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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Arapahoe County District Court
Honorable Darren Vahle, Judge
Case No. 19CR2273

Plaintiff-Appellee,

THE PEOPLE OF THE STATE OF COLORADO,

v.

Defendant-Appellant,

LUIS TORO-OSPINA.

▲ COURT USE ONLY ▲

Case No. 20CA2145

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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 9,406 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

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/ *Megan C. Rasband*

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STATEMENT OF THE CASE

A jury convicted defendant, Luis Toro-Ospina, of two counts of felony menacing. (CF, pp 374-77.) The trial court sentenced him to one year in prison on each count, concurrently. (CF, p 394.)

On appeal, Toro-Ospina contends that the trial court erred when it denied his Batson challenge, didn't include a race question in the jury questionnaire, and declined to instruct the jury on unconscious bias. He also contends the prosecutor committed misconduct in closing argument and that the cumulative effect of these errors requires reversal.

STATEMENT OF THE FACTS

JG and MO were maintenance workers.[1] On a morning in July 2019, they were picking up trash behind Toro-Ospina's apartment complex. (TR 9/21/20, pp 183:8-184:1; TR 9/22/20, pp 13:7-16:1; EX 1, p 1.) They both had trash claws and buckets. (TR 9/21/20, pp 206:6-207:20; TR 9/22/20, pp 18:15-19:5, 36:10-16.)

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[1] JG testified with the assistance of a Spanish interpreter. (TR 9/21/20, pp 183:8-14, 184:3-5.)

MO noticed that the back door to the building was open. (TR 9/21/20, pp 184:15-185:3, 189:17-190:1, 191:3-13; TR 9/22/20, pp 14:17-17:10, 20:13-19.) One of his responsibilities was to secure the building, so he opened and closed the door to see if it latched; it did. (TR 9/21/20, pp 190:2-23, 222:3-22, 224:6-23; TR 9/22/20, pp 19-6-21:2.) While the door was open, MO saw Toro-Ospina move from the hallway near the front door into his apartment.[2] (TR 9/22/20, pp 21:3-24:19, 31:15-21; EX 8, p 8.)

MO and JG were getting ready to pick up more trash when the back door "opened rapidly with an angry person with a [silver revolver] pistol." (TR 9/21/20, p 191:14-194:18; TR 9/22/20, pp 24:20-25:2, 25:25-27:11.) MO had seen this man several times while working at the building. (TR 9/22/20, p 26:7-19.) JG's and MO's testimony conflicted as to where they were positioned, but both were close to the door. (TR 9/21/20, p 196:16-20; TR 9/22/20, p 25:1-24.) Toro-Ospina yelled at them

[2] The building had front door and back doors. It was a small, 12-unit building with a hallway connecting the two doors. (TR 9/22/20, p 17:11-23.)

in Spanish. MO didn't understand what was being said, other than he either heard or inferred, "I'll kill you." (TR 9/22/20, p 26:3-6.)

JG said Toro-Ospina didn't point the gun at them, but MO said that Toro-Ospina pointed the gun at him and made threatening gestures. (TR 9/21/20, p 196:21-25; TR 9/22/20, p 27:12-17.) According to both accounts, Toro-Ospina shot the gun into the air three times. (TR 9/21/20, pp 191:14-194:18, 198:13-19; TR 9/22/20, p 28:3-14.) Neither man said anything to Toro-Ospina before the incident, they weren't armed, and they didn't make any movement toward him before he fired the gun. (TR 9/21/20, pp 201:10-202:21; TR 9/22/20, p 32:15-22.) JG was scared and afraid for his life; he thought Toro-Ospina might shoot him. (TR 9/21/20, pp 197:24-198:12, 219:1-7.) MO thought Toro-Ospina was going to kill him; he was afraid, scared, and angry. (TR 9/22/20, p 27:18-24.)

MO took off running. He ran to maintenance's main office at another apartment complex and called 911. (TR 9/21/20, p 198:20-25; TR 9/22/20, pp 27:25-29:18.) JG remained in the parking lot and conversed with Toro-Ospina in Spanish. Toro-Ospina told JG that he

worked the night shift and was frustrated because MO always woke him up working on the front door. (TR 9/21/20, pp 194:19-196:15, 199, 201.) He didn't say he felt threatened by MO. (TR 9/21/20, pp 200:1-201:2.) JG left after Toro-Ospina went inside. (TR 9/21/20, pp 201:3-202:9.)

Police identified Toro-Ospina based on the apartment MO saw him go into. (TR 9/22/20, pp 79:20-84:10; EX 18, pp 22-23.) During a search, they found a loaded silver revolver, ammunition, and three casings. (TR 9/22/20, pp 84:11-95:5; EX 9-13, pp 9-13; EX 15-17, pp 15-21.) Through the Spanish language line, he admitted to firing his gun in the air but didn't say it was in self-defense. (TR 9/22/20, pp 241:16-243:7.)

Nevertheless, Toro-Ospina's theory of defense at trial was that he acted in self-defense. (TR 9/21/20, pp 179:6-182:10.) He testified that on the morning of the incident, he was awoken by MO slamming the back door several times. (TR 9/22/20, pp 185:6-186:9.) He went to the back door shirtless and shoeless to ask MO what was going on. He

knew MO was a maintenance worker and had had prior confrontations with him. (TR 9/22/20, pp 233:21-234:7.)

Toro-Ospina always carried a gun to protect his wife and kids. That day, MO held a metal pole and responded "aggressively". Toro-Ospina had seen the doors propped open/tampered with so that people could enter to buy drugs; he believed MO was involved with breaking the doors based on his responses. (TR 9/22/20, pp 180:6-181:4, 190:17-21, 226:10-228:3.)

After Toro-Ospina's second or third question, MO raised his arm and made a threatening motion with the metal pole. (TR 9/22/20, pp 193:3-194:2, 226:7-228:16.) He thought MO would attack him with the pole, so he pulled out his gun and shot it into the air three times to dissuade MO because that's what he learned to do in Columbia. (TR 9/22/20, pp 194:3-12, 194:13-195:2.)

The jury convicted Toro-Ospina as charged. (CF, pp 9-10, 230, 374-77; TR 9/21/20, pp 4:24-5:11; TR 9/23/20, pp 62:6-65:16.)

SUMMARY OF THE ARGUMENT

The trial court properly denied Toro-Ospina's *Batson* challenge. Step one is moot because the prosecutor offered a race-neutral reason for the challenges and the trial court ruled on the ultimate issue of purposeful discrimination. At steps two and three, the prosecutor provided a detailed race-neutral reason for the challenge to Juror R and the record supports the court's factual findings that the striking of Juror V was not pretextual. The court didn't give defense counsel a chance to respond, but this didn't prejudiced him.

The trial court didn't err, plainly or otherwise, in not adding a race question to the jury questionnaire. A juror's race is irrelevant to their fitness and race should not factor into selecting a jury. Colorado law doesn't require a question about race. And if a defendant cannot determine the race of a potential juror without an explicit question in the questionnaire, then presumably the prosecution cannot determine the juror's race either, let alone use race as the grounds for a peremptory challenge.

The trial court properly denied Toro-Ospina's proffered unconscious bias instruction. Where, as here, the tendered instruction sets forth an instruction already encompassed in other instructions, the defendant isn't entitled to have it reiterated in a separate instruction. Any error was harmless.

The prosecutor didn't commit misconduct in closing argument. A prosecutor may comment on the credibility of the defendant's testimony, refocus the jury on the evidence presented, and is not expected to have a perfect memory about testimony. When viewed in context and in light of the evidence, her comments were not improper, but even if they were, reversal is not required.

The trial court properly excluded evidence that MO participated in drug deals at Toro-Ospina's apartment building. Drug dealing is not a pertinent character trait to self-defense. *Violence* could have been under the right circumstances, but those circumstances didn't exist here. Additionally, the evidence was properly excluded under CRE 403. Any error was harmless.

There was no cumulative error.

ARGUMENT

I. The trial court properly denied defendant's *Batson* challenge.

A. Standard of Review; Preservation

The People agree that each step of a trial court's *Batson* analysis is reviewed separately. *People v. Rodriguez*, 2015 CO 55, ¶13. The first two steps involve questions of law, reviewed de novo. *Id.* The third step is an issue of fact reviewed for clear error. *Id.*

The People agree this issue is preserved. (TR 9/21/20, pp 149:7-150:1, 151:15-152:13.)

B. Additional Facts

During voir dire, Juror R said that he'd had a bad experience with police in the past year so was not comfortable listening to them testify, would automatically discount their testimony, this was not something he could overcome, he'd been in a courtroom before and couldn't stay focused, and he was concerned with the number of police witnesses in the case. (TR 9/21/20, p 83:16-84:16.)

Later, when the prosecutor was discussing using a gun in self-defense, Juror V said, "when someone enters our house, and my

daughter's sleeping and someone tries to harm us." (TR 9/21/20, p 85:9-22.)

At the conclusion of her voir dire, the prosecutor challenged Juror R for cause. (TR 9/21/20, pp 92:20-94:12.) The trial court asked him some additional questions. He said maybe one or two officers might tell the truth and it would be hard for him to stay focused on the officers' testimony. He was noncommittal on whether he would/could find an officer credible, but in response to a hypothetical question said he could find someone guilty based on the evidence. (TR 9/21/20, pp 95:1-97:19.) The trial court denied the challenge for cause. (TR 9/21/20, p 97:20-21.)

The prosecutor used four peremptory challenges: the above-mentioned Jurors R and V, and Jurors F and E. She passed the remaining jurors for cause. Toro-Ospina used all six of his peremptory challenges. (TR 9/21/20, pp 145:21-148:6.) He also raised a *Batson* challenge as to Jurors R and V:

> [Juror R] appears African-American and [Juror V] appears Hispanic.
>
> And specifically, [Juror R] said that he – when he was asked by the Court whether or not he would

> be able to follow the law, he indicated that he would during the different hypothetical situations that he gave.
>
> In specifics to [Juror V], there was no reason that she would be necessarily [be] bad for the prosecution. She said that guns come to mind if someone came into the house, that her daughter was sleeping.

(TR 9/21/20, pp 149:7-150:1.)

Regarding Juror R, the prosecutor said:

> [M]y particular concern was what he expressed regarding perception of police officers, how he would treat their credibility. And I will rely on the record I made previously with respect to that challenge, but to incorporate that, [Juror R] essentially indicated that he – based on experience he's had and particularly within the last year, that he was – essentially what I took from his statements to mean – not trusting of law enforcement.
>
> There are going to be several law enforcement witnesses in this case. He mentioned that it seemed based on the witness list, there was – I think the word he used, was a brigade of law enforcement that had come in and been involved in this case.
>
> Some of the specific evidence will depend on law enforcement, including the – recovered the weapon at issue, so I do think their – their testimony will be of particular importance with respect to that issue. So I'm excusing him based on his – based on those comments.

(TR 9/21/20, pp 150:2-151:2.)

Regarding Juror V, the prosecutor said:

> [Juror V] made a particular comment regarding thinking self-defense was more warranted regarding someone attempting to enter the home where her kids were sleeping. I know factually that in this particular case, the Defendant was at his home and had several children inside of the apartment sleeping at the time that this incident occurred. I think that would make her more likely to side with a self-defense argument on this particular case, and that's my basis for excusing her.

(TR 9/21/20, p 151:4-14.)

The trial court denied the *Batson* challenge:

> This is a somewhat diverse pool of jurors. We have a number of people who are people of color, both remaining on the jury and have been excused by both sides. And the Court does not find either a pattern or some evidence that this is a discriminatory practice by the Prosecution that exercised four challenges, and left open two. Those two challenges – there are still people who are of color who could be challenged by the People, and they waived two of their challenges, and two of their challenges were exercised on what appeared to be Caucasian individuals.

> With regard to the two, the gentleman, who is African-American and the young woman, who appears to be Hispanic by name and appearance, the Court finds that there are race-neutral reasons given by the Prosecution. So that even if the Court had made the first step of *Batson* and found some sort of discriminatory appearance, the Court does find that these are race-neutral reasons for which a reasonable lawyer can strike someone that doesn't have anything to do with race.

(TR 9/21/20, pp 151:15-152:13.)

C. Legal Analysis

The Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using a peremptory challenge to strike a prospective juror based solely on race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *People v. Beauvais*, 2017 CO 34, ¶20. When the defendant raises a *Batson* challenge, the trial court engages in a three-step analysis to assess the claim of racial discrimination:

- Did the objecting party make a prima facie showing that the party exercising the peremptory strike did so on the basis of race?
- If so, then did the party exercising the strike articulate a race-neutral reason for removing the prospective juror?

- If so, considering both sides' arguments, has the objecting party shown, by a preponderance of the evidence, that the party exercising the strike engaged in purposeful discrimination?.

People v. Ojeda, 2022 CO 7, ¶21.

1. Step one

At step one, "the defendant must make a prima facie showing that the peremptory strike was based on the prospective juror's race." *Rodriguez*, ¶10. If the totality of the relevant circumstances raises an inference of racial motivation, the objecting party has satisfied his burden. *Batson*, 476 U.S. at 96; *Valdez v. People*, 966 P.2d 587, 589 (Colo. 1998). Factors in this inquiry include "the disproportionate effect of peremptory strikes, a pattern of strikes against a particular race, and the prosecutor's questions and statements during voir dire." *People v. Hogan*, 114 P.3d 42, 52 (Colo. App. 2004).

Here, step one is moot because the prosecutor offered a race-neutral reason for the challenges and the trial court ruled on the ultimate issue of purposeful discrimination. *See People v. Wilson*, 2012 COA 163M, ¶12*; Valdez*, 966 P.2d at 592. Nevertheless, the fact that

the prosecutor struck minority members of the jury pool "does not, in itself, raise an inference of discrimination." *Rodriguez*, ¶16 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)); *see also Hogan*, 114 P.3d at 52.

The trial court found that Toro-Ospina failed to meet his step one burden because it was a "somewhat diverse pool of jurors," a number of people of color both remained on the jury and had been excused by both sides, and there was no pattern or evidence that it was a discriminatory practice by the prosecutor because she could have used two more challenges on people of color and two of her challenge were on people who appeared to be Caucasian. (TR 9/21/20, pp 151:15-152:13.)

Toro-Ospina faults the trial court for the bases of its no-pattern finding. (OB, pp 11-14.) But the court didn't find that pattern was *required*, and pattern is a relevant factor in the step one analysis, as is the disproportionate effect of peremptory strikes, which didn't happen here. *Rodriguez*, ¶¶10, 16; *Hogan*, 114 P.3d at 52. He also faults the court for saying that people of color remained on the jury without actually knowing their race or indicating whether they were the same

race as the two minority jurors struck by the prosecution. (OB, p 13.) But defense counsel did not contest that people of color remained on the jury, did not make a record as to those jurors' race, and the record does not support a contrary finding.

2. Step two

At step two, the prosecution must provide an explanation for the challenge based on something other than race. That challenge "will be deemed race-neutral so long as the prosecutor's explanation lacks an inherently discriminatory intent." *People v. Friend*, 2014 COA 123M, ¶14, *rev'd in part on other grounds*, 2018 CO 90; *see also Fields v. People*, 732 P.2d 1145, 1156 (Colo. 1987) ("It is to be presumed that the prosecutor has exercised peremptory challenges on constitutionally permissible grounds.").

Toro-Ospina contends the prosecutor failed to state a sufficient race-neutral reason for striking Juror R because views on policing are inextricably connected to race. (OB, pp 14-15.) But Juror R never tied his distrust of the police to his race. *Cf. Ojeda*, ¶26 ("although the prosecutor claimed concern with Juror R.P.'s views about the criminal

justice system, Juror R.P.'s views were inextricably linked to being a Hispanic male who had experienced racial profiling, as he disclosed in his questionnaire.').

The prosecutor provided a detailed race-neutral reason for the challenge: Juror R did not trust police, he used the word "brigade" regarding the number of police witnesses, there were going to be several police witnesses in the case, and some of the evidence depended on police. *See Ojeda*, ¶24 (the bar at this step is "not high"; all the prosecutor must do is provide any race-neutral justification for the strike, regardless of implausibility or persuasiveness); *People v. DeGreat*, 2015 COA 101, ¶31 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason is deemed race-neutral."). This explanation did not evidence any discriminatory intent; thus, it sufficiently articulated race-neutral grounds for excusing Juror R. *See Friend*, ¶14.

3. Step three

At step three, the trial court must determine whether the proffered non-discriminatory reason for the use of the peremptory

challenge was the prosecutor's actual legitimate reason or whether it was pretextual. *Hernandez v. New York*, 500 U.S. 352, 359, 363 (1991). The decisive question at step three is whether counsel's race-neutral explanation for a peremptory challenge should be believed. *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005). The trial court must consider all relevant evidence as well as the credibility and demeanor of the prosecutor. *See id.*; *People v. Robinson*, 187 P.3d 1166, 1173 (Colo. App. 2008).

The trial court found that the prosecutor's race-neutral reasons were reasonable and had nothing to do with race. (TR 9/21/20, pp 151:15-152:13.) The court did not clearly err in this factual finding.

Toro-Ospina contends that the prosecutor's reasoning for striking Juror V was pretextual. He provides four reasons in support of this contention. First, he argues that the prosecutor failed to engage in a meaningful voir dire examination with Juror V by only responding with "sure" when Juror V said using a gun in self-defense would be okay "when someone enters our house, and my daughter's sleeping and someone tries to harm us." (OB, pp 15-16.) But strategically it made

sense for the prosecutor to not ask Juror V any more questions: the facts of this case were similar so she was concerned that Juror V would side with Toro-Ospina's self-defense claim and planned on striking her for that reason.

Second, Toro-Ospina argues that what Juror V said didn't actually mirror the facts of this case because his children were sleeping inside and the confrontation occurred outside. (OB, p 16.) Regardless of where Toro-Ospina's children were, the defense emphasized the fact that they were sleeping inside the apartment, and Toro-Ospina testified more than once that he carried a gun to protect his children. (TR 9/22/20, pp 180:6-182:3, 186:10-15, 226:10-15.)

Third, Toro-Ospina argues that the prosecutor didn't strike other jurors, presumably white, who gave similar answers about self-defense. (OB, pp 16-17.) Those jurors' race is speculative, however, and this argument ignores the distinguishing part of Juror V's answer: *sleeping children*. (*Compare* TR 9/21/20, p 85:9-22 *with* TR 9/21/20, pp 86:7-19 (Juror Da), 87:17-88:6 (Juror K), 89:10-11 (Juror P), 91:14-15 (Juror Dr)). Additionally, of the four jurors Toro-Ospina points to, only one

served on the jury. It is improper to include a prospective juror who didn't serve on the jury in a comparative juror analysis. *See Beauvais*, ¶57; *Miller-El*, 545 U.S. at 241.

Fourth, Toro-Ospina argues that Juror V appeared to be the same race or ethnicity as him. (OB, p 18.) Juror V was also the same race or ethnicity as JG, though, so this doesn't make sense. And at least one juror who served on the jury had a Hispanic surname (Juror G). (*See* TR 11/12/20, pp 67:25-68:1.)

Toro-Ospina also faults the trial court for not giving him a chance to respond. (OB, p 13.) A trial court should give defense counsel an opportunity to rebut a prosecutor's explanation before ruling on a *Batson* challenge, *see Valdez*, 966 P.2d at 590, but a defendant isn't entitled to relief when he is not prejudiced by a court's failure to do so. *See Friend*, ¶16. And a defendant isn't prejudiced when he fails to object to the court's failure to give him the chance to offer a rebuttal. *See id.* at ¶18; *see also Robinson*, 187 P.3d at 1174. Because the record here demonstrates that defense counsel failed to object to the court's ruling and didn't request an opportunity to rebut the prosecutor's

explanation, Toro-Ospina wasn't prejudiced by the court's failure to invite defense counsel to offer a rebuttal. So his claim fails.

II. The trial court didn't err, plainly or otherwise, by not including a question about race on the jury questionnaire.

A. Standard of Review; Preservation

The People disagree with de novo review. (OB, p 18.) A trial court's ruling a jury questionnaire is reviewed for an abuse of discretion. *See People v. Reaud*, 821 P.2d 870, 871-72 (Colo. App. 1991); Crim. P. 24(a)(3). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or reflects a misapplication of the law. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002).

In assessing an abuse of discretion, appellate courts "look to whether the trial court's decision fell within a range of reasonable options" and will only find an abuse of discretion when the decision "exceeds the bounds of the rationally available choices." *People v. Palacios*, 2018 COA 6M, ¶18. Those courts do not ask whether, sitting

as the trial court, they would have made the same decision. *See DeBella v. People*, 233 P.3 664, 666 (Colo. 2010).

The People also disagree that this issue is preserved. Toro-Ospina's motion for a juror questionnaire requested a question about ethnicity, not race. (CF, p 227, ¶G.38.) Race and ethnicity are not the same thing. *See Ojeda*, ¶1 n.1.

Because this issue is unpreserved, *see People v. Ujaama*, 2012 COA 36, ¶37, plain error review applies. *Hagos v. People*, 2012 CO 63, ¶14; Crim. P. 52(b). An error is plain if it is: (1) obvious, (2) substantial, and (3) so undermined the fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

"Ordinarily, for an error to be obvious, the action challenged on appeal must contravene a clear statutory command, a well settled legal principle, or Colorado case law." *People v. Manyik*, 2016 COA 42, ¶36.

B. Additional Facts

Toro-Ospina filed a motion for a jury questionnaire that asked about ethnicity because he had "a right to a jury from the fair cross

section of the community and to ensure jurors are not discriminated against inappropriately" and "[i]n order to know if any ethnic group is excluded from jury service, the defendant needs to know the ethnicity of the potential jurors." (CF, pp 227.) The trial court denied the motion. (CF, p 257.) The standard jury questionnaire asking for basic identifying information like name, year of birth, sex, age, marital status, and occupation was used instead. (*See, e.g.,* Sealed Juror Questionnaires, p 1.)

C. Legal Analysis

Crim. P. 24(a) governs the voir dire examination of prospective jurors. *People v. Reaud*, 821 P.2d 870, 871 (Colo. App. 1991). As relevant here, Crim P. 24(a)(3) specifies, "In the discretion of the judge, juror questionnaires, posterboards and other methods may be used … The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination." The purpose of voir dire is to enable counsel to select as fair and impartial a jury as possible. *Smith v. Dist. Court*, 907 P.2d 611, 613 (Colo. 1995); Crim. P. 24(a).

Here, the trial court acted within its discretion in not adding a race question to the jury questionnaire. A juror's race is irrelevant to their fitness and should not factor into selecting a jury. *Beauvais*, ¶20. Asking jurors about their race before the jury selection process begins is inconsistent with this proposition and is the exact opposite of being race neutral. Requiring a response to a question about race also "raises significant administrative and public policy questions … particularly given the potentially difficult intersection of a juror's racial self-identification with the striking attorney's perception of that juror." *State v. Raynor*, 221 A.3d 401, 406 (Conn. 2019). It would also identify the precise jurors to strike if a party wanted to discriminate against a certain race. *See State v. Lamon*, 664 N.W.2d 607, 637-38 (Wis. 2003) (Abrahamson, C.J. dissenting) (race played role in prosecutor's decision to obtain police report for one particular potential juror that was then used to strike the juror; prosecutor was aware of juror's race before voir dire because Wisconsin law requires jurors to fill out juror questionnaire and questionnaire includes race of prospective juror).

Colorado law does not require a question about race in the jury questionnaire. § 13-71-115(1), C.R.S. (2022) (governing the information required in juror questionnaires, such as name, sex, date of birth, age, residence, and marital status, and does not specifically require that race or ethnicity information be included); *cf., e.g.,* 28 U.S.C.A. § 1869(h); Conn. Gen. Stat. Ann. § 51-232(c)(1).

And if the defendant cannot determine the race of a potential juror without an explicit question in the questionnaire, then presumably the prosecution cannot determine the juror's race either, let alone use race as the grounds for a peremptory challenge. *See McDaniels v. Kirkland*, 839 F.3d 806, 812 (9th Cir. 2016) (prosecutor noted only way they knew juror was African-American was because she put on her questionnaire that she's of "Caucasian race, African–American, [and] I think American Indian [sic]. But physically to look at her, you would not be able to tell she's any parts African-American." (modifications in original)). This is also why *Batson* is not rendered meaningless simply because the jury questionnaire doesn't ask about

race: if the parties don't know a juror's race without it being disclosed on a jury questionnaire, then they cannot discriminate based on race.

Toro-Ospina argues that parties cannot effectively mount *Batson* challenges without knowing the race of potential jurors because they are forced to make assumptions based upon skin color or last name. (OB, pp 22-23.) But there are hundreds, if not thousands, of cases where defense counsel made *Batson* challenges based on their observations of potential jurors and questions asked during voir dire without needing a question about race in the questionnaire. *See, e.g., People v. Lucero*, 2014 COA 53; *People v. Phillips*, 2012 COA 176. And there is nothing preventing a party from conducting a comparative juror analysis at the time of trial. (OB, p 24.) *See Beauvais*, ¶52.

Assuming, *arguendo*, the trial court erred, any error was not plain because it was not obvious or substantial. Nothing in Colorado requires a question about race, and the questionnaire here complied with § 13-71-115(1). (Sealed Juror Qs, pp 1-45). And the lack of a question of about race in the jury questionnaire certainly did not hinder Toro-Ospina's Batson challenge here. The trial court simply disagreed that

the prosecutor engaged in race-based jury selection. Finally, Toro-Ospina doesn't assert that his counsel was prevented from conducting full voir dire examination of prospective jurors. *See People v. Page*, 907 P.2d 624, 634 (Colo. App. 1995), *overruled on other grounds by People v. Muckle*, 107 P.3d 380 (Colo. 2005).

III. The trial court properly denied defendant's unconscious bias instruction.

A. Standard of Review; Preservation

The People agree this Court reviews jury instructions de novo. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). A trial court's decision to not give a particular jury instruction is reviewed for an abuse of discretion. *People v. Gonzales*, 2017 COA 62, ¶4.

The People agree this issue is preserved, (CF, p 320; TR 9/22/20, pp 148:2-150:1), but disagree that constitutional harmless error review applies. (OB, p 30.) Preserved instructional errors are reviewed for non-constitutional harmless error. *Brown v. People*, 239 P.3d 764, 767 (Colo. 2010). Reversal is required only if the instructional error created the reasonable probability that the jury was misled in reaching a

verdict or otherwise contributed to the conviction. *People v. Mata-Medina*, 71 P.3d 973, 980 (Colo. 2003); Crim. P. 52(a).

B. Additional Facts

The trial court instructed the jury:

> During the trial, you received all of the evidence that you may properly consider in deciding the case. Your decision must be made by applying the rules of law that I give you to the evidence presented at trial. Remember, you must not be influenced by sympathy, bias or prejudice in reaching your decision.

(CF, p 352.)

It declined to give Toro-Ospina's unconscious bias instruction:

> I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious bias are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious

> bias, too, can affect how we evaluate information and make decisions.

(CF, p 320.)

C. Legal Analysis

It's the trial court's duty to properly instruct the jury on all matters of law. *Stewart*, 55 P.3d at 120. When the jury is adequately instructed on the law, the trial court has the discretion to determine whether additional jury instructions may be given. *People v. Jones*, 990 P.2d 1098, 1107 (Colo. App. 1999); *People v. Burke*, 937 P.2d 886, 890 (Colo. App. 1996). If the tendered instruction sets forth an instruction already encompassed in other instructions given to the jury, the defendant is not entitled to have it reiterated in a separate instruction. *People v. Rivera*, 710 P.3d 1127, 1129 (Colo. App. 1985). In determining the propriety of a particular jury instruction, the instructions are viewed as a whole. *People v. Trujillo*, 83 P.3d 43, 48 (Colo. 2004).

Toro-Ospina contends that the trial court had a duty to give the unconscious-bias instruction because he was a person of color and defense counsel requested it. (OB, pp 26-27.) But the instruction was

encompassed by the pattern introductory instruction, which says that jurors must not be influenced by bias or prejudice, (CF, p 352); COLJI-Crim E:01 (2021), so he was not entitled to this additional instruction. *See People v. Gracey*, 940 P.2d 1050, 1054 (Colo. App. 1996).

Assuming, *arguendo*, the trial court erred, the error was harmless. Defense counsel educated the jury on implicit bias during a meaningful discussion with the prospective jury. (TR 9/21/20, pp 115:9-116:24.) This, in combination with the pattern instruction, means the jury was aware that bias includes unconscious bias.

IV. The prosecutor did not commit misconduct in closing argument.

A. Standard of Review; Preservation

The People agree this Court reviews a claim of prosecutorial misconduct in two steps. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, it considers whether the prosecutor's conduct was improper based on the totality of the circumstances. *Id.* "Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion." *Domingo-Gomez v. People*, 125 P.3d

1043, 1049 (Colo. 2005). Second, it considers whether any improper conduct warrants reversal according to the appropriate standard of review. *Wend*, 235 P.3d at 1096.

The People agree this issue was partly preserved. (OB, pp 31.) Toro-Ospina objected to the prosecutor's comment about evidence, (TR 9/23/20, p 53:2-5), so that claim is preserved and reviewed for harmless error. *People v. Sauser*, 2020 COA 174, ¶80. But he did not object to the prosecutor's comments about thwarting his self-defense claim and her characterization of JG's testimony, so those claims are unpreserved and reviewed for plain error. *Id.* at ¶79.

B. Additional Facts

During closing argument, while discussing self-defense and whether Toro-Ospina's self-defense belief was reasonable, the prosecutor argued:

> [H]he knows they are out there picking up trash. He won't admit that the thing in [MO]'s hand is a trash claw because to do so would essentially thwart his claim that he believed he was in danger by this object, but he goes on to say that he talks to [MO] and that [MO] is defiant. He's not giving him the answers he wants, I assume.

> And at some point, based on the Defendant's testimony, [MO] raises his hand with the bucket and the metal object in his hand.
>
> Now, you'll recall from the Defendant's testimony yesterday that that action transforms from this (indicated) to this (indicated) throughout the course of his testimony. He did not pose a threat. That is the … act that the Defendant is relying on to say that he felt in fear at that moment, a maintenance man carrying a trash claw and a bucket doing his job, badgered by an angry resident who has come out with a gun on his hip arguing about this door.

(TR 9/23/20, pp 22:24-25:22.) The prosecutor also argued that Toro-Ospina's testimony about MO 's threatening movement was not credible. (TR 9/23/20, pp 25:23-27:15.)

While discussing reasonable doubt, the prosecutor argued:

> A reasonable doubt is a doubt that's based on reason and common sense. So if your reason and common sense are satisfied that the Defendant committed these crimes, that he wasn't acting in self-defense, he's guilty.
>
> A reasonable doubt is not vague. It's not speculative, and it's not imaginary. You must look at the evidence that was presented and make that determination.

(TR 9/23/20, p 29:14-25.)

Defense counsel's closing argument focused partly on the "total lack of investigation," including that police didn't look for independent eyewitnesses or surveillance video, and that they just believed the first story they heard. (TR 9/23/20, p 30:15-23, 31:20-33:7, 39:2-5, 40:23-41:19, 43:15-19.) Relatedly, counsel argued that the lack of evidence fell on the prosecution, and that the jury heard three different stories, but no story from an independent witness. (TR 9/23/20, pp 38:25-39:7, 43:7-14.)

Regarding JG, defense counsel argued:

> [Defendant] then eventually goes back inside, and [JG] just goes back to picking up trash. He said he did not feel threatened. And not only does he not feel threatened, his actions show that it's not someone who's being threatened. He doesn't call 911. He goes back. He picks up trash. He waits for the police to come. Eventually, he comes over to the home base.

(TR 9/23/20, p 38:7-15.)

Defense counsel used the prosecutor's name 16 times during closing argument.

In rebuttal close, the prosecutor responded:

> [U]nderstanding that Defense Counsel wants you to focus on me, I want you to focus on the people who testified who were there, who experienced this for themselves, and what they said about what happened that day. And I want you to remember that the evidence in this case is what came from that witness stand. It's not something that Defendant or Defense Counsel suggests could have possibly been gathered. Evidence is not a suggestion that there may have been other witnesses.

(TR 9/23/20, pp 52:18-53:1.) Defense counsel objected, arguing that the jury was allowed to consider lack of evidence. The trial court overruled the objection. (TR 9/23/20, p 53:2-5.) The prosecutor said again, "The evidence came from that witness stand," and again asked the jury to focus on the victims' testimony. (TR 9/23/20, p 53:6-10.)

She also said that when the jury considered the evidence, it was their recollection, not hers or defense counsel's, that mattered. (TR 9/23/20, pp 54:6-10.) Specific to JG, she argued:

> When you hear Defense Counsel stand up here and say that [JG] testified that he didn't feel threatened, and you know that's not true, you think about your recollection when you go back there.

(TR 9/23/20, p 54:10-25.)

C. Legal Analysis

"A prosecutor, while free to strike hard blows, is not at liberty to strike foul ones." *Wend*, 235 P.3d at 1096 (quoting *Domingo-Gomez*, 125 P.3d at 1048). Proper closing argument may include the facts in evidence and any reasonable inferences drawn therefrom, as well as comments on the instructions of law. *Domingo-Gomez*, 125 P.3d at 1048. A prosecutor "has wide latitude in the language and presentation style used to obtain justice." *Id.* But even in light of this latitude, "arguments and rhetorical flourishes must stay within the ethical boundaries drawn by" the supreme court. *Id.*

A prosecutor may not use arguments calculated to inflame the passions and prejudices of the jury, mislead the jury, denigrate defense counsel, or imply that the defense is not being asserted in good faith. *People v. Carter*, 2015 COA 24M-2, ¶70. A prosecutor also may not misstate the evidence or denigrate defense counsel. *People v. Gladney*, 250 P.3d 762, 769 (Colo. App. 2010).

The court evaluates a claim of prosecutorial misconduct by looking at the "context of the argument as a whole and in light of the evidence before the jury." *Carter*, ¶71 (quoting *People v. Geisendorfer*, 991 P.2d 308, 312 (Colo. App. 1999)).

Toro-Ospina alleges three instances of prosecutorial misconduct. First, he argues the prosecutor's comment—that Toro-Ospina couldn't admit MO was holding a trash claw because that would thwart his self-defense claim—denigrated him, and that the prosecutor inserted her personal opinion regarding the veracity of his testimony and portrayed him as lying to the jury. (OB, pp 32-33.)

When viewed in context, however, the prosecutor was commenting on the credibility of Toro-Ospina's testimony in light of the other evidence admitted at trial, which is not improper. *See Domingo-Gomez*, 125 P.3d at 1051 ("counsel may properly argue from reasonable inferences anchored in the facts in evidence about the truthfulness of a witness' testimony.").

Second, Toro-Ospina argues that the prosecutor's argument that the evidence was what came from that witness stand and was not

something that defense counsel suggested could have possibly been gathered, like other witnesses, misstated the law because the jury could also consider lack of evidence. (OB, pp 33-34.)

But the prosecutor was discussing what *constitutes* evidence, not commenting on the reasonable doubt instruction. While perhaps inartful, the prosecutor did not misstate the law. She responded to defense counsel repeatedly mentioning her in closing argument and attempted to refocus the jury on the evidence presented at trial and whether it proved the charges beyond a reasonable doubt. *See Carter*, ¶72. She reminded the jury not to speculate and that defense counsel's argument was not evidence. (*See* TR 9/21/20, p 167:18-20; CF, p 352); *City of Fountain v. Gast*, 904 P.2d 478, 482 n.5 (Colo. 1995) ("The arguments of counsel, of course, are not evidence."); COLJI-Crim. E:01 (2021).

Third, Toro-Ospina argues that the prosecutor misstated the evidence when she said JG never testified that he didn't feel threatened. (OB, pp 34-35.) During cross-examination, the following exchange occurred:

> Q And although you were scared, you didn't feel threatened; is that correct?
>
> A Correct, yes.
>
> Q And, in fact, you stay there and you have a conversation with this man, correct?
>
> A But that was after he shot.
>
> Q So right. After – you stay there – and you heard the sounds, you stay there and you have a conversation with this man, correct?
>
> A Yes, but that doesn't mean I wasn't afraid.
>
> Q Okay. But again, you didn't feel threatened. You said that previously, right?
>
> A Yeah, I didn't feel threatened, but the fear was there.

(TR 9/21/20, p 209:4-17.)

While it's true JG testified on cross-examination that he did not feel threatened, he testified on direct, cross-examination, and redirect that he felt scared, afraid, fearful, and in danger. (TR 9/21/20, pp 197:24-198:12, 219:1-7.) Trial attorneys—defense and prosecution—do not have written appellate records before them to refer to when asking questions or making arguments, and their memories can be faulty.

Consequently, the law does not require trial prosecutors to have exact memories of the evidence; rather, misconduct occurs only when a prosecutor misstates crucial evidence intentionally. *See United States v. Young*, 470 U.S. 1, 8 n.5 (1985); *Domingo-Gomez*, 125 P.3d at 1049; *compare Miller v. Pate*, 386 U.S. 1, 5-7 (1967) (prosecutor knowingly argued that paint on man's underwear was child victim's blood).

Assuming, *arguendo,* the prosecutor's comments were improper, reversal is not required. "In determining whether prosecutorial misconduct mandates a new trial, an appellate court must evaluate the severity and frequency of misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to defendant's conviction." *People v. Merchant*, 983 P.2d 108, 114 (Colo. App. 1999).

Any error regarding the prosecutor's evidence comment was harmless. Evaluating the evidence presented at trial to determine if the prosecution met its burden necessarily includes an evaluation of the lack of evidence. Only if the evidence is sufficient does a jury convict. If there is a lack of evidence, the jury acquits. (*See, e.g.,* CF, p 365 (felony

menacing elemental stating "After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of menacing. After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of menacing.")).

Additionally, the jury was instructed that "[r]easonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case" and that "[w]hile the attorneys may comment on some of these rules, you must follow the instructions I give you." (CF, pp 352, 357); COLJI-Crim. E:01 (requiring jurors to follow the rules of law given by the court and not the attorneys' comments). Absent any indication to the contrary, it is presumed that the jury followed these instructions. *People v. Lomanaco*, 802 P.2d 1143, 1145 (Colo. App. 1990); *see also People v. Estes*, 296 P.3d 189, 193 (Colo. App. 2012).

And any error regarding the other two comments was not plain. Defense counsel didn't object to the comments, suggesting they were not

overly damaging. *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990) ("Lack of an objection is a factor to be considered in examining the impact of a prosecutor's closing argument … The lack of an objection may demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging.")

Regarding the prosecutor's "thwart" comment, Toro-Ospina's credibility was called into question. As the prosecutor pointed out, he was the only witness with something to lose. (TR 9/23/20, pp 53:11-54:5); s*ee Martinez v. People*, 244 P.3d 135, 143 (Colo. 2010) (holding that substantial evidence calling the defendant's credibility into question favored finding that prosecutor's improper tailoring argument was harmless). Defense counsel's closing argument focused on why the victims weren't credible and why Toro-Ospina's version of events was true. (TR 9/23/20, pp 30:9-52:16.) And the trial court properly instructed the jury that they were the sole judges of the credibility of each witness and the weight to be given to the witness's testimony. (CF, p 359); COLJI-Crim E:05 (2021); *see Lomanaco*, 802 P.2d at 1145.

Regarding the prosecutor's characterization of JG's testimony, immediately before and after the comment, she said it was the jury's recollection that mattered. (TR 9/23/20, pp 54:6-25). And the trial court instructed the jury that closing arguments are not evidence. (TR 9/21/20, p 167:18-20). *See Lomanaco*, 802 P.2d at 1145. Perhaps most importantly, it is not necessary to prove actual subjective fear on the part of the victim. *People v. Zieg*, 841 P.2d 342, 343 (Colo. App. 1992); § 18-3-206, C.R.S. (2022). Regardless of whether JG felt threatened, it was clear that Toro-Ospina's actions placed him in fear. (TR 9/21/20, p 209:4-17.)

V. The trial court properly excluded evidence of the victim's alleged drug dealing.

A. Standard of Review; Preservation

The People agree a trial court's exclusion of evidence is reviewed for an abuse of discretion. *Stewart*, 55 P.3d at 122.

Evidentiary rulings abridge the right to present a defense only if they are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998)

(quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)); *see People v. Garcia*, 179 P.3d 250, 255 (Colo. App. 2007). Because the exclusion of this evidence did not entirely foreclose Toro-Ospina from presenting his self-defense theory, any error is not one of constitutional dimension. *See Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009) (rejecting the application of constitutional harmlessness where an erroneous evidentiary ruling did not "effectively bar the defendant from meaningfully" presenting his defense). Thus, the applicable standard of reversal is non-constitutional harmless error. *Hagos*, ¶12; *Pernell v. People*, 2018 CO 13, ¶22; *People v. Conyac*, 2014 COA 8M, ¶107.

B. Additional Facts

In opening statement, defense counsel asserted that Toro-Ospina was "scared by the dangerous streets in his neighborhood with drug dealings happening in his building," and that his apartment building's doors were often broken so people could come in and out for drug deals, so "[h]e was scared for the safety of his three young children. Counsel asserted that he was scared for his safety and for the safety of his wife and kids. (TR 9/21/20, p 179:6-24.)

At the end of the first day of trial and in anticipation of MO's testimony, the prosecution said that based on defense counsel's opening statement, it would be objecting to evidence about MO allegedly helping drug dealers into the building because "there's [not] any legitimate evidence of that" and it would be based on hearsay because "some of the witnesses mention that the doors were being fixed because of their suspected drug dealing in this building." (TR 9/21/20, pp 247:10-248:19.)

The next morning, before MO's testimony, the prosecutor moved in limine to exclude questions about him breaking the door intentionally to let drug dealers into the building. She argued that it was improper character evidence. (TR 9/22/20, pp 5:12-7:1.) Defense counsel responded that "under 404(b), propensity evidence does not apply to witnesses," and that she would be eliciting the evidence through a different witness anyway. (TR 9/22/20, p 7:3-9.) The trial court said the evidence would only be relevant if it went to Toro-Ospina's mental state for self-defense but "we'll have to see how we go

… We can take objections as they come, but I won't make a blanket ruling." (TR 9/22/20, p 7:10-8:1.)

Toro-Ospina testified that he saw drug deals through windows at his apartment building and sometimes the door would be propped open or tampered with so people could go inside to get drugs. (TR 9/22/20, pp 180:14-181:4.) When defense counsel asked him if he recognized any specific people who participated in the drug deals, the prosecutor objected; she anticipated Toro-Ospina testifying that he saw MO participate in drug deals. (TR 9/22/20, p 181:5-16.)

The trial court asked defense counsel how the evidence was relevant to self-defense. (TR 9/22/20, pp 182:17-18.)

Defense counsel responded that it went to the reasonableness of Toro-Ospina's reaction because he thought drug dealing was dangerous and he needed to protect himself and his family from it, he recognized MO, and during the initial verbal confrontation, they argued over MO breaking the door so drug dealers could come in. (TR 9/22/20, pp 181:19-183:4.)

The prosecutor responded that it was improper character evidence because it was not a pertinent character trait; instead, it was an attempt to paint MO as a criminal. She argued that defense counsel's offer of proof was not that Toro-Ospina was going to say he saw MO be violent on prior occasions, that he saw weapons on prior occasions involving the drug deals, or that he believed a drug deal was occurring at the time he confronted MO. (TR 9/22/20, pp 183:5-23.) She also argued that the jury heard testimony about drug deals going on so the defense was not prejudiced by the exclusion of the proffered testimony, which was irrelevant to self-defense. (TR 9/22/20, p 183:17-21.)

The trial court found that MO having sold drugs was character evidence and was not a pertinent character trait:

> If there is an interaction between them where that person has threatened him, if he has witnessed that person committing violence against somebody else, then it might be pertinent to the reasonableness of his conduct. But simply saying, Have you seen him participate in drug deals in the past, simply draws into the light – bad character of the alleged victim in the case that's not a relevant character in the case … If there's some prior violence he's witnessed, that he's aware of some prior violence between them,

> hostility between them, that's something different.

(TR 9/22/20, pp 183:24-184:22.) The court also found that even if the evidence had some relevance, it was excluding it under CRE 403. (TR 9/22/20, p 184:120-22.)

C. Legal Analysis

Only relevant evidence is admissible. CRE 402. Relevant evidence "means evidence having 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." CRE 401. Even relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice." CRE 403.

CRE 404(a)(2) governs the admissibility of character evidence of an alleged victim. *People v. Ferguson*, 43 P.3d 705, 710 (Colo. App. 2001). Generally, "evidence of a person's character is not admissible to prove he or she acted in conformity therewith on a particular occasion, except '[e]vidence of a pertinent trait of character of the victim of the

crime offered by an accused, or by the prosecution to rebut the same.'" *Id.* (quoting CRE 404(a)(2)). A pertinent trait of character is a character trait making "any fact 'of consequence to the determination' of the case more or less probable than it would be without evidence of the trait." *People v. Miller*, 890 P.2d 84, 92 (Colo. 1995) (quoting *United States v. Angelini*, 678 F.2d 380, 381 (1st Cir. 1982)).

Toro-Ospina contends that the trial court abused its discretion when it precluded the evidence of MO's alleged drug dealing. This is so, he argues, because it overlooked the defense's argument that drug dealing is often linked to violence. (OB, p 39.) The problem with this argument is that the evidence defense counsel sought to admit was that Toro-Ospina saw MO participate in drug deals, not that Toro-Ospina saw MO engage in violence while dealing drugs. (TR 9/22/20, p 181:5-6.) Drug dealing is not a pertinent character trait to self-defense. Violence could have been under the right circumstances. *See, e.g., People v. Jones*, 675 P.2d 9, 17 (Colo. 1984). But again, defense counsel's offer of proof was not that Toro-Ospina saw MO being violent on prior occasions or using a weapon while participating in drug

dealing; nor did he believe a drug deal was occurring at the time he confronted MO. (TR 9/22/20, pp 181:19-183:4.) Drug dealing can be intertwined with violence, but it isn't always, and that link was missing here.

Furthermore, the evidence's minimal probative value was substantially outweighed by the danger of unfair prejudice so was properly excluded under CRE 403. Defense counsel was attempting to paint MO as a criminal, and that criminality had nothing to do with Toro-Ospina acting in self-defense. *See People v. Dist. Court*, 869 P.2d 1281, 1286 (Colo. 1994) ("Unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger or shock." (quoting *People v. Goree,* 132 Mich.App. 693, 349 N.W.2d 220 (1984)).

Assuming, *arguendo*, that the trial court erred, any error was harmless. The jury heard that drug dealing occurred through windows and the door being tampered with so people could get inside, that Toro-Ospina had prior confrontations and problems with MO, and that Toro-

Ospina believed MO was involved with breaking the doors. (TR 9/22/20, pp 180:14-181:4, 193:3-194:2, 226:7-228:16, 233:21-234:7.)

Contrary to Toro-Ospina's contention, the unasked juror question, "if you knew he was [a] maintenance worker, why did you feel you needed to go out there with a gun," does not demand a different result. (*See* OB, pp 41-42.) Toro-Ospina had never seen MO engaged in violence, nor did he assert that MO was participating in a drug deal that morning. Although the affirmative defense of self-defense takes into account the actual belief or state of mind of a defendant, it ultimately requires that a reasonable person would have believed and acted as the defendant did. *People v. Vasquez*, 148 P.3d 326, 330 (Colo. App. 2006). "A 'reasonable person' means 'an objectively reasonable individual and not a subjectively reasonable one possessing the individual defendant's personality traits or defects.'" *Id.* (quoting *People v. Darbe,* 62 P.3d 1006, 1011 (Colo.App.2002)).

VI. Reversal is not required under the cumulative error doctrine.

A. Standard of Review; Preservation

The People agree whether a defendant has been deprived of his due process right to a fundamentally fair trial is a question of law reviewed de novo. *See Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005).

Preservation is relevant for a cumulative error analysis. While a cumulative error claim itself may not need to be preserved for this Court to review it*, see Howard-Walker v. People*, 2019 CO 69, plain error can affect appellate review of such a claim in other ways.

An unpreserved error that is not "obvious" will not be noticed. *See, e.g., Scott v. People*, 2017 CO 16, ¶18. Accordingly, if an unpreserved error is not obvious, it is not a noticed error, and it should not be considered an error in reviewing for cumulative error. *See, e.g., State v. Garcia*, 462 P.3d 1125, 1143 (Ida. 2020); *United States v. Delgado*, 672 F.3d 320, 340, n.24 (5th Cir. 2012).

Here, Toro-Ospina's jury questionnaire claim and two of his prosecutorial misconduct claims are subject to plain error review, and the errors were not obvious, so they should not be considered in the cumulative error analysis. In any event, his cumulative error claim fails.

B. Legal Analysis

"[N]o defendant has a right to a perfect trial; all have a right to a fair trial." *Reliford v. People*, 579 P.2d 1145, 1150 (Colo. 1978). Along those same lines, the Colorado Supreme Court has explained that, to warrant reversal for cumulative error, the defendant must show that "the cumulative effect of multiple errors and defects substantially affected the fairness of the trial proceedings and the integrity of the fact-finding process." *Howard-Walker*, ¶24. Cumulative error requires cumulative prejudice. *Id.* at ¶25.

The doctrine of cumulative error requires that numerous errors be committed, not merely alleged. *Conyac*, ¶152. Reversal is warranted only "when numerous errors in the aggregate show the absence of a fair

trial, even if individually the errors were harmless or did not affect the defendant's substantial rights." *Howard-Walker*, ¶26.

As set forth in the preceding sections, the trial court did not err with respect to any of Toro-Ospina's claims. *See People v. Valdez*, 2017 COA 41, ¶51 ("Because we have not discerned any errors, this contention [of cumulative error] does not warrant relief.").

But even assuming multiple errors occurred, they did not combine in such a way as to "substantially prejudice the defendant's right to a fair trial." *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007). In other words, any such errors do not demonstrate the absence of a fair trial in the aggregate. *See People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986); *see also People v. Flockhart*, 2013 CO 42, ¶36 ("Due process entitles a defendant to a fair trial but not a perfect one."); *cf. Howard-Walker*, ¶¶39-48 (cumulative effect of eight errors deprived the defendant of a fair trial).

Accordingly, reversal based on the cumulative error doctrine is unwarranted.

CONCLUSION

The People respectfully request that this Court affirm the trial court's judgment of conviction.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon JULIA CHAMBERLIN and all parties herein via Colorado Courts E-filing System on September 27, 2022.

/s/ Megan C. Rasband
MEGAN C. RASBAND