COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED September 25, 2024 4:09 PM
Arapahoe County District Court Honorable Ryan J. Stuart, Judge Case No. 20CR3054	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. SAMUEL ISAIAH BIRCH, Defendant-Appellant.	▲ **COURT USE ONLY** ▲ Case No. 22CA0928
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PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 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 7,676 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 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/ Jessica E. Ross
Signature of attorney or party

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STATEMENT OF THE CASE AND FACTS

On Thanksgiving Day 2020, the defendant, Samuel Isaiah Birch, robbed two convenience stores at gunpoint, walking away with a few hundred dollars and some cigarettes, and leaving the clerk of the last store, M.P., dead from a fatal gunshot wound to the abdomen. He later enlisted his then-girlfriend to destroy evidence connecting him to the crimes. When these crimes caught up with him, Birch claimed the prosecution had the wrong guy. The jury rejected his identity defense and convicted him of two counts of first-degree murder (after deliberation murder and felony murder), two counts of aggravated robbery, and tampering with physical evidence. *See* Opening Br. 1-12; CF, pp 495-99.

The trial court merged felony murder (count 2) into after deliberation murder (count 1) and sentenced him on count 1 to a sentence of life without the possibility of parole. CF, pp 539-40. The trial court also imposed 32 years in the department of corrections for each aggravated robbery count (with one count running concurrently to

the life sentence, and the other running consecutively to it) and 18 months for tampering with physical evidence. CF, pp 539-40.

The People substantially agree with Birch's statement of the case and facts in the opening brief, including the detailed recitation of the evidence presented at trial. Opening Br. 1-12. Further factual background is provided below for each issue Birch raises on appeal.

SUMMARY OF THE ARGUMENT

First, the trial court properly limited Birch's alternate suspect evidence proffered under the guise of attacking the adequacy of the police's investigation. In Colorado, alternate suspect evidence is admissible only upon a demonstration of a substantial nexus to the crime. Because Birch's proposed evidence lacked this nexus, the trial court did not abuse its discretion in refusing to allow him to cross-examine a prosecution witness regarding investigation into a specific alternate suspect. Regardless, any error in not allowing this specific testimony was harmless. Birch was given ample leeway to cross-examine the lead detective on the investigation and argue to the jury

that the investigation was insufficient. At the same time, evidence that it was indeed Birch who committed the crimes was strong.

Second, this Court should decline to address, or address and reject, Birch's claim of instructional error. Birch argues on appeal that the trial court plainly erred by instructing the jury that self-induced intoxication could not be considered as an element-negating traverse to tampering with physical evidence. But the trial court only gave that instruction because it was requested by the defense. Under the invited error doctrine, any error, and thus appellate review, is extinguished. In any event, the trial court did not plainly err in its intoxication instruction. And, even if it had, any error would be limited to the tampering with physical evidence conviction.

Third, Birch's proportionality challenge to his sentence to life without the possibility of parole (LWOP) is moot or otherwise fails. Birch contends LWOP is a grossly disproportionate sentence for the crime of felony murder. But Birch was not sentenced to LWOP for felony murder. The trial court merged that conviction into after deliberation murder, which had the effect of vacating the felony murder

conviction. So, Birch was sentenced to LWOP for only after deliberation murder. Accordingly, his challenge to that sentence for felony murder is moot. Although this Court need look no further to affirm, to the extent Birch persists in his proportionality challenge regarding his LWOP sentence, the trial court did not err, plainly or otherwise, in failing to conclude his LWOP sentence was grossly disproportionate to after deliberation murder.

This Court should affirm.

ARGUMENT

I. The trial court properly limited Birch's presentation of alternate suspect evidence; any error was harmless.

A. Preservation and Standard of Review

The People agree this issue was preserved. TR 03/09/2022, pp 5-20. The People also agree that the standard of review is abuse of discretion. *People v. Elmarr*, 2015 CO 53, ¶ 20. To show an abuse of discretion, "an appellant must establish that, under the circumstances, the trial court's decision to reject the evidence was manifestly arbitrary, unreasonable, or unfair." *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993).

However, contrary to Birch's assertion otherwise, any error in the trial court's ruling does not rise to the level of constitutional error. Rather, nonconstitutional harmless error analysis applies. *See Hagos v. People*, 2012 CO 63, ¶ 12.

In general, a trial court's exclusion of evidence is only of constitutional magnitude if a defendant can demonstrate that he was not otherwise permitted to subject the prosecution's case to "meaningful adversarial testing." *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009); *see also People v. Conyac*, 2014 COA 8M, ¶ 93 (an erroneous evidentiary ruling rises to the level of constitutional error only when it "deprive[s] the defendant of any meaningful opportunity to present a complete defense"). "It does not follow, of course, that every restriction on a defendant's attempts to challenge the credibility of evidence against him, or even every erroneous evidentiary ruling having that effect, amounts to federal constitutional error." *Krutsinger*, 219 P.3d at 1062.

As the issue here does not involve the wholesale exclusion of evidence regarding the adequacy of the investigation, and, as a result,

does not present a situation where Birch could not meaningfully test the prosecution's case on this point, constitutional harmless error analysis does not apply. *Cf. People v. Folsom*, 2017 COA 146M, ¶ 43 (analyzing complete exclusion of such evidence under constitutional harmless error standard).

Instead, under the proper nonconstitutional harmless error standard, this Court will not reverse unless the error substantially influenced the verdict or affected the fairness of trial. *Hagos*, ¶ 12. This standard is outcome determinative and therefore must account for an error's impact considering the evidence as a whole. *Krutsinger*, 219 P.3d at 1063.

B. Additional Facts

The main dispute at trial was identity: whether it was Birch who committed the crimes. However, Birch did not provide notice prior to trial of his intent to introduce alternate suspect evidence. *See* TR 03/09/2022, pp 4-5; *see also* Crim. P. 16(II)(c); *see also People v. Dye*, 2024 CO 2, ¶ 64 (discussing the requirement that defendant provide notice of intent to introduce alternate suspect evidence). And part way

through trial, the prosecution became concerned that the defense would be attempting to introduce alternate suspect evidence without the court first determining its admissibility pursuant to the standards set forth by the supreme court in *Elmarr*. TR 03/09/2022, pp 4-5.

Birch denied he would be "getting into alternate suspect evidence[.]" TR 03/09/2022, p 5:11-23. But he argued that he should be entitled to question law enforcement witnesses regarding various leads on other suspects that he believed were not adequately investigated before being discounted, including potentially introducing the names of these individuals to the jury. TR 03/09/2022, pp 5-6, 8-9, 10-11. Birch argued that this was not alternate suspect evidence, but merely evidence that went to the failure to investigate. TR 03/09/2022, p 5:21-23.

The prosecution replied that although Birch was entitled to attack the investigation, Birch was attempting to do exactly what *Elmarr* prohibited. TR 03/09/2022, pp 11-12. And, even if he wasn't, the concerns underpinning *Elmarr*'s requirements were the same. TR 03/09/2022, pp 12-13.

Eventually, Birch narrowed his argument to a specific individual who lived in the area, allegedly matched the description of the suspect, and was considered armed and dangerous. TR 03/09/2022, pp 13-14. Birch argued that the test in *Elmarr* was sufficiently met.
TR 03/09/2022, pp 13-14.

After additional discussion, the trial court ruled that Birch had not presented evidence "that connects this other individual to the crime itself. And it's the exact evidence that the Court finds the Supreme Court -- the Colorado Supreme Court has determined it would not be appropriate to present to a jury because it would invite speculation." TR 03/09/2022, p 20:6-11.

After Birch cross-examined the prosecution's witness who had done some of the cell phone investigation in the case, Birch made an offer of proof regarding the evidence that he would have elicited from that witness if not for the trial court's ruling. TR 03/09/2022, pp 34-35. Specifically, Birch would have questioned the witness regarding a search he did of the individual's phone. TR 03/09/2022, pp 34-35. The results of that analysis did not reveal any relevant location data. TR

03/09/2022, pp 34-35. But, according to Birch, police cleared the individual anyway. TR 03/09/2022, pp 34-35.

Later, Birch sought to cross-examine the main detective regarding a specific lead police received during the investigation: a nearby Subway restaurant manager thought she had seen the suspect. TR 03/09/2022, p 120:11-22. The prosecution objected, arguing that this evidence was irrelevant based on the court's prior rulings. TR 03/09/2022, p 120:23-24. The defense responded that the inquiry was proper, noting the suspect may or may not have been Birch, and thus, the inquiry went directly to the lack of investigation. TR 03/09/2022, pp 121-22. After a bench conference, the trial court overruled this objection and allowed Birch to question the detective regarding the Subway lead and the police follow-up regarding it. TR 03/09/2022, pp 120-24. Birch then elicited extensive testimony regarding what law enforcement did or did not do with that information. TR 03/09/2022, pp 124-30.

C. Law and Analysis

Birch contends the trial court improperly limited his right to present a defense by excluding inadequate investigation evidence. But (1) Birch was not entitled to present inadmissible alternate suspect evidence in order to attack the sufficiency of the investigation; and (2) error, if any, was harmless.

1. Birch was not entitled to present inadmissible alternate suspect evidence under the guise of attacking the sufficiency of the investigation into other suspects.

It is well-established that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Elmarr*, ¶ 26. "However, the right to present a defense is generally subject to, and constrained by, familiar and well-established limits on the admissibility of evidence." *Id.* at ¶ 27.

Fundamentally, to be admissible, evidence must be relevant. CRE 402. And even relevant evidence may be excluded under CRE 403. The principal issue in a criminal trial is whether the prosecutor has proved

beyond a reasonable doubt that the defendant committed the crime alleged. *Folsom*, ¶ 31.

Birch generally acknowledges these principles. But he argues that his right to present a defense entitles him to admit any evidence that tended to cast doubt on law enforcement's investigation into the crimes—a defense he refers to as a "*Bowden*" defense, citing *Commonwealth v. Bowden*, 399 N.E.2d 482, 486 (Mass. 1980).

Although Birch contends that a *Bowden* defense is a common technique, the admissibility of inadequate-investigation evidence is subject to debate nationwide. *Compare, e.g., United States v. Elysee*, 993 F.3d 1309, 1340 (11th Cir. 2021) (concluding that there is no caselaw indicating the existence of a defense "based on the failure of police to conduct an investigation as reasonably diligent officers" no such defense existed and was thus irrelevant), *with Bowden*, 399 N.E.2d at 486 ("The failure of the authorities to conduct certain tests or produce certain evidence was a permissible ground on which to build a defense in the circumstances of this case. The fact that certain tests were not conducted or certain police procedures not followed could raise a

reasonable doubt as to the defendant's guilt in the minds of the jurors.").

Birch cites no case directly addressing and resolving this debate for Colorado courts generally. But this Court is not writing on a blank slate. Colorado courts have extensively addressed the admissibility of alternate suspect evidence. And in light of existing caselaw from the supreme court, this Court is not free to adopt *Bowden* as it relates to the admissibility of alternate suspect evidence. *See People v. Melendez*, 2024 COA 21M, ¶ 19 (noting the court of appeals is "bound by the rules as expressed by the Colorado Supreme Court," and is "not free to depart from its precedent" (cleaned up)).

Under Massachusetts law, "[i]nformation regarding a third-party culprit ... may be admissible under a *Bowden* defense even though it may not otherwise be admissible under a third-party culprit defense[.]". *Commonwealth v. Andrade*, 174 N.E.3d 281, 299 (Mass. 2021) (cleaned up). The premise of allowing such evidence is that it is independently relevant to show that the police knew of the possible suspect and failed to take reasonable steps to investigate, and that failure, in turn, could

be used to sow reasonable doubt in the minds of the jurors. *See id.*; *see also Commonwealth v. Moore*, 109 N.E.3d 484, 497 (Mass. 2018).

Our supreme court has made clear, however, that the *only* way to admit alternate suspect evidence is if a defendant proffers a non-speculative connection or nexus between the alternate suspect and the crime charged. *Elmarr*, ¶ 32. In adopting this framework, the supreme court squarely rejected the premise that undergirds allowing the admissibility of alternate suspect evidence to support a *Bowden* defense—independent relevance to the defense itself—concluding instead that "[t]he touchstone of relevance in this context is whether the alternate suspect evidence established a non-speculative connection or nexus between the alternate suspect and the crime charged." *Elmarr*, ¶ 23. "Anything less may lead to speculative blaming that heightens the risk of jury confusion and invites the jury to render its findings based on emotion or prejudice." *Id.* at ¶ 32.

With this law in mind, this Court should hold that when a defendant attempts to introduce inadequate-investigation evidence, it must be relevant. *See id.* at ¶ 27 ("As a fundamental matter, evidence

must be relevant to be admissible."). And relevance depends on how the evidence tends to make a material fact more or less probable. *See id.* at ¶ 23; *see also id.* at ¶ 29 ("Alternate suspect evidence seeks to cast reasonable doubt on the material element of identity.").

In some cases, relevance will be immediately apparent, for example, where the inadequate-investigation evidence tends to show that a specific piece of evidence presented at trial is not reliable. *See United States v. McVeigh*, 153 F.3d 1166, 1192 (10th Cir. 1998) ("Admittedly, the quality or bias of a criminal investigation occasionally may affect the reliability of particular evidence in a trial . . . . However, in [the defendant's] case, he failed to establish the requisite connection between the allegedly 'shoddy' and 'slanted' investigation and any evidence introduced at trial." (internal citations omitted)). In others, like this one, it may face additional hurdles, crossing the line into inadmissible alternate suspect evidence.

Here, that police allegedly did a poor job investigating other suspects said nothing about whether their investigation into Birch was adequate. Instead, the reason Birch sought to introduce inadequate-

investigation evidence was to cast reasonable doubt on the material element of identity: that due to police's inadequate investigation into other suspects, the jury should have had a reasonable doubt that it was Birch. Said differently, the purpose of presenting such evidence is to suggest that, had law enforcement done more, they would have identified someone else other than Birch as the perpetrator, i.e., an alternate suspect. But this purpose runs headlong into *Elmarr*, which holds that "evidence merely showing that someone else had a motive or opportunity to commit the charged crime—without other additional evidence circumstantially or inferentially linking the alternate suspect to the charged crime—presents too tenuous and speculative a connection to be relevant." *Elmarr*, ¶ 34. And if such evidence, on its own, is irrelevant to whether it was indeed defendant who committed the crime, it does not become relevant merely because it is presented to prove the even more attenuated point that police didn't thoroughly investigate that alternate suspect.

To avoid running afoul of *Elmarr*, then, a defendant cannot use an inadequate-investigation defense as a backdoor to introduce

inadmissible alternate suspect evidence. Where, as here, a defendant attempts to introduce inadequate-investigation evidence to cast doubt on the material issue of identity, that evidence cannot be inadmissible alternate suspect evidence. Without this bound, Birch asks this Court for a rule that is incompatible with *Elmarr*.

Applying these principles here, the trial court aptly performed its gatekeeping function in prohibiting inadmissible alternate suspect evidence. The trial court disallowed Birch from introducing evidence *Elmarr* prohibited because Birch had not established that the other suspect had a non-speculative connection or nexus to the crime charged. Because this is exactly what *Elmarr* required, Birch's ability to present a defense was not improperly limited.

That the trial court properly exercised its discretion in this case is underscored by the leeway it granted Birch during his cross-examination of the lead detective. There, Birch was permitted to thoroughly question the detective regarding law enforcement's investigation, including inquiry regarding what law enforcement did (or did not do) in response to a specific lead. TR 03/09/2022, pp 124-30.

Given this cross-examination, Birch was not denied his only means of testing significant prosecution evidence. Instead, he was permitted to do just that within the bounds of Colorado case law and the rules of evidence. No error occurred.

2. Error, if any, was harmless.

Even if this Court concludes the trial court abused its discretion, any error was harmless. *See People v. Shanks*, 2019 COA 160, ¶¶ 67-69 (holding that even if the district court erred in denying alternate suspect defense, the error was harmless).

Preliminarily, as argued above, the standard of reversal should be nonconstitutional harmless error, not constitutional harmless error, because the exclusion of evidence here did not deny Birch virtually his only means of effectively testing significant prosecution evidence. *See Shanks*, ¶ 67. The trial court did not preclude Birch from otherwise arguing that the police investigation was inadequate such that the jury should have a reasonable doubt as to identity. *See* TR 03/10/2022, p 27:2-6 ("They got it wrong. They took [Birch's then-girlfriend] at her word. The evidence that did corroborate this, they didn't look at any

alternative explanations. They had leads they did not follow up on because they believed her."). This included relying on the evidence regarding the Subway lead elicited from the detective on cross-examination. TR 03/10/2022, pp 48-50. Because Birch was still able to present his defense and test significant prosecution evidence, harmless error applies.

Nevertheless, any error was harmless under either standard. There is no reasonable possibility that prohibiting Birch from eliciting other evidence contributed to his conviction, nor did it substantially influence the verdict or affect the fairness of the trial. *See Hagos*, ¶¶ 11-12. The defense made an offer of proof regarding the evidence that it would have presented but for the trial court's ruling. TR 03/09/2022, pp 34-35. That evidence was extremely limited. Specifically, the defense would have questioned a prosecution witness regarding a phone search he conducted on a specific alternate suspect and how it did not produce any relevant location information. TR 03/09/2022, pp 34-35. Although the defense contended that they would have argued that this did not "clear" the alternate suspect and thus that the police should have

followed up further, even that point is speculative at best. At the same time, as argued above, Birch was given extensive leeway to cross-examine the lead detective during trial and he used that evidence to argue his theory of defense to the jury. Accordingly, prohibiting Birch from presenting this sliver of evidence did not deprive him of his sole means of testing significant prosecution evidence, let alone contribute to his conviction.

That the exclusion of this evidence had no impact on the verdict is underscored by the strong evidence that it was Birch who committed the crimes:

- Both robberies and the murder were captured on video; although the assailant was masked, the jury could compare the assailant's other characteristics (his voice, for example) to Birch's characteristics to determine identity. TR 03/07/2022, pp 47-48; Env EX 173-74; TR 03/07/2022, pp 157-58; Env EX 176; *see, e.g.*, TR 03/08/2022, pp 88-89; Env EX 179 (Birch's voice).

- Surveillance video suggested the suspect drove a black Ford Fiesta; Birch drove a black Ford Fiesta. TR 03/07/2022, pp 79-80, 171:5-9, 200-01; Env EX 178; EX 72, p 117;.TR 03/09/2022, pp 82-83.
- The suspect during the first robbery wore gloves just like the gloves police recovered from Birch's car, which tested positive for gunshot residue and Birch's DNA. TR 03/08/2022, pp 127-28, 188-89, 238-40; EX 142, p 185.
- The suspect in both robberies wore a black face mask; a black face mask was recovered from Birch's house. TR 03/08/2022, p 157:5-24; EX 92, p 136.
- Although Birch's latent fingerprints were not identified at the second crime scene, neither were the victim's (who was undisputedly there). TR 03/08/2022, p 214:2-24.
- Birch's girlfriend identified him as the man in the surveillance videos; she also testified that he told her about a robbery, showed her the cash shortly thereafter, and told her about the

clerk maybe having a gun. TR 03/07/2022, pp 176-77, 181-82, 192-93; EX 69-71, pp 114-16.

- Birch's text messages confirmed that around the time of the robberies, he was strapped for cash, had a drug habit, and suddenly went from asking his dealer "to front [him] like five pills until tomorrow" to telling his dealer he now had "cash" to buy more the night of the robberies. *See* TR 03/09/2022, pp 27-30; EX 197-98, pp 247-52; *see also* TR 03/07/2022, pp 177-79; EX 199, p 254.
- Birch destroyed evidence connecting him to the crime. His girlfriend testified that he directed her to paint over a sweatshirt with a "No Pain No Jane" logo like the one worn during the first robbery; police recovered a painted-over sweatshirt at Birch's house. TR 03/07/2022, pp 182-84; EX 208, p 263; TR 03/08/2022, pp 168-69; EX 103, p 147. She also testified that he burned the flannel shirt he was wearing during the second robbery in the fireplace, and that he was

going to hide the gun "so he doesn't get in any more trouble." TR 03/07/2022, pp 186-87, 188:5-10.

- Although the gun used in the robberies was never recovered, police suspected it was a .22 caliber firearm; .22 caliber ammunition was found in Birch's car. TR 03/08/2022, pp 128-29, 155:7-9.
- When Birch was arrested shortly after the murder for an unrelated traffic incident, he volunteered to police that he would be going to jail for a very long time, suggesting consciousness of guilt. Env EX 180, 2:50-2:52, 4:40-4:42.

Against this wealth of evidence, and in light of the leeway Birch had to otherwise present his defense, any error in restricting Birch's ability to present the limited inadequate-investigation evidence that was ultimately precluded was harmless under any standard.

II. Birch invited any error in instructing the jury regarding self-induced intoxication; if reviewed, error, if any, was not plain.

A. Preservation and Standard of Review

The People disagree that this Court should address whether the trial court erred in instructing the jury on self-induced intoxication; Birch invited any error he now asserts on appeal. *See People v. Rediger*, 2018 CO 32, ¶ 34; CF, p 444.

Alternatively, if this Court concludes review is appropriate, the People agree that this claim is not preserved, and plain error applies. *See Hagos*, ¶ 14; Crim. P. 52(b).

"Plain error is obvious and substantial." *Id.*; *see also Scott v. People*, 2017 CO 16, ¶ 16 (For an error to be "so obvious that a trial judge should be able to avoid it without the benefit of an objection," "the action challenged on appeal ordinarily 'must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law.'" (quoting *People v. Pollard*, 2013 COA 31M, ¶¶ 39-40)). This Court reverses "under plain error review only if the error so undermined the fundamental fairness of the trial itself so as to cast

serious doubt on the reliability of the judgment of conviction." *Hagos*, ¶ 14 (quotation omitted). "[R]elief under Crim. P. 52(b) is only available if the error is plain at the time it is made[.]" *People v. Crabtree*, 2024 CO 40M, ¶ 72.

The People agree the standard of review is de novo. *People v. Stone*, 2020 COA 23, ¶¶ 54-55.

B. Additional Facts

Birch filed several proposed instructions that he requested the trial court provide to the jury. CF, pp 439-45. This included a proposed self-induced intoxication instruction. CF, p 444. As relevant here, Birch's proposed instruction was specifically limited to first-degree murder and further told the jury "you cannot consider evidence of self-induced intoxication for purposes of deciding whether the prosecution has proved the elements of Murder in the First Degree (Felony Murder), Aggravated Robbery, or Tampering with Physical Evidence." CF, p 444.

During the jury instruction conference, the prosecution agreed "that, based on the Defense request, there was some evidence raising this question," but the prosecution asked for "the exact COLJI

instruction on this topic." TR 03/09/2022 FTR, p 16:22-25. The defense noted that they had modified the COLJI instruction's reference to "may" consider to "should" consider, and "you may not consider" to "you cannot." TR 03/09/2022 FTR, pp 16:12-19, 17:2-16. After confirming those were the only changes from COLJI made by the defense, the trial court ruled that it would "instruct as written in COLJI, using 'may' and 'may not.'" TR 03/09/2022 FTR, p 19:9-12. The trial court otherwise gave the instruction as requested by the defense. CF, p 485.

C. Law and Analysis

Self-induced intoxication is not an affirmative defense, but "evidence of intoxication of the defendant may be offered by the defendant when it is relevant to negative the existence of a specific intent if such intent is an element of the crime charged." § 18-1-804(1), C.R.S. (2024). Self-induced intoxication occurs when a person ingests "substances which the defendant knows or ought to know have the tendency to cause intoxication and which he knowingly introduced or allowed to be introduced into his body, unless they were introduced pursuant to medical advice or under circumstances that would afford a

defense to a charge of crime." § 18-1-804(5), C.R.S. (2024). Generally, "where the evidence supports an intoxication defense, it is appropriate for a trial court to instruct on that defense." *Brown v. People*, 239 P.3d 764, 769 (Colo. 2010) (cleaned up).

On appeal, Birch claims that the trial court plainly erred by instructing the jury that it "may not" consider Birch's self-induced intoxication for the purpose of negating his state of mind for tampering with physical evidence because that crime contains a specific intent element to which a self-induced intoxication defense could have applied. For three independent reasons, this Court should reject Birch's claim of error: (1) Birch invited any error; (2) Birch failed to produce some credible evidence of self-induced intoxication at the time he tampered with evidence; and (3) error, if any, was not plain.

1. By requesting the court instruct the jury that it could not consider self-induced intoxication relative to tampering, Birch invited the error he raises on appeal.

"[T]he invited error doctrine precludes plain error review of a defense-tendered instruction." *People v. Gross*, 2012 CO 60M, ¶ 2;

accord People v. Zapata, 779 P.2d 1307, 1310 (Colo. 1989) ("We do not approve the assertion of error on appeal by the very party who injected that error into the trial.").

Here, the self-induced intoxication instruction that Birch now claims on appeal the trial court erred in giving—Instruction 15—was requested by defense counsel. *Compare* CF, p 444, *with* CF, p 485. Because the instruction was tendered by defense counsel, any error arising from giving it was injected into the case by the defense. *See Zapata*, 779 P.2d at 1310. Accordingly, the invited error doctrine precludes Birch from appealing the court's decision to give the instruction. *See Gross*, ¶ 2.

Birch counters that this error should not be deemed invited because it was due to oversight, not strategy. *See People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002) (declining to apply invited error in a case involving a nontactical instructional omission). Granted, our supreme court has tempered invited error for nontactical instructional omissions when the case presents one of "oversight, not strategy" as reflected through the heavy reliance on the omitted theory at trial. *See id.* But it

has subsequently held that such an exception is unavailable when counsel affirmatively argues for the instruction. *Gross*, ¶ 11.

This case is controlled by *Gross*, not *Stewart*, for two reasons.

First, *Stewart* involved the omission of an instruction, not an argument that the court erred in giving the instruction affirmatively requested by the defense. *Stewart*, 55 P.3d at 119. Here, Birch submitted an instruction that specifically limited the self-induced intoxication defense to after deliberation murder and instructed the jury that the defense did not apply to tampering with physical evidence. CF, p 444. This affirmative request goes beyond mere omission.

Second, the defendant in *Stewart* heavily relied on the theory reflected by the omitted instruction. 55 P.3d at 119 (viewing the omission of an instruction as an oversight "in light of the heavy reliance Stewart placed on this theory during trial"). Here, as Birch concedes, "[t]he defense, for its part, did not address the issue of self-induced intoxication in closing." Opening Br. 28; *see also* TR 03/10/2022, pp 27-53 (defense closing argument). Indeed, as argued next, there was no such evidence presented. Instead, the defense argued in closing that law

enforcement did not adequately investigate whether the sweatshirt Birch's then-girlfriend testified she painted over at his direction was indeed the one the suspect was wearing, suggesting the jury should have reasonable doubt regarding whether Birch was that individual. TR 03/10/2022, pp 29-30.

To this end, it is hardly inconceivable that Birch strategically chose not to argue that he was intoxicated while he committed tampering given that evidence of such intoxication was not presented, and such an argument would have undermined his primary argument that he was not the one who committed the robberies or murder. *See Townsend v. People*, 252 P.3d 1108, 1112 n.2 (Colo. 2011); *see also* TR 03/10/2022, p 53:19-20 ("Mr. Birch is innocent and they got it wrong."). Under these circumstances, there is no basis in the record for this Court to conclude that counsel's instruction presents a case of oversight, not strategy.

For these reasons, Birch must "abide the consequences" of tendering an intoxication instruction that restricted the jury from

considering evidence of his self-induced intoxication relative to tampering with physical evidence. *Rediger*, ¶ 34; *see also Gross*, ¶ 2.

2. Birch was not entitled to an instruction on self-induced intoxication relative to tampering with physical evidence.

Alternatively, even if this Court reviews this issue, the trial court did not err in instructing the jury because the evidence did not support giving the instruction Birch now requests.

When the record is devoid of credible evidence that the defendant was intoxicated while he committed the crime, he is not entitled to a self-induced intoxication instruction. *See Brown*, 239 P.3d at 769.

Here, the record is devoid of such evidence. The main evidence that Birch committed tampering came from his then-girlfriend. TR 03/07/2022, pp 182-88. Although the girlfriend told the jury how Birch directed her to paint over a sweatshirt and burn other evidence in their apartment fireplace, the girlfriend said nothing about him being intoxicated at that time. *See id.* Birch doesn't argue otherwise. Instead, on appeal, he contends "[t]here was evidence to suggest that Mr. Birch

had spent all of the alleged proceeds from the robberies on drugs—which would have amounted to around $250 worth of narcotics—and there was further evidence that [he] was acting erratically in the days following the robberies[.]" Opening Br. 30. But that Birch had access to drugs and that he was acting erratically in the days following the robberies and murder is not evidence that he was indeed intoxicated at the time of the tampering. And evidence of this temporal connection is essential. *See Brown*, 239 P.3d at 770 ("Because there was ample time for Brown to recover from the ecstasy and pool hall drinks he consumed earlier in the evening and because the only evidence demonstrating that he continued to drink from the bottle of vodka is Brown's own uncorroborated testimony, we hold that there is insufficient evidence for a voluntary intoxication instruction to issue."). Because there was insufficient evidence that Birch was intoxicated at the time of the tampering, the instructions properly informed the jury of the law considering the evidence.

3. Error, if any, was not plain.

Even if this Court concludes this error was not invited and there was some credible evidence to support the instruction, there was no plain error requiring reversal.

Even assuming the court erred by restricting the jury's consideration of self-induced intoxication relative to tampering, any error was not obvious under the circumstances presented here. As a general matter, self-induced intoxication may negate specific intent, and tampering is a specific-intent offense. *Cf. People v. Snelling*, 2022 COA 116M, ¶¶ 14, 16 (addressing similar offense of second degree criminal tampering); *see* § 18-8-610(1)(a), C.R.S. (2024) ("A person commits tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he . . . [d]estroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding."); *Palmer v. People*, 964 P.2d 524, 526 (Colo. 1998) (noting that crimes with a mental culpability requirement expressed as "with intent" are specific intent

offenses). But as Birch concedes, there is no case on point requiring a self-induced intoxication instruction for tampering with physical evidence in the absence of a request from the defendant. Opening Br. 30. Given that Birch did not request such an instruction, and in the absence of specific case law on point requiring such an instruction regardless of the defendant's theory of defense, any error was not obvious.

Even assuming obvious error, the jury instruction did not substantially prejudice Birch. "[A]n erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial." *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). Birch's defense at trial was not that he was so intoxicated he couldn't have formed the requisite intent necessary to commit tampering. It was that he didn't commit the crime at all. Accordingly, this issue was not contested at trial. *See id.* at 745 ("[T]he question of voluntary intoxication was not actually contested at trial, in that the defendant did not raise it as his defense."). The failure to instruct the jury regarding self-induced

intoxication relative to tampering casts no doubt on the reliability of the conviction. *See id.*

Finally, even if this Court were to discern plain error, any error is limited only to Birch's tampering conviction. The trial court properly instructed the jury regarding self-induced intoxication relative to the other offenses, and Birch does not contend otherwise.

III. Birch was not sentenced to life in prison without the possibility of parole for felony murder; life without parole is not grossly disproportionate to after deliberation first degree murder.

A. Preservation and Standard of Review

The People agree this issue was not preserved. Opening Br. 32. More than that, the issue Birch raises for the first time on appeal is moot. Whether an issue is moot is reviewed de novo. *People in Int. of C.G.*, 2015 COA 106, ¶ 11.

Alternatively, this Court should decline to address this issue because doing so will not further judicial economy. *See People v. Duncan*, 2023 COA 122, ¶ 25 ("[A]n appellate court may, as a matter of discretion, take up an unpreserved challenge to the constitutionality of

a statute, but only where doing so would clearly further judicial economy." (cleaned up). In addition to involving a challenge to a sentence he never received, as Birch acknowledges, another division of this Court has addressed and rejected a similar proportionality challenge to the one he makes now, and the Colorado Supreme Court has undertaken review of that decision in a case that is fully briefed and argued. *See People v. Sellers*, 2022 COA 102, ¶ 43 (LWOP was not grossly disproportionate to felony murder), *cert. granted* No. 22SC738 (Colo. May 15, 2023).

If reviewed, plain error applies to unpreserved proportionality claims. *People v. Walker*, 2022 COA 15, ¶ 60 ("[W]e hold that an unpreserved claim that a sentence is unconstitutionally disproportionate is subject to plain error analysis."). So, while this Court reviews the legal questions de novo, *Wells-Yates v. People*, 2019 CO 90M, ¶ 35, the standard of reversal is plain error, *Walker*, ¶ 60.

B. Law and Analysis

For the first time on appeal, Birch contends that the trial court plainly erred by failing to sua sponte declare LWOP for felony murder a

grossly disproportionate punishment. But because the trial court never sentenced Birch to LWOP for felony murder (only for after deliberation murder), (1) this issue is moot; and (2) no error, let alone plain error, occurred in sentencing Birch to LWOP.

1. This issue is moot.

First, this Court should decline to address Birch's proportionality challenge to LWOP for felony murder because the trial court did not sentence Birch to LWOP for felony murder. This issue is moot. *See C.G.*, ¶ 12 ("An issue is moot when the relief sought, if granted, would have no practical effect on an existing controversy.").

After deliberation murder and felony murder are not separate offenses; they are alternative ways of committing first-degree murder.[1] *People v. Lowe*, 660 P.2d 1261, 1269 (Colo. 1983). Because of double jeopardy concerns, a defendant cannot be convicted of multiple counts of first-degree murder of a single victim. *See People v. Wood*, 2019 CO 7,

[1] As Birch recounts, the General Assembly has since reclassified felony murder from first-degree to second-degree murder. Opening Br. 31; *see* § 18-3-103(1)(b), C.R.S. (2024).

¶ 23 ("Even a conviction unaccompanied by a sentence bears sufficiently adverse collateral consequences to amount to punishment for purposes of double jeopardy analysis."); *see also Lowe*, 660 P.2d at 1269 ("[T]wo convictions for one killing result in enhanced collateral punishment.").

When the evidence supports a conviction for either, the proper process is to charge both counts, present both theories to the jury, and request that the jury indicate which theories they found proven beyond a reasonable doubt. *Lowe*, 660 P.2d at 1269. Upon a finding that the defendant committed the crime under multiple theories (as occurred here), the trial court then enters only one conviction (either a generic murder conviction "in violation of section 18-3-102," or specifically after deliberation murder). *See Lowe*, 660 P.2d at 1272; *see also People v. Bartowsheski*, 661 P.2d 235, 247 (Colo. 1983) (Because the jury found the defendant guilty of both after deliberation murder, felony murder predicated on robbery, and robbery, to "give as much effect to the jury's resolution of the issues submitted to it as can be done without running afoul of the defendant's constitutional and statutory rights," the trial court was directed to enter judgments of conviction on after deliberation

murder and robbery). The legal effect of merging felony murder into after deliberation murder is to vacate the conviction for felony murder. *See Wood*, ¶ 29 ("[B]y merging the two murder convictions and imposing a single sentence for first-degree murder, the state district court necessarily vacated the conviction for second-degree murder, thereby avoiding multiplicitous convictions. Stated differently, '[m]erger ha[d] the same effect as vacating one of the multiplicitous' murder convictions." (quoting *People v. Rhea*, 2014 COA 60, ¶ 17)).

The trial court here followed this process to a "T." The prosecution charged Birch with both after deliberation and felony murder for killing the store clerk. CF, pp 19-23. The jury was instructed on both theories, returning guilty verdicts on both. CF, pp 488-89, 495-96. At sentencing, the trial court merged felony murder into after deliberation murder and imposed only a sentence for after deliberation murder. TR 04/22/2022, p 12:17-19 ("The Court, on Counts 1 and 2 – really on Count 1, imposes a sentence of life in prison without the possibility of parole. Count 2 merges with Count 1."). The mittimus reflects only a sentence to life without parole for after deliberation murder (count 1). CF, pp 539-40.

Accordingly, Birch's felony murder conviction was vacated at sentencing, and he was never sentenced to LWOP for felony murder. *See Wood*, ¶ 29.

Upon the trial court's merger of felony murder into after deliberation murder and its imposition of a single sentence of LWOP for after deliberation murder, any constitutional challenge to a potential LWOP sentence for felony murder became moot. Nothing this Court can say regarding whether LWOP is a grossly disproportionate sentence for felony murder will impact this case. *See C.G.*, ¶ 12.

Relatedly, considering the trial court's sentence, this Court is without authority to review Birch's appellate claim as presented. Under § 18-1-409, C.R.S. (2024), and C.A.R. 4(b)(5), a criminal defendant convicted of a felony has the right to appellate review of the propriety of the sentence. But this right is necessarily limited to the sentence the trial court imposed on the defendant. Again, Birch was sentenced to LWOP for after deliberation murder, not felony murder. Accordingly, Birch requests appellate review of a sentence he never received. Nothing in statute or the appellate rules permits such a review.

Whether because the issue is moot or because, as presented, this Court lacks authority to review it, this Court should decline to address this issue as Birch frames it.

2. No error, let alone plain error, occurred in imposing LWOP for first-degree murder.

Although this Court need go no further to affirm, to the extent Birch still desires this Court to review his LWOP sentence, such a review is limited to the crime for which it was imposed: after deliberation murder.[2] Properly construed then, the question is whether the trial court plainly erred in failing to sua sponte conclude that LWOP is a grossly disproportionate punishment for after deliberation murder. *See Walker*, ¶ 60.

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[2] To this end, Birch's arguments that *Sellers* was wrongly decided fall flat as *Sellers* addressed whether LWOP for felony murder raised an inference of gross disproportionality. And, of course, Birch was not sentenced to LWOP for felony murder. In any event, because Birch is proceeding under plain error, he fails to meet his burden to demonstrate that the trial court plainly erred in failing to sua sponte conclude that LWOP was a grossly disproportionate sentence for felony murder. *See People v. Mandez*, 997 P.2d 1254, 1273 (Colo. App. 1999); *see also Crabtree*, ¶ 72.

A court may ascertain whether a sentence is grossly disproportionate by conducting a proportionality review, which first compares the gravity or seriousness of the offense to the harshness of the penalty (the abbreviated proportionality review). *Wells-Yates*, ¶¶ 7-8. If that analysis gives rise to an inference of gross disproportionality, the court must conduct an extended proportionality review involving intrajurisdictional and interjurisdictional comparisons. *Id.* at ¶ 8. But if the abbreviated proportionality review does not give rise to an inference of gross disproportionality, the proportionality challenge fails, and the sentence must be upheld. *Id.*

Given that Birch proceeds under plain error, his claim fails. At the time of sentencing, it was certainly not obvious error for the trial court to sentence Birch to LWOP for after deliberation murder as statute requires. Over 30 years ago, our supreme court declared that first-degree murder is a "crime of the utmost gravity," such that imposing the minimum statutory sentence (at that time, life with the possibility of parole after 40 years) raised no constitutional concern. *People v. Smith*, 848 P.2d 365, 374 (Colo. 1993); *see also People v. Tate*, 2015 CO

42, ¶ 32 ("[F]rom 1985 until 1990, a 'life sentence' meant life with the possibility of parole after forty years."), *abrogated on other grounds by Montgomery v. Louisiana*, 577 U.S. 190 (2016).

In the years since *Smith*, the legislature has moved toward a *harsher* punishment for first-degree after deliberation murder, now requiring a minimum sentence of life without the possibility of parole. *See Tate*, ¶ 33 ("In 1990, the legislature changed the definition of a life sentence to mean life without the possibility of parole."); § 18-1.3-401(1)(a)(I)(V.5)(A), C.R.S. (2024) (minimum sentence for class 1 felony is life without the possibility of parole); § 18-3-102(1)(a), (3), C.R.S. (2024) (after deliberation murder is a class 1 felony); *see Wells-Yates*, ¶ 49 ("[D]uring the first subpart of the abbreviated proportionality review," courts should consider "any relevant legislative changes as the best evidence of our evolving standards of decency."); *see also Miller v. Alabama,* 567 U.S. 460, 494–95 (2012) (Roberts, C.J., dissenting) ("Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. But decency is not the same as leniency. A

decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.").

Giving our evolving standards of decency indicating after deliberation murder is even more grave and serious (and thus deserving of an even harsher punishment) than it was when our supreme court decided *Smith*, there is no doubt that Birch received a constitutional punishment. After deliberation murder is undisputably a per se grave or serious offense. *See Wells-Yates*, ¶ 63; § 18-3-102(1)(a), C.R.S. (2024) ("A person commits the crime of murder in the first degree if … [a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person."). And, although LWOP is undoubtedly harsh, imposing it as the legislature desired for the deliberate and intentional taking of life—one

of our most serious offenses— clearly raises no inference of gross disproportionality. *See Smith*, 848 P.2d at 374-75.

CONCLUSION

The People respectfully request that this Court affirm.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **MARK G. WALTA** and all parties herein via Colorado Courts E-filing System (CCES) on September 25, 2024.

/s/ Alex Miller