COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED April 19, 2024 2:05 PM
Douglas County District Court County Honorable Patricia B. Herron, Judge Case No. 20CR0422	
THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF-APPELLEE, v. JENNIFER L. WOODRUFF, DEFENDANT-APPELLANT.	▲ **COURT USE ONLY** ▲ Case No. 22CCA1728
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains 9465 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒**For each issue raised by the appellant,** the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Allison S. Block
Signature of attorney or party

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STATEMENT OF THE FACTS

Defendant, Jennifer Woodruff, and the victim, Christopher Roberts, worked together in Colorado Springs. TR 06/27/22, pp. 174:9-11, 179:23-25. On the afternoon of February 19, 2020, Defendant drove them to Westminster for a conference the next morning. TR 06/27/22, pp. 174:3-4, 175:5-14. This was Roberts's first day back at work after an emergency gallbladder surgery. TR 06/27/22, pp. 175:19-22, 181:9-10.

As they were traveling northbound on I-25 through a construction zone in winter weather conditions, witnesses reported seeing Defendant's Jeep swerving through traffic at speeds exceeding 100 mph. TR 06/27/22, pp. 173:23-174:2; 06/28/22, pp. 13:3-7, 43, 47:17-22, 138:19-139:2. The second victim, Joseph Medina, heard tires screeching and saw the Jeep approaching quickly from behind. TR 06/28/22, p. 9:8-18. Within seconds, Defendant swerved into Medina's lane, slamming into the rear of his pickup truck, causing him to careen left, and then back across the highway, skidding along the concrete barriers on the right. TR 06/28/22, pp. 11-14. Defendant's Jeep catapulted forward, sliding on

its roof and flipping multiple times before coming to rest on the driver's side. TR 06/28/22, pp. 15:3-10, 61:11-62:16, 169:2-11.

Witnesses rushed to help and found Roberts dangling on top of Defendant, held up by his seatbelt. TR 06/28/22, 69:18-24. They cut his seatbelt and realized the extent of the trauma to his body. TR 06/28/22, pp. 38:14-39:1, 69:18-24. By the time emergency responders arrived, Roberts had no pulse and was unresponsive. TR 06/28/22, pp. 38:14-20, 63:1-64:5. Defendant, who had been pinned in the driver's seat, was transported to a hospital. TR 06/28/22, p. 21:8-11.

Roberts was declared deceased at the scene. TR 06/28/22, p. 39:15-18. Medina suffered injuries to his back, neck, and foot, and became depressed. TR 06/28/22, p. 16:7-19.

Defendant stayed in the hospital for six days. TR 06/28/22, p. 128:8-15. She was examined by CT scan, brain MRI, and a head and neck CTA. TR 06/30/22, pp. 16:14-17:6. Her scalp was stapled to repair a laceration (TR 06/29/22, p. 126:15-25), and she voluntarily submitted to multiple blood draws. TR 06/29/22, p. 137:1-12. Her sisters, Lisa and

Cindy,[1] and her long-term partner, Jason Wagner, visited her soon after she was admitted. TR 06/29/22, pp. 127:3-128:5. Defendant then transferred to a rehab facility for five days. TR 06/28/22, p. 128:8-15.

State Trooper Botts interviewed Defendant at the hospital. TR 06/28/22, p. 107:21-23. Defendant claimed no memory of the accident. TR 06/28/22, pp. 112:6-9, 113:7-11. She reported no preexisting medical conditions and didn't mention a history of fainting. TR 06/28/22, pp. 113:17-19, 118:24-119:1, 120:7-10.

As part of the investigation State Trooper Waters conducted several interviews; reviewed the crash dynamics, damage, injuries, and "black box" data from the Jeep (including information about steering movements, accelerator depression, and speed); and input the data into crash reconstruction software. TR 06/28/22, pp. 211:13-212:12. He concluded the accident was due to Defendant "intentionally driving her vehicle in excess of the posted speed limit of 45, traveling at 103 to 106

[1] The People refer to Defendant's sisters by their first names, with no disrespect, for clarity.

miles per hour, while steering, to avoid traffic and maneuver in and out of traffic." TR 06/28/22, p. 207:1-7.

Four months after the crash, and two months after she was criminally charged, Defendant had an appointment with a neurologist. TR 06/29/22, p. 141:1-10; 06/30/22, p. 34:12-24. Due to COVID precautions, Defendant first met Dr. Alexander via telehealth. TR 06/30/22, p. 9:13-21. Defendant believed the crash was caused by a loss of consciousness just before it occurred, and she wanted to discuss her belief with the doctor. TR 06/30/22, p. 11:7-17. She expressed no recollection of the time before and during the accident, but conveyed to the doctor that she thought the loss of consciousness was triggered by Roberts talking about his gallbladder surgery. TR 06/30/22, pp. 46:18-47:8. She also reported having a history of fainting episodes when near a hospital, discussing medical procedures, or seeing blood. TR 06/30/22, pp. 13:22-14:4. The doctor referred her for a routine EEG and 48-hour EEG; the results were normal. TR 06/30/22, pp. 18:15-19:19, 39-13-40:16.

About one year later, she met with Dr. Alexander again and maintained that she did not remember anything about the accident, except her own inference, that her foot was "stuck" on the gas pedal, causing the jeep to reach speeds of 100 mph. TR 06/30/22, pp. 52:12-53:2.

By a diagnosis of exclusion, based on Defendant's reported symptoms, doctors were "inclined to believe" that she has vasovagal syncope, a malady that results in loss of consciousness when the subject is exposed to medical situations, blood, or pain. TR 06/30/22, pp. 20:3-21:2, 51:34-52:2, 64:14-25, 93:6-8.

STATEMENT OF THE CASE

Defendant was charged with multiple counts, including vehicular homicide of Roberts (F4), third-degree assault of Medina (M1), reckless endangerment of Roberts (M3), and reckless driving (T2). CF, pp. 25-26.

Defendant testified at trial, supporting the defense theory that she had a "medical event," which resulted in the crash that killed Roberts, and she was "not conscious and not aware of the inputs she

may have made to the vehicle during the medical event." CF, p. 219 (Jury Instruction (JI) 11).

The jury convicted her as charged. CF, pp. 264-68. The reckless endangerment and reckless driving counts merged into the vehicular homicide conviction. CF, p. 344. The trial court sentenced her to one year in prison for the vehicular homicide count and one year in jail for the assault, to be served concurrently. CF, p. 344.

SUMMARY OF THE ARGUMENT

The trial court properly exercised its discretion in excluding evidence that Defendant told her sisters that the victim was discussing his surgery shortly before the crash. Defendant attempted to elicit such testimony on recall from her sisters, but the court denied the motion because the statement was hearsay, not falling within any exception to the hearsay rules. Regardless, the exclusion of this evidence was overwhelmingly harmless.

In spite of Defendant's litany of prosecutorial misconduct accusations, nothing from Defendant's arguments, nor anything in the

record indicates that any of the alleged instances, individually or in aggregate, rise to a level of plain error.

Trooper Waters's expert testimony was proper and did not usurp the functions of the trial court and jury. He properly presented his expert analysis of the crash site data. Defense counsel was given ample opportunity to challenge the expert's specialized testimony on cross-examination, and the jury was properly instructed on the law.

Further, the trial court did not err by allowing a non-standard jury instruction. Even if the court finds error, Defendant invited it, or at a minimum, waived the issue by deliberately repeating the instruction aloud to the jury.

Finally, even if this court determines that one or two issues were error, they are not sufficiently abundant to rise to a level of harm so substantial as to affect Defendant's substantial rights. This is so because numerous errors must have actually occurred, not merely been alleged, which was not the case here.

ARGUMENT

I. The trial court acted within its discretion in excluding evidence that Defendant told her sisters that Roberts had mentioned his gallbladder surgery shortly before the crash.

A. Preservation and Standard of Review

The People agree this issue is preserved. OB, p. 10.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v. Vanderpauye*, 2023 CO 42, ¶23.

A trial court's exclusion of a witness's alleged prior inconsistent statement is reviewed for nonconstitutional harmless error. *People v. Salas*, 2017 COA 63, ¶31; *see Hagos v. People*, 2012 CO 63, ¶12. Reversal is required only if the error "substantially influenced the verdict or affected the fairness of the trial proceedings. *Salas*, ¶31.

Although Defendant argues that this issue should be reviewed for constitutional harmless error, she is mistaken. A constitutional violation is only found where the defendant was denied virtually their "only means of effectively testing significant prosecution evidence." *People v. Owens*, 2024 CO 10, ¶141. Here, Defendant testified, called six of her own witnesses (two of which were medical experts), and cross-

examined prosecution witnesses. Because Defendant presented a robust case and had ample opportunity to challenge the prosecution's evidence, nonconstitutional harmless error review applies.

B. Additional Facts

According to Defendant, she had a "medical event" while driving, causing her to lose consciousness. TR 06/29/22, p. 132:2-3; CF, p. 220 (JI 11). Defendant's alleged medical condition, vasovagal syncope, results in loss of consciousness and rigidity when the subject is exposed to medical situations, blood, or pain. TR 06/30/22, p. 64:14-25. She testified that she didn't remember anything about the accident, nor could she recall a conversation in the car with Roberts about his gallbladder operation; she conceded there was no evidence that such a conversation occurred. TR 06/29/22, pp.140:2-25, 145:7-9.

Defense counsel attempted to elicit testimony from Defendant's sister, Lisa, that in the hospital after the crash, Defendant told her sisters, Lisa and Cindy, that she and Roberts were discussing his surgery shortly before the accident. TR 06/29/22, pp. 59:6-11, 60:10-14. The prosecution objected on the grounds of self-serving hearsay. TR

06/29/22, p. 59:6-13, 22-25. The court allowed the question. TR 06/29/22, p. 60:7-9.

Defense counsel continued the line of questioning by asking, "What did she say?" TR 06/29/22, p. 60:10. Lisa responded:

> She said that she didn't remember the actual accident. I asked her—tried to draw out from her what was going on, and she said that they were talking about Chris's gallbladder surgery, I guess; that he had a drain.

TR 06/29/22, p. 60:11-14. The prosecution again objected to the self-serving hearsay; the court sustained the objection as "beyond what was addressed earlier." TR 06/29/22, p. 60:15-19.

During direct examination of Defendant's other sister, Cindy, defense counsel attempted to elicit testimony about Defendant's statements to her in the hospital about what happened in the crash. TR 06/29/22, p. 99:18-19. The court sustained the prosecution's hearsay objection. TR 06/29/22, p. 100:3-4.

Then defense counsel asked, "Did [Defendant] tell anything about a conversation she had with [victim]?" TR 06/29/22, p. 100:10-11. Again, the prosecution objected. TR 06/29/22, p. 100:12-13. The court permitted

a question about whether Defendant had a conversation with the victim, but at the bench conference, the prosecution objected on the basis of self-serving hearsay, arguing that it wasn't a question of impeachment of Defendant, so it didn't implicate either a prior consistent or inconsistent statement. TR 06/29/22, p. 101:7-19. The court sustained the objection. TR 06/29/22, p. 101:20-22.

Cindy further testified that she witnessed Defendant being triggered into a syncope by previous conversations, similar to that which were alleged to occur between Defendant and Roberts in the car just before the crash. TR 06/29/22, p. 102:13-16.

Defendant's doctors also testified that Defendant mentioned that while in the car, the victim was discussing his surgery TR 06/30/22, pp. 13:8-21, 96:14-18, 104:1-3.

Following the doctors' testimony, defense counsel asked to recall Cindy about her conversation with Defendant in the hospital about the conversation in the car prior to the crash. TR 06/30/22, p. 116:18-24. The prosecution objected on the grounds that it didn't fall within any exception, nor was there an evidentiary basis because similar testimony

was already on the record. TR 06/30/22, pp. 116:25-117:5, 117:16-25. The court denied the request. TR 06/30/22, p. 118:4-5.

C. Law and Analysis

Defendant argues that her statement to her sisters shortly after the crash in which she told them that the victim had talked about his surgery was improperly excluded. OB, p. 10. She is mistaken.

1. The statement was hearsay, and any exceptions as a prior consistent or inconsistent statement were inapplicable.

"'Hearsay' is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801. Hearsay is generally not admissible unless the statement falls under an exception. CRE 802.

During the sisters' testimony, the prosecution objected repeatedly to "self-serving hearsay." TR 06/29/22, pp. 59:12-13, 60:15-17, 101:7-8. Although Colorado has no per se rule excluding a defendant's self-serving hearsay statement, *see People v. Montoya*, 2024 CO 20, ¶50, such a limitation need not be addressed in this case because any type of

hearsay statement is admissible if it satisfies an exception in the Colorado Rules of Evidence. *Vanderpauye*, ¶28. As explained below, because Defendant's statements were hearsay and did not fall under any exception, the trial court properly excluded them. And since on appeal, "a party may defend the judgement of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court[,]" this Court may consider the record and the People's arguments here. *People v. Quintana*, 882 P.2d 1366, 1372 (Colo. 1994) (*abrogated on other grounds by Rojas v. People*, 2022 CO 8).

Prior statements by a witness are not hearsay if the witness testifies at trial and is subject to cross-examination about the statement, and the statement is "(A) inconsistent with [her] testimony, or (B) consistent with [her] testimony and is offered to rebut an express or implied charge against [her] of recent fabrication[.]" CRE 801(d)(1)(A),(B).

A declarant is a person who makes a statement. CRE 801(b). The declarant may be a witness that testifies at trial about her own prior

out-of-court statements. Rule 801. Definitions, 22 Colo. Prac., Handbook On Evidence ER 801 (2023-2024 ed.).

The statement at issue is what Defendant, while in the hospital after the crash, told her sisters about a discussion with the victim concerning his gallbladder surgery. Thus, Defendant is the declarant. But although Defendant testified at trial and was subject to cross-examination, at no point did she testify about that particular statement to her sisters.

Even if this Court determines that the *content* of Defendant's previous out-of-court statement was inconsistent with her denial of memory of the crash, § 16-10-201(1)(a),(b), C.R.S. (2023), requires that "[t]he witness, while testifying, was given an opportunity to explain or deny the statement" and "[t]he previous inconsistent statement purports to relate to a matter within the witness's own knowledge." Defendant would have had to have been asked about the statement while testifying. She wasn't. Therefore, because this statement does not satisfy the exceptions for a prior consistent or inconsistent statement, it was properly excluded. CRE 801(d)(1)(A),(B).

Defendant testified that she couldn't recall the conversations in the car before the crash. TR 06/29/22, p. 140:7-25. For that reason, she also argues that extrinsic evidence of the statement should have been admitted under CRE 613(a). OB, p. 13. But CRE 613 may only be used for impeachment purposes.[2] *Montoya v. People*, 740 P.2d 992, 997 (Colo. 1987); *People v. Jenkins*, 768 P.2d 727, 730 (Colo. App. 1988). Here, Defendant's purpose in seeking admission of her hearsay statement was not for impeachment, but rather, as Defense counsel explained in a bench conference:

> Your Honor, the prosecution asked Trooper Botts specifically about whether Ms. Woodruff had volunteered this kind of information. And I want to show that, under questioning, she would have answered this kind of information.

TR 06/29/22, p. 101:2-6.

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[2] Defendant mistakenly asserts that the trial court incorrectly credited the prosecution's argument that a lack of memory doesn't satisfy the requirement for inconsistency. OB, p. 14. Instead, the prosecution was arguing, as the People do here, that the purpose for eliciting the testimony from Cindy at that point wasn't for impeachment purposes, and prior consistent or inconsistent statement exceptions were not at issue.

Moreover, the plain language of CRE 613 indicates its application for admitting a declarant witness's *own* statements, not as here, where defense counsel attempted to admit the Defendant's statement through Cindy. Accordingly, Defendant's statement was inadmissible under CRE 613.

2. Any error was harmless.

In any event, any error was harmless for three reasons.

First, the jury heard the content of the statement from other testimony. Both doctors who examined Defendant testified that she mentioned she and the victim had discussed his surgery. TR 06/30/22, pp. 13:2-14:4 (Alexander), pp. 96:14-18, 104:1-22 (Clemmons). Cindy also testified that she had seen Defendant prompted into a syncope by previous conversations, similar to those alleged to occur between Defendant and victim in the car just before the crash. TR 06/29/22, p. 102:13-16. The doctors, through a diagnosis of exclusion based on what the sisters and Defendant conveyed to them, concluded and testified that such a discussion could have caused her to pass out. TR 06/30/22, pp. 20:15-21:2. Further, Defendant emphasized the syncope theory in

closing. TR 06/30/22, pp. 142-159. Considering that the jury heard ample arguments about Defendant's claimed reaction to an alleged statement by the victim allowed the jury to fairly consider the issue, and the exclusion of the sister's additional account of Defendant's statement was trivial. *See People v. Dominguez-Castor*, 2020 COA 1, ¶75.

Second, the prosecution presented overwhelming proof of Defendant's guilt. A crash reconstruction technician testified that no defects on the vehicles could have caused the crash. TR 06/28/22, p. 171:3-172:8. The same expert explained the Jeep's and Ford's (second impacted vehicle) black box data, charts, and crash reconstruction photos and videos. People's Exhibits 38-43, 48-52, 54, 56-57; TR 06/28/22, pp. 175-207. The expert concluded that accelerator pressure fluctuation from 100% throttle to 66%, which caused the Jeep to travel up to 106 mph, combined with the simultaneous steering variations from as little as 1-2 degrees left or right to as much as 35 degrees in the other direction, showed "[t]he driver [was] in control of the vehicle, putting intentional input to the steering wheel and the accelerator

pedal at the same time. People's Exhibits 42-43; TR 06/28/22, p. 192:12-23. The expert testimony shows that she was, in fact, driving—the objective data shows no consistent and firm pressure on the accelerator, as Defendant contends. Additionally, she presented no expert testimony to contradict the testimony about the vehicle inputs or crash reconstruction.

Consistent with the expert's conclusion, the jury also heard from several eyewitnesses, including the victim driving the second impacted vehicle, that Defendant's Jeep sped by them on the interstate at double the speed of the other cars, weaving in and out of traffic, until it hit the Ford, flipped multiple times, and skidded along the guardrail. TR 06/28/22, pp. 9-15, 44-49, 59-64, 65-68.

This overwhelming inculpatory evidence rendered exclusion of a single potentially exculpatory statement harmless. *Pernell v. People*, 2018 CO 13, ¶25.

Third, Defendant's credibility was challenged in several ways. Defendant testified to fainting episodes when she saw blood or was in pain. TR 06/29/22, p. 136:20-25. But she also testified that after the

crash, she didn't recall fainting at the hospital when her blood was drawn or while a doctor was stapling her scalp back together. TR 06/29/22, pp. 137:1-138:15. Her domestic partner had only seen her experience a possible syncope event once from pain, when she hurt her ankle, in the six and a half years they've been together, and she remained conscious. TR 06/29/22, pp. 89:20-90-12. Because Defendant extensively contradicted herself and other testimony, hearing the statement to her sisters would not have influenced the jury's assessment of her credibility. *See Martinez v. People*, 244 P.3d 135, 143 (Colo. 2010) (improper comments harmless because substantial evidence raised doubts about defendant's credibility).

Relatedly, the excluded statement was merely one part of an inferential chain in Defendant's theory: that the victim and Defendant were discussing the gallbladder surgery; that Defendant has syncope; such a discussion *can* trigger a syncope episode; such an episode *could* explain her erratic driving. Because she claimed no memory of the accident, the excluded evidence was harmless. *See Clark v. Buhring*, 761 P.2d 266, 268 (Colo. App. 1988) (where excluded impeachment

evidence could not have affected the credibility of independent evidence, error is harmless).

In sum, any alleged error was harmless. *Salas*, ¶31.

II. The prosecution did not engage in misconduct at any point of the trial.

A. Preservation and Standard of Review

The People disagree that the issue is preserved. OB, p. 18. Defendant argues that a single objection to the admission of one piece of evidence "partially preserves" this issue. OB, p. 18. However, at no point did Defendant object to any purported prosecutorial misconduct. When an objection made in the trial court differs from those raised on appeal, the issue is unpreserved. *People v. Gee*, 2015 COA 151, ¶45. Defendant's objection was based on evidentiary value, not prosecutorial misconduct. TR 06/28/22, p. 145:14-146:14.

If a defendant doesn't object to the alleged prosecutorial misconduct, this Court reviews for abuse of discretion and reverses only for plain error. *People v. Robinson*, 2019 CO 102, ¶19. Plain error must be obvious and substantial. *Hagos*, ¶18. "Obvious" means that the trial

court ruled contrary to statute, court rule, or clearly established Colorado law. *See People v. Smalley*, 2015 COA 140, ¶85.

"Prosecutorial misconduct rarely constitutes plain error." *People v. Estes*, 2012 COA 41, ¶19. "To constitute plain error, prosecutorial misconduct must have been so flagrant, glaring, or tremendously improper that the trial court should have intervened sua sponte." *People v. Cordova*, 293 P.3d 114, 121 (Colo. App. 2011). "Even then, to reverse, we must also conclude that the court's failure to address the misconduct so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *Id*.

B. Law and Analysis

When examining prosecutorial misconduct claims, the reviewing court employs a two-step analysis. *People v. Robinson*, 2019 CO 102, ¶18. First, the court analyzes whether the prosecutor's conduct was improper based on the "totality of the circumstances," and "second, whether such actions warrant reversal according to the proper standard of review." *Id*. The two steps are independent of each other; a court may

conclude the prosecutor's behavior was improper, but still uphold the verdict. *Id*.

The reviewing court considers "the exact language used, the nature of the misconduct, the degree of prejudice associated with the misconduct, the surrounding context, and the strength of the other evidence of guilt." *Wend v. People*, 235 P.3d 1089, 1098 (Colo. 2010). Additional factors include "the severity and frequency of the misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to the defendant's conviction." *People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010). The court also examines the allegedly improper argument in context and considers whether defense counsel's failure to object indicates a belief that the live argument was not overly damaging. *Cordova*, 293 P.3d at 122.

Defendant frequently asserts, with little development of the argument, only cursory analysis, and jumbled references to the record and law, that the trial was rife with prosecutorial misconduct. OB, pp. 18-37. But to obtain relief on plain error review, Defendant must "do

more than make conclusory assertions; [she] must present reasoned analysis." *People v. Lientz*, 2012 COA 118, ¶30.

1. The prosecution did not misrepresent the evidence.

Defendant alleges that on several occasions, the prosecution misrepresented evidence. OB, pp. 19-22. The record shows otherwise.

Defendant asserts the prosecution incorrectly stated during closing arguments, that "Dr. Clemmons was the only witness who testified that Defendant mentioned Roberts talking about his gallbladder surgery before the crash." OB, p. 19. This was a misstatement—Dr. Alexander also briefly mentioned the conversation. TR 06/30/22, p. 13:12-21. Even so, it was elicited by the prosecution on cross-examination of Dr. Alexander. TR 06/30/22, p. 46:18-24. Therefore, the jury was able to discern that both doctors testified to that conversation, and the prosecutor's fleeting misstatement in closing argument was inconsequential to the fair outcome of the trial.

Defendant also asserts that the prosecutor, again during closing arguments, employed arguments "it knew were false" based on evidence

it "fought to exclude." OB, pp. 19, 21. To claim that the prosecutor knew its arguments were false ignores the rule, followed here by the prosecution, prohibiting counsel from arguing only facts in evidence and any reasonable inferences therein. *Domingo-Gomez*, 125 P.3d at 1048. Because the prosecutor was advocating his best case, given the wide latitude in language and style to achieve justice (*People v. Estes*, 2012 COA 41, ¶27), his remarks were not "so flagrant, glaring, or tremendously improper that the trial court should have intervened sua sponte." *Cordova*, 293 P.3d at 121.

Defendant further alleges that the prosecutor "overstated the significance of the Jeep's black box data," which she asserts was consistent with her defense. OB, p. 21. But merely because Defendant disagrees with the data and the expert witness's interpretation of it (*see* OB, p. 21, referencing brief section explaining Defendant's own interpretation of the black box data), the court need not intervene. "The jury… must perform the fact-finding function when conflicting evidence—and conflicting reasonable inferences—are presented." *People v. Roberts-Bicking*, 2021 COA 12, ¶40. Because Defendant didn't object

to the prosecution's "overstatement," and the court properly did not interfere in the jury's fact-finding province, the prosecutor's statements were appropriate.

Defendant also argues that the prosecutor made other misrepresentations in closing, saying that her sisters described her response to syncope as going "limp" when the sisters described her as going "stiff." OB, p. 22. True, both sisters testified to Defendant's stiffening. TR 06/29/22, pp. 62:6-19, 63:25-64:5, 98:15-24. But one sister testified that "she doesn't do that every time." TR 06/30/22, p. 98:18-25. And even if the prosecution's argument misstated the sister's testimony, the prosecution conceded that the sisters' stories were consistent. TR 06/30/22, p. 139:15-16. Further, saying that going limp is a syncope reaction was consistent with the medical expert's testimony. TR 06/30/22, pp. 75:6-12, 76:7-12.

Defendant's final complaint is that in closing, the prosecution said that a particular witness didn't testify the Jeep was being driven erratically, although the witness had testified to that point. OB, p. 22. But Defendant misses the context of the prosecution's statements,

which reminded the jurors that they heard evidence that the Jeep *was*, in fact, driving "crazy," but the manner of driving didn't suggest a loss of consciousness. TR 06/30/22, pp. 172:25-173:6.

Any alleged misstatements or misrepresentations were trivial and did not rise to a level of being "so flagrant, glaring, or tremendously improper" to constitute plain error. *Estes*, ¶19.

2. The prosecution did not inflame the passions of the jury.

During opening statement and closing arguments, the prosecution pointed out milestones that Roberts would no longer be around to experience. TR 06/27/22, p. 157:18-22; TR 06/30/22, p. 133:14-17. Defendant asserts that these comments were improper appeals to the jury to consider the effect on the victim. OB, pp. 23-24. But the statements were brief—mere cursory comments reflecting inferences from testimony that the jury had already heard. *People v. Rodriguez*, 794 P.2d 965, 675 (Colo. 1990) (comments about a victim missing significant life events like her birthday, when placed in the context of the entire trial, were not objectionable); s*ee People v. Allee,* 77 P.3d 831,

836 (Colo. App. 2003) (no plain error where no objection was made to the brief improper statement and the jury heard evidence otherwise).

During closing, the prosecution also asked the jury to imagine what Roberts was thinking as he was twisting through the air in the car. TR 06/30/22, p. 10-13. Defendant asserts that this statement was an improper "golden rule argument." OB, p. 24. Though generally considered improper, isolated "golden rule" arguments are inconsequential if the strength of the evidence precludes any reasonable probability that a jury's attention would have been so diverted from the evidence by the remark that it would have arrived at a different verdict. *People v. Dunlap*, 975 P.2d 723, 759 (Colo. 1999). After all, the prosecution's brief mention of Roberts's state of mind when Defendant's car was flipping through the air only reminded the jury of what the uncontroverted evidence had established. *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984).

Defendant also asserts that introducing photographs of the victim, both "in life" and after the accident, and addressing his widow's demeanor while testifying, unfairly prejudiced her. OB, pp. 25-26. But

the "in life" photo was necessary to identify the victim because defense counsel didn't stipulate to identity. TR 06/28/22, p. 146:3-7. And prosecution's statement to the widow merely consoled her emotional reaction on the stand (TR 06/27/22, p, 177:18-19, "I'm sorry we have to go through this. You can take all the time you need, okay.") and was not a tactic to invite jury empathy.

The two post-crash photographs of the victim were similar to the autopsy photos that had already been admitted, but neither was published to the jury upon admission, nor did the prosecution refer to the photos in closing argument. TR 06/27/22, pp. 177:25-178:11; TR 06/28/22, pp. 145:19-146:14. Moreover, the jury was instructed: "Remember, you must not be influenced by sympathy, bias or prejudice in reaching your decision." CF, p. 211 (JI 1).

Finally, Defendant contends that the prosecution elicited irrelevant and prejudicial evidence, but she neither identifies this evidence specifically nor provides grounds on which any of it would be objectionable. OB, pp. 26-27. Even so, the evidence Defendant now objects to was properly admitted under the Rules of Evidence. And

because none of these instances were objected to at trial, let alone for prosecutorial misconduct,[3] they should not be reviewed on appeal. Moreover, this court need not consider "bare or conclusory assertions presented without argument or development." *People v. Salazar*, 2023 COA 102, ¶53 n.8.

Defendant's failure to explain the cumulative effect of these statements; the minimal likelihood that any of the statements or belatedly disputed evidence would have constituted a major factor in Defendant's conviction, which was supported by overwhelming inculpatory evidence; and her lack of objection at trial show that plain error does not apply, and reversal is not required.

3. The prosecution did not misstate the burden of proof.

A prosecutor's statements are improper when they have the effect of lowering the burden of proof or shifting it to the defendant. *People v. Santana*, 255 P.3d 1126, 1130 (Colo. 2011); *People v. Cuellar*, 2023 COA

[3] Defendant objected to the admission of the post-crash photograph, but on evidentiary grounds, not as prosecutorial misconduct.

20, ¶68. To determine whether a prosecutor's comments have improperly shifted or lowered the burden of proof, this Court considers whether: "(1) the prosecutor specifically argued or intended to establish that the defendant carried the burden of proof; (2) the prosecutor's actions constituted a fair response to the questioning and comments of defense counsel; and (3) the jury is informed by counsel and the court about the defendant's presumption of innocence and the prosecution's burden of proof." *Santana*, 255 P.3d at 1131-32. This analysis, which considers the actions in light of the entire record, protects a prosecutor's ability to "comment on the lack of evidence confirming defendant's theory of the case." *Id.* at 1132; *People v. Ramirez*, 997 P.2d 1200, 1211 (Colo. App. 1999) (prosecutor may assert that "evidence in support of defendant's innocence lacked substance").

Defendant argues that the prosecution shifted the burden of proof by requiring the jury to "believe every detail of her theory." OB, p. 29. But as Defendant admits, the prosecution was only commenting on "about ten different allegedly unbelievable things." OB, p. 29.

Defendant also argues that the prosecution employed improper analogies to Ockham's razor[4] and a TV show about a last-minute witness called to offer evidence of a defendant's innocence. OB, pp. 29-30. But the prosecution turned the TV analogy around by saying "This isn't TV, it's real life." TR 06/30/22, p 175:6-10. And courts have frequently held that the use of analogies to clarify the burden of proof is permissible. *People v. Camarigg*, 2017 COA 115M, ¶49.

Here, the prosecution used the Ockham's razor analogy to explain that when two conflicting theories exist for a particular event or conclusion, the clear, simple, obvious theory is the accurate one. TR 06/30/22, p. 160: 8-15. At no point did the prosecutor specifically declare or even imply that Defendant bore any burden. Moreover, the jury was repeatedly reminded of the standard of proof, and that the prosecution held that burden. CF, p. 212 (JI 3, "The burden of proof is upon the

[4] Ockham's razor is a principle, attributed to 14th century philosopher William of Ockham, premised on the notion that if two competing theories seem to explain the same phenomenon, the simplest should be preferred. https://www.britannica.com/topic/Occams-razor, (last visited April 15, 2023).

prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged."); TR 06/27/22, pp. 47:18-48:8 (court admonition to prospective jurors about prosecution's burden of proof beyond a reasonable doubt); TR 06/30/22, p. 165:17-25 ("the defense has no obligation to present evidence–I want to be really clear about that–none whatsoever.").

Considering the entire record, any allegations that the prosecution lowered or shifted the burden of proof were exiguous, as their purpose was to highlight the strength of the prosecution's case and expose the deficiencies in Defendant's case, and were therefore proper, especially considering the jury instructions on burden of proof. *Santana*, 255 P.3d at 1131-32, 36; *People v. Samson*, 2012 COA 167, ¶31 (a prosecutor may permissibly "comment on the absence of evidence to support a defendant's contentions").

4. The prosecution did not denigrate the defense.

A prosecutor shouldn't make remarks "for the obvious purpose of denigrating defense counsel." *People v. Trujillo*, 2018 COA 12, ¶38. But any allegedly inappropriate remarks must be evaluated considering the argument as a whole and the evidence before the jury. *People v. McMinn*, 2013 COA 94, ¶60. And because trial arguments aren't always perfectly scripted, reviewing courts grant prosecutors the "benefit of the doubt when their remarks are ambiguous or simply inartful." *Id*. Prosecutors may also "employ rhetorical devices and engage in oratorial embellishment and metaphorical nuance, based on the evidence presented and the reasonable inferences drawn therefrom. *Id.* "Prosecutorial misconduct in closing argument rarely constitutes plain error." *Liggett v. People,* 135 P.3d 725, 735 (Colo. 2006). This is not one such rare case where closing argument involved "flagrantly, glaringly, or tremendously improper" argument. *Domingo-Gomez*, 125 P.3d at 1053.

Defendant lists several instances where the prosecution allegedly denigrated Defendant, defense counsel, and the defense theory. OB, pp. 31-32. But the prosecution's occasional use of colorful language to advocate their position was an appropriate response to evidence presented by the defense. Defendant argues that the prosecution mischaracterized the defense theory as "encouraging jurors to stereotype," and calling it "performance art." OB, p. 32. The phrases about which Defendant complains were made entirely in closing argument and were responsive to the defense's opening arguments, including her call to the jury to stereotype Defendant as a "little old lady schoolteacher" (TR 06/27/22, p. 170:5-9) and the performative reenactment of Defendant's theory of what occurred just before the crash (TR 06/27/22, pp. 168:21-169:1, 170:1-3).

Considering the record as a whole, Defendant does not explain—nor could she—how the prosecutor's comments were made "for the obvious purpose of denigrating defense counsel." *Trujillo*, ¶38. Instead, the prosecution simply employed appropriate rhetorical language in response to defense counsel's statements and evidence. While some

comments were perhaps inartful, the prosecutor's comments were not "flagrantly, glaringly, or tremendously improper." *Domingo-Gomez*, 125 P.3d at 1053.

5. The prosecution did not insert its personal opinion.

"A prosecutor may not give a personal opinion on the defendant's guilt or the truth or falsity of witness testimony." *People v. Conyac*, 2014 COA 8M, ¶134. But when such comments are taken in the context of the argument, are brief, and lack a contemporaneous objection, they are not "so egregious as to constitute plain error." *People v. Ramirez*, 997 P.2d 1200, 1211 (Colo. App. 1999).

Defendant makes blanket assertions that the prosecutor inserted his personal opinion and encouraged the jury to consider the prosecutor's anecdotal experiences. OB, pp. 33-34. Taken in context, some of Defendant's examples were not personal opinion at all (TR 06/30/22, p. 174:10-16). OB p. 33.

Defendant complains that the prosecutor asked the jury to consider anecdotal information when he remarked in closing about his

experience as a prosecutor involving "people who do a lot of terrible things…and regret it afterward. […] People do stupid things they regret later or don't remember." TR 06/30/22, p. 161:2-7 (cleaned up). Though the prosecutor shared an observation from his profession, the remarks concluded with general, common knowledge about everyday experiences. Further, the comment related to facts in evidence—that Defendant did not remember the accident, but remembered "crying uncontrollably," when she learned that the victim didn't survive the accident. TR 06/29/22, pp. 125:19-20, 128:1-7. But closing arguments may properly include such statements and reasonable inferences drawn therefrom. *Domingo-Gomez*, 125 P.3d at 1048. Taken in context and considering its brevity, this comment does not constitute prosecutorial misconduct, let alone plain error. *Ramirez*, 997 P.2d at 1211.

Defendant further contends that the prosecutor's closing argument "impermissibly injected the prosecutor's credibility into the jury's consideration" of the evidence, and incorrectly summarized witness testimony. OB, pp. 34-35. With scant explanation on how this is so, a reading of the record reveals that again, the prosecutor was merely

commenting on the admitted evidence, or the lack thereof, both of which are permissible. *Santana*, 255 P.3d at 1132; *Medina*, 190 545 P.2d at 703; *Ramirez*, 997 P.2d at 1211.

Even if this Court finds one or two among the alleged opinion arguments improper, none are so "flagrantly, glaringly, or tremendously improper," and therefore, reversal is not required. *Domingo-Gomez*, 125 P.3d at 1053.

6. The prosecution didn't improperly ask about whether a witness's testimony was a lie or mistake.

A prosecutor must not ask about the veracity of a witness's or a defendant's testimony through "were they lying" types of questions. *Liggett*, 135 P.3d at 731. Even absent an objection, a "categorical" rule applies where the prosecutor "repeatedly and pervasively poses improper questions." *People v. Koper*, 2018 COA 137, ¶44.

In *Koper*, the prosecutor's conduct required reversal because not only did the prosecutor ask witnesses point blank if the prosecution's witnesses were lying, incorrect, or wrong, but did so some 44 times. *Id.* at ¶38. In contrast, here, the prosecution asked whether some

testimony was a "surprise" (TR 06/29/22, pp. 104:11-105:10); whether it was "accurate" (TR 06/29/22, p. 112:16-17); whether witnesses were "telling the truth" (TR 06/29/22, p. 136:11-14); and whether other witnesses' testimony would "contradict" Defendant's recollection (TR 06/29/22, p. 144:12-22). While such questions may suggest the prosecution's skepticism, the prosecution didn't use the words lie/lying, and the instances of that type of questioning was limited to those asserted above.

Therefore, reversal is not required because the prosecution's questioning was not so repeated and pervasive. *Koper*, ¶44.

7. The trial court did not err, and reversal is not required.

Though Defendant now asserts numerous occasions of prosecutorial misconduct, her consistent failure to object to *any* of these instances at trial demonstrates her belief that the live argument was not overly damaging. *Cordova*, 293 P.3d at 122. Nor do any alleged combination of erroneous statements warrant reversal, considering that so few of the prosecution's statements constituted error, much less plain

error. *People v. Arzabala*, 2012 COA 99, ¶73. Since the two-step analysis of each act of alleged misconduct is considered for impropriety and reversal independent of each other, even if this court finds some statements improper, reversal is not required because none was so "flagrantly, glaringly, or tremendously improper" to warrant it. *Domingo-Gomez*, 125 P.3d at 1053. Significantly, too, the inculpatory evidence against Defendant, as discussed in subsection I.C.2 above, was overwhelming, invalidating any claim of plain error. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

III. Trooper Waters properly gave expert testimony about his conclusions from the evidence and did not usurp the functions of the trial court or the jury.

A. Preservation and Standard of Review

The People agree that this issue is unpreserved and is therefore reviewed for plain error. OB, p. 38; *Hagos*, ¶14. The plain error principles described in *See* Section II.A, *supra*, apply.

"Trial courts have broad discretion to determine the admissibility of expert testimony pursuant to CRE 702, and the exercise of that

discretion will not be overturned absent an abuse of discretion." *People v. Prendergast*, 87 P.3d 175, 181 (Colo. App. 2003).

B. Law and Analysis

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." CRE 704. Even if the witness's opinion contains elements that the prosecution is required to prove, CRE 704 allows such a use of otherwise admissible testimony. *People v. Brewer*, 720 P. 2d 583, 588 (Colo. App. 1985). A fine line may exist between impermissible expert testimony about legal issues and permissible expert testimony on that expert's conclusions based on mixed questions of fact and law. *Prendergast*, 87 P.3d at 182. This is so because the trial court, not the expert, informs the jury of the law. *Id*.

When determining whether an expert has usurped the province of the court, factors to consider include whether: the testimony was prejudicially phrased; the expert repeated the statements so frequently to infer that he was "consciously using the same [legal] formulation"; the alleged inappropriate testimony was so pervasive as to assume the

court's duty to articulate the law; the testimony wasn't clarified on cross-examination; and if the expert opined on the likelihood of a defendant's guilt. *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011); *Prendergast*, 87 P.3d at 183.

Defendant argues that Trooper Waters, who was qualified to testify as an expert in crash investigation and reconstruction without objection (TR 06/28/22, p. 158:3-10), "usurped the jury's role" by testifying that the "cause of this crash was due to Ms. Woodruff intentionally driving her vehicle in excess of the posted speed limit of 45, traveling at 103 to 106 miles per hour, while steering, to avoid traffic and maneuver in and out of traffic." OB, p. 39; TR 06/28/22, p. 207:1-7.

Trooper Waters's conclusion about the cause of the crash wasn't prejudicially phrased. He properly relied on his interpretation of complicated black box data from the Jeep to assist the jury in understanding the accelerator and steering variations (TR 06/28/22, p. 192:12-14); comparisons to the Ford's black box data (TR 06/29/22, pp. 19:22-21:9); evidence collected at the scene (TR 06/28/22, p. 151:7-14);

and eyewitness testimony about their observations (TR 06/28/22, p. 224:13-20). Then he opined that collectively this information indicated that the driver had exercised control of the vehicle through "intentional input[s]" in the seconds leading to the crash. TR 06/28/22, p. 192:18-23; CRE 702.

Relatedly, although Trooper Waters employed the phrase "intentional" to describe the purported control of the vehicle, it wasn't in reference to any legal standard. Instead, the word, clarified in context through later testimony comparing black box data from the two impacted vehicles (TR 06/29/22, p. 21:3-9) and in introductory testimony (TR 06/27/22, p. 165:2-3), referred to each driver's *purpose* and *volitional command* (or lack thereof) of a vehicle to either avoid traffic or regain control. And in any event, none of the charges included a mens rea of "intent." CF, pp. 24-26. Therefore, Trooper Waters's testimony was not based on legal conclusions.

Nor were Trooper Waters's conclusions about the evidence frequently repeated. *Prendergast*, 87 P.3d at 183. Only three times did

he state his conclusion that the driver was intentionally providing input. TR 06/28/22, pp. 192:18-23, 207:1-7; TR 06/29/22, p. 21:3-9.

As well, the court properly instructed the jury on the law. *Prendergast*, 87 P.3d at 182; s*ee People v. Lawrence*, 487 P.3d 1066, 1074 (when jurors are properly instructed on the law, they need not accept the testimony of any expert, and are free to draw their own conclusions). The jury received instructions about the weight and credibility of witness testimony (CF, pp. 214 (JI 5), 217 (JI 8)).

And at no point did Trooper Waters infer Defendant's guilt, other than once in response to defense counsel's cross-examination about the timing of his conclusion. TR 06/28/22, pp. 211:4-212:12.[5] Otherwise he

[5] Defense counsel: You believe that [Defendant] had killed [victim] on February 19, of 2022?

Waters: No, sir. Currently, yes. Now, I do.

Defense counsel: But you didn't believe that on the 19th?

Waters: No, sir. I had no information, other than there was two vehicles in a crash, one person deceased, and one person transported. So the driving to the scene I had no preexisting thoughts or connotations as to what caused the crash, who was at fault, or anything of that nature.

explained, when questioned about assuming guilt upon arrival at the crash scene, that he had no such mindset and his job was to collect evidence, only later forming an opinion. TR 06/28/22, p 156:11-22.

But even if Trooper Waters's response was improper, defense counsel invited the answer to the question and Trooper Waters clarified the circumstances he encountered at the scene. Because Defendant invited any supposed error in Trooper Waters's response, she may not raise this issue for review. *People v Gingles*, 2014 CO 163, ¶21 (defendant may not complain on appeal of an error that was invited or injected into the case and must abide by the consequences of his decisions (cleaned up)). And even if invited error does not preclude review, public safety officials may testify to the reasons certain investigatory steps were taken, even when it could approach prohibited subjects. *People v. Penn*, 2016 CO 32, ¶32.

Defense counsel: And, therefore, you also had no thought that [Defendant] was criminally responsible for killing [victim] on February 19th, 2022?

Waters: Correct. On initial arrival to the scene, no, I did not.

Finally, defense counsel had the opportunity to challenge Trooper Waters's opinions on cross-examination, during which he reiterated the evidentiary basis and specialized knowledge that led to his conclusions. *Rector*, 248 P.3d at 1203; *Prendergast*, 87 P.3d at 183; TR 06/28/22, pp. 223:4-229:13.

For the above reasons, Trooper Waters's expert testimony was proper, and did not usurp the functions of the trial court or the jury. The trial court correctly exercised its discretion in not sua sponte limiting Trooper Waters's testimony. And given the overwhelming evidence of guilt, as discussed in subsection I.C.2 above, any error did not "so undermine[] the fundamental fairness of the trial so as to cast serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶14.

IV. The trial court did not err by using a non-standard jury instruction; but even if it was in

error, Defendant affirmatively acquiesced to the instruction.

A. Preservation and Standard of Review

Invited error "applies where one party expressly acquiesces to conduct by the court or the opposing party." *Horton v. Suthers*, 43 P.3d 611, 619 (Colo. 2002). Acquiescence differs from a mere failure to object. *Horton*, 43 P.3d at 619, fn 9.

For the first time on appeal, Defendant challenges a prosecution-tendered instruction on permissible inferences the jury may make from the evidence.[6] OB, p. 43. Here, as in *Horton*, Defendant not only failed to object to the tendered instruction, but expressly declared, "No objection" during the review of jury instructions. TR 06/29/22, p. 161:11-15. But critically, defense counsel went further, and read aloud the language of the instruction in closing to the jury ("If you go to Instruction Number 6, you're to consider only the evidence in this case and reasonable inferences therefrom. An inference is a deduction or a

[6] Though Defendant asserts that Jury Instruction 6 was proposed by the prosecution, she provides no supporting record citation. From the record, the People cannot discern which party proposed the instruction.

conclusion which reason and common sense lead the jury to draw from facts which have been proven."). TR 06/30/22, p. 147:6-12. Thus, Defendant embraced the instruction she now spurns. Given this unambiguous conduct, "the doctrine of invited error precludes defendant from challenging the instructions to which he expressly consented at trial." *People v. Gregor*, 26 P.3d 530, 533 (Colo. App. 2000).

Nor should the Reply Brief be allowed to avoid invited error based on *People v. Rediger*, 2018 CO 32, ¶¶34-37, which found no invited error because he didn't draft or tender the jury instruction at issue, nor did he request the instruction, nor did any party notice the error in the instruction. The court further explained that the case differed from *Horton*, because the error resulted from oversight and was not intentional or part of a trial strategy. *Id*. at ¶37.

In contrast, not only did Defendant consent to the instruction, but affirmatively employed verbatim in an explanation to the jury. *State v. Robertson,* 468 P.3d 1217, 1221-22 (Ariz. 2020) (party urging error engaged in affirmative, independent action to create the error or argue in favor of it); *see Jackson v. State*, 2019 WY 81, ¶9 (affirmative action

by asserting party is invited error); *see also Bush v. State*, 208 N.E. 3d 605 (Ind. App. 2023) (appellant's affirmative actions as part of a deliberate, well-informed trial strategy constituted invited error); *People v. Cooper*, 809 P.2d 865, 900 (Calif. 1991) (invited error if counsel made "conscious tactical choice," but need not have correctly understood all the legal implications of that choice). Therefore, because the error was invited, appellate review is foreclosed. *People v. Gross*, 2012 CO 60M, ¶8.

Yet, "[t]he lines distinguishing the doctrine of invited error from that of waiver are not precisely drawn." *People v. Hoggard*, 2017 COA 88, ¶15, *aff'd on other grounds*, 2020 CO 54, ¶15. So, if this Court disagrees as to invited error, Defendant waived this issue. True, the *Rediger* court allowed the defendant to challenge a jury instruction, although defense counsel had said "no objection" when asked his position by the rial court. *Rediger*, ¶10. But this holding must be viewed through the lens of the court's concern over lack of any evidence that defense counsel knew of the flaw in the instruction. *Id.*, ¶43.

Here, counsel's acquiescence, followed closely by an affirmative use of a now allegedly objectionable instruction, leaves no room for doubt that counsel knew precisely the role that the instruction could play in the jury's deliberation. No more should be required to constitute waiver—"the intentional relinquishment of a known right or privilege." *Johnson v. People*, 2023 CO 7, ¶22; s*ee also U.S. v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009); *State v. Kitchens*, 10 A.3d 942, 957-58 (Conn. 2011); *Ubiles v. People*, 66 V.I. 572, 585-86 (2017). Waiver precludes appellate review. *Johnson*, ¶22.

Finally, even if this court declines to apply either invited error or waiver, this issue was not preserved and is therefore reviewed only for plain error. *Hagos,* ¶14. In the context of jury instructions, a defendant must "demonstrate not only that the instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction." *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). Further, "an erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant's guilt." *Id.*

Trial courts have substantial discretion in determining the appropriateness of jury instructions, and appellate courts review whether a jury instruction correctly states the law de novo. *People v. Nerud*, 2015 COA 27, ¶35.

B. Additional Facts

Before the jury instruction conference, the trial court advised the parties: "Everybody look at them carefully one last time, and let's then come back on the record, make our record one by one about what jury instructions we'll be giving." TR 06/29/22, p. 159:1-3. The court reviewed each instruction aloud, including Jury Instruction 6, which read:

> The evidence in this case consists of the sworn testimony of all the witnesses, and all exhibits which have been received in evidence.
>
> You are to consider only the evidence in this case and reasonable inferences therefrom. An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

CF, p. 215; TR 06/29/22, p. 161:11-13.

Both the prosecution and defense counsel responded with "No objection." TR 06/29/22, p. 161:14-15.

During closing argument, the prosecution reviewed evidentiary concepts with the jury, reminding them that both direct and circumstantial evidence are to be equally weighed under the law. TR 06/30/22, p. 166:14-18. The prosecution pointed to the instruction in question, reminding the jury that:

> [Y]ou are to consider only the evidence in this case and reasonable inferences therefrom. An inference is a deduction or conclusion which reason and common sense leave the jury to draw from the facts.
>
> So the fact that something is merely theoretically possible is not the same as using your reason and common sense to conclude that it happened. And that's really important. […] you would have to engage in flights of fancy to buy the defense theory.

TR 06/30/22, pp. 166:19-167:8.

Defense counsel did not object. Instead, during closing argument, defense counsel specifically reiterated Jury Instruction 6 verbatim:

> You heard Ms. Woodruff testify that she did remember him talking about his wound earlier that day. And you're allowed to infer facts, right. If you go to Instruction Number 6, you're to consider only the evidence in this case and reasonable inferences therefrom. An inference is a deduction or a conclusion which reason and

> common sense lead the jury to draw from facts which have been proven.

TR 06/30/22, p. 147:6-12.

C. Law and Analysis

Defendant now claims on appeal that Jury Instruction 6 misstated the law and improperly shifted the burden of proof. OB, p. 45.

As argued above, the People assert that this issue is invited error, or at least waived. But if this Court reviews for plain error, Defendant's arguments are nonetheless unavailing.

Defendant cherry picks from the jury instructions to assert that the jury was "required to determine what facts in evidence were 'proved'"; that Jury Instruction 6 allowed the prosecution to argue the lack of any direct evidence of Defendant's theory of defense; and that it "instructed the jury to ignore her circumstantial evidence" of her alleged syncope event. OB, pp. 45-47.

But these arguments tell at best half the story. "Jury instructions must be read as a whole, and if, when so read, they adequately inform the jury of the law, there is no reversible error." *People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005).

Here, the jury was told by the court and the prosecution, about how facts may be proven. CF, p. 213 (JI 4); TR 06/30/22, p. 166:14-23 (prosecution's closing, repeating the jury instruction that a fact may be proven by direct or circumstantial evidence, and neither is more reliable than the other).

Additionally, the jury was repeatedly reminded of the standard of proof, and that the prosecution bore that burden. *See* Section II.B.3, *supra*, citing: CF, p. 212; TR 06/27/22, pp. 47:18-48:8; TR 06/30/22, pp. 162:8-14, 165:17-25.

Moreover, as explained above (Sec. I.C.2, *infra*), the jury heard overwhelming evidence of Defendant's guilt. *Miller*, 113 P.3d at 750.

In sum, the trial court properly exercised its discretion by including the jury instruction, and the decision does not constitute plain error. Therefore, reversal is not required.

V. There was no cumulative error.

A. Standard of Review

"A cumulative error analysis aggregates all trial errors that individually have been found harmless, and therefore not reversible,

and analyzes whether their cumulative effect is such that they can no longer be deemed harmless." *People v. Clark*, 214 P.3d 531, 543 (Colo. App. 2009). *Numerous* errors must have actually occurred, not merely be alleged. *People v. Thames*, 2019 COA 124, ¶69 (emphasis in original). Even if the trial court erred once, "a single error is insufficient to reverse under the cumulative error standard." *Id*. "[R]egardless of whether any error was preserved or unpreserved ..., reversal is warranted when numerous errors in the aggregate show the absence of a fair trial, even if individually the errors were harmless or did not affect the defendant's substantial rights." *Howard-Walker v. People*, 2019 CO 69, ¶26. Review is de novo. *Id*.

B. Law and Analysis

Defendant incorrectly asserts that cumulative error violated her "right to be convicted based only on the evidence and upon proof beyond a reasonable doubt." OB, p.48. Applying the above principles, the record shows otherwise.

None of the four issues raised on appeal were error. One error would not warrant reversal. Even two errors would not be "numerous."

Finally, despite any supposed cumulative effect of the alleged errors, the evidence against Defendant was substantial (s*ee* Sec. I.C.2. *infra*), and Defendant received a fundamentally fair trial. *See Vialpando*, 2022 CO 28, ¶46 (no cumulative error because the aggregate effect of errors on the trial was slight, considering the other evidence against the defendant).

Accordingly, there is no basis for reversal based on cumulative error.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully ask this Court to affirm Defendant's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **LEAH SCATUDO,** via Colorado Courts E-filing System (CCES) on April 19, 2024.

/s/Allison S. Block