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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Douglas County District Court
Honorable Patricia D. Herron, Judge
Case No. 20CR556

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

BRIAN SALTZMAN,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 23CA1143

PHILIP J. WEISER, Attorney General
CARMEN MORALEDA, Senior Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Floor
Denver, CO 80203
Telephone: 720-508-6000
E-Mail: AG.Appellate@coag.gov
Registration Number: 34852
*Counsel of Record

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains **5,254** words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Carmen Moraleda

Signature of attorney

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

PAGE

STATEMENT OF THE CASE

Following a jury trial, defendant, a police officer and firearms instructor, was convicted of the lesser-included offense of third-degree assault, prohibited use of a weapon, and reckless endangerment.[1] CF, pp 274-79, 428; TR 4/25/23, p 192:7-15; TR 4/27/23, pp 199-200, 219. The case arose out of an incident at a party defendant hosted to celebrate the completion of another officer's training program, and where defendant, highly intoxicated, shot his gun, hitting another guest in her leg.

At trial, defendant conceded that his actions in shooting his gun while intoxicated were negligent, but not reckless, because when he fired his gun, he was not aware that the victim (NL) was behind him. *See* TR 4/27/23, pp 179-80, 184; CF, p 328. As noted, the jury found him guilty of the lesser-included offense of third-degree assault, which

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[1] Defendant was charged with second-degree assault (reckless), prohibited use of a weapon, and reckless endangerment. CF, pp 1-2 (complaint); 333-36 (jury instructions).

required that defendant acted with criminal negligence, rather than recklessly. *See* CF, pp 274, 334.

The trial court sentenced defendant to 24 months of supervised probation and 45 days of jail time as a condition of probation. TR 6/30/23, pp 43-44.

Defendant now directly appeals, contending the trial court erred in denying his motion to suppress evidence found in his home pursuant to a warrant (specifically a Colt 1911 gun), because it was the fruit of an illegal protective sweep. Defendant's claim fails of its merits. But assuming error, it was harmless beyond a reasonable doubt because—regardless of the Colt 1911 gun found in defendant's residence (and other evidence)—many witnesses testified that defendant (who was highly intoxicated) pulled his gun out, fired it, and hit the victim. And, in any event, defendant admitted he fired his gun and was intoxicated, and conceded he acted with criminal negligence.

STATEMENT OF THE FACTS

Defendant hosted a party at his residence to celebrate that another officer had completed his field training. *See* TR 4/25/23, pp 23-24, 98-99, 131-32, 158, 192-93, 220. Most guests were law enforcement or employed in law enforcement, including defendant's girlfriend. TR 4/25/23, p 24:8-14. Defendant was drinking alcohol "quite a bit," and became more intoxicated as the night progressed, to the point that people around were "offering their shoulders for him to put his hand on and rest his weight against and keep him upright"; according to witnesses' accounts, defendant was very intoxicated, unsteady of his feet, "wobbly," and "hammered." TR 4/25/23, pp 30-32, 107-08, 133, 196, 221. People gathered around a fire pit in the backyard, and they went in and out the house through the basement door to get food and drinks. TR 4/25/23, pp 194-95.

Later in the evening, NL went inside the house to get water, and as she was walking back outside to the fire pit, she saw a muzzle flash, heard a shot, and ended up on the ground, later realizing she had been shot. TR 4/25/23, pp 28, 34-35, 102. Sometime after, defendant sat by

NL and said she was fine and did not get shot; she told him she had been shot and to call an ambulance; defendant told her she was fine and could sleep on the couch; defendant later whispered in her ear "I'm sorry. I'm sorry. I'm sorry." TR 4/25/23, pp 40-41. Then, someone was on the phone with dispatch, who asked where the gun was; defendant said "It's gone." TR 4/25/23, p 42:1-5. Shortly after, the paramedics arrived. TR 4/25/23, p 42:12-13. NL did not believe defendant intended to shoot her, rather he was trying to show off. TR 4/25/23, pp 49-50.

Another guest (SY) testified that, before the shooting, he heard defendant say "eyes and ears," which SY (who had military and law enforcement experience) explained was a "preparatory command given prior to gunfire commencing on a range." TR 4/25/23, p 103:1-6. Seconds after, he saw defendant access a firearm he had underneath his shirt, pulled it out, "pointed it kind of behind him to about 4, 5 o'clock position behind him," and "discharged one round." TR 4/25/23, pp 103-05. SY then saw NL hit the ground. TR 4/25/23, pp 105:25-106:1-7. SY described defendant's level of intoxication as "hammered." TR 4/25/23, pp 107-08.

SY's girlfriend (KG) also heard a loud pop and then saw defendant "shoving a gun back into his front holster or front pants." TR 4/25/23, pp 137-38. She also described defendant as highly intoxicated. TR 4/25/23, pp 140-41.

Another guest (EH) also heard defendant say, "eyes and ears," which she explained was an expression that meant that someone was going to shoot a gun. TR 4/25/23, pp 163-64. EH then saw defendant "looking like he was aiming at the ground toward [NL]," who just walked out of the basement of the house. TR 4/25/23, p 164:4-6. Next, EH saw defendant holding a gun, then, "[t]he round went off," and NL fell. TR 4/25/23, p 165:21-24.

Another guest (JB) testified that, right before the shooting, defendant asked SY whether he told SY's girlfriend what "eyes and ears" meant; then defendant pulled the gun out and fired it into the ground; and the round struck NL in her leg. TR 4/25/23, pp 197-98. JB did not see anyone other than defendant carrying a gun; and it was defendant who fired the gun. TR 4/25/23, p 214:21-25. JB left the house

before police and paramedics arrived, but contacted police two days later and provided a report of the incident. TR 4/25/23, pp 200-01.

When police arrived, they were invited into the home. The person who had opened the door told the officers the victim was downstairs and in the backyard, and guided them to where the stairs leading to the backyard were. The officers took the stairs and walked through the basement (flashing a flashlight because some parts/rooms were dark) and then outside where the victim was; defendant was lying next to her. *See* Exhibits.pdf, BWC Brown 00_30_40 to 00_32_54.mpg.

Defendant was visibly drunk, and he could barely stand up. *See* Exhibits.pdf, BWC Brown 00_54_13 to 01_01_46.mpg.

SUMMARY OF THE ARGUMENT

The trial court's suppression ruling was correct, but assuming error, it was harmless beyond a reasonable doubt. At trial, many eyewitnesses testified defendant was highly intoxicated and was the person who pulled his gun and fired the shot that hit the victim. Indeed, defendant did not dispute he fired his gun and that he was intoxicated;

rather, he contended he acted with criminal negligence, but not recklessly. So even assuming that the trial court erred in denying defendant's motion to suppress the evidence found in defendant's home (specifically a Colt 1911 gun), any error was harmless beyond a reasonable doubt. Contrary to defendant's contention on appeal, what gun defendant fired was not critical to the prosecution's case because many witnesses testified defendant, who was highly intoxicated, was the shooter, which defendant did not dispute. And, as set forth above, the jury found him guilty of the lesser-included offense of third-degree assault.

ARGUMENT

The trial court properly denied defendant's motion to suppress the fruits of a protective sweep, but assuming error, it was harmless.

A. Preservation and Standard of Review

Except as indicated below, the People agree this claim was preserved. CF, pp 99-102; TR 1/6/22; TR 1/11/22; TR 4/7/22. The People also agree review of a trial court's suppression order presents a mixed question of law and fact; this Court defers to the trial court's findings of

fact if they are supported by the record, but it assesses the legal effect of those facts de novo. *People v. Raider*, 2022 CO 40, ¶ 8.

The People further agree that any error is reviewed under the constitutional harmless error standard. *Hagos v. People*, 2012 CO 63, ¶ 11. An error is constitutionally harmless if the reviewing court is confident beyond a reasonable doubt that the error did not contribute the guilty verdict. *Zoll v. People*, 2018 CO 70, ¶ 18.

B. Suppression Proceedings

As noted, defendant moved to suppress the fruits of the protective sweep at his residence, asserting it was unreasonable, conducted after defendant was placed under arrest, and beyond the scope of a protective sweep. CF, pp 99-102.

After a multi-day hearing, where four officers testified (Pelle, Ruisi, Maracine, and Bach), the trial court denied the motion, finding the police officers' protective sweep was reasonable. TR 1/6/22, pp 1-84; TR 1/11/22, pp 1-44; TR 4/7/22, pp 1-18 (parties' arguments); CF, pp 135-39.

C. Trial Court's Suppression Ruling

Based on the suppression testimony and other evidence admitted, the trial court entered the following findings and conclusions:

● On May 25, 2020, defendant was having a party at his residence with several other individuals; alcohol was consumed; and defendant discharged a firearm behind him, striking one of the guests (NL) in the leg. CF, pp 12, 135; TR 1/11/22, pp 13-14.

● Police officers arrived approximately 11 minutes after the incident was reported; the 911 call came in at 12:17 a.m. on May 25, 2020, and Deputy Brown arrived at the front door at 12:28 a.m.; it was apparent based on the number of cars in the drive and the amount of food and alcohol that numerous people had just been at the residence, but were either no longer at the residence or could not be seen or located by the officer. CF, p 135; TR 1/6/22, pp 19-20, 22, 58, 68; TR 1/11/22, pp 12-13, 18-21.

● Upon arriving, Deputy Brown and another deputy were let into the front door by a guest at the party (ES), who directed them to the victim, who was downstairs and outside through the basement; as

Deputy Brown went towards the basement steps, he quickly flashed his flashlight around a room and then went down to the basement and again briefly flashed his flashlight through the open area in the basement as he walked out the basement door to the victim; Deputy Brown went back into the basement to direct the paramedics to the victim; he went back inside and checked the bathroom which was open; he then went up the stairs to talk with ES; the deputy then left the residence and did not conduct a protective sweep. CF, p 136; Exhibits.pdf, BWC Brown 00_30_40 to 00_32_54.mpg.

● Additional deputies arrived shortly thereafter; Deputy Ruisi initially looked at the vehicles in the driveway and two of them had firearms in plain view; Ruisi went through the house and directly into the backyard; at this time, the deputies conducted a pat down of defendant and his girlfriend (as captured in Ruisi's body camera[2]); at 12:58 a.m., Corporal Bach (who was in charge of the scene), told Deputy Ruisi to conduct a protective sweep of the residence; Bach did not know

[2] The electronic record contains two recordings from Deputy Brown's body camera.

for sure whether everyone at the house had been accounted for; Ruisi started the protective sweep with other deputies at 1:00 a.m., and it was completed at 1:12 a.m.; defendant was formally arrested at 3:19 a.m. on May 25, 2020. CF, pp 13, 136; TR 1/6/22, pp 44, 59-60 (Ruisi's testimony), 64-65 (Maracine's testimony); TR 1/11/22, pp 14-19, 37 (Bach's testimony); Exhibits.pdf, BWC Brown 00_30_40 to 00_32_54.mpg; Exhibits.pdf, BWC Brown 00_54_13 to 01_01_46.mpg.

● Contrary to defendant's assertion that he was under arrest after the protective sweep,[3] the deputies were trying to determine what had occurred; Corporal Bach realized that no one had conducted a pat down search of defendant (TR 1/11/22, pp 16-18); body camera footage showed that defendant had difficulty standing and balancing; another deputy started to pat down defendant, who told him he had a gun in his front pocket; at that time Corporal Bach stated "let's slap him in cuffs just for

[3] In the order, it seems the court mistakenly stated defendant argued the protective sweep was conducted *before* he was arrested; defendant argued the sweep was conducted *after* he was placed under arrest. *Compare* CF, p 138, *with* CF, p 100 (¶ 5).

now, he's not under arrest." CF, p 138; TR 1/11/22, pp 16-18; Exhibits.pdf, BWC Brown 00_54_13 to 01_01_46.mpg.

● Both defendant and his girlfriend refused to tell officers who fired the gun, where it was located, or if anyone had it; one guest observed defendant fired either a Colt 1911 or a .38 revolver; the report was received by dispatch at 12:17 a.m., and the first deputies arrived at 12:28 a.m.; defendant was not placed into protective custody until 12:53 when it was learned he had a firearm in his pocket along with clips for a .45 caliber weapon; the protective sweep started at 1:00 a.m. and ended at 1:12 a.m.; defendant was not arrested until 3:19 a.m. CF, pp 12-13, 138; TR 1/6/22, pp 15-16; TR 1/11/22, pp 37-38; Exhibits.pdf, BWC Brown 00_54_13 to 01_01_46.mpg.

● Given the deputies' observations of several unaccounted-for individuals who had been or were still somewhere in the residence, as well as not knowing who the shooter was and where the firearm was located, the protective sweep was reasonable; the scope of the search was related to the exigency that justified the warrantless search to

ensure the safety of everyone on the scene.[4] CF, p 138; TR 1/6/22, pp 32-33, 44-45.

● The protective sweep of the large three-story house and four-car garage lasted 12 minutes; the sweep focused on looking where any individual could be hiding. CF, p 138; Exhibits.pdf, EX #1, p 3; Exhibits.pdf, BWC Brown 00_30_40 to 00_32_54.mpg; Exhibits.pdf, BWC Brown 00_54_13 to 01_01_46.mpg.

● The prosecution met its burden of establishing the protective sweep was reasonable and there was probable cause to believe numerous additional individuals were at the residence given the number of vehicles and the amount of food and alcohol; the firearm used had not been located and there were several firearms in plain view in vehicles outside the residence as well as other firearms that were seen

[4] To the extent the court did not misspeak in using the term "search," it appears that it found that, if there was a search (in addition to a protective sweep), it was justified under the exigent circumstances doctrine. *See* CF, p 138 (the court stated "[t]he scope of the search was related to the exigency that justified the warrantless search to ensure the safety of everyone on scene[,]" citing *People v. Wright*, 804 P.2d 866, 869 (Colo. 1991) (discussing that warrantless searches are authorized when exigent circumstances are present)).

in the basement as deputies passed through to get to the victim and defendant. CF, pp 138-39; TR 1/6/22, pp 64-68.

D. This Court does not need to address the merits of defendant's suppression claim because any error was harmless beyond a reasonable doubt given the overwhelming evidence of guilt and defendant's concession.

As set forth in the statement of the facts, overwhelming and undisputed evidenced established that the day of the incident defendant was highly intoxicated and he fired the gun that hit the victim. Thus, even if the trial court erred in not suppressing the evidence recovered pursuant to a search warrant—specifically, the Colt 1911 gun that was recovered and tested for the presence of defendant's DNA[5]—the error was harmless beyond a reasonable doubt.

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[5] The People note that defendant stipulated that "[o]n June 16, 2020, DNA was collected … from [defendant] and [his girlfriend]. The DNA was collected via a cheek swab and submitted to CBI for comparison." CF, p 332 (Jury Instruction No. 13). Defendant's and his girlfriend's DNA was found on the Colt 1911 gun recovered. TR 4/26/23, pp 90-93 (the expert testified the "likelihood ratio" associated with defendant (61% contributor) was higher than the one associated with his girlfriend (28% contributor)).

Again, that evidence was not critical to the prosecution's case because independent overwhelming evidence established guilt, and otherwise defendant admitted he fired the round that hit the victim and conceded he acted with criminal negligence and was intoxicated. Indeed, in closing argument defense counsel argued that it was clear that defendant was intoxicated, had a gun, and acted negligently—particularly considering he was a firearms instructor and range master. TR 4/27/22, pp 179-80, 184-85. *See Bartley v. People,* 817 P.2d 1029, 1034 (Colo. 1991) ("A constitutional error is harmless when the evidence properly received against a defendant is so overwhelming that the constitutional violation was harmless beyond a reasonable doubt."); *People v. Rosa*, 928 P.2d 1365, 1371 (Colo. App. 1996) ("Even if we assume that defendant's testimony at the suppression hearing would have resulted in the suppression of the notebook, the admission of the notebook into evidence did not affect a substantial right of defendant as there was other independent and overwhelming evidence of guilt."); *People v. Muniz*, 622 P.2d 100, 103-04 (Colo. App. 1980) (admission of fruits of illegal search harmless error where there was overwhelming

evidence of defendant's guilt). Therefore, reversal is unwarranted because any error could not have contributed to the convictions.

Alternatively, the record demonstrates that under the independent source doctrine (or the inevitable discovery doctrine as the prosecution argued, TR 4/7/19, pp 7-8), the evidence would have been discovered independent of any illegality. For example, one of the eyewitnesses (JB) contacted police two days after the incident and wrote a report about the incident, which would have been sufficient to justify a warrant (and it would have led to discovery of the same evidence). TR 4/25/23, pp 200-01; TR 1/6/22, pp 38-39. *See People v. Morley*, 4 P.3d 1078, 1081 (Colo. 2000) ("Despite the undisputed illegality of the initial entry, the Thornton officers subsequently obtained evidence from the apartment pursuant to the legal search conducted under the authority of a valid search warrant."); *People v. Dominguez-Castor*, 2020 COA 1, ¶ 20 ("the [independent source] doctrine may apply where evidence was initially discovered during an unlawful warrantless entry or search but later seized (or re-seized) when the police executed a valid search warrant").

Indeed, the police would have sought a warrant based on the witnesses' statements at the scene (and the victim's gunshot injury), independently of what was observed during the alleged illegal entry or search. *See Murray v. United States*, 487 U.S. 533, 543 (1988) (evidence should not be suppressed as long as "agents would have sought a warrant if they had not earlier entered the warehouse"); *see also People v. Arapu*, 2012 CO 42, ¶ 32 ("We conclude that [the detective] would have sought a search warrant for drugs regardless of whether the firearm had been seen. Second, we conclude the firearm would have been discovered when the search warrant was executed regardless of whether it had previously been seen."); *People v. Pahl*, 169 P.3d 169, 175 (Colo. App. 2006) (the independent source doctrine focuses on whether the warrant "was based upon information independent from what was observed during the illegal search").

E. If this Court addresses the merits of defendant's suppression claim, it fails.

The Fourth Amendment protects individuals from unreasonable searches and seizures. *Maryland v. Buie*, 494 U.S. 325, 331 (1990).

Generally, the search of an individual's house without a search warrant is unreasonable and violates the Fourth Amendment. *Id.* Exceptions to this general rule arise when the benefits to the public interest outweigh the individual's privacy right. *Id.* One such exception is a protective sweep conducted in conjunction with the arrest of an individual in his home. *Id.* at 327; *see also United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001) ("[T]he principle enunciated in *Buie* with regard to officers making an arrest—that the police may conduct a limited protective sweep to ensure the safety of those officers—applies with equal force to an officer left behind to secure the premises while a warrant to search those premises is obtained.").

In *Buie*, the supreme court laid out the contours of a constitutional protective sweep:

> [A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer

> in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Buie, 494 U.S. at 334; *accord People v. Aarness*, 150 P.3d 1271, 1280 (Colo. 2006) ("police were justified in conducting a 'protective sweep' of the residence incident to Aarness's lawful arrest").

Here, to begin with, and contrary to what defendant contends for the first time on appeal,[6] Officer Brown's entry into the house was legal because it was consented; and it was not a search because the officer simply went down the stairs and into the basement leading to the backyard following the guest's instructions as to where the victim was. *See Aarness*, 150 P.3d at 1277 ("This Court has discretion to affirm the trial court's denial of Aarness's motion to suppress on different grounds than those relied upon by the trial court.").

Defendant does not argue that under the circumstances, the guest who invited the officers into the house did not have apparent authority

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[6] In his motion, defendant argued only that the protective sweep was illegal under *Buie*, and thus all fruits should be suppressed. Defendant did not argue that police entered the house without his consent. *See* CF, pp 99-102.

to consent, particularly considering the exigent circumstances they faced. What is more, the record (officer's body camera) shows that defendant implicitly consented to the officers' presence in the house. *See* Exhibits.pdf, BWC Brown 00_30_40 to 00_32_54.mpg; Exhibits.pdf, BWC Brown 00_54_13 to 01_01_46.mpg. *See Aarness*, 150 P.3d at 1277 ("On appeal, a party may defend the trial court's judgment on any ground supported by the record, whether relied upon or even considered by the trial court.").

Accordingly, the entry was legal because the police were invited and were reporting to an emergency at the house. *See Brigham City, Utah v. Stuart,* 547 U.S. 398, 398 (2006) ("one exigency obviating the [warrant] requirement is the need to render emergency assistance to occupants of private property who are seriously injured or threatened with such injury"); *Aarness*, 150 P.3d at 1277 (exigent circumstances justify a warrantless search where "there is a colorable claim of emergency threatening the life or safety of another"); *United States v. Rodriguez-Pacheco*, 948 F.3d 1, 7 (1st Cir. 2020) ("best examples" of exigent circumstances include "imminent threat to the life or safety of

the public, police officers, or a person in residence") (internal citation omitted); *United States v. Collins*, 321 F.3d 691, 694 (8th Cir. 2003) ("One exigent circumstance that may justify entry without a warrant is when the police reasonably believe that a person within is in need of immediate aid.") (internal citation omitted).

In addition, contrary to defendant's contention, the trial court's findings regarding the protective sweep were supported by the record and the law. *See People v. Grazier*, 992 P.2d 1149, 1155 (Colo. 2000) ("As the reviewing court, we defer to the trial court's findings of fact if they are supported by the record. . . . We do not substitute our judgment for that of the trial court unless its findings are clearly erroneous or lack evidentiary support."). It is the function of the trial court and not the reviewing court to weigh the evidence and determine the credibility of the witnesses. *People v. Mendoza-Balderama*, 981 P.2d 150, 157 (Colo. 1999); *see also People v. Thomas*, 853 P.2d 1147, 1149 (Colo. 1993) ("Deference is given to the trial court's findings of fact and, as long as there is support for them, we will not overturn such findings. This is true even though a contrary position may find support in the record and

even though we might have reached a different result had we been acting as the finder of fact.").

Initially, defendant takes issue with the timing of his arrest. He argues that the sweep was not incident to an arrest because the trial court found that defendant was not formally arrested until 3:19 a.m., which was over two hours after the protective sweep (*see* OB, p 16). Yet, as defendant's acknowledges, he was placed into protective custody (as the trial court found) when police discovered he had a gun in his front pocket, which occurred before the sweep. CF, p 138. *But see United States v. Starnes*, 741 F.3d 804, 810 (7th Cir. 2013) ("[T]he constitutionality of a protective sweep does not depend on whether that sweep is incidental to a search warrant, an arrest warrant, or a consensual search."); *United States v. Lawlor*, 406 F.3d 37, 41 (1st Cir. 2005) ("[A] protective sweep may be conducted *following an arrest* that takes place just outside the home, if sufficient facts exist that would warrant a reasonably prudent officer to fear that the area in question could harbor an individual posing a threat to those at the scene.") (emphasis added); *United States v. Garcia*, 997 F.2d 1273, 1282 (9th

Cir. 1993) (permitting protective sweep pursuant to consent entry); *State v. Davila*, 999 A.2d 1116, 1127 (N.J. 2010) ("[W]e discern no basis from *Buie* itself to justify restricting its authorization of protective sweeps to the arrest context. Our conclusion is bolstered by the many jurisdictions already to have considered the applicability of the *Buie* standard to searches that do not fit neatly within the in-home-arrest paradigm.").

Defendant next argues that because he was placed into protective custody in the backyard, "there was no justification for officers to conduct a protective sweep of the inside of the house, much less of the entire premises." (OB, p 16). This claim misses the mark of a protective sweep as articulated in *Buie*; the "linchpin of the protective sweep analysis is not 'the threat posed by the arrestee, [but] the safety threat posed by the house, or more properly by unseen third parties in the house.' " *United States v. Jones*, 667 F.3d 477, 484 (4th Cir. 2012) (quoting *Buie*, 494 U.S. at 336); *see also United States v. Cavely,* 318 F.3d 987, 995 (10th Cir. 2003) ("Although . . . *Buie* involved an in-home arrest, courts have recognized that the same exigent circumstances

present in *Buie* can sometimes accompany an arrest just outside of a residence or other structure. Depending on the circumstances, the exigencies of a situation may make it reasonable for officers to enter a home without a warrant in order to conduct a protective sweep."); *United States v. Henry*, 48 F.3d 1282, 1284 (D.C. Cir. 1995) ("Although *Buie* concerned an arrest made in the home, the principles enunciated by the Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence.").

As the trial court found, the protective sweep was justified because police did not know who the shooter was. *See Mora v. City of Gaithersburg*, 519 F.3d 216, 226 (4th Cir. 2008) (upholding a preventive search when officers "did not and could not fully know the dimensions of the threat they faced"). Neither defendant nor his girlfriend told the officers who fired the gun or where the recently fired gun was located, and there were several unaccounted-for individuals who had been or could still be somewhere in the residence (in fact during the sweep, police saw a woman, presumably defendant's mother, coming out of a room, TR 1/6/22, pp 45-46; CF, p 138, n.4). *See Lawlor*, 406 F.3d at 41

(underlying a protective sweep is the "'risk of danger in the context of an arrest in the home' due primarily to the reality that there may be 'unseen third parties in the house.'") (quoting *Buie*, 494 U.S. at 333, 336).

Indeed, police could reasonably believe additional individuals were somewhere in the residence (or outside) given the number of vehicles (some of them with firearms in plain view) and the amount of food and alcohol in the house, and that these individuals presented a danger to police, also considering the number of guns in plain view in the basement. *See United States v. Laudermilt*, 677 F.3d 605, 611 (4th Cir. 2012) ("The district court's ruling failed to 'recognize that unaccounted-for third parties with access to firearms may present a grave danger to arresting officers.' . . . That grave danger permitted the officers to conclude the sweep of the entire house."); *Fishbein v. City Of Glenwood Springs,* 469 F.3d 957, 962 (10th Cir. 2006) (protective sweep justified because "unaccounted-for third parties with access to firearms may present a grave danger to arresting officers"); *United States v. Tobin*, 923 F.2d 1506, 1513 (11th Cir. 1991) (upholding protective sweep

where, among other facts, officers had reasonable belief that someone would be hiding in the house because three vehicles were on scene).

Moreover, the sweep—of the large three-story house and four-car garage—lasted only 12 minutes, which further demonstrated that it was quick and limited to secure the safety of the police officers. *See United States v. Burrows*, 48 F.3d 1011, 1016 (7th Cir. 1995) (noting that the *Buie* inquiry is "very fact-specific" and that one of the guiding considerations is the house's "particular configuration"); *see also United States v. Winston*, 444 F.3d 115, 120 (1st Cir. 2006) ("[T]he validity of a protective sweep 'does not turn on the availability of less intrusive investigatory techniques.") (quoting *United States v. Sokolow*, 490 U.S. 1, 11 (1989)). In addition, when police arrived, it was dark. The videos show that it was difficult to see, and there were many places inside the large house and outside where someone could be hiding and ambush the officers.

Defendant relies on *United States v. Bagley*, 877 F.3d 1151, 1153-56 (10th Cir. 2017), to argue that the police lacked specific, articulable facts to believe a dangerous person could be hiding inside the house or

outside. But, as the trial court reasoned (CF, p 138), *Bagley* is factually distinguishable at many levels because there, unlike here, police had a search warrant for defendant and there was no evidence (or any indication) that other dangerous people could be in the house.

In contrast here, police were dispatched to the residence on the report of a shooting and that a female was shot (TR 1/6/22, pp 43, 63); when they arrived, they did not know who the shooter was, and specific and articulable facts showed that there were (or could be) uncounted-for and dangerous individuals (who could be the shooter) based on the number of cars parked outside, the amount of food and alcohol on the premises, and the number of firearms inside the house and in the cars parked outside. *See United States v. Gandia*, 424 F.3d 255, 261 (2d Cir. 2005) ("Unlike most warrantless searches, which focus on the immediate danger posed by a suspect, a *Buie* protective sweep allows officers to stop a potential ambush by searching for unseen third parties."). Thus, *Bagley* is inapposite.

Therefore, the law and record amply support the trial court's findings of fact and ultimate legal conclusions. Accordingly, this Court

should affirm the suppression ruling. And, in any event, as argued above, the record demonstrates that any error was harmless beyond a reasonable doubt because there is no reasonable probability that it could have contributed to the convictions based on the overwhelming evidence of guilt, the irrelevance of the type of weapon to the charged crimes, and defendant's concessions.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm defendant's convictions and sentence.

PHILIP J. WEISER
Attorney General

/s/ Carmen Moraleda
CARMEN MORALEDA, 34852*
Senior Assistant Attorney General
Criminal Appeals Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

MATTER ID: 9811

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **TAYLOR IVY**, and all parties herein, via Colorado Courts E-Filing System (CCES) on November 13, 2023.

Caitlin E. Grant