SUMMARY
March 20, 2025

2025COA30

No. 22CA0224, *Peo v. Rodriguez-Ortiz* — Crimes — Possession, Use, or Removal of Explosives or Incendiary Devices; Constitutional Law — Fourth Amendment — Searches and Seizures — Search Warrants — Probable Cause — Particularity

As a matter of first impression, a division of the court of appeals interprets the language "[e]xplosive or incendiary device," found in section 18-12-109(1)(a)(I), C.R.S. 2024, and holds that the word "or" should be interpreted in an inclusive fashion to mean "and/or." Applying that interpretation, the division further holds that a Molotov cocktail is an incendiary device, and that sufficient evidence supports the trial court's application of the crime of violence sentence enhancer for its use. The majority further holds that the search warrant was sufficiently particular to survive constitutional scrutiny, while the special concurrence disagrees with the particularity holding, but would affirm the court's ruling

under the good faith exception. Finally, the division discerns no abuse of discretion in the admission of expert testimony on firearms toolmarks and cell phone location data, the court's decision not to hold a hearing under *People v. Shreck*, 22 P.3d 68 (Colo. 2001), and in the court's imposition of consecutive sentences. The judgment is affirmed.

COLORADO COURT OF APPEALS **2025COA30**

Court of Appeals No. 22CA0224
City and County of Denver District Court No. 19CR8902
Honorable Kandace C. Gerdes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ramon Rodriguez-Ortiz,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE FREYRE
Sullivan, J., concurs
Schock, J., specially concurs

Announced March 20, 2025

Philip J. Weiser, Attorney General, Frank R. Lawson, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Jeffrey A. Wermer, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Ramon Rodriguez-Ortiz, appeals his convictions, entered after a jury trial, of three counts of attempted first degree murder, three counts of first degree assault, two counts of attempted murder using explosive or incendiary devices, two counts of attempted assault using explosive or incendiary devices, first degree arson, illegal discharge of a weapon, second degree criminal tampering, two counts of second degree trespass, and criminal mischief. He also challenges the crime of violence sentence enhancement of his first degree arson sentence, which raises an issue of first impression. Specifically, he asks us to interpret the language "[e]xplosive or incendiary device" in section 18-12-109(1)(a)(I), C.R.S. 2024, to describe two separate devices based on the disjunctive "or" and argues that a Molotov cocktail is an incendiary device, not an explosive as required by the crime of violence statute, and thus that insufficient evidence supports his enhanced sentence. Applying rules of statutory construction, we disagree and conclude that the word "or" should be interpreted in an inclusive fashion to mean "and/or" and hold that sufficient evidence supports the crime of violence sentence enhancer. We

address and reject each of Rodriguez-Ortiz's remaining contentions and affirm the judgment.

I. Background

¶ 2 A series of incidents in 2019 led to the charges in this case. Rodriguez-Ortiz and the victim, J.R., were in an on-again, off-again relationship. On April 27, 2019, Rodriguez-Ortiz attended a party at the house where J.R. and her mother lived, but he was not on speaking terms with J.R. Consequently, according to J.R.'s family members, the evening as uncomfortable and full of tension. The next morning, J.R. discovered that her pickup truck's rear tires had been slashed and the brake lines had been cut. Rodriguez-Ortiz volunteered to pay for the repairs, and he also installed security cameras around J.R.'s home. That installation had not yet been completed when the next incident occurred.

¶ 3 On May 19 at 1:30 a.m., multiple gunshots were fired into J.R.'s truck while it was parked in the driveway. Police officers recovered a .380 cartridge in the alleyway behind J.R.'s house. Rodriguez-Ortiz was known to own a .380 handgun. A witness who called 911 reported seeing a Hispanic male enter the alley before hearing the gunshots and saw the same male flee the alley in a

Chevy Trailblazer following the shooting. Rodriguez-Ortiz drove a Ford Explorer that looked similar to a Chevy Trailblazer. Family members informed police officers that Rodriguez-Ortiz had finished installing all but one camera when the shooting occurred and explained that the absent camera would have faced the car and captured the shooting. Rodriguez-Ortiz was charged with criminal mischief as an act of domestic violence for this incident.

¶ 4 While J.R.'s truck was being repaired, she borrowed her daughter's car. On June 7, multiple gunshots were fired into this car while it was parked outside J.R.'s house. The perpetrator positioned himself out of the surveillance camera's view. The police recovered two .380 cartridge cases from inside the car. No charges were filed in connection with this incident.

¶ 5 A week later, on June 14, multiple gunshots were fired into the basement bedroom where J.R. was sleeping. The day before, J.R. had rearranged her bedroom furniture, which included moving the bed beneath the basement window. J.R. had told Rodriguez-Ortiz about moving her bed. The surveillance camera showed a hooded man walk across the front yard and manipulate a camera on the south side so that it would no longer record. Police

officers observed a bullet-sized hole in J.R.'s comforter and bed sheet, and they recovered a bullet from J.R.'s pillow. They also recovered one spent .380 cartridge case from the window well, along with a note that read, "[W]e never play." Rodriguez-Ortiz was charged with attempted first degree murder, attempted first degree assault, illegal discharge of a firearm, and second degree criminal trespass for this incident.

¶ 6 Following the basement shooting, J.R. decided to move into her daughter's home in Longmont temporarily for her safety. Rodriguez-Ortiz expressed his frustration that J.R. would not live with him and helped her move into her daughter's house. On June 22, 2019, J.R.'s truck tires were slashed outside her daughter's home, prompting her to temporarily move in with Rodriguez-Ortiz. Only J.R.'s family members and Rodriguez-Ortiz knew she was living at her daughter's home. J.R. lived with Rodriguez-Ortiz for a few days before moving back in with her mother. No charges were filed for this incident.

¶ 7 On August 19, the surveillance cameras captured Rodriguez-Ortiz walk onto the property, move two cameras so that they faced the wall, and then disable another camera. The next

morning, J.R. found a note that read, "Tu passado regresso CJNG,"[1] which, in English, means "your past come back." Rodriguez-Ortiz was charged with one count of criminal trespass for this incident and second degree criminal tampering.

¶ 8 Several weeks later, J.R. saw Rodriguez-Ortiz at a bar they had frequented together. Rodriguez-Ortiz left the bar. Later that evening, two of J.R.'s neighbors saw a man approach J.R.'s home, light a Molotov cocktail made from a Modelo bottle, and throw it through J.R.'s mother's bedroom window. Twelve minutes later, the man threw a second Molotov cocktail into the same window, which exploded and ignited the drapes, bedroom wall, window blinds, and dresser. At some point before the fire, Rodriguez-Ortiz installed bars on J.R.'s mother's bedroom window. Rodriguez-Ortiz was charged with two counts of attempted first degree assault, first degree arson, two counts of attempted first degree murder using explosives or incendiary devices, two counts of attempted first degree assault using explosives or incendiary devices, and two counts of attempted first degree murder related to this incident.

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[1] CJNG stands for the Jalisco New Generation Cartel. The record shows that Rodriguez-Ortiz grew up in Jalisco, Mexico.

¶ 9 Investigation into who might want to harm J.R. revealed that she and Rodriguez-Ortiz had been in a tumultuous relationship for approximately eighteen months and that each of the incidents had followed shortly after arguments between them. Moreover, Rodriguez-Ortiz willingly paid for the damages, and he owned a .380 handgun. Additionally, J.R.'s family members identified him on the surveillance video, and one family member recognized his limp.

¶ 10 Other circumstantial evidence connected Rodriguez-Ortiz to the incidents, including the fact that he installed the surveillance cameras and therefore knew how to avoid and disable them. Further, he knew about J.R.'s rearranged bedroom furniture shortly before the basement shooting, and he was the only non-family member who knew J.R. briefly stayed at her daughter's house in Longmont.

¶ 11 The police obtained a search warrant for Rodriguez-Ortiz's cell phone records and then, based on what they found in those records, obtained warrants for his apartment and truck. They collected a .380 handgun from Rodriguez-Ortiz's truck. A forensic toolmark expert opined that two of the recovered bullet fragments

were fired from the gun. The expert further concluded that three of the recovered casings were fired from the same gun, although they could not be conclusively linked to Rodriguez-Ortiz's handgun.

¶ 12 A jury convicted Rodriguez-Ortiz of all charges. The trial court merged eight counts and entered nine convictions, resulting in a controlling sentence of 102 years in the custody of the Department of Corrections.

II. Search Warrant

¶ 13 Rodriguez-Ortiz contends that the search warrant for his cell phone records lacked probable cause and particularity and, thus, that the trial court erroneously denied his motion to suppress. He further argues that the search warrant for his truck and his apartment lacked probable cause because they were premised on the unlawful warrant for his cell phone records. We disagree with his first argument, and therefore we do not need to address his second argument.

A. Additional Facts

¶ 14 Investigators requested a search warrant for Rodriguez-Ortiz's cell phone records and the corresponding cell tower location data for the six months during which the incidents occurred — April 23

to October 23, 2019. The warrant incorporated the lengthy affidavit detailing each incident, as described above.

¶ 15 The police sought a warrant authorizing a search for the following:

- all outbound/originating and inbound/terminating call detail records to include cell site/tower activity/location and all other cell sites accessed;
- all incoming/terminating and outgoing/originating text and/or Multimedia Messaging Service messages;
- all data activity/internet usage;
- all advanced precision location data;
- physical address and/or latitude and longitude of cell site/tower locations;
- subscriber information, call features, account notes or comments, credit information, billing information;
- all numbers associated with the account;
- any other names, subscriber information, records or accounts related to or associated with the referenced phone number;

- all authorized users on the account;
- all devices used and associated with the subscriber's account;
- all twinned, tethered, or synched devices associated with the phone number;
- any stored voicemail messages; and
- legend information.

¶ 16 Before trial, Rodriguez-Ortiz moved to suppress all evidence seized from the warrant and argued that the warrant violated the Fourth Amendment's particularity requirement. Specifically, he asserted that the search warrant was not confined in scope, was overbroad, and was not tailored to J.R. and the specific dates on which the crimes were alleged to have occurred.

¶ 17 At the motions hearing, Rodriguez-Ortiz argued that the search warrant in his case was like the search warrant in *People v. Coke*, 2020 CO 28, which the Colorado Supreme Court found to be an impermissible general warrant. In *Coke*, the court held that the warrant lacked particularity concerning the alleged victim and the time period during which the crime allegedly occurred. *Id.* at ¶ 38.

¶ 18 The prosecution argued that the search warrant was different, for three reasons. First, the warrant did not seek data extracted from the phone, but instead sought call detail records from the cell phone company. Second, the warrant limited the search to a six-month time period in which all the crimes under investigation occurred. Third, the affidavit identified the victims as a former romantic partner and her mother.

¶ 19 The trial court denied the motion. It rejected Rodriguez-Ortiz's reliance on *Coke* because *Coke* was decided after the warrant for Rodriguez-Ortiz's cell phone and cell phone records was issued. It also found that, even if *Coke* supported a contrary conclusion, the officers acted in good faith reliance on existing case law, so the good faith exception applied.

B. Standard of Review and Applicable Law

¶ 20 The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. amend. IV. A trial court's suppression order presents a mixed question of fact and law. *Coke*, ¶ 10. Accordingly, "[w]e accept the trial court's findings of historic fact if those findings are supported by competent evidence, but we assess the legal significance of the facts de novo."

Id. (quoting *People v. Davis*, 2019 CO 24, ¶ 14). Because Rodriguez-Ortiz preserved his particularity argument in the trial court, any error is subject to the constitutional harmless error standard of reversal. *See Hagos v. People*, 2012 CO 63, ¶ 12. But because he did not challenge probable cause in his motion, we review that contention for plain error and will reverse only if any such error was obvious and so unfairly prejudicial as to cast serious doubt on the reliability of the judgment of conviction. *Id.* at ¶ 14.

¶ 21 The Fourth Amendment to the United States Constitution and article II, section 7 of the Colorado Constitution prohibit the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized. U.S. Const. amend. IV; Colo. Const. art. II, § 7. Probable cause for a search warrant exists when the affidavit in support of the warrant "alleges sufficient facts to allow a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched." *People v. Miller*, 75 P.3d 1108, 1112 (Colo. 2003). We review the totality of the circumstances to determine whether probable cause

exists. *Id.* at 1113. "This analysis does not lend itself to mathematical certainties or bright line rules; rather, it involves a practical, common-sense determination whether a fair probability exists that "a search of a particular place will reveal contraband or other evidence of criminal activity." *Id.*

¶ 22 Additionally, "[a] search conducted pursuant to a warrant is typically reasonable." *Coke*, ¶ 34. However, so-called "general warrants," which permit "a general, exploratory rummaging in a person's belongings," are prohibited. *Id.* (quoting *Andresen v. Maryland*, 427 U.S. 463, 480 (1976)). The warrant must be "sufficiently particular that it enables the executing officer to reasonably ascertain and identify the things authorized to be seized." *People v. Roccaforte*, 919 P.2d 799, 803 (Colo. 1996). This ensures that "government searches are 'confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.'" *Id.* at 802 (quoting *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985)).

¶ 23 In determining whether this requirement is met, "courts are required to read warrants and the accompanying affidavits [together] in a practical, common sense fashion." *Id.* at 804.

¶ 24 An affidavit submitted in support of a warrant may cure a warrant's facial lack of particularity if (1) the deficient warrant incorporates the curative affidavit by reference; (2) both documents are presented to the issuing judge or magistrate; and (3) the curative affidavit accompanies the warrant during the execution of the warrant. *People v. Staton*, 924 P.2d 127, 132 (Colo. 1996).

C. Analysis

1. Probable Cause

¶ 25 We conclude that the search warrant sufficiently alleged probable cause. The totality of the circumstances described in the affidavit showed a fair probability that a search of Rodriguez-Ortiz's cell phone and cell phone records would reveal "evidence of criminal activity," such as his physical location at the time of the crimes and any communications he had before, during, or after the crimes. *See People v. Omwanda*, 2014 COA 128, ¶ 21. In particular, the affidavit said that it is commonplace for individuals to carry cell phones, and then it described the facts and circumstances leading investigators to identify Rodriguz-Ortiz as the primary suspect, over a timespan that covered six months. These facts included that he had a tumultuous relationship with J.R., each crime correlated with

altercations between the two, Rodriguez-Ortiz owned a .380 handgun, police recovered .380 shell casings and bullet fragments following the shooting incidents, Rodriguez-Ortiz installed the security system at J.R.'s house, the security cameras were manipulated to prevent them from capturing images of the crimes, only J.R.'s immediate family and Rodriguez-Ortiz knew that J.R. had temporarily relocated to her daughter's house in Longmont, and Rodriguez-Ortiz knew that J.R. rearranged her bedroom furniture the day before shots were fired into her basement bedroom. The affidavit also noted similarities between the crimes and an arson committed against N.C., Rodriguez-Ortiz's ex-wife. N.C. told investigators that shortly after her children spotted Rodriguez-Ortiz at her house, her house was set on fire. Further, one day after their divorce was finalized, N.C.'s car was keyed.

¶ 26 We conclude, based on these facts, that the affidavit alleged sufficient probable cause for law enforcement to believe that a crime had been committed, and that Rodriguez-Ortiz committed a crime, thereby permitting officers to search the phone for the data requested in the affidavit. *People v. Kazmierski*, 25 P.3d 1207, 1211 (Colo. 2001) (affidavit must supply a sufficient nexus between

criminal activity, the things to be seized, and the place to be searched). Accordingly, we perceive no error, let alone plain error.

2. Particularity

¶ 27 Relying on *Coke*, Rodriguez-Ortiz asserts that the warrant is overbroad and lacks a limiting principle. Under *Coke*, broad searches may be sustained against particularity challenges if they are constrained by certain limiting principles. To be sufficiently particularized, warrants for the search of data on cell phones must include specific limitations based on (1) the type of alleged criminal activity; (2) the identity of the alleged victim; and (3) if applicable, the timeframe within which the suspected crime occurred. *Coke*, ¶ 38; *see also People v. Herrera*, 2015 CO 60, ¶ 20.

¶ 28 Concerning particularity, we conclude that this case is more akin to *Roccaforte* than *Coke*. In *Roccaforte*, the defendant owned a fuel distribution company and was investigated for tax fraud and tax evasion crimes. 919 P.2d at 801. Investigators obtained a broad search warrant covering twenty-five months that requested all books and records of the business. *Id.* at 801-02. The trial court found the warrant overly broad and suppressed all evidence obtained from it. *Id.* at 802. On interlocutory appeal, the supreme

court reversed the suppression order. While the court agreed that this was a broad, "all records" warrant, it concluded that this fact was not dispositive, noting that "[a]n 'all records' warrant is appropriate where there is probable cause to believe that the crime alleged encompasses the entire business operation and that evidence will be found in most or all business documents." *Id.* at 803. Additionally, the court found that the warrant "had a date restriction which related to the period of alleged fraud." *Id.* at 804. Finally, the court rejected the argument that the face of the warrant did not limit the search to fuel tax fraud. *Id.* In doing so, the court noted that courts are required to read warrants and accompanying affidavits together in a commonsense fashion and that overly broad warrants can be cured by an affidavit's particularity. *Id.* It determined that the warrant incorporated the affidavit, the affidavit was presented to a neutral magistrate who found probable cause, and the affiant executed the warrant. *Id.*

¶ 29 Applying *Roccaforte*, we conclude that the search warrant did not run afoul of the Fourth Amendment's particularity requirement, for four reasons. First, as in *Roccaforte* (and unlike the warrant in *Coke*, which contained no time limitations), the warrant here was

limited to the six-month time period during which the alleged crimes occurred. Moreover, the warrant incorporated the affidavit, which explained that the police's investigation of Rodriguez-Ortiz as a suspect occurred over this six-month period of time.[2] J.R. told investigators that Rodriguez-Ortiz was not with her or at her location in the early morning hours when the crimes occurred. Thus, it was reasonable for investigators to examine Rodriguez-Ortiz's patterns to determine whether he was regularly near the victim's location on days when no crimes occurred.

¶ 30 Second, while we agree that the warrant was, as in *Roccaforte*, broad, we conclude that this such fact is not dispositive. *See People v. Tucci*, 500 P.2d 815, 816 (Colo. 1972) ("[T]he quantity of items listed in a search warrant or the quantity of items seized during the execution of a warrant does not necessarily have any bearing on the

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[2] The record shows that the warrant incorporated the affidavit by cross-referencing it, was signed by a neutral magistrate, and was executed by the affiant. *See People v. Roccaforte*, 919 P.2d 799, 804 (Colo. 1996); *see also People v. Gall*, 30 P.3d 145, 149 (Colo. 2001) (upholding search based on warrant that "cross-referenced [an attachment] containing the list of items for which seizure was authorized"); *United States v. Hurwitz*, 459 F.3d 463, 470 (4th Cir. 2006) (Fourth Amendment's particularity requirement "may be satisfied by cross-reference in the warrant to separate documents that identify the property in sufficient detail").

validity of the search itself."). Because the crimes occurred over six months and concerned a domestic violence relationship, conduct and communications surrounding the crimes were relevant to identifying Rodriguez-Ortiz as the suspect. Moreover, while the warrant allowed a search for text messages, call records, and data, unlike the warrant in *Coke*, it excluded much of the data contained in a cell phone, such as images, videos, and contact lists.

¶ 31 Third, while the warrant itself did not name the two victims, the attached affidavit clearly identified the victims and tied them to the specific crimes. *Roccaforte*, 919 P.2d at 804.

¶ 32 Fourth, we are not convinced that the warrant authorized a general search of Rodriguez-Ortiz's phone by permitting an unlimited search of the data, as was found in *People v. Herrera*, 2015 CO 60. In *Herrera*, the warrant authorized the search of the entire contents of the defendant's phone. *Id.* at ¶ 4. The People reasoned that law enforcement was entitled to search the entire contents of the phone because every text message had the possibility of identifying the defendant as the owner of the phone. *Id.* The supreme court rejected this argument and concluded that,

so construed, the warrant would amount to a general warrant in violation of the Fourth Amendment's particularity requirement. *Id.*

¶ 33 In contrast, as described above, the warrant authorized collection of location data and certain message content surrounding the crimes. While the warrant could have been more particular by limiting each category using the language "related to the crimes," the warrant's incorporation of the attached affidavit served the same function. Moreover, unlike the search in *Herrera*, which extracted personal data and text messages, the search of records and cell phone location data did not involve the extraction of files from Rodriguez-Ortiz's phone or a search of its "entire contents." *Id.* The officers used the search of outgoing and incoming calls and text messages to establish Rodriguez-Ortiz's communications before, during, and after the crimes. Unlike the warrant in *Herrera*, the warrant here only allowed law enforcement to search such messages within the six-month timeframe of the crimes. Therefore, it did not allow for a general rummaging in Rodriguez-Ortiz's phone and personal information but instead targeted a specific set of data that law enforcement used to establish Rodriguez-Ortiz as the suspect. *See Roccaforte*, 919 P.2d at 803-04 (recognizing a broad

search warrant is nonetheless permissible when the requested evidence is justified by the nature of the crime or crimes). Therefore, we conclude that the search warrant satisfied the particularity requirement required by the Fourth Amendment.

¶ 34 Because we find that the affidavit sufficiently alleged probable cause and was sufficiently particular, we do not address the good faith and independent source exceptions. Additionally, because Rodriguez-Ortiz argues that the search warrants for the apartment and truck were premised on the invalid cell phone warrant, we need not address those issues.

III. Expert Testimony

¶ 35 Rodriguez-Ortiz next contends that the trial court erroneously admitted expert testimony concerning firearms toolmark analysis and cell phone location data, arguing that he was entitled to a hearing under *People v. Shreck*, 22 P.3d 68 (Colo. 2001), on both categories of testimony.[3] He also argues that the firearms toolmark analysis was not helpful to the jury. We disagree with both arguments.

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[3]Rodriguez-Ortiz does not challenge the qualifications of the experts who testified.

A. Standard of Review and Applicable Law

¶ 36 We review the admission of expert testimony for an abuse of discretion. *Kutzly v. People*, 2019 CO 55, ¶ 8. "[T]he standard of review pertaining to the admissibility of expert testimony is highly deferential." *People v. Jimenez*, 217 P.3d 841, 866 (Colo. App. 2008) (quoting *People v. Ramirez*, 155 P.3d 371, 380 (Colo. 2007)). "Trial courts are vested with broad discretion to determine the admissibility of expert testimony, and the exercise of that discretion will not be overturned unless manifestly erroneous." *Ramirez*, 155 P.3d at 380. When assessing whether the court abused its discretion, we look to "whether the trial court's decision fell within a range of reasonable options." *Churchill v. Univ. of Colo.*, 2012 CO 54, ¶ 74 (quoting *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 231 (Colo. App. 2006)).

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

¶ 38 In determining the admissibility of expert testimony, a trial court must consider whether (1) the scientific principles underlying the testimony are reasonably reliable; (2) the expert is qualified to opine on such matters; (3) the expert testimony will be helpful to the jury; and (4) the evidence satisfies CRE 403. *Shreck*, 22 P.3d at 77-79.

¶ 39 This inquiry should be broad in nature and consider the totality of the circumstances of each specific case. *Id.* at 70, 77. Thus, the court may, but is not required to, consider a wide range of factors pertinent to the case, including the factors mentioned in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). *Shreck*, 22 P.3d at 78. These include: (1) the testability of the scientific theory or technique; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence or nonexistence of maintained standards; and (5) whether the theory or technique has gained general acceptance in a relevant scientific community. *Id.*

¶ 40 The trial court is vested with the discretion to decide whether an evidentiary hearing would aid the court in its *Shreck* analysis. *People v. Rector*, 248 P.3d 1196, 1201 (Colo. 2011). A trial court is

not required to conduct an evidentiary hearing provided it has before it sufficient information to make specific findings under CRE 403 and CRE 702 concerning the reliability of the scientific principles involved, the expert's qualification to testify to such matters, the helpfulness to the jury, and any potential prejudice. *People v. Whitman*, 205 P.3d 371, 383 (Colo. App. 2007); *People v. McAfee*, 104 P.3d 226, 229 (Colo. App. 2004); *see also Shreck*, 22 P.3d at 77.

B. Additional Facts

1. Firearms Toolmark Analysis

¶ 41 Rodriguez-Ortiz filed a pretrial objection to the firearms toolmark evidence and requested a *Shreck* hearing to determine its admissibility. He argued that the scientific principles underlying firearms toolmark analysis had recently come under intense scrutiny from the scientific community and that the admissibility of this evidence should be reevaluated.

¶ 42 The prosecution responded that its expert would testify that he adhered to the standards promulgated by the Association of Firearm and Toolmark Examiners (AFTE) and would not assert that

his conclusions were infallible or had a zero-error rate or even that his opinions were to a "reasonable degree of scientific certainty."

¶ 43 The trial court initially set the matter for a hearing, but the prosecution moved for the court to reconsider. After reviewing orders in two pending district court cases with the same issue and in which *Shreck* hearings had occurred, *People v. Purpera*, Denver District Court Case No. 19CR7798, and *People v. Holmes*, Arapahoe County Case No. 12CR1522, the trial court vacated the hearing and issued a written order.[4] The court found that, under CRE 702, firearms toolmark analysis evidence was sufficiently reliable and had been accepted by multiple courts in multiple jurisdictions. It noted that Rodriguez-Ortiz's reliability challenges went to the weight of the evidence and not its admissibility. The court also found that the expert testimony would be helpful to the jury because firearms toolmarks are not commonly known. Additionally, the court acknowledged that, although the evidence may be prejudicial, any prejudice did not substantially outweigh the probative value of the

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[4] The order from *People v. Holmes*, Arapahoe County Case No. 12CR1522, is not part of the appellate record; however, we may and do take judicial notice of it. *See People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004).

testimony, particularly when the expert would be available for cross-examination.

¶ 44 Nathan Von Rentzell, a forensic scientist with the Denver Police Department (DPD) Crime Lab's firearms and toolmark unit, testified that he had been a firearms and toolmark examiner for five years. He attended a year-long training at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and received training from the DPD Crime Lab that encompassed lab-specific standard operating procedures. Von Rentzell had examined over three hundred firearms and had been qualified as an expert in Denver District Court seven times.

¶ 45 Von Rentzell described the .380 firearm he examined. He then explained that, when gun barrels are manufactured, they are "rifled" to improve the accuracy of the firearm. "Rifling" cuts a spiral groove into the barrel of the gun to spin the bullet. Each firearm's rifling produces random individual imperfections that allow components of fired cartridges or shell casings to be identified with specific firearms.

¶ 46 Von Rentzell compared the markings from the bullet fragments and the cartridge casings recovered from the various shootings to

the marks on test rounds fired from the .380 gun recovered from Rodriguez-Ortiz's truck. He concluded that the bullet fragments recovered from the May 19 and June 14 incidents had been fired from Rodriguez-Ortiz's .380 gun. He could not attribute the shell casings to Rodriguez-Ortiz's .380, but he concluded that the shell casings had been fired from the same, unknown .380 firearm. A second firearms examiner conducted an independent comparison and drew the same conclusions. Von Rentzell qualified his opinion by testifying that, while the methods of firearms toolmark analysis are objective, his conclusions are subjective and not based on any quantitative analysis.

2. Cell Phone Data

¶ 47 Rodriguez-Ortiz also challenged the admissibility of the prosecution's proposed expert testimony on cell phone/cell site location data before trial and requested a *Shreck* hearing. Specifically, he challenged the use of AT&T's Network Element Location Services (NELOS) data and argued that this data is unique and proprietary to AT&T and that the underlying technology has not been explained or tested by any outside agency. Thus, he reasoned, there was no way to determine the accuracy or reliability

of the NELOS data. Rodriguez-Ortiz also challenged the Call Detail Records (CDR) data, arguing that the data was unreliable because AT&T records "ghost data" while the phone is turned off that "do[es] not reflect where the phone is located."

¶ 48 Relying on *People v. Shanks*, 2019 COA 160, the prosecution asked the court to deny a hearing. In *Shanks*, a division of this court concluded that expert testimony explaining how historical cell site data is used to provide a general geographic location of a cell phone at a given time may be admitted without first holding an evidentiary hearing on the reliability of the methodology. *Id.* at ¶ 35. The trial court denied the request for a hearing based on *Shanks*.

¶ 49 Bryce Eikenberg, a special agent with the ATF, who authored the search warrants, testified at trial regarding the CDR data. He testified that he placed the CDR data in a mapping program called Nighthawk LEOvision. Using this data, Eikenberg found that, for many of the incidents, Rodriguez-Ortiz's cell phone was in the vicinity of the area in which the crimes were committed at the time of the crimes.

¶ 50 Mark Sonnendecker, an eighteen-year special agent with the ATF, testified at trial as an expert in CDR analysis. Sonnendecker specializes in the analysis of digital evidence, including cell phone tracking and analysis of records relating to cell phones and holds numerous certificates in the field. He has reviewed thousands of sets of CDR and has participated in over three hundred operations involving tracking cell phone handset locations in real time.

¶ 51 Sonnendecker testified that the NELOS system records exchanges between handsets and various phone applications (called NELOS events) without the user's knowledge, by date and time. The NELOS data also contains latitude and longitude coordinates and distance measurements to provide better call routing by AT&T. This data can identify a cell phone's location when a NELOS event occurs.

¶ 52 While acknowledging that he did not know the specifics of the NELOS proprietary technology, Sonnendecker described using the NELOS data in over one hundred live tracking investigations and said that, in each instance, the data accurately located the cell phone handset.

¶ 53 Sonnendecker obtained Rodriguez-Ortiz's phone records and used the GeoTime program to create maps of the phone's general locations using the NELOS data and call detail reports. The maps were not used to identify Rodriguez-Ortiz's location at a particular time, but instead were used to show patterns of his locations around the time of each incident.

¶ 54 On cross-examination, Sonnendecker acknowledged that he could not testify about how the NELOS data was generated. He said AT&T uses seventy different methods to collect location-based data, and, although he was not trained on these methods, he could interpret the data generated.

¶ 55 Sonnendecker testified that he was not familiar with "ghost data" in relation to CDR records and had never heard that AT&T could produce data usage records even if a phone is powered off. He acknowledged that, to some extent, the location information from AT&T's data usage records is not as accurate as location information generated by voice usage or text messaging.

C. Analysis

1. Firearms Toolmarks

¶ 56 Rodriguez-Ortiz contends that firearms toolmark analysis is unscientific, unreliable, and denounced by the scientific community. In support, he cites to a report by the National Research Council of the National Academies -- *Strengthening Forensic Science in the United States: A Path Forward* (2009) (NRC Report) -- and a report by the President's Council of Advisors on Science and Technology, Executive Office of the President -- *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016) (PCAST Report). We recognize the limitations and criticisms of toolmark comparisons described in these studies, particularly the subjective nature of interpreting the results. But we discern no abuse of discretion in the court's admission, without a hearing, of the firearms toolmark analysis conducted in this case because the expert acknowledged these shortcomings and provided a qualified opinion.

¶ 57 Numerous courts have addressed challenges to firearm identification through toolmarks analysis and have held that its underlying principles are sufficiently reliable. *See, e.g.*, *United*

States v. Willock, 696 F. Supp. 2d 536, 571 (D. Md. 2010) ("[T]he theory underlying firearms-related toolmark identification has gone through sufficient testing and publication of studies regarding its reliability and validity to establish a 'baseline level of credibility' . . . ."") (citation omitted), *aff'd sub nom. United States v. Mouzone*, 687 F.3d 207 (4th Cir. 2012); *United States v. Monteiro*, 407 F. Supp. 2d 351, 365 (D. Mass. 2006) ("[R]ecent scientific studies have demonstrated that the underlying principle that firearms leave unique marks on ammunition has continuing viability."); *United States v. Foster*, 300 F. Supp. 2d 375, 376 n.1 (D. Md. 2004) ("Ballistics evidence has been accepted in criminal cases for many years . . . [and] numerous cases have confirmed the reliability of ballistics identification."); *United States. v. Cooper*, 91 F. Supp. 2d 79, 82 (D.D.C. 2000) (holding that the defendant was not entitled to pretrial hearing on ballistic evidence because a court is not required to hold a hearing "if the expert testimony is based on well-established principles"). And courts considering challenges to firearms identification evidence following the criticisms raised in the NRC and PCAST Reports have found such evidence sufficiently reliable to be admissible. *See United States v. Taylor*, 663 F. Supp.

2d 1170, 1175-80 (D.N.M. 2009); *Commonwealth v. Pytou Heang*, 942 N.E.2d 927, 937-50 (Mass. 2011); *United States v. Sebbern*, No. 10 Cr. 87, 2012 WL 5989813, at *5-7, *9 (E.D.N.Y. Nov. 30, 2012) (unpublished order); *United States v. Otero*, 849 F. Supp. 2d 425, 427 (D.N.J. Mar. 15, 2012), *aff'd*, 557 F. App'x 146 (3d Cir. 2014); *United States v. Alvin*, No. 22-20244, 2024 WL 149288, at *4 (S.D. Fla. Jan. 5, 2024); *Willock*, 696 F. Supp. 2d at 564-70; *United States v. Graham*, No. 23-CR-00006, 2024 WL 688256, at *13 (W.D. Va. Feb. 20, 2024).

¶ 58 We are not persuaded to reach a contrary conclusion by *Abruquah v. State*, 296 A.3d 961 (Md. 2023), on which Rodriguez-Ortiz relies, because it is distinguishable, for two reasons. First, the *Abruquah* court applied a recently adopted test (the *Daubert-Rochkind* standard) for evaluating scientific evidence under Maryland's rules of evidence. *Id.* at 971-72. That test differs from the *Shreck*/CRE 702 standard because it *requires* consideration of the nonexhaustive list of five factors outlined in *Daubert*, plus five additional factors, to determine whether the proffered expert testimony is sufficiently reliable to be provided to the trier of fact. *Id.* In contrast, Colorado law permits, but does not require,

consideration of these factors and leaves their evaluation to the trial court's discretion on a case-by-case basis. *Shreck*, 22 P.3d at 77; *Brooks v. People*, 975 P.2d 1105, 1114 (Colo. 1999) (declining to "give any special significance" to the factors listed in *Daubert*, and directing trial courts to "focus instead on whether the evidence is reasonably reliable information that will assist the trier of fact"). We are duty bound to follow the *Shreck*/CRE 702 standard. *People v. Gladney*, 250 P.3d 762, 768 n.3 (Colo. App. 2010) ("[W]e are bound to follow supreme court precedent.").

¶ 59 Second, the firearms expert in *Abruquah* testified that the toolmarks from four bullets and a bullet fragment matched marks left by the defendant's firearm and concluded that they had been fired from the defendant's firearm. 296 A.3d at 987. He testified that his opinion was not subject to any qualifications or caveats. *Id.* The Maryland Supreme Court concluded that the methodology of firearms identification did not provide a reliable basis for the expert's *unqualified* opinion. *Id.* at 997. In contrast, Von Rentzell qualified his opinion by saying that his determinations were not based on any quantitative analysis, and that his final conclusion was a subjective determination, not an objective one.

¶ 60 Additionally, Rodriguez-Ortiz contends that the trial court did not have enough information to determine that the firearms toolmark analysis was helpful to the jury because the prosecution's experts could not "explain the significance of their conclusions." Contrary to Rodriguez-Ortiz's assertion, Von Rentzell's qualification that his final conclusion was a subjective determination did not undermine its usefulness to the jury. Expert testimony is helpful when it assists the fact finder in understanding the evidence or determining a fact in issue. CRE 702. Thus, whether the proffered testimony is useful "hinges on whether there is a logical relation" between the testimony and the facts of the case. *People v. Douglas*, 2015 COA 155, ¶ 62 (quoting *Ramirez*, 155 P.3d at 379). Von Rentzell's testimony regarding the rifling process helped the jury understand how the bullet fragments from the May 19 and June 14 shootings were found to have been fired from Rodriguez-Ortiz's gun, and how the shell casings were found to have been fired from the same .380 handgun. Therefore, we conclude that the trial court did not err by finding that Von Rentzell's testimony would be helpful to the jury.

¶ 61 Accordingly, on this record, we conclude that the trial court did not abuse its discretion by finding that the prosecution's expert's firearms toolmark analysis satisfied the *Shreck*/CRE 702 threshold of baseline reliability and that any shortcomings went to the weight of the evidence and not its admissibility. *See Willock*, 696 F. Supp. 2d at 571 ("[T]he theory underlying firearms-related toolmark identification has gone through sufficient testing and publication of studies regarding its reliability and validity to establish a 'baseline level of credibility' . . . .") (citation omitted).

¶ 62 Rodriguez-Ortiz also argues that firearms toolmark analysis has not been meaningfully tested, has not been subject to peer review and publication, has an unknown error rate, and has not been generally accepted. We disagree. First, according to the district court orders on which the court relied, firearms toolmark analysis has been meaningfully tested. *See United States v. Harris*, 502 F. Supp. 3d 28, 37 (D.D.C. 2020) ("The literature shows that the many studies demonstrating the uniqueness and reproducibility of firearms toolmarks have been conducted." (quoting *Otero*, 849 F. Supp. 2d at 432)). Second, these same orders reveal that firearms toolmark analysis has been subject to peer review and publication.

See United States v. Tibbs, No. 2016-CF1-19431, 2019 WL 4359486, at *9 (D.C. Super. Ct. Sept. 5, 2019) (collecting cases and noting that other courts have found that "publication in the *AFTE Journal* satisfies this prong of the admissibility analysis"). Third, these orders reveal that firearms toolmark analysis error rates are known. Federal courts that have examined the AFTE method's rate of error have found it to be low. *See United States v. Ashburn*, 88 F. Supp. 3d 239, 246 (E.D.N.Y. 2015) ("[T]he error rate, to the extent it can be measured, appears to be low, weighing in favor of admission . . . ."); *Monteiro*, 407 F. Supp. 2d at 367-68 (summarizing relevant studies and finding that the known error rate is not "unacceptably high").

¶ 63 Finally, firearms toolmark analysis is a generally accepted method in the forensic sciences community. *See Ashburn*, 88 F. Supp. 3d at 247 ("The AFTE theory . . . has been widely accepted in the forensic science community."); *Otero*, 849 F. Supp. 2d at 435 (collecting cases and noting that even those courts that have been critical of the AFTE method have concluded that it is "widely accepted among examiners as reliable").

¶ 64 Given the information the trial court had before it from this case and from the orders in the *Purpera* and *Holmes* cases, we discern no abuse of discretion in its decision declining to hold a *Shreck* hearing. We conclude that the court had ample information before it from which it could determine the admissibility of the firearms toolmark analysis testimony.

2. Cell Phone Data Analysis

¶ 65 Rodriguez-Ortiz contends that the NELOS cell phone location data incorporated proprietary information that has not been evaluated or tested and thus was insufficiently reliable to be admissible. We disagree for three reasons.

¶ 66 First, Sonnendecker testified that the NELOS data was not used to pinpoint Rodriguez-Ortiz's location at a particular time, but instead was used to show his general location in relation to the crimes. He also described the limitations of the data and said he was not trained in the methods used to compile the data.

¶ 67 Second, Sonnendecker performed his own tests to confirm the reliability of the NELOS data. Sonnendecker described testing the NELOS data on at least one hundred occasions, and during each

test, the NELOS data accurately revealed the location of the cell phone handset.

¶ 68 Third, the NELOS data was used in combination with the traditional cell phone tower data. Therefore, it was merely cumulative of the cell phone tower data. *See People v. Caldwell*, 43 P.3d 663, 668 (Colo. App. 2001) ("[I]f the evidence is merely cumulative and does not substantially influence the verdict or affect the fairness of the trial proceedings, any error in its admission is harmless."). Moreover, a *Shreck* hearing was not required. It is not an abuse of discretion to admit cell site location data to determine the general geographic location of a cell phone without a *Shreck* hearing. *Shanks*, ¶ 35.

¶ 69 Finally, we reject Rodriguez-Ortiz's assertion that the CDR data was unreliable because AT&T records "ghost data" while the phone is turned off because no evidence supports this assertion. In the motion to suppress, defense counsel alleged that an employee of his office, who had attended trainings on cell phone and cell tower data, said that AT&T collects data when the phone is turned off. However, this person's identity was never revealed, nor did the defense tender a supporting affidavit. Moreover, this person was

not endorsed or called by the defense at trial. Additionally, the trial evidence showed that the data collected around the June 22 and August 19 incidents reflected no interaction with Rodriguez-Ortiz's handset, suggesting that the phone was powered off, not that "ghost data" was produced. Finally, to the extent Rodriguez-Ortiz contends that the secret nature of AT&T's proprietary information renders the data unreliable, we conclude that the accuracy of this data goes to its weight and not its admissibility. Indeed, the defense asked the jury to reject the data based on AT&T's disclaimers concerning accuracy, while the People asked the jury to rely on the same data based on Sonnendecker's personal experience with its accuracy.

IV. Cumulative Error

¶ 70 Rodriguez-Ortiz contends the cumulative evidentiary errors require reversal. When reviewing for cumulative error, we ask whether "numerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial." *Howard-Walker v. People*, 2019 CO 69, ¶ 18 (quoting *Oaks v. People*, 371 P.2d 443, 446 (Colo. 1962)). Because

cumulative error requires numerous errors and we have found none, we find no cumulative error.

V. Section 18-12-109(1)(a)(I)

¶ 71 Rodriguez-Ortiz next contends that a Molotov cocktail is not an "explosive," a crucial element for the crime of violence sentence enhancer for first degree arson. We disagree.

A. Standard of Review and Applicable Law

¶ 72 We review sufficiency challenges de novo. *See Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). Moreover, statutory interpretation presents legal questions, which we review de novo. *Dubois v. People*, 211 P.3d 41, 43 (Colo. 2009). In construing statutes, we seek to effectuate the General Assembly's intent. *Askew v. Indus. Claim Appeals Off.*, 927 P.2d 1333, 1337 (Colo. 1996). We look first to the statutory language, giving words and phrases their commonly accepted and understood meanings. *Id.* We read the statutory scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results. *Doubleday v. People*, 2016 CO 3, ¶ 20.

¶ 73 Section 18-4-102(1), C.R.S. 2024, defines first degree arson as follows:

> A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent commits first degree arson.

¶ 74 If the jury finds that the defendant committed "first degree arson by the use of any explosive," the defendant must be sentenced "in accordance with the provisions of section 18-1.3-406[, C.R.S. 2024]." § 18-4-102(3).

¶ 75 Section 18-12-109(1)(a)(I)(A)-(C) states,

> "Explosive *or* incendiary device" means:
>
> (A) Dynamite and all other forms of high explosives, including, but not limited to, water gel, slurry, military C-4 (plastic explosives), blasting agents to include nitro-carbon-nitrate, and ammonium nitrate and fuel oil mixtures, cast primers and boosters, R.D.X., P.E.T.N., electric and nonelectric blasting caps, exploding cords commonly called detonating cord or det-cord or primacord, picric acid explosives, T.N.T. and T.N.T. mixtures, and nitroglycerin and nitroglycerin mixtures;
>
> (B) Any explosive bomb, grenade, missile, or similar device; and
>
> (C) Any incendiary bomb or grenade, fire bomb, or similar device, including any device,

> except for kerosene lamps, which consists of or includes a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one individual acting alone.

(Emphasis added.)

B. Analysis

¶ 76 Rodriguez-Ortiz contends that the legislature intended for "explosives" to carry a different meaning than "incendiary devices" based on the "or" in section 18-12-109(1)(a)(I). He argues that the word "or" is disjunctive and reasons that, because "explosive" and "incendiary" carry different meanings, the Molotov cocktail he used falls within the category of incendiary devices in subsection (1)(a)(I)(C) and not the explosives identified in subsection (1)(a)(I)(A) and (B). As a result, he argues, the crime of violence sentence enhancer cannot apply. We are not persuaded and conclude that the legislature intended "explosive" to carry the same meaning as "incendiary device."

¶ 77 In *Pellegrin v. People*, 2023 CO 37, the supreme court addressed a similar argument concerning the word "or" in section 18-1-408(5)(c), C.R.S. 2024. It concluded that depending on the

context, the word "or" is better understood and applied by attributing to it an inclusive "and/or" meaning. *See Pellegrin*, ¶¶ 27-29. Moreover, Colorado case law supports that such a reading is proper when it is necessary to carry out the intent of the legislature or to avoid an absurd or unreasonable result. *See, e.g.*, *Henrie v. Greenlees*, 208 P. 468, 469 (Colo. 1922) (substituting "and" for "or" to effectuate the legislature's intent); *Waneka v. Clyncke*, 134 P.3d 492, 494 (Colo. App. 2005) ("When interpreting a statute, a reviewing court may substitute 'or' for 'and,' or vice versa to avoid an absurd or unreasonable result."), *aff'd*, 157 P.3d 1072 (Colo. 2007); *In re Estate of Dodge*, 685 P.2d 260, 265-66 (Colo. App. 1984) (same, and giving "or" its "usual inclusive construction").

¶ 78 We agree with the People that interpreting section 18-12-109(1)(a)(I) to mean that the word "or" creates three separate subparts defining "explosive" or "incendiary device," but not both, would be illogical. Part 1 of article 12 of title 18 addresses criminal limitations on the possession and use of certain firearms and weapons. And section 18-12-109 defines explosives or incendiary devices and criminalizes specified acts involving such devices. The

consequences of violating section 18-12-109 do not depend on whether the conviction is connected to an explosive or an incendiary device — they are treated the same. *See* § 18-12-109(2). Because violations of the subsection are treated as one and the same regardless of whether an explosive or incendiary device is used, interpreting the "or" as disjunctive would lead to an absurd or illogical result. Accordingly, we interpret "or" to mean "and/or" and therefore conclude that sufficient evidence supports the crime of violence sentence enhancer.

¶ 79 We further conclude that our interpretation is supported by section 9-7-103, C.R.S. 2024, which defines "explosive," "incendiary device," and "Molotov cocktail":

> "Explosive" or "explosive device" means any material or container containing a chemical compound or mixture that is commonly used or intended for the purpose of producing an explosion and that contains any oxidizing and combustible materials or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, or by detonation of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects . . . .

§ 9-7-103(3).

> "Incendiary device" means any flammable material or container containing a flammable liquid or material whose ignition by fire, friction, concussion, detonation, or other method produces destructive effects primarily through combustion rather than explosion.

§ 9-7-103(4).

> "Molotov cocktail" means a breakable container containing an explosive or flammable liquid or other substance, having a wick or similar device capable of being ignited, and *may be described as either an explosive or incendiary device* . . . .

§ 9-7-103(5) (emphasis added).

¶ 80 While section 9-7-103 is not part of the criminal code, it is referenced in two provisions of title 18. *See* § 18-9-118, C.R.S. 2024 ("A person commits a class 6 felony if, without legal authority, he has any loaded firearm or explosive or incendiary device, as defined in section 9-7-103, C.R.S., in his possession . . . ."); § 18-12-101(1)(b), C.R.S. 2024 ("'Bomb' means any explosive or incendiary device or [M]olotov cocktail as defined in section 9-7-103 . . . .").

¶ 81 Interpreting the relevant statutes as a whole, we conclude that the legislature intended a Molotov cocktail to constitute "either an

explosive or an incendiary device" for purposes of section 18-12-109(1)(a)(I) and discern no error in the court's application of the crime of violence sentence enhancer.

VI. Concurrent Versus Consecutive Sentences

¶ 82 Rodriguez-Ortiz last contends that his convictions on count 3 (attempted extreme indifference murder) and count 8 (first degree arson) are based on identical evidence -- the second Molotov cocktail that caused the fire -- and therefore that concurrent sentencing was therefore required. We are not persuaded because we that separate evidence supports each conviction.

A. Standard of Review and Applicable Law

¶ 83 Sections 18-1-408(3) and 18-1.3-406(1)(a) limit a sentencing court's discretion to impose concurrent or consecutive sentences for multiple convictions. As relevant here, section 18-1-408(3) requires concurrent sentencing when a defendant is convicted of multiple crimes based on identical evidence. *People v. Phillips*, 2012 COA 176, ¶ 172. Moreover, a defendant's conduct can violate more than one criminal statute. *People v. James*, 497 P.2d 1256, 1257 (Colo. 1972) ("[A] single transaction may give rise to the violation of more than one statute.").

¶ 84 Section 18-4-102(1) addresses first degree arson and provides,

> A person who knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent commits first degree arson.

¶ 85 Section 18-2-101(1), C.R.S. 2024, addresses attempt and provides,

> A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused.

¶ 86 Section 18-3-102(1)(d), C.R.S. 2024, addresses extreme indifference murder and provides,

> A person commits the crime of murder in the first degree if . . . [u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death

to a person, or persons, other than himself, and thereby causes the death of another.

B. Analysis

¶ 87 We conclude that the convictions on counts 3 and 8 are not based on identical evidence. Rodriguez-Ortiz's combined conduct of placing the bars on the window and throwing the first Molotov cocktail supports the attempted extreme indifference murder conviction, while throwing the second Molotov cocktail into the house twelve minutes later, which resulted in the fire, supports the first degree arson conviction.

¶ 88 Accordingly, we conclude that section 18-1-408(3) is not implicated by the facts of this case and, thus, that concurrent sentencing was not required.

VII. Disposition

¶ 89 The judgment is affirmed.

JUDGE SULLIVAN concurs.

JUDGE SCHOCK specially concurs.

JUDGE SCHOCK, specially concurring.

¶ 90 The cell phone records warrant in this case authorized the search and seizure of all call records, text messages, internet usage, data activity, voicemail messages, and location data for defendant, Ramon Rodriguez-Ortiz, over a six-month period, based on a series of suspected crimes that occurred on eleven specific days during that timeframe. In my view, such a warrant is too broad to satisfy the constitutional particularity requirement. And because the warrant does not incorporate the supporting affidavit, that affidavit cannot provide the particularity that the warrant lacks on its face.

¶ 91 I therefore respectfully disagree with the majority's conclusion in Part II.C.2 of its opinion that the warrant is sufficiently particular.[1] But because I nevertheless conclude — albeit, hesitantly — that a reasonable law enforcement officer could reach the same conclusion the majority did under the facts of this case, I would apply the good faith exception to uphold the denial of the motion to suppress. Thus, I concur in affirming the judgment.

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[1] I concur in the remainder of the majority opinion.

¶ 92 In doing so, however, I emphasize what the law has long made clear. The particularity requirement is not a formality or a legal technicality; it is a bedrock constitutional principle. Its purpose is to tell law enforcement officers exactly what they are authorized to search for and to prevent the kind of general, exploratory rummaging the United States and Colorado Constitutions prohibit. When a warrant fails in this purpose, courts should not reflexively look to the affidavit to provide the particularity that constitutionally must be in the warrant itself. Nor should the government assume that the good faith exception will invariably come to its rescue when officers execute a warrant they should reasonably know is invalid.

I. Particularity of the Warrant

¶ 93 The Fourth Amendment requires search warrants to "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This requirement is a "constitutional bulwark" that prevents "arbitrary invasions [of privacy] by governmental officials" and "general, exploratory rummaging in a person's belongings." *People v. Coke*, 2020 CO 28, ¶¶ 33-34 (citations omitted). It ensures that government searches are "confined in scope to particularly described evidence relating to

a specific crime for which there is demonstrated probable cause." *People v. Roccaforte*, 919 P.2d 799, 802 (Colo. 1996) (citation omitted). An overbroad warrant is invalid. *Coke*, ¶ 38.

¶ 94 The particularity requirement takes on added significance in the context of cell phone searches because cell phones "store information that can be used to reconstruct '[t]he sum of an individual's private life.'" *People v. Davis*, 2019 CO 24, ¶ 18 (quoting *Riley v. California*, 573 U.S. 373, 393-94 (2014)). Cell-site location data goes even further by allowing the government to "travel back in time" to "achieve[] near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Carpenter v. United States*, 585 U.S. 296, 312 (2018). Thus, a warrant that authorizes a search of the entire contents of a phone violates the particularity requirement. *People v. Herrera*, 2015 CO 60, ¶ 4. So too does a warrant that accomplishes the same thing by authorizing a search of "all texts, videos, pictures, contact lists, phone records, and any data [showing] ownership or possession." *Coke*, ¶ 38.

¶ 95 As a threshold matter, I see no basis for distinguishing — at least for particularity purposes — between a search of a cell phone and a search of a cell phone service provider's records for the same

content. In *Carpenter*, the United States Supreme Court rejected the argument that cell-site location records maintained by wireless carriers were "fair game" without a warrant, explaining that "[i]n light of the deeply revealing nature of [location data], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." 585 U.S. at 320. The same can be said about communication and content generated by the user.

¶ 96 So the validity of the warrant in this case turns on whether it is distinguishable from the overbroad warrant in *Coke*.[2] It is — just barely — but not in any way that makes it sufficiently particular.

¶ 97 In some ways, the warrant in this case is narrower in terms of subject matter than the warrant in *Coke*. Like the warrant in *Coke*, this warrant allowed a search of all Rodriguez-Ortiz's text and Multimedia Messaging Service messages, call records, and data

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[2] The People wisely concede that the district court erred by concluding that *People v. Coke*, 2020 CO 28, did not apply because it was announced after the warrant was issued in this case. *Coke* invalidated the warrant in that case — also necessarily issued before the *Coke* opinion — based on existing law. *Id.* at ¶¶ 37-38.

activity. *See Coke*, ¶ 35. But unlike the warrant in *Coke*, this warrant did not extend to other data stored on the phone, including photos, images, videos, and contact lists. *See id.* Nor did it give the officers "virtually unfettered access" to the phone itself. *Id.* at ¶ 36.

¶ 98 But in other ways, the warrant in this case is *broader* than the one in *Coke*. As just one example, this warrant also sought voicemail messages — a category not sought in *Coke*. And because it sought information from the provider, it would presumably include information that was no longer on the phone, either having been deleted or not saved in the first place. Most significantly, this warrant sought all location data, allowing law enforcement to "retrace [Rodriguez-Ortiz's] whereabouts" as if he had "been tailed every moment of every day." *Carpenter*, 585 U.S. at 312. In sum, the warrant authorized law enforcement to collect information about everywhere Rodriguez-Ortiz went, everyone he communicated with by phone, and everything he said or was said to him via text.

¶ 99 That brings me to the time limitation. Unlike the warrant in *Coke*, which had no time limitation, the warrant in this case was limited to a six-month time period. But that time limitation must be viewed in the context of the nature of the information sought.

And given the indiscriminate breadth of the intrusion into the privacies of Rodriguez-Ortiz's life, *see Davis*, ¶¶ 17-22, it is hard to see the six-month time limitation as much of a limitation at all.

¶ 100 The majority likens the six-month limitation in this case to the twenty-five-month limitation in *Roccaforte*, 919 P.2d at 801. *Supra* ¶ 29. But *Roccaforte* involved the search of a *business* for which its every transaction potentially implicated the alleged fraud. *Id.* at 803. Thus, the supreme court upheld the "all records" warrant because "there [was] probable cause to believe that the crime alleged encompasse[d] the entire business operation and that evidence will be found in most or all business documents." *Id.* In contrast, no one would suggest that the nine specific incidents (over eleven days) under investigation in this case comprised the entirety of Rodriguez-Ortiz's life over that six-month period or that evidence would be found in most or all of his communications. Unlike a fraudulent business, even the most hardened criminal surely has aspects of their life that have nothing to do with their crimes.

¶ 101 And that leads to the final problem with the warrant. Notwithstanding the warrant's breadth as to subject matter and time period, it might have been salvaged if it had simply specified

that it was limited to evidence related to the crimes under investigation, or even the alleged victim. *See Coke*, ¶ 38; *United States v. Suggs*, 998 F.3d 1125, 1134 (10th Cir. 2021) ("[A] warrant may satisfy the particularity requirement if its text constrains the search to evidence of a specific crime such that it sufficiently narrows language that, on its face, sweeps too broadly."). But the warrant did not even do that. The majority agrees that it would have been better if it had, but in my view, that omission is fatal.

¶ 102 As a practical matter, such a limitation may not materially change the nature of the search. After all, to determine whether evidence relates to the crimes under investigation, someone must first look at it (or at least search it electronically). But the purpose of the particularity requirement is to ensure that law enforcement officers know what they are authorized to search for and seize. With no limitation as to the specific crimes for which evidence is sought, nothing would prevent the kind of fishing expedition the Fourth Amendment prohibits. *See People v. Gutierrez*, 222 P.3d 925, 944 (Colo. 2009). Under the guise of this warrant, officers could search for evidence of other crimes, or unknown crimes, or even private information having nothing to do with crime at all.

¶ 103 Thus, because the warrant authorizes an all-encompassing search of Rodriguez-Ortiz's phone data over a six-month period without sufficiently specifying the subject matter, timeframe, or crimes under investigation, I would conclude that it violated the Fourth Amendment's particularity requirement. *See Coke*, ¶ 38.

II. Affidavit

¶ 104 I also respectfully disagree with the majority that we may look to the supporting affidavit for particularity — as to the alleged victims and the alleged crimes — that is not in the warrant itself.

¶ 105 An affidavit may provide the requisite particularity only if three conditions are met: (1) the warrant incorporates the affidavit by reference; (2) both documents are presented to the issuing magistrate; and (3) the affidavit accompanies the warrant during its execution. *People v. Staton*, 924 P.2d 127, 132 (Colo. 1996).[3]

¶ 106 To satisfy the first condition, it is not enough that the warrant *mentions* the affidavit; it must *incorporate* it. *See Groh v. Ramirez*, 540 U.S. 551, 555, 557-58 (2004) (holding that warrant did not

[3] The third *Staton* factor may be excused when, as here, the search warrant is executed under the supervision and control of the affiant. *See People v. Staton*, 924 P.2d 127, 132 (Colo. 1996).

incorporate affidavit where it "recite[d] that the Magistrate was satisfied the affidavit established probable cause"); *Suggs*, 998 F.3d at 1135 ("[A] warrant does not incorporate an affidavit merely by mentioning the affidavit or reciting that the magistrate judge found probable cause to authorize the search."). This distinction is important because "[t]he Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh*, 540 U.S. at 557. While the warrant may in certain circumstances provide that particularity by "cross-referencing other documents," *id.*, it must actually do so. It is the warrant, not the affidavit, that tells law enforcement what they may search for.

¶ 107 The warrant's sole mention of the affidavit in this case was to say that the court had reviewed it: "The Court, upon review of [the] affidavit . . . in support of the issuance of this order, hereby orders the production of the following records . . . ." It did not use any express "words of incorporation," *id.* at 558, as warrants often do. *See, e.g.*, *People v. Gall*, 30 P.3d 145, 149 (Colo. 2001) (noting that the warrant "specifically incorporated by reference the affidavit" and "cross-referenced [an attachment] containing the list of items for which seizure was authorized by the warrant"); *United States v.*

Waker, 534 F.3d 168, 172 n.2 (2d Cir. 2008) (holding that a warrant incorporated the affidavit by stating that the items to be seized were "more fully described in the affidavit filed in support of this warrant which is incorporated herein by reference"). Nor did it say that the subject of the search was "described in the [affidavit]," as the warrant did in *Staton*. 924 P.2d at 132 (emphasis omitted).

¶ 108 Thus, nothing in the warrant directed officers (or the cell phone service providers) to look to the affidavit to further define what officers were authorized to search for and seize. I do not think that a simple acknowledgment in a warrant that the issuing court has reviewed the affidavit — something that is true for every warrant — is enough to incorporate that affidavit by reference.[4]

¶ 109 Moreover, even if the affidavit were incorporated into the warrant, I am still not sure it provided the requisite particularity. True, it provided extensive detail on the crimes under investigation. But critically, it did not limit the search of Rodriguez-Ortiz's cell phone records to evidence of those crimes — at least not expressly. To the contrary, after detailing the eleven specific dates in question

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[4] Notably, the People did not argue in the district court or on appeal that the affidavit was incorporated by reference into the warrant.

and the relevance of records from those dates, the affidavit explained that it was seeking "such a large data set" of 184 days of records "to develop a pattern of life," including communication patterns and location data that might be exculpatory. In other words, the affidavit *confirmed* that law enforcement was indeed seeking the full scope of records I have concluded was overbroad. And far from restricting those records to evidence of specific crimes, the affidavit explicitly sought evidence of *non-criminal* activity.

III. Good Faith Exception

¶ 110 The general rule is that evidence seized under an overbroad warrant must be suppressed. *See Coke*, ¶ 38. But this general rule yields to the good faith exception when officers "act[] in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate." *People v. Seymour*, 2023 CO 53, ¶ 63 (citation omitted). An officer's reliance on a warrant is unreasonable when, as relevant here, the warrant is "so facially deficient . . . in failing to particularize the place to be searched or the things to be seized . . . that the executing officers cannot reasonably presume it to be valid." *United States v. Leon*, 468 U.S. 897, 923 (1984).

¶ 111 For the reasons above, I think the warrant in this case comes close to that line. *See Groh*, 540 U.S. at 563 ("[N]o reasonable officer could believe that a warrant that plainly did not comply with [the particularity] requirement was valid."); *cf. Gutierrez*, 222 P.3d at 944 (holding that good faith exception did not apply where search encompassed thousands of files, "the substantial majority of which were free from any evidence of wrongdoing"). Although the People point out that *Coke* was decided after the search warrant in this case was issued, both the underlying constitutional principles and their application to cell phones long predate *Coke*. *See Coke*, ¶ 37 (citing cases). Indeed, just six months before the warrant in this case, the supreme court warned that "the general trend of caselaw provides cell phones with more protection, not less." *Davis*, ¶ 17.

¶ 112 But despite some hesitation, I would apply the good faith exception under the circumstances of this case for three reasons.

¶ 113 First, no Colorado case law addresses whether a warrant for records from a cell phone service provider is subject to the same "special protections applicable to cell phone searches." *Id.* at ¶ 19. Absent such precedent, a reasonable officer would not necessarily have known — as I have concluded — that a warrant for cell

records held by a third party would be subject to the same particularity standard as a warrant for the defendant's cell phone itself. *Cf. Seymour*, ¶ 70 (applying good faith exception based on "absence of precedent explicitly establishing" a constitutionally protected privacy interest in an individual's Google search history).

¶ 114 Second, the warrant did not "authorize a general search of the entire contents of the phone," as the supreme court disapproved in *Herrera*, ¶ 18. Although the warrant was broad — and in my view, overbroad — it did list specific categories of data sought and limited the search to the general timeframe of the crimes under investigation. And with the exception of the location data, it was somewhat narrower than the warrant in *Coke*. Given the state of the case law at the time, a reasonable officer could have concluded that the limitations in this warrant went far enough.

¶ 115 Third, the affidavit was attached to the warrant and set forth in detail the crimes under investigation, including the date, location, and victims of each crime. The officer who signed that affidavit was the same officer who conducted the search of the cell records. That officer therefore could have reasonably understood the warrant to be read together with the affidavit as limiting the

search to evidence of the crimes under investigation — even though the warrant did not expressly incorporate the affidavit. *See United States v. Russian*, 848 F.3d 1239, 1246 (10th Cir. 2017) ("Although a warrant . . . affidavit cannot save a warrant from facial invalidity, it can support a finding of good faith, particularly where . . . the officer who prepared the . . . affidavit also executed the search.").

¶ 116 Finally, in reaching my conclusion that the good faith exception would apply, I am also mindful that the majority has determined that the warrant in this case was sufficiently particular. It is hard for me to say that the executing officer could not have reasonably presumed the warrant to be valid when two judges on this division have concluded, after careful analysis, that it was.

¶ 117 Thus, although I respectfully disagree with my colleagues that the warrant in this case was valid, I would nevertheless affirm the district court's denial of the motion to suppress. But in doing so, I caution that the good faith exception should not be viewed as a free pass whenever the government violates the Fourth Amendment. While the exception is broad — as it should be when officers take the important step of obtaining a warrant, *see* § 16-3-308(4)(b), C.R.S. 2024 — it will not apply when a reasonable officer should

know the warrant is invalid. *See Gall*, 30 P.3d at 150; *Gutierrez*, 222 P.3d at 941, 944. In light of the long line of case law recognizing that cell phones are "entitled to special protections from searches," *Coke*, ¶ 37, a reasonable officer should by now be well on notice that a cell phone warrant may not seek all (or even most) data on a phone simply because the owner of the phone may have committed a crime. Instead, law enforcement must take care to ensure that such warrants, like any warrant, limit the search to that specific data for which there is demonstrated probable cause.

¶ 118 I respectfully concur in the judgment affirming Rodriguez-Ortiz's judgment of conviction.