SUMMARY
May 16, 2024

2024COA53

No. 22CA1265, *Peo v Herold* — Crimes — DUI — Prior Convictions — Specific Corroborating Evidence of Identification; Criminal Law — Defendant's Identity as Element of Crime or Sentence Enhancer

A division of the court of appeals considers the novel issue in Colorado of whether a description that a person with a prior conviction was a "Caucasian Male" with the same name and date of birth as the current defendant is sufficiently "specific corroborating evidence of identification connecting the defendant" to the person with the prior conviction under *Gorostieta v. People*, 2022 CO 41, ¶¶ 26-27, 516 P.3d 902, 907, for purposes of proving that the current defendant has a prior conviction when that prior conviction is an element of the charged offense. We conclude that such description is insufficient and therefore reverse the defendant's

conviction for felony DUI and remand for entry of a judgment of conviction for misdemeanor DUI.

COLORADO COURT OF APPEALS **2024COA53**

Court of Appeals No. 22CA1265
Arapahoe County District Court No. 19CR1469
Honorable Eric B. White, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Dennis P. Herold,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE LIPINSKY
Tow and Grove, JJ., concur

Announced May 16, 2024

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¶ 1 In *Gorostieta v. People*, 2022 CO 41, 516 P.3d 902, the supreme court provided guidance regarding the type of evidence a prosecutor must introduce to prove that a defendant has a prior conviction when that prior conviction is an element of the charged offense. This issue arises in prosecutions for felony driving under the influence (DUI) because a conviction for DUI or driving while ability impaired (DWAI) is elevated from a misdemeanor to a class 4 felony upon proof beyond a reasonable doubt that the defendant had three or more prior convictions for DUI, DUI per se, or DWAI. *See* § 42-4-1301(1)(a), C.R.S. 2023; *see also Linnebur v. People*, 2020 CO 79M, ¶ 2, 476 P.3d 734, 735.

¶ 2 *Gorostieta* explains that "the mere fact that the defendants in the present and prior cases have the same name and date of birth, *without more*, will generally be insufficient" to prove that the defendant has a prior conviction. *Gorostieta*, ¶ 28, 516 P.3d at 907. The opinion provides examples of "specific corroborating evidence of identification connecting the defendant" to the person with the prior conviction. *See id.* at ¶¶ 26-27, 516 P.3d at 907.

¶ 3 In this case, we consider the novel issue in Colorado of whether a description that the person with the prior conviction was

a "Caucasian Male" with the same name and date of birth as the defendant is sufficient "corroborating evidence" to support a defendant's conviction for felony DUI. We conclude it is insufficient.

¶ 4 Defendant, Dennis P. Herold, appeals the judgment of conviction entered on a jury verdict finding him guilty of class 4 felony DUI – fourth or subsequent offense, in violation of section 42-4-1301(1)(a). We reverse Herold's conviction for felony DUI and remand for entry of a judgment of conviction for misdemeanor DUI, but we reject his arguments that other errors entitle him to a new trial.

I. Background Facts and Procedural History

¶ 5 Sergeant John Sherrill responded to a call reporting an intoxicated individual "passed out behind the wheel of a van" in the parking lot of an apartment complex. When Sergeant Sherrill arrived at the parking lot, he saw Herold, "on all fours, on his hands and feet" in a landscaping rock bed, in front of a running van. Herold told Sergeant Sherrill that "he had fallen out of the van into the rocks."

¶ 6 Sergeant Sherrill and Deputy Scott Gricks, who arrived later, asked Herold numerous questions, including questions regarding

his well-being and ownership of the van. Later, medical personnel arrived to evaluate Herold. They decided he did not require hospitalization, and he chose not to go to a hospital. After asking him further questions, the officers arrested Herold for DUI.

¶ 7 Defense counsel conceded at trial that Herold was "drunk" throughout his interaction with the officers.

¶ 8 Herold was charged with class 4 felony DUI (fourth or subsequent offense), in violation of section 42-4-1301(1)(a). Herold's theory of defense was that he had not driven the van the day of his arrest, but rather, a coworker had borrowed it and left it running in the parking lot of Herold's apartment complex to recharge the battery. Defense counsel argued in closing that, although Herold "was sitting in that car drinking," he did not drive it while intoxicated.

¶ 9 The jury found Herold guilty as charged.

II. Analysis

¶ 10 Herold contends that (1) "the prosecution produced insufficient evidence of identity as to the prior convictions element"; (2) the court "reversibly erred by refusing to suppress statements Herold made during a custodial interrogation where he did not

receive a *Miranda* warning"; (3) "the prosecutor engaged in numerous instances of misconduct during closing[] [argument] that violated Herold's right to a fair trial"; and (4) the cumulative effect of these errors requires reversal.

A. Sufficiency of the Evidence

¶ 11 Herold argues there was insufficient evidence to convict him of felony DUI because the prosecution failed to present sufficiently "specific corroborating evidence of identification," *Gorostieta*, ¶ 2, 516 P.3d at 903, connecting him to three or more prior DUI or DWAI convictions. We agree.

1. Standard of Review

¶ 12 To decide whether a prosecutor presented sufficient evidence to support the defendant's conviction, we consider the relevant direct and circumstantial evidence and ask "whether the relevant evidence, . . . when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010) (quoting *People v. Bennett*, 183 Colo. 125, 130, 515 P.2d 466, 469 (1973)).

2. Applicable Law

¶ 13 As relevant here, a conviction for DUI is a felony "if the violation occurred after three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, . . . or DWAI . . . or any combination thereof." § 42-4-1301(1)(a). The prior convictions are an element of felony DUI. *Linnebur*, ¶ 33, 476 P.3d at 741.

3. Additional Facts

¶ 14 The court admitted into evidence Sergeant Sherrill's body camera recording of his interaction with Herold. In the recording, Sergeant Sherrill can be heard saying into his radio "Dennis Herold" and Herold's date of birth.

¶ 15 Later during the trial, the prosecutor advised the jury that it would "hear evidence regarding allegations of prior DUI convictions suffered by Mr. Herold." The court then admitted into evidence conviction records from four earlier DUI and DWAI cases. We summarize those records in the table below, which shows the exhibit number of the conviction record at Herold's trial, the year of the conviction, the name of the person with the prior conviction, such person's date of birth, the person's physical description and

distinguishable features (if the conviction record contains any), and the county in which the offense occurred:

Exhibit	**Name**	**Date of Birth**	**Physical Description**	**Dist. Features**	**County**
Ex. 7 (1991)	Dennis P. Herold	Herold's date of birth	Caucasian Male	No	Adams
Ex. 8 (1983)	Dennis P. Herold	Herold's date of birth	No	No	Denver
Ex. 9 (1996/ 1998)	Dennis Paul Herold	Herold's date of birth	Caucasian Male, 6'0", 175lbs, Brown Hair and Eyes	No	Douglas
Ex. 10 (1996/ 1998)	Dennis Paul Herold	Herold's date of birth	Caucasian Male, 6'0", 175lbs, Brown Hair and Eyes	No	Arapahoe

(For privacy reasons, we do not disclose Herold's date of birth.)

4. The Evidence Was Insufficient to Support Herold's Conviction for Felony DUI

¶ 16 In *Gorostieta*, the supreme court held that, to prove that a defendant has a prior conviction, when such conviction is an element of the subject offense, "the prosecution must establish an essential link between the prior conviction and the defendant." *Gorostieta*, ¶ 2, 516 P.3d at 903.

¶ 17 As noted above, a match between the defendant's name and date of birth and those of the individual with the prior conviction,

"*without more*, will generally be insufficient." *Id.* at ¶ 28, 516 P.3d at 907. The prosecution must "present some documentary evidence combined with specific corroborating evidence of identification connecting the defendant to the prior felony conviction." *Id.* at ¶ 2, 516 P.3d at 903. Examples of such corroborating evidence are

> (1) evidence specifically identifying the defendant; (2) unique identifiers such as a driver license, prison identification number, or social security number; (3) photographs or fingerprints from the prior case that link that case to the current defendant; (4) a physical description from the prior case that can be compared to the defendant in the present case; (5) distinguishable features of the defendant such as tattoos; or (6) testimony of probation officers or others with personal knowledge positively identifying the defendant as being the same person who had previously been convicted.

Id. at ¶ 27, 516 P.3d at 907. The supreme court noted that this is not "a comprehensive list of appropriate corroborating evidence." *Id.*

¶ 18 The supreme court concluded in *Gorostieta* that the evidence linking the defendant to the individual convicted in the prior case was sufficient because, in addition to proving a name in common and the same date of birth, the prosecution established that the

prior felony and the offense in the current case occurred in the same county, and the physical descriptions of the defendant and the previously convicted individual — including height, weight, eye color, hair color, and ethnicity — matched. *Id.* at ¶ 33, 516 P.3d at 908. (*Gorostieta* involved a conviction for possession of a weapon by a previous offender, which requires only one prior conviction. *See id.* at ¶ 1, 516 P.3d at 903; *see* § 18-12-108(1), C.R.S. 2021. But the *Gorostieta* analysis applies to any offense that has one or more prior convictions as an element. *See Gorostieta*, ¶ 1, 516 P.3d at 903.)

¶ 19 Applying *Gorostieta*, we hold that the prosecutor did not introduce sufficiently "specific corroborating evidence of identification," *id.* at ¶ 2, 516 P.3d at 903, to prove beyond a reasonable doubt that Herold had three prior convictions for DUI or DWAI.

¶ 20 While three of the prior conviction records describe the offender as a "Caucasian Male," as is Herold, this descriptor, without more, even when coupled with name and date of birth, is not sufficiently "specific corroborating evidence of identification." *Id.* "Caucasian Male" is not a "physical description . . . that can be

compared to the defendant in the present case" in a meaningful way. *Id.* at ¶ 27, 516 P.3d at 907. The general description of a person as a "Caucasian Male" is too broad to allow a jury to determine whether the person with the prior conviction is the same person as the defendant.

¶ 21 Moreover, "Caucasian Male" lacks the specificity of the "types of corroborating evidence" that the supreme court identified in *Gorostieta*. *See id.*

¶ 22 We need not decide whether the additional physical details of height and weight contained in the records of two of the prior convictions are sufficiently specific under *Gorostieta*. A felony DUI conviction requires proof beyond a reasonable doubt of *three* prior convictions. *See* § 42-4-1301(1)(a).

¶ 23 Similarly, we need not decide whether, as the People contend, the evidence that the four prior offenses "were all committed in . . . front range counties," and that one occurred in the "same county as the charged offense," is sufficiently specific corroborating evidence of identity under *Gorostieta*. As Herold notes, "in *Gorostieta*, it was the fact that the offenses occurred in the same county *in combination with* the shared name and date of birth and [a] detailed

physical description that led the Court to conclude the evidence was sufficient." Even if we were to determine that, for purposes of the *Gorostieta* analysis, a court can treat prior convictions in the same general geographic area like prior convictions in the same county, in this case, unlike in *Gorostieta*, the prosecutor failed to introduce sufficient additional corroborating evidence of identity.

¶ 24 Lastly, we reject the People's argument that the fact that "the charged offense and all the priors were all impaired driving offenses" is sufficient to link Herold to the person convicted of the prior offenses. Evidence that a prior offense manifested the same "distinctive features" as the charged offense may be admitted to prove identity. *People v. Lahr*, 2013 COA 57, ¶ 18, 316 P.3d 74, 78; *see* CRE 404(b). But commonality of offense, without more, does not provide "specific corroborating evidence of identification." *Gorostieta*, ¶ 2, 516 P.3d at 903.

¶ 25 In sum, we hold that, even when viewing the evidence as a whole and in the light most favorable to the prosecution, the prosecution did not present sufficiently "specific corroborating evidence of identification," *id.*, to prove the identity element of felony DUI beyond a reasonable doubt.

¶ 26 Under double jeopardy principles, Herold cannot be retried for felony DUI because the prosecution failed to prove sufficient evidence to support his conviction for that offense. *See People v. Brassfield*, 652 P.2d 588, 594 n.5 (Colo. 1982); *cf. People v. Viburg*, 2021 CO 81M, ¶ 22, 500 P.3d 1123, 1129 (explaining that a defendant can be retried for felony DUI if "the trial court erroneously ruled that [the defendant's] prior convictions were a sentence enhancer rather than an element of the crime" and "the prosecution never received the opportunity to present the evidence [of the prior convictions] to the jury").

¶ 27 Thus, as the parties acknowledge, the appropriate remedy for the insufficiency of evidence supporting Herold's conviction for felony DUI is to reverse such conviction and remand for entry of a judgment of conviction for misdemeanor DUI. When a defendant successfully raises a sufficiency argument, "a lesser offense can be considered necessarily implied in a jury verdict finding a criminal defendant guilty of a greater offense." *Halaseh v. People*, 2020 CO 35M, ¶ 8, 463 P.3d 249, 251. Misdemeanor DUI is "necessarily implied" in felony DUI. *Id.*; *see* § 42-4-1301(1)(a) ("Driving under

the influence is a misdemeanor, but it is a class 4 felony if the violation occurred after three or more prior convictions. . . .").

¶ 28 Accordingly, we remand for entry of a judgment of conviction for misdemeanor DUI.

B. Motion to Suppress

¶ 29 Herold argues that the court erred by denying his motion to suppress Sergeant Sherrill's and Deputy Gricks's bodycam recordings. He asserts that his incriminating statements to the officers heard on the recordings were inadmissible because he made them during a custodial interrogation before receiving a *Miranda* warning, and consequently, the officers obtained those statements in violation of his Fifth Amendment right against self-incrimination. We hold that, even if the court erred by admitting any portion of the recordings, such error was harmless beyond a reasonable doubt.

1. Standard of Review

¶ 30 "[W]e review trial errors of constitutional dimension that were preserved by objection for constitutional harmless error." *Hagos v. People*, 2012 CO 63, ¶ 11, 288 P.3d 116, 119. Under this standard of review, an error "require[s] reversal unless the reviewing court is 'able to declare a belief that [the error] was harmless beyond a

reasonable doubt.'" *Id.* (second alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

2. Applicable Law

¶ 31 "To protect a suspect's Fifth Amendment right against self-incrimination," the prosecution is barred from "introducing in its case-in-chief any statement, whether inculpatory or exculpatory, procured by custodial interrogation, unless the police precede their interrogation with certain warnings." *Mumford v. People*, 2012 CO 2, ¶ 12, 270 P.3d 953, 956 (quoting *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002)); *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The *Miranda* protections apply only where "a suspect is subject to both custody and interrogation." *Effland v. People*, 240 P.3d 868, 873 (Colo. 2010).

¶ 32 A person is interrogated for *Miranda* purposes if the person "'is subjected to either express questioning or its functional equivalent.' Thus, interrogation includes 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.'" *People v. Bonilla-Barraza*, 209 P.3d 1090, 1094 (Colo. 2009) (quoting *People v. Madrid*, 179 P.3d

1010, 1014 (Colo. 2008)). To make this determination, Colorado courts look to the totality of the circumstances. *See id.*

¶ 33 A person is in custody for purposes of *Miranda* if the person "has been formally arrested or if, under the totality of the circumstances, a reasonable person in [his] position would have felt that [his] freedom of action had been curtailed to a degree associated with formal arrest." *People v. Garcia*, 2017 CO 106, ¶ 20, 409 P.3d 312, 317.

3. Additional Facts

¶ 34 Defense counsel presented the following evidence at the hearing on Herold's motion to suppress.

¶ 35 Sergeant Sherrill's bodycam recording shows him arriving at an apartment complex's parking lot and walking toward Herold. Herold was "on all fours, on his hands and feet" in a landscaped rock bed, in front of a running van with an Ace High Plumbing logo.

¶ 36 Sergeant Sherrill asked Herold, "what happened," and whether he "was ok." Herold responded that "he had fallen out of the van into the rocks." Herold responded affirmatively when Sergeant Sherrill asked, "Did you just get here?"

¶ 37 Sergeant Sherrill grabbed Herold's arm, saying, "Come here for a second, can you stand up?" He pulled Herold to a standing position, then directed him to a nearby step. Herold appeared to try to walk away, but Sergeant Sherrill pulled him back and said, "Sit on the curb right here." When Herold did not respond, Sergeant Sherrill grabbed Herold's arm and his shirt, and sat him on the step.

¶ 38 Sergeant Sherrill explained at the suppression hearing that he grabbed Herold's arm and shirt because he "was afraid [Herold] was going to fall" or "injure himself," as he was "very intoxicated or there was some medical reason for him not to be able to walk or even stand without falling."

¶ 39 Sergeant Sherrill asked Herold, among other questions, if the van was his, what and how much he had had to drink, and if he took any medications. Herold answered that the van was his and that he worked for Ace High Plumbing. He first said he had drunk "a few" but subsequently said he had drunk "like one glass" of "the worst kind" of liquor. Herold later contradicted himself again, asserting that he had drunk "at least four or five" beers. Despite

expressing confusion regarding his address, he said he lived in the complex.

¶ 40 Herold asked to turn off his van. Sergeant Sherrill told Herold he was waiting for another officer to arrive and that the officers would turn off the van. Herold said, "In the meantime, I'm going to go inside." Sergeant Sherrill replied, "No, just sit right here."

¶ 41 Sergeant Sherrill told Herold that he was calling medical personnel to ensure Herold was not having any medical issues.

¶ 42 Deputy Gricks then arrived. Sergeant Sherrill told Herold to "stay seated" while he spoke with Deputy Gricks.

¶ 43 Deputy Gricks asked Herold, "So, Dennis, did you drive here?" Herold said no. Sergeant Sherrill interrupted Deputy Gricks to note he had not given Herold a *Miranda* warning. Herold asked multiple times whether he could turn off the van; the officers said no.

¶ 44 While Deputy Gricks questioned Herold further about the van, Sergeant Sherrill turned it off. He found a liquor bottle inside and immediately told Deputy Gricks about his discovery.

¶ 45 After Herold repeatedly denied that he had driven the van to the parking lot, Deputy Gricks asked, "So, why was it running?" Herold said, "That's what I was trying to figure out." Herold said

that the van was his, but that he did not know who had driven it to the parking lot.

¶ 46 Both officers' bodycams were turned off for an unknown period of time while the medical personnel examined Herold. The medical personnel determined they did not need to take Herold to a hospital and left.

¶ 47 When the officers' bodycams were turned back on, Deputy Gricks asked Herold if he felt steady enough to get on his feet. Herold responded, "Yeah, enough to get inside" and "I go inside." Deputy Gricks refused to let him go inside. At the suppression hearing, Deputy Gricks testified that the officers refused to let Herold go to his apartment because "we were conducting an investigation." The officers then helped Herold stand and escorted him to one of the patrol cars.

¶ 48 While escorting him, Deputy Gricks told Herold, "Don't act up on me, man. I'm telling you right now, step over here, please." Herold said, "For what?" and Deputy Gricks said, "We're going to have a conversation." The officers ordered Herold to sit on the bumper of the patrol car.

¶ 49 Deputy Gricks again asked Herold about medical issues, his intoxication, and whether he had been driving. Sergeant Sherrill asked Herold if he had ever been arrested for a DUI or had a DUI on his record; Herold said no. Deputy Gricks then arrested Herold for DUI.

4. The Challenged Statements

¶ 50 Defense counsel's motion to suppress did not direct the court to any particular statements heard on the officers' bodycam recordings; rather, defense counsel asked the court to suppress the entirety of the recordings.

¶ 51 On appeal, Herold challenges the admission of certain of the statements heard on the recordings in which "he essentially admitted to [DUI] because his statements reflected he was in actual physical control of the van while intoxicated." He contends that, while "[t]he defense argued that Herold wasn't driving[,] . . . his statements undermined that defense."

5. Herold Was Being Interrogated When He Made the Challenged Statements

¶ 52 Herold contends he was being interrogated when he made the challenged statements to the officers.

¶ 53 The People respond that Herold's assertion that he fell out of his van was not the product of an interrogation because the question, "what happened," is not intended to elicit an incriminating response. They further note that Sergeant Sherrill "did not ask any follow up questions designed to elicit an incriminating response, such as 'how did you fall out?'"

¶ 54 The People do not address whether Herold was being interrogated when he made any of the other statements at issue.

¶ 55 The court did not expressly rule on whether the bodycam recordings depicted an "interrogation," but, in denying Herold's motion, it referred to the encounter as an "interrogation."

¶ 56 We agree with the People that Herold's assertion that he fell out of his van was not the product of an interrogation because Herold made the statement in response to one of Sergeant Sherrill's initial questions — "what happened" — which Sergeant Sherrill asked to assess whether Herold needed medical attention. In this context, "what happened" was not a question "the police should know [is] reasonably likely to elicit an incriminating response." *Bonilla-Barraza*, 209 P.3d at 1094 (quoting *Madrid*, 179 P.3d at 1014).

¶ 57 But we agree with Herold, the People appear to concede, and the court acknowledged, that Herold made the other challenged statements following "either express questioning or its functional equivalent," *id.* (quoting *Madrid*, 179 P.3d at 1014), and thus during an interrogation.

6. Even if Herold Was in Custody When He Made the Other Challenged Statements, Any Error in Their Admission Was Harmless Beyond a Reasonable Doubt

¶ 58 In assessing whether the erroneous admission of a defendant's incriminating statement while in custody was harmless beyond a reasonable doubt, "an appellate court should consider a number of factors, including the importance of the statements to the prosecution's case, whether the statements were cumulative, and the overall strength of the prosecution's case." *People v. Davis*, 2018 COA 113, ¶ 18, 429 P.3d 82, 87 (quoting *People v. Melanson*, 937 P.2d 826, 833 (Colo. App. 1996)).

¶ 59 We hold, without deciding whether Herold was in custody when he made the challenged statements, that any error in the court's admission of such statements was harmless beyond a reasonable doubt.

¶ 60 First, we disagree with the People's argument that such statements were of little importance to the prosecution's case because, "[e]xcepting where Herold responds to non-interrogatory questioning that he fell out of the van, Herold's statements were either incoherent or exculpatory."

¶ 61 The challenged statements showed that Herold was in "actual physical control" of the van while intoxicated, which constitutes "driving" for purposes of the DUI statute. *See People v. Swain*, 959 P.2d 426, 431 (Colo. 1998). And the prosecutor linked the challenged statements to that definition of "driving" in opposing Herold's motion for judgment of acquittal:

> Actual physical control is present when a person exercises bodily influence or direction over a motor vehicle which is determined by the totality of the circumstances . . . . Mr. Herold even agreed in the video that the car was on. *He wanted to turn it off. He agreed the vehicle was his.* He was trying to figure out why it was on, is what he said, but it was clearly on. *When the officers were talking to him about it, he continued to try to go to the vehicle.*

(Emphases added.) The prosecutor made the same point during closing argument:

> This case is about whether Mr. Herold was driving a vehicle when he was sitting in the driver's seat with the vehicle running without touching or changing the state of that vehicle in any way whatsoever. The evidence that you heard makes it pretty clear what happened . . . .

Therefore, the subject statements were important to the prosecution's case.

¶ 62 Nevertheless, the cumulative nature of the statements, *Melanson*, 937 P.2d at 833, demonstrates why their admission was harmless beyond a reasonable doubt. Herold's neighbor Sandra Castro testified at trial that, at around 4:30 p.m. on the day of Herold's arrest, she noticed that Herold was passed out behind the wheel of a running white van with an Ace High Plumbing logo. Castro testified that the van belonged to Herold. Therefore, Herold's statements in which he admitted the van was his, said he worked for Ace High Plumbing, asked to turn off the van, and denied driving the van were cumulative.

¶ 63 In addition, "the overall strength of the prosecution's case," *Davis*, ¶ 18, 429 P.3d at 87, demonstrates why the admission of the statements was harmless beyond a reasonable doubt.

¶ 64 On appeal, Herold asserts, "Although Castro claimed she saw Herold passed out behind the wheel while the van was running, neither officer saw Herold in the van. Thus, [Herold's] statements were crucial to corroborating the neighbor's claims." But in her closing argument, Herold's own lawyer told the jury that "Herold was extremely intoxicated. *He was sitting in that car drinking that bottle of liquor* that Sergeant Sherrill later found empty in the front passenger seat." (Emphasis added.) Therefore, the record shows that Herold had "actual physical control" of the van while under the influence because he was drinking while seated in the running vehicle. *See Swain*, 959 P.2d at 431 (affirming the defendant's conviction for DWAI where deputies found the defendant lying in the front seat of a parked truck, with the keys in the ignition and the radio playing).

¶ 65 In sum, we conclude, without deciding whether Herold was in custody when he made the challenged statements, that any error in the admission of the statements was harmless beyond a reasonable doubt.

C. Prosecutorial Misconduct

¶ 66 Herold contends that the prosecutor engaged in misconduct during closing argument by misstating the facts, opining on evidence, and denigrating the defense. We disagree.

1. Standard of Review

¶ 67 We engage in a two-step analysis when reviewing a claim of prosecutorial misconduct. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). We first determine whether "the prosecutor's questionable conduct was improper based on the totality of the circumstances and, second, whether such actions warrant reversal according to the proper standard of review." *Id.*

2. Applicable Law

¶ 68 Because "[a]dvocates must be able to present their best case to achieve just results," prosecutors have "wide latitude in the language and presentation style used to obtain justice." *Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005). During closing argument, a prosecutor "may refer to the strength and significance of the evidence, conflicting evidence, and reasonable inferences that may be drawn from the evidence." *People v. Walters*, 148 P.3d 331, 334 (Colo. App. 2006). However,

their "arguments and rhetorical flourishes must stay within the ethical boundaries" that our supreme court has drawn. *Domingo-Gomez*, 125 P.3d at 1048.

¶ 69 Three of those ethical boundaries are not intentionally misstating the evidence or the law, *id.* at 1048-49; not "express[ing] a personal belief or opinion as to [the] truth or falsity of [a witness's] testimony," *Wilson v. People*, 743 P.2d 415, 419 (Colo. 1987); and not making remarks for the "obvious purpose of denigrating defense counsel," *People v. Jones*, 832 P.2d 1036, 1038 (Colo. App. 1991).

¶ 70 "Claims of improper argument must be evaluated in the context of the argument as a whole and in light of the evidence before the jury." *People v. Geisendorfer*, 991 P.2d 308, 312 (Colo. App. 1999); *see also People v. Allee*, 77 P.3d 831, 835 (Colo. App. 2003).

3. The Prosecutor Did Not Misstate the Evidence

a. Statements About Herold and the Van at Walmart

¶ 71 Herold argues that the prosecutor misstated the facts during closing argument by arguing that Castro "testified to seeing Herold driving at Walmart," even though "Castro unequivocally testified that she didn't know who was driving Herold's van when she

encountered it at Walmart because the windows were tinted." We disagree with Herold's characterization of Castro's testimony and the prosecutor's closing argument.

¶ 72 Castro testified to the following. She remembered "driving down an aisle" in a Walmart parking lot on the day of the incident and seeing Herold's van in that parking lot. She could not remember whether the aisle was one- or two-way, or whether the van was driving toward or away from her. When the prosecutor asked whether she noticed anything about "his driving," she responded, "I remember it was kind of erratically, it was kind of . . . hard to see specifics. . . . Just erratically, just kind of in and out of traffic." Castro said she did not recall who was driving Herold's van at the time because the windows were tinted. But Castro also testified that, in her written statement to the police officers, she had reported seeing Herold at the Walmart that day.

¶ 73 As noted in Part II.B.6. above, Castro further testified that she saw Herold passed out behind the wheel of the white van with the Ace High Plumbing logo while it was running.

¶ 74 During closing argument, the prosecutor reviewed Castro's testimony:

> She told you she saw the van owned by Mr. Herold enter the driving lane that she was in and was erratic, was her term . . . . She saw Mr. Herold. . . . [A]t first she said she didn't remember, again, it's been three years. But when I asked her . . . , you wrote a report that day of and *in that report she said she saw the defendant. She recognized the defendant at Wal-Mart.*

(Emphasis added.) Defense counsel objected, asserting that the prosecutor had misstated Castro's testimony. The court neither overruled nor sustained the objection, but instead instructed the jurors "to rely upon their collective memories of the testimony. It is up to [the jurors] to determine what findings they make and not up to the attorneys."

¶ 75 The prosecutor continued:

> Ms. Castro in her report said that she saw the defendant. . . . *So after Ms. Castro sees Mr. Herold at Wal-Mart driving erratically, a few hours later they're now at this address*. . . . This is where they both reside . . . . Ms. Castro walks out on to her patio . . . and she sees Mr. Herold sitting in the front seat of his van with it on and she sees him passed out.
>
> . . . .
>
> This is where it comes down to: Did he drive. Did Mr. Herold drive . . . . [Castro] said she didn't remember but per her statement she saw Mr. Herold at Wal-Mart.

. . . .

> Well, we know Mr. Herold was seen by Ms. Castro in the van in the driver's seat. We know that the vehicle was on. Right there we have Mr. Herold at the driver's seat of an operating vehicle inches away from pedals, inches away from steering wheels, and operating a motor vehicle.

(Emphasis added.)

¶ 76 During the prosecutor's rebuttal argument, he again stated, "What did happen . . . is at Wal-Mart Ms. Castro saw Mr. Herold driving erratically down the wrong lane of the road and then at her apartment saw Mr. Herold sitting in that vehicle again passed out." Defense counsel did not object to this statement.

¶ 77 The prosecutor's statements regarding Castro's testimony about what she saw in the Walmart parking lot fell into two categories: (1) reiteration of Castro's testimony and (2) inferences the jury could draw from that testimony. *See Domingo-Gomez*, 125 P.3d at 1048.

¶ 78 In reiterating Castro's testimony, the prosecutor correctly recounted what Castro said: at trial, she testified that she saw *Herold's van* driving erratically at Walmart, and in her report, she had written that she saw *Herold* at Walmart.

¶ 79 Although the prosecutor also argued that Castro saw Herold driving erratically at Walmart, he framed that statement as an inference and not as a reiteration of Castro's actual words. Specifically, the prosecutor was making the point that the jurors could infer from Castro's testimony, coupled with her written report, that she had seen Herold driving erratically at Walmart.

¶ 80 That the prosecutor was arguing for inferences is clear when his remarks are considered in context. Immediately before making the statement in rebuttal, the prosecutor had explained why the alternative inferences that defense counsel was attempting to draw made no sense. Moreover, the prosecutor twice acknowledged that Castro testified she could not remember who was driving at Walmart, but that she had written in her report she saw Herold at Walmart.

¶ 81 We recognize that the distinction between a recitation of the evidence and possible inferences from it can be a subtle one. However, when evaluating the prosecutor's statements in the context of his argument as a whole, *Geisendorfer*, 991 P.2d at 312, we do not believe the prosecutor intentionally misstated the

evidence or misled the jurors as to the inferences they could draw from it.

b. Statements About Driving Down the "Wrong Lane"

¶ 82 Likewise, the prosecutor did not intentionally misstate the evidence when, in rebuttal, he said that Castro saw Herold driving "down the wrong lane of the road."

¶ 83 As explained above, Castro said she could not remember whether she saw the van driving down a one-way or a two-way aisle in the Walmart parking lot, or whether the van was driving toward or away from her. She only remembered that the van was driving "kind of erratically, it was kind of . . . hard to see specifics. . . . Just erratically, just kind of in and out of traffic."

¶ 84 The prosecutor did not misstate the evidence when he argued that the jurors could *infer* that Herold was driving down the "wrong lane" from Castro's trial testimony that she saw the van driving "erratically, just kind of in and out of traffic." Castro's vague statement could encompass driving down the "wrong lane." Even if the prosecutor's assertion was a misstatement, nothing in the record suggests that the prosecutor *intentionally* misstated the facts when he argued that the jury should accept one possible

interpretation of Castro's vague statement. *See Domingo-Gomez*, 125 P.3d at 1048-49.

¶ 85 Accordingly, given the "wide latitude," *id.* at 1048, granted prosecutors to argue "reasonable inferences that may be drawn from the evidence," *Walters*, 148 P.3d at 334, we do not believe the prosecutor intentionally misstated the evidence or misled the jurors regarding the inferences they could draw from the evidence.

4. The Prosecutor Did Not Express His Opinion on Witness Credibility

¶ 86 Herold next contends that the prosecutor impermissibly gave his personal opinion about the credibility of LeAndre McWilliams, the only defense witness. Herold's theory of defense was that McWilliams, Herold's coworker, had borrowed the van that day and left it running in the parking lot of Herold's apartment complex to recharge the battery. Specifically, Herold takes issue with the italicized portion of this statement during the prosecutor's closing:

> I want to start with [Mr.] McWilliams because he's the freshest and that's what you guys heard about today. *His story was great at first. I was believing him at first but then* as questions went to him things got a little weird and I think foremost the biggest issue with Mr. McWilliams is when he was asked if he believed Mr. Herold was under the influence or

> he could perceive that, he said no, he seemed fine. There's not a chance in the world that anyone two minutes — a couple minutes prior to seeing Mr. Herold as we saw him in those videos would not see Mr. Herold drunk. Mr. Herold had peed himself. Mr. Herold couldn't stand up straight. He couldn't walk straight. He couldn't talk properly . . . . If Mr. McWilliams couldn't see him drunk, that should throw some doubt in your mind.

(Emphasis added.)

¶ 87 We disagree with Herold that the prosecutor impermissibly gave a personal opinion in these remarks.

¶ 88 At first blush, "I was believing him at first" may appear to be an expression of the prosecutor's personal opinion — specifically, his initial belief and implied subsequent disbelief of McWilliams's testimony. But when read in the context of the argument as a whole and in light of the evidence before the jury, *Geisendorfer*, 991 P.2d at 312, we conclude that such statement "properly point[ed] to circumstances which may raise questions or cast doubt on a witness's testimony" and drew "reasonable inferences from the evidence as to the credibility of witnesses," *Wilson*, 743 P.2d at 418.

¶ 89 Moreover, the prosecutor's statements did not implicate the two dangers posed by a prosecutor's expression of personal belief:

(1) conveying the impression that the prosecutor knows of evidence, not presented to the jury, that supports the charges; and

(2) inducing the jury to trust the prosecutor's judgment — with the "imprimatur of the Government" — rather than its own view of the evidence. *Id.* at 418-19 (quoting *United States v. Young*, 470 U.S. 1, 18 (1985)).

¶ 90 First, the prosecutor's comments did not imply that additional evidence supported the charges.

¶ 91 Second, the prosecutor did not insinuate that the jurors should trust *his* judgment. Instead, he argued there was "not a chance in the world that *anyone* . . . minutes prior to seeing Mr. Herold as we saw him in those videos would not see Mr. Herold drunk" and, therefore, the jury should doubt McWilliams's credibility if he said he could not tell that Herold was under the influence that day. (Emphasis added.) The prosecutor was attempting to present an objective view, rather than his personal opinion, of McWilliams's credibility by pointing out discrepancies between McWilliams's testimony and the bodycam recording showing that Herold was too intoxicated to stand. *See id.* at 418. "Although ill-advised, a prosecutor's use of the first person singular

does not automatically transform his expression of confidence into a personal opinion." *People v. Sanders*, 2022 COA 47, ¶ 53, 515 P.3d 167, 178 (*cert. granted on other grounds* Apr. 24, 2023).

¶ 92 Thus, the prosecutor's statements did not amount to impermissible personal opinion.

5. The Prosecutor Did Not Denigrate Defense Counsel

¶ 93 During closing argument, defense counsel said there was "no evidence that Mr. Herold touched anything in the car except for the seat and the bottle of alcohol" that day. She argued:

> He didn't touch the pedals. He didn't touch the steering wheel. He didn't touch the gear shift. He didn't even touch the key in the ignition because the car was already running. He didn't turn it on or off. He just sat there, got drunk and then fell out of the car.

¶ 94 In rebuttal, the prosecutor argued that "[a]lmost everything [defense counsel] is trying to claim happened was not facts."

> What she says isn't facts. She's allowed to make arguments based off of facts, absolutely, but there's no facts that Mr. Herold got into the car afterwards and drank that liter of alcohol in there. Not a single person said that. [Defense counsel] did but no one else. You don't get to consider that. That doesn't get to go into deliberation because [defense counsel] just made that fact up.

> . . . .
>
> It makes zero sense, but the fact that Mr. Herold got in the car and drank this liter of alcohol is not a fact. You don't get to consider that because that never came out anywhere in evidence.
>
> . . . .
>
> [Y]ou can't consider facts that were not facts. You can't consider her argument based on facts that don't exist. That's what I talked about in voir dire. You can't just make up stuff. You can't just bring in stuff you didn't hear.

¶ 95 Herold contends that these comments "denigrated the defense, suggested defense counsel acted improperly, and told the jury the defense argument couldn't be considered in deliberations." We disagree.

¶ 96 The prosecutor's comments did not have the "obvious purpose of denigrating defense counsel." *Jones*, 832 P.2d at 1038. Rather, the statements that what defense counsel said "isn't facts" and that "[s]he's allowed to make arguments based off of facts, absolutely, but there's no facts" emphasized that defense counsel's statement quoted above offered only inferences, and not facts established by the evidence. Moreover, the prosecutor argued that those inferences made "zero sense."

¶ 97 These statements attacked the theory of defense, not defense counsel. Prosecutors may "suggest to the jury that defendant's theory . . . was so unlikely as to strain credibility." *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010) (The prosecutor did not engage in misconduct by stating, "Counsel talks a lot about reasonable doubt. What she is asking you to do is find an unreasonable doubt. It is absurd."); *see also People v. Ramirez*, 997 P.2d 1200, 1211 (Colo. App. 1999) (holding that the prosecutor did not improperly comment on defense counsel's belief in the merits of her case by characterizing her defense as "blowing smoke"; such statement was a proper argument that "the evidence in support of defendant's innocence lacked substance"), *aff'd*, 43 P.3d 611 (Colo. 2001). Therefore, the prosecutor did not improperly denigrate defense counsel.

¶ 98 In sum, we conclude that the prosecutor did not commit misconduct.

D. Cumulative Error

¶ 99 Herold contends that the errors in this case, taken together, constitute cumulative error. We disagree.

¶ 100 Herold's cumulative error argument, consisting of a single conclusory sentence, is undeveloped. *See People v. Mendoza*, 313 P.3d 637, 645 (Colo. App. 2011) (declining to address a contention that was "not support[ed] . . . with any meaningful argument").

¶ 101 In any event, we have not identified "multiple errors that collectively prejudice the substantial rights of the defendant." *Howard-Walker v. People*, 2019 CO 69, ¶ 25, 443 P.3d 1007, 1011. Thus, reversal on this ground is not warranted. *See People v. Villa*, 240 P.3d 343, 359 (Colo. App. 2009) (cumulative error analysis is required only when multiple errors have been identified).

III. Disposition

¶ 102 We reverse Herold's conviction for felony DUI and remand for entry of a judgment of conviction for misdemeanor DUI.

JUDGE TOW and JUDGE GROVE concur.