SUMMARY
June 27, 2024

2024COA66

No. 21CA1584, *People v. Miller* — Crimes — Stalking — Contacts — Unanswered Telephone Calls — First Degree Burglary — First Degree Criminal Trespass; Criminal Law — Lesser Included Offenses

A division of the court of appeals holds that a person "contacts" a victim within the meaning of the stalking statute, section 18-3-602(1)(c), C.R.S. 2023, by phoning the victim, even if the victim does not answer the calls. The division also holds that first degree criminal trespass is a lesser included offense of first degree burglary.

COLORADO COURT OF APPEALS **2024COA66**

Court of Appeals No. 21CA1584
Adams County District Court Nos. 19CR4352, 20CR2217 & 20CR3032
Honorable Mark D. Warner, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Roy Matthew Miller,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE J. JONES
Harris and Gomez, JJ., concur

Prior Opinion Announced May 2, 2024, WITHDRAWN
Petition for Rehearing GRANTED

Announced June 27, 2024

Philip J. Weiser, Attorney General, Brenna A. Brackett, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Kelly A. Corcoran, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Roy Matthew Miller, appeals the judgment of conviction entered on jury verdicts finding him guilty of aggravated motor vehicle theft, third degree assault, first degree criminal trespass, violation of bail bond conditions, violation of a protection order, stalking (emotional distress), and two counts of first degree burglary as a crime of violence. He also appeals his sentences. Addressing an issue of first impression in Colorado, we hold that the term "contacts" in the stalking statute, section 18-3-602(1)(c), C.R.S. 2023, encompasses making phone calls, even if the victim doesn't answer the calls. Addressing another issue of first impression, we hold that under the test adopted by the Colorado Supreme Court in 2017 for determining when one offense is a lesser included offense of another, first degree criminal trespass is a lesser included offense of first degree burglary, and therefore Miller's first degree criminal trespass conviction merges into his conviction for first degree burglary. We affirm the judgment in part and reverse it in part.

I. Background

¶ 2 Miller began dating the victim, F.R., in 2019. In October of that year, while she was driving Miller home, F.R. told him that she

wanted to break up. Miller pulled the steering wheel to the left, causing the car to swerve into the opposite lane. F.R. stopped her car in the middle of the road. Miller got out of the car, walked around to the driver's side, pulled F.R. out of the car by her hair, assaulted her, and left her lying on the road as he drove away in her car.

¶ 3 Bystanders called the police. When officers arrived, F.R. let them take pictures of her but didn't write a statement for the police because she "was afraid of [Miller] and . . . felt like he would retaliate."

¶ 4 In June 2020, F.R. awoke in the middle of the night to a "ruckus" in her apartment. She grabbed a gun. When she opened her bedroom door, she saw Miller — who had been released on bond after the police arrested him for the car incident — walking toward her. F.R. told him to leave, told him that he was breaking and entering, and warned him that she "practice[s] [her] Second Amendment and . . . will use the firearm if necessary." Miller then tackled F.R. to the floor, wrestled the gun from her hands, walked into the bathroom, and shut the door behind him.

¶ 5 While in the bathroom, Miller yelled at F.R., accused her of having someone else in the apartment, and sporadically fired eight shots over a period of about an hour and a half. F.R., who had "rolled into the bedroom" and hidden behind her door, didn't call the police because she "was afraid that it was going to be a murder-suicide." Instead, she tried to calm Miller down by assuring him that nobody else was in the apartment and that she loved him and wanted to work things out.

¶ 6 When Miller came out of the bathroom, he searched F.R.'s apartment, grabbed and threw her belongings, pointed the gun at her head several times, and burned her face with a cigarette. He then put the gun in his waistband, grabbed F.R.'s hair, pushed her out the door, ordered her to walk to her car, and warned her, "I could kill you." F.R. drove Miller home. He left the gun in her car after she assured him that she wouldn't call the police and that she "was just going to go home and clean and everything would be fine."

¶ 7 After F.R. got home, S.D., whom F.R. had recently begun dating, drove to F.R.'s apartment and called the police. Officers arrested Miller the following week.

¶ 8 Between July and August 2020, F.R. received more than forty phone calls from an unknown number. She believed that Miller had made these calls in violation of a protection order prohibiting him from harassing, molesting, intimidating, retaliating against, tampering with, contacting, or communicating with her. F.R. reported the calls to a police officer, who traced the number back to the Adams County jail where Miller was in custody.

¶ 9 The People charged Miller with robbery, aggravated motor vehicle theft, and third degree assault based on the car incident in October 2019; first degree criminal trespass, violation of bail bond conditions, second degree kidnapping as a crime of violence, and two counts of first degree burglary as a crime of violence based on the apartment incident in June 2020; and stalking (emotional distress) and violation of a protection order based on the phone calls between July and August 2020. The People charged all of the offenses as acts of domestic violence.

¶ 10 A jury acquitted Miller of robbery and kidnapping but found him guilty of the remaining charges.

¶ 11 The district court sentenced Miller to the following terms in the custody of the Department of Corrections:

- time served for aggravated motor vehicle theft and third degree assault;
- fifteen years for first degree burglary as a crime of violence (the court merged Miller's burglary convictions), to run consecutively to the aggravated motor vehicle theft sentence;
- three years for first degree criminal trespass, to run concurrently with the burglary sentence;
- five years for stalking (the court merged Miller's violation of a protection order conviction into his stalking conviction), to run consecutively to the burglary sentence; and
- eighteen months for violation of bail bond conditions, to run consecutively to the burglary sentence and concurrently with the stalking sentence.

II. Discussion

¶ 12 Miller contends that (1) the prosecutor committed misconduct; (2) his stalking conviction must be reversed because the jury used an incorrect verdict form and heard inadmissible testimony; (3) his violation of a protection order conviction must be reversed because the prosecution constructively amended that charge; (4) the

prosecution presented insufficient evidence to prove that he committed first degree burglary as a crime of violence; (5) the district court plainly erred by not merging his criminal trespass and burglary convictions; and (6) the district court abused its discretion by imposing consecutive sentences for his violation of bail bond conditions and burglary convictions. We reject all but one of Miller's contentions.

A. Prosecutor's Statements

¶ 13 Miller first contends that the prosecutor improperly bolstered F.R.'s credibility during voir dire, opening statement, and closing argument by (1) referencing several domestic violence concepts and (2) expressing her personal opinion that F.R.'s behavior was consistent with that of domestic violence victims.

1. Additional Background

¶ 14 During voir dire, the prosecutor asked several prospective jurors whether a domestic violence victim's recanting, delayed reporting, or noncooperation with the police affected that victim's credibility. One prospective juror responded that it didn't because "[m]aybe they were scared or other fears" and "[n]ot everybody's comfortable with the police." Another prospective juror told the

prosecutor that a victim's recanting didn't give him "any pause" because sometimes a person says one thing under initial shock but later remembers the event differently.

¶ 15 Defense counsel didn't object to this discussion.

¶ 16 The prosecutor began her opening statement as follows:

> You're lucky I don't kill you. I can kill you right now. Those are the words that the defendant . . . said to the victim, [F.R.], the night of June 27, 2020. Members of the jury, this case is entirely about power and control and what happened when the defendant felt that he was losing hold of [F.R.].

¶ 17 After describing the apartment incident, the prosecutor said,

> This case starts back in October of 2019, when the defendant and the victim, [F.R.], were still involved in a relationship. . . . They begin to argue. . . . [S]he told him she wanted to end the relationship, she wanted to break up. . . . The defendant, sensing he's losing the power and control, gets very angry and begins to attack her in the car while she's driving.

¶ 18 After describing the car incident, the prosecutor said,

> [E]ven after both of these events the defendant doesn't give up. He calls her continuously well over 40 times when there's a protection order in place over the summer of 2020. He won't give up that power and control.

¶ 19 Defense counsel didn't object to these remarks.

¶ 20 During closing argument, defense counsel argued that F.R. wasn't a credible witness because she didn't call the police to report the car incident or apartment incident and minimally cooperated with the police after the car incident.

¶ 21 During rebuttal closing, the prosecutor responded to defense counsel's argument as follows:

> There's a lot of, "She didn't call the police. She didn't want to cooperate with the police." She told you why. She is afraid of him. . . . She didn't want to cooperate at the beginning. She told you why. We talked about this in jury selection, if you remember, why victims of domestic violence do some things that maybe people who weren't victims think are strange. We talked about that. And we all understood why they do things a little differently. She is scared of him.

¶ 22 Defense counsel didn't object to this response.

2. Standard of Review

¶ 23 In reviewing Miller's claim of prosecutorial misconduct, we first determine whether the prosecutor's remarks were improper under the totality of the circumstances. *See Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). We consider "the language used, the context in which the statements were made, and the strength of the

evidence supporting the conviction." *Domingo-Gomez v. People*, 125 P.3d 1043, 1050 (Colo. 2005).

¶ 24 If we determine that any of the remarks were improper, we review for plain error because Miller's counsel didn't object to any of them. *See Hagos v. People*, 2012 CO 63, ¶ 14; *see also Wend*, 235 P.3d at 1096 (if conduct was improper, we decide whether it requires reversal under the appropriate standard). Plain error is error that is obvious and that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Hagos*, ¶ 14.

3. Analysis

¶ 25 Miller asserts that recantation, minimization, noncooperation with the police, and "power and control" are defining characteristics of domestic violence, *see People v. Cooper*, 2021 CO 69, ¶ 22, that can be presented to a jury only through expert testimony. Accordingly, he contends, by referencing these characteristics during voir dire, opening statement, and closing argument, the prosecutor improperly injected nonexistent expert testimony into the trial.

¶ 26 In support of his argument, Miller relies on *People v. Davis*, 280 P.3d 51 (Colo. App. 2011), and *People v. Nardine*, 2016 COA 85. Those cases are inapposite.

¶ 27 In *Davis*, the prosecutor presented a slideshow on the "stages" experienced by trauma victims in domestic violence situations and said how the victim's behavior fit in those stages. 280 P.3d at 53. A division of this court determined that the prosecutor's presentation was improper because it described "a variation of rape trauma syndrome," evidence of which is admissible only through expert testimony, and because it wasn't "wholly rooted in the evidence presented at trial." *Id.* at 53-54.

¶ 28 In *Nardine*, ¶ 58, the prosecutor told the jury that the victim's failure to realize that she had been sexually assaulted was "not an uncommon reaction among female sexual assault victims." A division of this court determined that the prosecutor's comment was improper because it "implicated specialized information pertaining to social science that is not commonly known to laypersons," and because the prosecutor didn't present any testimony to support the comment. *Id.*

¶ 29 Unlike in *Davis* and *Nardine*, the prosecutor's comments in this case didn't implicate specialized social science information. Rather, she used the prospective jurors' voir dire responses to make arguments about domestic violence victims' experiences that reflected the jurors' common understanding of domestic violence concepts. *See Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011) ("[J]urors may apply their general knowledge and everyday experience when deciding cases . . . ."), *abrogated on other grounds by Bedor v. Johnson*, 2013 CO 4.

¶ 30 Additionally, whereas the prosecutors in *Davis* and *Nardine* didn't present testimony supporting the challenged remarks, the prosecutor in this case anchored her comments in the evidence presented at trial. F.R. testified that Miller assaulted her because she told him that she wanted to break up; she felt traumatized by Miller's conduct; she didn't write a police statement about the car incident because she "was afraid of him and . . . felt like he would retaliate"; and she didn't call the police when Miller broke into her apartment because she "was afraid that it was going to be a murder-suicide." Other witnesses corroborated much of F.R.'s testimony. *See People v. Strock*, 252 P.3d 1148, 1153 (Colo. App.

2010) ("A prosecutor has wide latitude to make arguments based on facts in evidence and reasonable inferences drawn from those facts.").

¶ 31 We also reject Miller's assertion that the prosecutor's use of the word "we" during rebuttal closing amounted to a personal opinion that improperly bolstered F.R.'s credibility. "[A] prosecutor's use of the first person . . . does not automatically transform [her] expression of confidence into a personal opinion." *People v. Sanders*, 2022 COA 47, ¶ 53, *aff'd on other grounds*, 2024 CO 33; *see also People v. Fears*, 962 P.2d 272, 285 (Colo. App. 1997) (the prosecutor didn't vouch for witnesses' credibility by speaking in the first person).

B. Stalking Conviction

¶ 32 Miller next contends that we must reverse his stalking conviction because the jury used an incorrect verdict form and heard inadmissible testimony relating to that charge.

1. Additional Background

¶ 33 Officer Sirka testified at trial that he had responded to F.R.'s report of an alleged protection order violation. After he explained

that protection orders have different limitations, he described how the protection order in this case could be violated:

> Q. What are ways that that protection order can be violated?
>
> A. Either direct contact, via internet, email, telephone, or third party.
>
> Q. And third party would be between someone else?
>
> A. Correct.
>
> Q. Is an attempt to contact a protective [sic] party a way to violate?
>
> A. Yes.

Defense counsel didn't object to this testimony.

¶ 34 Officer Sirka said that F.R. had told him that she had received repeated phone calls from an unknown number, she believed Miller had made the calls, and the calls had frightened her and disrupted her sleep. Officer Sirka had traced the number back to the Adams County jail where Miller was in custody.

¶ 35 Later in the trial, the prosecution introduced evidence that F.R. had received forty-seven phone calls from the Adams County jail, four of which she had answered. Video footage showed that Miller had made most of these calls, and the jury received audio

recordings of the calls F.R. had answered. F.R. testified that she recognized Miller's voice on the calls she answered.

¶ 36 During closing, the prosecutor urged the jury to find Miller guilty of stalking in violation of a protection order because he had contacted F.R. by calling her more than forty times.

¶ 37 The stalking verdict form listed the forty-seven calls as potential incidents of stalking for which the jury could convict Miller.[1] Defense counsel didn't object to the verdict form.

¶ 38 The jury found Miller guilty of stalking in violation of a protection order based on all forty-seven calls.

2. Standard of Review

¶ 39 We review de novo whether a verdict form accurately informed jurors of the governing law and their obligations. *See Garcia v. People*, 2022 CO 6, ¶ 16. When a challenge to an instruction is, as in this case, based on an argument that requires us to interpret a statute, we review that challenge de novo. *Id.*

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[1] The verdict form asked the jury to check a box next to each identified phone call it found to have been proved beyond a reasonable doubt.

¶ 40 We review a district court's evidentiary ruling for an abuse of discretion. *People v. Thompson*, 2017 COA 56, ¶ 91. A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on a misunderstanding or misapplication of the law. *Id.*

¶ 41 Because Miller's counsel didn't object to the verdict form or the challenged portion of Officer Sirka's testimony, we review any error for plain error. *See Hagos*, ¶ 14.

3. Analysis

a. Stalking Verdict Form

¶ 42 Miller doesn't seem to take issue with the jury's finding that he made the forty-seven phone calls to F.R. Instead, he argues that unanswered phone calls aren't "contacts" under the stalking statute, section 18-3-602(1)(c), "because there is no possibility of physical engagement and no communication." In support of his argument, Miller relies on *People v. Serra*, 2015 COA 130. In that case, a division of this court addressed the meaning of "contact" under the violation of a protection order and violation of bail bond conditions statutes, not the stalking statute. *Id.* at ¶¶ 20-35. In any event, *Serra* doesn't support the narrow interpretation of

"contact" Miller invites us to adopt. The division "decline[d] to formulate a comprehensive definition of 'contact' that would cover all situations in which a criminal defendant could violate a 'no contact' condition of bond or a protection order" and held that even a defendant's attempted communication with the victim could constitute such a violation. *Id.* at ¶ 34.

¶ 43 We conclude that Miller contacted F.R. within the meaning of the stalking statute by making phone calls, including those that F.R. didn't answer.

¶ 44 Under section 18-3-602(1)(c),

> [a] person commits stalking if directly, or indirectly through another person, the person knowingly . . . [r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.

¶ 45 Though the stalking statute doesn't define "contacts," a division of this court has held that its plain and ordinary meaning is "'to make connection with' and 'get in communication with,' including instances of 'establishing communication with someone,' 'touching or meeting,' and 'meeting, connecting, or

communicating.'" *People v. Burgandine*, 2020 COA 142, ¶ 11 (quoting Webster's Third New International Dictionary 490 (2002)). "The definition is broad but clear, and it plainly includes general communications." *Id.* at ¶ 12.

¶ 46 In *Burgandine*, a jury had convicted the defendant of credible threat stalking under section 18-3-602(1)(a) based on evidence that the defendant had "relentlessly texted and called his ex-girlfriend" for seven hours. *Burgandine*, ¶ 1.[2] In affirming the defendant's conviction, the division concluded that "'contacts' under subsection (1)(a) includes phone and text message communications." *Id.* at ¶ 28. The division found support for its conclusion in the legislative history of the stalking statute:

> The legislative history provides some context for the addition of "contacts" to the stalking statute. Before this addition, the stalking statute addressed only situations where a person made a credible threat and either "repeatedly follow[ed] that person" or

[2] Under section 18-3-602(1)(a), C.R.S. 2023, "[a] person commits stalking if directly, or indirectly through another person, the person knowingly . . . [m]akes a credible threat to another person and, in connection with the threat, repeatedly follows, approaches, *contacts*, or places under surveillance that person." (Emphasis added.)

"repeatedly [made] any form of communication with that person."

In proposing the amendment that added "approaches, contacts, or places under surveillance," Ms. Jeanne Smith from the Colorado District Attorneys Council (a contributor to the proposed amendment) explained that the "repeatedly follows" language then in effect did not adequately address instances where "a stalker was watching a victim" or "just leaving notes on the [victim's] car."

Given that Ms. Smith referenced a type of communication (leaving notes) to explain one reason for amending the stalking statute to add "approaches, contacts, or places under surveillance," we don't agree with Burgandine that the amendment "was not intended to cover run-of-the-mill communications such as calls and texts." And given that leaving a note on a car requires no proximity to the victim, we don't discern any legislative intent to narrow the meaning of "contacts" or tether it to "some sort of physical proximity." Rather, the legislative discussion focused on expanding the statute to cover more types of stalking conduct.

To sum it up, we decline Burgandine's request to depart from the plain and ordinary meaning of "contacts" by construing it to require "some sort of physical proximity" that the plain text doesn't support. We recognize that the plain meaning of "contacts" in subsection (1)(a) renders "any form of communication" in subsection (1)(b) duplicative, but it is for the legislature, not this court, to re-define

> "contacts" should it intend it to mean something different than what it plainly does.

Id. at ¶¶ 24-27 (citations omitted).

¶ 47 We agree with the People that the division's analysis in *Burgandine* supports the conclusion that the statutory term "contacts" under section 18-3-602(1)(c) encompasses the act of making repeated, even if unanswered, phone calls to the victim.

¶ 48 Courts in other states interpreting analogous statutes have held that unanswered phone calls are "contacts." In *Holmon v. District of Columbia*, 202 A.3d 512, 522-23 (D.C. 2019), for example, a jury had convicted the defendant of violating a no-contact protection order based on evidence that the victim's cell phone's screen showed that she had received missed calls from the defendant. *Id.* at 522. In affirming the defendant's conviction, the court held that "the plain language definition of 'contact' suggests that intentional actions that result in missed calls constitute contact." *Id.* It reasoned that a no-contact protection order "is designed to, among other things, protect a [victim] from emotional violence and provide the [victim] 'a measure of peace of mind.' These purposes support interpreting 'no contact' to prohibit calls

even if the recipient does not answer." *Id.* at 522-23 (citations omitted); *see also State v. McGee*, 84 P.3d 690, 692-93 (N.M. Ct. App. 2003) (evidence that the defendant "contacted" the victim by making phone calls from jail that the victim didn't answer supported the defendant's violation of a protection order conviction because "a 'contact' is not limited to a direct communication").

¶ 49 This case is similar to *Holmon*. The prosecution presented evidence that the screen of F.R.'s cell phone showed that Miller called her numerous times. Though the calls came from an unknown number, F.R. identified Miller as the caller because she had recognized his voice during the calls she had answered, and an automated recording would alert her that Miller was calling from the Adams County jail and prompt her to accept or decline the call. And just as protection orders serve to protect victims from emotional violence, *see Holmon*, 202 A.3d at 522, the stalking statute serves to protect victims from emotional distress, *see* § 18-3-601, C.R.S. 2023. Indeed, F.R. testified that Miller's calls frightened her and disrupted her sleep.

¶ 50 Because Miller's act of repeatedly calling F.R., even if she didn't answer, constitutes "contact[ing]" under the stalking statute,

we conclude that the stalking charge verdict form correctly listed those calls as potential incidents of stalking for which the jury could convict Miller. *See also Moses v. State*, 39 S.W.3d 459, 462 (Ark. Ct. App. 2001) (evidence that the defendant called the victim so frequently that she would no longer answer the phone if she knew it was him supported the defendant's stalking conviction); *State v. Shields*, 56 P.3d 937, 940-41 (Or. Ct. App. 2002) (evidence that the defendant called the victim but didn't speak when she answered supported the defendant's stalking conviction); *State v. Geiger*, 997 N.W.2d 845, 848-49 (N.D. 2023) (same as *Shields*); *State v. Gubitosi*, 886 A.2d 1029, 1037-38 (N.H. 2005) (evidence that the defendant called a restaurant at which the victim was dining but only talked to the victim's friend supported the defendant's stalking conviction).

b. Officer Sirka's Testimony

¶ 51 Miller also contends that we must reverse his stalking conviction because Officer Sirka gave an inadmissible legal opinion by answering "yes" to the prosecutor's question, "Is an attempt to contact a protective [sic] party a way to violate [the protection order in this case]?"

¶ 52 We will assume that the prosecutor's question called for a legal conclusion, and that Officer Sirka's answer provided one. *See People v. Beilke*, 232 P.3d 146, 153 (Colo. App. 2009) (assuming that a judge's testimony about what constitutes a violation of the defendant's child custody order was an inadmissible legal opinion); *see also Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. App. 2000) (a witness "may not usurp the function of the court by expressing an opinion of the applicable law or legal standards").

¶ 53 Even so, we conclude that any error wasn't plain because the challenged portion of Officer Sirka's testimony didn't substantially influence the stalking verdict. The prosecution presented a great deal of evidence that Miller contacted, not merely attempted to contact, F.R., and that such contact caused her to suffer serious emotional distress. The Adams County jail call log showed that F.R. received forty-seven phone calls from the jail, several of which F.R. answered; the jury watched video footage and heard audio recordings of Miller making several of these calls to F.R.; and F.R. and Officer Sirka testified that the calls frightened F.R. and disrupted her sleep. *See Beilke*, 232 P.3d at 153-54 (admitting the judge's testimony about what constitutes a violation of the

defendant's child custody order wasn't plain error because sufficient properly admitted evidence sustained the defendant's violation of a custody order conviction).

C. Constructive Amendment

¶ 54 Miller next contends that we must reverse his violation of a protection order conviction because the prosecution constructively amended that charge. But he concedes that if we affirm his stalking conviction, this contention is moot because the district court merged the violation of a protection order conviction into the stalking conviction. Because we have affirmed the stalking conviction, this contention is moot, and we won't address it.

D. Sufficiency of the Evidence

¶ 55 Next, Miller contends that the prosecution presented insufficient evidence to prove that he committed first degree burglary as a crime of violence.

¶ 56 "We review de novo whether the prosecution presented sufficient evidence to sustain a conviction." *Gorostieta v. People*, 2022 CO 41, ¶ 16.

¶ 57 In evaluating the sufficiency of the evidence, "we ask whether the evidence, '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.'" *Id.* (quoting *People v. Harrison*, 2020 CO 57, ¶ 32). We give the prosecution the benefit of every reasonable inference that might fairly be drawn from the evidence. *Id.* at ¶ 17.

¶ 58 The People charged Miller with two counts of first degree burglary and a crime of violence sentence enhancement for each burglary count.

¶ 59 To convict Miller of first degree burglary, the prosecution needed to prove that he entered unlawfully, or remained unlawfully after a lawful or unlawful entry, in a building or occupied structure with intent to commit the crime of violation of a protection order therein, and that "in effecting entry or while in the building or occupied structure or in immediate flight therefrom," he (1) assaulted or menaced F.R. or (2) used or possessed and threatened the use of a deadly weapon. § 18-4-202(1), C.R.S. 2023.

¶ 60 To convict Miller of the crime of violence sentence enhancement, the prosecution needed to prove that he "[u]sed, or possessed and threatened the use of, a deadly weapon" during the

burglary or in the immediate flight therefrom. § 18-1.3-406(2)(a)(I)(A), C.R.S. 2023.

¶ 61 Miller's sufficiency of the evidence challenge pertains only to the crime of violence sentence enhancement. Specifically, he contends that the prosecution presented insufficient evidence to prove that he intended to commit the crime of violation of a protection order once he took the gun from F.R.

¶ 62 True, the prosecutor argued that Miller intended to violate the protection order by entering F.R.'s apartment, and Miller didn't have the gun upon entry. But the evidence shows that, once Miller took the gun, he contacted F.R. in violation of the protection order while unlawfully remaining in her apartment and during the immediate flight therefrom. That evidence includes the following testimony by F.R.:

- Over a period of an hour and a half, Miller yelled at F.R., accused her of having someone else in the apartment, and fired eight shots from the bathroom.
- Once Miller came out of the bathroom, he searched F.R.'s apartment, grabbed and threw her belongings, pointed the

gun at her head several times, and burned her face with a cigarette.

- As he left the apartment, Miller grabbed F.R.'s hair, pushed her out the door, ordered her to walk to her car, and warned her, "I could kill you."

¶ 63 Accordingly, we conclude that the prosecution presented sufficient evidence to sustain the crime of violence sentence enhancement for Miller's first degree burglary convictions.

E. Merger

¶ 64 Miller contended in his briefs on appeal that the district court plainly erred by not merging his first degree criminal trespass and first degree burglary convictions. He reasoned that under the statutory elements test, as clarified in *Reyna-Abarca v. People*, 2017 CO 15, ¶ 64, first degree criminal trespass is a lesser included offense of first degree burglary.

¶ 65 At the time of Miller's trial, divisions of this court had rejected the precise argument that Miller makes in this case. *People v. Lucas*, 232 P.3d 155, 168 (Colo. App. 2009); *People v. Satre*, 950 P.2d 667, 668-69 (Colo. App. 1997); *see also People v. Garcia*, 940 P.2d 357, 362 (Colo. 1997) (first degree criminal trespass isn't a

lesser included offense of second degree burglary; whereas the former involves a "dwelling," the latter involves a "building or occupied structure"). At the time of trial and sentencing, the supreme court hadn't explicitly overruled *Lucas*, *Satre*, or *Garcia*. Accordingly, when we first resolved this appeal, we held that any error wasn't obvious and therefore wasn't plain.

¶ 66 But after we issued our initial opinion in this case, the supreme court held in *Whiteaker v. People*, 2024 CO 25, ¶ 20, that first degree criminal trespass is a lesser included offense of second degree burglary under the "clarified subset test" adopted in *Reyna-Abarca*.[3] And the court held that when one offense is a lesser included offense of another, any conviction for the lesser included offense *must* merge into a conviction for the greater offense; the plain error test doesn't apply. *Id.* at ¶¶ 24-29.

¶ 67 Miller filed a petition for rehearing with this court asserting that under *Whiteaker* his conviction for first degree criminal

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[3] The court expressly held that *Reyna-Abarca v. People*, 2017 CO 15, abrogated *People v. Garcia*, 940 P.2d 357 (Colo. 1997). *Whiteaker v. People*, 2024 CO 25, ¶ 19.

trespass must merge into his conviction for first degree burglary. We agree, and therefore we grant Miller's petition.

¶ 68 In *Whiteaker*, the court reasoned that first degree criminal trespass is a lesser included offense of second degree burglary because a person commits first degree criminal trespass by "[k]nowingly and unlawfully enter[ing] or remain[ing] in a dwelling of another," and one way to commit second degree burglary — "knowingly . . . enter[ing] unlawfully in, or remain[ing] unlawfully . . . in a building or occupied structure" — satisfies all the elements of first degree criminal trespass. *Id.* at ¶ 20 (first quoting § 18-4-502(1)(a), C.R.S. 2023; and then quoting § 18-4-203(1), C.R.S. 2023).

¶ 69 The same is true for first degree burglary. To commit that offense, a person must, among other things, "knowingly enter[] unlawfully, or remain[] unlawfully . . . in a building or occupied structure." § 18-4-202(1). Thus, proving those elements proves first degree criminal trespass. It follows that first degree criminal trespass is a lesser included offense of first degree burglary. *Lucas* and *Satre*, in which the divisions reached the contrary conclusion, are no longer good law.

¶ 70 Because first degree criminal trespass is a lesser included offense of first degree burglary, Miller's conviction for the former must merge into his conviction for the latter. *See Whiteaker*, ¶ 24.

F. Sentences

¶ 71 Lastly, Miller contends that the district court erred by imposing consecutive sentences for his violation of bail bond conditions and first degree burglary convictions. He asserts that the court was required to impose concurrent sentences for those convictions under section 18-1-408(3), C.R.S. 2023, because they were supported by identical evidence — that Miller entered F.R.'s apartment in June 2020.

¶ 72 But "the mere possibility that identical evidence supported the two convictions is not enough." *People v. Muckle*, 107 P.3d 380, 384 (Colo. 2005). Rather,

> [i]t is only when the evidence will support *no other reasonable inference* than that the convictions were based on identical evidence that a sentencing court must find that the defendant is entitled to concurrent sentences. In all other cases, the trial court retains its discretion and its sentencing decision must be upheld unless the trial court abused its discretion.

Id. (emphasis added).

¶ 73 Two of Miller's bail bond conditions were that he couldn't contact F.R. or possess a weapon. The prosecution presented evidence that while Miller was in F.R.'s apartment, he wrestled the gun from her hands, yelled at her, fired eight shots, burned her face with a cigarette, grabbed her hair, and pushed her out the door. The prosecution also presented evidence that after Miller left F.R.'s apartment, he told her "I could kill you" while the gun was in his waistband. So the jury could reasonably have convicted Miller of violation of bail bond conditions and first degree burglary based on different acts. *See id.* at 383-84 (evidence that the defendant shot the victim in the abdomen while the victim was seated and then in the arm while the victim was moving away supported the court's finding that the defendant's assault and attempted murder convictions were based on separate acts).[4]

¶ 74 Because the evidence supports a reasonable inference that the jury convicted Miller of violation of bail bond conditions and first

[4] The verdict form for the first degree burglary charge asked the jury to determine whether Miller used, or possessed and threatened to use, a deadly weapon. The jury answered "Yes."

degree burglary based on separate acts, we affirm the district court's exercise of its sentencing discretion.

III. Disposition

¶ 75 The judgment is reversed in part; the district court must amend the mittimus to reflect merger of Miller's conviction for first degree criminal trespass into his conviction for first degree burglary. In all other respects, the judgment is affirmed.

JUDGE HARRIS and JUDGE GOMEZ concur.