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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal, Douglas District Court Honorable Patricia B. Herron Case Number 2020CR422	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JENNIFER L. WOODRUFF	
Megan A. Ring Colorado State Public Defender LEAH SCADUTO 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone Number: (303) 764-1400 Fax Number: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Attorney Registration #52788	Case Number: 2022CA1728

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 9,468 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Defendant-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.

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

Leah Scaduto

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INTRODUCTION

Jennifer Woodruff has struggled her whole life with convulsive syncope, a condition that looks much like a seizure. When confronted with gore, she faints. But rather than going limp, her body stiffens. One day, Woodruff was driving her friend and co-worker Chris Roberts up I-25; Roberts had just returned to work after an emergency gallbladder surgery. They crashed, and Woodruff suffered major injuries. Tragically, Roberts died. Prior to the crash, Woodruff's car was going over 100 miles per hour and weaving through traffic, but it was unclear why she would've been driving this way. Her theory was that Roberts told her about the surgery and she had a convulsive syncope event, causing her legs to stiffen and press the accelerator. Meanwhile, she reasoned, Roberts grabbed the wheel and tried to dodge other cars.

Woodruff was charged with vehicular homicide (reckless) and defended on the grounds that she was unconscious. But several errors combined to undermine this defense: the court excluded key evidence supporting it, the prosecution committed misconduct throughout trial, an expert witness usurped the jury's role by opining Woodruff was guilty, and an instruction misinformed the jury about inferences it could draw from the evidence. Ms. Woodruff was ultimately convicted as charged.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court erred by excluding evidence that, while still in the hospital after the crash, Woodruff said Roberts was talking about his gallbladder surgery before the crash.

II. Whether pervasive prosecutorial misconduct deprived Woodruff of her right to a fair trial.

III. Whether a Government expert impermissibly usurped the jury's role by testifying about Woodruff's intentions.

IV. Whether the trial court erred by using a 1970s civil jury instruction that misstated the law and the burden of proof.

V. Whether the cumulative effect of the errors requires reversal.

STATEMENT OF THE CASE AND FACTS

Jennifer Woodruff was packing her Jeep when she got a text from her friend, Chris Roberts. (TR6/29/22, pp5:19-21,120:13-19,121;17-23,122:12-16,123:4,124:25-125:2) Roberts and Woodruff were teachers at Zebulon Pike Youth Services Center; they and their colleagues were required to attend a conference in Westminster starting the next morning. (TR6/27/22, p179:3-25; TR6/29/22, p120:13-19) Their employer provided hotel rooms for each employee that night

through the duration of the conference. (TR6/27/22, p181:18-24; TR6/29/22, p120:13-19)

Roberts asked for a ride to Westminster; it wasn't uncommon for them to carpool. (TR6/27/22, pp175:8-11,180:3-10; TR6/29/22, pp122:14-16,124:5-16) It was his first day at work after an emergency gallbladder surgery. (TR6/27/22, pp175:19-22,181:7-10)

Woodruff and Roberts drove north on I-25. (TR6/27/22, p187:16-18) The last thing Woodruff remembered was heading toward Monument Hill, where the drizzle turned to light snow. (TR6/29/22, pp125:19-126:5,133:21-25) Woodruff slowed to let cars pass. (*Id.*)

Witnesses on northbound I-25 noticed a white Jeep quickly approaching. (TR6/28/22, pp9:8-12,44:13-23,66:23-67:1) This area of the highway was under construction and reduced to two lanes. (TR6/28/22, pp43:23-44:4) The cluster of cars was driving about 70 mph. (TR6/28/22, pp9:1-7,28:1-2,45:3-4,66:23-67:10)

Other drivers grew concerned as the Jeep drew closer. (TR6/28/22, pp66:23-67:10) It was going quickly, about 100 mph. (*Id.* pp45:22-25,186:14-22) It maintained speed, weaving between cars and almost hitting them. (*Id.* pp45:17-18,46:13-18,47:18-20,67:15-18) The Jeep drove erratically, sometimes straddling

the line between lanes. (*Id.* pp49:10-14,55:11-13,60:24-61:18) Other cars dodged the Jeep to avoid being hit. (*Id.* p49:4-9)

Data from the Jeep's computer confirmed witnesses' descriptions that it was traveling over 100 mph and weaving. (EX, pp48-52; Ex. 57) The data also showed the brakes weren't applied before the crash. (EX, pp48,50)

One driver said, although it was hard to see, she thought she remembered the driver's hands on the wheel. (TR6/28/22, pp51:11-18,55:7-8) She saw the passenger turned toward the driver, making agitated gestures. (*Id.* pp53:23-54:4) She couldn't say whether the passenger's hands were on the wheel. (*Id.* p51:20-22)

Eventually, the Jeep's luck ran out, and it clipped the rear corner of Joseph Medina's pickup. (*Id.* pp11:9-11,168:7-8) The pickup spun out, pinballing between barriers on either side of the highway. (*Id.* p168:9-17) Medina suffered minor injuries. (*Id.* p16:7-11)

The Jeep fared worse. It hit a crash cushion and launched over several cars. (*Id.* pp168:18-169:3) The roof was ripped off as it slid upside down on a guardrail. (*Id.* pp159:10-12,169:4-11) It came to rest upside down in the road. (*Id.* p169:6-8)

Witnesses rushed to help. (*Id.* pp68:19-69:17) Roberts was severely injured and dangled over Woodruff. (*Id.* pp69:9-70:3) Witnesses cut his seatbelt to extract

him. (*Id.* pp63:20-22,69:23-24) Woodruff's head was crushed in, and they initially thought she was dead. (*Id.* p69:25, TR8/26/22, p8:4-9)

Paramedics declared Roberts dead on scene. (TR6/28/22, p39:11-18) It took them 30 minutes to extract Woodruff. (TR8/26/22, p8:8-11)

Trooper Botts interviewed Woodruff while she was treated at a hospital. (TR6/28/22, pp109:20-110:2,112:6-21,113:7-16,116:22-24) She was confused and remembered nothing about the crash. (*Id.*) Blood test results confirmed Woodruff was sober. (EX, p9)

Woodruff spent six days in the hospital before moving to a rehabilitation facility. (TR6/29/22, p128:12-15) Her injuries were severe and included a traumatic brain injury. (*Id.* p134:14-15; TR6/30/22, p10:16-22) No one understood why she would've been driving so fast, given that she wasn't in any rush. (TR6/29/22, pp125:10-18,128:16-129:1; TR6/30/22, pp142:12-17,145:23-146:5)

Woodruff had a lifelong history of syncope, or fainting, triggered by medical treatments or gore. (*Id.* pp62:6-63:3; TR6/30/22, pp13:23-14:4) Syncope ran in her family, but her condition was unusual: instead of going limp, her body stiffened. (TR6/29/22, pp63:4-64:5,70:9,97:23-24,109:10-14; TR6/30/22, pp14:14-15:9; CF, p177) This condition, called convulsive syncope, causes a range of body movements and can look like a seizure to bystanders. (TR6/30/22, pp15:6-16:5)

While in the hospital, Woodruff told her sisters she remembered Roberts talking about his gallbladder surgery before the crash. (TR6/29/22, p60:11-14) This suggested that the crash might've been caused by Woodruff experiencing a convulsive syncope event. But the jury wasn't allowed to hear this evidence—the court barred the defense from eliciting it, despite multiple attempts. (TR6/29/22, pp59:6-61:20,64:15-25,99:18-102:16; TR6/30/22, pp116:18-118:5)

In search of answers, Woodruff scheduled a neurology appointment. (TR6/29/22, pp128:16-129:1) Dr. Alexander met with Woodruff and her sister, Cindy Woodruff,[1] for a telehealth appointment. (TR6/30/22, p10:1-15) Dr. Alexander recommended testing to rule out a seizure disorder. (TR6/29/22, p129:9-20; TR6/30/22, pp11:1-12,13:2-15:2,17:20-19:20) After negative test results, Dr. Alexander and Dr. Clemmons, an epilepsy specialist, each diagnosed Woodruff with syncope. (TR6/30/22, pp20:17-21:2,93:1-94:4) Although a seizure disorder was still possible, they believed convulsive syncope best explained the descriptions of Woodruff's body stiffening and the crash. (*Id.* pp14:16-19,75:20-25)

[1] Cindy Woodruff will be referred to as "Cindy" because she and her sister share a last name.

Several months after the crash, Woodruff was charged with vehicular homicide (reckless) of Roberts, third-degree assault against Medina, reckless endangerment of Roberts, and reckless driving. (CF, pp25-29)

At trial, Woodruff argued that she experienced a convulsive syncope event, which caused the crash. She presented evidence about her medical condition. (TR6/29/22; TR6/30/22) The doctors testified that someone experiencing convulsive syncope could unconsciously press the accelerator as their legs stiffen. (TR6/30/22, pp93:19-23,97:25-98:4) Woodruff argued Roberts realized she'd passed out and grabbed the wheel, trying to steer around cars. (*Id.* p153:21-24) Several witnesses testified that Woodruff was a cautious driver who didn't speed. (TR6/29/22, pp52:1-10,65:16-22,79:7-80:1,85:24-86:3) But because the trial court excluded evidence of Woodruff's hospital statement—that Roberts was talking about his surgery before the crash—the Government argued that this was merely a story concocted in response to being criminally charged. (TR6/30/22, pp135:16-136:5,138:25-139:8)

Woodruff was convicted as charged. (CF, p344) The trial court sentenced her to one year of prison on the vehicular homicide count, finding extraordinary mitigating circumstances, and one year of concurrent jail on the assault count. (*Id.*) The remaining counts merged into the vehicular homicide conviction. (*Id.*)

SUMMARY OF THE ARGUMENT

I. The trial court erroneously excluded Woodruff's statement in the hospital that Roberts talked about his gallbladder surgery before the crash. This statement was admissible as both a prior consistent and inconsistent statement. In its absence, the Government misled the jury by arguing that Woodruff concocted this story later, after she was criminally charged. The error thus requires reversal.

II. The Government exploited the trial court's error and argued that Woodruff's medical defense was concocted after charges were filed. It repeatedly diverted the jury from its duty to render a verdict based on the evidence, instead encouraging it to convict based on sympathy for Roberts and his widow. It shifted the burden of proof to Woodruff, arguing the jury had to believe each detail of her theory to acquit her. It denigrated Woodruff and her attorney, implying defense counsel didn't believe in her innocence and that jurors would be foolish to acquit. It improperly injected personal opinions and anecdotes into closing argument. Finally, it asked witnesses to comment on other witnesses' testimony, even when those witnesses were subject to a sequestration order. The misconduct was pervasive and egregious; it deprived Woodruff of a fair trial.

III. The Government's expert witness, Trooper Waters, usurped the jury's role by opining Woodruff was in control of the car and intentionally speeding and weaving between cars. Waters exceeded his proper role as an expert by opining on a disputed fact—whether Woodruff was conscious—and engaging in credibility determinations reserved for the jury. Waters's status as a dual-capacity expert and advisory witness compounded the harm, casting serious doubt on the verdict.

IV. The trial court used a civil jury instruction from the 1970s incorrectly telling the jury it could draw inferences only from "facts which have been proved," as opposed to drawing inferences from the evidence as a whole. The Government used this instruction to argue the jury couldn't consider Woodruff's circumstantial evidence she lost consciousness before the crash because there was no direct evidence to prove it. The instruction misstated the law and placed a burden on Woodruff to prove her innocence. This error was obvious and substantial.

V. The cumulative effect of the errors deprived Woodruff of her right to be convicted only upon the evidence and upon proof beyond a reasonable doubt. Together the errors deprived Woodruff of a fair trial. The cumulative effect of the errors requires reversal.

ARGUMENT

I. The trial court erred by excluding evidence that, while still in the hospital, Woodruff told her sisters that Roberts talked about his gallbladder surgery before the crash.

A. Standard of Review

This issue was preserved. (TR6/29/22, pp59:6-61:20,64:15-25,99:18-102:16; TR6/30/22, pp116:18-118:5)

Courts review violations of constitutional rights de novo, including the right to present a defense. *People v. Scott*, 2021 COA 71, ¶12. Other evidentiary rulings are reviewed for an abuse of discretion. *People v. Dominguez*, 2019 COA 78, ¶13. "The trial court's application or interpretation of the law when making an evidentiary ruling is a question of law we review de novo." *Id*.

Because the error violated Woodruff's constitutional right to present a defense, this court should review for constitutional harmless error. *See Hagos v. People*, 2012 CO 63, ¶11. If this Court finds the error wasn't of constitutional dimension, it should review for non-constitutional harmless error. Under this standard, reversal is required where the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.* at ¶12.

B. Applicable Facts

Before she was released from the hospital, Woodruff told her sisters that although she remembered nothing about the actual accident, she remembered Roberts talking about his gallbladder surgery before the crash. (TR6/29/22, p60:11-14) Woodruff repeatedly tried to introduce this prior statement.

Woodruff first attempted to elicit the hospital statement from her sister, Lisa Tsiao. (TR6/29/22, pp59:6-61:20) The trial court sustained the Government's objection to "[s]elf-serving hearsay." (*Id.* pp59:12-13,60:15-19)

Woodruff tried to elicit the same statement from another sister, Cindy. (*Id.* p100:5-23) At a bench conference, Woodruff explained the Government had asked Trooper Botts whether Woodruff volunteered information about her medical condition. (*Id.* p101:2-6) She wanted to show that had Botts asked her more questions, "she would have answered [with] this kind of information." (*Id.*) The Government again objected to "self-serving hearsay," (*Id.* p101:7-8) and argued that lack of memory cannot be impeached with a prior inconsistent statement. (*Id.* p101:16-19) The trial court again sustained the objection. (*Id.* p101:20)

Ultimately, all the trial court allowed Woodruff to elicit from Cindy was that what Woodruff told her about the conversation she and Roberts had before the

accident was similar to other situations that triggered Woodruff's syncope. (*Id.* p102:13-16) The jury didn't hear the content of that conversation.

Woodruff testified she remembered nothing about the accident. (*Id.* p125:20) On cross, the Government elicited that Woodruff no longer remembered Roberts talking about his surgery before the crash. (*Id.* p140:19-22)

Both Dr. Clemmons and Dr. Alexander testified that Woodruff or Cindy told them Roberts talked about his gallbladder surgery before the crash. *See* Section II.B, *infra*.

After the doctors' testimony, Woodruff asked to recall Cindy to elicit that Woodruff told her this information already at the hospital. (TR6/30/22, p116:18-24) The Government again objected. (*Id.* p117) The trial court refused to let Woodruff recall Cindy. (*Id.* p118:4-5)

In closing, the Government repeatedly argued Woodruff never mentioned Roberts talking about his gallbladder surgery until she was criminally charged. It argued this timing showed Woodruff fabricated the conversation. *See* Section II.B, *infra.*

C. Prior Statements of Witnesses

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(c). It is inadmissible unless an exception applies. CRE 802. But there is no categorical bar against admitting "self-serving hearsay" in Colorado. *People v. Vanderpauye*, 2021 COA 121, ¶29 (*cert. granted* July 25, 2022). If the statement is otherwise admissible under the rules of evidence, it may be admitted. *Id.*

Prior statements by a testifying witness aren't hearsay when "the declarant ...is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." CRE 801(d)(1).

If a witness doesn't remember the content of a prior statement, the statement is admissible as a prior inconsistent statement under 801(d)(1)(A). *People v. Thomas*, 2014 COA 64, ¶20; *People v. Aguirre*, 839 P.2d 483, 486 (Colo.App.1992). Extrinsic evidence of that statement may also be admitted under CRE 613(a).

Outside of CRE 801(d)(1)(B), prior consistent statements are admissible for rehabilitative purposes after a witness's credibility is attacked. *People v. Eppens*, 979 P.2d 14, 21 (Colo.1999). When a witness's credibility is generally attacked and impeachment is "not limited to specific facts," "the jury should have access to all the relevant facts, including consistent and inconsistent statements." *People v. Elie*, 148 P.3d 359, 362 (Colo.App.2006).

D. The hospital statement was admissible as a prior inconsistent statement.

The hospital statement was admissible as a prior inconsistent statement. The Government asked Woodruff about the gallbladder conversation, but she couldn't remember. (TR6/29/22, p140:7-25) Woodruff's testimony that she didn't remember what Roberts told her in the car was inconsistent with her prior statement to her sisters that Roberts told her about his gallbladder surgery before the accident. *See Thomas*, ¶20. Thus, Woodruff should've been allowed to recall her sister to introduce her prior inconsistent statement. *See id.* The court abused its discretion by refusing this request.

The trial court also abused its discretion by crediting the Government's incorrect assertion that lack of memory doesn't satisfy the requirement for inconsistency. (*Id.* p101:15-20 (sustaining objection after Government's argument that because Woodruff said she had no memory, the statement wasn't inconsistent)). This was a misunderstanding of the law. *See Thomas*, ¶ 20; *Aguirre*, 839 P.2d at 486.

Similarly, sustaining the Government's objections to "self-serving hearsay" was an abuse of discretion. "[T]he trial court erred as a matter of law when it relied on this nonexistent evidentiary rule to exclude [Woodruff's] self-serving statement." *Vanderpauye*, ¶29.

E. The hospital statement was admissible as a prior consistent statement.

The hospital statement was admissible as a prior consistent statement both for rehabilitative purposes and as nonhearsay. Both doctors testified Woodruff or Cindy told them Roberts talked about his gallbladder surgery before the crash. The Government attacked the credibility of this statement and Woodruff's credibility generally.

The Government argued that Woodruff's medical treatment, including the statements to her doctors about the gallbladder story, were "part of preparing [a] defense in this case." (*Id.* p141:4-18; *see also id.*, p107:7-10; TR6/27/22, pp160:16-161:2) The Government elicited testimony from Dr. Clemmons that the hospital statement was the basis of his syncope diagnosis because "you wouldn't expect [a syncope event] to just happen spontaneously." (TR6/30/22, pp104:14-105:5) The Government relied on this argument in closing to discredit Woodruff's defense. (TR6/30/22, pp135:16-136:5,138:25-139:12)

Because the Government argued that Woodruff fabricated the gallbladder conversation after being criminally charged, evidence that she actually told her sisters that same information in the hospital was admissible under CRE 801(d)(1)(B).

The hospital statement was also admissible for rehabilitative purposes because the Government attacked Woodruff's credibility generally. In its opening statement, the Government repeatedly characterized Woodruff's medical defense as an "attempt to dodge responsibility." (*See e.g.*, TR6/27/22, p158:9-10) It insinuated that Woodruff and her witnesses weren't being truthful. (*See e.g.*, TR6/28/22, pp113:7-19,115:22-116:15; TR6/29/22, pp22:11-18, 85:11-22,105:1-25,134:23-135:4,136:11-14,137:1-138:3; TR6/30/22, p45:3-6)

These were general attacks on Woodruff's credibility. *See People v. Miranda*, 2014 COA 102, ¶¶18-20. Thus, Woodruff's prior consistent statement was admissible to rehabilitate her. *See id.* Preventing Woodruff from recalling her sister to elicit the hospital statement was an abuse of discretion.

F. The error was harmful.

Under any standard, reversal is required. The Government repeatedly exploited the exclusion of the hospital statement to argue that Woodruff fabricated the gallbladder conversation only after being charged. *See* Section II.B, *infra*.

Further, the evidence against Woodruff wasn't overwhelming. Although the Government claimed the Jeep's black box data "100 percent refute[d]" Woodruff's defense, it was actually consistent with it. (TR6/27/22, p161:3-5) The data showed Woodruff never touched her brakes before the crash, indicating she was

unconscious. (EX, p48) The accelerator was fully depressed, varied, then evened out around 60-70% for the final 3.5 seconds before the crash. (*Id.*) The wheel movements were consistent with witness descriptions of weaving. (*Id.* pp51-52) Significantly, steering input changes didn't occur simultaneously with changes in accelerator pressure, as they would when someone accelerates to change lanes. (*Id.*)

Woodruff argued Roberts grabbed the steering wheel once he realized Woodruff was unconscious. The black box data wouldn't capture this because it only retains the last five seconds before impact. (TR6/28/22, p174:7-8) One witness saw Roberts turned toward the driver making animated gestures. (*Id.* pp53:23-54:4) She described the Jeep's driving as "very erratic" and appearing only partially in control of the car. (*Id.* p55:11-13) Another witness described the Jeep driving down the center of the highway. (*Id.* p61:6-8; Ex. 57)

The accelerator data was consistent with convulsive syncope, which causes symptoms like seizures. (TR6/30/22, p16:1) Drs. Clemmons and Alexander both testified the data was consistent with Woodruff experiencing a syncope event. (*Id.* pp12:3-22,15:13-21,20:25-21:2,31:19-32:1,43:4-13,85:19-86:9,93:7-25,94:8-18,97:25-98:4,101:16-102:3) Dr. Clemmons explained it was unlikely a passenger could bend the leg of a driver experiencing convulsive syncope to move it off the accelerator. (*Id.* p98:5-13)

The Government couldn't explain why Woodruff was driving so quickly, or why she never hit the brakes before the crash. (TR6/30/22, p154:1-6) And although it emphasized no witness could testify that she'd passed out or that Roberts had grabbed the wheel, neither could any witness testify to the contrary. Excluding the hospital statement deprived the jury of key evidence as to what happened.

Reversal is thus required under any standard.

II. Pervasive prosecutorial misconduct deprived Woodruff of her right to a fair trial.

A. Standard of Review

Prosecutorial misconduct is reviewed de novo when it violates a defendant's constitutional rights. *See Scott*, ¶12. More generally, courts first consider whether conduct was improper based on the totality of the circumstances, then ask whether the misconduct requires reversal. *People v. Buckner*, 2022 COA 14, ¶17.

Woodruff partially preserved this issue by objecting to an exhibit under CRE 403. (TR6/28/22, pp145:10-146:14) This Court should review for non-constitutional harmless error.

The remaining instances of misconduct weren't preserved and are reviewed for plain error. "Although plain error review affords considerable deference, [courts] will not blindly cling to such deference in order to uphold an unjust conviction where

prosecutorial misconduct has contaminated the jury's impartiality." *Wend v. People*, 235 P.3d 1089, 1099 (Colo.2010).

B. Misrepresenting the Evidence

It is misconduct for a prosecutor to misrepresent or overstate the evidence. *People v. Prieto*, 124 P.3d 842, 851 (Colo.App.2005); *People v. Hernandez*, 829 P.2d 394, 397 (Colo.App.1991); *People v. Sepeda*, 581 P.2d 723, 732 (Colo.1978). Here, the Government misrepresented evidence about the gallbladder conversation and overstated the significance of the Jeep's black box data. It also misrepresented other testimony.

The Government's misconduct regarding the gallbladder conversation was extensive. It incorrectly claimed that Dr. Clemmons was the only witness who testified that Woodruff mentioned Roberts talking about his gallbladder surgery before the crash. (TR6/30/22, pp135:22-23,139:9-12) This wasn't true; Dr. Alexander also testified about the gallbladder conversation. (*Id.* p13:8-21) The Government elicited this testimony itself, on the same day it asserted it didn't exist. (*Id.* pp46:18-47:11)

The Government made arguments about the gallbladder conversation it knew were false based on testimony it successfully excluded from trial. It claimed Woodruff had "no memory" of the gallbladder conversation in the hospital and

mentioned it for the first time "conveniently after making appointments with doctors, after being charged in this case." (*Id.* pp135:16-21,139:1-8) But the Government knew excluded evidence showed Woodruff told her sisters about the gallbladder story when she was still in the hospital, before she was charged. *See also* Section I, *supra*.

The Government used the purportedly late timing of the gallbladder conversation as evidence it was a lie, despite knowing it was actually mentioned for the first time months before charges were filed:

> Then, with Dr. Clemmons, we get the gallbladder story that she didn't tell the other doctor, Dr. Alexander. Then she testified in front of you today…that she had no memory of ever, ever hearing a gallbladder story. Now that is some selected memory. That certainly conforms to the doctor's reports, but allows her not to comment on it here. And she went to those doctors to create a defense. She testified for you to bolster that defense.
>
> ….
>
> [Dr. Clemmons] says it's likely she had a syncope event. But what did he base that on? The gallbladder story, the description of the gallbladder. He said that was key to his diagnosis; that trying to remember was key, that gallbladder story that she didn't remember after the crash, that she remembered only conveniently after making appointments with doctors, after being charged in the case, that she conveniently didn't remember in her testimony ever saying during the trial. That was the key to his diagnosis.

(*Id.* pp135:22-136:5,138:25-139:8)

The Government cannot make arguments in closing it knows are refuted by evidence it fought to exclude. *See People v. Fierro*, 651 P.2d 416, 417-18 (Colo.App.1982) (defendant denied a fair trial where prosecutor argued "defendant's assertion that he turned the guns in was a fabrication, even though he knew that the three guns had been surrendered and were in the District Attorney's possession"); *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo.2005); ABA Standard § 3-6.8(a).

The Government also overstated the significance of the Jeep's black box data. In opening argument, the Government argued that the black box data "refutes 100 percent that [Woodruff] fainted…. [The data] does not lie." (TR6/27/22, p161:3-6) It argued it was "impossible" for the data to show steering inputs and accelerator variation if Woodruff was unconscious. (*Id.* p165:3-5) The Government returned to this theme in closing. (TR6/30/22, pp134:13-14,135:3-5)

The evidence at trial didn't bear this out; Woodruff's defense was actually consistent with the black box data. *See* Section I.F, *supra*. By describing the black box data as conclusively establishing Woodruff was conscious, the Government overstated its evidence. *See Prieto*, 124 P.2d at 851 (argument that fibers "matched" when the analyst only concluded they were "consistent" overstated the evidence).

The Government misrepresented other significant evidence in its closing argument. It claimed Woodruff's sisters described her syncope events as going "limp." (TR6/30/22, p139:16-17) But her sisters consistently described convulsive syncope events including involuntary body stiffening. (TR6/29/22, pp62:9-23, 63:13-64:5,70:9,70:16-17,71:3-4,73:7-13,98:8-24,109:10-19) Dr. Alexander also remembered Cindy describing body movements consistent with convulsive syncope. (TR6/30/22, p50:11-18)

Similarly, the Government claimed a particular witness never testified that the Jeep was driving erratically. (TR6/30/22, p173:2-6) This was incorrect; both that witness and another described the Jeep's driving as erratic. (TR6/28/22, pp55:11;61:16-17;62:13-15)

These misrepresentations of the evidence, conforming it to the Government's theory, were misconduct. *Prieto*, 124 P.3d at 851; *Hernandez*, 829 P.2d at 397; *Sepeda*, 581 P.2d at 732; *Fierro*, 651 P.2d at 417-18; *Domingo-Gomez*, 125 P.3d at 1049.

C. Inflaming the Passions of the Jury

Every defendant has the right to a fair and impartial jury. U.S. Const. amend. VI; Colo. Const. art. II, §§ 16, 23. "This right includes the right to have an impartial jury decide the accused's guilt or innocence solely on the basis of the evidence

properly introduced at trial." *Domingo-Gomez*, 125 P.3d at 1048. "A jury that has been misled by inadmissible evidence or argument cannot be considered impartial." *Harris v. People*, 888 P.2d 259, 264 (Colo.1995).

Prosecutors are held to a "higher ethical responsibility than other lawyers because of their dual role as both the sovereign's representative in the courtroom and as advocates for justice." *Domingo-Gomez*, 125 P.3d at 1049. As part of their duty to seek justice and not merely convictions, prosecutors have a "fundamental duty" to "scrupulously ...avoid comments that could mislead or prejudice the jury." *People v. McBride*, 228 P.3d 216, 221 (Colo.App.2009) (quotation omitted). "Overzealous advocacy that undermines the quest for impartial justice by defying ethical standards cannot be permitted." *Domingo-Gomez*, 125 P.3d at 1048.

The Government's opening and closing arguments in this trial were replete with appeals for the jury to decide the case based on sympathy for Roberts and his family instead of the evidence. It repeatedly highlighted the family milestones Roberts would miss. (TR6/27/22, p157:18-22 ("This is Chris Roberts. He was 54 years old when he was killed in a car crash on February 19, 2020. He's not going to celebrate birthdays. He's not going to celebrate anniversaries with his wife. He's not going to see the births of grandchildren. And it's important."); TR6/30/22, p133:14-17 ("A husband gone. A father gone. He's not going to create any new experiences.

He's not going to have any new memories. That's because of the choices and actions of Jennifer Woodruff.")). *See People v. Fernandez*, 687 P.2d 502, 506 (Colo.App.1984) (prosecutor's comment about the "effect of the victim's death on her family and the community" was improper); *People v. Martinez*, 2020 COA 141, ¶1 (victim impact evidence "can deprive the defendant of the right to be judged based on the jury's rational deliberation, rather than on jurors' visceral reaction upon hearing how the defendant's alleged acts affected the victim").

The Government also used improper golden rule arguments to ask the jury to imagine what Roberts was thinking before his death and to step into the shoes of other drivers on the highway that day. (TR6/30/22, pp132:25-133:1("[Witnesses had n]o connection to this case, just people, just like you, driving on I-25 north that day."),133:10-12 ("Now, imagine what Roberts is thinking in that moment. That car, twisting in the air, landing on its side, the top being crushed, that all happened.")) *See People v. Munsey*, 232 P.3d 113, 123 (Colo.App.2009) (disapproving of golden rule arguments); *People v. Dunlap*, 975 P.2d 723, 758 (Colo.1999) ("[G]olden rule arguments…are impermissible digressions from the evidence.").

It argued Woodruff's defense was an "attempt[] to dodge responsibility for his death," and "an insult to him," implying an acquittal would insult his memory. (TR6/27/22, pp158:5-10, 165:5; TR6/30/22, p141:16-18 ("This case has always

been about Chris Roberts. His death, to characterize it as a tragic accident, is an insult to him. It was not an accident.")) *See People v. Jones*, 832 P.2d 1036, 1038 (Colo.App.1991) (misconduct to call defense theory "insulting"); *People v. Scheidt*, 526 P.2d 300, 302 (Colo.1974) (misconduct to argue mental condition defense was a "miscarriage of justice").

The Government entreated the jury to "think of [Roberts] when you look at the evidence," and to "find [Woodruff] guilty and hold her accountable." (TR6/27/22, pp166:21-167:1; TR6/30/22, pp141:22-25,175:11-15)

These arguments violated the principle that "[a] prosecutor may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim." *Buckner*, ¶40 (quotation omitted). Nor should a prosecutor "encourage the jury to depart from its duty to decide the case on the evidence by asking the jury to memorialize or pay tribute to the victims by its verdict." *People v. Marko*, 2015 COA 139, ¶221 (quotation omitted).

The Government committed similar misconduct during witness testimony, "inflam[ing] the passions or prejudice of the jury" with irrelevant victim-impact evidence. *Dunlap*, 975 P.2d at 758. It admitted an "in life" photograph of Roberts through his widow. (EX, p60; TR6/27/22, pp176:15-177:20) The Government highlighted the widow's emotional response by telling her it was "sorry we have to

go through this," and to "take all the time you need." (TR6/27/22, p177:14-19) The Government also displayed this photo in its opening statement, while highlighting the family milestones Roberts would miss. (*Id.* p157:18-22)

Right after the "in life" photo, the Government confronted Roberts's widow with a graphic photograph of her dead husband, ostensibly to establish his identity. (EX, p61; TR6/27/22, pp177:21-178:12) Any marginal relevance as to the undisputed element of identity was substantially outweighed by the risk that the evidence would induce the jury to decide the case based on sympathy for Roberts and his widow. *See People v. McClelland*, 2015 COA 1, ¶¶38-57.

Over Woodruff's objection, the Government introduced another, bloodier photograph of Roberts's body on the highway. (EX, p29) Again, the Government argued it was relevant to Roberts's identity, despite blood rendering his face almost unrecognizable. (TR6/28/22, pp144:12-146:15) These photos were admitted and went back with the jury during deliberations. (*Id.* pp146:15,178:22-23)

The Government elicited other irrelevant and prejudicial evidence. (TR6/27/22, pp172:13-174:5 (widow detailing how she found out about Roberts's death); TR6/28/22, pp16:16-19 (pickup driver's ongoing physical injuries), 17:7-17 (pickup driver describing seeing Roberts's body), 45:12-13 (driver was frightened when Woodruff's Jeep passed her), 46:7-19 (another driver describing PTSD from

event); TR6/29/22, p139:6-22 (berating Woodruff about whether one time fainting at the wheel was "enough for Chris," and that she had his "life in [her] hands")) The Government relied on the improper victim-impact evidence in closing. (TR6/30/22, pp140:22-141:9)

The severity and frequency of the Government's misconduct diverted the jury from the evidence and encouraged it to return a guilty verdict as justice for Roberts and his family. *See People v. Lee*, 630 P.2d 583, 592 (Colo.1981) ("Considering its patent irrelevancy to the charges and its vast potential for prejudice, we view the presentation of this testimony as a thinly veiled effort to evoke the jury's sympathy for the witness due to her loss of husband and child."). The Government "turn[ed] the impartial quest for truth into an impassioned expression of anger." *Harris*, 888 P.2d at 266. This was misconduct. *See e.g.*, *Bucker*, ¶40; *Marko*, ¶221; *Domingo-Gomez*, 125 P.3d at 1049; *Martinez*, ¶40; *Fernandez*, 687 P.2d at 506.

D. Misstating the Burden of Proof

The reasonable doubt standard is "a bedrock principle of American jurisprudence." *People v. Knobee*, 2020 COA 7, ¶21. "This requirement dates at least from our early years as a Nation and is nothing short of indispensable." *Id.* (quotations omitted).

Prosecutors cannot "misstate or misinterpret the law in closing arguments." *People v. Weinreich*, 98 P.3d 920, 924 (Colo.App.2004). They mustn't attempt to lower their burden of proof, *People v. Cuellar*, 2023 COA 20, ¶68, or shift the burden to the defense, *People v. Bowring*, 902 P.2d 911, 921 (Colo.App.1995). When prosecutors burden-shift, courts consider 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.

People v. Santana, 255 P.3d 1126, 1131-32 (Colo.2011).

Throughout Woodruff's trial, the Government misstated its burden of proof. The Government was dismissive of Woodruff's defense, and instead of arguing the evidence disproved it beyond a reasonable doubt, it argued jurors would be foolish to "believe her story." (TR6/30/22, p140:4)

In opening statements, the Government previewed Woodruff's medical defense and argued the jury could find her guilty even if it "want[ed] to entertain the fainting for a second." (TR6/27/22, p166:7-8) But this framing turned criminal procedure on its head; the jury doesn't decide whether it wants to "entertain" the defendant's theory—it starts from the presumption the defendant is innocent, until

and unless the Government proves each element of the offense beyond a reasonable doubt. *McBride,* 228 P.3d at 223-24.

The Government went further in closing arguments. It told the jury that to acquit Woodruff, it had to "believe her story," which required it to believe about ten different allegedly unbelievable things. (TR6/30/22, pp140:4-20,166:24-167:8,168:6-174 ("Still going… Still going…")) The Government then concluded: "And ladies and gentleman, if you believe that, I've got some ocean-front property in Arizona to sell you. That's silly." (TR6/30/22, p174:7-9)

By arguing the jury had to believe every detail of her theory, the Government lowered its burden and shifted the burden to Woodruff to prove her innocence. *See Cuellar*, ¶¶67-69 (misconduct for prosecutor to argue that to acquit defendant, the jury had to believe the alleged victim fabricated the whole event, because this lowered the burden of proof); *United States v. Reed*, 724 F.2d 677, 681 (8th Cir.1984) (misconduct for prosecutor to argue that to acquit defendant the jury had to determine defendant was telling the truth and all the government witnesses were lying, because it was "a distortion of the government's burden of proof"); *United States v. Vargas,* 583 F.2d 380, 387 (7th Cir.1978) ("If the jurors believed that the agents probably were telling the truth and that Vargas probably was lying…[,] it

would have been proper to return a verdict of not guilty because the evidence might not be sufficient to convict defendant beyond a reasonable doubt.").

Throughout closing argument, the Government also used improper analogies that implied Woodruff had to prove her innocence, including references to Ockham's razor and a television show where a last-minute witness would prove the defendant's innocence. (TR6/30/22, pp160:8-23,174:10-11,174:23-175:10) The jury's duty isn't to accept the most logical explanation of the evidence, but to decide whether the defendant is guilty beyond a reasonable doubt.

Further, the Government exploited an erroneous instruction given by the trial court regarding inferences the jury could draw from the evidence. *See* Sections IV.B, IV.C, *infra.* It used the instruction to argue the jury couldn't consider Woodruff's defense without direct evidence she was unconscious. This argument improperly shifted the burden to the defense.

The Government's repeated misstatements and attempts to shift its burden of proof were misconduct. *Winreich*, 98 P.3d at 924; *Cuellar*, ¶ 68; *Bowring*, 902 P.2d at 921; *Santana*, 255 P.3d at 1131-32.

E. Denigrating Defense

"A prosecutor may not state or imply that defense counsel has presented the defendant's case in bad faith or otherwise make remarks for the purpose of

denigrating the defense." *People v. Denhartog*, 2019 COA 23, ¶52 (quotation omitted).

Yet here, the Government repeatedly denigrated Woodruff, her attorney, and the defense theory. It referred to Woodruff's defense as:

- requiring "incredible mental gymnastics" (TR6/30/22, pp131:10,134:15-16);
- "distracting performance art" by defense counsel (*id.* pp136:10,136:14-15,164:21-22);
- "a story only told by defense counsel" (*id.* p136:6-7);
- a "façade" requiring "flights of fancy" to "buy" (*id.* pp162:4,167:7-8);
- "instances of fantasy, facts appearing out of thin air" (*id.* p163:6-7);
- "nonsense" (*id.* p160:20);
- "ridiculous" (*id.* p172:9-10);
- "baffling" (*id.* p166:12-13); and
- "silly" (*id.* pp168:5,174:9).

See People v. Trujillo, 2018 COA 12, ¶44 (misconduct to call defense arguments "completely ridiculous" and "preposterous"). The theme of the Government's rebuttal was the jury would be foolish to fall for Woodruff's scheme and acquit. (*Id.* p174:7-9)

The Government mischaracterized the defense theory as encouraging the jurors "to stereotype" and "make judgments about people by the way they look and their age," in an attempt to "distract" and "confuse[]" them. (*Id.* pp136:16-137:7) These statements, like calling Woodruff's defense "performance art" and a "story" told by defense counsel, were inaccurate and implied that defense counsel didn't believe in Woodruff's innocence. *See Cuellar*, ¶¶70-71; *Jones*, 832 P.2d at 1038-39 (misconduct to imply defense counsel "did not have a good faith belief in the innocence of her client"); *People v. Nardine*, 2016 COA 85, ¶67 (misconduct to mischaracterize and denigrate defense theory and imply defense counsel didn't believe it).

In rebuttal, while walking through all the allegedly improbable things the jury must "believe" to acquit Woodruff, the Government compared her defense to Wendy's commercials from the 1980s, asking jurors, "Where's the beef?" (*Id.* p171:9-22) *See also* Sections IV.B, IV.C, *infra*. The frequency of the Government's remarks belittling, mischaracterizing, and ridiculing Woodruff's defense show they weren't comments on the lack of evidence supporting Woodruff's theory, but made "for the purpose of denigrating the defense." *Denhartog*, ¶52.

F. Personal Opinion

A prosecutor must not "refer to facts not in evidence or...make statements reflecting his or her personal opinion or personal knowledge." *People v. Walters*, 148 P.3d 331, 334 (Colo.App.2006). Nor may a prosecutor "give a personal opinion on the defendant's guilt." *People v. Conyac*, 2014 COA 8M, ¶134. Due to the prestige associated with a prosecutor's office, and its ability to investigate and consult with police, "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Domingo-Gomez*, 125 P.3d at 1049 (quotation omitted).

The prosecutors repeatedly injected into argument their personal opinion that Woodruff was guilty and their personal experiences as prosecutors. (TR6/30/22, pp138:21-22,160:24-161:10,172:25-173:3,174:7-9,174:10-16,174:23-175:10,175: 11-15)

These comments were improper. A prosecutor cannot "argue that the jury should consider anecdotal information" from the prosecutor's personal experiences in reaching a verdict. *Walters*, 148 P.3d at 336. By implying that, like "a lot" of the people it has prosecuted, Woodruff did a "terrible thing[]" for no "good reason" and "regret[ted it] later," the Government attempted to paper over a significant hole in

its case: there was no reason for Woodruff to be driving over 100 mph on the highway that day. (*Id.* pp160:24-161:10) The conference didn't start until the next morning. She had no recent history of speeding or road rage indicating this behavior was normal for her; in fact, several witnesses testified this kind of driving was very unusual for her. (TR6/29/22, pp43:12-15,52:1-10,55:4-9,65:10-66:7,78:20-80:1,96:6-97:9)

The Government asserted that in its personal experience dealing with criminals, they "almost never have a good reason" for the "terrible things" they do. (TR6/30/22, pp161:24-162:10) Thus, the Government implied to the jury it need not pay attention to why Woodruff was speeding that day. These comments were "outside the record and irrelevant," and "injected [the Government's] own knowledge and credibility into the issue." *Id.* Further, the comments characterized Woodruff as a criminal acting according to her criminal character. *See e.g.*, *Jones*, 832 P.2d at 1039; *People v. Cordova*, 293 P.3d 114, 122 (Colo.App.2011) (describing the defendant as an outlaw who respected few and feared none improperly attributed character traits to defendant).

Similarly, the Government's assertions of guilt and recollection of witness testimony "impermissibly injected the prosecutor's credibility into the jury's consideration" of the evidence. *Walters*, 148 P.3d at 336. (*Id.* pp172:25-

173:3,174:10-16,174:23-175:10,175:11-15) Worse, the Government's recollection of the testimony was wrong. *See* Section II.B, *supra*.

These comments were improper because they diverted the jury from its duty to render a verdict based on the evidence. *See Buckner*, ¶40.

G. *Liggett* Issue

A prosecutor must not ask a witness whether another witness's testimony was a lie or a mistake. *Liggett v. People*, 135 P.3d 725, 732-33, 735 (Colo.2006). Such questioning "is prejudicial, argumentative, and ultimately invades the province of the fact-finder." *Id.* at 732. It is also misconduct for prosecutors to ask a defendant to explain the testimony of an adverse witness. *People v. Koper*, 2018 COA 137, ¶32 (discussing *Liggett*).

Here, the Government repeatedly asked witnesses to comment on other evidence. It asked defense witnesses whether other allegedly contradictory testimony would "surprise" them, whether it was "accurate" or "incorrect," whether they had any reason to believe the other witnesses weren't "telling the truth," and whether they could "contradict" the other testimony. (TR6/29/22,pp103:22-105:25,109:20-110:9,112:16-113:22,136:1-14,141:23-25,144:12-22) It asked Trooper Waters and Woodruff to comment on whether there was any trial evidence of aspects of the defense theory. (*Id.* p15:14-16,139:23-140:25,145:1-6) It asked

witnesses whether they were aware of other witnesses' testimony and recounted its interpretation of the testimony to the witnesses. (*Id.* pp15:17-16:10,53:16-54:10,110:10-12,134:4-6,134:23-135:8,142:15-22,149:24-150:4)

These questions were improper. *Liggett*, 135 P.3d at 732-35; *Koper*, ¶32. And because the sequestration order prevented all witnesses except Woodruff and Waters from hearing the testimony they were asked to comment on, the Government often also improperly supplied its own summation of the evidence to these witnesses. (TR6/28/22, p26:10-23)

H. <u>The misconduct requires reversal under any standard.</u>

Courts review the "combined prejudicial impact of [a] prosecutor's improper statements to determine whether their cumulative effect so prejudiced the jury's verdict as to affect the fundamental fairness" of the trial. *Bucker*, ¶46 (quotations omitted).

Here, the improper remarks were pervasive, infecting every stage of the trial from opening statement to rebuttal. *See United States v. Payne*, 2 F.3d 706, 715 (6th Cir.1993). The Government repeatedly misrepresented the evidence about the gallbladder conversation, exploiting the court's error in excluding Woodruff's hospital statement to falsely claim the timing indicated Woodruff was lying. It tried to divert the jury from its duty to base its decision on the evidence—by arguing an

acquittal would be an insult to Roberts's memory and send a message he wasn't "important," by expressing its personal opinion that Woodruff was guilty, and by relentlessly denigrating Woodruff's defense and analogizing it to selling the jury "ocean-front property in Arizona." The prejudice of these inflammatory statements was exacerbated when the Government misstated its burden, indicating that Woodruff needed to prove her innocence. "In the context of this record, it strains credulity to view the [misconduct] as the product of inadvertence or mistake." *Lee*, 630 P.2d at 592.

Further, the evidence wasn't overwhelming. *See* Section I.F, *supra*. The misconduct here "permeated the whole trial and prejudiced [Woodruff]." *See Payne*, 2 F.3d at 715. "[T]he prosecutor's comments were repeated over the course of the entire [trial], with a probable cumulative effect on the jury which cannot be disregarded as inconsequential." *Harris*, 888 P.2d at 268 (quotation omitted). The "pervasive misconduct casts serious doubt on the reliability of the verdict." *Nardine*, ¶66; *see also Harris*, 888 P.2d at 269 ("Our system of justice cannot tolerate verdicts based on bias and prejudice rather than on the relevant facts and applicable law."). Thus, reversal is required.

III. Trooper Waters usurped the jury's role by testifying about Woodruff's intentions.

A. Standard of Review

This issue wasn't preserved and is reviewed for plain error. The standard is described in Section II.A, *supra*.

B. Applicable Facts

Trooper Waters was the Government's advisory witness and the lead investigator. (TR6/27/22, p3:7) He was allowed to testify as an expert in "accident investigation and reconstruction." (TR6/28/22, p158:8-10)

Based on steering and accelerator data from the Jeep's black box, Trooper Waters testified "[t]he driver is in control of the vehicle, putting intentional input to the steering wheel and the accelerator pedal at the same time." (Id. p192:18-23) He opined that the "[c]ause of this crash was due to Woodruff intentionally driving her vehicle in excess of the posted speed limit of 45, traveling at 103 to 106 mph, while steering, to avoid traffic and maneuver in and out of traffic." (Id. p207:3-7) He testified that "the driver's intent while controlling the vehicle accelerator with the gas pedal and intentionally putting driver input to go around other traffic." (TR6/29/22, p21:3-9)

The Government emphasized this evidence in closing argument. (TR6/30/22, pp131:23-24,135:6-15,137:17-18,139:25-140:2)

C. Trooper Waters improperly usurped the jury's role.

A properly qualified expert may offer testimony that embraces an ultimate issue to be decided by the trier of fact. CRE 704. But even an expert may not usurp the jury's role as factfinder. *People v. Rector*, 248 P.3d 1196, 1203 (Colo.2011). To determine whether the testimony crossed this line, courts look to factors including (1) "whether the testimony was clarified on cross-examination," (2) "whether the expert's testimony expressed an opinion of the applicable law or legal standards thereby usurping the function of the court," (3) "whether a jury was properly instructed on the law and that it may accept or reject the expert's opinion," and (4) "whether an expert opined that the defendant committed the crime or that there was a particular likelihood that the defendant committed the crime." *Id.*

Here, Trooper Waters usurped the jury's role by testifying, essentially, that Woodruff was conscious and intentionally drove at high speeds. Waters "opined that [Woodruff] committed the crime" by testifying to his opinions about Woodruff's *mens rea* and intentions. *Id.* (TR6/28/22, pp224:21-225:2) Everyone agreed that the Jeep's speed was excessive and that it weaved between cars. The dispute was whether that resulted from any conscious action by Woodruff—the very subject of Waters's improper testimony.

Waters had no reliable basis for his testimony that Woodruff was in control of the car and intentionally speeding and weaving around the other cars. Nevertheless, he "applied the law to the facts in such a way as to suggest that the expert had determined that the defendant was guilty." *People v. Baker*, 2021 CO 29, ¶33 (collecting cases).

Waters claimed his opinion that Woodruff was conscious was based on the black box data and descriptions of the car weaving in traffic. (TR6/28/22, pp223:4-224:25) But this evidence wasn't incongruent with her defense, *see* Sections I.F, II.B, *supra*; Waters just didn't believe it, and he conveyed this disbelief to the jury.

Worse, his disbelief was rooted in a misconception dispelled in later testimony by medical experts: that "people who pass out always go limp" and cannot press the accelerator. (*Id.* p225:3-11) Waters "effectively weighed the evidence, made credibility determinations as to such evidence, and essentially told the jury what had occurred in this case, all of which were matters solely for the jury's determination." *Id.* ¶36. By doing so, Waters opined that Woodruff was guilty and violated *Rector*'s fourth factor. *See id.*

D. The error requires reversal.

After *Baker*, the trial court's error in admitting Waters's testimony was obvious. The error was also substantial because the improper testimony cast serious doubt on the reliability of the verdict.

First, errors in admitting expert testimony are particularly dangerous where, as here, the expert is testifying both to facts they personally observed during the investigation and as an expert commenting on those observations. *See People v. Gamboa-Jimenez*, 2022 COA 10, ¶¶22-24; *People v. Fortson*, 2018 COA 46M, ¶¶121-22 ("The hazards of dual capacity expert testimony...are well known.") (Berger, J., concurring).

Second, like in *Baker*, Waters's status as an expert "undoubtedly imbued [his] testimony—including [his] assessment of disputed facts—with an aura of trustworthiness and reliability." *Baker*, ¶41.

Third, Waters testified about submitting this case to the District Attorney's office for prosecution, and he served as the Government's advisory witness. "These facts tended to put the expert's stamp of approval on the government's theory and thus might well have unduly influenced the jury's assessment of the disputed facts and evidence in this case." *Id.* ¶43 (quotations omitted).

Finally, the Government emphasized this evidence in closing argument. (TR6/30/22, pp131:23-24,135:6-15,137:17-18,139:25-140:2)

The error was thus substantial and requires reversal.

IV. The trial court erred by using a 1970s civil jury instruction that misstated the law and the burden of proof.

A. Standard of Review

This issue is reviewed for plain error. "Plain error is obvious and substantial." *Hagos*, ¶14. Errors are obvious when they "contravene (1) a clear statutory command; (2) a well-settled legal principle; or [3] Colorado case law." *People v. Pollard*, 2013 COA 31M, ¶40 (citations omitted). An error is substantial when it "so undermine[s] the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶22. "[P]lain error exists if there is a reasonable possibility that an erroneous [jury] instruction contributed to the defendant's conviction." *People v. LePage*, 397 P.3d 1074, 1078 (Colo.App.2011).

Appellate courts review de novo "whether the instructions accurately informed the jury of the governing law." *Riley v. People*, 266 P.3d 1089, 1092 (Colo.2011). "If two instructions are in direct conflict and one of the instructions is an incorrect and clearly prejudicial statement of law, the fact that the other

instruction contains a correct statement of law cannot cure the error." *People v. Prendergast*, 87 P.3d 175, 178 (Colo.App.2003).

B. Additional Facts

The Government proposed an instruction defining allowable inferences:

> The evidence in this case consists of the sworn testimony of all the witnesses, and all the 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, p238 (emphasis added)) This instruction is not included in the pattern instructions for Colorado criminal cases. Instead, it appears in a handful of civil cases from the 1970s. *See* section IV.C, *infra*. Nonetheless, the trial court gave the instruction. (CF, p215)

Throughout trial, the Government argued Woodruff's theory of defense—that she was unconscious due to a syncope event—required direct evidence to rise above speculation. (*E.g.*, TR6/30/22, pp131:9-12 ("The defense's case relies on assumption, speculation. As you'll see, it takes a lot of gymnastics to get to that theory; whereas, our case has data, witness statements, and objective facts. Everything outside of that is speculation."), 136:6-15 ("Roberts grabbing the wheel is a story only told by defense counsel. There is no evidence of that whatsoever. No

one saw it. There's no tangible evidence of it. The steering doesn't indicate it. There is no evidence of that. It is not fact in this courtroom. It was performance art."), 137:8-13 ("No witnesses say she fainted. There's no proof. No evidence has been presented that she fainted. She has no memory, even her own testimony."), 162-63 ("[E]verything the defense is asking you to do is based on rank speculation, or really, frankly, just instances of fantasy, facts appearing out of thin air."), 164:19-25 ("But there's zero evidence she fainted…. I don't recall hearing that from here, or from there, right…. It's not evidence.")) It relied on the erroneous instruction to argue the jury couldn't consider Woodruff's medical defense because it hadn't been proven. (*Id.* pp166-67 (citing the erroneous instruction and contrasting what is "merely theoretically possible" with what "*happened*" and arguing that the jury would have to "engage in flights of fancy to buy the defense theory" (emphasis added)).

C. The civil instruction misstated the law and the burden of proof that apply in a criminal case.

"It is axiomatic that the burden of proof rests upon the prosecution throughout the trial [to] prove beyond a reasonable doubt the existence of all essential elements necessary to constitute the offense charged." *Leonard v. People*, 369 P.2d 54, 61 (Colo.1962). "The burden is never on the defendant to show that [s]he did not commit the crime." *Id.* (quotation omitted).

Direct and circumstantial evidence are equally reliable under the law. (CF, p213) Circumstantial evidence supports an inference regarding a relevant fact instead of directly proving it. (*Id.*) An "inference" is a "conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary (11th ed. 2019).

The civil instruction given here misstated the law and the burden of proof. It instructed the jury it could only draw inferences from facts that were "proved." The Government relied on this instruction in closing argument, arguing the jury wasn't allowed to consider Woodruff's defense, because there was "no evidence" supporting it and it was "speculative." *See* Section IV.B, *supra*. This was wrong.

First, the only thing that must be "proved" is a defendant's guilt beyond a reasonable doubt. Woodruff wasn't required to prove her innocence or any component of her defense. *Leonard,* 369 P.2d at 61. The burden was on the Government to prove Woodruff's guilt beyond a reasonable doubt, including that she acted voluntarily and recklessly.

Second, the instruction required the jury to determine whether facts were "proved" but failed to identify a standard or burden of proof. Requiring the jury to make findings beyond a defendant's guilt injects unnecessary confusion into deliberations. *See e.g., People v. Montoya*, 2022 COA 55M, ¶52 (Welling, J.,

concurring) (disapproving of refusal instruction in DUI trial in part because "[w]e don't generally ask juries to make findings that aren't elements of charged crimes or facts necessary to enhance a sentence").

It isn't clear where the Government found this proposed instruction; there were no citations in its instruction packet. (CF, pp232-58) The first two sentences from the erroneous instruction are almost identical to those from a model civil instruction, but the civil instruction doesn't limit inferences to those from "facts which have been proved"; it correctly allows any reasonable inference from the evidence. COLJI-Civil 3:8 (2022).

No published authority in Colorado contains the instruction's definition of "inference." Outside Colorado, four published cases contain the definition, all federal cases from no later than 1977. *See United States v. Clark*, 475 F.2d 240, 250 (2nd Cir.1973); *Knapp v. United States*, 316 F.2d 794, 795-96 (5th Cir.1963); *United States v. Vacca,* 431 F.Supp. 807, 810 n.2 (E.D.Penn.1977); *United States v. Schneiderman*, 106 F.Supp. 906, 928 (S.D.Cal.1952).

This instruction let the Government argue that because there wasn't direct evidence that Woodruff suffered a syncope event before the crash or that Roberts grabbed the wheel, the jury couldn't consider those alternative explanations. After summarizing the instruction, the Government argued:

> 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…. This is actually somewhat analogous in that you would have to engage in *flights of fancy* to *buy* the defense theory.

(TR6/30/22, pp166:19-167:8 (emphasis added))

The instruction, along with the State's argument, thus "turned the presumption of innocence on its head" and shifted the burden of proof to Woodruff to prove her innocence. *See Tibbels v. People*, 2022 CO 1, ¶52. It instructed the jury to ignore her circumstantial evidence that she suffered a convulsive syncope event because that fact wasn't "proved."

D. The error was substantial.

The error was substantial. The Government's exploitation of the error was extensive and prejudicial, barring the jury from considering Woodruff's defense. *See* Sections IV.B, IV.C, *supra*. Further, the evidence against Woodruff wasn't overwhelming. *See* Section I.F, *supra.*

There is a "reasonable possibility" the "erroneous instruction contributed to the defendant's conviction." *LePage*, 397 P.3d at 1078. By preventing the jury from drawing inferences from Woodruff's evidence, the instruction cast serious doubt on the reliability of the verdict. Thus, reversal is required. *See Kaufman v. People*, 202 P.3d 542, 551-52 (Colo.2009) (finding plain error where the court used an

instruction based on an obsolete version of a statute); *Auman v. People*, 109 P.3d 647, 665-66, 671 (Colo.2005) (reserving under plain error for an instructional error); *People v. Luna*, 2020 COA 123M, ¶¶15-23 (same).

V. Whether cumulative error requires reversal.

A. Standard of Review

Appellate courts use the same standard when evaluating claims of cumulative error, regardless of whether the errors were preserved: "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.

B. The cumulative effect of the errors requires reversal.

The errors in Woodruff's trial cumulatively deprived her of her right to be convicted based only on the evidence and upon proof beyond a reasonable doubt. Woodruff's defense was easier to paint as deceptive and unworthy of consideration due to the court's error in excluding her statement in the hospital, an error then exploited by the Government in closing. The Government's misconduct encouraged the jury to render a verdict based on sympathy for Roberts and his widow instead of the evidence. By incorrectly arguing the jury had to "believe" Woodruff's "story,"

the Government shifted the burden to Woodruff to prove her innocence. The Government and Waters's dismissive attitude toward her defense exacerbated the harm of the Government's burden-shifting, particularly when combined with the erroneous instruction used by the Government to argue the jury couldn't consider Woodruff's evidence.

Considered together, the errors here deprived Woodruff of a fair trial.

CONCLUSION

Based on the arguments above, Woodruff respectfully asks this Court to reverse her convictions and remand for a new trial.

MEGAN A. RING
Colorado State Public Defender

Leah Scaduto

LEAH SCADUTO, #52788
Deputy State Public Defender
Attorneys for JENNIFER WOODRUFF
1300 Broadway, Suite 300
Denver, Colorado 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on June 15, 2023, a copy of this Opening Brief was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's office through their AG Criminal Appeals account.

K. Root