COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal; Adams District Court; Honorable Sean P. Finn and Robert W. Kiesnawski, Jr.; and Case Number 2020CR1055	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant JUAN MANUEL CASTORENA	
Megan A. Ring, Colorado State Public Defender JOHN PLIMPTON 1300 Broadway, Suite 300 Denver, Colorado 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #48262	Case Number: 2022CA1591

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

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

It contains 9,499 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.

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INTRODUCTION

Juan Castorena appeals his conviction by jury verdict for first-degree murder. At trial, the dispute was whether Castorena was misidentified as the person who shot and killed the victim, Ricardo Rivas-Mireles ("Rivas"). The shooting occurred outdoors at night in low light. The only evidence that Castorena was the shooter was the account of a single eyewitness, Araceli Puebla, who saw the shooter from approximately 100 feet away. Puebla's account of the incident changed in significant ways over time, including her description of the shooter. At trial, she testified she did not see the shooter in the courtroom.

On appeal, Castorena raises two issues. First, the trial court reversibly erred when it denied Castorena's motion to suppress Puebla's out-of-court identification of him in a suggestive photographic lineup. Second, the court reversibly erred by prohibiting counsel from introducing Puebla's prior inconsistent statement that implied Castorena was not the shooter. Additionally, Castorena asserts cumulative error.

STATEMENT OF ISSUES PRESENTED

I.   Whether 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.

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

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

STATEMENT OF CASE

The prosecution charged Castorena with first-degree murder. CF, p 572. Castorena's defense was mistaken identity. TR 7/18/22, pp 119-39. The jury found him guilty. CF, p 600. He was sentenced to life without the possibility of parole. CF, p 653.

STATEMENT OF FACTS

Rivas was shot and killed in the parking lot of his Westminster apartment complex at approximately 10:00 PM on January 30, 2018. The shooting was the culmination of a physical altercation between Rivas and two men. One of those men was the shooter. TR 7/12/22, pp 84-234.

Rivas was a drug dealer. He'd been in contact with several people who planned to meet with him to buy drugs around the time of the shooting. TR 7/12/22, pp 60-61; TR 7/15/22, pp 43-44, 67-73, 81:2-11, 86-87, 93-94.

Rivas, through his Facebook account, exchanged messages with a Facebook account under the name "Damian Casillas." Based on activity of the Casillas account and facts known about Castorena, the prosecution contended that the account was actually Castorena's and "Damian Casillas" was a pseudonym. The defense didn't concede that the Casillas account was Castorena's. EX (trial), pp 116-21; TR 7/15/22, pp 36-53; TR 7/14/22, pp 97-132.

Facebook messages between Rivas and the Casillas account user ("Casillas") going back months suggested that they were both drug dealers and Casillas would buy drugs from Rivas. EX (trial), pp 116-21; TR 7/15/22, pp 36-53, 67-73.

On the night of the shooting, Rivas sent messages to Casillas telling him to "[b]e careful taxing on that shit I know a couple of people trying to rob you,"[1] and that one of those people was named "[J]ordan." Casillas basically responded that he could take care of himself. Rivas replied, "[l]maooo [h]ell yea I'm just letting you know what's the word you know," and "[s]tay safe have a blessed night." EX (trial), pp 118-19.

Roughly 40 minutes later, Casillas and Rivas exchanged more messages. Casillas said he was outside Rivas's apartment and asked him to come outside

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[1] In the world of "drug transactions," "taxing" means "shorting" a buyer on the amount of drugs they paid for. TR 7/15/22, pp 46-47.

because he was going to "buy something." Rivas indicated he would come out to sell to Casillas. Casillas messaged, "I m by the mail boxes." A few messages from Casillas asked Rivas where he was and if he was going to come out. The last message was from Casillas to Rivas and said, "[w]hat up bro." EX (trial), pp 116-18.

Witnesses saw two men fighting with Rivas[2] in the parking lot. They described one of the men as shorter and heavyset, and the other as taller and thinner. TR 7/12/22, pp 90-91, 97-98, 160-61, 175-78, 208-09, 229:2-24. Castorena, suspected of being the shorter, heavyset man, was 5'3" and weighed 250 pounds. TR 7/15/22, pp 63:4-5, 74-75.

Police suspected Juan Flores-Esparza of being the taller, thinner man. TR 7/15/22, pp 134-35. Flores-Esparza's documented height was between 5'9" and 6'0" tall, and his documented weight was between 209 and 260 pounds. TR 7/18/22, p 41:11-25; TR 7/15/22, pp 75-76; *see also* TR 7/14/22, pp 140:16-22 (officer describing Flores-Esparza as 5'10" and 250 pounds). The lead detective "recollect[ed]" that Flores-Esparza was 5'10" or 5'11" tall, and 180 to 200 pounds. TR 7/15/22, pp 75-76, 81:15-19.

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[2] The witnesses didn't know Rivas and didn't refer to him by name; they usually referred to him by the blue Denver Nuggets jersey he was wearing. TR 7/14/22, pp 43-44; TR 7/12/22, pp 84-234.

Rivas was 5'10" ("70 inches") and weighed 159 pounds. TR 7/13/22, p 108:3-7.

A witness said that, during the altercation, she saw a gray Impala or Malibu parked with its hazard lights flashing in a "roundabout" in front of the apartment mailboxes. TR 7/12/22, pp 77-78, 105-06, 117-18. The entrance to the parking lot branched off of this roundabout. EX (trial), pp 50, 125.

Days later, police observed Castorena driving his girlfriend's silver Impala. TR 7/13/22, pp 43-44, 175-78.

DNA analysis "excluded" Castorena as a contributor to DNA on the nine shell casings at the scene. The DNA analyst, Yvonne Woods,[3] concluded there was "strong support [for] the possibility" that Castorena was a contributor to DNA swabbed from Rivas's face. Woods also concluded there was "limited support to the proposition that" Flores-Esparza's DNA was on the sweatshirt Rivas was wearing during the altercation. There was a substantial amount of DNA of unknown people found on the shell casings and on Rivas's person and clothes. TR 7/14/22, pp 147-215.

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[3] According to recent media reports, Woods was terminated from the Colorado Bureau of Investigation and is currently under criminal investigation for "anomalies" in her DNA analyses.

Four trial witnesses—all residents of the apartment complex—observed different parts of the altercation between Rivas and the two men. Those witnesses were Jeffrey Caven, Maria Flores, Jesse Abeyta, and Araceli Puebla. None of them recognized the two men. TR 7/12/22, pp 84-234.

Caven observed the altercation's early stages from his car as he was leaving the parking lot to pick up his wife from work. He witnessed the fight transform from verbal to physical. He testified that it appeared Rivas was "definitely the aggressor" towards another man. When Rivas and the man started punching each other, a "taller" third man ran towards them from the mailboxes. This taller man had something in his hand that he held "like…a gun." Caven testified that whatever the man was holding "was lit up," and Caven assumed it was a "flashlight" or a cellphone. He could see "them fighting" but he couldn't tell "who was hitting who." Caven called 911 as he drove away and didn't see anything more. TR 7/12/22, pp 145-72.

In Caven's 911 call, he describes the two men fighting with Rivas, and also "another guy standing up by the mailboxes"; Caven couldn't tell if this fourth person "was part of it or not." People's EX (trial) 13, 0:50-1:10.

The record shows that police received an anonymous Crime Stoppers tip from a tipster who was by "the bank of mail boxes" and saw the "skinny male" "pull[] out

a gun and point[] it at the two men fighting." CF, pp 206, 302, 418-19. The "tipster got out of there and was later told that the skinny guy shot the victim." CF, pp 418-19. No evidence of this tip was introduced at trial. TR 7/18/22, pp 33-36.

Maria Flores saw the shorter, heavier man holding Rivas from behind while the "taller," "thinner" man hit Rivas in the "head" and "face." Rivas fell to the ground when the taller man "knee[d]" him in the head. Flores "left the area," out of view of the men, and "called 911." She heard the gunshots while she was on the phone with dispatch. TR 7/12/22, pp 84-143; People's EX (trial) 16.

From the vantage point of his apartment window, Abeyta saw the "heavyset" man and Rivas fighting. The "taller, thin man" was "there with them" and "interacting" with them. Rivas ended up "on the ground." The heavyset man and the taller man then "walked up…towards the mailboxes" and out of Abeyta's view. Rivas "got up" and walked towards them. "He had his hands up in the air" and he "was saying something to the two individuals." Rivas "turned and ran" back through the parking lot. Abeyta heard gunshots and saw Rivas fall. The shooter was out of view. Abeyta then stopped looking out the window. TR 7/12/22, pp 172-201.

Puebla was the only witness who saw the two men after they returned to the car, and the only witness who saw the shooter shoot. She was standing in front of her apartment building. She viewed the men from approximately 100 feet away

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across a dimly-lit parking lot. TR 7/12/22, pp 203-04, 205-07, 213:9-11; TR 7/13/22, pp 29-30; EX (trial), pp 4, 9-10, 50, 52-58; CF, p 449.

Puebla first saw Rivas arguing with a man (*hereinafter* "the driver") who was standing on the driver's side of a car parked near the mailboxes. Another man (*hereinafter* "the passenger/shooter") got out of the front passenger seat, pulled a gun from his waistband, said no more than three words to Rivas, and started shooting at him. Rivas ran. The passenger/shooter kept firing at Rivas until he fell. TR 7/12/22, pp 204-15; TR 2/17/22, pp 49:10-13.

The car was gone when police arrived minutes after the shooting. TR 7/12/22, pp 76-78, 194:6-14.

In an interview immediately after the shooting, Puebla described the driver as tall and skinny, and she described the passenger/shooter as shorter and heavier than the driver. She said that the passenger/shooter was taller than she was, and she was 5'4" or 5'5". She said the passenger/shooter was bald and had no facial hair. She did not know the race of the driver or the passenger/shooter, and she said she wouldn't be able to identify either one of them. TR 7/18/22, pp 81-82, 91-94; TR 2/17/22, p 41:6-11; TR 1/7/22, pp 14-17.

In mid-May 2018, Puebla said that the passenger/shooter was a mix between white and Hispanic and the driver was white. She said the passenger/shooter was

wearing a dark, baggy, hooded sweatshirt. TR 1/7/22, pp 23:13-16, 81:17-20, 96-97, 101-02, 105:13-24; TR 2/18/22, pp 11-12, 49-50.

On May 30, 2018, Puebla was presented a six-photograph array that included a photograph of Castorena. After reviewing the array for four minutes, Puebla identified Castorena's photograph as the one that "'looks most like'" the passenger/shooter. Her confidence level was eight out of ten. TR 1/7/22, pp 81-85; EXs (motions hearing, 1/7/22), pp 9-16.

At a suppression hearing in February 2022, Puebla repeatedly testified that the passenger/shooter was taller than the driver and taller than Rivas. She even described the passenger/shooter as "[t]hin and tall." Contradicting her initial description to police, Puebla also testified that the passenger/shooter had a beard and hair on his head. TR 2/17/22, pp 18:18-23, 28-30, 41-42, 52:12-19, 58-59.

At trial, Puebla testified that she did not see the passenger/shooter in the courtroom.[4] She described the passenger/shooter as "shorter," "chunky," and Hispanic. She described the driver as tall, thin, and white. TR 7/12/22, pp 208-09, 214-15, 229:4-21.

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[4] Castorena was in the courtroom. TR 7/12/22, pp 144-45.

Flores-Esparza was still a suspect in Rivas's murder at the time of trial. Police also had other suspects who were communicating with Rivas near the time of the murder. TR 7/15/22, pp 77-78.

One suspect, Guadelupe Aguas-Lomeli, nicknamed "Porky," was a "heavyset Hispanic male," 5'8" to 5'10" in height and 250 pounds. A DNA sample was obtained from Aguas-Lomeli, but it was never submitted for analysis. His private spaces were never searched. TR 7/15/22, pp 15:14-17, 19-20, 78:10-18, 86-87.

Troy Foley was another suspect who had been contacting Rivas. He was at the apartment complex when police arrived, purportedly to meet with Rivas. Foley's girlfriend was with him. Foley was 6'0", 180 pounds, and Caucasian. He "generally matche[d]" Puebla's trial testimony describing the driver. Police didn't obtain a DNA sample from Foley. They didn't interview his girlfriend. TR 7/15/22, pp 15:8-13, 70-71, 92-95.

Another suspect was Jordan Reeves. He was a regular 10:00 PM customer of Rivas. He burned his phone prior to a police interview. The police never acquired a sample of his DNA for testing, and never searched any of his private spaces. Reeves was ostensibly the "[J]ordan" about whom Rivas warned Casillas. TR 7/15/22, pp 68-69, 81:4-11, 88-89; TR 7/13/22, pp 73-74.

ARGUMENT SUMMARY

I.   Due process prohibits admission of an out-of-court eyewitness identification of the defendant in a photographic array where (1) the defendant shows that the identification procedure was impermissibly suggestive, and (2) the prosecution fails to show by clear and convincing evidence that the identification was reliable despite the suggestive procedure.

The trial court correctly concluded that the six-photo array presented to Puebla was impermissibly suggestive. However, the court erroneously concluded that Puebla's identification was reliable despite the suggestive array. This error was not harmless.

II.   Section 16-10-201 allows a witness's prior inconsistent statement to be admitted as both impeachment evidence and substantive evidence of the fact to which the statement relates as long as the witness is still available and her prior inconsistent statement relates to a matter within her own knowledge. The statute doesn't include the foundation requirement that a witness must have denied or failed to remember the prior statement before it can be proved by extrinsic evidence.

Here, counsel tried to present extrinsic evidence of Puebla's prior inconsistent statement that the passenger/shooter was taller than the driver, which implied that Castorena wasn't the passenger/shooter. The trial court erroneously precluded

counsel from presenting the evidence under section 16-10-201 because Puebla had not been given the opportunity to explain or deny the statement. This error wasn't harmless.

III. An appellate court will reverse for cumulative error where numerous individual errors in the aggregate show the absence of a fair trial.

The errors identified in Arguments I and II cumulatively deprived Castorena of a fair trial and warrant reversal.

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. Background

Exactly four months after the shooting, on May 30, 2018, police presented Puebla with a six-photograph array that included a photograph of Castorena. Although Puebla had described the passenger/shooter as bald with no facial hair, all the men pictured had beards and hair on their heads. In Castorena's photograph, he's wearing a lighter-colored (it appears gray in the black-and-white photo), baggy, hooded sweatshirt over a black t-shirt. The hood comes up high behind his head, encircling his face. He's the only person in the array wearing a hooded or baggy sweatshirt. Puebla had previously described the passenger/shooter as wearing a dark,

baggy, hooded sweatshirt. TR 1/7/22, pp 52-54, 79-85, 96-97, 101-02, 105:13-24; EXs (motions hearing, 1/7/22), pp 9-16.

After viewing the array for four minutes and "shuffl[ing] through it more than once," Puebla said of Castorena's photograph, "'This is the one that looks most like the person who I saw commit the homicide.'" She said her confidence level was eight out of ten. TR 1/7/22, pp 84-85, 106:14-16; TR 2/18/22, pp 21-22.

Despite there being other suspects, Puebla wasn't presented with any other photo lineups. TR 1/7/22, pp 86-87.

The photograph of Castorena was a booking photo. The detective who prepared the array claimed it was the only booking photo of Castorena that he could find. However, the detective had access to Castorena's "Department of Motor Vehicles photographs." In Castorena's driver's license photo, he is wearing a simple white t-shirt. TR 1/7/22, pp 52-54, 79-81; EX (motions hearing, 1/21/22), p 1.

Before trial, counsel moved to suppress Puebla's out-of-court identification of Castorena's photograph. Counsel argued that admitting the identification would violate due process because the array was impermissibly suggestive and Puebla's identification was unreliable. CF, pp 275-77.

Evidence at the suppression hearing showed it was quite dark where the shooting occurred in the parking lot at night. TR 2/18/22, pp 32-33, 46-47, 55-57;

Defense EXs (motions hearing, 1/21/22), pp 1-4; Defense EXs (C-G, motions hearing, 1/21/22),[5] pp 5-8. All of the shell casings were found near where the car was parked in the roundabout by the mailboxes. TR 1/7/22, pp 47:16-18, 64-65; People's EXs (motions hearing, 1/7/22), p 17; TR 13-14; TR 2/18/22, p 17:11-24; Defense EXs (C-G, motions hearing, 1/21/22), pp 1-2. When Puebla witnessed the incident, she was standing on the sidewalk in front of her apartment building (she lived in apartment 122 in building 16) on the other side of the parking lot from Rivas and the two men. TR 1/7/22, pp 45-46; TR 2/17/22, pp 11-13, 33-34; EX (trial), pp 4, 125; Defense EXs (motions hearing, 1/21/22), pp 1-2. She initially guesstimated that she was standing 40 to 45 feet away from the driver, but she later admitted to not knowing the distance. TR 2/17/22, pp 15-16, 49-50; TR 2/18/22, pp 58-59. She was actually standing about 100 feet away from the shooter, and the driver was at least as far away. TR 2/18/22, pp 58-59; TR 1/7/22, pp 46-47; Defense EXs (C-G, motions hearing, 1/21/22), pp 1-2 (containing a scale bar to measure approximate distance).

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[5] The name of this PDF suggests that the exhibits it contains (Defense Exhibits C, D, E, F, and G) weren't admitted, at least not on January 21, 2022. But these exhibits were admitted at the suppression hearing on February 18, 2022. TR 2/18/22, pp 13-14, 35-36, 56:16-20.

In an overhead photo of the parking lot, Puebla placed the shooter inside the parking lot (marked with a "P" for passenger), far from where all the shell casings were found in the roundabout. TR 2/17/22, pp 21-22, 37-38; EX (trial), p 125;[6] Defense EXs (C-G, motions hearing, 1/21/22), p 1. Puebla had previously told police that the passenger/shooter was standing on a corner by the mailboxes, near where the shell casings were found. TR 2/18/22, p 35:15-18.

To police, Puebla initially described the passenger/shooter as "bald" and without facial hair. She said it was "too dark to see the color of" his hair, and she couldn't tell what his race was. She said she wouldn't be able to identify the passenger/shooter or the driver. TR 2/18/22, pp 11-12, 18-19, 43-44, 55:7-16; TR 1/7/22, p 54:7-12.

In a subsequent police interview, Puebla described the passenger/shooter as a mix between white and Hispanic. TR 1/7/22, p 23:13-16; TR 2/18/22, pp 11-12.

At the suppression hearing, Puebla described the passenger/shooter as Hispanic with short hair and a beard. She didn't remember telling police that the passenger/shooter didn't have facial hair; she said she remembered telling police that he had facial hair. TR 2/17/22, pp 18:18-23, 41-42.

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[6] Stickers on the exhibit show that Defense Exhibit A at trial and People's Exhibit 7 at the suppression hearing (admitted on February 17, 2022) are the same. EX (trial), p 125.

At the suppression hearing, Puebla testified that the driver was "white," he "had long hair" and "a ponytail," and his hair was "blonde." She had previously told police that she couldn't discern the driver's race. She had also told police either that the driver's hair was brown, or she couldn't recall the color. TR 2/17/22, p 16:4-9; TR 2/18/22, pp 8-9, 40-41; CF, p 9.

Puebla told police that it was "too dark to see" the model of the car, whether the car's windows were tinted, and the color of the passenger/shooter's hair. Flores, who witnessed part of the fight, "described the light in the parking lot as very dim." TR 2/18/22, pp 55:2-25.

Puebla initially told police that she was only in front of her apartment building for "about one minute" before she heard shots and ran back to her apartment. When police asked her if she could think of anything else, she "said no, everything was just so fast, I just saw, I don't know." Recall that Puebla first watched the driver and Rivas argue before the passenger/shooter exited the car. At the suppression hearing, Puebla testified that she was outside for "two minutes," the whole incident lasted "[t]wo minutes," and "the passenger [was] still inside of the vehicle" the "whole time." But then she testified she could see the passenger "[f]or about two minutes." Pressed to clarify, she testified that the passenger was "not" in the car the "whole time"; he was out of the car "[f]or about 40 seconds" of the two minutes she was

outside. She said the driver didn't move—he stayed next to the driver's door—the whole time she was watching. TR 2/17/22, pp 32-35, 37:4-18, 52:6-11.

Puebla was (understandably) surprised and scared when she witnessed the shooting. TR 2/17/22, pp 52-53; TR 2/18/22, pp 10-11; CF, p 10; TR 7/12/22, p 216:10-21. In its suppression order, the trial court found that witnessing the shooting was "traumatic." CF, p 452.

At the suppression hearing, Puebla described the gun as "[b]lack and small." TR 2/17/22, p 22:5-6. She had previously described the gun to police as "black" and "squared," and said the shooter held the gun with "both" hands. TR 1/7/22, p 30:3-11.

As discussed above, Puebla initially told police that the passenger/shooter was heavyset and shorter than the driver. TR 1/7/22, pp 15-16. But at the suppression hearing she described the passenger/shooter as "[t]hin and tall." She repeatedly testified that the passenger/shooter was "taller" than the driver and, conversely, the driver was "shorter" than the passenger/shooter. She testified that she didn't remember telling police that the driver was taller than the passenger/shooter. She also testified that Rivas was shorter than the passenger/shooter. (Recall that Rivas was 5'10" and Castorena is 5'3".) TR 2/17/22, pp 18:18-21, 28-29, 52:16-19, 58-59.

The trial court concluded that the photo array was unduly suggestive. It reasoned that Puebla initially described the passenger/shooter as wearing a baggy hooded sweatshirt, and Castorena was the only person in the array wearing a baggy hooded sweatshirt. Furthermore, in Castorena's photograph, the hood rises "above his ears" behind his head, encircling his head "almost like a halo." Also, everyone else in the array is wearing "somewhat light-colored shirts." Castorena, by contrast, is wearing a "black T-shirt" under the hoodie. Due to the unique baggy hoodie with the hood encircling Castorena's head, and the unique black t-shirt under the hoodie, the court found that Castorena "kind of jumps out off the page at me." TR 1/7/22, pp 121-23; *see also* EXs (motions hearing, 1/7/22), pp 9-16.

However, the court denied suppression, concluding that Puebla's identification was reliable despite the array's suggestiveness. CF, pp 438, 452.

At trial, Puebla testified that she didn't see the passenger/shooter in the courtroom. The prosecution presented evidence of her out-of-court identification of Castorena's photograph. TR 7/12/22, pp 214-16; TR 7/13/22, pp 44-53.

B. Standard of Review

This issue is preserved. CF, pp 275-77, 438-53.

This Court reviews the constitutionality of pretrial identification procedures as a mixed question of law and fact. *People v. Martinez*, 2015 COA 37, ¶9. The

Court gives deference to the trial court's findings of fact, but it may give different weight to those facts and may reach a different conclusion in light of the legal standard. *Id.* The trial court's legal conclusions are reviewed de novo. *People v. Campbell*, 2018 COA 5, ¶53.

C. Dangers of Suggestive Identification Procedures

Suggestive identification procedures "are disapproved because they increase the likelihood of misidentification and have, in the past, too often brought about the conviction of the innocent." *Bernal v. People*, 44 P.3d 184, 190 (Colo.2002). As the United States Supreme Court has observed:

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.... Suggestion can be created intentionally or unintentionally in many subtle ways.[ ] And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."

Id. "Furthermore, the Supreme Court has noted that, once an eyewitness has chosen a suspect from a line-up, that witness is 'not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'"

Id.

"Subsequent experience and empirical evidence support the Supreme Court's conclusions." *Id.* "For example, a study of forty cases in which the convicted persons were later exonerated through DNA testing revealed that ninety percent (90%) of the convictions were obtained, at least in part, by erroneous eyewitness identifications." *Id.* "The study concluded that 'mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined,' and that 'eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries.'" *Id.*; *see also Garner v. People*, 2019 CO 19, ¶1 (eyewitness identifications are "fallible" yet "so persuasive" to juries); *id.* ¶¶75-77 (Hart, J., dissenting) (same).

D. Law

Due process prohibits admission of an out-of-court eyewitness identification of the defendant in a photographic array where (1) the identification procedure was impermissibly suggestive, and (2) the identification was unreliable. U.S. Const. amend. XIV; Colo. Const. art. II, §25; *Bernal*, 44 P.3d at 190-91; *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972).

There is thus a "two-part analysis" for determining whether admission of the identification violates due process. *Bernal*, 44 P.3d at 191. "First, a court must determine whether the photo array was impermissibly suggestive, which the

defendant has the burden of proving." *Id.* "If this burden is not met, no further inquiry is necessary." *Id.* "Second, if the defendant's burden is met, the burden shifts to the People to show" by clear and convincing evidence "that despite the improper suggestiveness, the identification was nevertheless reliable under the 'totality of the circumstances.'" *Id.*; *see also People v. Walker*, 666 P.2d 113, 119 (Colo.1983) (prosecution's burden is "clear and convincing evidence"); *People v. Mattas*, 645 P.2d 254, 261 (Colo.1982) (same); *People v. Monroe*, 925 P.2d 767, 774 (Colo.1996) (same).

"In evaluating whether a pretrial photo identification procedure is impermissibly suggestive, a number of factors may be relevant." *Bernal*, 44 P.3d at 191. "These include the size of the array, the manner of its presentation by the officers, and the details of the photographs themselves." *Id.* "Although courts have held that a photo array with as few as six pictures is not per se a due process violation,…the size of a photo array, specifically the number of pictures in it, is a factor affecting the weight a court gives to the irregularities in the array." *Id.* "The more pictures used in an array, the less likely it is that a minor difference, such as background color or texture, will have a prejudicial effect on selection." *Id.*

"In contrast, when relatively few photographs are used in an array, minor differences such as background color make a picture stand out and can repeatedly draw a witness's eyes to that picture." *Id.*

> "Common sense dictates that slight irregularities are more likely to 'jump out' at a witness when reviewing a single sheet of paper with only six photographs on it than at a witness reviewing a large mug book containing hundreds of photographs. Upon continued inspection, the witness may begin to believe that the 'oddball' picture was taken under different circumstances than the others. This fact can suggest a number of things to the witness, the most dangerous of which is that the similar pictures were taken together to form a pool or control group, and that the one picture that stands out is the suspect."

Id. "Thus, the fewer photographs used by the officers in a photo array, the closer the array must be scrutinized for suggestive irregularities." *Id.*

"When the number of photographs shown has not been so small as to make the presentation itself unfairly suggestive, and there is nothing in the officials' manner of presentation that renders the procedure surrounding the array suggestive, the principal question 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." *Id.* (cleaned up). "In other words, the array must not be so limited that the defendant is the only one to match the witness's description of the perpetrator." *Id.*

"The police do not have to provide a photo array containing only exact replicas of the defendant's picture; all that is required is that the photos are matched by race, approximate age, facial hair, and a number of other characteristics." *Id.* at 191-92. "Thus, a photo array in which the individual characteristics of the accused, such as race, stand in stark contrast to the other photographs is impermissibly suggestive." *Id.* at 192.

"Although it is not required that all of the photographs in the array be uniform with respect to one given characteristic,…a photographic array that includes a photo that is unique in a manner directly related to an important identification factor may be held impermissibly suggestive." *Id.*; *accord People v. Borghesi*, 66 P.3d 93, 104 (Colo.2003).

"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." *Bernal*, 44 P.3d at 192. "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.* These are often called the *Biggers* factors. *See id.* at 194.

"In conducting this analysis, a court must balance the suggestiveness of the procedures employed against indicia of reliability surrounding the identification to determine whether the identification should be suppressed." *Id.* at 192. "Reliability is the linchpin in determining the admissibility of identification testimony." *Id.* "As long as the totality of the circumstances does not indicate a very substantial likelihood of irreparable misidentification, no constitutional impediment to the admission of the identification testimony exists." *Id.*

E. Analysis

1. The photo array was impermissibly suggestive.

The trial court was correct that the photo array was impermissibly suggestive. Puebla described the passenger/shooter as wearing a dark, baggy, hooded sweatshirt. In the array, Castorena is the only person wearing a baggy hooded sweatshirt. Additionally, as the trial court noted, the hood comes up high behind Castorena's head, encircling it almost like "a halo." And while the hoodie sweatshirt appears gray in the black-and-white photo, the t-shirt Castorena is wearing underneath it is dark, and appears black. As the trial court found, no one else in the array is wearing dark clothing. Therefore, in two respects—the baggy hooded sweatshirt and the dark

shirt underneath it—Castorena's photo is "unique in a manner directly related to an important identification factor." *Bernal*, 44 P.3d at 192.

Notably, using Castorena's booking photograph in the array wasn't necessary. The police could've used Castorena's driver's license photograph, in which he's wearing a white t-shirt. Using Castorena's license photo wouldn't have been impermissibly suggestive because that photo wasn't "unique in a manner directly related to an important identification factor."

While not noted by the trial court, Castorena's booking photo in the array is the only one of the six that has a completely black background. This "seemingly minor detail of the background compounds" the suggestiveness of Castorena's clothing, making him jump off the page even more. *Bernal*, 44 P.3d at 193-94.

Finally, although also not mentioned by the trial court, the array was suggestive because no one in it, including the "fillers," "match[ed] the original description of the perpetrator." §16-1-109(3)(a)(IV). In particular, no one in it was bald (or even close to it) or lacking facial hair. Furthermore, 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." §16-1-109(3)(a)(III). The array thus violated legislative prescriptions that ensure fair photo lineups.

Therefore, the trial court correctly concluded that the photo array was unduly suggestive.

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

The trial court was wrong to conclude that Puebla's identification was reliable despite the suggestiveness of the photo array.

For background, it's helpful to understand how the process of eyewitness recall generally works:

> [W]hen an eyewitness recalls a crime, he or she unconsciously reconstructs his or her memory of the event. In unconsciously reconstructing that memory, the eyewitness fills in the gaps in his or her factual memory of the crime based on such factors as the eyewitness's expectations, attitude, beliefs, and knowledge of similar events—without realizing he or she is doing so. These different sources of information are automatically blended together in the eyewitness's memory to produce an account of the crime that is apparently seamless and coherent but that may contain inaccuracies.

7 Jones on Evidence §61:3 (7th ed.).

Under the totality of the circumstances, including the *Biggers* factors and the influence of the array's suggestiveness, Puebla's identification wasn't reliable.

a. Opportunity to View the Passenger/Shooter

Puebla's opportunity to view the passenger/shooter weighs against reliability.

She viewed the passenger/shooter from approximately 100 feet away in low light. Distance and low light, especially in combination, make identifications unreliable. *State v. Lawson*, 291 P.3d 673, 702 (Or.2012) ("visual perception decreases with either distance or diminished lighting"); *accord* Third Circuit Task Force, 2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications, 92 Temp. L. Rev. 1, 20-21 (2019); *U.S. v. Eltayib*, 88 F.3d 157, 167 (2dCir.1996) (identification unreliable where witness viewed perpetrator's face for only few moments from 35-40 feet away in middle of night). A recent study found that "that in low lighting conditions…a likely upper distance threshold of reliable eyewitness identification is at 20 meters." Thomas J. Nyman et al., *A stab in the dark: The distance threshold of target identification in low light*, Cogent Psychology (July 5, 2019), vol. 6, issue 1, p.18, https://www.tandfonline.com/doi/epdf/10.1080/23311908.2019.1632047?needAccess=true.[7] Twenty meters is 65.6 feet.

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[7] The study's authors added that "these findings were produced using an immediate recall task," and "in a real-life scenario with a longer delay between witnessing a culprit and line-up presentation, the distance threshold is likely to be lower." Nyman, p.18. The delay between the crime and the array presentation in this case was four months.

Furthermore, Puebla's opportunity to observe the passenger/shooter was also limited by the length of time she observed him, what researchers call "exposure duration." Third Circuit Task Force, 92 Temp. L. Rev. at 86-87. "Longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications." *Lawson*, 291 P.3d at 687; *see also State v. Clopten*, 223 P.3d 1103, 1110 (Utah2009) ("brief exposure time" is one of the "factors known to contribute to mistaken identifications"); *accord State v. Haugen*, 392 P.3d 306, 318 (Or.2017). One study, for example, found that "suspects were more likely to be identified…when the exposure duration exceeded 60 s than when the exposure duration was less than 60 s." Ruth Horry et al., *Archival Analyses of Eyewitness Identification Test Outcomes: What Can They Tell Us About Eyewitness Memory?*, 38 Law & Hum. Behav. 94, 95, 101-02, 103 (2014).

Puebla first saw the driver and Rivas arguing. The passenger was in the car— she couldn't see him. The passenger got out, pulled the gun out from his waistband, said one to three words to Rivas, shot at Rivas, ran back to the car, and the car drove away. TR 2/17/22, pp 19-20, 48-49. Puebla initially estimated this entire incident to be one minute. At the suppression hearing, she changed her estimate to two minutes. She was clear that the passenger/shooter was in the car the majority of the time. *See*

TR 2/17/22, p 49:5. At the suppression hearing, Puebla settled on 40 seconds as her estimate for the duration that the passenger-shooter was within her view.

Research shows that "people tend to overestimate the length of brief viewing experiences." Third Circuit Task Force, 92 Temp. L. Rev. at 86. This is especially true "if conditions were stressful or involved other stimuli." *Young v. State*, 374 P.3d 395, 423 (Alaska2016); *accord Lawson*, 291 P.3d at 702. "Duration estimates may become even less reliable when"—as with Puebla at the suppression hearing—"they are made following positive postidentification feedback." Ruth Horry et al., *Archival Analyses of Eyewitness Identification Test Outcomes: What Can They Tell Us About Eyewitness Memory?*, 38 Law & Hum. Behav. 94, 103 (2014).

Thus, Puebla's estimate at the suppression hearing that the passenger/shooter was within view for 40 seconds was likely an overestimate. In any event, Puebla's exposure duration was short.

In sum, Puebla's opportunity to view the passenger/shooter was poor due to the low light, far distance, and short exposure duration. The "opportunity to view" factor therefore weighs against reliability.

b. Degree of Attention

Puebla's degree of attention on the passenger/shooter was diminished by two variables known to reduce the reliability of eyewitness identifications: weapon focus and stress.

"Weapon focus" is the concept that "the presence of a weapon at the crime scene tends to draw the eyewitnesses' attention, distracting them from the face of the perpetrator." *United States v. Nolan*, 956 F.3d 71, 80 (2dCir.2020); *accord Bernal*, 44 P.3d at 190; *Garner*, 2019 CO 19, ¶86 (Hart, J., dissenting); *Young v. Conway*, 698 F.3d 69, 80-81 (2dCir.2012).

The record shows that Puebla's attention was drawn to the gun. She described the passenger/shooter pulling the gun from his waistband, she described the gun's appearance, and she described how the passenger/shooter held the gun as he fired it. All this attention on the gun distracted Puebla from viewing and encoding the appearance of the passenger/shooter. *Lawson*, 291 P.3d at 701 (weapon focus causes "diminished attention" which "frequently impairs the witness's ability to encode things such as facial details into memory, resulting in decreased accuracy in later identifications").

Puebla's attention was distracted by other things, as well. *See id.* ("A person's capacity for processing information is finite, and the more attention paid to one

aspect of an event decreases the amount of attention available for other aspects."). She described watching Rivas run, slow down, and then fall upon being shot. TR 2/17/22, pp 16-22. She described watching the driver stay where he was the entire time the passenger/shooter was out of the car. TR 2/17/22, pp 34-35. Thus, the record shows that Puebla's attention to the gun, Rivas, and the driver distracted her during the short time she had to perceive and encode into memory the passenger/shooter's appearance in low light and from a long distance.

Additionally, "[h]igh levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications," as they "significantly impair a witness's ability to recognize faces and encode details into memory." *Lawson*, 291 P.3d at 700; *see also Garner*, 2019 CO 19, ¶86 (Hart, J., dissenting); Brian L. Cutler, Ph.D., *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 334 (2006) ("twenty-seven separate tests involving over 1700 participant-witnesses…clearly showed that stress had a negative impact on identification accuracy").

Puebla was understandably scared when she witnessed the shooting. As the trial court found, it was "traumatic." CF, p 452. However, the court appeared to be laboring under the "common misconception that faces seen in highly stressful

situations can be 'burned into' a witness's memory." *Lawson*, 291 P.3d at 701; *see* CF, p 452. Puebla's stress and trauma weigh against the reliability of her identification.

In sum, Puebla's degree of attention to the passenger/shooter's appearance was low because her attention was distracted by the gun, Rivas, and the driver, and she was under significant stress when she witnessed the shooting.

c. Accuracy of Puebla's Prior Description of the Passenger/Shooter

Puebla previously described the passenger/shooter as being bald, having no facial hair, and being taller than her (recall she is "5'4" or 5'5""). TR 2/17/22, p 25-26, 27:5-7, 41:6-11; TR 1/7/22, pp 52-53. That doesn't match Castorena.

In Castorena's array photograph, he clearly has hair on his head and face. This marks a change in appearance from Puebla's prior description of the passenger/shooter as being bald with no facial hair. Such changes in appearance reduce the reliability and accuracy of the subsequent identification. Third Circuit Task Force, 92 Temp. L. Rev. at 92. In particular, studies have "found that changing hairstyles reduced identification accuracy." *Id.*

Aside from being bald and lacking facial hair, Puebla's previous description of the passenger/shooter's face was vague and imprecise. She said he had a "round face" and "darker skin." TR 2/18/22, pp 11-12, 42:13-15. She initially said she didn't

know the passenger/shooter's race and that she wouldn't be able to identify him. In a later interview, she said she thought the passenger/shooter was "a mix between white and Hispanic." TR 1/7/22, pp 23:13-16; TR 2/18/22, pp 11-12. It wasn't until she received positive post-identification feedback after a suggestive identification procedure that she started describing the passenger/shooter as only Hispanic. TR 2/18/22, pp 11-12; *see also Lawson*, 291 P.3d at 710 ("post-identification confirming feedback tends to falsely inflate witnesses' confidence in the accuracy of their identifications, as well as their recollections concerning the quality of their opportunity to view a perpetrator and an event").

Additionally, while Puebla had initially described the passenger/shooter as being shorter and more heavyset than the driver, at the suppression hearing she described the passenger/shooter as being "[t]hin" and taller than both the driver and Rivas. This raises the possibility that Castorena may have been the driver[8] or Puebla may have seen him in a different context, and Puebla might have misattributed the role of passenger/shooter to him through a process of "unconscious transference." *See Lawson*, 291 P.3d at 709 ("Studies have found that witnesses who…have incidentally but innocently encountered a suspect may unconsciously transfer the familiar suspect to the role of criminal perpetrator in their memory."); Unconscious

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[8] This seems likely if indeed the car was Castorena's girlfriend's.

transference, 7 Jones on Evidence §61:7 (7th ed.) ("Eyewitnesses sometimes identify as the perpetrator a bystander to the crime or an individual they saw in a different context or situation, a phenomenon often referred to as 'unconscious transference.'"); Jonathan P. Vallano et al., *Familiar Eyewitness Identifications: The Current State of Affairs*, 25 Psychol. Pub. Pol'y & L. 128, 133 (2019) ("One pernicious example" of a "cognitive process[] that can be faulty despite an accurate familiarity judgment" "is the phenomenon of unconscious transference whereby an eyewitness accurately adjudges familiarity…but mistakenly identifies a familiar--but innocent--individual as the perpetrator.").

In sum, Puebla's initial description of the passenger/shooter was short on details. Of the few details she provided, most (i.e., bald, no facial hair, taller than her) didn't accurately describe Castorena. Moreover, Puebla's subsequent inconsistent and protean descriptions of the passenger/shooter suggest a memory contaminated by source-monitoring errors (of which unconscious transference is a kind). *See* Richard A. Wise et al.*, How to Analyze the Accuracy of Eyewitness Testimony in A Criminal Case*, 42 Conn. L. Rev. 435, 457-58 (2009) (source-monitoring errors occur when eyewitnesses "become confused about where they learned information about a crime or where they saw an individual," including unconscious transference); Unconscious transference, 7 Jones on Evidence §61:7 n.3

(7th ed.) ("'Unconscious transference' is a specific type of source monitoring error.").

Therefore, the accuracy of Puebla's prior description weighs against reliability.

d. Puebla's level of certainty

After reviewing the suggestive six-photo array for four minutes, Puebla said Castorena's photograph looked most like the passenger shooter of all the photographs. When asked for her level of confidence, she said it was only eight out of ten.

It's unclear if Puebla was eighty-percent confident that Castorena's photo *looked most* like the passenger/shooter of all the photographs, or eighty-percent confident that Castorena was the passenger/shooter.

In any event, a mere eighty-percent confidence level supports unreliability. *See People v. Santiago*, 958 N.E.2d 874, 883-84 (N.Y.2011); *Nooner v. Hobbs*, 689 F.3d 921, 936 (8thCir.2012).

To the extent eighty-percent confidence might be considered high in some circumstances, Puebla's eighty-percent confidence doesn't substantially support the reliability of her identification because "an initial high-confidence identification must be made under pristine circumstances to have value; if not, the witness's high

confidence may well be the result of suggestive conditions, such as…the fact that

the suspect stood out from the fillers." Third Circuit Task Force, 92 Temp. L. Rev.

at 86-87; *accord Garner*, 2019 CO 19, ¶¶76, 89 n.4 (Hart, J., dissenting)

("confidence 'is not a reliable predictor of the accuracy of the identification,

especially where the level of confidence is inflated by its suggestiveness'").

Puebla's eighty-percent confidence is further undercut by the fact that she

viewed the suggestive array for four minutes, shuffling through it multiple times,

before selecting Castorena's photograph. *See State v. Henderson*, 27 A.3d 872, 909

(N.J.2011) (citing a study that concluded "'[d]ecision time and lineup fairness were

the best postdictors of accuracy'"). "Accurate identifications generally tend to be

made faster than inaccurate identifications." *Lawson*, 291 P.3d at 704. "[F]aster

identifications correlate with accuracy because the automatic cognitive process

associated with facial recognition operates faster than the deliberative cognitions

used to make relative judgments, a process that is more likely to result in

misidentification." *Id.*; *see also* Melanie Sauerland et al., *Assessing Nonchoosers'*

Eyewitness Identification Accuracy from Photographic Showups by Using

Confidence and Response Times, 36 Law & Hum. Behav. 394, 394-95 (2012)

("[S]trong memories permit quick and accurate decisions, while weaker memories

lead to slower, less reliable decisions."). "One study found that the most accurate

identifications were made within 10 to 12 seconds." *Lawson*, 291 P.3d at 704. "A later study, however, noted a positive correlation to accuracy with response times ranging from five to 29 seconds." *Id.* A four-minute decision time is far beyond the range for reliable identifications, especially with a suggestive array. *See id.* ("[S]tudies have shown that suggestive identification procedures can result in quicker identifications without any corresponding increase in accuracy.").

Therefore, Puebla's confidence level weighs against reliability.

e. Length of Time Between Crime and Confrontation

Puebla was presented the photo array four months after the murder.

"[M]emory decays over time." *Lawson*, 291 P.3d at 705. "The more time that elapses between an initial observation and a later identification procedure (a period referred to…as a 'retention interval')…the less reliable the later recollection will be." *Id.*; *Garner*, 2019 CO 19, ¶¶74, 87 (Hart, J., dissenting). "An aspect of memory decay that is less well known, however, is that decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time." *Lawson*, 291 P.3d at 705. "Courts across the country now accept that...a person's memory diminishes rapidly over a period of hours rather than days or weeks." *State v. Guilbert*, 49 A.3d 705, 721-22 (Conn.2012).

"Estimating the effect of memory decay, however, turns in large part on the strength and quality of the initial memory encoded; a witness forgets, over time, only what was encoded into the witness's memory to begin with. Scientists generally agree that memory never improves." *Lawson*, 291 P.3d at 705. "Consequently, memory decay must be viewed in conjunction with other variables that affect the initial encoding of memories, such as…weapon-focus, degree of attention, distance, lighting, and duration of initial exposure." *Id.*

A four-month retention interval weighs against reliability. *See United States v. Wilson*, 787 F.2d 375, 386 (8thCir.1986); *Kubat v. Thieret*, 867 F.2d 351, 359 (7thCir.1989); *State v. Lehr*, 38 P.3d 1172, 1184 (Ariz.2002); *People v. Miller*, 626 N.E.2d 1350, 1360 (Ill.App.Ct.1993); *see also Biggers*, 409 U.S. at 201 ("a lapse of seven months…would be a seriously negative factor in most cases"); *State v. Artis*, 47 A.3d 419, 444 (Conn.App.Ct.2012) ("a delay of months…is not an indicator of reliability"), *rev'd on other grounds*, 101 A.3d 915 (Conn.2014). That is especially so here, since there were so many variables that negatively affected the initial encoding of Puebla's memories.

f. Conclusion

For the reasons discussed above, all of the *Biggers* factors weigh against reliability. Therefore, the prosecution failed to prove by clear and convincing

evidence that, based on the totality of the circumstances, Puebla's identification was reliable despite the suggestiveness of the array. The admission of Puebla's out-of-court identification violated Castorena's right to due process.

F. Harm

The prosecution must show that the unconstitutional admission of Puebla's out-of-court identification was harmless beyond a reasonable doubt. *People v. Martinez*, 2015 COA 37, ¶10. "If there is a reasonable possibility the error contributed to the conviction," this Court "will reverse." *Id.*

The prosecution cannot carry its burden. Puebla provided the only evidence that Castorena was the passenger/shooter. She didn't identify Castorena as the passenger/shooter at trial. There were other suspects in the case—Flores-Esparza, Aguas-Lomeli, Foley, and Reeves—who could've fit one or more of Puebla's ever-changing descriptions of the passenger/shooter. The trial evidence didn't rule them out.

Eyewitness identification evidence, despite its fallibility, is extremely persuasive to a jury. *Garner*, 2019 CO 19, ¶1; *id.* ¶¶75-77 (Hart, J., dissenting). And in closing argument, the prosecutor repeatedly relied on Puebla's identification to argue for Castorena's guilt. TR 7/18/22, pp 115-16, 142-43, 144:5-10.

Therefore, there is more than a reasonable possibility that the unconstitutionally-admitted identification evidence contributed to Castorena's conviction for first-degree murder. Reversal is required.

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 statement that the passenger/shooter was taller than the driver.**

A. Background

At trial, Puebla testified that the passenger/shooter was shorter than the driver. TR 7/12/22, pp 208-09, 229:2-24; TR 7/13/22, pp 15-16.

Counsel later tried to introduce, through the lead detective, Puebla's prior inconsistent testimony from the suppression hearing that the passenger/shooter was taller than the driver. TR 7/15/22, pp 115-17.

The trial court understood that counsel was trying to introduce Puebla's prior inconsistent statement that the passenger/shooter was taller than the driver. TR 7/15/22, p 117:18. The court prohibited counsel from introducing the statement, reasoning that there was no "foundation there" because counsel didn't "afford" Puebla the "opportunity" to "explain or deny" making the statement "under…16-10-201." TR 7/15/22, pp 117-18.

In closing argument, the prosecutor told the jury that Puebla had "repeatedly" described "the shooter as shorter and heavier than the driver." TR 7/18/22, p 112:7-11.

B. Preservation & Standard of Review

Counsel offered Puebla's prior statement as a prior inconsistent statement, the trial court explicitly understood what counsel was doing, and the court precluded counsel from presenting the statement explicitly based on its (mis)understanding of section 16-10-201. Therefore, the court ruled on this issue and it's preserved. CRE 103(a)(2); *People v. Salas*, 2017 COA 63, ¶¶27-29; *People v. Jones*, 907 P.2d 667, 669 (Colo.App.1995); *Itin v. Ungar*, 17 P.3d 129, 130 (Colo.2000); Crim. P. 51; *People v. Terhorst*, 2015 COA 110, ¶¶11-12.

This Court reviews the trial court's decision to exclude a witness's prior inconsistent statement for an abuse of discretion. *Salas*, 2017 COA 63, ¶30. "However, a trial court's interpretation of a statute or rule governing the admissibility of evidence is reviewed de novo." *Id.* "A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues the law." *Id.*

C. Law

Section 16-10-201, C.R.S., provides:

(1) Where 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 and is admissible not only for the purpose of impeaching the testimony of the witness, but also for the purpose of establishing a fact to which his testimony and the inconsistent statement relate, 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.) Thus, as long as the witness is still available and her prior inconsistent statement relates to a matter within her own knowledge, section 16-10-201 allows the prior statement to be used as both impeachment evidence and substantive evidence of the fact to which the statement relates. *Salas*, 2017 COA 63, ¶33; *see also People v. Saiz*, 32 P.3d 441, 445 (Colo.2001) (a prior inconsistent statement that's admissible under 16-10-201 is admissible for both "substantive purposes" and "impeachment purposes"). The statute "'does not include the foundation requirement that a witness must have denied or failed to remember the prior statement before it can be proved by extrinsic evidence.'" *Salas*, 2017 COA 63, ¶33.

D. Analysis

Here, the trial court obviously misconstrued section 16-10-201 to have the foundational requirement that the witness must be given the opportunity to explain or deny their prior inconsistent statement before it's proved by extrinsic evidence. Explicitly based on this misconstrual, the court precluded counsel from presenting extrinsic evidence of Puebla's prior statement that the passenger/shooter was taller than the driver. This ruling was an abuse of discretion because it was based on a misinterpretation of 16-10-201.

E. Harm

"A court's erroneous exclusion of a witness'[s] prior inconsistent statements is reviewed for nonconstitutional harmless error." *Salas*, 2017 COA 63, ¶31. "Reversal is warranted only where the error 'substantially influenced the verdict or affected the fairness of the trial proceedings.'" *Id.* "To determine if that occurred," the Court looks "to whether the prosecution has shown that there is no reasonable possibility that the error contributed to the defendant's conviction." *Rojas v. People*, 2022 CO 8, ¶53 (cleaned up).

The prosecution cannot make this showing.

It's hard to overstate the importance of Puebla's prior inconsistent statement to Castorena's defense that he was not the passenger/shooter. Counsel presented

evidence tending to raise a reasonable doubt about Castorena's guilt, but he didn't present any substantive evidence tending to show that Castorena was in fact not the passenger/shooter. And while there was other evidence that Castorena was one of the two men in the altercation with Rivas, Puebla provided the only evidence that Castorena was the passenger/shooter and not the driver. A particularly probative aspect of Puebla's account was her description of the passenger/shooter as being shorter than the driver. At 5'3", Castorena is short for a man—significantly shorter than the other suspects, including Flores-Esparza, Aguas-Lomeli, and Foley.

Admitting Puebla's prior statement that the passenger/shooter was *taller* than the driver would have: effectively impeached her trial testimony that the passenger/shooter was shorter than the driver; cast substantial doubt on the reliability of her memory of the shooting generally, including her identification of Castorena in the photo lineup; and shown the jury substantive evidence that Castorena was, in fact, not the passenger/shooter (even if he might've been the driver). This easily could've raised a reasonable doubt about Castorena's guilt in the jurors' minds.

Therefore, Castorena's conviction should be reversed.

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.

An appellate court will reverse for cumulative error where, although "multiple" errors may be deemed individually harmless, in the aggregate they show

the absence of a fair trial. *Howard-Walker v. People*, 2019 CO 69, ¶¶23-26. "Stated simply, cumulative error involves cumulative prejudice." *Id.* ¶25.

As previously explained, the errors identified in Arguments I and II were individually prejudicial. *See supra* Arguments I.F & II.E. As discussed above, Puebla provided the only evidence that the shooter was the passenger, that the passenger/shooter was the shorter of the two men fighting with Rivas, and that the passenger/shooter was Castorena. Had the court excluded Puebla's unreliable out-of-court identification of Castorena and admitted her prior statement that the passenger/shooter was taller than the driver (which implied Castorena was *not* the passenger/shooter), it's very likely that the jury would've had a reasonable doubt and acquitted Castorena. The combination of these errors undermines the fairness of the trial and warrants reversal of Castorena's conviction.

CONCLUSION

Castorena respectfully asks this Court to reverse his conviction.

> MEGAN A. RING
> Colorado State Public Defender
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>
> _____
> JOHN PLIMPTON, #48262
> Deputy State Public Defender
> Attorneys for Juan M. Castorena
> 1300 Broadway, Suite 300
> Denver, Colorado 80203
> (303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on December 4, 2023, a copy of this Opening Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Jillian J. Price of the Attorney General's office through their AG Criminal Appeals account.

Chmy L. Bron