COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; Adams County District Court Honorable Sean P. Finn Honorable Robert W. Kiesnawski, Jr. Case Number	DATE FILED July 12, 2024 9:39 AM
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JUAN MANUEL CASTORENA	
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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 and formatting requirements set forth in C.A.R. 28(g).

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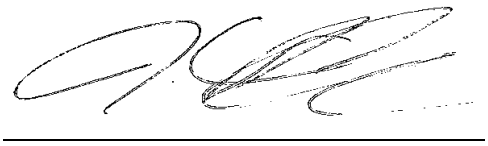

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OTHER AUTHORITIES

In response to matters raised in the State's Answer Brief (AB), and in addition to the arguments and authorities presented in the Opening Brief (OB), Juan Castorena submits this Reply Brief.

ARGUMENT

I. The trial court reversibly erred when it admitted Puebla's unreliable out-of-court identification of Castorena's photograph in an impermissibly suggestive six-photograph array.

A. Standard of Review

The trial court found the photographic array impermissibly suggestive because of Castorena's clothing in it, namely, his baggy hoodie and dark t-shirt. *See* OB at 18. The trial court's reasoning is sound. In the Opening Brief, Castorena provides three additional reasons that further support the trial court's finding: (1) the "completely black background" in Castorena's photo, (2) none of the people in the array matched Puebla's previous descriptions of the passenger/shooter, and (3) "the instructions for the photo lineup didn't inform Puebla 'that the investigation will continue whether or not [she] identifie[d] anyone as the alleged perpetrator in the photo array.'" OB at 25-26. The State argues that these additional reasons were unpreserved and should be reviewed for plain error. AB at 10-12, 25, 36.

It makes no sense to review these additional reasons for plain error because Castorena is not alleging any error in the trial court's finding of impermissible

suggestiveness. Quite the contrary, Castorena agrees with the finding. The trial court correctly determined that Castorena's clothing was sufficient to make the array impermissibly suggestive, and Castorena simply supplies additional factors that bolster the trial court's correct conclusion. As its name implies, plain error review is reserved for unpreserved claims of *error*; it is inapposite for claims of correctness.

As anticipated, the State challenges the trial court's finding of impermissible suggestiveness. AB at 21-26. Castorena may defend that finding on any ground supported by the record, which includes the trial court's explicit rationale, as well as reasons supporting the finding that the trial court may not have considered. *See People v. Quintana*, 882 P.2d 1366, 1371 (Colo. 1994) ("[O]n appeal a party may defend the judgment of the trial court on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court. … Such grounds include the express rationale of the trial court."), *abrogated on other grounds by Rojas v. People*, 2022 CO 8.

B. Law & Analysis

1. The photo array was impermissibly suggestive.

The trial court found the photographic array impermissibly suggestive partly because Castorena was the only person in the array wearing clothes similar to those

Puebla described seeing on the passenger/shooter. TR 1/7/22, pp 121-23. Prior to the lineup, Puebla described the passenger/shooter as wearing a dark, baggy, hooded sweatshirt. TR 1/7/22, pp 81:3-20, 96-97, 101-02, 105:13-24; TR 2/17/22, pp 27-28. In the array, Castorena wore a baggy hooded sweatshirt over a black t-shirt. EXs (motions hearing, 1/7/22), pp 9-16. Castorena was the only person in the array wearing a baggy hooded sweatshirt, and the only person wearing a black shirt. EXs (motions hearing, 1/7/22), pp 9-16.

The State, however, claims that "Puebla did not originally describe the shooter as wearing a dark, baggy, hooded sweatshirt." AB at 22-23. This claim is readily disproven by the record. There was copious testimony produced at the suppression hearings that, a couple weeks before the lineup, Puebla described the passenger/shooter as wearing a dark, baggy, hooded sweatshirt. TR 1/7/22, pp 81:3-20 ("two weeks prior" to preparation of the lineup, Puebla described a "dark" "hoodie"), 96-97 ("Puebla had described a hoodie" and "dark-colored clothing"), 101-02 ("Wearing a dark hoodie, I believe is what [Puebla] said."), 105:13-24 ("a couple weeks before [police] put together this lineup," Puebla said that the "person who did the shooting was wearing a dark, baggy sweatshirt"); TR 2/17/22, pp 27-28 (Puebla testifying that she told police the passenger/shooter wore "a black sweatshirt"); *see also* OB at 8-9. Thus, the trial court's factual finding that, prior to

the lineup, Puebla described the passenger/shooter as wearing a dark, baggy, hooded sweatshirt, should be left undisturbed. *See People v. Lewis*, 975 P.2d 160, 171 (Colo. 1999) ("the trial court's factual findings will not be disturbed on appeal so long as they are supported by competent evidence in the record"); TR 1/7/22, pp 122-23 (finding "the fact that Ms. Puebla talked about a hoodie of some sort"; finding the array "impermissibly suggestive based upon the fact that [Puebla] 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"; further finding that the impermissible suggestiveness of the array is exacerbated by the fact that Castorena is the only one with "a black T-shirt on").

The State attempts to downplay the requirement that the people depicted in a photographic array must match the witness's description of the perpetrator (and not merely each other). AB at 24-25. However, not only is this a statutory requirement, *see* §16-1-109(3)(a)(IV), C.R.S., it is also a requirement of case law. *See People v. Singley*, 2015 COA 78M, ¶¶13-24 (under *Bernal v. People*, 44 P.3d 184 (Colo. 2002), the suspect and fillers in a photographic array must "match the initial description given by the witness," and if they don't, the array is impermissibly suggestive); *Bernal*, 44 P.3d at 191 (it is necessary that "the picture of the

accused…matches descriptions given by the witness," and "the array must not be so limited that the defendant is the only one to match the witness's description of the perpetrator"). "[D]isparity in facial hair" (between the witness's description and the photographs in the array) "is a factor to be considered when determining whether an array is impermissibly suggestive." *People v. Plancarte*, 232 P.3d 186, 191 (Colo. App. 2009). Here, the disparity in facial hair, combined with the other factors discussed above and in the Opening Brief, rendered the array impermissibly suggestive, as the trial court concluded it was. OB at 24-26.

As argued in the Opening Brief, the lineup's noncompliance with section 16-1-109(3)(a)(III) is one more factor weighing in favor of impermissible suggestiveness. OB at 25. Contrary to the State's suggestion, Castorena does not posit that violating 16-1-109(3)(a)(III) renders a photographic lineup "thereby per se unconstitutional." AB at 26.

2. The prosecution did not prove by clear and convincing evidence that Puebla's identification was reliable despite the suggestiveness of the array.

The Opening Brief refutes the State's analysis of the *Biggers* factors. OB at 26-39; AB at 26-31. However, the State makes an incorrect factual assertion that merits a specific response here. Regarding the accuracy of Puebla's prior descriptions, the State says that "although a few details changed over four years,

important descriptors remained consistent. Puebla consistently described the shooter as *heavy-set* with a round face…" AB at 30 (emphasis added). This is not true; at the suppression hearing, Puebla described the passenger/shooter as "[t]hin and tall." TR 2/17/22, p 28:14-18; OB at 9, 17. Moreover, at the suppression hearing, Puebla described the passenger/shooter as having "short hair" and "a beard," whereas she had previously described him as being "bald" with "no facial hair." TR 1/7/22, pp 52-53; TR 2/17/22, pp 18:18-23, 26:1-5, 27:5-7, 41-42; TR 2/18/22, pp 18-19, 44:6-12; OB at 8-9.

The State acknowledges that Puebla was inconsistent about the height of the passenger/shooter relative to the driver. AB at 30. It does not acknowledge Puebla's suppression-hearing testimony that Rivas was "shorter" than the passenger/shooter, or the fact that Rivas was approximately seven inches taller than Castorena. TR 2/17/22, p 52:12-19; OB at 4-5, 17. Nor does the State acknowledge Puebla's consistent description of the passenger/shooter as "taller" than her, even though she (at 5'4" or 5'5") is taller than Castorena (at 5'3"). TR 2/17/22, p 41:6-11; TR 1/7/22, pp 14-17; OB at 4, 8, 32.

C. Harm

The State argues that, even minus Puebla's out-of-court identification, the evidence of Castorena's guilt was "overwhelming." AB at 33-35. It cites not to

evidence that Castorena was the passenger/shooter, but instead to evidence that Castorena was one of the two men fighting with Rivas before the shooting, including DNA[1] found on Rivas's face and evidence that the car by the mailboxes was Castorena's girlfriend's. AB at 33-34. Notably, if the car by the mailboxes belonged to Castorena's girlfriend, as the State claims it did, then it is more likely that Castorena was the driver, especially because police observed him driving his girlfriend's car on a later occasion. AB at 35; OB at 5, 33 & n.8. Puebla's unreliable out-of-court identification was crucial for the prosecution's case that the passenger/shooter was Castorena rather than the other person (possibly Flores-Esparza) who fought with Rivas.

The State speculates that the jury must have discounted Puebla's identification because, it claims, defense counsel drew "out every inconsistent statement Puebla made about the identification." AB at 32.

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[1] After the Opening Brief was filed, *see* OB at 5 n.3, the Colorado Bureau of Investigation found that Yvonne "Missy" Woods, the DNA analyst in this case, "tampered with DNA testing by altering or omitting some test results from the case file." Colorado Bureau of Investigation, *Colorado Bureau of Investigation Releases Internal Affairs Report into Former Forensic Scientist Missy Woods*, June 5, 2024, https://cbi.colorado.gov/news-article/colorado-bureau-of-investigation-releases-internal-affairs-report-into-former-forensic. She was "removed…from her position." *Id.* It is not yet known whether Woods's misconduct affected this case.

First, such "speculation cannot satisfy the prosecution's burden of showing that the constitutional error in this case did not contribute to the defendant's conviction." *Key v. People*, 865 P.2d 822, 827 (Colo. 1994).

Second, the State's claim that counsel drew out all of Puebla's prior inconsistent statements is simply untrue. Indeed, Castorena's second issue on appeal is that the trial court precluded counsel from drawing out Puebla's prior inconsistent suppression-hearing testimony that the passenger/shooter was taller than the driver, and the State acknowledges that this evidence did not come in. *See* AB at 36-49. Additionally, at trial, Puebla testified that she did not "recall" the passenger/shooter having facial hair, whereas at the suppression hearing she said he had a "beard" after previously telling police he had "no facial hair." TR 7/13/22, pp 24-25; TR 1/7/22, pp 52-53; TR 2/17/22, pp 18:18-23, 26:1-5, 27:5-7, 41-42; TR 2/18/22, pp 18-19, 44:6-12; OB at 8-9. Counsel did not introduce Puebla's prior inconsistent suppression-hearing testimony that the passenger/shooter had a beard.

The State writes that "Juan Flores" (i.e., Flores-Esparza) "matched the description multiple witnesses gave of the driver." AB at 33-34. Flores-Esparza may have matched the description of one of the two men who fought with Rivas, but nobody other than Puebla described "the driver" because none of the three

other percipient witnesses (i.e., Caven, Flores, and Abeyta) saw the two men when they were in or at the car. *See* OB at 6-8.

Finally, contrary to the State's claims, Puebla's identification was a big and important part of the prosecutor's opening statement and closing argument—just as one would expect in a murder case that turns on descriptions and an identification provided by a single eyewitness. TR 7/12/22, pp 21-22; TR 7/18/22, pp 115-16, 117:8-12, 142-43, 144:5-10; AB at 32; OB at 39. It was also a big part of defense counsel's closing argument because, as counsel explained to the jury, "Ms. Puebla is the only witness that puts a gun in my client's hand. She's the only witness, and she was the only evidence that you heard about that would prove murder in the first degree, would prove that my client killed anyone." TR 7/18/22, p 123:3-8.

II. The trial court reversibly erred when, based on a misunderstanding of section 16-10-201, it prohibited defense counsel from introducing Puebla's prior inconsistent testimony that the passenger/shooter was taller than the driver.

A. Background

The State correctly notes that, on the first day of trial, the trial court discussed "section 16-10-201 and CRE 613" with the attorneys. AB at 39; TR 7/12/22, pp 50:15-21, 65-66. The State omits that the trial court read section 16-10-201 into the record, stating:

> I'll just read 16-10-201 so everyone is, yet again, aware of it. "Where a witness in a criminal trial has made a previous statement inconsistent with his trial testimony, the previous inconsistent statement may be shown by any otherwise competent evidence and is admissible not only for purposes of impeaching the testimony of the witness, but also for purposes of establishing a fact to which his testimony and the inconsistent statement relate if the witness, while testifying, is given an opportunity to explain or deny the statement *or the witness is still available to give further testimony in the trial and the previous inconsistent statement purports to relate to a matter within the witness's own knowledge*."

TR 7/12/22, pp 65-66 (emphasis added).

B. Preservation & Standard of Review

The State argues that trial counsel waived this claim "because counsel withdrew the question" about Puebla's prior inconsistent testimony "after extensive discussion and affirmatively acquiesced in the trial court's ruling" that Puebla's prior inconsistent testimony was inadmissible for lack of foundation. AB at 43. Essentially, the State argues that counsel needed to take exception to the trial court's ruling excluding the prior inconsistent testimony or else waive any objection to it. But "[e]xceptions to ruling[s] or orders of the court are unnecessary." Crim. P. 51. And, under CRE 103(a)(2), a ruling excluding evidence is preserved if "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once

the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

Waiver is the intentional relinquishment of a known right or privilege. *People v. Rediger*, 2018 CO 32, ¶39. Courts indulge every reasonable presumption against waiver. *Id.* An attorney's post-ruling statements (like counsel's here) indicating that he understands the court's ruling and will move on are not waiver. As this Court has explained in circumstances materially similar to those here: "At some point after receiving an adverse ruling on an objection or argument at trial, trial counsel must accept the trial court's decision and move on. This acquiescence is not akin to a waiver, but instead permits the party adversely affected by the ruling to seek appellate relief—as defendant does here." *People v. Terhorst*, 2015 COA 110, ¶12.

Counsel said he "underst[oo]d" the trial court's ruling and would "move on" only after the trial court (1) (erroneously) ruled that, for the prior inconsistent testimony to be admissible pursuant to section 16-10-201, Puebla "ha[d] to be afforded an opportunity to explain or deny" the prior testimony; and (2) said that it did not "remember" counsel affording Puebla such an opportunity. TR 7/15/22, pp 117-18. And even after counsel made these statements, he continued to press for

admission of the prior inconsistent statement until the trial court had reviewed its notes of Puebla's testimony and made it clear it would not allow counsel to introduce the inconsistent statement because counsel had not given Puebla the opportunity to explain or deny the statement. TR 7/15/22, pp 117-18. Like in *Terhorst*, this was not the intentional relinquishment of a known right; it was preservation. *See Terhorst*, 2015 COA 110, ¶¶10-13 (counsel preserved and did not waive claim that defendant was erroneously deprived of fifth peremptory challenge when counsel said "'I think I get a fifth' peremptory challenge," trial court said "that it did not think defendant was permitted to use his [fifth] peremptory challenge 'after having passed on the people that are in there,'" and counsel responded, "okay, never mind"). The State does not cite to any case in which similar statements by counsel were held to be waiver.

C. Law & Analysis

To begin, it is important to recall that the prior inconsistent statement which counsel sought to introduce was Puebla's testimony from the suppression hearing. *See* OB at 9, 40.

The State acknowledges that, under section 16-10-201, the trial court should have allowed counsel to introduce Puebla's prior inconsistent testimony if Puebla was "still available to give further testimony in the trial." AB at 44-47. However,

the State now claims that Puebla was *un*available. AB at 46-47. It does so for the very first time. The trial prosecutors did not claim that Puebla was unavailable; they only claimed that Puebla's prior inconsistent testimony was inadmissible because "Ms. Puebla was never directed to this line of questioning and asked to explain it, so this is improper impeachment." TR 7/15/22, p 117:1-3. Furthermore, as the State acknowledges, the trial court never found on the record that Puebla was unavailable. AB at 47. Instead, as the Opening Brief argues, it is clear that the trial court misinterpreted section 16-10-201 to require "an opportunity to explain or deny the statement," despite having read the statute into the record on the first day of trial. OB at 40-43; TR 7/12/22, pp 65-66. And, in fact, the record shows that, on the first day of trial, the trial court made the same misinterpretation of section 16-10-201 that it later relied on to exclude Puebla's prior inconsistent testimony. TR 7/12/22, p 50:15-21 ("It seems to me that the only way to do this, you need to take a look at 16-10-201 and then look at the rules of evidence about prior inconsistent statements. The last time I read the rules, it was, Did you say this? No. Well, but did you make a statement on such and such date? And you say it. Okay. That's kind of how you set it up for prior inconsistent statement.").

The State speculates that Puebla was unavailable to give further testimony when counsel attempted to introduce the prior inconsistent statement because she

had returned to California. AB at 46-47. There is no record evidence that Puebla had returned to California. Prior to trial, the court issued a "Certificate of Judge for Attendance of Out-of-State Witness" which stated that "the presence of Araceli Puebla is required for the duration of the trial." CF, pp 472-73. Moreover, the record does not support the State's claim that Puebla was "released from her subpoena." AB at 40, 47. When Puebla finished testifying, the trial court thanked her for her time and told her she was "free to go," but it did not tell her she was released from her subpoena or that she would not be subject to recall. TR 7/13/22, p 32:15-20. The court did not ask the parties if there were any objections to releasing Puebla from her subpoena. TR 7/13/22, p 32:15-20. Indeed, the court did not ask the parties if Puebla could be released, though neither party objected when the trial court told Puebla she was "free to go."

Even assuming *arguendo* that Puebla had returned to California, this would not necessarily render her unavailable. Counsel sought to introduce the prior inconsistent statement on Friday. TR 7/15/22, pp 116-18. The prosecution did not rest its case until after it presented two witnesses the following Monday, after which the defense presented a case and the parties gave closing arguments. TR 7/18/22. It is possible that Puebla's attendance could have been secured for Monday. Or, if necessary, she might have been available to give further testimony

remotely (e.g., by telephone or videoconference). *See People v. Casias*, 2012 COA 117, ¶22.

In sum, there is no record support—not even statements by the prosecutors or the trial court—for the State's new claim that Puebla was not available to give further testimony. Critically, the various ways in which Puebla might have been able to give further testimony were not explored because of the trial court's misconstruction of section 16-10-201 to require an opportunity to explain or deny the prior inconsistent statement. It was an abuse of discretion for the trial court to exclude the prior statement based on this misconstruction. *People v. Salas*, 2017 COA 63, ¶30.

Even assuming *arguendo* the State is correct that Puebla was unavailable, her prior inconsistent suppression-hearing testimony would have then been admissible under CRE 804(b)(1). That rule states, in pertinent part: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding…if the party against whom the testimony is now offered…had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." CRE 804(b)(1); *see also Berger v. Coon*, 606 P.2d 68, 70 (Colo. 1980); *People v. Reed*, 216 P.3d 55, 57 (Colo. App. 2008). The prior

inconsistent statement at issue was part of Puebla's testimony from the suppression hearing in this case, so it was "[t]estimony given as a witness at another hearing of the same or a different proceeding." Also, the party against whom the statement was offered—the prosecution—had an "opportunity and similar motive" to develop the testimony by "direct" and "redirect examination" at the suppression hearing. In fact, the prosecution *did* develop the testimony at the suppression hearing on direct and redirect examination of Puebla. *See* TR 2/17/22, pp 18:18-23, 28-30, 59-60. Therefore, even if the State is correct that Puebla was unavailable, her prior inconsistent testimony should have been admitted pursuant to CRE 804(b)(1).

The State surmises that "everyone understood" Puebla was unavailable. AB at 47. But if this were true, then counsel presumably would have argued for admission under CRE 804(b)(1). The true scenario is the one the record shows: when counsel proffered Puebla's prior inconsistent testimony, the trial court erroneously ruled that section 16-10-201 requires an opportunity to explain or deny, and counsel courteously abided by that ruling and moved on. TR 7/15/22, pp 116-18.

To summarize, Puebla was either available or unavailable to give further testimony. If she was available, her prior inconsistent statement was admissible

under section 16-10-201. If she was unavailable (which the State now claims for the first time), then the prior inconsistent statement, which was testimony, was admissible under CRE 804(b)(1). Either way, the prior inconsistent statement was admissible, and the trial court abused its discretion when it excluded the statement based on its misinterpretation of section 16-10-201.

D. Harm

The State's argument for harmlessness fails because the evidence that Castorena killed Rivas—which all came from Puebla—was far from overwhelming, and admitting the prior inconsistent testimony would have simultaneously: (1) impeached Puebla's description and identification of the passenger/shooter, and (2) provided substantive evidence that Castorena was not the passenger/shooter. *See* OB at 43-44; AB at 48-49.

III. The cumulative effect of the errors identified in Arguments I and II deprived Castorena of a fair trial and warrants reversal of his conviction.

The State claims there was no cumulative error due to the supposedly overwhelming evidence against Castorena, including "other witnesses consistently describing the shooter." AB at 51-52. As discussed, the evidence that Castorena shot Rivas was far from overwhelming, and Puebla was the only witness to describe and identify the shooter. Indeed, while there was other evidence that

Castorena was one of the two men who fought with Rivas, Puebla provided the only evidence that Castorena was the shooter. Accordingly, there is a significant likelihood that the jury would have acquitted Castorena had it (1) known about Puebla's prior testimony implying that Castorena was *not* the shooter, and also (2) not known about Puebla's out-of-court identification of Castorena in the photographic lineup. *See* OB at 44-45.

CONCLUSION

For the reasons above and in the Opening Brief, Castorena respectfully asks this Court to reverse his conviction.

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CERTIFICATE OF SERVICE

I certify that, on July 12, 2024, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Sonia Raichur Russo of the Attorney General's office.