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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

District Court of La Plata County
Honorable William L. Herringer, Judge
Case No. 19CR91

Defendant-Appellant,

WILLIAM BENJAMIN CLINE, VI,

v.

Plaintiff-Appellee,

THE PEOPLE OF THE STATE OF COLORADO.

▲ **COURT USE ONLY** ▲

Case No. 20CA1121

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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:

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/s/ Christine Brady

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STATEMENT OF THE CASE

William Benjamin Cline, VI (defendant) appeals his multiple convictions arising from his unlawful entry into a neighbor's home.

For the unlawful entry, the prosecution charged defendant with second-degree burglary and first-degree trespass. The prosecution also charged defendant in relation to his arrest with second- and third-degree assault, criminal mischief, and harassment-ethnic intimidation. CF, pp 511-14. The trials were severed. CF, pp 349-53.

At the first trial, the jury acquitted defendant of burglary but convicted him of trespass. CF, pp 456-57. At the second trial, the jury convicted him of the remaining charges. CF, pp 729-35.

The court sentenced defendant to all concurrent sentences as follows: 731 days in prison for second-degree assault; 731 days in jail for third-degree assault; one year in prison for trespass; one year in jail for harassment; and six months in jail for criminal mischief. CF, pp 882-85.

This appeal follows.

STATEMENT OF THE FACTS

I. The trespass

Defendant was staying, alone, at his parents' home in a very small gated community in the mountains near Durango. On a snowy night in February 2019, an intoxicated defendant left his residence in his golf cart with his dog, traveled to the residence of his neighbor (Poillion) about a half mile down the road, and then crashed into a snowbank at the end of the driveway. TR 12/9/2019, pp 268, 318, 354, 363-64.

Defendant walked up the driveway, entered through the unlocked garage side-door, and proceeded inside the residence. Once inside, he walked upstairs to the kitchen, pulled out four liquor bottles from the island liquor cabinet, and placed them on the counter. Poillion was asleep and the house was dark; he was awakened when defendant, who had opened the bedroom door and shined a cellphone flashlight into the bedroom, saw Poillion, exited the room, and closed the bedroom door. Poillion got up and came into the kitchen without his eyeglasses on; he saw a figure standing at the island and heard him scoop ice from the ice maker. TR 12/9/2019, pp 257-67.

Poillion went back to the bedroom to put on his eyeglasses and a shirt, and when he came back, the person was gone. When Poillion turned on the lights and checked outside, a dog walked up to him, and defendant, whom Poillion had never met, stated, "That's my dog." When Poillion asked defendant why he had been in his house, he stated, "I didn't know anyone was home. I like going in empty houses at night." When Poillion questioned him further, defendant repeated his own address several times. When Poillion told defendant he had better leave, defendant stated, "You can do what you want," and he walked away with the dog. Poillion observed a black holster containing a revolver tucked inside the back of defendant's pants. TR 12/9/2019, pp 260-62.

Poillion went back inside and called the community's gatehouse guard (Bobo), who had just started to make his security rounds. Bobo headed to Poillion's house, encountered defendant on the way, asked him what happened, and defendant stated, "I thought it was my house, so I went in." TR 12/9/2019, p 286:2-12; TR 12/10/19, pp 449-52. When Bobo told defendant this was "really serious," he responded, "I don't

give a fuck what they do. I just like checking these houses to see if anybody's home." TR 12/10/19, p 452. Bobo went to Poillion's house; Poillion told him the details and called 911. TR 12/10/19, pp 454-55.

II. The assaults, criminal mischief, and harassment

Deputy D was dispatched to Poillion's residence to investigate a suspected burglary. When he arrived, he noticed the crashed golf cart and smelled an odor of alcohol. Poillion and Bobo explained to him the entire incident—including that defendant was wearing a gun holster and was intoxicated. He also investigated the scene and observed corroborating evidence, including tracks in the snow, puddles in the home, and the liquor bottles. Bobo told him defendant's address, and he learned the crashed golf cart belonged to defendant's family, so he went to defendant's home; Deputy C met him there. TR 1/13/20, pp 199-210.

With their body cameras activated, *see* EX 4, the deputies knocked on the front door and commanded defendant to come outside. Instead, defendant invited them into the house and he was smiling and on his cellphone. TR 1/13/20, pp 210-14. The friendly interaction escalated

into defendant becoming agitated toward Deputy C, and when defendant moved toward Deputy C with his arms raised, the deputies detained him for officer safety by handcuffing him and placing him on the floor. TR 1/13/20, pp 214-16.

When Deputy D attempted to *Mirandize* him, defendant would not listen, but rather talked over the deputy and then reached behind him toward the floor to get his cellphone. Deputy D took the phone away, and then defendant stood up aggressively, after which the deputies placed him back on the floor. TR 1/13/20, pp 216-18.

At this point, defendant was now under arrest, so Deputy C went to get the patrol vehicle. Defendant, now alone with Deputy D, squirmed out of his grasp and began kicking him in the stomach, chest, and kneecaps. Then defendant grabbed the deputy's genitals. When he was told to stop, but did not, the deputy punched him in the face. Defendant let go but then grabbed again and squeezed. During this time, Deputy D was trying to transmit on his radio for Deputy C to come back in and help. Eventually, Deputy C came back into the home.

Deputy D yelled to him to tase defendant, which he did, and defendant let go of the deputy's genitals. TR 1/13/20, pp 218-28.

Deputy D denied putting defendant in a chokehold. TR 1/14/20, pp 344-45. Deputy C testified that, when he came back inside, he saw defendant's back was on Deputy D's chest, and Deputy D had his arms and legs around defendant. He did not remember seeing where Deputy D's arm was, so he did not see a chokehold. TR 1/14/20, p 484:12-17.

Deputy D then used his radio to call his supervisor, who soon arrived and tried to put defendant into the patrol vehicle, but defendant resisted, so the deputy tased him. In the patrol vehicle, defendant tore off the door handle. He also engaged in a long continuous tirade of vile and offensive remarks, hurling violent, racial slurs at Deputy D, an African-American. TR 1/13/20, pp 233, 239-49; EX 5.

Defendant's theory of defense for the assault charges was self-defense, arguing Deputy D used unreasonable and excessive force against him when he "overcontrolled" defendant by using a chokehold. CF, p 708; TR 1/15/20, pp 640-41.

Additional pertinent facts are presented in the argument section.

SUMMARY OF THE ARGUMENT

The trial court's ultimate conclusion that no unlawful entry occurred was not erroneous because defendant invited the officers to enter his home, and thus, the make-my-day defense was unavailable. The objective standard for unlawful seizures under the Fourth Amendment was a separate question from whether defendant gave voluntary consent to the officers to enter his home, and since he did so, the deputies were not "intruders" when they entered the home.

The trial court properly included the initial-aggressor exception in the self-defense instruction. The deputy's testimony—along with the jury's review and evaluation of the video—provided ample grounds to support the conclusion that it was defendant who initiated the physical conflict by kicking the deputy and grabbing the deputy's genitals.

The trial court did not abuse its decision when it precluded expert testimony about the deputies' tasing and physically transporting defendant to the police car. After defendant was tased, he did not respond to Deputy D physically, nor was he charged with assaulting

any deputy after he was tased. Thus, the expert's opinion regarding tasing procedures was irrelevant on this point.

The trial court did not err when it rejected the defense instruction on the affirmative defense of mistake of fact. A division of this Court has concluded that when a defendant knowingly and unlawfully entered and remained in a dwelling of another, the jury must necessarily conclude, beyond a reasonable doubt, that he formed the particular mental state required in order to commit trespass.

The trial court did not err in refusing to conduct an in camera review of a deputy's personnel file. Defendant did not set forth a specific factual basis for demonstrating a reasonable likelihood that the materials he sought existed and contained material evidence. Further, he did not show the file included documents that were evidentiary or relevant under CRE 401. In any event, even if the trial court erred in applying the wrong standard, defendant is not entitled to a remand for an in camera review under the facts and circumstances of his case.

ARGUMENT

I. The trial court's ultimate conclusion that no unlawful entry occurred was not erroneous because defendant invited the officers to enter his home, and thus, the make-my-day defense was unavailable.

A. Standard of Review

The People agree defendant preserved this issue by tendering a make-my-day instruction. CF, pp 619, 688.

The People also agree the standard of review is de novo, *People v. Zukowski*, 260 P.3d 339, 343 (Colo. App. 2010), and, any error requires reversal unless the reviewing court concludes the error is harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18, 24 (1967). The reviewing court looks to whether "there is a reasonable probability that it contributed to the defendant's conviction." *People v. Rock*, 2017 CO 84, ¶ 22 (citing *People v. Roman,* 2017 CO 70, ¶13; *Crider v. People,* 186 P.3d 39, 42-43 (Colo. 2008)); *but see Zoll v. People*, 2018 CO 70, ¶ 18 (whether there is a reasonable "possibility" that the error contributed to the conviction).

B. Legal Standards

The statute governing the use of physical force against an intruder provides, in pertinent part:

> [A]ny occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.

§ 18-1-704.5, C.R.S. (2021).

A person "unlawfully enters" premises when he is not licensed, invited, or otherwise privileged to do so. § 18-4-201(3), C.R.S. (2021); *see also People v. McNeese*, 892 P.2d 304, 311-12 (Colo. 1995) (interpreting "unlawful entry" in context of make-my-day statute). Generally, consent to enter the premises given by the owner, occupant, or other authorized person has been recognized as a valid defense to an unlawful entry. *McNeese*, 892 P.2d at 325. The explicit terms of the

statute provide the occupant of a dwelling with immunity from prosecution only for force used against a person who has made an unlawful entry into the dwelling, but not against a person who *remains unlawfully* in the dwelling. *Id.* at 309.

C. Analysis

As explained by the court in its ruling, defendant invited the officers into his home, and thus no scintilla of evidence supported a knowing unlawful entry for purposes of the intruder instruction:

> Defense Instruction No. 6, which is the physical force against an intruder. The Court has found that there is no evidence in the record that would support the finding that there was an illegal [sic] entry.
>
> What the Court has previously ruled in its consolidated order that the defendant was unlawfully seized, that is separate and apart from the question of whether or not the entry was a knowing unlawful entry. The deputies were essentially invited into Mr. Cline's home, they did not enter the home until he basically asked them to come in. I don't think there's any way that that could be viewed as being -- any knowing unlawful entry, so I don't think that that instruction is supported in the facts.

TR 1/15/20, pp 597-98. The court's factual findings are supported by the record, and its legal conclusion is supported by the law.

In the court's consolidated order granting "in part" defendant's motion to suppress, it concluded the deputies' command to open the door constituted a Fourth Amendment unlawful seizure. However, the court found the objective standard for unlawful seizures was a separate question from whether defendant gave voluntary consent to the officers to enter his home, and it made the following findings:

> Even though he is responding to the commands of the deputies, the Defendant exhibited a surprisingly casual demeanor during the interaction. When he first approaches the door, he is on the phone and appears to be smiling. When he returns to open the door, he is still on the phone and appears relaxed. After he opens the door, the deputies direct him to step outside, but instead of complying, he replies "My dog won't bite . . . why don't you guys come in."
>
> . . .
>
> Defendant's relaxed demeanor, the statements that he knew that he did not have to open the door and the fact that he has training in law strongly support a conclusion that his choice to open the door and invite the officers into his home was knowing, intelligent, and voluntary.

> The Court finds by clear and convincing evidence that the Defendant voluntarily opened the door and consented to the deputies entering his home.

CF, pp 346-47.

At the motions hearing, Deputy D testified the bodycam video showed he knocked on the door and rang the bell, and defendant invited the deputies in and offered them a drink. TR 10/23/19, p 35:13-20. The defense, while making the argument for no probable cause to arrest defendant, agreed defendant "invited in" the deputies, and defendant had the right to limit the scope of their permissible location in the house because "they were invitees. He was consenting to their presence in the home." TR 10/23/19, p 90:13-20. And the bodycam video also shows defendant had invited the deputies into his home when he later stated, "I have not done anything. You guys came to my house, I invited you, and you guys are abusing your right." People's Ex. 1, 34:45; TR 10/23/19, p 77:17-22.

Deputy D testified at trial it was his belief defendant invited him and his partner into the home by stating, "You guys come on in," to which Deputy D replied, "Thank you." Deputy D also testified, before

he knocked on the door, he had no intention of entering defendant's home without his permission, and he formed the intention to actually enter the home only after defendant invited him in. TR 1/14/20, pp 368-69.

Given the above, the record supports the court's factual finding that defendant invited the deputies into his home. And, because the record shows not only that the deputies were invited into the home, but also the deputies reasonably believed at the time they had been invited in, the court properly concluded there was no "knowing, unlawful entry" into the home. In turn, the court's legal conclusion is supported by the law under de novo review. *See* § 18-4-201(3); *McNeese*, 892 P.2d at 304.

Nonetheless, defendant contends that because "the court itself, in its suppression order, found there was sufficient evidence of an unlawful entry," it erred by not giving the instruction. And additionally argues, "whether the deputies' entry into the house was unlawful is a question of fact, and there is ample evidence in the record that their entry was unlawful." OB at 18-21.

As noted, a finding of an unlawful seizure for purposes of a Fourth Amendment violation does not affect the defendant's voluntary consent, and indeed the invitation, for the deputies to enter the home.

Accordingly, the trial court did not err when it rejected the make-my-day defense instruction.

D. Harmlessness

Finally, defendant contends this Court should reverse the assault convictions because the court's error in failing to give the make-my-day instruction lowered the prosecution's burden of proof, and, therefore, the error cannot be deemed harmless. OB at 22.

Generally, this would be true. However, under the unique circumstances of this case, any error was harmless beyond a reasonable doubt because there is no "reasonable probability that it contributed to the defendant's conviction." *Rock*, ¶ 22.

Even if the *deputies* knew their entry was technically unlawful, defendant apparently did not know, because he not only consented to the entry, but actually extended an unsolicited invitation. This fact was

necessarily found by the jury based on the evidence proved at trial, i.e., defendant did not dispute it. In so doing, the jury necessarily found the prosecution disproved the make-my-day defense, which is intended to apply to "intruders" only. *See McNeese,* 892 P.2d at 309 (make-my-day does not apply to one who only *remains unlawfully* in the dwelling).

Accordingly, any error was harmless beyond a reasonable doubt.

II. The trial court properly included the initial-aggressor exception in the self-defense instruction.

A. Standard of Review

The People agree defendant preserved this issue by objection. CF, p 708; TR 1/15/20, p 593. And also agree review is de novo. *See Galvan v. People*, 2020 CO 82, ¶ 23 n.6 (quantum of proof necessary before a trial court should instruct jury on an exception to the affirmative defense of self-defense is a question of law subject to de novo review)

The initial-aggressor exception allows the prosecution to defeat a claim of self-defense. *Castillo v. People,* 2018 CO 62, ¶ 40. A trial court may instruct the jury on the exception if "some evidence" supports it. *People v. Roberts-Bicking*, 2021 COA 12, ¶¶ 30-32. That evidence—

viewed in the light most favorable to the giving of the challenged instruction—must be such as would support a reasonable inference that the accused was the initial aggressor. *See id.*

B. Facts and Analysis

The court elected to give the initial-aggressor instruction, concluding that the jury could reasonably find—based on a review of the video and Deputy D's testimony— that the deputy did not use excessive force while arresting and handcuffing defendant, and thus defendant was the initial aggressor:

> There is some lack of clarity regarding the exact sequence of events. The jury could find that there was a -- that the initial conduct and initial contact between Mr. Cline and law enforcement, that did not constitute unreasonable or excessive force, and then they could then find that -- then they would have to evaluate the struggle between Mr. Cline, when Deputy Christensen was outside of the house, and then in that instance, they could certainly find that Mr. Cline, based upon the testimony of Deputy D and the review of the video, that Mr. Cline basically first struck the deputy, making him the initial aggressor. Likewise, they could find otherwise. So I think that is an appropriate instruction for the jury to evaluate.

TR 1/15/20, p 593:6-19.

An initial aggressor instruction is warranted when the evidence suggests the defendant initiated the physical conflict by using or threatening imminent use of unlawful physical force. *Castillo,* ¶¶ 43, 50-51.

Here, viewing the evidence in the light most favorable to giving the initial-aggressor instruction, the record contains some evidence to support it. Nonetheless, defendant asserts that it was the deputies who acted as initial aggressors because "the evidence was undisputed that [defendant] only kicked Deputy D after the deputies took him to the ground, even though he was handcuffed, and only after Deputy D pinned him to the ground with his leg." OB at 28.

However, Deputy D's testimony explained the circumstances that led the deputies to take defendant to the ground. He testified that he went to defendant's home with probable cause to arrest him. It was a large home, and Deputy D did not know if anyone else was inside or if there were any weapons within the home. He testified that defendant was visibly intoxicated. TR 1/13/20, pp 214-15.

When defendant became agitated and aggressive towards Deputy C, getting closer and closer to him, the deputies grabbed his arms and wrists and placed him into handcuffs to detain him for officer safety. After placing him in handcuffs, they sat him down on a "two-step" in that room. He was placed on the floor so that he would not be moving around and would stay in one spot. TR 1/13/20, pp 215-16.

When Deputy D then started to advise defendant of his *Miranda* rights, defendant would not answer if he understood, would not listen to him, was talking over him, and then reached behind him for his cellphone on the floor. When Deputy D took the cellphone away, defendant jumped up by himself and came toward him, so Deputy D pushed him away with one hand to maintain his "safety bubble." Then Deputy C grabbed him and took him down to the floor. TR 1/13/20, pp 216-18.

At this point he was no longer detained, but rather was under arrest, but defendant refused to stand up. He was "just being dead weight," and started to struggle and kick. It was then that Deputy C went to get the patrol vehicle and Deputy D was holding defendant

down while calling on his radio for a supervisor to come to the scene. TR 1/13/20, pp 218-20.

The bodycam video, even if open to interpretation, can reasonably be viewed as corroborating all of this testimony. The prosecution played each segment of the video while Deputy D was testifying, and later, during deliberations, the jury requested and was granted access to videos from both deputies. *See* CF, p 679.

Deputy D's testimony—along with the jury's review and evaluation of the video—provided ample grounds to support the conclusion that it was defendant who initiated the physical conflict by using or threatening the imminent use of unlawful physical force.

Accordingly, the trial court did not err in instructing the jury on the initial-aggressor exception to self-defense.

III. The trial court did not abuse its decision when it precluded expert testimony about the deputies' tasing and physically transporting defendant to the police car.

A. Standard of Review

The People agree defendant preserved this issue for review. TR 12/20/19, pp 7-14. The People agree a trial court's ruling on the admissibility of expert testimony for an abuse of discretion, which occurs when its decision is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues the law. *Kutzly v. People*, 2019 CO 55, ¶ 8; *see also People v. Battigalli-Ansell*, 2021 COA 52M, ¶ 30.

The People do not agree that the standard of reversal is constitutional harmless error. The supreme court has recognized that not "every erroneous evidentiary ruling . . . amounts to federal constitutional error." *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009). "[T]he standard or test for assessing whether a defendant's right to . . . present a defense has been violated by evidentiary rulings is clearly dependent upon the extent to which he was permitted to subject the prosecutor's case to 'meaningful adversarial testing.' " *Id.* (quoting

Crane v. Kentucky, 476 U.S. 683, 691 (1986)). In the present case, defendant was permitted to subject the prosecution's case to "meaningful adversarial testing." *Id.* Consequently, any error was not of constitutional dimension.

Under the nonconstitutional harmless error test, the defendant bears the burden of showing prejudice from the error. To obtain reversal, the defendant must establish a reasonable probability that the court's error contributed to his conviction. A "reasonable probability" does not mean that it is "more likely than not" that the error caused the defendant's conviction; rather, it means only a probability sufficient to undermine confidence in the outcome of the case. *People v. Short,* 2018 COA 47, ¶ 54.

B. Facts

Pretrial, the defense endorsed an expert in police policy and procedures to opine at the assault trial about (1) the manner of subduing defendant, i.e., handcuffing, placing him on the floor, and punching him, (2) using a taser while defendant was handcuffed and on

the floor, and (3) attempting to get defendant to stand up while handcuffed and lifting his arms upwards. CF, pp 367-69.

The court found, based on the bodycam video, the defense expert was qualified to opine regarding police tactics and procedures for effecting an arrest of a suspect in handcuffs. Thus, for opinion 1, the court found, under CRE 702, expert testimony was relevant, helpful to the jury, and not unduly prejudicial as it related to the question of fact before the jury, i.e., whether defendant reasonably believed that Deputy D was using or about to use unlawful physical force, and whether defendant used reasonable force in response to this belief. TR 12/20/19, pp 7-8, 12:1-9.

For opinions 2 and 3, the court found the expert's opinion not relevant to the Taser and the "standing up" issues, which happened after-the-fact, because there was no allegation that defendant used violent physical force in response to being tased or being physically stood up and transported to the car. The court found such testimony would be merely a critique on police tactics; as opposed to a question of whether or not the defendant used reasonable force in response to what

he reasonably believed to be an unlawful application of physical force against him. TR 12/20/19, pp 8-9.

The defense responded that opinions 2 and 3 could "become relevant" based upon Deputy D's testimony, and that it would go to the totality of the circumstances and help the jury understand in context how a professional law enforcement officer should handle a like situation. TR 12/20/19, pp 8-9.

The court determined it would reconsider if the presentation of evidence at trial opened the door to rebuttal evidence, but noted this was not a civil case to decide if defendant's constitutional rights were violated, and thus police procedures used after defendant had been subdued was tangential to the issues at trial and more prejudicial than probative to the jury. TR 12/20/19, pp 12-13.

C. Analysis

Defendant contends Deputy D's conduct, from the beginning of the encounter to the end, was relevant to the defense that he overreacted and used excessive force, and the expert opinions was relevant to show

that given every opportunity, Deputy D escalated when he should have deescalated. He also argues the opinions were not unfairly prejudicial because the jury heard evidence regarding the entire encounter, including the tasing and the transport to the car. OB at 32-34.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. CRE 702.

Only relevant evidence is admissible. CRE 402. Under CRE 401, relevant evidence is "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." *People v. Bruno*, 2014 COA 158, ¶¶ 23-24. A district court may exclude even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Id.*; CRE 403. Deference is given to the trial court because of the superior opportunity of the judge to assess

the competence of the expert and to assess whether the opinion will be helpful to the jury. *People v. Rector*, 248 P.3d 1196, 1200 (Colo. 2011).

The expert's opinion was only relevant to whether defendant reasonably believed that Deputy D was using or about to use unlawful physical force, and whether defendant used reasonable force in response to this belief. Defendant, after he was handcuffed and sitting on steps near the floor, used force against Deputy D by kicking him and grabbing his genitals. After defendant was tased, he did not respond to Deputy D physically, nor was he charged with assaulting any deputy after he was tased. Thus, under CRE 702, there was no reason for the expert to opine on the police procedures used in tasing defendant and standing him up and taking him to the vehicle, i.e., the expert's opinion regarding tasing procedures was irrelevant on this point. *See Bruno*, ¶¶ 23-24; CRE 401.

Accordingly, the trial court did not abuse its decision when it precluded expert testimony about the deputies' tasing and physically transporting defendant to the police car.

D. Harmlessness

Defendant argues any error was not harmless beyond a reasonable doubt because, after the improper exclusion of his "make my day" defense, self-defense was all that was left. OB at 24.

In assessing the prejudicial effect of evidentiary error, an appellate court considers a number of factors, namely, "the overall strength of the state's case, the impact of the improperly admitted or excluded evidence on the trier of fact, whether the proffered evidence was cumulative, and the presence of other evidence corroborating or contradicting the point for which the evidence was offered." *Short*, ¶ 55

First, as noted above, constitutional harmless error does not apply. In the present case, defendant was permitted to subject the prosecution's case to "meaningful adversarial testing," and thus any error was not of constitutional dimension.

Second, as argued above, the court properly rejected the make-my-day instruction.

Finally, any error was harmless because the impact of the excluded evidence on the jury would have been minimal given that it

was not asked to decide any issue regarding defendant's transport to the vehicle. *See id.* In other words, the exclusion of the testimony did not undermine confidence in the outcome of the case. *Short,*¶ 54.

Accordingly, any error was harmless.

IV. The trial court did not err when it rejected the defense instruction on the affirmative defense of mistake of fact.

A. Standard of Review

The People agree defendant preserved this issue by tendering a mistake of fact instruction for the burglary/trespass trial, which the court rejected. CF, p 488; TR 12/10/2019, p 526.

The People disagree that review is for constitutional error. A trial court has a duty to correctly instruct the jury on all matters of law for which there is sufficient evidence to justify giving the instructions. *Cassels v. People,* 92 P.3d 951, 955 (Colo.2004). Whether an instruction should be given to the jury is a matter committed to the sound discretion of the trial court. *People v. Walden,* 224 P.3d 369, 378 (Colo. App. 2009) (citing *People v. Renfro*, 117 P.3d 43, 48 (Colo. App. 2004)).

The standard of reversal for a preserved error alleging the rejection of a mistake of fact instruction is harmless error. *Id.* at 378-79 (citing *People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005)); *see also People v. Gutierrez-Vite,* 2014 COA 159, ¶ 22 ("If the trial court erred in determining whether to give a requested [mistake of fact] instruction, we assess whether reversal is required under a harmless error standard.") (citing *Walden*, 224 P.3d at 378-79)).

B. Legal Standard

"A person is not relieved of criminal liability for conduct because he engaged in that conduct under a mistaken belief of fact, unless [i]t negatives the existence of a particular mental state essential to commission of the offense." § 18-1-504(1)(a), C.R.S. (2021).

The mistake of fact instruction states in pertinent part:

> The evidence presented in this case has raised the affirmative defense of "mistaken belief of fact," as a defense to [insert name(s) of offense(s)].
>
> The defendant's conduct was legally authorized if:
>
> 1. the defendant engaged in the prohibited conduct under a mistaken belief, and

> 2. due to this mistaken belief he [she] did not form the particular mental state required in order to commit the offense.
>
> The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

COLJI-Crim H:01 (2020). A division of this Court has held in a first-degree trespass case that a trial court did not err by refusing a proposed mistake of fact instruction where defendant alleged he believed he had permission to enter and stay at a victim's apartment. *See Walden,* 224 P.3d at 378-79. The division held the instruction duplicated the trespass-elements instruction, and thus, the effect of the instruction on the jury if it were to believe defendant's contention would merely have been to negate the requisite "knowing" element of trespass. *See id*.

Another division has similarly concluded for aggravated motor vehicle theft, *see People v. Nelson*, 2014 COA 165, ¶ 52 (same) (citing *Walden*); *accord People v. Andrews,* 632 P.2d 1012, 1016 (Colo. 1981) ("the culpability element of 'knowingly' belies the notion that the

[aggravated motor vehicle theft] statute somehow authorizes a conviction based on a mistaken belief in one's authorization to obtain or exercise control over another's vehicle"); *see also People v. Bush*, 948 P.2d 16, 18-19 (Colo. App. 1997) (in drug case where defendant alleged she believed she was authorized by doctor to call in prescriptions, relevant mental state was correctly defined for jury in an instruction specifying that defendant was guilty of charged offenses if she knowingly obtained a controlled substance by fraud, deceit, misrepresentation, or subterfuge).

C. Facts and Analysis

The defense tendered a mistake of fact instruction, arguing that defendant mistakenly believed he was in his own home when he entered the victim's home, due to alcohol, the accident, the cold, and the snow. The defense tried to distinguish *Walden* by arguing the issue in that case was whether the person had a license to enter his girlfriend's premises, and not whether it was his own apartment. TR 12/10/19, pp 525-26.

The court found there was no meaningful distinction between when someone enters with license versus when someone enters based upon a belief that they are a legal resident of the property, and thus it found *Walden* was on point and controlling. The court noted the prosecution would have to prove that defendant knowingly entered someone else's home and the parties would be able to argue that appropriately. TR 12/10/19, p 526:7-16.

The court's conclusion that *Walden* is on point and controlling was correct and this Court should follow it here. That is, by concluding that defendant knowingly and unlawfully entered and remained in a dwelling of another, the jury must necessarily conclude, beyond a reasonable doubt, that he formed the particular mental state required in order to commit trespass.

Nonetheless, defendant asserts there was sufficient evidence to support a mistake of fact defense here because defendant said to Bobo, "I thought it was my house, so I went in." He argues the instruction should have been given under section 18-1-504(3), C.R.S. (2021) ("[a]ny defense authorized by this section is an affirmative defense") and

section 18-1-407(2), C.R.S. (2021), ("If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.") OB at 36. However, this argument is counter to the on-point precedent of *Walden*.

Defendant next argues that, even if mistake of fact is a traverse, and not an affirmative defense, the court must still provide an instruction informing jurors of their obligation to consider evidence of the traverse in determining whether the government has proved the mens rea beyond a reasonable doubt. OB at 36-37. Again, *Walden* controls, and it does not provide, even in *dicta*, that a separate, additional instruction is required.

Defendant further asserts that the trespass instruction here did not clearly inform the jury of the government's burden to prove beyond a reasonable doubt that he knew he was entering the trespass victim's home and not his own. He argues the given instruction did not indent or offset the element of "dwelling of another" under the element of "knowingly," and thus the jury was inadequately informed that

"knowingly" applied to the "dwelling of another" element. OB at 36-37. He argues then that "the mistake of fact affirmative defense instruction was not superfluous here," unlike in *Walden*. OB at 37.

To the extent this argument pertains not to whether the court erred in rejecting the mistake of fact instruction, but whether the jury instruction for trespass was erroneous, defendant did not object to the wording of the first-degree trespass instruction at trial, TR 12/10/19, pp 526-28, and he does not raise a plain-error claim on appeal. But in any event, his argument fails. Logically, the third element of knowingly—connected to "unlawfully" by the conjunctive—could only have applied to the fifth element:

> 3. knowingly, and
> 4. unlawfully,
> 5. entered or remained in a dwelling of another.

CF, p 465. Thus, since the jury *was* adequately informed, the mistake of fact of instruction would have been superfluous as in *Walden*.

Defendant finally asserts, "In any event, *Walden* was incorrectly decided, and this Court is not bound by it." OB at 38. To the extent

defendant intends this assertion to be an argument independent of his other previous arguments, this Court should not consider it because he does not present any supporting substantive argument or case citations. *See People v. Diefenderfer,* 784 P.2d 741, 752 (Colo. 1989) (court will not review claim unsupported by argument or authority); *People v. West,* 2019 COA 131, ¶ 23 ("Because the additional aforementioned constitutional arguments are not developed, we do not address them."); *accord Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3rd Cir. 1993) ("It is . . . well settled . . . that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.").

Accordingly, the trial court did not err when it declined to instruct the jury on the affirmative defense of mistake of fact as to the trespass charge.

D. Harmlessness

Even if the trial court erred by not giving the mistake of fact instruction, any error was harmless because defendant has not

established a reasonable probability sufficient to undermine confidence in the outcome of the case. *Short,* ¶ 54.

Although defendant originally said to Bobo, "I thought it was my house, so I went in," he immediately contradicted that statement by saying, "I just like checking these houses to see if anybody's home." TR 12/10/19, p 452. And, as set forth in the facts above, overwhelming evidence pointed to defendant's guilt. *Id*. at ¶ 55 (in assessing prejudicial effect of an error, an appellate court considers "the overall strength of the state's case . . . and the presence of other evidence . . . contradicting the point for which the evidence was offered.").

When Poillion asked defendant why he had been in his house, he stated, "I didn't know anyone was home. I like going in empty houses at night." Additionally, defendant woke up Poillion by shining a flashlight in his eyes and then, apparently realizing a man was there in bed, he closed the bedroom door and returned to the kitchen, apparently to make himself an alcoholic drink because he had the liquor on the counter and was scooping ice from the freezer. Poillion and Bobo

described defendant as intoxicated but not slurring his words. TR 12/9/19, p 264:1-10; TR 12/10/19, p 453:11-14.

Further, in walking through the garage, defendant had to pass Poillion's three vehicles, included a golf cart. He obviously would not have recognized any of those vehicles as his own, and indeed already knew that his golf cart was crashed in the snowbank outside. TR 12/9/19, pp 279-80.

Moreover, testimony revealed that defendant's house looked significantly different from Poillion's, to such an extent that defendant could not have harbored a reasonable mistake of fact that he was entering his own home. When compared with defendant's home, Poillion's garage door was positioned on the opposite side; the driveway graded up instead of down, and his driveway was covered in snow, whereas defendant's driveway was heated and thus clear of snow. TR 12/10/19, pp 441-42. Bobo testified that he had been in both Poillion's and defendant's houses and noticed the layouts of the interiors were "quite different." TR 12/10/19, pp 456-57.

Accordingly, any error was harmless.

V. The trial court did not err in refusing to conduct an in camera review of Deputy D's personnel file.

A. Standard of Review

The People agree this issue was preserved, and that a trial court's decision to quash a subpoena is reviewed for an abuse of discretion. *People v. Battigalli-Ansell*, 2021 COA 52M, ¶¶ 30, 69 (citing *People v. Spykstra*, 234 P.3d 662, 666 (Colo. 2010)). The People also agree matters of law are reviewed de novo. *See Zapata v. People,* 2018 CO 82, ¶ 24 (reviewing de novo statutes governing privilege in the context of criminal discovery).

However, as set forth more fully below, the People do not agree with defendant that, if this Court finds an error of law here, the remedy is to remand the case to the trial court to conduct an in camera review. The case upon which defendant relies, *Zoll*, ¶ 12, held the trial court erred in *failing to disclose* certain documents from a file that was *reviewed in camera* by the trial court and reviewed on appeal under seal. Those are not the circumstances here, and thus *Zoll*'s analysis does not apply.

B. Facts

Pretrial, the defense filed a subpoena under Crim. P. 17 directed to the La Plata County Sheriff's Office requesting "Any and all internal investigations and personnel file of [Deputy D]," as well as Taser logs of the deputies and the Taser Manual. CF, p 102. The Sheriff responded it would provide the Taser materials, but it had no records of "internal investigations" of Deputy D, and further moved to quash the request for Deputy D's personnel file because the request was unreasonable and pertained to confidential documents and information. CF, p 147.

The court held a hearing wherein the defense made no specific relevance argument, but essentially cited *Spykstra* as a legal standard and requested the trial court, based on the preliminary hearing, search the file to find documents that "would be relevant." TR 9/6/19, p 4:12-18. The prosecution argued the defense failed to make a showing necessary for an in camera review, and the court reserved ruling. TR 9/6/19, pp 4-5.

The court later issued a written order granting the motion to quash, finding in pertinent part that, based upon the representations in

the motion to quash with respect to the personnel file, defendant had failed to show a specific factual basis demonstrating a reasonable likelihood that documents exist within the file that would be relevant to this action, citing *Spykstra*. The court thus determined that no in camera review would be conducted, and directed that the records be returned to La Plata County. CF, p 169.

The defense filed a motion to reconsider in which it argued that, under *People v. Walker*, 666 P.2d 113, 122 (Colo. 1983), the court should conduct an in camera review and "if that file contains information regarding excessive force or dishonesty it should be provided to the Defense." CF, p 178. The Sheriff filed a written response, arguing that the defense motion provided no new or additional facts demonstrating that the materials being sought existed, or were relevant to this case, and that the *Spykstra* decision had rejected the idea of a "mandated in camera review standard." CF, pp 182-83.

The court entered a written order denying the motion to reconsider, citing the *Spykstra* factors and concluding defendant had made no showing that evidentiary and material documents relevant to

this case existed within the file. The court also noted that if the file did contain evidence regarding excessive force or dishonesty, such evidence would be *Brady* material that was already required to be disclosed to the defense by the prosecution. CF, p 185.

C. Legal Standard

Crim. P. 17(c) permits the prosecution and defense to compel third parties to produce evidence, such as "books, papers, [or] documents" for use at trial. The court, on motion, may quash the subpoena if compliance would be unreasonable or oppressive. *Id.* A subpoena may not be used as an investigatory tool or as a means of discovery. *Battigalli-Ansell*, ¶ 71 (citing *Spykstra*, 234 P.3d at 669) ("[S]ubpoenas are for the production of 'evidence.' ... [Crim. P. 17(c)] does not create an equivalent to the broad right of civil litigants to discovery of all information that is relevant or may lead to the discovery of relevant information.")). Thus, *Spykstra* adopted a test to determine if a subpoena constitutes improper discovery:

> [W]hen a criminal pretrial third-party subpoena is challenged, a defendant must demonstrate:

> (1) A reasonable likelihood that the subpoenaed materials exist, by setting forth a specific factual basis;
>
> (2) That the materials are evidentiary and relevant;
>
> (3) That the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
>
> (4) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
>
> (5) That the application is made in good faith and is not intended as a general fishing expedition.

Battigalli-Ansell, ¶ 71 (citing *Spykstra*, 234 P.3d at 669).

In addition, where a subpoena is issued for materials potentially protected by a privilege or a right of confidentiality, "the defendant must make a greater showing of need and, in fact, might not gain access to otherwise material information depending on the nature of the interest against disclosure." *Id*. at ¶ 72 (citing *Spykstra*, 234 P.3d at 670). This is because the right to confrontation "does not guarantee 'access to every possible source of information relevant to cross-

examination.' " *Id.* Thus, under Crim. P. 17, courts must balance "a defendant's right to exculpatory evidence with the competing interests of a witness to protect personal information and of the government to prevent unnecessary trial delays and unwarranted harassment of witnesses." *Id.* at ¶ 73 (citing *Spykstra*, 234 P.3d at 671).

In *Martinelli v. District Court*, 612 P.2d 1083, 1086-88 (1980), and *Walker*, 666 P.2d at 121-22, the supreme court recognized that a trial court may conduct an in camera review of police personnel files that the defense has requested, so long as the files could be relevant. But trial courts are not required to conduct an in camera review of documents subpoenaed by a defendant in a criminal case before determining whether the documents must be produced to the defense. In *Spykstra*, our supreme court explicitly said that it did not "adopt a mandate of in camera review, although such a review may in some instances be necessary in the interest of due process." *Battigalli-Ansell*, ¶¶ 78-79 (citing *Spykstra*, 234 P.3d at 670).

Thus, if a defendant fails to make an initial showing that the subpoenaed materials are relevant, a trial court does not abuse its

discretion by declining to conduct an in camera review before ruling on the defendant's right to see the materials. *Id.* at 80 (citing *People v. Blackmon*, 20 P.3d 1215, 1220 (Colo. App. 2000) (trial court did not abuse its discretion by refusing an in camera review of officer's records because "[o]ther than bare allegations that the requested documents would relate to the officer's credibility, defendant did not show how they would be relevant to his defense of the charges against him")).

D. Analysis

Defendant's argument fails under the first prong of *Spykstra* because he did not set forth a specific factual basis for demonstrating a reasonable likelihood that the materials he sought existed and contained material evidence. *See Battigalli-Ansell*, ¶ 83 (no reference to specific instances in which complaints may have been filed regarding truthfulness or untruthfulness, or complaints or internal affairs investigation conducted in regards to the police investigator).

In other words, defendant failed to establish that Deputy D's personnel file contained complaints involving excessive force or

dishonesty. Rather, he merely "hoped" the file would include some document showing same. *See Battigalli-Ansell*, ¶ 85 (defendant did not establish the file contained misstatements by the investigator, but only hoped it would include a document showing misconduct).

Defendant's argument also fails under the second prong of *Spkystra* because he did not show the file included documents that were evidentiary or relevant under CRE 401, i.e., that the documents sought had a tendency to make the existence of any material fact more probable or less probable than it would without the evidence. *See Battigalli-Ansell*, ¶ 87 (defendant must demonstrate relevance under CRE 401).

In sum, defendant's request appears to have been a general fishing expedition, which is prohibited under *Spkystra*'s fifth prong. *Spykstra*, 234 P.3d at 669. The initial request was overbroad because defendant requested the entire file for in camera review. CF, p 102. At the hearing, he added no specifics. TR 9/6/19, p 4:12-18. When the trial court quashed the subpoena, defendant filed a motion to reconsider where he failed to allege any new factual basis, and merely argued that

under *Walker*, 666 P.2d at 122, the court was required to review in camera to see "if that file contains information regarding excessive force or dishonesty." CF, p 178.

However, *Walker* did not hold that every defendant charged with assaulting a police officer is automatically entitled to an in camera review of the police officer's personnel file. There, the police officer shot Walker while he was fleeing, and the trial court conducted an camera review of only "sustained" complaints in the files pertaining to brutality, excessive force, and dishonesty, and found none. *Walker*, 666 P.2d at 121. Thus, the issue addressed in the case was not whether the defense was entitled to an in camera review, but whether "unsustained" complaints should be reviewed as well once the trial court determines that an in camera review is appropriate. Id. at 121-22. *Walker* held in the affirmative. *Id.* But the holding did not purport to address the circumstances under which a police officer's personnel file must be reviewed in camera.

To the extent *Walker* stated in *dicta* "a defendant who is charged with assaulting a police officer is entitled to disclosure of the fact that

complaints charging excessive use of force have been filed against the officer involved," it was not addressing what, if anything, defendant needed to show to be entitled to an in camera review to search for these documents. The case does not discuss the contents of the defendant's "motion seeking disclosure," which appeared to be a request for *Brady* material, in contrast with the subpoena later addressed in *Spkystra.*

And the federal case of *Denver Policemen's Protective Ass'n v. Lichtenstein,* 660 F.2d 432, 436 (10th Cir. 1981), is factually distinguishable and thus not persuasive authority under the facts of the instant case. There, the court held, "when the only prosecution witnesses are the police officers involved, anything that goes to their credibility may be exculpatory." Here, the jury had bodycam video in addition to deputy testimony, and the prosecution played and paused the video throughout Deputy D's testimony. The jury apparently did place much importance on the video because it requested during deliberations to view videos from both deputies' bodycams, which the court granted. *See* CF, p 679.

Nonetheless, defendant argues that *Spykstra* did not purport to overrule *Walker* or *Martinelli*, and although the court in *Spykstra* said "[w]e do not, however, adopt a mandate of in camera review," in the very same sentence the Court also said, "such review may in some instances be necessary in the interest of due process." OB at 42. He maintains that *Walker* "holds" that the personnel file of a police officer in an assault-on-a-police-officer case is one such instance. OB at 42-43. As set forth above, *Walker* does not so hold, and *Spykstra* did not cite to *Walker* for that proposition. Rather, it cited *Walker/Martinelli* for the general proposition that a defendant must make a greater showing of need to gain access to privileged/confidential materials. *See Spykstra*, 234 P.3d at 670.

Here, the defense made no argument explaining a "greater need" for the materials, nor did it make a specific argument explaining why an in camera review was "necessary in the interest of due process."

Nor did it meet the requirements of *Spykstra.* The defense investigated the circumstances of the arrest within a very small, gated community that employed a security guard at the gatehouse who was

well-familiar with all of the residents. TR 12/10/19, pp 447-48. The investigation apparently failed to uncover even a rumor that Deputy D was known for or suspected of past acts of excessive force or dishonesty. Without at least a scintilla of same, the defense could not use an in camera review as an "investigative tool." *See Battigalli-Ansell*, ¶ 71.

Accordingly, the trial court did not err in refusing to conduct an in camera review of Deputy D's personnel file.

E. Remedy

Defendant requests a remand for the trial court to perform an in camera review of Deputy D's personnel file. The People agree that if this Court finds defendant is entitled to a remedy, that remedy is a remand for review of the personnel file. However, even with two bites of the apple, defendant failed to meet the requirements of the *Spykstra* test. And, on appeal, defendant has failed to allege any circumstances that would meet the requirements of the first two prongs of the test.

Further, defendant did not request that the trial court keep the personnel file under seal for the purposes of appeal, and therefore he

should not be entitled to a remand. *See People v. Ullery*, 984 P.2d 586, 591 (Colo. 1999) (if the appealing party fails to provide the reviewing court with a complete record, the reviewing court must presume the correctness of the trial court's proceedings); *see also People v. Washington*, 2014 COA 41, ¶ 16 (review is limited to the record on appeal) (citing *Fendley v. People*, 107 P.3d 1122, 1125 (Colo. App. 2004) ("We are limited to the record presented and may consider only arguments and assertions supported by the evidence in the record.")).

In this regard, defendant's reliance on *Zoll*, ¶ 12, is misplaced. There, the supreme court held that when an appellate court determines the trial court erred in *failing to disclose* certain documents from a file that was *reviewed in camera*, the proper remedy is to remand. *See id.* It is distinguishable because the trial court here declined to conduct an in camera review based on the defendant's insufficient proffer, and it ordered the documents to be returned to the Sheriff.

And because defendant did not request the trial court instead order the file sealed for appellate review, he should not be rewarded with a remedy just because this Court was unable to review the

personnel file for itself. *Cf. People ex rel. A.D.T.*, 232 P.3d 313, 317 (Colo. App. 2010) (once trial court determined juvenile made a sufficient showing to warrant in camera review of records, it was obligated to review all of the records); *People v. Herrera*, 2012 COA 13, ¶¶ 22-23 (remand required where it was undisputed social services records existed, and the prosecution had already reviewed the files and advised the court they contained potentially exculpatory material relevant to the defense).

Finally, a division of this Court has recently concluded, albeit implicitly, that *Spykstra* applies to the personnel files of a police officer when "dishonesty" is at issue. *See People v. McCants*, 2021 COA 138, ¶¶ 46-48 (remanding for a hearing regarding reliability of a police officer's eyewitness identification of the defendant, but offering "no opinion as to whether an in camera review . . . of the subpoenaed documents will be required. Instead, the trial court will need to make that determination based on the facts and circumstances before it at the time.") (citing *Spykstra,* 234 P.3d at 666; *Martinelli*, 612 P.2d at 1088-89)).

Accordingly, this Court should not remand this case to the trial court for an in camera review but should instead affirm the convictions.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully request this Court affirm defendant's convictions.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **ADAM MUELLER** via Colorado Courts E-filing System (CCES) on January 28, 2022.

/s/ Michael Rapp