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COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 La Plata County District Court Honorable Suzanne Carlson, Judge Case No. 19CR486 Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant-Appellant, BRADLEY TODD CLARK.	**▲ COURT USE ONLY ▲**
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PEOPLE'S ANSWER 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:

The brief complies with C.A.R. 28(g).

It contains 7,680 words.

The brief complies with C.A.R. 28(a)(7)(a) and 28(b).

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

The brief also contains statements concerning both the standard of review and preservation of the issue for appeal.

Patrick A. Withers

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

STATEMENT OF THE FACTS AND CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. The trial court did not violate the rules of evidence 4

A. Preservation and Standard of Review 4

B. CRE 404(b) did not preclude evidence of Defendant's motive for the crime: enjoying setting bags on fire. 4

1. The evidence was relevant to show that Defendant had a motive to commit the crime 5

2. The motive evidence is relevant for reasons other than to cast aspersions on Defendant's character. 7

3. The unfair prejudice does not substantially outweigh the motive evidence's relevance. 14

C. Admitting evidence that Defendant was arrested after starting a dumpster fire was within the trial court's discretion 17

1. The officer's testimony about Defendant's prior arrest was admissible. 18

a. The evidence is relevant to rebut Defendant's theory of the case. 18

b. The risk of unfair prejudice does not substantially outweigh its probative value. 25

TABLE OF CONTENTS

PAGE

2. The trial court properly exercised its discretion when it admitted the search-warrant affidavit. 28

a. CRE 106 permitted the trial court to admit the affidavit. 28

b. The rule against hearsay did not apply to the affidavit because it was admitted under CRE 106. 35

II. Criminal mischief should merge into second-degree arson, but attempted first-degree assault should not merge. 37

A. Preservation and Standard of Review 37

B. Defendant should stand convicted of second-degree assault and attempted first-degree assault.. 37

1. The criminal-mischief and second-degree arson convictions should merge. 40

2. The elements of second-degree arson and attempted first-degree arson are mutually exclusive and, therefore, do not include one another. 41

CONCLUSION 42

TABLE OF AUTHORITIES

PAGE

CASES

Bell v. People, 406 P.2d 681 (Colo. 1965) 10

Cagle v. Mathers Family Trust, 2013 CO 7 36

Davis v. People, 2013 CO 57 24

Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994) 34

Henderson v. United States, 632 A.2d 419 (D.C. 1993) 29

Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011) 27

Masters v. People, 58 P.3d 979 (Colo. 2002) 5, 8, 9

Monfore v. Phillips, 778 F.3d 849 (10th Cir. 2015) 25

Page v. People, 2017 CO 88 .... 37, 38, 41, 42

People v. Alemayehu, 2021 COA 69 24

People v. Bobian, 2019 COA 183 24

People v. Clark, 2015 COA 44 .... 9, 13

People v. Cobb, 962 P.2d 944 (Colo. 1998) 19

People v. Cousins, 181 P.3d 365 (Colo. App. 2007) 10

People v. Davis, 218 P.3d 718 (Colo. App. 2008) 36

People v. Delsordo, 2014 COA 174 6

People v. Dist. Court, 869 P.2d 1281 (Colo. 1994) 15, 16, 26

People v. Gibbens, 905 P.2d 604 (Colo. 1995) 15

TABLE OF AUTHORITIES

PAGE

People v. Goree, 349 N.W.2d 220 (Mich. Ct. App. 1984) 15

People v. Heredia-Cobos, 2017 COA 130 18

People v. Ibarra, 849 P.2d 33 (Colo. 1993) 26

People v. Knight, 167 P.3d 147 (Colo. App. 2006) 29, 35

People v. Leonard, 872 P.2d 1325 (Colo. App. 1993) 5, 13

People v. McBride, 228 P.3d 216 (Colo. App. 2009) 9

People v. McLaughlin, 21SC506, 2022 WL 815563 (Colo. Mar. 14, 2022) 37

People v. Medina, 51 P.3d 1006 (Colo. App. 2001)................................... 25

People v. Montoya, 2022 COA 55M 29, 35, 36

People v. Mountjoy, 2016 COA 86 39

People v. Orozco, 210 P.3d 472 (Colo. App. 2009) 19, 24

People v. Phillips, 175 Cal. Rptr. 703 (Cal. Ct. App. 1981) 6

People v. Rath, 44 P.3d 1033 (Colo. 2002)................................... 7, 13, 16

People v. Robinson, 908 P.2d 1152 (Colo. App. 1995)............................. 15

People v. Rock, 2017 CO 84 .... 38, 39, 42

People v. Short, 2018 COA 47 .... 29, 35, 36

People v. Sims, 2020 COA 78 37

People v. Snyder, 874 P.2d 1076 (Colo. 1994) 9

People v. Spoto, 795 P.2d 1314 (Colo. 1990)... 4

TABLE OF AUTHORITIES

PAGE

People v. Victorian, 165 P.3d 890 (Colo. App. 2007) 18

People v. Welborne, 2018 COA 127 40

People v. Welsh, 80 P.3d 296 (Colo. 2003) 19

People v. Wood, 2019 CO 7 39

People v. Zubiate, 2013 COA 69 36

Rojas v. People, 2022 CO 8 4

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008) 25

State v. Crumb, 649 A.2d 879 (N.J. Super. Ct. App. Div. 1994) 8

Thompson v. State, 491 P.3d 1033 (Wyo. 2021) 27

U.S. v. Goodwin, 457 U.S. 368 (1982) 8

United States v. Awan, 607 F.3d 306 (2d Cir. 2010) 10

United States v. Brown, 767 F.2d 1078 (4th Cir. 1985) 27

United States v. Cunningham, 103 F.3d 553 (7th Cir. 1996) 8

United States v. Fonseca, 49 F.4th 1 (1st Cir. 2022) 25

United States v. Harry, 816 F.3d 1268 (10th Cir. 2016) 29, 30, 35

United States v. Jordan, 813 F.3d 442 (1st Cir. 2016) 25

United States v. McRae, 593 F.2d 700 (5th Cir. 1979) 15

United States v. Ramos-Caraballo, 375 F.3d 797 (8th Cir. 2004) 30

United States v. Schrock, 855 F.2d 327 (6th Cir. 1988) 15

United States v. Siddiqui, 699 F.3d 690 (2d Cir. 2012) 16

TABLE OF AUTHORITIES

PAGE

Wagman v. Knorr, 69 Colo. 468, 195 P. 1034 (1921) 6

Woellhaf v. People, 105 P.3d 209 (Colo. 2005) 37

Yusem v. People, 210 P.3d 458 (Colo. 2009) 11, 12, 13

STATUTES

§ 18-1-408(1), C.R.S. (2022) 38, 42

§ 18-1-408(3), C.R.S. (2022) 39, 42

§ 18-4-102(1), C.R.S. (2022) 41

§ 18-4-103(1), C.R.S. (2022) 40, 41

§ 18-4-501(1), C.R.S. (2022) 40

OTHER AUTHORITIES

Interview by Goodreads, Inc., with Neil Gaiman, posted on September 18, 2008, *available at* www.goodreads.com/interviews/show/12.Neil_Gaiman 1

RULES

CRE 106 .... passim

CRE 401 .... 7, 13, 20, 24

CRE 402 24

CRE 403 .... 15, 25, 26, 27

CRE 404(b) 8, 10, 24

CRE 801(c) 27

CRE 802 27

TABLE OF AUTHORITIES

PAGE

TREATISES

Bailey, F. Lee and Kenneth J. Fishman, *Criminal Trial Techniques* 14

Edward J. Imwinkelried, *Uncharged Misconduct Evidence* (2009) . 10, 12

Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, (Mark S. Brodin, ed., Matthew Bender 2d ed. 1997) 30

John H. Wigmore, *Evidence in Trials at Common Law* 29

INTRODUCTION

A jury convicted Defendant, Bradley Todd Clark, of attempted first-degree arson, second-degree arson, and criminal mischief. *See* CF, p 709. He received an aggregate four years in prison. *See id.*

Defendant now seeks a new trial based on multiple evidentiary issues. Alternatively, he seeks to merge his convictions. Defendant's criminal-mischief conviction and second-degree arson convictions should merge, but the judgment should otherwise be affirmed.

STATEMENT OF THE FACTS AND CASE

To paraphrase Neil Gaiman, life provides no explanations—only inexplicably odd moments. *See* Interview by Goodreads, Inc., with Neil Gaiman, posted on September 18, 2008, *available at* www.goodreads.com/interviews/show/12.Neil_Gaiman. And this is true of this case more than most: someone set fire to paper bags of tortilla chips in a grocery store, and the first report of the fire came from a young man who calmly told a grocery-store worker, "Your chips are on fire. I didn't start it. I was just trying to get some candy." *See*. TR 8/23/21, pp 258:19–260:11,

267:18–268:4 (258–260, 267–68); TR 8/24/21, pp 145:5–22, 163:19–25 (479, 497).[1]

Naturally, this young man was an early focus of the ensuing investigation. *See* TR 8/23/21, pp 243:23–244:4 (243–44); TR 8/24/21, pp 113:8–114:22, 121:25–123:14 (447–48, 455–57). But soon the investigation swerved; a loss-mitigation officer for the grocery store viewed the security footage and told the lead investigator that Defendant had started the fire. *See* TR 8/23/21, p 244:5–12 (244); TR 8/27/21, pp 156:17–159:1 (1289–1292).

The prosecution presented this series of events as the normal maturation of an investigation. The defense, however, portrayed this as a "rush to judgment" caused by the police blindly accepting the loss-mitigation officer's opinion, rather than conducting a proper investigation. *See id.* And once Defendant had been selected as the arsonist, both the police and the prosecution selectively gathered and

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[1] The transcripts are consecutively paginated. So, the first set of page numbers in transcript citations refers to the PDF page number, while the printed page numbers follow in parentheses.

manipulated evidence to reach their pre-selected conclusion. *See infra* Part I.C; TR 8/27/21, pp 152:11–21, 154:3–156:16 (1285, 1287–89).

The prosecution charged Defendant with attempted first-degree arson, second-degree arson, and criminal mischief. *See* CF, p 451. The jury convicted him as charged. *See* CF, p 709.

SUMMARY OF THE ARGUMENT

The trial court properly admitted evidence of a past incident involving Defendant lighting a bag on fire and using it to cause a small dumpster fire. Because it provided a motive for Defendant to commit this odd crime, it was relevant to identity and therefore admissible despite CRE 403 and CRE 404(b). Evidence that Defendant was arrested for—but not convicted of—the dumpster fire likewise was relevant to rebut the defense's theory of the case; because the police learned of this arrest in their investigation before they sought search warrants, the jury could conclude that the investigators conducted a thorough investigation and relied on more than the loss-mitigation officer's opinion. And CRE 106 allowed the prosecution to admit statements to this effect in a search-warrant affidavit out of fairness,

given the defense's blistering use of selections from the same affidavit in cross-examination.

The criminal-mischief conviction should merge into the second-degree arson conviction. But attempted first-degree arson does not meet the test for merging convictions and should remain.

ARGUMENT

I. The trial court did not violate the rules of evidence.

A. Preservation and Standard of Review

Defendant's challenges are preserved. Review is for abuse of discretion. *See Rojas v. People*, 2022 CO 8, ¶ 16.

B. CRE 404(b) did not preclude evidence of Defendant's motive for the crime: enjoying setting bags on fire.

In *Rojas v. People*, ¶ 51, the Colorado Supreme Court clarified that any evidence of misconduct extrinsic to the charged offense must pass through the test first announced in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). Under this test, evidence is admissible if it is (1) relevant (2) for reasons other than to cast aspersions on the defendant's character, and

(3) the risk of unfair prejudice must not outweigh the evidence's relevance to the case.

Here, the trial court admitted evidence that Defendant's neighbor years ago had seen Defendant put a burning bag in a dumpster. *See* TR 8/25/21, pp 54:3–60:22 (686–92). After the neighbor went to the police about the incident, Defendant confronted his neighbor about the report. *See* TR 8/25/21, pp 60:23–62:23 (692–94). As will be discussed below, admitting this evidence was not an abuse of discretion.

1. The evidence was relevant to show that Defendant had a motive to commit the crime.

Evidence of motive helps to prove that the defendant was the person who committed the charged crime. *See People v. Leonard*, 872 P.2d 1325, 1328 (Colo. App. 1993). This is especially so when the crime appears otherwise inexplicable. *See Masters v. People*, 58 P.3d 979, 992 (Colo. 2002) ("While a prosecutor ordinarily need not prove motive as an element of a crime, the absence of apparent motive may make proof of the essential elements less persuasive. Clearly that was the principal problem confronting the prosecutor here. In the absence of a

motivational hypothesis, and in the light of other information which the jury had concerning her personality and character, the conduct ascribed to [the defendant] was incongruous and apparently inexplicable." (brackets in original) (quoting *People v. Phillips*, 175 Cal. Rptr. 703, 712 (Cal. Ct. App. 1981))). For this reason, "'motive is always relevant' to establish whether the defendant committed the charged act and why, and [it] may also explain otherwise unexplainable behavior." *People v. Delsordo*, 2014 COA 174, ¶ 14 (quoting *Wagman v. Knorr*, 69 Colo. 468, 470, 195 P. 1034, 1035 (1921)).

Here, the jury was faced with a bizarre crime: lighting bags of tortilla chips on fire in a store. And the prosecution was trying to convince the jury that the culprit was Defendant—a local college professor—rather than a much younger alternate suspect who had exhibited odd behavior. *See* TR 8/24/21, p 44:10–25 (378); TR 8/25/21, pp 64:24–65:7 (696–97). So, showing that Defendant had some reason to commit the crime would make his identity as the culprit more likely.

And that is what the challenged testimony did. A jury could conclude from the evidence that Defendant liked to light bags on fire

and watch the fire spread. This would explain why Defendant was a suspect and give the jury a reason to believe that he had lit the fire. Because the existence of a motive made the main issue in the case—Defendant's commission of the crime—more likely, the evidence was relevant. *See* CRE 401 (defining evidence as relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

2. The motive evidence is relevant for reasons other than to cast aspersions on Defendant's character.

As discussed above, motive is a "well-accepted method[] of proving the ultimate facts necessary to establish the commission of a crime, without reliance upon an impermissible inference from bad character." *See People v. Rath*, 44 P.3d 1033, 1040 (Colo. 2002). This is especially so when a crime seems otherwise inexplicable, for absent motive evidence, the jury could struggle to understand the "secret design or purpose of the act charged in which the very gist of the offense may consist." *See*

Masters, 58 P.3d at 999 (quoting *State v. Crumb*, 649 A.2d 879, 882 (N.J. Super. Ct. App. Div. 1994)).

"Motives are complex and difficult to prove." *U.S. v. Goodwin*, 457 U.S. 368, 373 (1982). Motive—when someone is a "firebug," for instance—often must be shown by prior acts. *See United States v. Cunningham*, 103 F.3d 553, 556 (7th Cir. 1996) ("A 'firebug'—one who commits arson not for insurance proceeds or revenge or to eliminate a competitor, but for the sheer joy of watching a fire—is, like the sex criminal, a person whose motive to commit the crime with which he is charged is revealed by his past commission of the same crime."). Thus, while motive evidence may show a defendant in a negative light, the evidence does more than this—it provides the potentially only window into a crime's true psychological cause. For this reason, evidence that someone enjoys setting fires is admissible despite CRE 404(b) when necessary to show motive. *See Cunningham*, 103 F.3d at 556 (discussing that, when necessary to show that someone set a fire for the "sheer joy" of the act, "[n]o special rule analogous to Rules 413 through 415 is necessary to make the evidence of the earlier crime admissible, because

404(b) expressly allows evidence of prior wrongful acts to establish motive."); *see also People v. McBride*, 228 P.3d 216, 227 (Colo. App. 2009) ("Because all evidence of other bad acts could support a propensity inference, *Spoto* 'does not demand the absence of the inference' but 'merely requires that the proffered evidence be logically relevant independent of that inference.'" (quoting *People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994))); *People v. Clark*, 2015 COA 44, ¶ 20 (discussing that potentially inadmissible character evidence could also be admissible despite CRE 404(b) if it "establishes more than character or propensity" by showing the defendant's motive because such evidence "tends to show why the defendant perpetrated a seemingly random and inexplicable attack" (quotations omitted) (quoting *Masters*, 58 P.3d at 999)).

Here, as discussed above, the evidence was relevant to show why Defendant would have committed such an odd crime: he enjoyed lighting bags on fire and watching the resulting fire. Such evidence that provides the reason for a crime—especially when one is not obvious—is evidence of motive. *See United States v. Awan*, 607 F.3d 306, 317 (2d

Cir. 2010) ("'Motive' is concerned with the rationale for an actor's particular conduct."); *People v. Cousins*, 181 P.3d 365, 371 (Colo. App. 2007) (discussing "motive" as being a "reason that nudges the will and prods the minds to indulge the criminal intent" and the "inducement or state of feeling that impels and tempts the mind to indulge in a criminal act" (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 3:15, at 3-95 (2009))). By CRE 404(b)'s own terms, then, this evidence need not be excluded. *See* CRE 404(b)(2) ("This evidence may be admissible for another purpose, such as proving motive…."); *see also* *Bell v. People*, 406 P.2d 681, 685 (Colo. 1965) ("It is always proper to show the motive which may have prompted the accused to commit the crime for which he is being tried, and the intent with which he committed the acts which it is claimed constitute that crime; and evidence which tends to prove either of these facts is relevant to establish the commission of the crime for which he is on trial, even though such evidence, for the purpose indicated, may tend to show the commission of similar and independent crimes by him.").

In response, Defendant argues that this case is like *Yusem v. People*, 210 P.3d 458 (Colo. 2009). *See* Op. Br. 18–20. But the initial similarity fades upon closer analysis of the court's reasoning.

In *Yusem*, 210 P.3d at 461, the charges arose from the defendant allegedly walking up to someone driving a van, pointing a gun at him, and telling him to back up. The extrinsic act evidence involved the defendant months earlier yelling at his apartment manager while wearing a holstered gun, which he never touched or mentioned. *See id.* at 462. The court concluded that this had some relation to the defendant's motive—that the defendant "was motivated to brandish his gun, not in self-defense, but in order to intimidate and control the van driver." *See id.* at 465. Yet, the court also concluded that this, at most, showed that the defendant was prone to "aggression or bullying." *See id.* at 466 & n.14. And this was far too general to constitute a "motive" in any real sense:

> In sum, the prior act evidence was admissible in both *Douglas* and *Willner* because it demonstrated the defendant's tendency to use a gun in a particular manner in specific circumstances, and therefore rebutted the claim that the defendant acted in self-defense when similar circumstances

> arose. Additionally, because the prior acts demonstrated a specific tendency, the relevance of the evidence could be separated from the improper inference that the defendant had a bad character. Therefore, the evidence was relevant independent of the prohibited inference of bad character. In contrast, the prior act evidence in Yusem's case does not show a specific tendency that can be separated from the prohibited inference that Yusem bullied in the past and therefore menaced in this case.

Id. at 467; *see also* Imwinkelried, *supra*, at § 3:15, 3-98 (noting that, while motive evidence need not show a motive that is "truly unique to the defendant," a motivation that is "almost universal, such as a general sexual desire" has "little or no probative value on the issue of identity").

Returning to this case, the alleged motive for the fire was much more specific than that in *Yusem*. As discussed above, the extrinsic act suggested that Defendant enjoyed lighting bags on fire and watching that fire spread. *See supra* Part I.B.1. While perhaps not unique, this predilection certainly is distinctive. And it shows more than a generic character trait, such as the aggressive or bullying personality in *Yusem*. Rather, the extrinsic act was relevant to illustrate a "specific tendency" of Defendant, which allowed it to be "separated from the improper

inference that the defendant had a bad character." *See Yusem*, 210 P.3d at 467. Therefore, *Yusem* ultimately is inapposite.

Defendant also argues that motive is not an element of the charged offenses. *See* Op. Br. 20–21. Perhaps not, but establishing the identity of the arsonist certainly was at issue in this case. And "evidence of uncharged conduct indicative of motive is generally admitted for the purpose of establishing identity or intent." *Leonard*, 872 P.2d at 1328. Therefore, Defendant having a motive to commit the crime made his identity as the arsonist more likely, thereby making the motive-related evidence relevant. *See* CRE 401; *see also Rath*, 44 P.3d at 1040 ("Plan, scheme, design, modus operandi, and motive, while not usually elements or ultimate facts themselves, are among, or closely related to, those examples of permissible reasons enumerated in the rule and are well-accepted methods of proving the ultimate facts necessary to establish the commission of a crime, without reliance upon an impermissible inference from bad character."); *Clark*, ¶ 31 ("[M]aterial facts may either be ultimate facts (i.e. evidence defendant committed the crime, evidence of the requisite intent, or evidence of

deliberation) or intermediate or evidential facts, themselves probative of ultimate facts." (quotations and citations omitted)).

Finally, Defendant suggests that the prosecution's alleged motive was not a true motive because it was based on Defendant's pure enjoyment of lighting fires, rather than vengeance or financial gain. *See* Op. Br. 21–22. But the People are unaware of any Colorado case making that distinction. Nor can counsel discern why some motivations should be treated differently than others when the effect is the same—making it more likely that Defendant caused the fire. *Cf.* 1 Bailey, F. Lee and Kenneth J. Fishman, *Criminal Trial Techniques* § 24:5 ("The common motives for committing arson are concealment of a crime, insurance fraud, malice toward the occupant of the dwelling or place of business, or mental instability, such as pyromania."). Therefore, in the end, Defendant argues a distinction without a difference.

3. The unfair prejudice does not substantially outweigh the motive evidence's relevance.

A court balancing evidence's probative value against the danger of unfair prejudice must maximize the probative value and minimize any

presumed unfair prejudice. *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995). Prejudice is unfair only if it "inject[s] considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger or shock." *People v. Dist. Court*, 869 P.2d 1281, 1286 (Colo. 1994) (quoting *People v. Goree*, 349 N.W.2d 220 (Mich. Ct. App. 1984)). The term does not include the impact of the evidence's "legitimate probative force." *See Dist. Court*, 869 P.2d at 1286 (quoting *United States v. Schrock*, 855 F.2d 327, 334–35 (6th Cir. 1988)). As the oft-quoted metaphor goes, CRE 403—and the final step of *Spoto*, which embodies it—is "limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *People v. Robinson*, 908 P.2d 1152, 1156 (Colo. App. 1995) (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979)), *aff'd*, 927 P.2d 381 (Colo. 1996).

Here, the motive evidence was significant to the prosecution's case: it explained why Defendant would have committed a seemingly senseless crime. And when, as here, Defendant denied committing the crime, evidence explaining why he would have engaged in the charged

conduct is highly relevant. *United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012).

On the other hand, little chance of unfair prejudice exists. True, as Defendant points out on appeal, the motive evidence allowed the jury to conclude that he committed the charged act. But this is a result of proving that Defendant had a motive to do so—the precise reason why the evidence was relevant. So, any prejudice was not unfair to the defense. *See Dist. Court*, 869 P.2d at 1286.

Further, testimony that Defendant reacted negatively to his neighbor seeing him cause a fire in the dumpster supported the evidence of Defendant's motive. Defendant's reaction showed that the fire was not an accident, as Defendant evinced anger rather than embarrassment. Because this also related to the evidence's probative force, this, too, was not unfairly prejudicial. *See id.*

In sum, this Court reverses a trial court's admission of evidence only if doing so was arbitrary, unreasonable, or unfair. *Rath*, 44 P.3d at 1043. As discussed above, a reasonable jurist could have concluded—as

the trial court did in this case—that the extrinsic-act evidence was admissible. Therefore, the trial court's decision should not be disturbed.

C. Admitting evidence that Defendant was arrested after starting a dumpster fire was within the trial court's discretion.

As discussed above, years before the offense at issue here, a neighbor reported Defendant to the police for intentionally lighting a dumpster fire with a burning bag. *See supra* Part I.B. The police responded by arresting Defendant, though the resulting attempted-arson charges were later dismissed. *See* Op. Br. 11–12.

At trial, a police witness testified on redirect that these facts were part of the calculus that steered the investigation to Defendant's door. *See* TR 8/25/21, pp 14:22–16:13 (646–48). The witness also testified that these facts were part of the justification for obtaining a search warrant of Defendant's property. *See id.*; *see also* EX (Trial), p 6.

On appeal, Defendant argues that, apart from his challenge to the evidence of the dumpster fire discussed above in Part I.B, the court erred in its handling of testimony and documentary evidence of

Defendant's arrest and the impact that this had on the investigation. *See* Op. Br. 10–12, 24–31. But for the reasons discussed below, the trial court did not abuse its discretion.

1. The officer's testimony about Defendant's prior arrest was admissible.

Defendant first challenges testimony from an officer who, on re-direct, testified that she had learned during the investigation that someone who had been present at the time of the fire—Defendant—previously had been arrested for attempted arson. *See* Op. Br. 11–12, 24–29. And that this helped steer the investigation to Defendant. *See id*. But admitting this evidence did not violate the evidentiary rules.

a. The evidence is relevant to rebut Defendant's theory of the case.

Evidence is relevant if it refutes the stated defense at trial. *See People v. Heredia-Cobos*, 2017 COA 130, ¶ 34 ("[T]he other acts evidence was also relevant to rebut defendant's theory of defense that Y.P. fabricated the allegation."); *People v. Victorian*, 165 P.3d 890, 893 (Colo. App. 2007) ("Evidence that defendant sexually assaulted M.M. eighteen

years earlier was logically relevant to rebut the suggestion that K.V. and L.F. had fabricated their allegations."). Similarly, evidence is relevant if it challenges the assumptions upon which the defense seeks to build its case. *See People v. Welsh*, 80 P.3d 296, 304 (Colo. 2003) ("Rebuttal evidence is that evidence which tends to contradict the adverse party's case, whether it be challenging the testimony of a specific witness or refuting the adverse party's entire theory or claim. Unlike impeachment evidence, which is more focused on the credibility of an individual declarant, '[r]ebuttal evidence goes to the heart of the case, reflecting upon the truth of facts upon which the other side relies.'" (citation omitted) (brackets in original) (quoting *People v. Cobb*, 962 P.2d 944, 953 (Colo. 1998) (Kourlis, J., dissenting))); *People v. Orozco*, 210 P.3d 472, 477–78 (Colo. App. 2009) (discussing that evidence was relevant to "rebut the suggestion, implicit in defendant's theory of defense, that R.O. fabricated his allegations").

Here, the evidence showing that Defendant had been arrested for suspected arson helped to rebut the defense's trial theory. And because

the evidence made material issues less likely, it was relevant. *See* CRE 401.

The defense's theme was that the prosecution had rushed to judgment in identifying Defendant as the perpetrator based on weak evidence. Indeed, the defense's first words to the jury rang this bell:

> This case is about a rush to judgment and the danger of speculation. [Defendant] did not start the fire at City Market. Law enforcement needed someone to find quickly and resolve this quickly, and they lost their focus and trained everything in on one person based on what somebody who was not even there, who was 150 miles away in Grand Junction, told them.

TR 8/23/21, p 239:16–22 (239). According to the defense, once the grocery store's loss-mitigation officer decided that Defendant was the culprit based on unreliable security footage, the police pursued him exclusively and later did what was needed to "shore up their case…." *See* TR 8/23/21, pp 239:23–240:15 (239–40).

The defense cross-examined the prosecution's witnesses with this theme in mind. For example, an investigating officer confirmed on direct that the loss-mitigation officer's observations "help[ed] guide [the] investigation" in that the "suspect [was] going to be" Defendant. *See* TR

8/24/21, pp 164:13–165:9 (498–99). Then, on cross-examination, defense counsel elicited lengthy testimony about omissions and inaccuracies in a search-warrant affidavit, which the witness had authored after receiving the information from the loss-mitigation officer. *See* TR 8/24/21, pp 225:19–226:16, 254:5–269:5 (559–60, 588–603). Defense counsel also elicited testimony that the witness had met with the prosecution multiple times during the lead-up to trial, including to discuss a discrepancy in the affidavit. *See* TR 8/24/21, pp 269:21–270:7 (603–04). Through this testimony, defense counsel effectively illustrated its trial theory: that the police blindly accepted the loss-mitigation officer's theory and then did what had to be done—including misrepresenting facts to the court—to backfill supporting evidence. *Cf.* TR 8/23/21, pp 239:23–240:15 (239–40).

This context shows how the challenged evidence, which was elicited on re-direct, helped to rebut these suppositions of a rush to judgment and ill intent:

> Q Over the course of your investigation, did you discern if any of the people in Aisle 7 had previously been arrested for attempted arson?

A I did.

Q And who was that?

A [Defendant]

…

Q So in the course of your investigation, was anyone in Aisle 7 around the time of the fire, had any of them previously been arrested for attempted arson?

A Yes.

Q Who was that?

A [Defendant].

Q Do you know if charges were ever formally filed against [Defendant] in the 2007 case?

A I believe so.

Q Was the case ultimately dismissed?

A Yes, it was.

Q Okay. And was that a fact that you included in your affidavit for a search warrant on October 6th of 2019 to Judge Herringer?

A I believe so.

[Affidavit published to the jury]

Q [Witness], in this paragraph, the second paragraph on page 4 of your affidavit, you include the prior arrest as something in support of your request for a search warrant?

A Yes, I did.

Q And was that another part of your investigation that directed your focus to [Defendant]?

A Yes, it was.

Q So was there more than just [the loss-mitigation officer's] observations in the video, your observations in the video, that you included in your affidavit for those search warrants?

A Yes.

TR 8/24/21, p 285:17–22 (619); TR 8/25/21, pp 14:24–16:13 (646–48).

By admitting evidence that Defendant previously had been arrested for a similar crime, the prosecution showed that the police had reason to suspect Defendant separate from the beliefs of the loss-mitigation officer. And a jury could have concluded from the evidence that seeking the search-warrant affidavit had legitimate investigatory intent, rather than being a mere fishing expedition, as the defense suggested. Because the evidence discussed above made the defense's theory less likely—and therefore supported the veracity of the

prosecution's case, the trial court properly found it to be relevant.[2] *See* CRE 401; *Orozco*, 210 P.3d at 477–78.

Defendant seeks support from *Davis v. People*, 2013 CO 57, ¶¶ 1, 17, *People v. Alemayehu*, 2021 COA 69, ¶ 95, and *People v. Bobian*, 2019 COA 183, ¶ 53 (Berger, J., specially concurring). *See* Op. Br. 25–26. But these cases discuss a different issue: when law enforcement may opine on the veracity of another trial witness, based on what that witness said to the officer before trial. This issue is beside the point here.

Unless kept out by another rule or legal prohibition, all relevant evidence is admissible. *See* CRE 402. And the evidence here was relevant. Therefore, unless Defendant can successfully raise a bar to its presumed admission, the trial court did not err.

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[2] Defendant does not seem to challenge the arrest evidence under CRE 404(b). But if this Court concludes otherwise, the above analysis shows that the evidence had a particular theory of relevance that was independent of the general character inference banned by CRE 404(b). So, that rule was not violated either.

b. The risk of unfair prejudice does not substantially outweigh its probative value.

CRE 403 allows courts to exclude relevant evidence if the risk of unfair prejudice "substantially outweigh[s]" the evidence's relevance. But the evidentiary rules "strongly favor the admission of evidence, and the trial court has broad discretion in determining the admissibility of evidence." *People v. Medina*, 51 P.3d 1006, 1017 (Colo. App. 2001), *aff'd sub nom. Mata-Medina v. People*, 71 P.3d 973 (Colo. 2003). And appellate courts "typically find an abuse of discretion only when the court commits a 'material error of law' or some sort of 'meaningful error in judgment.'" *United States v. Fonseca*, 49 F.4th 1, 10 (1st Cir. 2022) (quoting *United States v. Jordan*, 813 F.3d 442, 445 (1st Cir. 2016)); *see Monfore v. Phillips*, 778 F.3d 849, 854 (10th Cir. 2015) ("[T]he degree of a district court's discretion in evidentiary rulings under Rule 403 is 'particularly' wide." (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008))).

Here, the evidence that Defendant previously had been arrested for attempted arson was relevant to dispel the defense's theme that

Defendant had been targeted in a race to judgment, and that a case had been fabricated to bolster that initial presumption. *See supra* Part I.C.1.a. This relevance admittedly did not paint Defendant in a positive light. But that was the point—the prosecution was trying to show that legitimate investigative reasons existed both to suspect Defendant and to investigate his property. *See id.* For this reason, any prejudice to the defense was not "unfair," as the term is used in the CRE 403 context. *See Dist. Court*, 869 P.2d at 1286 (discussing that unfair prejudice "inject[s] considerations extraneous to the merits of the lawsuit" and does not include evidence's "legitimate probative force").

Further, absent evidence of jury bias, appellate courts presume that juries follow limiting instructions. *People v. Ibarra*, 849 P.2d 33, 39 (Colo. 1993). And here, the trial court contemporaneously instructed the jury that the arrest evidence could be considered only "in relation to how the investigation in this case proceeded and not for any other purpose." *See* TR 8/25/21, p 15:16–21 (647). This would have cabined any specter of unfair prejudice. Also, the prosecutor made clear that the

arrest did not lead to a conviction, which also would have lessened any unfair prejudice. *See* TR 8/25/21, p 15:5–9 (647).

Defendant also raises the threat of abuse that could come from admitting such as this as mere background for the jury. *See* Op. Br. 27–28. Perhaps—but that is not what happened here. As discussed above, the arrest testimony was relevant for a specific purpose: to refute a specific theme that wove through the defense's case. Therefore, the evidence was not barely probative background evidence, and the trial court's balancing under CRE 403 was not an abuse of discretion.

Finally, Defendant cites multiple cases about hearsay and the Confrontation Clause. *See Jones v. Basinger*, 635 F.3d 1030, 1046 (7th Cir. 2011); *United States v. Brown*, 767 F.2d 1078, 1084 (4th Cir. 1985); *Thompson v. State*, 491 P.3d 1033 (Wyo. 2021); *see also* Op. Br. 26. But Defendant does not argue that the officer's testimony violated the Confrontation Clause. And the challenged testimony did not recount an out-of-court statement. *See* TR 8/24/21, p 285:17–22 (619); TR 8/25/21, pp 14:24–16:13 (646–48). Thus, nothing in the officer's testimony implicates the rule against hearsay. *See* CRE 801(c), 802. And the trial

court did not ultimately abuse its discretion when it admitted the officer's testimony.

2. The trial court properly exercised its discretion when it admitted the search-warrant affidavit.

In tandem with the testimony discussed above, the trial court permitted the prosecution to publish to the jury a portion of the search-warrant affidavit that had been authored by the witness as part of the investigation. *See* TR 8/25/21, p 15:5–22 (647). As relevant here, the published paragraph said that a sergeant had advised the testifying witness that he had "found [a] record that [Defendant] was arrested by Durango Police Department for a criminal attempt of second-degree arson on 09/12/2007." *See* EX (Trial), p 6. Under the circumstances, admitting this was not an abuse of discretion.

a. CRE 106 permitted the trial court to admit the affidavit.

"If a party introduces part of a written or recorded statement, CRE 106 allows the opposing party to introduce any other part of the recording that in fairness should also be considered." *People v. Knight*,

167 P.3d 147, 155 (Colo. App. 2006). This rule codified the common-law rule of completeness. *People v. Montoya*, 2022 COA 55M, ¶ 24, *cert. granted in part*, 22SC580. CRE 106 serves to "avoid misleading the jury by taking evidence out of context or creating a distorted picture by the selective introduction of evidence." *Knight*, 167 P.3d at 155; *see Henderson v. United States*, 632 A.2d 419, 426 (D.C. 1993) ("The principle underlying the rule of completeness is fairness. When properly invoked the rule is designed 'to secure for the tribunal a complete understanding of the total tenor and effect of the utterance[s].'" (brackets in original) (quoting 7 John H. Wigmore, *Evidence in Trials at Common Law*, § 2113 at 653)); *see also People v. Short*, 2018 COA 47, ¶ 41 ("Because CRE 106 is identical to Fed. R. Evid. 106, we consider federal cases and authorities concerning the federal rule highly persuasive in interpreting and applying our own.").

"The contours of the fairness standard are 'rather vague' and courts have 'enormous discretion' in applying [Rule 106]." *United States v. Harry*, 816 F.3d 1268, 1280 (10th Cir. 2016) (quoting 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*,

§ 106.02[1], at 106–4 to 106–6 (Mark S. Brodin, ed., Matthew Bender 2d ed. 1997)); *see United States v. Ramos-Caraballo*, 375 F.3d 797, 802 (8th Cir. 2004) ("In considering claims of evidentiary error in applying Rule 106, we give substantial deference to the district court's decisions on admissibility and will find error only if there has been a clear abuse of discretion."). For this reason, a "high bar" faces anyone seeking to reverse a conviction based on this rule. *Harry*, 816 F.3d at 1280.

Here, the trial court concluded that the challenged portion of the affidavit was admissible under CRE 106's fairness calculus.[3] *See* TR 8/24/21, pp 282:5–284:14 (616–18). And the record supports this finding. Therefore, no abuse of discretion occurred.

As discussed above in Part I.C.1.a, the defense cross-examined the testifying officer extensively about inaccuracies and oversights in the search-warrant affidavit. And counsel began the cross-examination with questions conveying the theory that police had blindly accepted the loss-

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[3] Technically, the trial court ruled that the entire affidavit should be admitted. *See* TR 8/24/21, pp 284:23–285:3 (618–19). But Defendant on appeal seems only to challenge the portion about the 2007 arrest. *See* Op. Br. 29. Thus, this brief focuses on that portion of the affidavit.

mitigation officer's chosen culprit—Defendant—and simply did what was necessary from that point on to build a case:

> Q All right. So it sounds like you are saying today that the course of your investigation really sort of hinged on much of what [the loss-mitigation officer] from Grand Junction told you; is that correct?
>
> A I wouldn't say it was totally hinged on what [the loss-mitigation officer] told me.
>
> Q You just testified that you ruled out three unknown and never-identified individuals based upon information that [the loss-mitigation officer] relayed to you about his observations of this surveillance video; is that correct?
>
> A No, that's not what I had testified to.
>
> Q Okay. So let's back up, Detective. …

TR 8/24/21, pp 198:16–199:2 (532–33); *cf.* EX (Trial), p 6.

In this way, the defense telegraphed to the jury that the attacks on the witness's honesty in the affidavit meant one thing: that the investigation had zeroed in on Defendant based on one person's say-so without independently coming to that conclusion. And the cross-examination was reasonable effective at supporting this theory. For example, defense counsel elicited that the officer had sworn in the affidavit that the video showed Defendant's feet and cart at the ignition

site. *See* TR 8/24/21, pp 258:25–259:20 (592–93); *cf.* EX (Trial), p 6. But this was untrue; the witness never saw either at the precise spot that the fire began. *See* TR 8/24/21, pp 257:6–258:24 (591–92). Rather, the store's loss-mitigation officer had spoken with the officer on the phone and had "told [her] he saw cart and feet." *See* TR 8/24/21, pp 258:25–259:8 (592–93). Indeed, the investigation had turned toward Defendant, which had led to the search warrants in this case, before the officer had had independent access to the videos:

> Q You said that you didn't change the content or discrepancy in the affidavit for the search warrant of [Defendant's] home given how the investigation was going. That was the day after the fire, right, that you applied for that?
>
> A Yes, it was – I got the search warrant approved at about 9:30 p.m. on October 6th.
>
> Q Okay. And then on October 9th, which was a couple days later, some more time in between, you filled out another affidavit for search warrant, right?
>
> A Correct.
>
> *Q And it sounds like there was a little bit more time for you to get some sleep and to settle in to the evidence in this case as you understood it, right?*
>
> *A That's not correct. I still didn't have access to these videos.*

Q Okay. Did [the loss-mitigation officer] not cooperate with your phone call?

A No, he did. He was very, very cooperative.

Q And the gentleman you described at the local City Market, the local guy, [name], was he not helpful in giving you access to these videos?

A No, they were helpful. I'm talking about my computer that's available to me in my office wasn't of the power. I don't know what programs it had. I couldn't see those videos easily, so I was not focusing on the videos.

Q Okay. But you were focusing on the videos to change the course of this investigation toward [Defendant], correct?

A I focused on the videos once the manager, the asset protection manager, [the loss-mitigation officer], had pointed out what he had seen on the videos, and then I got to see them a few times.

Q A couple days after the fire when you applied for the search warrant for [Defendant's] office at Fort Lewis, you attested to the same allegations, correct?

A Correct.

Q And you swore to the veracity of those allegations?

A Correct. *I had not seen videos again another time to make any other assumptions than I had the first time originally. I was going off the same video information.*

TR 8/24/21, pp 266:9–268:1 (600–02) (emphasis added).

Based on the cross-examination, the trial court decided that, in fairness, the jury should see that the search warrant was not based solely on those portions of the affidavit that relied on the loss-mitigation officer; the police had investigated Defendant's background and had discovered a previous arrest for a similar crime. *See* TR 8/24/21, pp 282:5–284:14 (616–18). The next day, the trial court also ruled that any prejudice did not substantially outweigh the probative value of dispelling the notion that "there may have been a fraud perpetrated on the [c]ourt" during the investigation. *See* TR 8/25/21, pp 10:10–12:7 (642–44).

Based on the tenor of cross-examination, a reasonable jurist could have concluded that fairness warranted showing the jury a fuller picture of the circumstances surrounding the police narrowing their focus to Defendant. *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994) ("Plaintiff's lengthy impeachment of Heaslip by use of his report entitled defendant to introduce other statements in the report to rebut the charge of inconsistency and bias."). The same is true of the trial court's conclusion that the risk of prejudice did not outweigh

the challenged statement's probative value. *See Montoya*, ¶ 31 (noting that CRE 403 did not prevent admitting a videotaped statement because the questions that the evidence would have raised were "precisely the point"). Therefore, because the trial court's decision was not arbitrary, unreasonable, or unfair, the court's exercise of discretion should not be disturbed. *See Knight*, 167 P.3d at 155; *see also Harry*, 816 F.3d at 1280 (discussing the "high bar" to disturbing a court's ruling under CRE 106).

b. The rule against hearsay did not apply to the affidavit because it was admitted under CRE 106.

CRE 106 enacts a principle of fairness—parties cannot lessen the metaphorical "cost" of admitting an ambivalent document by cherry-picking the favorable parts; a trial is not a fire sale. *See Short*, ¶ 49 ("If the prosecution wants to admit part of a statement, it ought, in fairness, to "pay the costs" of admitting it in its (relevant) entirety under the rule of completeness. If it is not willing to pay the costs, it should not be permitted to admit any portion of the statement."). For

this reason, CRE 106 allows trial courts to admit otherwise-inadmissible evidence if doing so "prevent[s] a misleading or incomplete view."[4] *Montoya*, ¶ 29; *see Short*, ¶¶ 44–46 (agreeing with the Tenth Circuit and other federal courts that hearsay rules should not prevent a court from admitting evidence for context purposes under CRE 106). Indeed, fairness principles do not allow a party to "admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness." *Montoya*, ¶ 29 (quoting *Short*, ¶ 45).

Here, it is unclear whether Defendant objects to admitting the challenged statement on hearsay grounds. But because CRE 106 permitted the trial court to admit the challenged statement, hearsay rules would stand aside anyway. *See Montoya*, ¶ 29; *Short*, ¶¶ 44–46.

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[4] While *Short*, ¶ 43, cites *People v. Zubiate*, 2013 COA 69, ¶ 33, and *People v. Davis*, 218 P.3d 718, 731 (Colo. App. 2008), as conflicting precedent, the People respectfully disagree; each merely says that courts *may* exclude self-serving hearsay that would otherwise be admissible under CRE 106. Given the discretionary nature of the word "may," *see Cagle v. Mathers Family Trust*, 2013 CO 7, ¶ 31, these cases appear to merely emphasize the discretion afforded to courts in this area.

Therefore, the potential hearsay nature of the challenged portion of the affidavit need not concern this Court further.[5]

In brief, admitting testimony and documentary evidence that Defendant previously was arrested was not an abuse of the trial court's discretion. Therefore, the judgment should be affirmed.

II. Criminal mischief should merge into second-degree arson, but attempted first-degree assault should not merge.

A. Preservation and Standard of Review

The People agree that reversal requires plain error. *See* Op. Br. 37. Review is de novo. *See People v. Sims*, 2020 COA 78, ¶ 37.

B. Defendant should stand convicted of second-degree assault and attempted first-degree assault.

The state and federal constitutions "preclude the imposition of multiple punishments when the General Assembly has not 'conferred specific authorization for multiple punishments.'" *Page v. People*, 2017 CO 88, ¶ 8 (quoting *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005)).

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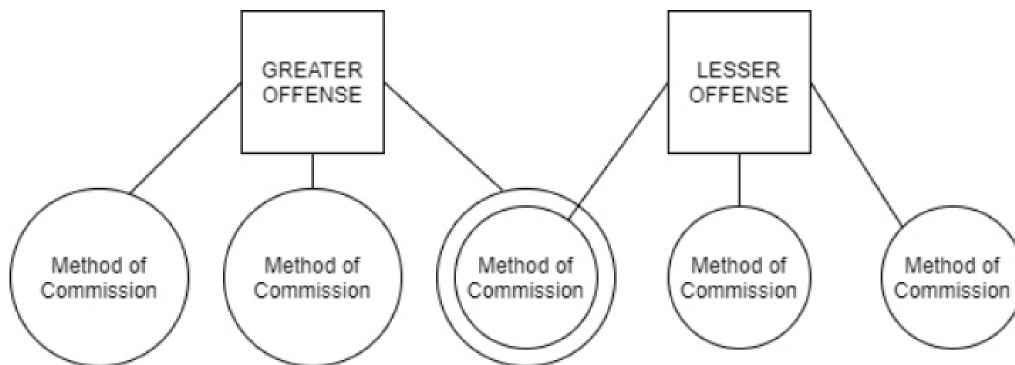
[5] The Colorado Supreme Court currently is considering the interplay of CRE 106 and hearsay in *People v. McLaughlin*, 21SC506, 2022 WL 815563 (Colo. Mar. 14, 2022).

As relevant here, the General Assembly has not authorized—and indeed forbids—entering multiple convictions when "[o]ne offense is included in the other…." *See* § 18-1-408(1)(a), C.R.S. (2022). When a jury's verdicts find a defendant guilty of both a greater and lesser offense, the lesser must merge into the greater. *Page*, ¶ 9.

The Colorado Supreme Court considers an offense lesser-included if it satisfies two criteria:

1. *Statutory:* As shown in the diagram below, one offense is included in another when any set of elements establishing the greater offense necessarily satisfies any set of elements establishing the lesser offense:



   See id. at ¶¶ 10–11; and

2. *Factual:* The lesser and greater offenses as proved in this particular case did not arise from "distinctly different conduct." *See People v. Rock*, 2017 CO 84, ¶¶ 17–18.

To wrap up, if both criteria above are met, the convictions must merge, meaning that the conviction for the lesser-included offense disappears. *See People v. Wood*, 2019 CO 7, ¶ 29; *Rock*, ¶ 17. If two convictions satisfy only the factual criterion, the convictions do not merge, but the respective sentences generally must be concurrent. *See* § 18-1-408(3), C.R.S. (2022) (requiring concurrent sentences for counts "supported by identical evidence," unless "multiple victims are involved"). Otherwise, multiple convictions are permitted, and the sentences may be consecutive. *See Rock*, ¶ 18 ("Multiple convictions for two separate offenses the elements of one of which constitute a subset of the elements of the other can clearly stand if the offenses were committed by distinctly different conduct. Separate convictions for even the same offense are permissible if it was committed more than once."); *People v. Mountjoy*, 2016 COA 86, ¶ 50 (discussing that, absent identical evidence, a court may "impose either concurrent or consecutive sentences where a defendant is convicted of multiple offenses"), *aff'd on other grounds*, 2018 CO 92M.

Here, Defendant seeks to merge his convictions for criminal mischief and attempted first-degree arson into his second-degree arson conviction. *See* Op. Br. 37–41. Defendant is correct on the first point, but he is incorrect on the second.

1. The criminal-mischief and second-degree arson convictions should merge.

Criminal mischief requires someone to (1) knowingly (2) damage (3) the real or personal property of another (4) during a single criminal episode. § 18-4-501(1), C.R.S. (2022). As relevant here, second-degree arson requires someone to (1) knowingly (2) set fire to, burn, or cause to be burned (3) the property of another, other than a building or occupied structure (4) without consent. § 18-4-103(1), C.R.S. (2022).

Here, citing to *People v. Welborne*, 2018 COA 127, Defendant argues that his conviction for criminal mischief should merge into the conviction for second-degree arson. *See* Op. Br. 38–39. The People agree.

2. The elements of second-degree arson and attempted first-degree arson are mutually exclusive and, therefore, do not include one another.

Again, second-degree arson requires someone to (1) knowingly (2) set fire to, burn, or cause to be burned (3) the property of another, *other than a building or occupied structure* (4) without consent. § 18-4-103(1), C.R.S. (2022) (emphasis added). Attempting first-degree arson requires someone to attempt to (1) knowingly (2) set fire to, burn, or cause to be burned (3) another's *building or occupied structure* (4) without consent. § 18-4-102(1), C.R.S. (2022) (emphasis added). So, first- and second-degree arson are mutually exclusive offenses—second-degree arson expressly excludes the property damage that is included in first-degree arson. For this reason, no set of statutory elements can satisfy both offenses, and the offenses do not merge. *Cf. Page*, ¶¶ 9–11.

Defendant argues that the offenses should merge because they each stem from the same act. *See* Op. Br. 41. But even if this were true, it would satisfy only the factual criterion of the merger test; it does nothing to satisfy the also-required statutory criterion, as discussed

above. *See Page*, ¶¶ 9–11; *Rock*, ¶¶ 17–18. Thus, while Defendant may be entitled to have his sentences run concurrently, the separate convictions remain. *See* § 18-1-408(1), (3), C.R.S. (2022).

CONCLUSION

The People respectfully request that the case be remanded to merge criminal mischief into second-degree arson. Otherwise, the judgment should be affirmed.

DATED: April 24, 2023

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **HOLLIS WHITSON** and **ERIC A. SAMLER** and all parties herein, via Colorado Courts E-filing System on April 24, 2023.

/s/ Michael Rapp