COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED June 28, 2024 12:16 PM
Adams County District Court Honorable Robert W. Kiesnowski, Jr., Judge Case No. 2020CR1055	
THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF-APPELLEE, v. JUAN MANUEL CASTORENA, DEFENDANT-APPELLANT.	▲ **COURT USE ONLY** ▲ Case No. 22CA1591
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ANSWER BRIEF

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/s/ Sonia R. Russo

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INTRODUCTION

Defendant, Juan Manuel Castorena, appeals the judgment of conviction entered after a jury convicted him of first-degree murder. CF, p 600. Defendant was sentenced to life in the Department of Corrections without the possibility of parole. CF, p 653.

STATEMENT OF FACTS

On January 30, 2018, from 9:39 p.m. to 9:44 p.m. MST, a Facebook user named Damian Casillas repeatedly messaged Ricardo Rivas, the murder victim, saying that he was at Rivas's apartment complex, he wanted to talk to him, and he was by the exterior mailboxes. People's EX 2, p 2; TR 7/13/22, p 175:2-11; TR 7/15/22, pp 50:1-53:4. Shortly after, a witness made a 911 call on which gunshots can be heard in the background. TR 7/12/22, p 102:6-103:20. *Id.* At approximately the same time, Westminster police officers were sent to Rivas's apartment complex. *Id.*, p 68:8-20. Officer James Holley found Rivas lying in the parking lot near the mailboxes with a single gunshot wound to the head. *Id.*, p 71:10-21. Paramedics arrived and transported

Rivas to a hospital where he was pronounced dead at 10:23 pm. *Id.*, pp 73:23-74:1; TR 7/13/22, p 106:21-25.

Angel Rivas-Mireles, Rivas's brother, told detectives that someone on Facebook named Damian Casillas had been an associate of Rivas's, and that he'd seen Casillas in the parking lot of his and Rivas's apartment complex two to four weeks before the homicide. TR 7/12/22, p 43:3-17. Damian Casillas was chubby in his Facebook profile photo, and the profile featured a black T-Top Monte Carlo that Rivas-Mireles had seen outside his apartment before and in his and Rivas's old neighborhood in Denver. *Id.*, p 44:10-25. Rivas-Mireles also said that Rivas did not have any injuries when he last saw him at around 9:30 p.m. the night of the homicide. *Id.*, pp 37:17, 46:15-17.

One week after the shooting, Detective Steve Sanders surveilled a silver Chevy Impala that was registered to Viviana Galaviz, Defendant's girlfriend, and saw Defendant get in the driver's seat of the vehicle. TR 7/13/22, pp 175:21-178:10; TR 7/15/22, p 17:11-13. A different detective also spoke with Galaviz about a Facebook account linked to a user named Damian Casillas. TR 7/15/22, p 18:10-12. They

also discussed Defendant's friendship with Juan Flores. *Id.*, p 18:13-17. Sanders confirmed that he'd spoken with Flores, that Flores was 5'10" or 5'11" and 180 to 200 pounds, and that Flores remained a suspect. *Id.*, p 62:15-63:5.

Detectives obtained warrants for Facebook records for the usernames Damian Casillas, Boosie Queenviv, and Ricardo Rivas. *Id.*, p 19:5-15. Casillas and Boosie Queenviv frequently exchanged numerous Facebook messages. *Id.*, p 24:1-21. Sanders eventually matched Damian Casillas's profile pictures and Facebook messages to Defendant and identified Defendant during the trial as Damian Casillas. *Id.*, pp 38:7-39:1. A cover photo uploaded to Damian Casillas's profile on December 26, 2017, was of Defendant. *Id.*, p 61:4-20. Sanders also confirmed that Boosie Queenviv was Viviana Galaviz. *Id.*, pp 33:21-35:25, 56:9-15. Casillas's Facebook account was deactivated at 8:45 a.m. Mountain Standard Time the day after the homicide. *Id.*, p 23:12-19.

Facebook messages between Rivas and Defendant established that they were involved in drug transactions. *Id.*, pp 43:1-46:11. Two months before he died, Rivas warned Defendant not to steal from the drug

supply, writing, "Be careful taxing on that shit. I know a couple of people trying to rob you." *Id.*, p 46:24-25. Sanders explained that "[t]axing is essentially shorting somebody their product…It's essentially stealing." *Id.*, p 47:3-8. Rivas then told Defendant to "stay safe," and Defendant replied, "Lmao, fuck yeah, homie. Come through, I stay ready." *Id.*, p 47:15-19. The night of the homicide at 8:55 p.m., less than an hour before the shooting, Defendant posted to Facebook, "States, Niggas stay plotting, but ain't making no noise, I stay ready. Come see for yourself." *Id.*, p 59:6-7.

CBI analysis revealed that a mixture of Defendant's and Rivas's DNA was on Rivas's face. TR 7/14/22, pp 179:10-180:25. Juan Flores's DNA was on Rivas's sweatshirt, but Defendant's DNA was not. *Id.*, pp 184:12-185:5. Juan Flores's DNA was not on the spent bullet casings from the scene and not on Rivas's right arm or his face. *Id.*, pp 181:7-182:11. Neither Defendant nor Juan Flores's DNA was on Rivas's jeans. *Id.*, pp 182:12-184:3.

Multiple bystanders witnessed an altercation between Rivas and a chubby, shorter man (Defendant) and a taller, thinner man (likely Juan Flores). On the night of the murder, Maria Flores was walking across the parking lot of Rivas's apartment complex from her apartment to the laundry facility.[1] TR 7/12/22, p 87:8-19. As she crossed the parking lot, she saw three males who seemed to be arguing. *Id.*, p 88:6-7.

As Flores returned to her apartment, she noticed that a physical fight among the three had broken out, and Flores saw someone (Defendant) holding another person's (Rivas's) arms behind his back while the third person (likely Juan Flores) hit Rivas in the face with his knee. *Id.*, pp 91:1-5, 96:20-23. The third man, likely Juan Flores, was tall, taller than the heavier man, and thin. *Id.*, p 98:2-9.

The man (Defendant) holding the man who was being hit (Rivas) was heavier, not too tall, and not too short. *Id.*, p 91:10-15. Rivas was wearing a baby blue jersey with numbers on it. *Id.*, p 97:5-9. The heavier man was facing Flores. *Id.*, p 91:17. Flores is five feet and five

[1] Nothing in the record indicates that Maria Flores was related to Juan Flores.

inches tall, and the heavier man was a little bit taller than her. *Id.*, p 91:20-22. Flores called 911, and during the call gunshots were audible. *Id.*, pp 102:9, 103:16-20. When Flores heard the gunshots, she started running back to her apartment. *Id.*, p 104:12-24. Flores told the 911 operator that she saw a gray Impala or gray Malibu by the mailboxes and thought it was connected to the people fighting because its hazard lights were on. *Id.*, pp 105:4-106:1.

Jeffrey Caven lived at Rivas's apartment complex, and on the night of the murder he was driving toward the mailboxes to pick up his wife from work when he saw two people who looked like they were "getting ready to get into a fight." *Id.*, pp 145:25-147:21. One of the men, Rivas, wore a light-colored Nuggets jersey. *Id.*, p 149:8-10. The other man was wearing darker clothes. *Id.*, p 149:13-15. Rivas appeared to Caven to be the aggressor. *Id.*, p 149:25. When the two men "started swinging" at each other, a third man ran over to them. *Id.*, p 150:11-17. Caven called 911. In a later written statement to police, Caven described a car parked in front of the mailboxes that was possibly gold. *Id.*, pp 151:1, 154:13-17.

Jesse Abeyta, another resident at Rivas's complex, was in his apartment the night of the murder. TR 7/12/22, p 174:3-6. Abeyta heard men arguing outside, so he went outside to his second floor balcony, which looks directly down on the parking lot. *Id.*, pp 174:21-175:11. He saw three men fighting; one was heavyset (Defendant) and the other two were thin (Rivas and likely Juan Flores). *Id.*, p 175:14-21. The heavyset man was about the same height as Abeyta, who's 5'7". *Id.*, pp 175:22-176:1. Defendant was hitting a thin man who was wearing a baby blue Nuggets jersey (Rivas). *Id.*, p 176:8-17. Abeyta didn't see the third, taller, thin man (likely Juan Flores) hitting Rivas. *Id.*, p 177:1-6.

Abeyta then saw Rivas on the ground and the other two men walk away. *Id.*, p 177:16-24. The two men walked toward the mailboxes, and then Rivas got up and walked in the same direction with his hands in the air. *Id.*, pp 178:12-13, 181:10-12. Shortly after that, Abeyta saw Rivas run back toward the building in which Abeyta lived, Abeyta heard seven to ten gunshots, and then he saw Rivas fall to the ground. *Id.*, pp 180:6-8, 181:10-15, 182:3. Abeyta remembered the heavyset man (Defendant) wearing dark clothing and estimated that he was over 200

pounds. *Id.*, p 183:1-8. Flores, Caven, and Abeyta did not see who fired the shots.

Rivas's autopsy showed that he had contusions and abrasions on his face, his forehead, both sides of his neck, his hands, an ankle, his back, and his left shoulder. TR 7/13/22, pp 109:16-18, 117:11-121:24. Rivas also had a series of parallel linear patterned abrasions on his forehead indicating recent blunt impact because there was no evidence of healing. *Id.*, p 118:7-12. Because there were no stipple wounds from gunpowder, the medical examiner estimated that the range of fire was "probably at least two to three feet." *Id.*, p 111:12-14.

Defendant did not testify during the trial. TR 7/12/22, p 99:22. Through counsel, he raised lack of evidence that he had committed the murder and alternate suspects that the police didn't fully investigate. TR 7/12/22, pp 23:20-30:23; TR 7/18/22, p 120:19-121:23, 127:12-18, 134:24-135:18. Defense counsel also argued that although two DNA profiles had been found on the shell casings recovered at the scene, neither was Defendant's, and analysis showed DNA from unknown people on Rivas's body. TR 7/12/22, p 29:8-20; TR 7/18/22, p 136:5-13.

Defense counsel also thoroughly attacked the only eyewitness identification of Defendant by Araceli Puebla, another resident at Rivas's apartment complex. TR 7/18/22, pp 123:3-126:12, 128:4-129:21. While Puebla was not able to identify Defendant in the courtroom (TR 7/12/22, p 215:2-4), the detective who assembled her photo array testified that Puebla identified Defendant in the photo array at her apartment on May 30, 2018. TR 7/13/22, pp 44:5-20, 53:2-12.

SUMMARY OF ARGUMENT

Defendant's appeal centers on Puebla's out-of-court identification of him in a photo array, which was the only witness identification admitted at trial. The record and applicable case law show that the trial court correctly denied Defendant's motion to suppress Puebla's identification. Additionally, the court acted within its discretion in denying defense counsel's attempt to improperly introduce Puebla's prior inconsistent statement through a detective's testimony because the record is devoid of evidence that Puebla, who had been excused, was still available to testify. Any error was harmless based on overwhelming evidence of guilt. Finally, because the trial court did not err, Defendant

is not entitled to relief for cumulative error because evidence of his guilt was overwhelming.

ARGUMENT

I. Puebla's photo array was not impermissibly suggestive and her out-of-court identification of Defendant was reliable.

Defendant contends that Puebla's photo array was impermissibly suggestive and that her identification of Defendant was not reliable. OB, pp 24-39. Defendant is wrong.

A. Preservation and Standard of Review

Defendant's argument that the photo array was impermissibly suggestive was partially preserved. Defendant did not argue below that his photo was the only one with a black background or that no one in the photo array met Puebla's original description, which Defendant asserts is that the shooter was bald and didn't have facial hair. *See* OB, p 25; TR 1/7/22, pp 114:19-118:20. Defendant also did not argue below that the instructions for the photo array were flawed because they didn't inform Puebla that the investigation would continue regardless of whether she identified anyone in the array. *See id.*

"The constitutionality of a pretrial identification procedure is a mixed question of law and fact. While we give deference to the trial court's findings of fact, we may give weight to those facts differently and thus reach a different conclusion." *People v. Singley*, 2015 COA 78M, ¶9 (internal citations omitted). This Court reviews the trial court's legal conclusions de novo. *People v. Campbell*, 2018 COA 5, ¶53. This Court reviews "preserved errors of constitutional dimension for constitutional error, meaning we will reverse unless the People show that the error was harmless beyond a reasonable doubt." *Id.*, ¶54.

"[W]e review all other errors, constitutional and nonconstitutional, that were not preserved by objection for plain error." *Hagos v. People*, 2012 CO 63, ¶14. Plain error "was formulated to permit an appellate court to correct particularly egregious errors[.]" *Id.* (internal citation and quotation marks omitted). For that reason, "the error must impair the reliability of the judgment of conviction to a greater degree than under harmless error to warrant reversal." *Id.*

"Under the plain error standard, the defendant bears the burden to establish that an error occurred, and that at the time the error arose,

it was so clear cut and so obvious that a trial judge should have been able to avoid it without benefit of objection[.]" *People v. Conyac*, 2014 COA 8M, ¶54. If the error is not obvious, this Court need not consider whether error occurred. *People v. Vigil*, 251 P.3d 442, 447 (Colo. App. 2010).

B. Additional Background

Puebla was the only person to witness the shooting. *Id.*, pp 15:21-16:16. That night, Puebla took her dogs out for a walk at her apartment complex. TR 2/17/22, p 11:15-25. As she walked, Puebla heard people yelling at each other and walked toward the parking lot. *Id.*, pp 13:13-14:1. Puebla saw a car parked by the mailboxes. *Id.*, p 14:2-4. Three men were near the car; one was standing outside the car next to the driver's side, another was inside the car, and the third was outside the car wearing a blue shirt with a number on it. *Id.*, pp 14:14-17:5. Puebla estimated that she was about forty to forty-five feet away from the men. *Id.*, p 15:25.

The man in the blue shirt started running, and the man sitting inside the car got out from the front passenger's seat. *Id.*, pp 16:16-18,

18:7-13. At the suppression hearing in February 2022, Puebla described the passenger as "tall, dark skinned, [wearing] a black shirt" and blue pants, and that he had a beard, short hair, and was overweight. *Id.*, pp 18:18-19:1. Puebla added that the passenger was chubby and had a round face. *Id.*, p 19:5-16.

When the passenger got out of the car, the man with the blue shirt started running; Puebla saw the passenger pull out a gun from the front, right side of his waist. *Id.*, p 19:17-25. The passenger said, "Stop," and the man in the blue shirt slowed down. *Id.*, p 20:1-21. The passenger fired twice, holding the gun with both hands, and the man in the blue shirt started running again. *Id.*, pp 21:2-22:10. Then the passenger shot twice more, and the man in the blue shirt fell down. *Id.*, p 22:11-14. After that, the passenger and the driver ran to the car and drove away. *Id.*, p 22:15-19. Puebla estimated that everything she witnessed had occurred within approximately two minutes. *Id.*, p 20:22.

1. Puebla's original description of the shooter

Puebla was first interviewed on January 30, 2018, the day the murder occurred. TR 1/7/22, pp 14:23-15:1. Puebla originally described

the shooter, according to Detective Steve Sanders, as "a heavier male. I believe it was bald or very short hair wearing a blue shirt, a very round face. She described him as looking directly at her at one point." TR 1/7/22, p 17:3-5; TR 2/17/22, p 26:1-11 (Puebla testifying to the same description during a suppression hearing). A handwritten statement that her daughter wrote for her in English after Puebla told her daughter what to write in Spanish said that the passenger was chubby, bald, and wearing a black sweater. TR 2/17/22, pp 26:14-27:10.

2. Puebla's out-of-court identification of Defendant

Approximately four months after the murder, on May 30, 2018, a different detective presented a photo array to Puebla that Detective Luis Lopez prepared. TR 1/7/22, pp 78:14-79:17. Lopez used "a program called Lumen that contains prior booking pictures for all the counties within the metro area" to prepare the photo array. *Id.*, p 80:7-12. In doing so, Lopez's goal "is to try to find individuals that look similar to the defendant and use those as fillers for the lineup." *Id.*, p 80:13-23. Lopez was trying to match the fillers as Hispanic males with rounder

faces and some facial hair. *Id.*, pp 80:24-81:2. Lopez spoke to Puebla two weeks before he administered the photo array, she described the shooter to him as "a Hispanic male about 26 to 28 years old, round face, wearing dark clothing." *Id.*, p 81:5-13. Puebla did not describe the shooter as wearing a light-colored hooded sweatshirt. *Id.*, p 81:14-16. Lopez believed that Puebla said the shooter was wearing a hoodie but not a light-colored one. *Id.*, p 81:17-20.

Lopez explained that although the filler photographs were of individuals who weren't Defendant's height, he learned through experience that what's crucial is how "people appear in the photo." *Id.*, p 86:9-14. Lopez was trying to match Defendant's appearance, not Defendant's weight and height. *Id.*, p 86:15-18. Lopez also explained that every person in the photo array had facial hair because he was trying to match Defendant's booking photo, and it wouldn't be a fair photo array if "I have a picture of Mr. Castorena with facial hair because he has facial hair in the booking picture and then I put everybody else in the booking picture without facial hair. That doesn't help me." *Id.*, p 99:22-100:18.

The photo array had six photographs, and Lopez showed her the admonitions form, which was in English, and then interpreted it into Spanish. *Id.*, p 83:6-11. Detective Dean Passarelli remained in Puebla's dining room to administer the photo array while Lopez was in the kitchen. *Id.*, p 84:2-5. Puebla looked at the photos for around four minutes before saying that Defendant, who was in photograph 5, looked most like the person she saw commit the murder. *Id.*, pp 84:17-85:14. When Lopez asked her on a scale of one to ten how sure she was, with ten being a perfect match, Puebla said an eight. *Id.*, p 85:15-20.

The trial court made the following findings and conclusions regarding the suggestiveness of Puebla's photo array:

> [G]enerally speaking, the individuals have similar physical – at least facial physical characteristics. I really simply don't find particularly persuasive [defense counsel]'s concerns about their actual height and weight. I agree with Lopez. He's trying to put together an array so that these people appear to be similar, have similar characteristics. And I frankly think their height and weight otherwise is largely irrelevant, especially when you look at the array. These gentlemen—they resemble one another generally speaking.
>
> My heartburn is the hooded sweatshirt. Okay? And the fact that Ms. Puebla talked about a hoodie of some sort. Okay? Five months go by. They go to her house. They give her

> sequentially, and that's fine, five, and, lo and behold, the only person that's wearing a hooded sweatshirt, almost like a halo, so to speak, is the defendant. Okay?
>
> I understand there are other factors. But in my mind, as the finder of the fact, that pushes me over the edge. I find that with respect to the Puebla photo lineup, it's not truly a six-pack, I find that it is indeed unduly suggestive, impermissibly suggestive based upon the fact that she testified that she believes she saw someone in a hoodie or a sweatshirt or something of that type, and the only person that has that type of clothing in the array is the defendant.
>
> And additionally, what I find somewhat disconcerting with respect to the Puebla array is everybody has somewhat light-colored shirts. Okay? The defendant has not only the hoodie that goes up to above his ears, he also has a black T-shirt on, unlike the others.
>
> So when I take those two together, he kind of jumps out off the page at me. So I do agree that that array is unduly suggestive.

TR 1/7/22, pp 122:4-123:14. The court then turned to whether, given the totality of the circumstances, Puebla's identification was otherwise reliable, and noted that the burden to establish that had shifted to the prosecution. *Id.*, p 123:22-25.

3. Puebla's testimony about the reliability of her identification

At a suppression hearing, Puebla said she saw the shooter for about forty seconds. TR 2/17/22, p 38:18. There was lighting in the area where she saw the shooting at the mailboxes and the parking lot, and she said that it was "very clear" in response to how well she could see the three men. TR 2/17/22, p 23:10-17. Puebla was standing next to her apartment building, there were lights on the apartment building, and she was close enough to hear what the three men were saying. TR 2/17/22, p 23:18-25. Puebla was looking at the shooter "on his front side." TR 2/17/22, p 24:20-21. The passenger was further away from her than the man in the blue shirt. TR 2/17/22, p 37:22-24.

There were three rows of parking spots between where Puebla was standing and where the passenger was. TR 2/17/22, pp 37:25-38:4. The rows were neither full nor empty, but there weren't any cars blocking her view. TR 2/17/22, p 38:9-13. Puebla insisted that the lighting was good enough that she could see that the vehicle windows were tinted dark, even though she told a detective the night of the

shooting that she couldn't tell if they were tinted. TR 2/17/22, p 39:11-24. Puebla denied telling officers the night of the murder that she wouldn't be able to identify either the passenger or the driver. TR 2/17/22, p 52:2-5.

Puebla did not feel that the passage of more than three years between when she testified at a suppression hearing and the murder made it more difficult for her to remember what she saw in 2018. TR 2/17/22, p 31:30-23.

4. Trial court's findings and conclusions regarding the reliability of Puebla's out-of-court identification of Defendant

The court concluded that the prosecution "met their burden to show that the totality of the circumstances indicate that identification by Araceli Puebla was reliable." CF, p 452. The court found:

> Ms. Puebla was standing either 40 or 100 feet away from the altercation. She asserted that the area was clearly sufficiently lit for her to view the altercation. Puebla was only able to see the man holding the victim for 40 seconds, but that is not too short a time to make a reliable determination of identity.
>
> Additionally, Puebla was positioned such that she got a clear view of the shooter's face. Puebla's identification of the

> shooter as being taller than the other two men does not, by itself, demonstrate a completely inaccurate recollection, but as a factor it does weigh against a determination of reliability. Puebla did, however, demonstrate reasonable confidence in her selection of Defendant as the shooter when she viewed the photo array. Finally, Puebla's identification occurred five months after the crime. This is not an unreasonable delay which would materially erode a witness's memory of a traumatic event.

CF, p 452.

C. Law and Analysis

In deciding whether an out-of-court identification from a photo array should be suppressed, courts use a two-part analysis. "First, a court must determine whether the photo array was impermissibly suggestive, which the defendant has the burden of proving." *Bernal v. People*, 44 P.3d 184, 191 (Colo. 2002) (internal citations omitted). "If this burden is not met, no further inquiry is necessary." *Id.* "When determining whether a photo lineup was impermissibly suggestive, courts generally look at (1) the size of the photo array, (2) the officer's presentation of the photos, and (3) whether the defendant's picture so stood out from the other photographs as to suggest to an identifying

witness that the defendant was more likely to be the culprit." *People v. Plancarte*, 232 P.3d 186, 190 (Colo. App. 2009).

"The crucial question when examining the array itself is 'whether the picture of the accused, which matches descriptions given by the witness, so stood out from all of the other photographs as to suggest to an identifying witness that that person was more likely to be the culprit.'" *People v. Shanks*, 2019 COA 160, ¶49 (quoting *Bernal*, 44 P.3d at 191). The defendant should not be "the only one to match the witness's description of the perpetrator," but the others in the photo array don't need to be "exact replicas of the defendant or be uniform with respect to a given characteristic." *Id.* (internal citation omitted). "An array that includes a photo 'unique in a manner directly related to an important identification factor' may be impermissibly suggestive." *Id.* (quoting *Bernal*, 44 P.3d at 192).

1. Puebla's photo array was not impermissibly suggestive.

Defendant does not challenge the size of the photo array or Lopez's and Passarelli's procedure for presenting the photos to Puebla,

nor did he below. Defendant's appeal centers on his argument that his photo impermissibly stood out from the others, which became the crux of the trial court's finding that the array was impermissibly suggestive.

Defendant contends that Puebla's photo array was impermissibly suggestive because he was the "only person [in the array] wearing a baggy hooded sweatshirt" and Defendant claims that Puebla originally described the shooter as wearing a dark, baggy, hooded sweatshirt. OB, p 24. Defendant also argues that the photo array was impermissibly suggestive because "no one else in the array is wearing dark clothing" and because his photo is the only one with a "completely black background." OB, pp 24-25.

As discussed above, Puebla did not originally describe the shooter as wearing a dark, baggy, hooded sweatshirt. Sanders thought she said that the shooter was wearing a blue shirt, but Puebla wrote in her statement the night of the murder that the shooter was wearing a black sweater. When Puebla spoke to Lopez four months later, she said the shooter was wearing dark clothing, and Lopez believed she'd mentioned a hooded sweatshirt, but wasn't definitive about it during the

suppression hearing. Although Puebla's description of what the shooter was wearing changed slightly from 2018 to 2022, it's not clear from Lopez's testimony or her handwritten statement whether for Puebla, a sweater is the same as a sweatshirt, which is the same as a hoodie. If Defendant had worn a hooded sweatshirt during the murder, Puebla likely would have specified that on the day of the homicide for the same reason that Defendant alleges it makes his picture stand out in the array. *See* OB, p 24 (discussing the halo effect).

Yet, the trial court's ruling that the photo array was impermissibly suggestive was wholly premised on Puebla having originally described the shooter as wearing a hooded sweatshirt, which she did not do, regardless of what Lopez believed she told him four months later.

Although Defendant is the only person in the photo array wearing a light-colored hoodie and a black shirt, and Puebla was consistent describing the shooter as wearing dark clothing, in the black and white photos of the array, three other men are wearing darker clothing. *See* People's Exhibits 1-7-22, p 16. And because two men in the array are

wearing white shirts, Defendant's light-colored hoodie didn't make him stand out within the array. *Id.*

Additionally, Defendant argues that none of the people in the array, including Defendant, matched the original description of the perpetrator because no one was bald or lacked facial hair. OB, p 25. While "disparity in facial hair is a factor to be considered when determining whether an array is impermissibly suggestive," that disparity doesn't render an array impermissibly suggestive. *Plancarte*, 232 P.3d at 191. As *Plancarte* said, "[W]e have found no Colorado case in which the court concluded that all photos in an array must have facial hair matching the victim's description of the perpetrator." *Id.* Lopez explained that there were no available photos of Defendant without facial hair. Had Lopez included a photo of Defendant with facial hair and ensured that the rest of the photos were of men who didn't have facial hair, Defendant would have stood out to Puebla.

In addition, *Plancarte* and *Bernal* instruct that array photos should match each other in "race, approximate age, facial hair, and a number of other characteristics." *Id.*, 190 (quoting *Bernal*, 44 P.3d at

191-92). Puebla's array complied with that requirement. The men in the photo array had very similar skin tones, round faces, and facial hair. *See* People's Exhibits 1-7-22, p 16.

Defendant's unpreserved argument that his photo was the only one with a black background ignores the record. Two other photos have dark backgrounds, and although Defendant's is darker than those, it wasn't so uniquely or meaningfully different such that Defendant's photo jumped out at the viewer. *See id*.

With respect to Defendant's other unpreserved contention that the directions Puebla received with the array violated section 16-1-109(3)(a)(III), C.R.S. (2021), OB, p 25, this Court should decline to address it as undeveloped. *See People v. Gingles*, 2014 COA 163, ¶29 (declining to address an argument presented in a "contradictory, cursory, and undeveloped manner.").

But if this Court proceeds to the merits, Defendant's argument fails because section 16-1-109(3)(a)(III), C.R.S. (2021), required law enforcement agencies to adopt written policies and procedures for eyewitness identifications, which were required to include instructions

for eyewitnesses advising them that "the investigation will continue whether or not the eyewitness identifies anyone as the alleged perpetrator in the photo array or live lineup[.]" While Puebla's instructions did not so advise her, nothing in the record explains whether the Westminster Police Department's policies and procedures included those instructions, which is what section 16-1-109(3)(a)(III) requires. Section 16-1-109(3)(a)(III) does not state that every set of photo array instructions that do not contain that advisement are thereby per se unconstitutional.

If this Court concludes that Puebla's photo array was not impermissibly suggestive, it can conclude its analysis with respect to this claim at this step because the burden does not then shift to the prosecution to show that Puebla's identification was sufficiently reliable.

2. Puebla's out-of-court identification of Defendant was sufficiently reliable.

If this Court concludes that Puebla's array was impermissibly suggestive, her identification of Defendant was still sufficiently reliable

because the *Biggers* factors support reliability. After a defendant has proven that the photo array was impermissibly suggestive, "the burden shifts to the People to show that despite the improper suggestiveness, the identification was nevertheless reliable under the 'totality of the circumstances.'" *Bernal*, 44 P.3d at 191 (internal citations omitted). The "two steps must be completed separately; it is only necessary to reach the second step if the court first determines that the array was impermissibly suggestive." *Id.*

"If the court finds a photo array impermissibly suggestive, it must then proceed to the second step of the analysis and determine whether, under the totality of the circumstances, the suggestive procedure created a very substantial likelihood of misidentification." *Id.*

> The factors to be considered in determining whether, despite a suggestive array, the identification was nonetheless reliable are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Id. (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). "Ultimately, the suggestiveness of the identification procedure must be balanced against the indicia of reliability; provided that there is not a 'very substantial likelihood of irreparable misidentification,' the identification is admissible." *Campbell*, ¶56 (quoting *Bernal*, 44 P.3d at 192).

As the trial court found, Puebla observed the shooter from forty to 100 feet away for approximately forty seconds. CF, p 449. Puebla therefore had ample opportunity to view the shooter at the time of the homicide. The same is true of Puebla's degree of attention, which was high since she was able to observe the shooter for forty seconds. *Id.* Although it was dark at the time of the shooting, when asked how well she was able to see the three men, Puebla answered, "It was very clear." TR 2/17/22, p 23:12-13. Puebla said that there were lights at the mailboxes and in the parking lot. TR 2/17/22, p 23:14-17. Puebla was close enough to hear what the men were saying. *Id.*, p 24:20-21. And even though the shooter was further away from her than Rivas, only three rows of parking spots were between where she was and where the

shooter was and no cars blocked her view of the shooting. *Id.*, pp 37:22-38:4.

Puebla was able to observe the shooter for twenty times longer than the victim in *Campbell*, who saw the intruder inside his home for one to two seconds while he wasn't wearing contact lenses or eyeglasses. *Campbell*, ¶58. This case is also distinguishable from the out-of-state authority on which Defendant relies to discuss distraction due to weapon focus because in *State v. Lawson*, 291 P.3d 673, 678 (Or. 2012), the victim who identified the defendant was also shot, whereas here, Puebla was simply watching and was not part of the altercation. *See* OB, p 37. Similarly, in *People v. Garner*, 2019 CO 19, ¶9, three brothers that were shot identified a defendant in court as the shooter, and in *United States v. Nolan*, 956 F.3d 71, 75 (2d Cir. 2020), "[f]our of the five adults present in the apartment at the time of the robbery…identified [the defendant] as one of the robbers." *See* OB, p 37. Puebla's opportunity to view the shooter and her degree of attention should weigh in favor of reliability.

With respect to the accuracy of Puebla's prior description of the shooter, although a few details changed over four years, important descriptors remained consistent. Puebla consistently described the shooter as heavy-set with a round face, as bald or with very short hair, as wearing dark clothing (whether that was a black sweater, a black shirt, a black hooded sweatshirt, or dark clothing generally, Puebla consistently described dark clothing), and that he exited the vehicle on the passenger side. TR 1/7/22, pp 20:22-21:6, 55:15-18, 80:24-81:20, 102:1-17; TR 2/17/22, pp 18:1-23, 19:1, 26:1-29:13. As the trial court noted, Puebla inconsistently described the shooter as being both taller and shorter than the driver. *Id.*, 28:24-30:1. But several other elements of Puebla's description of the shooter were consistent throughout the four-and-a-half years this case was pending before trial, and "discrepancies alone [do not] require a court to suppress an identification." *People v. Folsom*, 2017 COA 146M, ¶¶ 62-63. This factor should therefore weigh in favor of a reliability finding.

Puebla's level of certainty at the time of confrontation and the length of time between confrontation and the murder also weigh in

favor of reliability. When Lopez asked her on a scale of one to ten how sure she was, with ten being a perfect match, Puebla said an eight. 1/7/22, p 85:15-20. The shooting occurred on January 30, 2018, and Puebla identified Defendant from the photo array on May 30, 2018, four months later. *Id.*, p 78:14-79:17. Puebla rating her certainty as an eight of ten is still a high rating, and four months is not so long such that her identification is unreliable, given the significant amount of detail to which she testified four years later.

In *Campbell*, the victim's level of certainty, which was ninety-five percent sure, outweighed his inconsistencies in how he described the intruder at his home with respect to the trial court's reliability finding. *Campbell*, ¶59. Likewise, Puebla's relatively high certainty despite minor inconsistencies should weigh in favor of reliability.

Because all of the *Biggers*/*Bernal* factors weigh in favor of reliability, this Court should conclude that Puebla's out-of-court identification of Defendant was sufficiently reliable, even if it concludes that the photo array was impermissibly suggestive.

If this Court concludes that the trial court erred in deciding that Puebla's identification was sufficiently reliable, it was harmless error with respect to the preserved portions of Defendant's claim and not plain error for the unreserved portions.

Defense counsel extensively cross-examined Puebla about her identification of Defendant, focusing on the reliability of the identification and drawing out every inconsistent statement Puebla made about the identification. TR 7/12/22, pp 219:21-234:16; TR 7/13/22, pp 7:2-22:12. During closing and rebuttal closing, while the prosecutors mentioned Puebla's identification, it was not a focus of their arguments. Several times when they discussed Puebla's testimony, they did not refer to her identification of Defendant at all. TR 7/18/22, pp 112:3-11, 117:8-9, 141:13-19. Instead, they focused on other evidence of guilt. Likewise, during the opening argument, the prosecutor described how Puebla identified Defendant in the photo array, but it was not a central part of his opening argument, and he didn't refer to it more than once. TR 7/12/22, p 21:16-25.

Error here does not result in automatic reversal. In *Singley*, ¶34, the division considered "the extensive evidence of [the defendant's] guilt" in hypothetically deciding that possible error was to reliability was harmless beyond a reasonable doubt. Likewise, in *People v. Walker*, 2022 COA 15, ¶¶23-25, the division concluded that any error in admitting the out-of-court identification was harmless beyond a reasonable doubt because the prosecution "presented overwhelming evidence" that the defendant committed the crime.

Here, the prosecution presented overwhelming evidence that Defendant murdered Rivas, independent of Puebla's out-of-court identification of him. Every witness at Rivas's apartment complex saw a man in a blue Nuggets jersey and a chubby, heavyset Hispanic man. TR 7/12/22, pp 91:10-15, 97:5-9, 149:8-10, 175:14-21, 176:8-17, 208:20-209:24. As well, a mixture of Defendant's and Rivas's DNA was on Rivas's face. TR 7/14/22, pp 179:10-180:25.[2] *Id.*, p 116:2-5. Juan Flores

[2] Defendant does not challenge the DNA analysis in this case and shouldn't be permitted to do so for the first time in his reply brief. *Gomez v. Walker*, 2023 COA 79, fn 3 ("[W]e do not consider arguments raised for the first time in a reply brief.") (internal citation omitted).

matched the description multiple witnesses gave of the driver, and his DNA was on Rivas's sweatshirt. *Id.*, pp 184:12-185:5.

Defendant's photo was attached to the Damian Casillas Facebook profile from which Defendant sent Rivas messages the night of the murder trying to get him to come outside to the parking lot because Defendant was angry that Rivas had accused him of stealing and from which Defendant posted that he was "ready" to deal with people who were "plotting" against him. TR 7/15/22, pp 38:7-39:1, 43:1-47:19, 59:6-7, 61:4-20.

In the Facebook messages, Defendant told Rivas that he was "at the mailboxes," which is where multiple witnesses saw a vehicle parked and saw portions of the initial altercation occur. People's EX 2, p 2; TR 7/12/22, pp 105:4-106:1; TR 7/13/22, p 175:2-11; TR 7/15/22, pp 50:1-53:4, 145:25-147:21, 154:13-17, 178:12-13, 181:10-12, 207:8-9.

Rivas had bruises and other signs of injury on different parts of his body, confirming that there was a fight, as multiple witnesses saw. TR 7/13/22, pp 109:16-18, 117:11-121:24. The medical examiner also explained that what Puebla and Abeyta described—the shooting took

place at a distance—was consistent with the lack of stippling and burning around Rivas's gunshot wound. *Id.*, p 111:12-14; TR 7/12/22, pp 21:2-22:14, 180:6-182:3. All nine casings found at the scene were for nine-millimeter bullets, TR 7/15/22, p 75:18-24. All nine casings having the same caliber and similar toolmark characteristics indicated that they were fired from a single firearm. *Id.*, p 79:17-80:15.

Defendant's girlfriend at the time owned an Impala that she allowed Defendant to drive, Flores thought the vehicle by the mailboxes was an Impala (TR 7/12/22, pp 105:4-106:10), and law enforcement officers saw Defendant driving the Impala shortly after the murder. TR 7/13/22, pp 175:21-178:10; TR 7/15/22, p 17:11-13. Additionally, two of the alternate suspects, Troy Foley and Guadalupe "Porky" Aguas-Lomeli, spoke with investigators, who ultimately decided they were no longer persons of interest. TR 7/15/22, pp 128:4-129:8 (Foley); TR 7/13/22, pp 192:22-194:10 (Aguas-Lomeli).

Considered in its entirety, the evidence presented by the prosecution was overwhelming, and it renders any erroneous admission of Puebla's identification harmless beyond a reasonable doubt.

For the same reasons, any error wasn't plain with respect to the unpreserved portions of Defendant's claim. Given this evidence and how Puebla's identification was argued during opening, closing, and rebuttal closing, Defendant hasn't proven that the trial court's admission of Puebla's identification impaired the reliability of the judgment of conviction to a greater degree than under harmless error.

For all these reasons, this Court should conclude that Puebla's photo array was not impermissibly suggestive, or in the alternative affirm the trial court's conclusion that Puebla's out-of-court identification was either reliable, or if it wasn't, that it did not constitute constitutional harmless or plain error.

II. The trial court acted within its discretion by denying defense counsel's attempt to introduce Puebla's prior inconsistent statement through Detective Sanders.

Defendant argues that Puebla testified at trial that the passenger/shooter was shorter than the driver, but at the suppression hearing, she testified that the passenger/shooter was taller than the driver. OB, p 40. Defendant contends that the trial court erred by not allowing defense counsel to introduce Puebla's prior inconsistent

statement about the height of the shooter because its ruling was premised on defense counsel not giving Puebla the opportunity to explain or deny making the statement, which section 16-10-201, C.R.S. (2024) does not require. OB, pp 40, 42. Defendant is wrong because he omits the second alternative requirement of section 16-10-201—that the witness must be available to give further testimony in the trial if she was not given an opportunity to deny having made the statement.

A. Preservation and Standard of Review

Defendant did not preserve this argument. When the trial court asked defense counsel whether he asked Puebla about the prior inconsistent statement to give her the opportunity to explain it or deny it, defense counsel did not argue that section 16-10-201 allowed him to introduce the statement without giving Puebla that opportunity. TR 7/15/22, p 115:20-118:25. Defense counsel agreed to withdraw the question when the trial court confirmed that counsel had never asked her about the statement. *Id.*

Defendant does not request plain error review. However, if this Court nevertheless reviews for plain error, the standards are explained

in Section I(A) above. If this Court concludes that Defendant preserved his argument, "[a] court's erroneous exclusion of a witness' prior inconsistent statements is reviewed for nonconstitutional harmless error." *People v. Salas*, 2017 COA 63, ¶31. This Court reverses "only where the error substantially influenced the verdict or affected the fairness of the trial proceedings." *Id.* (internal citations and quotation marks omitted).

This Court reviews "the trial court's decision to exclude the evidence for an abuse of discretion." *Id.*, ¶30. "A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues the law." *Id.* But "a trial court's interpretation of a statute or rule governing the admissibility of evidence is reviewed de novo." *Id.* And whether Defendant waived this claim is a question of law that's reviewed de novo. *Stackhouse v. People*, 2015 CO 48, ¶4.

B. Additional Background

During the first and second suppression hearings, the parties discussed why Puebla wasn't available to testify in person. TR 1/7/22,

pp 124:4-128:18; TR 1/21/22, pp 12:13-15:19. After the court granted the prosecution a continuance so that Puebla could be available at the second suppression hearing, the prosecution explained that Puebla avoided service of a subpoena to testify at her home in Sacramento, California, and the prosecution later filed documents for interstate rendition that listed Puebla's California address. *Id.*; CF, pp 325, 329-30. The prosecution was ultimately able to compel Puebla to appear to testify in person in Colorado for the suppression hearing in February 2022 and the trial.

On the first day of the trial, the trial court reminded the parties about section 16-10-201 and CRE 613. TR 7/12/22, p 5:10-25. The court instructed the attorneys to "make sure that when we are going to use prior inconsistent statements, we do it right….So, please, this is going to be incredibly long and there are going to be an inordinate amount of bench conferences if we don't actually observe the rules, [and] follow Rule 613 and [section] 16-10-201." *Id.*, p 66:3-11.

During cross examination, defense counsel asked Puebla about her written statement in which the said that "[t]he one who shot the

gun was the passenger. He was chubby, bald, black sweater, not white, brownish color, but arguing in English." TR 7/13/22, p 20:8-11. Defense counsel did not ask her about her prior testimony during the suppression hearing that the passenger/shooter was taller than the driver. *See* TR 2/17/22, p 29:2-13 (Puebla's suppression hearing testimony about the height of the shooter). After Puebla's testimony, the trial court released her, and did not instruct her that she was still subject to a subpoena by either party. TR 7/13/22, p 32:18-19 ("There being [no jury questions], ma'am, thank you for your time. You're free to go.").

Two days later, while defense counsel was cross examining Sanders, he asked whether Sanders agreed "that in this trial, she described the passenger as being shorter than the driver?" TR 7/15/22, p 116:1-2. Sanders agreed that Puebla said that. *Id.*, p 116:3. Defense counsel then asked, "Do you admit that on February 17th of 2022, she said that the passenger was taller than the driver?" *Id.*, p 116:4-5. The prosecutor objected based on improper impeachment, Sanders said he didn't remember Puebla saying that, defense counsel started refreshing

Sanders's recollection with the transcript of the hearing, and then the prosecutor asked the trial court to approach. *Id.*, p 116:6-22.

The following exchange occurred:

Prosecutor:	Your Honor, Ms. Puebla was never directed to this line of questioning and asked to explain it, so this is improper impeachment.
The Court:	I'm trying to recall—
Prosecutor:	I confirmed that with [the other prosecutor].
Defense counsel:	She was cross-examined. This is with regards to identification of—
The Court:	My question is, did you specifically ask her about the February—she has to be afforded an opportunity to explain or deny. And, I'm sorry, I'm just not remembering it. Do your notes show something different?
Defense counsel:	I have—my recollection is that I did.
Prosecutor:	It's not my recollection, and I confirmed with [the other prosecutor] whose witness it was.
The Court:	I don't remember that, [defense counsel]. I understand what you're doing. And assuming that she was

afforded the opportunity to explain and deny today in contrast to February, I don't see how I let the extrinsic evidence come in absent affording her that opportunity under 613 and 16-10-201.

Defense counsel: I understand. I'm happy to move on. The only question I would ask is that at some point the Court said we are not going to keep her on the witness stand forever. We can address these issues with officers—

The Court: No, I understand that. Let me just—I have pretty good electronic notes. Let me just go back and see. If you tee'd it up, it's fair game. I do it electronically now because my wife won't let me have yellow pads all over the house.

Prosecutor: It probably contains everything.

The Court: My notes talked about Exhibit 6 the aerial photograph, as well as Defendant's A. So let me look through that now. Talked about all of the letters placed on Exhibit A. She didn't say tired and confused. Asked her about her written statement. Shooter is not tall. Chubby, not white. Gordita guy did the shooting. I'm looking at redirect too.

Defense counsel: Judge, I can withdraw the question.

The Court:	I don't see the foundation there.
Defense counsel:	Understood. We'll just move on.

(The following proceedings were had in open court:)

Defense counsel:	Detective, I'll take that back. Detective, thank you for answering my questions. I don't have anything further.
The Court:	Redirect, please.

Id., pp 117:1-118:25.

C. Law and Analysis

Defendant waived this argument because counsel withdrew the question after extensive discussion and affirmatively acquiesced in the trial court's ruling. "Waiver is the intentional relinquishment of a known right or privilege," which can be implied "when a party engages in conduct that manifests an intent to relinquish a right or privilege or acts inconsistently with its assertion." *Forgette v. People*, 2023 CO 4, ¶28 (emphases and internal citations omitted). Waiver "requires intent" and "extinguishes error[.]" *Id.*, ¶¶29-30. The record shows defense counsel extensively discussed section 16-10-201's requirements with the

court and then voluntarily withdrew his question to Sanders about Puebla's prior inconsistent statement. Defense counsel therefore had the requisite knowledge to intentionally waive this claim, which distinguishes this case from other cases that have held that waiver requires more than acquiescence. *Compare Rediger v. People*, 2018 CO 32, ¶3 ("[M]ere acquiescence to a jury instruction does not constitute a waiver without some record evidence that the defendant intentionally relinquished a known right."), with *People v. Garcia*, 2024 CO 41, ¶¶30-53 (record supported a reasonable inference that the defendant's attorneys were aware his trial judge had represented him at one hearing and finding implied waiver of his claim that the judge was disqualified).

If this Court concludes Defendant did not waive his argument and proceeds to the merits, Section 16-10-201 provides:

> [w]here a witness in a criminal trial has made a previous statement inconsistent with his testimony at the trial, the previous inconsistent statement may be shown by any otherwise competent evidence…if:

> (a) The witness, while testifying, was given an opportunity to explain or deny the statement **or** the witness is still available to give further testimony in the trial; and
>
> (b) The previous inconsistent statement purports to relate to a matter within the witness's own knowledge.

(emphasis added). Section 16-10-201 therefore permits "impeachment of prior inconsistent statements by extrinsic evidence without first laying a foundation with the witness who made the inconsistent statement." *People v. Saiz*, 32 P.3d 441, 452 (Colo. 2001) (Bender, J., dissenting). Even so, "[t]he continued availability" of the witness who made the prior inconsistent statement "is a foundational requirement of impeachment" where defense counsel does not confront the witness with their prior statements. *Id.* at 445, 451 (citing §16-10-201). Section 16-10-201, "rather than CRE 613, controls the admissibility of the prior inconsistent statements for substantive purposes in a criminal case." *Montoya v. People*, 740 P.2d 992, 995 (Colo. 1987).

But section 16-10-201 and CRE 613 are not in conflict; rather, "CRE 613 is directed to situations in which a prior inconsistent statement is used only for impeachment purposes." *Id.* at 997. "CRE 613

thus will have application in all civil cases and, as well, in criminal cases whenever the foundation requirements of section 16-10-201 for admissibility have not been satisfied but the statement nonetheless qualifies for admission for the limited purpose of impeaching the credibility of the witness." *Id.* CRE 613 requires that a witness be confronted with their prior inconsistent statement before it can be used for impeachment purposes, so even if Defendant argues that he was attempting to introduce Puebla's prior inconsistent statement for impeachment only, defense counsel failed to confront her.

That leaves section 16-10-201 as the only way for Defendant to introduce Puebla's prior inconsistent statement. But as with CRE 613, its foundational requirements weren't met either. The parties understood that Puebla lived in California, so when the trial court released her from any subpoena, the parties understood that she would not be available later during the trial. Although the parties did not explicitly discuss her availability to testify later in the trial, Defendant did not object when the trial court released Puebla at the end of her testimony, and defense counsel understood that Puebla not only lived in

California but had avoided earlier subpoenas, based on extensive discussion of the prosecution's efforts to bring her to Colorado to testify. TR 1/7/22, pp 124:4-128:18; TR 1/21/22, pp 12:13-15:19

Two days later, when defense counsel attempted to introduce Puebla's prior inconsistent statement through Sanders, the court accurately interpreted section 16-10-201, concluding that defense counsel could not introduce the statement through Sanders because he did not confront Puebla with her prior statement. Although the trial court did not make explicit findings on the alternative ground—that Puebla wasn't available to testify—the record shows that everyone understood she lived in California, she was released from her subpoena two days earlier, and defense counsel did not object to her having been released. Despite the trial court's lack of explicit findings on Puebla's availability, the record does supports an implied—and correct—finding of her unavailability. Because "an appellate court may affirm a lower court's decision on any ground supported by the record, whether relied upon or even considered by the trial court[,]" the trial court did not abuse its discretion. *See People v. Dyer*, 2019 COA 161, ¶39.

Even if the Court concludes that the trial court erred by denying Defendant's request to introduce Puebla's prior inconsistent statement, any error was harmless, or if the Court concludes that Defendant did not preserve this claim, any error wasn't plain.

As to general harmlessness, through the question to Sanders, defense counsel still introduced to the jury the idea that Puebla testified inconsistently about the height of the shooter. Puebla was thoroughly cross-examined on other prior inconsistent statements she'd made concerning her identification of Defendant. TR 7/12/22, pp 219:21-234:16; TR 7/13/22, pp 7:2-22:12. And Puebla, along with every other eyewitness, was consistent about the general characteristics of the shooter.

Turning to plain error, any error wasn't obvious because section 16-10-201 requires that the witness be available to testify if she wasn't confronted with her prior inconsistent statement, and the trial court knew that Puebla had been released from her subpoena. Without some input from defense counsel, the court would have no way to know

whether she remained available.[3] After all, she had no relationship to either Rivas or Defendant that would motivate her to remain beyond the force of the subpoena that she had sought to avoid.

Finally, as discussed above, that Puebla earlier testified the shooter was taller than the driver, as opposed to the shooter being shorter, could not have substantially influenced the verdict or affected the fairness of the trial proceedings given the extent that she was impeached by other inconsistencies, as well as the overwhelming evidence of guilt, including Defendant's DNA on Rivas's face.

In the end, this Court should conclude that the trial court acted within its discretion in ruling that section 16-10-201's foundational requirements were not satisfied to introduce Puebla's prior inconsistent statement through Sanders.

III. There was no cumulative error.

Defendant argues that the combination of the trial court allowing the admission of Puebla's out-of-court identification of Defendant and

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[3] For example, defense counsel could have asked the court to take notice that Puebla had remained in the courtroom.

denying the admission of Puebla's prior inconsistent statement about the height of the shooter through section 16-10-201 constitutes cumulative error. OB, pp 44-45.

Because the trial court did not err, there is no cumulative error. Even if this Court concludes the trial court erred, those errors did not substantially affect the fairness of the trial and integrity of the fact-finding process.

This Court reviews whether cumulative error occurred de novo. *Howard-Walker v. People*, 2019 CO 69, ¶22. "A defendant, although not entitled to a perfect trial, has a constitutional right to receive a fair trial." *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986). "For reversal to occur based on cumulative error, a reviewing court must identify multiple errors that collectively prejudice the substantial rights of the defendant, even if any single error does not. Stated simply, cumulative error involves cumulative prejudice." *Howard-Walker*, ¶25.

Even if this Court concludes that the trial court erred in allowing the identification to be introduced and excluding the prior inconsistent statement, the errors together do not "show the absence of a fair trial."

Id., ¶24. *See also People v. Serna-Lopez*, 2023 COA 21, ¶48 (finding no cumulative error when two errors were committed). The standard is not, as Defendant suggests, whether the jury could have developed reasonable doubt. The standard is whether Defendant received a fair trial. *Howard-Walker*, ¶26. Given that Defendant did not meet section 16-10-201's foundational requirements for introducing Puebla's prior inconsistent statement, it wasn't unfair for the trial court to deny Defendant's attempt to introduce the statement through Sanders. And given that Puebla viewed the shooter for forty seconds and rated her certainty at an eight out of ten, among the other *Biggers*/*Bernal* factors, it was hardly unfair for the trial court to conclude that her identification was sufficiently reliable. Even if error, together they do not show the absence of a fair trial.

Additionally, given the overwhelming evidence of Defendant's guilt as discussed above, which included DNA evidence placing Defendant at the scene and other witnesses consistently describing the shooter, this Court should not conclude there was cumulative error. *See People v. Martinez*, 2020 COA 141, ¶89 (concluding that despite two

errors, overwhelming evidence of guilt precluded a conclusion of cumulative error).

CONCLUSION

For all these reasons, this Court should affirm Defendant's judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon John Byram Plimpton, Deputy State Public Defender, via the Colorado Courts E-filing System (CCES) on June 28, 2024.

/s/ Sonia R. Russo

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