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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203 Appeal; Douglas County District Court; Honorable Patricia B. Herron; and Case Number 2020CR422	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JENNIFER L. WOODRUFF	
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REPLY 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 5,699 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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ARGUMENT

I. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT, WHILE STILL IN THE HOSPITAL, WOODRUFF TOLD HER SISTERS C.R. DISCUSSED HIS GALLBLADDER SURGERY BEFORE THE CRASH.

A. By misapplying the law, the trial court precluded counsel from laying a foundation for Woodruff's prior inconsistent statement under CRE 613. Because counsel could have laid an appropriate foundation without the error, this Court should decline to affirm on other grounds.

The Government does not defend the trial court's ruling sustaining the prosecution's "self-serving hearsay" objection. AB, pp. 12-13. Instead, it asks this Court to affirm on other grounds. *Id.* But the erroneous ruling precluded defense counsel from laying a foundation for admission of Woodruff's prior inconsistent statement under CRE 613.[1] Because the trial court ruled the hospital statement was inadmissible as "self-serving hearsay," defense counsel would have violated the court's order by asking Woodruff whether she told her sisters C.R. was discussing his surgery before the accident.

The Government now complains on appeal about defense counsel's compliance with the court's ruling. AB, p. 14. It does not argue the statement was

[1] The hospital statement was still admissible as described in Sections I.B-C, *infra*.

categorically inadmissible, only that defense counsel failed to lay the proper foundation.[2] AB, pp. 14-16.

The trial court applied a nonexistent rule of evidence and thus misapplied the law. *People v. Vanderpauye*, 2023 CO 42, ¶38. This was an abuse of discretion. *Margerum v. People*, 2019 CO 100, ¶9. Because the erroneous ruling prevented defense counsel from specifically asking Woodruff about the hospital statement, and the Government complains only about the purported lack of foundation, this Court should reject the Government's request to affirm on other grounds.

B. The hospital statement was admissible as substantive evidence under section 16-10-201.

The Government argues that because defense counsel was not introducing the hospital statement to attack Woodruff's credibility, it was inadmissible as a prior inconsistent statement. AB, p. 15. But prior inconsistent statements are admissible as substantive evidence under section 16-10-201. *Montoya v. People*, 740 P.2d 992, 997-998 (Colo. 1987). And section 16-10-201 applies even if the witness was not

[2] The Government does not contest that the hospital statement was inconsistent with Woodruff's testimony that she did not remember if the victim discussed his surgery in the car before the accident. TR 6/29/22, pp. 140:19-22, 145:7-9. While it argues that the hospital statement was not proffered for "impeachment purposes," and therefore could not be proven with extrinsic evidence under CRE 613, this argument relies on defense counsel's attempt to elicit the statements *before* Woodruff had testified, not her later attempt to recall Cindy. AB, p. 15. Regardless, the statement was admissible as substantive evidence. *See* Section I.B, *infra*.

directly confronted with the prior statement, as long as "the witness is still available to give further testimony in the trial." §16-10-201(1)(a), C.R.S. (2023). Because Woodruff was still available and present at trial, the hospital statement was admissible as substantive evidence she told her sisters C.R. discussed his surgery before the crash.

C. The hospital statement was admissible as a prior consistent statement under CRE 801.

Alternatively, the hospital statement was admissible as a prior consistent statement. *See* OB, p. 15. The Government doesn't address this argument except to say that the statement "does not satisfy the exceptions for a prior consistent or inconsistent statement." AB, p. 14. This seems to reference the lack of foundation discussed above. *Id.* But the requirement that counsel confront the witness with their prior statement does not apply to prior *consistent* statements. *See* §16-10-201, C.R.S. (2023) (discussing *inconsistent* statements); CRE 613 (same). And prior consistent statements admitted under CRE 801 are admissible as substantive evidence. *People v. Eppens*, 979 P.2d 14, 20 (Colo. 1999). The statement was thus admissible as a prior consistent statement under CRE 801. *See* OB, p. 15.

D. The hospital statement was admissible as a prior consistent statement for rehabilitative purposes.

The Government fails to address Woodruff's argument that the hospital statement was admissible as a prior consistent statement for rehabilitative purposes. OB, pp. 15-16; AB, pp. 14-16. The admission of prior consistent statements for rehabilitative purposes is an avenue of admission distinct from the rules of evidence. *Eppens*, 979 P.2d at 19-20. By failing to address this argument, the Government implicitly conceded it. *See People v. Jackson*, 2020 CO 75, ¶60. The statement was admissible for rehabilitative purposes under *Eppens*. *See* OB, p. 16.

E. The error was harmful.

The Government argues this Court should apply nonconstitutional harmless error review instead of constitutional harmless error. AB, pp. 8-9. Woodruff maintains the constitutional standard is appropriate because the error "effectively barred [her] from meaningfully testing evidence central to establishing [her] guilt"—the prosecution's allegation that she made up the gallbladder conversation after she was criminally charged. *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009); *People v. Johnson*, 2021 CO 35, ¶17. In any event, reversal is required under either standard. OB, pp. 16-18.

The Government first argues the error was harmless because Woodruff's doctors testified that Woodruff or Cindy told them C.R. talked about his surgery

before the crash. AB, p. 16. But the point of eliciting the hospital statement was to undercut the prosecution's argument that Woodruff made up this conversation only *after* she had been criminally charged. *See* OB, pp. 19-21. The importance of the hospital statement was that it was made *before* she was criminally charged, whereas the statements to her doctors were made after. TR 6/29/22, pp. 59-60, 128; TR 6/30/22, p. 139; CF, p. 1; *see Tome v. United States*, 513 U.S. 150, 158 (1995) (allegations of recent fabrication forcefully refuted by prior consistent statements predating the motive to fabricate).

The Government next argues the error was harmless because the evidence against Woodruff was overwhelming. AB, pp. 17-18. Woodruff disagrees with the Government's interpretation of the evidence. *See* OB, pp. 16-18. And although the Government claims Woodruff "presented no expert testimony to contradict the testimony about the vehicle inputs or crash reconstruction," she did: her doctors testified the data was consistent with Woodruff experiencing a syncope event. AB, p. 18; OB, p. 17; TR 3/30/22, pp. 12-13, 93-94, 97-98, 101-102. The Government, like the prosecution, also fails to address why Woodruff would not have hit the brakes before the crash, or why she was driving so quickly when the conference they were traveling to did not start until the next morning. AB, pp. 17-18.

Finally, the Government argues the error was harmless because Woodruff "extensively contradicted herself and other testimony." AB, p. 19. But the only specific instances the Government cites are that Woodruff did not remember fainting at the hospital after the accident when doctors were treating her, and that her long-term partner had only seen her experience a syncope event once. *Id.* Neither example contradicted Woodruff's testimony or her theory of defense. As Woodruff explained, she did not know if she fainted at the hospital because she was "under pretty heavy medication, sedation," and had "a pretty traumatic brain injury." TR 6/29/22, pp. 137-138. Woodruff's doctor explained that the TBI she suffered "can cause trouble with memory," even "two and a half years later," and that memories themselves can be "fragmented or not fully intact from a head injury." TR 6/30/22, pp. 111-112. Witnesses also testified that syncope events don't happen "every time" someone is exposed to a trigger, and Woodruff testified she does not experience syncope "frequently." *Id.* pp. 76-77; TR 6/29/22, pp. 71-72, 98-99, 139. And although Woodruff and her partner had been together for six years, they did not live together. *See* CF, p. 116, 303, 309, 311.

The Government's citation to *Martinez v. People* is inapposite. 244 P.3d 135, 143 (Colo. 2010); AB, p. 19. In *Martinez*, the defendant's testimony was directly contradicted by a video of the crime. *Martinez*, 244 P.3d at 143. The Court ruled that

improper comments by the prosecution were harmless because "the substantial evidence call[ed] into question the defendant's credibility." *Id.* Here, the Government has identified only two alleged inconsistencies in Woodruff's testimony, which were actually consistent with her testimony, as described above.

Further, in *Martinez*, the improper comments were essentially conceded by the defendant's testimony. The prosecutor argued that because the defendant was present throughout trial, he had the opportunity to "tailor" his testimony. *Id.* at 138. But that improper argument was harmless because the defendant himself essentially admitted he tailored his testimony by directly commenting on and incorporating the testimony of prior witnesses. *Id.* at 143. That reasoning does not apply here, where the harm was the prosecution's accusation that Woodruff made up the gallbladder conversation after she was criminally charged. Because the hospital statement would have rebutted that accusation, its exclusion cannot be considered harmless.

Additionally, more recent supreme court case law clarifies that appellate courts are not to speculate about credibility on appeal; that is for the jury alone to decide, with all the properly admissible evidence before it. *See Vanderpauye*, ¶¶52-56. Thus, whether Woodruff's testimony contained contradictions, or whether the jury would have believed the improperly excluded evidence, are not proper matters for this Court's consideration.

The Government also argues that because Woodruff didn't remember the accident, the error was harmless. AB, p. 19. It appears from the Government's citation to *Clark v. Buhring* that it is arguing Woodruff's theory was presented primarily through other witnesses because she had no independent memory of the crash, and her credibility was thus irrelevant. 761 P.2d 266, 268 (Colo. App. 1988).

This argument fails for two reasons. First, because Woodruff testified about her experiences with syncope, which formed the basis of her theory of defense, her credibility was at issue. Second, *Clark*'s rationale applies only to impeachment evidence, not evidence of prior *consistent* statements or substantive evidence like the hospital statement. *See* Section I. Because the hospital statement would have rebutted the prosecution's argument that Woodruff made up the gallbladder conversation after she was charged, its exclusion was not harmless.

II. PERVASIVE PROSECUTORIAL MISCONDUCT DEPRIVED WOODRUFF OF HER RIGHT TO A FAIR TRIAL.

A. Woodruff preserved one instance of prosecutorial misconduct through her CRE 403 objection.

Woodruff argued that she preserved one instance of misconduct by objecting under CRE 403 to Exhibit 14, a grizzly photograph of C.R.'s dead body on the highway. *See* OB, pp. 18, 26. The Government argues that because the objection cited CRE 403, instead of prosecutorial misconduct, it did not preserve this issue.

AB, p. 20. But "talismanic language" is not required to preserve arguments for appeal. *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004). The trial court need only "be presented with an adequate opportunity to make findings of fact and conclusions of law." *Id.*

Woodruff's objection under CRE 403 did just that. Although the prosecution argued Exhibit 14 was relevant to C.R.'s identity, blood rendered his face almost unrecognizable. TR 6/28/22, pp. 145-146. Woodruff objected under CRE 403, as it was more prejudicial than probative. *Id.* This is the same reasoning underlying Woodruff's prosecutorial misconduct argument on appeal—admitting the photographs was more prejudicial than probative and was intended to inflame the passions of the jury. OB, p. 26. Woodruff's objection thus provided the trial court an adequate opportunity to make findings of fact and conclusions of law regarding the evidence.

B. Misrepresenting the Evidence

Although the Government denies the prosecution misrepresented any evidence, it concedes many of the misrepresentations Woodruff alleged. AB, p. 23. It agrees that the prosecution's statement that Dr. Clemmons was the only witness who testified about the gallbladder conversation was incorrect. *Id.* It concedes that the prosecution misstated Woodruff's sisters' testimony by claiming they described

her going "limp," when instead they said she stiffens. AB, p. 25. And it agrees that the prosecution's statement that a witness did not testify that the Jeep was driving erratically was also wrong. *Id.*

More worrisome, the Government apparently disagrees that the prosecution cannot make arguments in closing it knows are refuted by evidence it successfully excluded from trial. AB, pp. 23-24. Although Woodruff cited multiple authorities establishing this ethical boundary, the Government maintains this argument is permissible because it complies with the rule that parties may only argue facts in evidence, and the prosecutor was just "advocating his best case." AB, p. 24; OB, p. 21.

But a prosecutor's duty is to seek justice, not merely convictions. *Berger v. United States*, 295 U.S. 78, 88 (1935). The Government fails to acknowledge that "[e]ven in light of the wide latitude given for oral arguments, arguments and rhetorical flourishes must stay within the ethical boundaries drawn by this court." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). Neither does the Government explain why the authorities cited in the Opening Brief do not preclude the prosecution's argument here, that Woodruff only "conveniently" remembered the gallbladder conversation after she was criminally charged. OB, pp. 20-21; AB, pp. 23-24. Even if the prosecution believed Woodruff made up the gallbladder

conversation, it was improper to argue she mentioned it for the first time after being charged when it knew her sisters would have testified to the contrary.

Finally, the Government disagrees that the prosecution overstated the significance of the Jeep's black box data. AB, p. 24. But there is a line between arguing permissible inferences from the testimony and committing misconduct by overstating helpful evidence. *See People v. Prieto*. 124 P.3d 842, 851 (Colo. App. 2005). The prosecution crossed it here. It did not say that the data was consistent with conscious inputs, it said the data "refuted" Woodruff's defense "100 percent," that the data "does not lie," and that it was "impossible" she was unconscious. OB, p. 21. But Trooper Waters never went so far with his testimony. He indicated he "never considered" whether the data could be explained by Woodruff experiencing a convulsive syncope event. TR 6/28/22, pp. 225-226.

The Government does not explain how this case differs from *Prieto*. That is because it doesn't. The prosecution committed misconduct by overstating the evidence. *Prieto,* 124 P.3d at 851.

C. Inflaming the Passions of the Jury

The Government fails to address Woodruff's argument that the prosecution committed misconduct by arguing an acquittal would be an insult to the victim's memory. *People v. Buckner*, 2022 COA 14, ¶40; *see* OB, pp. 24-25. This failure

should be interpreted as a concession, particularly given the egregious nature of the misconduct. *Jackson*, ¶60; TR 6/30/22, p. 141.

The Government argues it was appropriate for the prosecution to repeatedly highlight family milestones C.R. would miss. AB, p. 26. But its citation to *People v. Rodriguez* is not helpful, because that was a death penalty case. 794 P.2d 965, 975 (Colo. 1990). Our Supreme Court held that the prosecutor's comments in *Rodriguez* were permissible argument "for or against a sentence of death," and relevant to the jury's decision about the appropriate sentence. *Id.* Neither consideration was relevant here.

Similarly, its citation to *People v. Allee* is inapposite because the misconduct here was not a "brief misstatement…corrected in closing argument," but pervasive misconduct that was repeated in closing. 77 P.3d 831, 836 (Colo. App. 2003); *see* OB, pp. 23-24 (citing instances in both opening and closing arguments).

The Government does not address the prosecution's improper argument that the other drivers on the road were "just like [the jurors]." OB, p. 24; *see Jackson*, ¶60. It seems to concede that the prosecution urging the jury to imagine what the victim was thinking in his last moments was a "golden rule argument," but argues it was "inconsequential." AB, p. 27. The misconduct here was not inconsequential—it was pervasive and egregious. *See* Section II.H, *infra*.

The Government argues the "in-life" photo of C.R. was necessary to prove his identity. AB, p. 28. But the way the prosecution used the photograph revealed its true purpose was to inflame the passions of the jury—particularly its use of the photograph in its opening PowerPoint, as it highlighted the family milestones he would miss. OB, pp. 25-26. Although the Government argues the prosecution merely "consoled" C.R.'s widow on the stand when she broke down after seeing the photos, the pervasiveness of the misconduct belies this interpretation. AB, p. 28. The Government does not argue the two post-crash photographs of C.R. were appropriate, only that their admission was not harmful. AB, p. 28. Although the prosecution did not display the photos during testimony, they went back into deliberations with the jurors. OB, p. 26.

Regarding her argument that the Government committed misconduct by eliciting other irrelevant and prejudicial evidence during trial, the Government complains that Woodruff did not "identif[y] this evidence specifically." AB, p. 28. The Opening Brief included page and line citations to each instance, along with summary parentheticals. OB, pp. 26-27. And although the Government claims she did not identify the grounds for an objection, Woodruff identified the evidence as "improper victim-impact evidence," and the following paragraph explains the

impact of the improper evidence. AB, p. 28; OB, p. 27. Woodruff identified the case law prohibiting such testimony. OB, p. 24.[3]

Its final contention is that this Court should not consider Woodruff's arguments because they were undeveloped. AB, p. 29. They weren't. Woodruff precisely cited each instance of misconduct, provided the grounds for her objection, cited case law supporting her argument, and analyzed the effect of the "severity and frequency" of this misconduct on Woodruff's trial. OB, pp. 24-28. And although the prosecution claims Woodruff did not explain the cumulative effect of the misconduct, she did so twice. AB, p. 29; OB, pp. 27, 36-37.

D. Misstating the Burden of Proof

The Government does not address Woodruff's argument that the prosecution exploited the instruction incorrectly defining inferences to argue the jury could not consider Woodruff's defense. OB, p. 30. This Court should accept this as a concession that the comments were improper. *Jackson*, ¶60.

The Government argues it was proper for the prosecutor to tell the jury it had to believe every detail of Woodruff's theory before acquitting her. AB, p. 30. But

[3] Confusingly, the Government argues that defense counsel's failure to object to this evidence precludes all appellate review. AB, p. 29. It doesn't. *People v. Rediger*, 2018 CO 32, ¶40 (waiver extinguishes error, forfeiture does not).

the Government fails to cite any case law or distinguish the citations provided by Woodruff in her Opening Brief. *Id.* These comments improperly shifted the burden to Woodruff. *People v. Cuellar*, 2023 COA 20, ¶¶67-69.

The Government also argues that the prosecution's analogies to Ockham's razor and a TV show were proper. AB, p. 31. The Government claims that courts have frequently allowed the use of analogies to clarify the burden of proof, and cites to *People v. Camarigg*. AB, p. 31; 2017 COA 115M, ¶49. The Government misunderstands both *Camarigg* and the law. *Camarigg* does not stand for a general rule approving the use of analogies to describe the burden of proof; it noted that analogies "can be problematic in several ways." *Id.* ¶¶44-47. Although the division held the analogy used in *that case* was permissible, it highlighted the "potentially problematic" nature of the analogy. *Id.* ¶51. And contrary to the Government's assertion, courts often emphasize the *danger* of analogies describing the burden of proof. *See e.g.*, *Tibbels v. People*, 2022 CO 1, ¶¶25, 46-53; *People v. Knobee*, 2020 COA 7, ¶¶35-49; *People v. Van Meter*, 2018 COA 13, ¶31; *People v. Carter*, 2015 COA 24M-2, ¶¶57-58.

The Government argues the prosecution "turned the TV analogy around" by contrasting it with "real life." AB, p. 31. Not so—by telling the jury this was "real life" and not a "TV show," the prosecution argued Woodruff was not like a "poor

defendant," who has been "wrongfully accused" and "set up," and highlighted that she did not call a witness who proved her innocence. TR 6/30/22, pp. 174-175.

Similarly, the Government argues that the Ockham's razor analogy was appropriate because the simplest answer is often the right one. AB, p. 31. Its argument demonstrates the problem—this analogy is intuitively appealing but lowers the burden of proof. The jury is not tasked with choosing between two equally viable theories of what happened. It must afford the defendant the presumption of innocence and convict her only upon proof beyond a reasonable doubt.

E. Denigrating Defense

In her Opening Brief, Woodruff cited numerous instances of the prosecution belittling, ridiculing, and mischaracterizing her defense. OB, pp. 31-32. The Government characterizes this misconduct as the "occasional use of colorful language to advocate their position." AB, p. 34. The Government again fails to acknowledge that a prosecutor's role is to obtain justice, not to win, and that the prosecution must stay within ethical boundaries. These remarks were not "ambiguous"—they were egregiously improper. They characterized Woodruff and her attorney as charlatans trying to trick the jurors into acquitting her. *See e.g.*, TR 6/30/22, p. 174 ("[I]f you believe [Woodruff's defense], I've got some ocean-front property in Arizona to sell you.").

Instead of engaging with Woodruff's argument about why the comments were improper, the Government claims she did not make it. AB, p. 34; OB, p. 32. It does not distinguish the case law Woodruff cited. OB, pp. 30-32. That's because it cannot—under controlling case law, the prosecution committed misconduct by arguing that defense counsel did not have a good faith belief in Woodruff's innocence and implying they were trying to swindle the jurors. *See People v. Trujillo*, 2018 COA 12, ¶44; *Cuellar*, ¶¶70-71; *People v. Jones*, 832 P.2d 1036, 1038-1039 (Colo. App. 1991); *People v. Nardine*, 2016 COA 85, ¶67.

F. Personal Opinion

The Government never addresses Woodruff's argument that the comments characterizing Woodruff as a criminal acting according to her criminal character were improper. OB, p. 34. Nor does it address the prosecution's final comment urging the jury to "hold [Woodruff] accountable," because that is "all we want." TR 6/30/22, p. 175; OB, pp. 34-35. This Court should interpret these omissions as concessions. *Jackson*, ¶60.

The prosecution told jurors it wasn't saying Woodruff was a "bad person," because it didn't "know." TR 6/30/22, p. 174. It told them, "*I am saying* she was driving recklessly on February 19, 2020, and the evidence has proven that beyond any reasonable doubt." *Id.* (emphasis added). The Government argues this was not

personal opinion. AB, p. 35. It was. The prosecution contrasted what it personally didn't "know" with what it did—that Woodruff was driving recklessly.

The Government disagrees that the prosecutor's comments about his work experiences dealing with "a lot of people who do a lot of terrible things," were misconduct. AB, p. 35-36. However, it never distinguishes *People v. Walters.* 148 P.3d 331 (Colo. App. 2006); OB, pp. 33-35. As in *Walters*, the prosecution injected anecdotal information from its own experiences to contradict the theory of defense. TR 6/30/22, p. 161; *Walters*, 148 P.3d at 336. The prosecutor inserted his own experience as an expert in criminals to make generalized statements about criminals' behaviors. TR 6/30/22, p. 161 ("A lot of times they regret it afterward. And they almost never have a good reason to do it."). In doing so, he "injected his own knowledge and credibility into the issue," and improperly implied Woodruff was a criminal acting in accordance with those generalizations. *Walters*, 148 P.3d at 336; OB, p. 34. This was misconduct.

The Government claims that by recounting its own (incorrect) recollection of the evidence the prosecution merely commented on the admitted evidence. AB, p. 36-37; TR 6/30/22, pp. 172-173 ("Your memory of that testimony is important, not mine or defense counsel's. But that's my recollection."). But, again, the Government fails to distinguish *Walters.* As in *Walters*, "the prosecutor's attestation regarding

what he [remembered] impermissibly injected the prosecutor's credibility into the jury's consideration" of the evidence. 148 P.3d at 335-336.

G. *Liggett* Issue

The Government admits there is a "categorical rule" barring prosecutors from repeatedly and pervasively asking witnesses improper "were they lying" questions. *People v. Koper*, 2018 COA 137, ¶44; AB, p. 37. It tries to distinguish *Koper* by arguing that here the prosecution avoided the word "lie" specifically and asked fewer than *Koper*'s 44 improper questions. But Woodruff pointed out approximately 41 improper questions across 22 pages of a single transcript. OB, pp. 35-36; TR 6/29/22, pp. 15-16, 53-54, 103-105, 109-110, 112-113, 134-136, 139-142, 144-145, 149-150. It is hard to describe the misconduct as anything but repeated and pervasive. *Koper*, ¶44.

Neither can the prosecution skirt ethical rules by using synonyms for "lie." "Improper 'were they lying' type questions include asking a testifying defendant whether another witness was 'mistaken,' as well as questions asking a defendant to explain the testimony of an adverse witness." *Id.* ¶32 (citations omitted). The prosecution here repeatedly asked "were they lying" type questions, including whether other witnesses were "incorrect," "accurate," or not "telling the truth." OB, p. 35. The prosecutor also asked the defendant to explain the testimony of adverse

witnesses. TR 6/29/22, pp. 134-135, 144. This was egregious misconduct. *Koper*, ¶35; *Liggett v. People*, 135 P.3d 725, 728, 732-733 (Colo. 2006).

H. The misconduct requires reversal under any standard.

The Government alleges that the evidence against Woodruff was overwhelming. AB, p. 39. It wasn't. *See* Section I.E, *supra.* It also relies on case law that a defendant's failure to object demonstrates her belief that the live testimony was not overly damaging. AB, pp. 29, 38. But if this factor were always dispositive, no misconduct would be plain error.

The Government frequently argues that the misconduct was "fleeting," "brief," and "inconsequential." AB, pp. 23, 26, 27, 32, 34, 36. The misconduct was so pervasive and varied it required nineteen pages and eight subheadings to address. OB, pp. 18-37. This misconduct was not "fleeting," but permeated the whole trial—from opening arguments, to testimony, to closing and rebuttal arguments.

This case presents exactly the kind of "flagrantly, glaringly, or tremendously improper" conduct warranting reversal under plain error. *Domingo-Gomez,* 125 P.3d at 1053; *see* OB, pp. 36-37.

III. TROOPER WATERS USURPED THE JURY'S ROLE BY TESTIFYING ABOUT WOODRUFF'S INTENTIONS.

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

The Government argues Trooper Waters did not usurp the jury's role because his testimony did not violate some of the *Rector* factors. AB, pp. 42-45; *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011). It argues the testimony did not usurp the court's role by expressing an opinion on applicable legal standards, that the jury was properly instructed on the law, and that defense counsel had the opportunity to challenge the opinion on cross-examination. AB, pp. 42-45.

But our Supreme Court has held that violating the fourth *Rector* factor—whether an expert opined the defendant committed the crime—is error without further consideration of the other factors. *People v. Baker*, 2021 CO 29, ¶¶33-37 (finding error based on a violation of the fourth factor without considering remaining factors).[4] So too here. *See* OB, pp. 39-40.

The Government argues that the testimony was permissible because it was not "prejudicially phrased." AB, p. 41. But its argument proves Woodruff's point. Trooper Waters testified that after reviewing all the prosecution's evidence, he concluded that Woodruff was conscious and exercising control over the car. AB, pp.

[4] The Government does not address Woodruff's citations to *Baker*. OB, p. 40.

41-42. The trooper thus "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." *Baker,* ¶36.

Neither does the Government's argument that the trooper merely referred to "each driver's *purpose* and *volitional command*" prove helpful. AB, p. 42. That was precisely the problem. Nor did he describe any reliable method by which he divined each driver's "purpose" from his accident reconstruction analysis. *See* OB, p. 40. Although the Government argues the testimony did not reflect "legal conclusions," it was—the requirement that the defendant act "voluntarily." CF, p. 219. Thus, although the Government says Trooper Water never "infer[red] Defendant's guilt," his testimony that the driver was acting intentionally did just that. AB, p. 43.

B. The error requires reversal.

Regarding harm, the Government argues only that the evidence was overwhelming. AB, p. 45. It wasn't. *See* Section I.E, *supra.*

IV. THE TRIAL COURT ERRED BY USING A 1970S CIVIL JURY INSTRUCTION THAT MISSTATED THE LAW AND THE BURDEN OF PROOF.

A. Defense counsel did not invite or waive the error.

1. Defense counsel did not invite the error.

As an initial matter, the Government expresses confusion about how to determine which party proposed the instruction. AB, p. 46 n.6. If this Court

experiences any similar confusion, it can take judicial notice that the prosecution filed these instructions on E-Filing.[5] *See People v. Linares-Guzman*, 195 P.3d 1130, 1136 (Colo. App. 2008).

The Government claims defense counsel invited this error by saying he had "no objection" to the instruction during the charge conference and by reading the text of the instruction in his closing argument. AB, pp. 46-47. It cites to *Horton v. Suthers* for this proposition. 43 P.3d 611 (Colo. 2002).

This case is not *Horton*. There, the party explicitly conceded an issue at the trial level while taking the opposite position on appeal. *Id.* at 614, 618. In contrast, here defense counsel's attention was never directed to the issue with the challenged instruction—the incorrect definition of "inference." The trial court, reading the beginning sentences of each instruction, read a portion of the instruction that was correct and trailed off with "blah, blah, blah." TR 6/29/22, p. 161. Defense counsel said, "no objection." *Id*. But "[i]nvited error is a narrow doctrine and applies to errors in trial strategy but not to errors that result from oversight." *People v. Rediger*, 2018 CO 32, ¶34. Defense counsel did not "draft or tender the instruction at issue," or

[5] The People of the State of Colorado, Jury Instructions – Proposed (June 30, 2022), Douglas County Case No. 20CR422 https://www.jbits.courts.state.co.us/efiling/web/caseInformation/caseHistory.htm?caseNumber=18D2020CR000422.

"request that the instruction be given." *Id.* ¶35. As in *Rediger*, nothing in the record suggests that anyone noticed the instruction incorrectly defined "inference." *Id.* ¶¶35, 37. And repeating an instruction the jury received in closing does not mean defense counsel realized the instruction was wrong.

Even if this Court believes the failure to object was intentional, "the invited error doctrine does not preclude appellate review of errors resulting from attorney incompetence." *People v. Gross*, 2012 CO 60M, ¶9. The "attorney incompetence" exception applies to errors resulting from oversight or inadvertence, as opposed to strategic decisions. *Id.*; *People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002).

Under these circumstances, the error was not the result of a "deliberate, strategic act[] of defense counsel." *Gross*, ¶2. The incorrect definition of "inference" did not provide Woodruff any strategic advantage. Woodruff presented only circumstantial evidence she suffered a syncope event in the car. When defense counsel read the instruction in closing, he argued it was a "reasonable inference" that C.R. would have spoken about his recent surgery with Woodruff. TR 6/30/22, p. 147. The incorrect definition of "inference" only made it *more difficult* for the jury to make that inference, and the others supporting Woodruff's theory of defense. *Compare People v. Carter*, 2021 COA 29, ¶¶24, 30-33 (constructive amendment issue waived by defense counsel where difference between instruction and charge

was obvious, counsel referred to the amended charge by name in closing, and there were "obvious strategic reason[s]" to prefer the amended charge). Thus, the attorney incompetence exception applies.

2. Defense counsel did not waive this issue.

The Government argues, alternatively, that defense counsel waived the issue. AB, pp. 48-49. The critical question is whether defense counsel realized the instruction incorrectly defined what inferences the jury could take from the evidence. *Rediger*, ¶43. There is no evidence he did. *See People v. Ramirez*, 2019 COA 16, ¶19 (no waiver where defense counsel accepted the challenged instruction); *People v. Garcia*, 2023 COA 58, ¶¶42-43 (same). None of the cases cited by the Government found that if a party reads from the challenged instruction in closing, it waives that issue on appeal. *See Johnson v. People*, 2023 CO 7, ¶¶22-28; *United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009); *State v. Kitchens*, 10 A.3d 942, 957-958 (Conn. 2011); *Ubiles v. People*, 66 V.I. 572, 585-586 (2017). And courts must "indulge every reasonable presumption against waiver." *Rediger*, ¶46.

This issue was forfeited, not waived. *Rediger*, ¶44.

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

The Government doesn't defend the instruction's definition of inference. AB, pp. 52-53. This Court should interpret that failure as a concession that the instruction was erroneous. *Jackson*, ¶60.

C. The error was substantial.

The Government argues the incorrect instruction was harmless because other instructions correctly informed the jury about how facts are proven, as well as the standard and burden of proof. AB, p. 53. But none of these instructions corrected the incorrect definition of what inferences the jury could take from the evidence. CF, pp. 212-213. And to the extent the instructions conflicted, the correct instructions held the same weight as the erroneous one and could not cure the error. *See People v. Prendergast*, 87 P.3d 175, 178 (Colo. App. 2003) ("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.").

The Government also argues the error was not substantial because there was overwhelming evidence of Woodruff's guilt. AB, p. 53. There wasn't. *See* Section I.E, *supra*; OB, pp. 47-48. The instruction was exploited by the prosecution to

prevent the jury from considering Woodruff's defense. The error thus cast serious doubt on the reliability of the verdict.

V. THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL.

The Government argues cumulative error does not apply because no errors were made, the evidence was overwhelming, and Woodruff received a fundamentally fair trial. AB, pp. 54-55. As explained above and in the Opening Brief, the Government is wrong. Woodruff asks this Court to reverse her convictions, so she may receive the fair trial to which she is constitutionally entitled.

CONCLUSION

Woodruff requests this Court reverse her convictions.

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CERTIFICATE OF SERVICE

I certify that, on May 31, 2024, a copy of this Reply Brief was electronically served through Colorado Courts E-Filing on Allison S. Block of the Attorney General's Office.

K. Root