APPENDIX A

Order of the Colorado Supreme Court, Case No. 17SC864, denying petition for a writ of certiorari, dated July 30, 2018. (unpublished)

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: July 30, 2018 CASE NUMBER: 2017SC864
Certiorari to the Court of Appeals, 2015CA1074 District Court, Douglas County, 2012CR403	
Petitioner: Lonnie James Pebley, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2017SC864
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 30, 2018.

A P P E N D I X B

Opinion of the Colorado Court of Appeals, Case No. 15CA1074, affirming the judgment and sentence, announced November 9, 2017. (Not published pursuant to C.A.R. 35(e))

COLORADO COURT OF APPEALS

DATE FILED: November 9, 2017
CASE NUMBER: 2015CA1074

Court of Appeals No. 15CA1074
Douglas County District Court No. 12CR403
Honorable Paul A. King, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Lonnie James Pebley,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE DAILEY
Hawthorne and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 9, 2017

Cynthia H. Coffman, Attorney General, Brian M. Lanni, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Suzan Trinh Almony, Alternate Defense Counsel, Broomfield, Colorado, for Defendant-Appellant

¶ 1 Defendant, Lonnie James Pebley, appeals the judgment of conviction and sentence entered on jury verdicts finding him guilty of five counts of attempted first degree (after deliberation) murder, ten counts of attempted first degree (extreme indifference) murder, twelve counts of first degree assault on a peace officer, three counts of attempted manslaughter, seventeen counts of reckless endangerment, one count of criminal mischief, and one count of prohibited use of a weapon. We remand for correction of the mittimus. In all other respects, we affirm.

I. Background

¶ 2 Police set up a perimeter in the area where a man was reported to have been brandishing a gun. Pebley drove up in his car and had his hand on a pistol in the center console. When, seeing this, officers shouted "gun," Pebley drove off with officers in pursuit of him. Pulling into the driveway of his home, he got out of his car and fired several shots at the officers before retreating into his house, from where he began firing on the officers with a rifle and a shotgun from different positions in the house. Backup officers, as well as a SWAT team, arrived on the scene and were fired upon by Pebley.

¶ 3 After about thirty minutes, Pebley stopped firing at the officers. When the officers entered his house, they discovered that he had fled. From shell casings recovered at the scene, he appeared to have fired seventy-three rounds at the officers. None of the officers, however, had been hit or hurt.

¶ 4 Pebley was apprehended the next morning and brought to trial twice. His first trial ended in a mistrial when a witness testified that Pebley had a criminal history.

¶ 5 At his second trial, Pebley again asserted a defense of involuntary intoxication, based on evidence that (1) on the night in question, he was glassy eyed, acting strange, and stumbling; (2) he was taking arthritis medications (i.e., Prednisone and Plaquenil) that could have made him psychotic; and (3) he was not informed by his doctor that the arthritis medicine had the capacity to cause these severe, albeit rare, side effects or could have an adverse effect when mixed with alcohol.

¶ 6 The jury found him guilty of the forty-nine counts mentioned above. Pebley was sentenced to an aggregate term of 736 years imprisonment in the custody of the Department of Corrections.

II. Double Jeopardy

¶ 7 Pebley contends that the trial court should have dismissed his case on double jeopardy grounds because of prosecutorial misconduct that caused a mistrial in the first trial. We disagree.

A. Facts

¶ 8 On three occasions during the first trial, the prosecution asserted that defense testimony "opened the door" to the admission of evidence of Pebley's criminal history.[1] The first time was in response to Pebley's ex-wife's testimony that Pebley had acted "out of character" during the incident for which he was charged; the second was in response to a neighbor's testimony about what Pebley had said to him before the incident; and the third was in response to a defense expert's testimony about possible medical explanations why Pebley fled from (and subsequently shot at) the police.

¶ 9 The trial court found that the door had not been opened in the first instance. In the second instance, after the court cautioned the prosecutor about the likelihood that the case would be reversed on

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[1] The record reflects that Pebley had previously been convicted of several felonies: first degree burglary, in California in 1990, and second degree forgery and theft (two counts), in Colorado in 1992.

appeal if the criminal history evidence was erroneously admitted, the prosecutor withdrew his request "momentarily."

¶ 10 It was the third instance that led the court to declare a mistrial. During cross-examination of the defense expert, the prosecutor asked the expert if she was "ever provided any information by the defense about perhaps motive, why he would behave in this way?" After questioning the witness about Pebley's having been in a bad situation (i.e., facing an arrest for driving drunk, with a gun present), the prosecutor then asked the witness,

> Were you given any other information about this defendant perhaps reasons why he would not want to be stopped or interviewed by the police with regard to him having a gun or being drunk at that point?

¶ 11 The witness answered, "I believe he had a criminal history which he would not want that. So he would not want that to occur."

¶ 12 When defense counsel objected, the prosecutor asserted, out of the presence of the jury, that the defense had opened the door to the admission of Pebley's criminal history. This followed, the prosecutor asserted, because the defense expert had testified, essentially, that Pebley "had no reason to act as he did." In this

regard, the expert had testified that alcohol and Pebley's medications could cause "impulsivity" (i.e., acting without thinking) and that Pebley's behavior "would in [her] interpretation involve being impulsive."

¶ 13 The court rejected the prosecutor's position, saying the issue of impulsivity did not "open the door" to "inquiring of the defendant's history." In this regard, the court could find little, if any, sense in an argument, the effect of which was that Pebley "engaged in a firefight with law enforcement" because he had "nonviolent convictions that are twenty-five years old."

¶ 14 The court noted that it (1) had twice before denied the prosecution's attempts to put Pebley's criminal history before the jury[2] and (2) was "baffled" as to why the prosecution felt the information was necessary in light of the strength of the evidence presented and the fact that it was near the close of a nearly two-and-half-week trial. Because it did not "know how [it] could unring [the] bell," and because "the jury is going to want to know what

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[2] That was incorrect. The court had once before denied the prosecution's attempt; the other time, the court had merely cautioned the prosecution about the prosecution's desired course of action.

[Pebley's] convictions were," the court was "left with no choice" but to declare a mistrial.

¶ 15 Perhaps anticipating that the defense might move to bar a retrial on double jeopardy grounds, the prosecutor asked that the court determine whether he had elicited the evidence in "bad faith." He asserted that he only intended his question to evoke a "yes" or "no" answer from the witness and that, following the witness's expected yes or no answer, he intended to approach the bench, ask for the jury to be excused, and argue for the admission of the criminal history evidence.

¶ 16 The court found that the prosecution's explanation as to how he wanted to bring up the evidence was

> somewhat weakened by the fact that the question was asked a second time, but clearly the question as posed was a question of whether there was anything else out there. At this point in time, while I'm bothered by the circumstances here, the court cannot find there was bad faith on the part of the People. . . .
>
> So the Court will make a finding there has been no establishment of bad faith with respect to the mistrial at this time.

¶ 17 Subsequently, defense counsel filed a written motion, based on double jeopardy grounds, to dismiss the case against Pebley. Citing the double jeopardy clauses of the Federal and Colorado Constitutions, and relying on *People v. Baca*, 193 Colo. 9, 562 P.2d 411 (1977), counsel argued a retrial was barred because the "District Attorney acted in bad faith, or at least negligently, in his repeated and aggressive attempts to inform the jury of Mr. Pebley's record."

¶ 18 At a hearing, the court found that "the law [was] clear" that a case could be dismissed on double jeopardy grounds only "upon a finding by the Court that the behavior of the prosecution was done for the purpose of provoking defense into asking for a mistrial[,] thereby giving [the prosecution] a second chance at trying the defendant." Given the stage of trial — two and a half weeks in, with over a hundred exhibits admitted into evidence, during the examination of the next to last of forty-five witnesses — it was "clear to the Court that the People were not seeking to . . . place the defense in a posture of then having to ask for a mistrial in order to get a second bite at the apple." Consequently, the court denied

defense counsel's motion to dismiss, on double jeopardy grounds, the charges against Pebley.[3]

B. *Analysis*

¶ 19 Pebley contends that the trial court's ruling denied him the double jeopardy protections of our Federal and Colorado Constitutions. We are not persuaded.

1. Federal Double Jeopardy Protections

¶ 20 The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

¶ 21 "[O]ne of the principal rights embodied in the double jeopardy clause is the defendant's 'valued right to have his trial completed by a particular tribunal.'" *People v. Espinoza*, 666 P.2d 555, 558 (Colo. 1983) (quoting *United States v. Dinitz*, 424 U.S. 600, 606 (1976)). Ordinarily, a defendant's motion for mistrial functions as a waiver of that right. *Id.*; *Baca*, 193 Colo. at 12, 562 P.2d at 413.

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[3] The court did, though, dismiss the counts charging Pebley with being an habitual criminal and with possessing a weapon by a previous offender as a sanction for what the court termed "overreaching" conduct by the prosecution.

"However, when the defendant's motion for mistrial is attributable to a particular type of prosecutorial misconduct, the motion will not result in such a waiver." *People v. August*, 2016 COA 63, ¶ 14.

¶ 22 Under federal double jeopardy principles, if prosecutorial misconduct is intended to provoke a mistrial, the defendant's motion will not result in a waiver of double jeopardy protections. *See Oregon v. Kennedy*, 456 U.S. 667, 679 (1982); *August*, ¶ 15. "To bar reprosecution under this standard, the record must support a finding that the prosecutorial misconduct 'giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.'" *August*, ¶14 (quoting *Kennedy*, 456 U.S. at 679).

¶ 23 "A defendant has the burden of establishing that the prosecutor acted with the intent to provoke the defense into obtaining a mistrial." *Id.* at ¶¶ 19-20 (citing *Earnest v. Dorsey*, 87 F.3d 1123, 1130 (10th Cir. 1996)).

¶ 24 As the division in *August* recounted:

> The fact that the government blunders at trial and the blunder precipitates a successful motion for a mistrial does not bar a retrial. Yet the blunder will almost always be intentional

> — the product of a deliberate action, not of a mere slip of the tongue. . . . But unless [the prosecutor] is trying to abort the trial, his misconduct will not bar a retrial. It doesn't even matter that he knows he is acting improperly, provided that his aim is to get a conviction. The only relevant intent is intent to terminate the trial, not intent to prevail at this trial by impermissible means.

Id. at ¶ 22 (quoting *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993)).

¶ 25 The trial court's finding concerning the prosecution's motivation and intent is a finding of fact, *Kennedy*, 456 U.S. at 675, that we defer to so long as it is not tainted by legal error or otherwise clearly erroneous. *August*, ¶ 23. We review *de novo* whether the trial court correctly applied the appropriate legal standard in making its findings of fact. *Id.*

¶ 26 Here, using the correct legal standard, the trial court found that the prosecutor had not intended to provoke Pebley into requesting and obtaining a mistrial. The trial court's finding is supported by the following circumstances reflected in the record: (1) the prosecutorial misconduct occurred near the end of a long trial; (2) the prosecutor resisted Pebley's motion for mistrial; (3) the prosecutor offered a plausible justification for his action — that is,

the witness's testimony had opened the door to the admission of evidence of Pebley's criminal history; (4) there is no indication in the record that the prosecutor believed Pebley might be acquitted; and (5) there was no reason to believe that another trial might prove more favorable for the prosecution.[4] *See August*, ¶ 35 (identifying these factors as relevant to the "prosecutorial intent" determination).

¶ 27 Because the trial court's finding of "prosecutorial intent" is amply supported by the record, we cannot disturb it. Consequently, Pebley is not entitled to relief on federal double jeopardy grounds.

2. State Constitutional Double Jeopardy Protections

¶ 28 Pebley asserts that the double jeopardy clause of the Colorado Constitution[5] should be interpreted more broadly than its federal counterpart in order to bar retrials upon a showing of prosecutorial

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[4] Pebley asserts otherwise, pointing to the unavailability of his main expert to testify at the second trial. The problem with this argument is that there is nothing in the record that would have given the prosecution even a hint that this would be so. The prosecution cannot be expected to know of events that unfold only at a later date.

[5] *See* Colo. Const. art. II, § 18 ("[N]or shall any person be twice put in jeopardy for the same offense.").

misconduct resulting from improper motivation, bad faith, overreaching, or even gross negligence. We are not persuaded.

¶ 29 In *Curious Theatre Co. v. Colorado Department of Public Health & Environment*, 220 P.3d 544 (Colo. 2009), the Colorado Supreme Court referenced the methodology it uses to determine whether a state constitutional provision should be applied differently from its federal counterpart:

> In the past, we have . . . generally declined to construe the state constitution as imposing . . . greater restrictions [than its federal counterpart] in the absence of textual differences or some local circumstance or historical justification for doing so. Simply disagreeing with the United States Supreme Court about the meaning of the same or similar constitutional provisions, even though we may have the power to do so, risks undermining confidence in the judicial process and the objective interpretation of constitutional and legislative enactments.

Id. at 551.[6]

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[6] Indeed, other states have identified various factors to consider in determining whether to construe a state constitutional provision more broadly than its federal counterpart. *See, e.g., Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 662-64 (Del. 2014) (listing, as things to consider, (1) textual language, (2) legislative history, (3) preexisting state law, (4) structural differences, (5) matters of particular state interest or local concern, (6) state traditions, and (7) distinctive public attitudes); *State v. Munzanreder*, 398 P.3d 1160,

¶ 30 "[T]o make an independent argument under [a] state [constitutional] clause takes homework — in texts, in history, in alternative approaches to analysis." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 392 (1980).

¶ 31 Although, in his motion to dismiss, Pebley cited the state constitutional double jeopardy clause, he did not present an argument — either then or at the hearing on the motion — that that clause should be interpreted or applied differently from its federal counterpart. While he asserted that a standard other than that adopted in *Kennedy* ought to apply, he based that assertion on Colorado case law that predated *Kennedy* and that gave no indication of being based on state grounds independent of the federal constitution. Necessarily, then, he gave no reasons to the trial court *why* the state clause should be interpreted differently than the federal clause.

1167 (Wash. Ct. App. 2017) (listing, as things to consider, "(1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern.").

¶ 32 "Where, as here, a defendant does not make a specific objection, *with a separate argument*, under the state constitution, we must presume the defendant's objections are based on federal, not state, constitutional grounds, and limit our review accordingly." *People v. Rodriguez*, 209 P.3d 1151, 1156 (Colo. App. 2008) (emphasis added), *aff'd*, 238 P.3d 1283 (Colo. 2010).

¶ 33 There is a second reason why we will not address Pebley's state constitutional argument on appeal. In its ruling, the trial court did not refer to the state constitution. "In the absence of a statement indicating that the decision rests on state grounds, we will presume that the court relied on federal law." *People v. Holmes*, 981 P.2d 168, 170 n.3 (Colo. 1999) (quoting *People v. Hauseman*, 900 P.2d 74, 77 n.4 (Colo. 1995)) (limiting review of a suppression order to federal constitutional grounds where, although the defendant based his suppression motion on both federal and state constitutional provisions, the court's order did not specify whether it was made pursuant to federal or state constitutional provisions); *see People v. Juvenile Court*, 893 P.2d 81, 92 n.11 (Colo. 1995) ("Although the juvenile court at times made reference to the [state constitutional due process clause], it made no distinction between

federal and state constitutional criteria in its opinion. In this circumstance, we conclude that federal standards were employed."); *People v. Gee*, 33 P.3d 1252 (Colo. App. 2001).

¶ 34 Consequently, Pebley is not entitled to relief based on state constitutional double jeopardy grounds. *See Gee*, 33 P.3d at 1257 (Where court made no reference to state constitution in its ruling, "we will presume the trial court relied on federal constitutional standards, and we will not address [the state constitutional] issue.").

III. Suppression of Material Evidence

¶ 35 Pebley contends that the trial court erroneously denied his motion to dismiss or other appropriate sanctions for law enforcement officers' refusal to draw and test his blood for intoxicants, in violation of his due process rights. We disagree.

¶ 36 Here, Pebley's firefight with the police took place around midnight and he was arrested the next morning at around 6:30 or 7 a.m. At 3:08 p.m. on the day he was arrested, Pebley filled out a "Resident Grievance Report" at the jail, which said, "I need a toxicology screen of my blood to check for some form of ruffy." Two days later, jail staff responded, "we do not routinely check for this."

¶ 37 Six days later, defense counsel filed a motion for preservation of evidence, which did not mention blood tests or testing. More than a year later, defense counsel filed a motion to dismiss, arguing that jail personnel had destroyed material evidence by not testing Pebley's blood as he requested.

¶ 38 At the hearing on the motion to dismiss, defense counsel argued that Pebley "wanted testing" for Rohypnol, "which is commonly referred to as a date rape or slow down drug." According to counsel, "[e]ven lay people would understand . . . that [Rohypnol] in one's system would impact one's mental state and one's ability to form a culpable mental state."

¶ 39 The prosecution responded by noting that the jail personnel had not destroyed any evidence; they had just failed to collect it. And, the prosecution asserted, "simply asking for a blood test without telling the police why at that point doesn't give any indication that there's exculpatory evidence to be obtained."

¶ 40 Largely agreeing with (and expanding upon the reasons given by) the prosecution, the trial court denied Pebley's motion to dismiss or for other sanctions.

¶ 41 On appeal, Pebley, in large part, reiterates the arguments he made in the trial court. In one respect, he expands on them. In the trial court he was concerned with the State's failure to undertake testing that could have shown the presence of Rohypnol. On appeal he takes issue with the State's failure to capture, through blood testing, the presence of additional potential intoxicants (i.e., two arthritis medications that could have caused him to have a psychotic reaction). Because neither his request of the jail personnel nor his arguments before the trial court referenced these medications, we limit our review to what was before the trial court — namely, whether the State's failure to conduct blood testing deprived him, in violation of his due process rights, of the ability to present exculpatory evidence tending to show that he was acting under the influence of Rohypnol that night.

¶ 42 The trial court said it did not.

¶ 43 In *People v. Braunthal*, 31 P.3d 167 (Colo. 2001), the supreme court noted that (1) when it is reasonably foreseeable that evidence may be favorable to the accused, the prosecution must employ procedures to preserve such evidence; (2) the prosecution's duty to prevent the loss or destruction of evidence that may be favorable to

the defendant is not absolute, however; and (3) to establish a due process violation, a defendant must prove that (a) the evidence was destroyed by state action; (b) the evidence possessed an exculpatory value that was apparent before it was destroyed; and (c) the defendant was unable to obtain comparable evidence by other reasonably available means. *Id.* at 172-73.

¶ 44 Otherwise, the state's failure to preserve evidence that did not have apparent exculpatory value but simply might have been useful in some way to a defendant does not, absent a showing of bad faith on the part of the state, violate due process. *See People v. Wyman*, 788 P.2d 1278, 1279 (Colo. 1990); *People v. Bachofer*, 192 P.3d 454, 459 (Colo. App. 2008).

¶ 45 The trial court's findings on these issues will not be disturbed if supported by the record. *People v. Baca*, 109 P.3d 1005, 1008 (Colo. App. 2004).

¶ 46 Here, even assuming that the jail's failure to conduct the requested blood testing amounted to a destruction of evidence by

the State,[7] the trial court correctly determined that Pebley did not establish the remaining elements of a due process violation.

¶ 47 The court properly found that Pebley failed to demonstrate that the evidence possessed an exculpatory value that was "apparent" before it was "destroyed."

¶ 48 "The word 'apparent' means 'readily seen; visible; readily understood or perceived; evident; obvious.'" *State v. Brawner*, 678 S.E.2d 503, 505 (Ga. Ct. App. 2009) (quoting Webster's New World (College) Dictionary 65 (3d. ed. 1994)). "'Exculpatory' means 'supportive of a claim of innocence' or 'tending to clear from alleged fault or guilt.'" *State v. Blackwell*, 537 S.E.2d 457, 461 (Ga. Ct. App. 2000) (first quoting *Tribble v. State*, 280 S.E.2d 352, 353 (Ga. Ct. App. 1981); then quoting Black's Law Dictionary 508 (5th ed. 1979)).

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[7] *Cf. People v. Humes*, 762 P.2d 665, 667 (Colo. 1988) ("When evidence can be routinely collected and preserved by state agents, 'failure to do so is tantamount to suppression of the evidence.' There are routine procedures for collecting and preserving blood samples, yet these samples were not adequately preserved by the state or state agents to enable the defendant to conduct an independent chemical test." (quoting *People v. Greathouse*, 742 P.2d 334, 337 (Colo. 1987))).

¶ 49 Here, as the trial court noted, "[t]here's nothing that the court can utilize to determine that even if Mr. Pebley had consumed [Rohypnol,] that it would still be in his system at 3:00 p.m. the next afternoon." Even if the drug had been in his system then, the court was still unwilling to find that it had "apparent" exculpatory value. Contrary to Pebley's assertion, Rohypnol does not appear to be an "intoxicant"; it is, instead, a drug the effects of which are drowsiness, sleep, decreased anxiety, and amnesia. *See United States v. Wharton*, 320 F.3d 526, 530 n.2 (5th Cir. 2003). Because the symptoms or effects of Rohypnol are not those that were present in Pebley during the shootout, the presence of Rohypnol in Pebley's blood at 3 p.m. the next day would not have been of "apparent" (i.e., "obvious" or "evident") exculpatory value.[8] *See People v. Daley*, 97 P.3d 295, 299 (Colo. App. 2004) ("'Speculative assertions regarding the possible exculpatory effect had the evidence been available . . . are not sufficient' to show that loss of the evidence constituted a

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[8] The trial court also determined that "other means" existed to establish that Pebley "took some form of controlled substance. . . . It may be difficult, but certainly if there were witnesses present, the person who provided the controlled substance, all those matters potentially could be utilized as another alternative form of presenting the same evidence that Mr. Pebley wishes to have presented with respect to a toxicology screen of his blood."

violation of due process." (quoting *People v. Scarlett*, 985 P.2d 36, 39 (Colo. App. 1998))).

¶ 50 Because the proposed evidence did not have an "apparent" exculpatory value at the time, Pebley had to demonstrate that the jail personnel acted in bad faith to deny him access to potentially useful information or evidence. As the trial court found, Pebley failed to do so: "[T]here's been nothing presented to the Court [upon which] the Court can conclude any bad faith occurred in the denial by law enforcement of the request to have his blood examined."

¶ 51 Based on the above, Pebley failed to demonstrate that his due process rights had been violated, and thus, the trial court properly denied his motion to dismiss or for other sanctions. *See People v. Simpson*, 93 P.3d 551, 557 (Colo. App. 2003) ("Because defendant failed to establish either that the police officers acted in bad faith in failing to preserve evidence or that the evidence had apparent exculpatory value before it was destroyed, the trial court did not err in denying defendant's motion to dismiss."); *People v. Perryman*, 859 P.2d 263, 272 (Colo. App. 1993) (upholding trial court's denial of motion to dismiss where defendant "had only speculated as to evidence that might have been present at the scene and had failed

to establish that any unpreserved items at the crime scene had any exculpatory value . . . [and] to show any bad faith or intentional misconduct on the part of the prosecution or police").

IV. Exclusion of Evidence

¶ 52 Pebley asserts that the trial court abused its discretion by prohibiting him from impeaching a witness regarding a prior instance of untruthfulness that was probative of the witness's credibility. We disagree.

¶ 53 In an earlier, unrelated drunk-driving case, a county court judge found that Officer Body — one of the two officers who stopped Pebley in his car on the night of the shootout — (1) had "manufactured" grounds to stop the suspect and (2) was not "credible in light of the glaring contradiction between his testimony and what [his] car video unveils."[9]

¶ 54 The prosecution moved in limine to preclude Pebley from offering any evidence pertaining to the county court judge's findings regarding Officer Body's credibility. Defense counsel responded

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[9] "A finding that a witness is not credible is not fundamentally different from a finding that the witness lied. It often just reflects a fact finder's desire to use more gentle language." *United States v. White*, 692 F.3d 235, 249 (2d Cir. 2012).

that, under CRE 608(b), the matter was "entirely relevant and completely appropriate for cross-examination."

¶ 55 The trial court precluded questioning about the subject, finding, in connection with the first trial, that the opinion of the county court judge "was really not subject to any form of cross-examination." The court reasoned that if it allowed the questioning, it would be "opening the door . . . to an attack on collateral matters" (i.e., findings supportive of Officer Body's credibility in other cases). When confronted again with the issue before the second trial, the trial court reaffirmed its initial ruling, adding that (1) the evidence was not probative because other officers in this case could corroborate Officer Body's testimony about the night in question; and (2) bringing but "one snapshot" of Officer Body's career would be "fraught with difficulty."

¶ 56 Absent a showing of an abuse of that discretion, we will not disturb a trial court's evidentiary rulings including decisions to exclude impeachment evidence. *See Davis v. People*, 2013 CO 57, ¶ 13; *People v. Segovia* 196 P.3d 1126, 1130 (Colo. 2008). A court abuses its discretion when its ruling is (1) based on an erroneous understanding or application of the law or (2) manifestly arbitrary,

unreasonable, or unfair. *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011).

¶ 57 We perceive no abuse of the court's discretion here.

¶ 58 "Under CRE 608(b), a witness may be cross-examined about specific instances of conduct that are probative of the witness's character for truthfulness or untruthfulness," *People v. Knight*, 167 P.3d 147, 153 (Colo. App. 2006).[10] Nonetheless, "[a] trial court has discretion . . . to exclude CRE 608(b) evidence on CRE 403 grounds." *People v. Wilson*, 2014 COA 114, ¶ 34 (collecting cases).

¶ 59 Under CRE 403, "[a] trial court should 'exclude evidence that has little bearing on credibility, places undue emphasis on collateral matters, or has the potential to confuse the jury.'" *Id.* at ¶ 36 (quoting *Knight*, 167 P.3d at 153); *see also People v. Diaz*, 644

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[10] Extrinsic evidence (i.e., evidence from another source) is not, however, admissible to prove that conduct. CRE 608(b); *see People v. Pratt*, 759 P.2d 676, 689 (Colo. 1988) ("The rule is that for the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness; the qualification of the rule being that the party questioning him is bound by his answers and may not contradict him with regard thereto."(quoting *Simon v. United States*, 123 F.2d 80, 85 (4th Cir. 1941))). Practically speaking, there is one exception to this rule: extrinsic evidence is admissible to contradict a criminal defendant's testimony. *See People v. Thomas*, 2014 COA 64, ¶ 49.

P.2d 71, 72 (Colo. App. 1981) ("[W]hen impeaching a witness the relevancy of the impeaching evidence must be clear, must not raise collateral issues, and must be directed only at the witness' credibility, and not at the witness' moral character."). "A matter is considered collateral when it has no independent significance to the case and thus would not be independently provable regardless of the impeachment." *Banek v. Thomas*, 733 P.2d 1171, 1178 n.7 (Colo. 1986).

¶ 60 There is a dispute among federal courts and commentators as to whether a witness may, in the court's discretion, be cross-examined about a third party's opinion of the witness's credibility. *Compare, e.g., United States v. Dawson*, 434 F.3d 956, 959 (7th Cir. 2006) ("[T]he decision whether to allow a witness to be cross-examined about a judicial determination finding him not to be credible . . . is not barred by Rule 608(b) . . . ."), *with United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) ("Allowing such a line of questioning not only puts hearsay statements before the jury, it injects the views of a third person into the case to contradict the witness. This injection of extrinsic evidence not only runs afoul of Rule 608(b), but also sets the stage for a mini-trial regarding a

tangential issue of dubious probative value that is laden with potential undue prejudice."), *amended*, 197 F.3d 662 (3d Cir. 1999). *See also* 4 Michael H. Graham, *Handbook of Federal Evidence* § 608:4 (7th ed. 2012) (criticizing holding in *Dawson*); Stephen A. Saltzburg, *Impeaching the Witness: Prior "Bad Acts" and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("[C]ounsel should not be permitted to circumvent the no-extrinsic-evidence provision [in Rule 608(b)(1)] by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

¶ 61 There is no dispute, however, that even in those jurisdictions that would not prohibit the questioning outright, the ultimate decision to permit or prohibit the questioning lies in the court's discretion:

> It would be one thing to ask a witness whether a judge or jury had disbelieved his testimony in the past if a pattern of dishonest testimony by the witness could be shown, and quite another to ask such a question when the witness had testified frequently and been disbelieved in only one case . . . . It would be within the district judge's discretion to permit the question in the first case and to forbid it in the second.

Dawson, 434 F.3d at 959.

¶ 62 In the present case, the county court's determination that Officer Body was not credible was not based on a "pattern of dishonesty" but was, rather, case-specific. And Officer Body's credibility in the other case was a "collateral" matter in this one: it did not arise in a context similar to the present case, and it was not something that was independently provable here apart from Pebley's impeachment efforts. Because Officer Body's testimony in the present case was corroborated by another officer, and because the prosecution appeared willing, if necessary, to introduce evidence of other cases in which Officer Body's testimony had been accepted as credible, the trial court acted within its discretion in precluding Pebley's desired line of cross-examination. *See People v. Taylor*, 190 Colo. 210, 213, 545 P.2d 703, 706 (1976) (stating that the trial court is responsible for assuring "that the sideshow does not take over the circus" (quoting 1 C. McCormick, *Evidence* § 40 (2d ed. 1972))); *see also United States v. Richardson*, 793 F.3d 612, 629 (6th Cir. 2015) ("This type of collateral 'mini-trial' is precisely what Rule 608(b) is intended to prevent, and why the decision of whether or not to permit such cross-examination should be, and is,

within the district court's discretion."), *judgment vacated on other grounds, and case remanded*, 577 U.S. ___, 136 S. Ct. 1157 (2016).

V. Involuntary Intoxication Instruction

¶ 63 We also reject Pebley's contention that reversal is required because the trial court did not instruct the jury regarding the prosecution's burden of proof with respect to the affirmative defense of involuntary intoxication.

¶ 64 The evidence presented factual issues for the jury to resolve regarding whether Pebley was intoxicated during the incident and, if so, whether his intoxication was voluntary (self-induced) or not. In such a case, the Criminal Model Jury Instructions Committee has suggested as follows:

> If there is a question as to the voluntariness of the defendant's intoxication, draft an instruction explaining that: (1) the jurors are to decide, as a threshold matter, whether the defendant's intoxication was 'self-induced' (as defined in Instruction F:330); and (2) depending on the outcome of that determination, they should then apply either this instruction [i.e., H:34, on Voluntary intoxication], or Instruction H:35 (involuntary intoxication).

COLJI-Crim. H:34 cmt. 7 (2016).

¶ 65 The trial court did not draft a separate instruction to this effect. Instead, at the prosecution's request, it tacked on to the involuntary intoxication instruction the following two prefatory paragraphs:

> Prior to considering the defense of "involuntary intoxication" as described in this instruction, the jury must decide whether the intoxication, if any, was "self-induced." The definition of "self-induced intoxication" is found in instruction 14.
>
> If the jury finds the defendant's intoxication, if any, was "self-induced" the jury should disregard the remainder of this instruction. If the jury finds that the defendant's intoxication, if any, was not self-induced, the jury should apply the remainder of this instruction.

¶ 66 Defense counsel objected to the additional paragraphs on two grounds. On appeal, Pebley also objects to the additional instructions on two grounds. But the two grounds raised on appeal are not the two grounds that were raised in the trial court.

¶ 67 In the trial court, Pebley argued that the two paragraphs (1) were unnecessary, in light of the other instructions given; and (2) lessened the prosecution's burden of proof. On appeal, he asserts that the additional paragraphs (1) erroneously led the jury into

believing that it could find that he was voluntarily intoxicated or involuntarily intoxicated, but not both at the same time;[11] and (2) lessened the prosecution's burden of proof.

¶ 68 Pebley did not raise in the trial court any objection based on the purported "mutually exclusive" effect of the additional paragraphs. That "argument" or "position" was raised by the trial court and treated, by the defense, essentially as musings of the court. In this regard, defense counsel said only, "I do agree with the Court – that [the additional paragraphs are] kind of saying that it has to be one or the other. But that – again, that is the fact finder's duty to sift through all the evidence." Defense counsel went on to say that her "big concern[s]" were that the additional paragraphs were unnecessary and had the effect of lessening the prosecution's burden of proof.

¶ 69 Because the court's discussion squarely brought the "mutually exclusive" issue to the attention of defense counsel, and defense

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[11] Based on the evidence, he asserts, the jury could have found (a) he was voluntarily intoxicated with alcohol but involuntarily intoxicated with medication, (b) he was voluntarily intoxicated with a mixture of alcohol and medication, (c) the mixture of the alcohol with the medication was voluntary, or (d) the mixture of alcohol with the medication was involuntary.

counsel indicated that she was not in the least concerned about it, Pebley must be considered to have waived any objection based on that ground. *See People v. Rediger*, 2015 COA 26, ¶¶ 49-64 (defense counsel's affirmative acquiescence on instructional matter waived issue on appeal) (*cert. granted* Feb. 15, 2016); *see also United States v. Adigun*, 703 F.3d 1014, 1021 (7th Cir. 2012) ("[W]aiver involves a party's intentional (and often strategic) choice not to invoke a right."). Consequently, he is precluded from raising that issue now on appeal. *See United States v. Walton*, 255 F.3d 437, 441 (7th Cir. 2001) ("[A] waived issue is unreviewable because a valid waiver leaves no error to correct and extinguishes all appellate review of the issue."); *People v. Bondsteel*, 2015 COA 165, ¶ 28 ("Where a defendant has waived a right, there is no error or omission by the court, leaving nothing for an appellate court to review.") (*cert. granted* Oct. 31, 2016).[12]

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[12] Moreover, even if we were to consider Pebley's objection on this point merely forfeited, instead of waived, Pebley cannot demonstrate plain error. He cites no authority, nor are we aware of any, supporting the proposition that one can simultaneously be both voluntarily and involuntarily intoxicated. *See Hagos v. People*, 2012 CO 63, ¶ 14 (to qualify as plain error, an error must be both "obvious and substantial"); *People v. Pollard*, 2013 COA 31M, ¶ 40 ("Ordinarily, for an error to be this 'obvious,' the action challenged

¶ 70 That brings us to Pebley's second assertion on appeal — that is, that the additional paragraphs lessened the prosecution's burden of proof with respect to whether Pebley's intoxication was self-induced or not. Because this assertion mirrors that which was raised in the trial court, it is properly preserved for appellate review.

¶ 71 A trial court has the duty to correctly instruct the jury on matters of law. *Riley v. People*, 266 P.3d 1089, 1092-93 (Colo. 2011). We review *de novo* whether a particular jury instruction, and all of the jury instructions as a whole, adequately informed the jury of the law. *Id.*

¶ 72 "In Colorado, involuntary intoxication is an affirmative defense to a criminal charge." *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). A defense of involuntary intoxication presumes that "[a] person is not criminally responsible for his conduct if," because of intoxication that "is not self-induced," he "lacks capacity to conform his conduct to the requirements of the law." § 18-1-804(3), C.R.S. 2017.

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on appeal must contravene (1) a clear statutory command; (2) a well-settled legal principle; or ([3]) Colorado case law.") (citations omitted).

¶ 73 "To present an affirmative defense to the jury, a defendant must come forward with 'some credible evidence' to support the defense. Once the defendant meets that burden, the prosecution must disprove the affirmative defense beyond a reasonable doubt." *People v. Douglas*, 2015 COA 155, ¶ 24 (citation omitted).

¶ 74 Here, (1) the additional paragraphs in the involuntary intoxication instruction directed the jury to "disregard the remainder of the instruction" if it determined that Pebley's intoxication was self-induced and (2) the instruction did not mention the prosecution's burden of proof until after the additional paragraphs and near the end of the instruction itself. But, the People assert, the instructions as a whole properly explained and held the prosecution to its burden because (1) instruction 1 explained that the instructions had to be considered "together as a whole"; (2) instruction 4 explained that the prosecution had to prove beyond a reasonable doubt the existence of all the elements necessary to constitute the crime charged; and (3) all the pertinent elemental instructions included, as the final element of each offense, that "the defendant's conduct was not legally authorized by the affirmative defense in [the involuntary intoxication instruction]."

¶ 75 The flaw in the People's argument, however, is that the involuntary intoxication instruction in effect told the jurors not to consider its remaining contents until after it first decided whether Pebley's intoxication was self-induced or not; *and* the only part of the instructions specifically addressing the prosecution's burden of proof with respect to that issue was in the part of the instruction that need not be considered until after the jury had determined that issue. In our view, the additional paragraphs erroneously "put the cart before the horse," creating the possibility that the affirmative defense of involuntary intoxication — and the prosecution's burden with respect thereto — would not be given due consideration by the jury. *Cf. Tillman v. Massey*, 637 S.E.2d 720, 723-24 (Ga. 2006) (An instruction on the presumption of innocence that tells the jury that the presumption protects only the innocent is erroneous because it "suggests to the jurors that their assessment of the defendant's guilt is separate and distinct from the prosecution's burden to prove guilt beyond a reasonable doubt.").

¶ 76 Where, as here, the trial court erroneously instructs the jury in a manner that lessens the prosecution's burden of proof with respect to an affirmative defense, constitutional error has been

committed. *See People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) ("In Colorado, if presented evidence raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable."); *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005) ("[A] defendant's constitutional right to due process is violated by an improper lessening of the prosecution's burden of proof . . . .").

¶ 77 When, as here, a defendant has properly preserved the issue for appeal, constitutional error requires reversal unless the People prove that the error was harmless beyond a reasonable doubt. *Hagos v. People*, 2012 CO 63, ¶ 11; *see People v. Harlan*, 8 P.3d 448, 471-73 (Colo. 2000) (applying a harmless beyond a reasonable doubt test in connection with instructions that lowered prosecution's burden of proof on charge of first degree murder).

¶ 78 "An error is not harmless beyond a reasonable doubt '[i]f there is a reasonable possibility that the defendant could have been prejudiced.' Alternatively, an error is harmless beyond a reasonable doubt 'if there is no reasonable possibility that it affected the guilty

verdict.'" *People v. Stroud*, 2014 COA 58, ¶ 6 (quoting *People v. Orozco*, 210 P.3d 472, 476 (Colo. App. 2009)).

¶ 79 "A district court's failure properly to instruct the jury on an element of the offense is harmless if we can 'conclude that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."'" *United States v. Munoz*, 412 F.3d 1043, 1047 (9th Cir. 2005) (quoting *United States v. Shryock*, 342 F.3d 948, 986 (9th Cir. 2003)).

¶ 80 We conclude that reversal is not warranted. Even if, properly instructed, the jury would have found that Pebley was involuntarily intoxicated, there was no reasonable possibility that the jury would have found the other component of the involuntary intoxication defense — namely, that Pebley lacked the capacity to conform his conduct to the requirements of the law. Pebley's own toxicology expert admitted that it was "very rare" for people taking his arthritis medications to experience psychosis. And, as the People point out, the evidence was undisputed that upon initial contact with police, Pebley showed no signs of delirium; upon realizing that the police had spotted his weapon, he retreated to his home; once home, he used night vision to move from location to location to fire at officers

from different angles; he reloaded his weapons, changed his clothes, and escaped into the darkness; and jail records indicated no delusional or psychotic behavior on his part.

¶ 81 In light of the overwhelming evidence that Pebley was capable of conforming his conduct to the requirements of the law, the court's instructional error was harmless beyond a reasonable doubt. *See, e.g., People v. Delgado-Elizarras*, 131 P.3d 1110, 1112 (Colo. App. 2005) ("A constitutional error is harmless when the evidence properly received is so overwhelming that the error was harmless beyond a reasonable doubt."); *see also People v. Jensen*, 747 P.2d 1247, 1256 (Colo. 1987) (recognizing that overwhelming evidence can render a constitutionally flawed instruction harmless); *cf. Miller*, 113 P.3d at 751-52 (holding instructional error regarding involuntary intoxication defense was not plain error, in light of evidence that (1) the defendant "had sufficient presence of mind to conceal the murder weapon" and to "later locate [it] after 'waiting for the right moment' to use it" and (2) exhibited behavior "more demonstrative of calculation and design than of 'delirious,' 'unconscious' action"); *id.* at 757 (Bender, J., specially concurring)

(overwhelming nature of the evidence and curative effect of other instructions rendered error harmless beyond a reasonable doubt).

VI. Consecutive Sentencing

¶ 82 We are also not persuaded that the trial court erroneously sentenced Pebley to consecutive terms for charges of attempted first degree murder and first degree assault with respect to each of nine police officer-victims.

¶ 83 "Generally, a trial court has discretion to impose either consecutive or concurrent sentences, except when the offenses charged are supported by 'identical evidence,' in which case concurrent sentencing is required under section 18-1-408(3), C.R.S. 201[7]." *People v. Wiseman*, 2017 COA 49M, ¶ 16. A sentencing court must impose concurrent sentences "only when the evidence will support no other reasonable inference than that the convictions were based on identical evidence." *Juhl v. People*, 172 P.3d 896, 900 (Colo. 2007).

¶ 84 "To determine whether the evidence is identical, a court must decide whether the separate convictions were based on more than one distinct act and, if so, whether those acts were separated by time and place." *People v. Glasser*, 293 P.3d 68, 79 (Colo. App.

2011). The focus of the inquiry is "whether the charges result from the same act, so that the evidence of the act is identical, or from two or more acts fairly considered to be separate acts, so that the evidence is different." *Juhl*, 172 P.3d at 902; *see People v. Jurado* 30 P.3d 769, 773 (Colo. App. 2001) ("The mere fact that the offenses took place during one continuous criminal episode does not establish that they were supported by identical evidence.").

¶ 85 Here, the evidence supporting Pebley's convictions for attempted first degree murder and first degree assault with respect to the same victim(s) was not identical. Each of the police officer-victims here testified that Pebley shot at them from different locations in the house, and while they moved from place to place to take cover from the gunfire. Because the dual set of charges lodged against Pebley for each victim was supported by two or more acts separated in time and location from one another, the trial court was not required to impose concurrent sentences for those offenses. *See People v. Muckle*, 107 P.3d 380, 384 (Colo. 2005) (upholding consecutive sentences for heat of passion manslaughter and first degree assault where the defendant shot the victim once in the abdomen while the victim was sitting on the couch and then fired a

second shot, hitting the victim in the back of his arm while he was moving away); *Qureshi v. Dist. Court*, 727 P.2d 45, 47 (Colo. 1986) (upholding consecutive sentencing for first degree assault and attempted manslaughter where the defendant first attacked the victim in the kitchen by stabbing her in the abdomen and later attacked her in the bathroom by aiming for her throat or heart and hitting her hand).

VII. Correction of the Mittimus

¶ 86 Finally, Pebley asserts, the prosecution concedes, and we agree that the matter must be remanded to the trial court with directions to correct the mittimus with respect to one of Pebley's sentences.

¶ 87 At sentencing, the trial court imposed a term of thirty years imprisonment in the custody of the Department of Corrections for count 35. The mittimus, however, reflects that Pebley was sentenced to a term of thirty-five years imprisonment on this count. Because "[w]hat the judge says in sentencing a defendant takes precedence over the written judgment," *Wiseman*, ¶ 52 (quoting *United States v. Cephus*, 684 F.3d 703, 709 (7th Cir. 2012)), a remand for correction of the mittimus is required. *See People v.*

Malloy, 178 P.3d 1283, 1289 (Colo. App. 2008) (stating that when the mittimus is incorrect, the case must be remanded to allow the trial court to correct it).

VIII. Conclusion

¶ 88 We remand for correction of the mittimus, consistent with the views expressed in this opinion. In all other respects, the judgment of conviction and sentence are affirmed.

JUDGE HAWTHORNE and JUDGE WELLING concur.

Court of Appeals

STATE OF COLORADO
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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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