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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Arapahoe District Court
Honorable Andrew Baum and Honorable Eric B. White, Judges
Case No. 19CR695

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

DAVID JOSEPH CHAPEL,

Defendant-Appellant.

▲ **COURT USE ONLY** ▲

Case No. 20CA711

PHILIP J. WEISER, Attorney General
SHELBY A. KRANTZ, Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Floor
Denver, CO 80203
Telephone: (720) 508-6000
E-Mail: shelby.krantz@coag.gov
Registration Number: 53866
*Counsel of Record

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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Shelby A. Krantz

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INTRODUCTION

Defendant, David Joseph Chapel, appeals his judgment of conviction entered on a jury verdict finding him guilty of two counts: first- and second-degree criminal trespass. On appeal, he contends the trial court reversibly erred in three ways. First, the court violated his right to due process by disallowing the choice of evils affirmative defense. Second, the court erred by applying its *Miranda* suppression order to the defense and excluding his statements as self-serving hearsay. And third, the court erred by overruling an objection to prosecutorial closing argument that allegedly mischaracterized the defense, denigrated the defendant, and mislead the jury.

Chapel's convictions should be affirmed.

STATEMENT OF THE CASE

Chapel was charged with first- and second-degree criminal trespass (F5 and M3, respectively). CF, p 8. Chapel did not testify at trial. A jury convicted him on both counts. CF, pp 107-08. He was sentenced to 24 months of probation. TR 2/26/2020, p 146:1-2.

STATEMENT OF FACTS

According to a videotaped interview that Chapel gave to police after his arrest, he was invited to a neighbor's house party and arrived "wasted." EX 15, 4:00-5:43. He passed out in the neighbor's house and woke up to a loud noise and other people running. *Id.* He panicked, ran out of the house, and followed someone else into the backyard. *Id.* He jumped fences through other homes' backyards. *Id.*

He found himself in the backyard of 1245 Granby Street, where the owner of that home heard noises coming from outside. TR 2/25/2020, pp 172:17-175:2. The owner checked her security camera and saw someone running back and forth in her backyard trying to break into her home for about ten minutes. *Id.*; EX 1. She called the police. TR 2/25/2020, p 180:12-15.

Not able to get inside, Chapel moved on from 1245 Granby by hopping the fence to the next backyard at 1244 Fraser Street. EX 1; CF, p 8. His boot had fallen off and he had twisted his ankle, so he sought shelter and fell asleep in that home's garage. EX 15, 5:45-6:53. He woke up with his hands in pain from the cold, so made his way into the home.

EX 15, 6:55-7:37. A resident of that home lit the stove for him to warm up for a moment because he was shivering and told her he was cold, but the owner then asked him to leave, which he did. TR 2/25/2020, pp 200:4-22, 203:12-21, 205:6-19; EX 15, 7:40-9:21.

SUMMARY OF THE ARGUMENT

The trial court properly declined to provide the jury with the choice-of-evils affirmative defense because the record showed that Chapel had brought the circumstances leading to his trespasses on himself.

The trial court did not err in refusing to admit testimony of Chapel's statements subject to a suppression order because the statements were self-serving hearsay. Any error was harmless because the statements were cumulative.

The prosecutor did not commit misconduct in rebuttal closing; he properly contrasted arguments from the evidence. Even if his comments were overstated, because the evidence of guilt was overwhelming, they were harmless.

ARGUMENT

I. The trial court properly rejected the choice-of-evils affirmative defense.

A. Preservation and Standard of Review

The People agree that this issue is preserved.

The People also agree that "[w]hen a defendant challenges a trial court's failure to instruct a jury on the choice-of-evils defense, a reviewing court must determine, as a matter of law, whether the defendant's offer of proof, considered in the light most favorable to the defendant, was substantial and sufficient to support the defense." *People v. Wingfield*, 2014 COA 173, ¶ 58; *People v. Hasadinratana*, 2021 COA 66, ¶ 15. "A trial court commits reversible error if it improperly disallows an affirmative defense because it has the effect of impermissibly lowering the prosecution's burden of proof." *Wingfield*, ¶ 59.

B. Relevant Facts

On the morning of trial, defense counsel submitted the choice-of-evils affirmative defense to the court. TR 2/25/2020, pp 25-36. Counsel argued that Chapel was "faced with the alternative of either going into

a house in front of him or proceeding to his own house" and there would be sufficient evidence to show "it would have been futile for him to continue walking because his condition at the time was so dire that he needed to take other measures." TR 2/25/2020, p 26:8-16.

As further support, defense counsel noted that Chapel had lost a boot; he had had to leave the house where he was sleeping when he was awakened by a commotion and saw people leaving quickly; and the temperature that night ranged from -6 to 6 degrees. TR 2/25/2020, pp 27:11-28:25.

The prosecutor responded by noting that Chapel had tried for ten minutes to get into the first house at 1245 Granby, even though his own home was about a three-minute walk away. Instead of going home after unsuccessfully trying to enter the first house, he jumped a fence into the next backyard, entered that garage, and eventually went into the house. TR 2/25/2020, p 31:2-9. According to the prosecutor, because Chapel brought the situation on himself and did not take reasonable actions to avoid it, the choice-of-evils defense was without merit. TR 2/25/2020, p 31:9-24.

The trial court focused on the language of § 18-1-702(1), C.R.S. (2020), to reject the affirmative defense. In particular, the court noted that the statute requires the "imminent private injury" must be occurring "through no conduct of the actor." TR 2/25/2020, pp 35:8-36:6. The court ruled that because Chapel had chosen to leave a warm place that night, the proffer did not include sufficient evidence of why Chapel had fled to allow the defense to be given to the jury. *Id.* Defense counsel reminded the court that it needed to view the proffered evidence in the light most favorable to the proffering party; the court agreed but persisted in its ruling. TR 2/25/2020, p 36:7-22.

C. Law and Analysis

Choice of evils is a statutory defense that applies only "when the alleged crimes were necessary as an emergency measure to avoid an imminent public or private injury that was about to occur by reason of a *situation occasioned or developed through no conduct of the actor* and which is of sufficient gravity to outweigh the criminal conduct." *People v. Al-Yousif*, 206 P.3d 824, 831 (Colo. App. 2006) (emphasis added); § 18-1-702(1), C.R.S. (2020). To submit the defense to the jury, the trial

court must first rule on whether the proffered "facts and circumstances would, if established, constitute a justification"; in other words, if the charged offense was "necessitated by a specific and imminent threat of injury to his or her person under circumstances that left the defendant no reasonable and viable alternative other than to violate the law." § 18-1-702(2); *Al-Yousif*, 206 P.3d at 831.

Thus, an offer of proof for the choice-of-evils defense must establish:

> (1) all other potentially viable and reasonable alternative actions were pursued, or shown to be futile, (2) the action taken had a direct causal connection with the harm sought to be prevented, and that the action taken would bring about the abatement of the harm, and, (3) the action taken was an emergency measure pursued to avoid a specific, definite, and imminent injury about to occur.

Andrews v. People, 800 P.2d 607, 610 (Colo. 1990) (internal citations omitted).

By contrast, where the threat of imminent injury is created by the defendant's own conduct, the choice-of-evils defense is not available. *People v. Trujillo*, 682 P.2d 499, 501 (Colo. App. 1984). In the bench

trial in *Trujillo*, the court found that because the defendant's excessive speed caused his loss of control on a turn, the resulting accident did not justify his trespass into a mobile home near the accident scene for shelter from a storm. *Id.* at 500-01. So, the court rejected the choice-of evils-defense. *Id.* at 501.

Like the defendant's trespass in *Trujillo*, Chapel's trespass resulted from his own actions—he willingly left a warm place knowing the dangers the cold that night posed but without having sufficient information to assess the risks of staying inside. Thus, the record shows that this situation was occasioned by Chapel himself.

Despite Chapel's assertion that *Trujillo* "provides little guidance," he fails to explain why the trial court's findings of fact are not still instructive: the factual findings negated the justification for the crime. Likewise, here, the court was required to test the facts against § 18-1-702(2); the court did so and found the trespass was brought about by Chapel's own conduct, thereby negating the affirmative defense.

Even where there is an imminent threat of injury, a defendant's proffer must also show that the defendant tried reasonable alternatives

before committing the crime at issue. *Wingfield*, ¶¶ 7-10. In *Wingfield*, the defendant was placed in a cell with two inmates who had already started to effectuate an escape plan and threatened him into joining. *Id.* at ¶ 7. The defendant asked to be moved from the cell but did not tell the jailers why. *Id.* at ¶¶ 8-10. Because he failed to take this reasonable step, the choice-of-evils defense was not available as a defense to joining his cellmates' escape plan. *Id.* at ¶¶ 61-62.

Likewise, Chapel's proffer falls short concerning reasonable alternative actions, including going to his own home or staying at the house where he had passed out. He spent longer trying to enter other peoples' homes than would have been required to walk home, demonstrating the amount of time he had to pursue reasonable alternatives before the situation turned dire. *Id.*; *see also Andrews*, 800 P.2d at 610; *People v. Brandyberry*, 812 P.2d 674, 679 (Colo. App. 1990) ("[I]f a reasonable legal alternative was available to defendants as a means to avoid the threatened injury, they properly may be foreclosed from asserting a choice of evils defense.").

In sum, the record supports the trial court's decision to reject the choice-of-evils defense.

II. The trial court properly excluded Chapel's unwarned statements as self-serving.

A. Preservation and Standard of Review

The People agree this issue is preserved.

The People agree that evidentiary rulings are reviewed for an abuse of discretion, including whether the court's ruling is contrary to law. *People v. Acosta*, 2014 COA 82, ¶ 27; *People v. Dominguez*, 2019 COA 78, ¶ 13. "A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair." *Acosta*, ¶ 27. "Absent a misapplication of the law, the decision to admit evidence remains in the court's broad discretion." *Dominguez*, ¶ 14.

The People disagree with Chapel's stated standard of reversal. OB, pp 33-34. Because this issue is evidentiary and not constitutional, this Court will reverse for harmless error; under that standard, reversal is warranted only if the error substantially influenced the verdict or

impaired the fairness of the trial. *People v. Heredia-Cobos*, 2017 COA 1340, ¶ 30.

B. Relevant Facts

Before trial, Chapel moved to suppress statements made while being arrested as violative of *Miranda*.[1] CF, pp 26-31; TR 1/8/2020. The court suppressed most of the statements made by Chapel to police from the time he was handcuffed until he was Mirandized at the police station. TR 1/8/2020, pp 65-67. Then, he gave a videotaped statement, which was played to the jury. EX 15.

On cross-examination of the arresting officer, defense counsel attempted to elicit hearsay statements of Chapel's under Rule 803(3), the hearsay exception for state of mind. TR 2/26/2020, pp 48:10-49:9. Defense counsel argued that a suppression ruling suppresses the statements in the prosecution's case in chief, leaving the defendant the option of waiving the suppression ruling and offering some of the suppressed statements. TR 2/26/2020, p 48:18-21. She continued:

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

"Obviously I can't admit self-serving hearsay but I can admit statements that come in under a hearsay exception, and as I made a record of, these statements are going to be statements of his physical condition." TR 2/26/2020, p 48:21-25.

Defense counsel analogized the situation to one in which a defendant can take the stand and testify to what he said on scene, which opens the door for the prosecution to ask about those statements without waiving the entire suppression motion. TR 2/26/2020, pp 58:22-59:4. The prosecutor responded that allowing these statements would not be the same as the defendant testifying because the prosecutor would not be able to cross-examine or impeach the defendant here. TR 2/26/2020, p 60:10-19.

The court ruled on the suppression issue as follows:

> The first [issue] is essentially this ability the defense asserts that it has to pick and choose which of these suppressed statements it should be able to then inquire of [] this witness, so this isn't a question of whether the defendant ultimately chooses to testify and may be cross-examined about those statements, this is about a hearsay witness being now permitted to testify as to those statements. I'm not persuaded that the

> authority that I have before me is sufficient to allow the defense to now go into an area that I had ordered suppressed at their request and without a waiver or withdrawal of their request that I take action based upon what I found to be the *Miranda* violation.

TR 2/26/2020, p 61:11-23. Turning to the issue of hearsay exceptions, the court ruled:

> Even if I were to allow the defense to go into this area, specifically the proffer was the defense wants to ask the officer a series of questions leading up to the fact that the defendant says his hands hurt or they're cold, something to that effect. That's self-serving hearsay, particularly in light of the defense that seems to be on track here; therefore, even if I were to admit this statement, that is, if I were to allow the defense to get into an area that I had deemed to be suppressed, it still is self-serving hearsay, so the result, even if I were to allow it is that I would sustain the People's objection as this is self-severing [sic] hearsay so I'll not allow the defense to ask that question.

TR 2/26/2020, pp 61:23-62:10.

When defense counsel later sought to bring in the same statements that had been suppressed through a different witness, the court persisted in its earlier ruling. TR 2/26/2020, pp 71:4-72:12. The court noted that this proposed witness would not pose the same self-

serving hearsay issue because Chapel was making statements about his medical condition under CRE 803(4); however, the same suppression issues remained. TR 2/26/2020, pp 71:10-72:12. Defense counsel did not call that witness.

C. Law and Analysis

CRE 803 provides exceptions to the hearsay rule, including the state of mind exception and the medical treatment exception. *See* CRE 803(3), (4). "The state of mind exception provides that '[a] statement of the declarant's then existing state of mind . . . (such as intent, plan, motive, design, mental feeling, pain, and bodily health)' is not excluded by the hearsay rule." *People v. Zubiate*, 2013 COA 69, ¶ 25 (quoting CRE 803(3)). But even if a defendant's self-serving hearsay declarations fall within an exception, they may be excluded because nothing guarantees their trustworthiness. *Zubiate*, ¶ 27 (citing *People v. Davis*, 218 P.3d 718, 731 (Colo. App. 2008); *People v. Avery*, 736 P.2d 1233, 1237 (Colo. App. 1986); *People v. Abeyta*, 728 P.2d 327, 331 (Colo. App. 1986)); *see also People v. Short*, 2018 COA 47, ¶ 43 (collecting cases).

Although the judge's comments on the suppression issue may have been imprecise, this Court may affirm on any basis supported by the record. *People v. Brown*, 2014 COA 155M-2, ¶ 15. The record supports the trial court's finding that the statements were inadmissible regardless of the suppression ruling because their self-serving nature made them unreliable. *Zubiate*, ¶ 27.

On the one hand, irrespective of any suppression ruling, to be admissible at trial, evidence must satisfy the rule against hearsay. *See Harris v. New York*, 401 U.S. 222, 224 (1971) ("It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.").

On the other hand, self-serving hearsay declarations made by a defendant may be excluded because they lack trustworthiness. *People v. Davis*, 218 P.3d 718, 731 (Colo. App. 2008). "If such evidence were admissible, the door would be thrown open to obvious abuse: an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence." *People v.*

Cunningham, 194 Colo. 198, 202-03, 570 P.2d 1086, 1089 (1977) (quoting Wharton's Criminal Evidence § 303 (13th ed., 1972), at 97-98).

Chapel is correct that the self-serving limitation does not appear in the Colorado Rules of Evidence. But he cites to no case, nor have the People found one in Colorado, holding that self-serving hearsay is nevertheless admissible because it fits within an exception to the hearsay rule. This lack of authority is unsurprising because the firmly rooted hearsay exceptions in CRE 803 depend on "sufficient indicia of reliability." *People v. Vigil*, 127 P.3d 916, 926 (Colo. 2006); *see People v. Schmidt*, 928 P.2d 805, 807 (Colo. App. 1996) ("[R]eliability may be inferred if the evidence falls within a firmly rooted hearsay exception.").

Finally, even if the court erred in disallowing the statements made by Chapel to police officers concerning his state of mind or to another witness for the purposes of medical attention, any error was harmless. The evidence defense counsel sought to admit was cumulative of statements made by Chapel in the video that was admitted at trial and the testimony of the tenants of the home he went into, so the jury heard evidence to the same effect. EX 15 (Chapel describes pain in his

hands from the cold while detailing the events of the night); TR 2/25/2020, p 200:4-22 ("He didn't answer because he was very cold. He was shivering."); TR 2/26/2020, p 8:14-20 ("He had his hands on the stove. . . . and all he was saying was, I'm sorry, and that he was very cold."); *see Short*, ¶ 55 ("In assessing the prejudicial effect of evidentiary error, an appellate court considers a number of factors, [including] . . . 'the presence of other evidence corroborating or contradicting the point for which the evidence was offered.'") (quoting *People v. Casias*, 2012 COA 117, ¶ 64).

For these reasons, the court properly excluded the testimony as self-serving hearsay, and any error was harmless; this Court should affirm.

III. The prosecutor did not commit misconduct in rebuttal closing.

A. Preservation and Standard of Review

The People agree this issue is preserved.

The People also agree that this Court will consider prosecutorial misconduct by engaging in a two-step analysis. *Wend v. People*, 235

P.3d 1089, 1096 (Colo. 2010). The first step is to determine whether the prosecutor's conduct was improper under a totality of the circumstances analysis; the second step is deciding whether the conduct warrants reversal according to the proper standard of review. *Id.* Preserved claims of prosecutorial misconduct are subject to harmless error review unless they directly implicate a specific constitutional right. *Id.* at 1097. Applying that standard, an appellate court will reverse only if the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Hagos v. People*, 2012 CO 63, ¶ 12 (quoting *Tevlin v. People*, 715 P.2d 338, 341-42 (Colo. 1986)).

B. Relevant Facts

After the trial court disallowed the choice of evils defense, counsel's theory of the case was that Chapel did not have the requisite mental state—knowingly—for trespassing: he was not aware of the likely consequences of his actions because he was too cold. TR 2/26/2020, pp 111-18. In rebuttal closing, the prosecutor responded:

> As we all know, evidence is what comes from the witness stand and it is the only thing that you can rely upon in determining your verdict.

> Everything else that does not come from the witness stand is therefore argument and cannot be considered, so it's necessary to actually categorize some of the things that you heard in defense counsel's closing as either evidence versus argument, what you cannot consider. What has been asserted as argument here? Again, that the defendant was so cold that he was not aware he was trespassing. Members of the jury room, you have only heard that from one place, that's the defense counsel. No one in this case ever said that. There's not a single fact, not a single piece of evidence in this case which came from the witness stand which would support it, which means that the entire argument, the entire defense actually has to be cast out. You cannot consider it.

TR 2/26/2020, p 121:3-19. Defense counsel objected, arguing that the prosecutor was disparaging the defense, disparaging defense counsel, and disparaging the defendant. TR 2/26/2020, p 121:20. The court overruled the objection. TR 2/26/2020, p 122:10-11.

The prosecutor continued: "This entire defense can be cast out. Rely in this case only on the evidence that came from the witness stand, not from the mouths of the attorneys." TR 2/26/2020, p 122:15-18.

C. Law and Analysis

Closing arguments may "include the facts in evidence and any reasonable inferences drawn therefrom." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). Prosecutors have "wide latitude" in their use of "language and presentation style used to obtain justice." *Id.* The trial court is in the best position to enforce these standards, so whether a prosecutor's closing statements "constitute misconduct is generally a matter left to the trial court's discretion." *Id.* at 1049. Prosecutorial remarks made to inflame the passions and prejudices of the jury are improper. *Id.* at 1050. Further, arguments "calculated to appeal to the prejudices of the jury" or which are "personal attacks on the defense" are inappropriate. *People v. Garcia*, 2012 COA 79, ¶ 12 (quoting *American Bar Association Standards for Criminal Justice* 3—5.8(c) & cmt. (3d ed. 1993)).

In determining the propriety of closing statements, courts consider: the language used, the statements' context, the strength of evidence supporting the conviction, whether the evidence is conflicting or inconclusive, whether the prosecutor improperly appealed to the

jurors' sentiments, whether the misconduct was repeated, and other relevant factors. *Domingo-Gomez*, 125 P.3d at 1050.; *People v. Lovato*, 2014 COA 113, ¶ 64. "Given the sometimes fuzzy line between hard-but-fair blows and foul blows, and because arguments delivered in the heat of trial are not always perfectly scripted, reviewing courts accord prosecutors the benefit of the doubt where remarks are ambiguous, or simply inartful." *People v. McBride*, 228 P.3d 216, 221 (Colo. App. 2009) (internal quotations and citations omitted). And prosecutors are "afforded considerable latitude in replying to an argument by defense counsel." *Lovato*, ¶ 63 (quoting *People v. Perea*, 126 P.3d 241, 247 (Colo. App. 2005)).

Chapel argues that the prosecutor's remarks were improper because they misled the jury and denigrated the defense. But closing remarks may be based on reasonable inferences from facts in evidence. *See Lovato*, ¶ 62. When viewed in context, the prosecutor was not trying to mislead the jury or denigrate the defense, but was juxtaposing argument with what evidence had been presented. Indeed, Chapel's video confession did not suggest any mistake over where he was or what

he was doing—he said that when he arrived at the garage at 1244 Fraser Street, he knew he was not on his own property and was "hoping [the police] would never find [him] in there." EX 15, 2:15-2:20. The comments were at worst, "simply inartful." *McBride*, 228 P.3d at 221. And in context, they were a proper response to the defense's closing argument, which suggested Chapel had not formed the requisite mental state. *See People v. Vialpando*, 804 P.2d 219, 225 (Colo. App. 1990) ("In considering whether prosecutorial remarks are improper, the reviewing court must weight the impact of those remarks on the trial but must also take into account 'defense counsel's opening salvo.'") (quoting *Wilson v. People*, 743 P.2d 416 (Colo. 1987)).

Lastly, even if to the prosecutor overstated how the jury could consider the evidence, any error was harmless at three levels. First, the jury was properly instructed that closing arguments are not evidence and that they may draw reasonable inferences from the evidence that was presented. CF, pp 86-87, 92, 93; *People v. Herrera*, 87 P.3d 240, 246 (Colo. App. 2003) (juries are presumed to heed the instructions of the trial court judge absent evidence to the contrary). Second, the comment

was short relative to the length of closing arguments. *See* TR 2/26/2020, pp 103-11, 119-26. And third, the evidence of guilt was overwhelming, including Chapel's videotaped confession to each element of the crimes charged. *See* EX 15; *Lovato*, ¶ 64.

In the end, because the comment was not misconduct, and even if so, was harmless, Chapel's convictions should be affirmed.

CONCLUSION

For the foregoing reasons, the People respectfully request that this Court affirm Chapel's convictions.

PHILIP J. WEISER
Attorney General

Shelby A. Krantz

SHELBY A. KRANTZ, 53866*
Assistant Attorney General
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **JEFFREY A. WERMER** and all parties herein via Colorado Courts E-filing System (CCES) on June 29, 2021.

/s/ Tiffiny Kallina