challenge to the peremptory strike showing that the facts or any other relevant circumstances raise an inference that the exclusion of the jury was racially motivated is sufficient to establish a prima facie case of discriminatory intent. *Batson*, 476 U.S. at 96. Also, in such circumstances where the State offered a race-neutral explanation for the challenged peremptory strike and the district court ruled on whether the State's intent was discriminatory, "the first prong of the *Batson* analysis is moot." *State v. Gonzalez*, 311 Kan. 281, 302-03, 460 P.3d 348 (2020).

2. *The prosecution's neutral, nondiscriminatory explanation*

Wilson argues that his *Batson* challenge must focus on the second step, whether the State's reason for the peremptory strike was race neutral. The State contends it has sufficiently presented two race-neutral reasons for the peremptory strike.

The State's offered motives for its strike were that "number one, she's a social worker. Number two, she works for DCF, and works with adults that have disabilities." The State need only provide a neutral explanation that is something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

This second step of the *Batson* analysis

> "does not demand a prosecutor's explanation that is persuasive, or even plausible, but merely facially valid. Further, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. Accordingly, the ultimate burden of persuasion rests with, and never shifts from, the opponent of the strike. [Citations omitted.]" *State v. Pham*, 281 Kan. 1227, 1237, 136 P.3d 919 (2006).

On review of the record, it appears the prosecutor's reason for striking juror A.B. was not—at least facially—based on the juror's race. Rather, the prosecutor inferred the State's strike was based on juror A.B.'s answers during voir dire, as the State claims on appeal. Especially considering that, at trial, Wilson did not challenge the State's stated reasoning, nor did the district court raise any concerns, we must presume for the purpose of the analysis that the State sufficiently showed a race-neutral reason for its peremptory strike. See *State v. Trotter*, 280 Kan. 800, 815, 127 P.3d 972 (2006) ("If the defendant or the trial court do not correct errors in the prosecutor's statements of fact supporting his or her reasons for exercising peremptory challenges, these facts are considered to be true for purposes of determining whether the prosecutor set forth a race-neutral reason for the

strike."). And, although there is a somewhat puzzling lack of connection provided by the State between the juror's profession and the strike, there was no discriminatory intent inherent in the prosecutor's explanation. Again, the explanation is not required to be either persuasive or believable, but only to be facially valid. *Pham*, 281 Kan. at 1237.

3. *Pretext of Discrimination*

Finding the State has proffered a race-neutral reason, we move to a review of the final step of the *Batson* analysis. Accordingly, we must determine whether the district court abused its discretion in finding that Wilson failed to show pretext on the part of the State's peremptory strike. *Gonzalez-Sandoval*, 309 Kan. at 126-27. Wilson still carries the burden to show the State's purposeful discrimination. *State v. Brown*, 314 Kan. 292, 302, 498 P.3d 167 (2021); see *Gonzalez*, 311 Kan. at 302.

The United States Supreme Court stated:

> "We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.' As we have said in a related context, '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.' [Citations omitted.]" *Foster v. Chatman*, 578 U.S. 488, 501, 136 S. Ct. 1737, 195 L. Ed. 2d 1 (2016).

But "[a]n appeals court looks at the same factors as the trial judge, but is necessarily doing so on a paper record," so review of factual determinations in a *Batson* hearing is "'highly deferential.'" *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228, 2244, 204 L. Ed. 2d 638 (2019). The Court has held that a district court's ruling on the discriminatory intent of a *Batson* challenge must be accepted on appellate review unless

it reaches the level of "clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

Here, after the State provided its race-neutral reason, Wilson did not *present* any evidence or argument to support his claim that the State's reasoning was a pretext for purposeful racial discrimination. Wilson did not seek an opportunity to argue the contrary before or after district court's finding, either. But now, on appeal, Wilson argues that the State covered its discriminatory intent for striking juror A.B. by using the juror's occupation as a race-neutral reason. Wilson asserts that the employment of other potential jurors was a "nonissue" for the State, but it was only concerned with A.B.'s employment. He also claims that the State's reasoning is not plausible or persuasive because it did not inquire further into juror A.B.'s employment and her day-to-day work during voir dire.

The State counters, arguing that Wilson did not present these arguments before the district court, and, as such, the court did not abuse its discretion denying the *Batson* challenge.

Wilson's argument is unpersuasive. He asserts that somehow the State's interest only in the occupation of juror A.B. and not the occupations of other jurors on the panel is clear evidence of pretext. But it is reasonable to only ask questions about one's job if it would seem to affect the duties as a juror. It would not be prudent for the prosecutor to question each juror about their occupation and daily work when no clear connection to the case exists.

And, contrary to Wilson's argument on appeal, the State did inquire into several other jurors' work or their employment background. The State also questioned juror A.B. about her employment as a social worker for DCF. Specifically, the State probed into whether, in her work experience with DCF and caring for adults with disabilities, she had

been faced with adults "telling [her] different things" and questioned how she would determine who was telling the truth.

Wilson's arguments may have been more convincing if he had argued that other jurors' occupations suggested a greater conflict with the case than that of juror A.B., or that juror A.B.'s occupation could have actually favored Wilson's defense theory. But Wilson provided neither. In fact, Wilson did not make any argument against the district court's denial during voir dire and never raised that the State's reasoning was a pretext to discriminatory intent before the district court.

Fatal to Wilson's argument is that nothing in the record supports that he has met his burden of showing that the State's peremptory strike was purposefully discriminatory. Through the record, we cannot perceive the unspoken interactions between counsel and the trial court, nor can we discern from the transcript whether Wilson was not given the chance to argue against the State's reason or if he simply chose to be silent.

Still, what is clear from the record is that Wilson did not raise this argument before the district court. By doing so, Wilson failed to meet his burden to create the factual record to prove his case to the district court. See *Trotter*, 280 Kan. at 818-19 (noting "it is not the trial court's duty *sua sponte* to compare the characteristics of the final jurors with the characteristics of the people who were stricken. The defendant has the burden to create the record of relevant facts and to prove his or her case to the trial court."). The record is absent any showing of impermissible racial animus on the prosecutor's strike during voir dire. Considering the lapse of facts in the record, this court cannot then conclusively determine that the district court's ruling rose to the level of clearly erroneous.

Although it would have been wise for the district court to inquire into the third step of *Batson* and ask Wilson for a response to create a clearer record, the district court's

omission of the inquiry does not alone amount to a *Batson* violation. See, e.g., *State v. Jenkins*, No. 117,026, 2018 WL 2375788, at *8 (Kan. App. 2018) (unpublished opinion) (noting the record did not show the defendant's lawyer was denied the opportunity to show the prosecutor's stated reason for excusing the potential juror was pretextual, and that the defendant on appeal pointed to no evidence supporting that conclusion). Ultimately, it was Wilson's burden as the party asserting the *Batson* challenge to show by a preponderance of the evidence that racial intent motivated the State's peremptory strike. *Jenkins*, 2018 WL 2375788, at *4 (citing *Crittenden v. Ayers*, 624 F.3d 943, 958 [9th Cir. 2010]; *United States v. Martinez*, 621 F.3d 101, 109 [2d Cir. 2010]; *United States v. Tucker*, 90 F.3d 1135, 1142 [6th Cir. 1996]).

And, as we have noted repeatedly, Wilson failed to present his arguments to the district court. We cannot now, on appeal, make assumptions about what could have happened and must rely on what is on the cold paper record. Because a district court's determination on such a challenge often includes such circumstantial evidence as its own observation of potential jurors as well as counsel's credibility, appellate courts must give considerable deference to the district court's determinations. *Snyder*, 552 U.S. at 477 (matters of credibility and demeanor singularly rest within the district court's purview, and, "in the absence of exceptional circumstances," we defer to state court factual findings unless we conclude that they are clearly erroneous).

Without more, we cannot conclude that the district court's finding that the State sufficiently presented a race-neutral reason for its peremptory strike of juror A.B. is a determination with which a reasonable person could not agree.

Because we find that the district court properly concluded that the State's reason was race-neutral and that Wilson failed to satisfy his burden to show the State's purposeful discrimination, the district court did not abuse its discretion by denying Wilson's *Batson* challenge.

Affirmed.