APPENDIX A

MUNICIPAL COURT, CITY OF WESTMINSTER, COLORADO
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Westminster, CO 80030
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PLAINTIFF: People of the State of Colorado by and through the People of the City of Westminster
vs.
DEFENDANT: JOANNA JOY BLAUCH
CASE NO.: 2013-2484-DV
COURT'S ORDER REGARDING POSTCONVICTION RELIEF PURSAUNT TO C.M.C.R. 235(c)

This matter comes before the Court to determine if Ms. Blauch is entitled to relief pursuant to C.M.C.R. 235(c). The Court, having considered the testimony and evidence, provides the following findings of fact and conclusions of law.

I. The Prosecution committed misconduct by improperly impeaching Ms. Blauch, asking jurors to put themselves in Ms. Blauch's position, and removing Mr. Nelson's credibility from the jury's sphere of consideration.

Improper Impeachment

Ms. Blauch is of the position the prosecution committed misconduct by improperly impeaching her from the motions hearing transcript without laying

the appropriate foundation as is required by CRE 613(a). During the trial, there was a contemporaneous objection to the impeachment of Ms. Blauch but it was to misstatement of the evidence, not to the method of impeachment. The issue of misstatement of the evidence (in this case an allegation the City Prosecutor was not correctly reciting from the transcript) could easily have been corrected by Ms. Enichen reading from the transcript verbatim in redirect. The Court does not view the contemporaneous objection by Ms. Enichen as preserving the impeachment issue, therefore, the review is at a plain error standard as opposed to a gross abuse of discretion resulting in prejudice and a denial of justice. To constitute plain error, misconduct must be flagrant or glaring or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. See *People v. Weinreich*, 98 P.3d 920 (Colo. App. 2004).

Before a witness may be examined for impeachment by prior inconsistent statement the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement. As a part of that foundation, the examiner may refer to the witness statement to bring to the attention of the witness any purported prior inconsistent statement. The exact language of the prior statement may be given. Where the witness

denies or does not remember making the prior statement, extrinsic evidence, such as a deposition, proving the utterance of the prior evidence is admissible. However, if a witness admits making the prior statement, additional extrinsic evidence that the prior statement was made is inadmissible. Denial or failure to remember the prior statement is a prerequisite for the introduction of extrinsic evidence to prove that the prior inconsistent statement was made. C.R.E. 613(a).

The purpose of C.R.E. 613(a) is to ensure a prosecutor is not using impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable. The prosecutor who asks the accused a question that implies the existence of prejudicial facts must be prepared to prove that fact. In this case, the prosecutor had the transcript that he believed contained the impeaching information. If a contemporaneous objection had been made to lack of foundation, the City Prosecutor would have had an opportunity to withdraw or correct his omission. Albeit, the prosecutor did not lay the proper foundation that is required by C.R.E. 613(a), that conduct does not warrant a reversal according to the plain error standard or according to an abuse of discretion standard as the People contend. A showing has not been made there is a reasonable probability that, but for counsel's lack of appropriate and timely objection, the result of the proceeding would have been different. *Strickland*; *Davis v. People*, 871 P.2d 769 (Colo.1994).

Asking the jurors to place themselves in a victim's (Ms. Blauch 's) position

This Court does not agree that Ms. Blauch alleging she is the victim in fact makes it so, and that if she were to prevail on that claim, she would be the victim and therefore the City Prosecutor's statements in closing were improper when argued:

"Would any of you put yourself in that book? I'm getting arrested, I've just been cooperative as she testified. I told them what was going on she testified and then they picked me up, they dragged- put me in the car and banged my head as they were putting me in. I don't think anyone's having a was-that-too-much-force moment. That's a clear that's-too-much-force moment. Walking to the car and getting banged into the car is physical. It is. Judge the credibility." (See Defense's Ex. W). The Court finds these statements were not asking the jurors to put themselves in a victim's position. The City Prosecutor was challenging the defendant's credibility which is certainly within their purview to do and the statements used to try to accomplish that do not constitute plain error.

Removing Mr. Nelson's credibility from the jury's sphere of consideration

The jury determines if the prosecutor has disproven the affirmative defense of self-defense beyond a reasonable doubt. The City Prosecutor's closing arguments are not evidence and the defense has an opportunity to make their own closing

arguments. In his closing argument the City Prosecutor, when speaking of Mr. Nelson's behavior, states "that's not what we're here to talk about." In context, the People were arguing a temporal break from the wrist grab by Mr. Nelson to the alleged conduct of Ms. Blauch and that the temporal break between the two took Ms. Blauch's conduct out of the self-defense justification. This assertion is not a misstatement of the law but an attempt to draw the focus on the defendant's behavior as opposed to the victim's. Prosecutorial misconduct in closing argument rarely constitutes plain error. See *People* v. *Avila,* 944 P.2d 673, 676 (Colo.App.1997) and the Court cannot conclude the prosecution's remarks here were plainly erroneous.

II. Ms. Blauch was denied her statement and constitutional right to due process due to judicial bias.

One of the allegations of judicial biasness stems from the Judge telling Ms. Blauch at the motions hearing that if she refused to answer a question posed by the People, then she is getting herself in more trouble and her credibility here goes down. Ms. Blauch waived her privilege against self-incrimination when she took the stand. By doing so, she subjected herself to cross examination by the People. The City Prosecutor was asking what he believed to be a yes or no question. Ms. Blauch was insisting on clarification of the question. The Court is permitted to direct Ms. Blauch to answer the

question. See *US.* v. *Rivas-Macias,* 537 F.3d 1271 (2008) (An individual may lose his right to claim the privilege against self-incrimination if, in a single proceeding, he voluntarily testifies about a subject and then invokes the privilege when asked to disclose the details; in such cases, the privilege is waived for the matters to which the witness testifies, and the scope of the waiver is determined by the scope of relevant cross-examination.) The way in which it was done does not evidence a display of deep-seated favoritism or antagonism that would make fair judgement impossible. It is a large leap that the "only conclusion", given Ms. Blauch's continued struggle with the question, is that the Court found her incredible. It should be remembered that Ms. Blauch was found guilty by a jury, not the Judge.

The second allegation is a comment made by the Judge at sentencing "I guess I'm a little disappointed that you're not taking responsibility for your part in this." Again, Ms. Blauch was found guilty. Accountability is something the Court is permitted to take into consideration at the time of sentencing. The Court stated "I'm going to impose essentially my standard sentence for a first time domestic violence case ... " There is nothing in the record to support the Judge treated Ms. Blauch any differently than that, or that he treated Ms. Blauch unfairly or with any bias. This Court does not find that a little disappointment for lack of accountability equates to a deep-seated favoritism or antagonism that would make fair judgment impossible. Nor does it rise to

the level of an attitude of hostility or ill will toward Ms. Blauch that would raise a reasonable question about the Court's impartiality. See *People v. Walden,* 224 P.3d 369 (Colo. App. 2009).

A third allegation is when the Court guided Mr. Nelson to label certain parts of a diagram when he was trying to depict the apartment where the charged conduct occurred. The Court is permitted to ask questions of a witness during a court or jury trial. This can be done to better flush out the testimony and assist the trier of fact. That appears to be what the Judge was trying to accomplish and this Court does not view the request from the Judge as favoritism toward Mr. Nelson. A Judge's comments in front of the jury must prejudice the Defendant to constitute deprivation of a fair trial. See *People v. Acosta,* 338 P.3d 472 (Colo. App. 2014). This Court does not find the Judge's guidance of Mr. Nelson prejudiced Ms. Blauch or rose to the level of depriving her of a fair trial.

The fourth allegation is the Court's negative feelings toward Ms. Blauch. Ms. Blauch contends this is "evidenced by the Court's own conclusion that Ms. Blauch had a part in this incident and the ordering of mental health treatment." Again, this was a jury trial and the jury found Ms. Blauch guilty. Additionally, counsel for Ms. Blauch stated (according to Exhibit Z) "I myself have-when I first met her, encouraged her to have some mental health counseling and she did." Most judges would use this

information alone to trigger a mental health evaluation and follow up with any recommended treatment. If the goal is to get the defendant the resources necessary to ensure a similar incident never occurs in the future, then a judge may be remiss to not make this order given the information provided.

III. Ms. Blauch was denied her state and federal constitutional right to effective assistance of counsel.

The standard as laid out in *Strickland v. Washington,* 466 U.S. 668 (1984): A criminal defendant is constitutionally entitled to effective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, a defendant must show the attorney's performance was deficient, and that he suffered prejudice as a result of this deficient performance.

A. Ms. Enichen failed to withdraw despite a breakdown in communication, which rendered her performance deficient.

Breakdown in Communication

Mr. Simms, who was qualified as an expert in the area of ineffective assistance of counsel (specifically deficient assistance in criminal defense), testified about the voluminous emails and other communication between Ms. Blauch and Ms. Enichen or her paralegals during the course of Ms. Enichen's representation. According to him the basis of the

communication breakdown was a lack of trust. He testified this lack of trust stemmed from Ms. Enichen sending a letter to the prosecutor without Ms. Blauch reviewing it ahead of time as she had requested.

Ms. Enichen also filed motions in the case without Ms. Blauch' s review, again as she had requested. These actions, according to Mr. Simms, were not ineffective but started the distrust between Ms. Enichen and Ms. Blauch. According to him, that distrust played a role when Ms. Enichen repeatedly tried to explain to Ms. Blauch that the domestic violence sentencing enhancers were not charges in and of themselves and would not be decided by the jury. Mr. Simms noted that although Ms. Enichen was accurate and clear about the legal standard, Ms. Blauch was not hearing Ms. Enichen due to the distrust and therefore, in his opinion, there was a total breakdown in communication.

The letter referenced by Mr. Simms that was sent by Ms. Enichen to the City Prosecutor was dated June 15, 2013 (see Exhibited AC). The defense motions referenced by Mr. Simms were filed July 18, 2013. Ms. Blauch expressed her concerns regarding the letter to the City Prosecutor in a memo to Ms. Enichen dated June 26, 2013 (see Exhibit AD). Ms. Blauch also expressed her distress about not seeing the motions in an email to Ms. Enichen dated July 28, 2013. (see Exhibit I). On August 1st, Ms. Enichen's paralegal sent an email to Ms. Blauch asking for a list of her concerns and inquiring if she still wanted Ms. Enichen to represent her (see

Exhibit M). Ms. Blauch responded in an email dated August 2, 2013 that "my phone messages indicated that I am distressed that my trust was violated ... They did not indicate that I do not wish to proceed with representation by Care [Ms. Enichen]" (see Exhibit M).

Subsequent to this period of time in their relationship, Ms. Blauch and Ms. Enichen appeared on the mend with positive communication going back and forth until they hit the next hurdle which seemed to stem from Ms. Blauch's lack of understanding of the role the domestic violence sentencing enhancer played in her case. This discussion that started around the end of September (according to the emails) was two-fold. One issue was Ms. Blauch not understanding that the domestic violence enhancers were not separate charges. The second issue was that Ms. Blauch felt she was being dismissed when Ms. Enichen wrote "Sorry Charlie" when Ms. Enichen attempted to explain the fact Ms. Blauch and the alleged victim were no longer intimate partners did not "cancel out [their] previous relationship." (See exhibit B).

These two-fold issues led to communication and relationship complications leading into trial. (See exhibits K and J). Ms. Blauch sent an email the day before trial where she expressed feeling uncomfortable but ended the email saying she would hire Ms. Enichen again, that Ms. Enichen is the best in every way and that Ms. Blauch is fully confident that Ms. Enichen will leave no stone unturned and

will win this. Ms. Enichen responded back that in light of the email and the response Ms. Enichen has to it, that she has doubts about her ability to be an effective advocate tomorrow [in trial]. She explained Ms. Blauch has upset her, she questions Ms. Blauch's motives and wrote that if her actions have made Ms. Blauch unhappy to the point where she does not trust Ms. Enichen to proceed tomorrow then she [Ms. Enichen] needs to tell the Judge.

The subsequent communication leading up to trial is not memorialized in an email, however, Ms. Enichen testified that on the morning of trial Ms. Blauch was "ready to go" and trusted Ms. Enichen based on their conversation which Ms. Enichen described included comments from Ms. Blauch like "go team, you can do it, you're the best, you're the greatest". As before in their relationship, this communication would seem to be a reunification and a rally to push forward. Although Mr. Simms believes Ms. Enichen should have put the trial Judge on notice of the communication issues, he also testified it would confuse the issue of whether there was a breakdown in communication if the defendant expresses satisfaction with the services.

Mr. Simms asserted it is for the lawyer to decide if there is a break-down in communication. Given the historical communication between Ms. Enichen and Ms. Blauch and the affirmative communication leading up to trial, Ms. Enichen decided there was not a breakdown in communication that needed to be raised. See *People v. Kelling,* 151 P.3d 650 (Colo.

App. 2006) (Good communication does not guarantee effective assistance of counsel, and bad communication does not guarantee ineffective assistance of counsel.) Mr. Simms testified he could not see where the communication issues affected the trial. He stated he has no doubt they did but he cannot opine how.

During their relationship, Ms. Enichen and Ms. Blauch had discussions filled with debates and disagreements. However, to prove a total breakdown in communication, a defendant must put forth evidence of a severe and pervasive conflict with her attorney or evidence that she had such minimal contact with the attorney that meaningful communication was not possible. See *US. v. Lott,* 310 F.3d 1231 (10th Cir. 2002). Given the totality of the circumstances the Court finds the communication between Ms. Enichen and Ms. Blauch did not rise to the level of a severe and pervasive conflict and that Ms. Enichen provided effective assistance throughout Ms. Blauch's representation.

Not prepared for trial

Mr. Simms testified Ms. Enichen was not prepared to go to trial on October 3, 2013. It is clear from the evidence before the Court that Ms. Enichen worked very hard on this case and put in many hours. It is also clear that Ms. Enichen and her paralegal had voluminous communication with Ms. Blauch. According to Ms. Blauch's testimony, it consisted of 120 email exchanges, around 20-30 phone calls, 5-10

texts and multiple office visits. This Court is not persuaded that lacking a clear theory of defense is ineffective. Often defense attorneys want to see where the prosecution is going before they pick a horse to ride. Even after defense knows the prosecution's theory, the defense will still ride multiple horses hoping something sticks with the jury. The evidence before this Court demonstrates that Ms. Enichen had a strong grasp of the legal and factual ramifications of the case, she strategized prior to and during trial, and she provided reasonably effective assistance to Ms. Blauch.

Not Filing Certain Motions at Ms. Blauch's Request

Ms. Blauch wanted certain things accomplished in her defense to include a motion for selective prosecution. Ms. Enichen did not file such a motion, to Ms. Blauch's dismay. Ms. Enichen testified that Ms. Blauch wanted Ms. Enichen to file a lot of motions and Ms. Enichen is not a puppet. She said Ms. Blauch wanted to review the motions prior to them being filed. This apparently did not happen but Ms. Enichen testified she talked about all of the motions with Ms. Blauch prior to their filing. As is indicated by Defense's exhibit H, Ms. Enichen filed six motions on Ms. Blauch' s behalf and discussed them with Ms. Enichen ahead of time to include the selective prosecution motion that Ms. Enichen elected not to file.

According to Mr. Simms's expert testimony, attorneys have their own professional judgment and

do not just do what clients want done. The principal concern with respect to allegedly unreasonable decisions of defense counsel is whether those actions undermined the reliability of the result of the proceeding. See *People v. Bergerud,* 223 P.3d 686 (Colo. 2010). This Court finds Ms. Enichen had sound strategic reasoning for filing the particular motions she did and for not filing others and these decisions did not undermine the reliability of the proceedings.

B. Ms. Enichen's performance was also deficient because of her failure to investigate, produce certain evidence at trial, and abandoning her theory of defense.

To prove the defendant was prejudiced by her attorney's failure to investigate, present certain evidence at trial, and maintain a defense, Ms. Blauch must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Strickland* and *Hagos* v. *People,* 288 P.3d 116 (Colo. 2012).

Failure to Investigate

Ms. Enichen had a duty to make reasonable investigations or to make a reasonable decision that made particular investigations unnecessary. See Strickland. Pursuant to Ms. Enichen's testimony, she spent "hours and hours and hours of investigation" on this case. She communicated with her client,

which she described as "extreme". She reviewed reports and case law. She chose not to do a scene visit because she did not see the need. She testified she did admit certain photos during trial. A defendant is entitled to pretrial investigation sufficient to reveal potential defenses and facts relevant to guilt or penalty; however, an attorney's decision not to pursue certain avenues of investigation and instead rely on other sources of information, if made in the exercise of reasonable professional judgment, does not amount to ineffective assistance. See *People v. Pendleton*, 374 P.3d 509 (Colo. App. 2015).

More specifically, Ms. Enichen was put on notice of a rape kit from a separate incident that happened close in time to the charged offense in this case. According to her testimony, Ms. Enichen's understanding of this separate incident was that on St. Patrick's Day 2013, Ms. Blauch was in Denver. She was very intoxicated and hurt to include bruising on her face. She was taken to Denver Heath, where she did not want to go. At the hospital she was restrained and a catheter had been inserted into her body involuntarily. According to Ms. Enichen's testimony, Ms. Blauch considered the insertion of the catheter as sexual assault which was why Ms. Blauch sought the rape exam.

Ms. Enichen did not think the rape kit from the exam had anything to do with the trial. She was shown photos by Ms. Blauch but expressed huge concerns exposing the jury to this separate incident.

Based upon Ms. Enichen's testimony, it is evident great thought was put into the decision not to admit the rape kit or associated photos. Ms. Enichen was concerned it would put Ms. Blauch in an unfavorable light and be very detrimental to their case. Courts are required not simply to give the attorneys the benefit of the doubt but to affirmatively entertain the range of possible reasons ... counsel may have had for proceeding as they did. See *Cullen v. Pinholster*, 563 U.S. 170 (2011). This Court finds Ms. Enichen's investigatory and strategic decisions were made after appropriate reflection and in the exercise of reasonable professional judgment.

She didn't follow up with witness Justin McMillan

When Mr. McMillan testified at the post-conviction relief hearing he stated he was made aware of Ms. Blauch's relationship with Mr. Nelson in September of 2012. Mr. McMillan had met Mr. Nelson a few times in passing, to include going out to a restaurant on one occasion. Ms. Blauch had told Mr. McMillan that Mr. Nelson had been verbally abusive to her and he was unstable in the way he treated her. According to Mr. McMillan's testimony, Ms. Blauch would say this pretty much every time she saw Mr. McMillan after having seen Mr. Nelson (approximately 5-6 times) but she would not provide much detail. She had told Mr. McMillan about an incident where Mr. Nelson got "very angry", was "yelling at her" and "intimidating toward her".

Mr. McMillan was not present at the time of the

charged conduct. He had never seen Mr. Nelson be violent toward Ms. Blauch and had no independent knowledge of the same. Mr. McMillan discussed with Ms. Blauch whether he could testify for Ms. Blauch at trial. He was not contacted by her attorney, Ms. Enichen, regarding his possible testimony. Ms. Enichen testified Ms. Blauch never brought up a prior incident of violence from Mr. Nelson, otherwise, Ms. Enichen would have explored reverse 404(b). Mr. Simms testified if Ms. Blauch had not told Ms. Enichen about a particular prior act it would alleviate the duty to investigate.

Determining whether to subpoena certain potential witnesses is a power allocated to the defense attorney. *People v. Bergerud*, 223 P.3d 686 (Colo. 2010). Given Mr. McMillan had never witnessed any violence to Ms. Blauch at the hands of Mr. Nelson and testified he had only been provided minimal details about Mr. Nelson being verbally abusive and intimidating toward Ms. Blauch, this Court finds it was professionally reasonable for Ms. Enichen to not contact Mr. McMillan or call him as a witness at trial.

Abandoning the Theory of Defense

Mr. Simms testified Ms. Enichen did not pursue self-defense at all and later testified Ms. Enichen started with self-defense then abandoned it. Mr. Simms testified going with straight credibility is not a good defense. The only viable defense was self-defense. According to him, it was what was most

effective in this case. He cites exhibit AA as Ms. Enichen abandoning her defense where Ms. Enichen said in her closing argument, "What she did is she admitted was she hit him out of frustration". Mr. Simms testified he was not present during the trial. He could not see the jury or have an appreciation if the jury was accepting the theory of self-defense.

This is a clear instance of reasonable minds and reasonable attorneys can disagree. Ms. Blauch's current attorneys indicate "Ms. Blauch's credibility was central to this case. In a "he said/she said" case, like this one, the credibility of both witnesses is the jury's primary concern."
Page 5 Petition for Post-Conviction Relief Pursuant to C.M.C.R. 235(c).

She abandoned her defense by not cross examining Mr. Nelson after he was called for rebuttal, she did not attempt to discredit him

The City Prosecutor recalled Mr. Nelson as a rebuttal witness for a limited inquiry about two topics: 1) whether or not he ordered Ms. Blauch to take off her pants and 2) if he strangled Ms. Blauch to unconsciousness on the couch. Some attorneys make a decision not to cross a particular witness because the belief is the message sent to the jury is that nothing damaging was presented in the direct, or the direct of that witness was a waste of time. Another thought is you start to lose a jury when you beat a dead horse. Mr. Nelson's answer included, "Like I said before ... ". Again, Mr. Simms was not at

the trial to observe if the City Prosecutor's rebuttal of Mr. Nelson was having any impact with the jury.

The Court must indulge strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome presumption that, under those circumstances, challenged action might be considered sound trial strategy. *Strickland v. Washington*, 466 U.S. 668 (1984). The Court does not find error or an abandonment of the defense by deciding to not conduct a cross examination of Mr. Nelson in rebuttal. Given the totality of the circumstances as known by Ms. Enichen the time, this decision could be considered sound trial strategy.

In closing Ms. Enichen said Ms. Blauch hit Mr. Nelson out of frustration and therefore the intent element was missing (switching the defense away from self-defense)

Mr. Simms opined that when Ms. Enichen said in her closing argument that Ms. Blauch hit Mr. Nelson out of frustration, this statement was an admission on behalf of Ms. Blauch. The following is what Ms. Enichen said during her closing argument:

"So, let's say for example that you think that she struck him or shoved him or kicked him or touched him. Do you think she did so with the intent to harass, annoy, or alarm him? She didn't. She didn't. *What she did is she admitted was she hit him out of frustration.* Where's my purse? That's not up there. Intent to harass, annoy, or alarm. You have to find

beyond a reasonable doubt. And frankly you also have to find that she did any of this to him, and it comes out because you don't have to find it, you can decide what to believe."

Ms. Enichen testified she made those statements because after the charged incident Ms. Blauch "blurted out" to the officer "He hit me. I hit him." The following is that officer's testimony at trial.

Trial Transcript page 209

Q: Okay. Didn't she include -- didn't you include in your report that she said that you -- she hit him and he hit her?

A: Oh, yes. Yes, I did a report actually, yes.

Q: Okay. So now that I've kind of pointed that is in your report, is that something that you remember her saying?

A: Yes, that was part when I was asking her what was going on, and she just kept saying they were both to blame, she had hit him, he had hit her so –

The officer's testimony invites a theory other than self-defense and it is a reasonable strategy for a defense attorney to attack the mens rea of the charged offenses in the event the jury accepts a theory other than self-defense. When a defendant chooses to have a lawyer manage and present his/her case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. Defense counsel is captain of the ship. See *People v. Bergerud*, 223 P.3d 686 (2010).

C. Ms. Enichen's assistance was ineffective

because of her failure to object to the prosecutorial misconduct and raise the judicial bias prior to the conviction and sentencing.

As previously stated this Court did not find there was prosecutorial misconduct nor judicial bias. Based upon those findings, Ms. Enichen was not ineffective for failing to object to prosecutorial misconduct or raise judicial bias prior to the conviction and sentencing.

Whereby, this Court finds Ms. Blauch did not show that Ms. Enichen's performance was deficient, that Ms. Enichen made errors so serious that counsel was not functioning as "counsel" guaranteed to Ms. Blauch by the Sixth Amendment, nor did Ms. Blauch show that Ms. Enichen's performance prejudiced the defense with errors that were so serious as to deprive Ms. Blauch of a fair trial, a trial whose result is reliable. Ms. Blauch may not agree with all the decisions made by Ms. Enichen, but according to this Court, Ms. Enichen exercised reasonable professional judgment and made the adversarial testing process work for Ms. Blauch.

12-6-16, Date

s/Municipal Court Judge

APPENDIX B

District Court, Adams County, Colorado
1100 Judicial Center Dr., Brighton, CO 80601

Petitioner: Joanna Blauch
Respondent: People of the State of Colorado

Case No. 2017 CV 30021
Div. C Ctrm. 506
Appeal from Westminster Municipal Court
Case No. 2013-2484-DV
Hon. Tiffany Sorice
Order Affirming Municipal Court

Joanna Blauch was convicted of harassment and obstruction of the peace officer upon a jury trial held October 3, 2013. Ms. Blauch appealed her convictions which were upheld in district court, 2013 CV 32514. Ms. Blauch sought post-conviction relief in the municipal court pursuant to C.M.C.R. 235(c). Following several hearings, post-conviction relief was denied on November 27, 2016.

This appeal is from the denial of Ms. Blauch's Rule 235(c) motion. An Opening Brief was filed November 1, 2017. An Answer Brief was filed January 19, 2018, and a Reply Brief was filed February 2, 2018. Ms. Blauch asserts that a new trial is required because at the underlying trail there was:

1. prosecutorial misconduct;
2. judicial bias; and

3. ineffective assistance of counsel.

Ms Blauch also asserts that a new C.M.C.R. 235(c) evidentiary hearing is required because at the hearing Ms. Blauch's expert was sequestered.

Legal standard – municipal court appeals C.M.C.R. 237 / C.R.Crim.P. 37

Appeals from municipal court orders are governed C.M.C.R. 237. The rule explicitly invokes C.R.Crim.P. 37 and C.R.S. § 13-6-310, which govern county court appeals.

The district court's appellate function is to review the judgment of the lower court based upon the court record. *People v. Luna*, 648 P.2d 624, 625 (Colo. 1982); C.R.Crim.P. 37. When exercising appellate review, the court may affirm, reverse, remand, or modify the lower court judgment, or order a trial de novo before the district court. *See* § 13–6–310(2); *Bovard v. People*, 99 P.3d 585, 588-89 (Colo. 2004).

When reviewing a denial of post-conviction relief, the district court "defer[s] to the postconviction court's findings of fact if supported by the record, and review[s] the conclusions of law de novo." *People v. Campos-Corona*, 343 P.3d 983, 985 (Colo. App. 2013).

"We presume the validity of the judgment of conviction and place upon [petitioner] the burden to establish his right to relief by a preponderance of the evidence." *People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996).

Prosecutorial misconduct

Ms. Blauch asserts three instances of prosecutorial

misconduct: (1) impeachment of Ms. Blauch without laying proper foundation; (2) asking jurors to put themselves in a party's position; and (3) telling jurors to ignore an element of Ms. Blauch's self-defense defense in closing arguments. Opening, p. 32.

These assertions of error are inappropriate grounds for Rule 235(c) relief. "Mere error, unless of constitutional dimension, is no grounds for post-conviction relief." *People v. Crawford*, 515 P.2d 631, 632 (Colo. 1973). *See also Walters v. People*, 441 P.2d 647, 648 (Colo. 1968) ("[T]he issue as to the admissibility of an exhibit based on an alleged lack of foundation, and not based on any constitutional ground, is not one which can form the basis for relief under 35[c].); *People v. Williams*, 736 P.2d 1229, 1230 (Colo. App. 1986) ("[petitioner] also argues that the prosecutor's remarks during cross-examination and closing argument ... constitute reversible error. Neither of these alleged errors is proper ground for post-conviction relief under Crim.P. 35(c)."); C.R.M.P. 235. Further review is denied.

An appellate court may affirm a trial court's ruling on grounds different from those employed by that court, as long as they are supported by the record. *Moody v. People*, 159 P.3d 611, 615 (Colo.2007); *People v. Aarness*, 150 P.3d 1271, 1277 (Colo.2006); *People v. Holmes*, 959 P.2d 406, 408 (Colo.1998). The decision not to grant relief on the basis of prosecutorial misconduct is affirmed.

Judicial bias

Judicial bias against a criminal defendant constitutes structural error requiring reversal. *Krutsinger v. People*, 219 P.3d 1054, 1059 n. 1 (Colo.2009) (citing *Tumey v. Ohio*, 273 U.S. 510, (1927)). To warrant reversal, however, "more than mere speculation concerning the possibility of prejudice must be demonstrated." *People v. Coria*, 937 P.2d 386, 391 (Colo.1997). The record must clearly establish bias. "The test is whether the trial judge's conduct so departed from the required impartiality as to deny the defendant a fair trial." *People v. Rodriguez*, 209 P.3d 1151, 1162 (Colo.App.2008), aff'd, 238 P.3d 1283 (Colo.2010).

"[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555-6 (1994), discussed in *People v. Dobler*, 369 P.3d 686, 691 (Colo. App. 2015)); *see also Coria, supra* ("Judicial decorum and restraint are always goals, but comments which cause disappointment, discomfort, or embarrassment to counsel in the presence of the jury, without more, rarely constitute deprivation of a fair trial.").

"A trial court has the prerogative and, sometimes, the duty to question witnesses called by a party. Such questions are not improper where the purpose is to develop more fully the truth and to clarify testimony already given." *People v. Ray*, 640 P.2d 262, 264 (Colo. App. 1981).

"Neither a judge's expression of opinions derived

from his participation in prior proceedings in a pending cause nor his rulings on issues presented in those proceedings are sufficient in themselves to demonstrate disqualifying bias or prejudice." *People v. Boehmer*, 767 P.2d 787, 790 (Colo. App. 1988), quoted in *Dobler, supra.*

Ms. Blauch identifies two occurrences of purported judicial bias.[1] The first is a statement to Ms. Blauch two months before trial during a *Miranda* hearing. During questing, the prosecution made multiple attempts to get a response from Ms. Blauch to the question "Would you agree with me that that was - - the police officers were explicitly asking you not to do that?" *Tr. 8/15/13*, p. 65:7-9.

Eventually, Ms. Blauch was asked by the prosecuting attorney, "Do you know whether they asked you not to speak to Mr. Nelson while they were trying to conduct their investigation - - do you know if they asked you the question?" *Tr. 8/15/13* p. 66: 13-17. The record reflects the following:

A I - - I cannot answer that question
Q You can't answer - -
A - - the way you're asking - -
Q - - the question?
A - - me that question. Maybe you could - -
...
THE COURT: Ms. Blauch - -
THE WITNESS: - - to clarify the question.
THE COURT: - - the answer - - the question that he asked is pretty simply you either knew or you didn't know and the - - so the answer's either yes or no. And

if you refuse to answer, then you're getting yourself in more trouble and your credibility here goes down. *Id. at 66:18-67:9.*

Ms. Blauch asserts this last statement is evidence of judicial bias. Prior to this interaction, the record indicates that Ms. Blauch had regularly asked for clarifications by interrupting counsel. Even if construed as a comment that was "critical or disapproving of, or even hostile to" Ms. Blauch it does not support a bias challenge. *See Liteky, supra.* The comment was not made at trial, Judge Basso did not "attack" Ms. Blauch's credibility, nor does the comment evidence a deep seeded bias against Ms. Blauch.

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[1] Ms. Blauch also asserts, without citation to the record, that Judge Basso "evidenced a long-held predetermination of Ms. Blauch's guilt," which "contaminated the whole proceeding. Opening, p. 41. This undeveloped argument is not addressed. *See, e.g., Marriage of Elmer*, 936 P.2d 617 (Colo. App. 1997) ("Conclusory statements that a judicial officer is biased do not establish a reasonable basis for disqualification."); *Parsons ex rel. Parsons v. Allstate Ins. Co.,* 165 P.3d 809 (Colo. App. 2006) ("[m]ere opinions or conclusions that the judge is biased are insufficient.").

Second, Ms. Blauch asserts that by asking questions of Mr. Nelson concerning a diagram of the scene during trial, the Judge Basso "encouraged the

jury to infer it was appropriate to side with Mr. Nelson." Opening, p. 41. The record does not reflect such a disposition. Prior to the offending line of questions, Mr. Nelson was asked if he could draw a diagram of his apartment. (*Tr.* 10/3/13, p. 157:8-10). The record indicates that either while drawing or after his drawing, the following exchange occurred:

[Mr. Nelson] Bedroom, kitchen area, and a living area. And then this is the place where you can walk and go down the stair, so there's a door here.

THE COURT: B for bedroom.

THE WITNESS: Yeah.

THE COURT: K for kitchen.

THE WITNESS: K for kitchen.

THE COURT: LR for living room.

THE WITNESS: LR for living room.

THE COURT: And put door or something.

THE WITNESS: All right. There's an actual door here. This is just a walkway.

THE COURT: All right.

MR. BROSTROM: Thank you, Your Honor.

(*Tr.* 10/3/13, p. 157:21-158:9).

Though it cannot be divined from the transcript whether Mr. Nelson had completed his drawing or was in the process, it appears that the markings had already been made by Mr. Nelson, and Judge Basso sought clarification of the drawing. Questions for the purpose of clarifying testimony are allowed. *Ray, supra.* This line of questioning does not constitute the deprivation of a fair trial.

Neither of these occurrences clearly establish that

the trial judge "so departed from the required impartiality as to deny the defendant a fair trial." *Rodriguez, supra.*

Ineffective assistance of trial counsel

> To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's performance was outside the wide range of professionally competent assistance; and (2) he was prejudiced by his attorney's errors. *Strickland v. Washington*, 466 U.S. 687 (1984). In order to show prejudice, he must show a reasonable probability that, but for his attorney's unprofessional errors, the outcome of the proceeding would have been different. *Davis v. People*, 871 P.2d 769 (Colo. 1994).

People v. Ardolino, 69 P.3d 73 (Colo. 2003).

> the standard is a most deferential one .... The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms', not whether it deviated from best practices or most common custom.

Harrington v. Richter, 562 U.S. 86, 88 (2011).

"[I]neffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove

prejudice." *People v. Ardolino*, 69 P.3d 73 (Colo. 2003).

"To establish prejudice, a defendant must demonstrate a reasonable probability that, *but for* counsel's ineffective assistance, the result of the proceeding would have been different." *People v. Robles*, 74 P.3d 437, 438 (Colo.App.2003) (emphasis added).

Because a defendant must show both deficient performance and prejudice, a court may resolve the claim solely on the basis that the defendant has failed in either regard. *See People v. Garcia*, 815 P.2d 937, 941 (Colo.1991). Likewise, the "court may also deny relief where the allegations of counsel's deficient performance are merely conclusory, vague or lacking in detail." *People v. Osorio*, 170 P.3d 796 (Colo. App. 2007).

Here, Ms. Blauch asserts that her trail counsel, Ms. Enichen, was ineffective because she (1) did not move to admit certain photographs at trial; (2) did not call Mr. McMillan as a witness; (3) failed to withdraw after a breakdown in communication; and (4) failed to object to prosecutorial misconduct and judicial bias.

After four separate days of testimony, where the post-conviction court heard testimony from Ms. Blauch, Mr. McMillan, Ms. Enichen, and Mr. Simms – legal expert, the Judge Sorice made detailed findings with regard to the first three assertions of ineffectiveness. With regard to the fourth assertion Judge Sorice found no error in not objecting to

prosecutorial misconduct or judicial bias because neither had occurred.

Photographs

Ms. Blauch argues that Ms. Enichen's choice not to introduce photographs from a rape kit taken in an unrelated prior event constitutes ineffective assistance. Before trial Ms. Enichen argued that allowing cross-examination, after introduction of the photographs would be prejudicial to her client, and that the prejudice outweighed the probative value of cross-examination. The Judge Basso disagreed, holding that if the photos where introduced it would open the door to questions concerning the prior event. [2]

It cannot be said Ms. Enichen's decision to not introduce photographs which when cross-examination could have been harmful to her client was "incompetence under 'prevailing

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[2] Ms. Blauch asserts that this ruling was in error; however, the issue was raised and decided in a previous appeal. (Adams County 2013CV32514, Order on Appeal, pp. 5-7). The evidentiary ruling is not "based on any constitutional ground, [it] is not one which can form the basis for relief under [Rule 235]." *Williams, supra.*; *see also Rodriguez,* 914 P.2d 249 ("Rule 35 proceedings are intended to prevent injustices after conviction and sentencing, not to provide perpetual review").

professional norms.' " *Harrington v. Richter, supra.* This strategy was well within the "wide range of professionally competent assistance." *Ardolino, supra.*

Mr. McMillan

Ms. Blauch argues that Mr. McMillan's testimony was vital to provide a foundation for preemptive self-defense. At the C.M.C.R. 235 hearing, Mr. McMillan testified that he did not have personal knowledge of incidences of violent behavior; he had not witnessed verbal abuse; and his only basis for believing that Mr. Nelson was violent was Ms. Blauch relating that information to him, and his impressions of her when she did. *See, Tr.* 06/27/16, p. 19-24.

Assuming arguendo Ms. Blauch's argument that portions of this testimony could have been admitted at trial, Mr. Simms testified there was other evidence to establish the foundation for the defense. *See, e.g., Tr.* 08/30/16, p. 129:2-13.

> "Rare are the situations in which the latitude counsel enjoys will be limited to any one technique or approach. ...Counsel is entitled to balance limited resources in accord with effective trial tactics and strategies".

Harrington vs. Richter supra. Accord Ardolino 69 P.3d at 76.

Choosing not to pursue a witness who may have only minimally helpful testimony when there were other alternatives available was not "outside the

wide range of professionally competent assistance demanded of defense counsel in criminal cases 'under prevailing professional norms.' " *Strickland*, supra.

Communications

Ms. Blauch argues that there was a breakdown in communications prior to trial that prevented effective assistance of counsel. Ms. Blauch asserts that the post-conviction court's ruling to the contrary is erroneous because (1) the court "disproportionately weigh[ed] [Ms. Enichen's] uncorroborated representations," Opening, p. 25; and (2) because it was erroneously premised on whether there was a total breakdown in communication. *Id.* at 21-22.

With respect to the first argument, the record reflects there was testimony that conflicts with the testimony cited in the reviewing court's order. However, the reviewing court was not required to conclude that a breakdown in communication occurred where there was conflicting testimony. "In a Crim. P. 35(c) proceeding, the trial court is the trier of fact and determines the weight and credibility of witness testimony." *West v. People,* 341 P.3d 520, 525 (Colo. 2015). Similarly, "the *inferences* and *conclusions* drawn from the evidence are all within the province of the trial court, whose findings will not be disturbed unless manifestly erroneous." *Bockstiegel v. Board of Cty. Com'rs of Lake Cty.,* 97 P.3d 324, 328 (Colo. App. 2004) (emphasis added). A manifest error is "[a]n error that is plain and indisputable, and that amounts to a complete

disregard of the controlling law or the credible evidence in the record." Black's Law Dictionary (10th ed. 2014). Judge Sorice's weighing testimony differently than Ms. Blauch would have desired is not manifest error.

As to the second argument, Ms. Blauch asserts that she did not need to prove a total breakdown in communications and that with the breakdown that did occur, "it was deficient performance for counsel to fail to withdraw." Opening, p. 19. The cases Ms. Blauch cites for this proposition all consider the appropriateness of appointing new counsel where there is a total breakdown of communication between a defendant and court appointed counsel.

Judge Sorice's factual findings are supported by the record. The record reflects a plethora of communications between Ms. Blauch and Ms. Enichen – at least 50 emails and other communications. *See Tr.* 08/30/16 p. 132:20-133:5. While the record also reflects that Ms. Blauch and Ms. Enichen had several disagreements, it does not reflect that Ms. Enichen was unable to have meaningful communication with Ms. Blauch. Indeed, the record reflects that Ms. Blauch had requested Ms. Enichen continue representation after disagreements occurred. *See generally, Tr.* 7/26/16 & Tr. 8/30/16.

Even assuming the difficulty in communication between Ms. Blauch and Ms. Enichen supported the first prong of ineffective assistance, Ms. Blauch's assertions of prejudice do not support post-conviction

relief. Ms. Blauch asserts that the breakdown in communication prejudiced her because "the one clear defense, self-defense, was abandoned." Motion, p. 28. [3]

It is clear Ms. Blauch disagrees with Ms. Enichen's strategy, and would have preferred counsel to emphasize a self-defense defense. This sentiment however, is insufficient to support an ineffective assistance claim. As stated in *McClendon v. People*, 481 P.2d 715 (Colo. 1971), *citing ABA Defense Standards* §4-5.2(a)

> A defendant's disagreements with his attorney over trial strategy do not establish a claim of ineffective assistance of counsel. Certain decisions ... rest with the accused ...but tactical decisions should ultimately be decided by defense counsel.

This standard was more recently articulated in *Arko v. People*, 158 P.3d 555, 558 (Colo. 2008) (citations and quotation marks omitted):

> Defense counsel stands as captain of the ship in ascertaining what evidence should be offered and what strategy should be employed in the defense of the case. ... The attorney has the authority to make tactical decisions with which the client disagrees.

Objections

Ms. Blauch argues that Ms. Enichen failed to

object to instances of prosecutorial misconduct and judicial bias. Judge Sorice rejected this argument finding there were no instances of prosecutorial misconduct or judicial bias. That rational applies here; however, assuming arguendo that the failure to object could be construed as deficient performance, Ms. Blauch has failed to establish prejudice.

The only prejudice asserted is that Ms. Blauch was subjected to less favorable standards of review on appeal. The standard for ineffective assistance is a showing that "the result *of the proceeding* would have been different." *Robles, supra.* (emphasis added). No case is cited for the proposition that prejudice may be shown from differing standards in *future* proceedings. Indeed such a standard seems contradictory to the "rule of contemporary assessment of counsel's conduct" whereby "the reasonableness of counsel's challenged conduct ... [is] viewed as of the time of counsel's conduct." *Strickland, supra* at 690.

Finally, Ms. Blauch offers no supporting evidence to show that even if the standard she argues were applied on appeal, the result of the appeals would

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[3] In one conclusory sentence, Ms. Blauch also asserts that Ms. Enichen provided "no defense." Opening, p. 28. This hyperbole is clearly contradicted by the record and Ms. Blauch's claim that Ms. Enichen pursued a defense different from the self-defense defense. It is not considered.

have been different. Instead, she asks this court and the post-conviction court to "indulged in the natural tendency to speculate as to whether a different trial strategy might have been more successful." *Maryland v. Kulbicki,* 136 S. Ct. 2, 4 (2015). Mere speculation is insufficient to affirmatively prove prejudice.

Sequestration

"A trial court has discretion under CRE 615(3) to exempt from a sequestration order any person whose presence is shown by a party to be essential to the presentation of that party's case. We will not overturn a court's decision regarding witness sequestration absent an abuse of discretion. *People v. Melendez*, 102 P.3d 315, 319 (Colo.2004)" *People v. Cohn*, 160 P.3d 336, 346 (Colo. App. 2007). *Accord, People v. Lopez*, 401 P.3d 103, 105 (Colo. App. 2016) (*cert. denied* July 31, 2017).

Mr. Simms, expert witness, was not allowed to witness Ms. Enichen's testimony during the C.M.C.R. 235 hearing. Ms. Blauch argues that a new hearing is required because Mr. Simms, as her defense expert, was an essential witness to the hearing. Rule 615 of the rules of evidence governs witness sequestration. The Rule provides that certain persons are not to be excluded, among them "a person whose presence is shown by a party to be essential to the presentation of his cause."

Ms. Blauch asserts that Mr. Simms viewing of Ms Enichen's testimony was essential because Mr.

Simms, as a defense expert, was to opine as to the reasonableness of trial counsel's decisions. The post-conviction reviewing court did not allow Mr. Simms to witness trial counsel's live testimony, noting that he could be asked hypotheticals that encompassed trial counsel's testimony. The court also noted that Mr. Simms could be provided a transcript before his testimony scheduled for a later date. *See Tr.* 7/12/16, p. 11:16-12:7.

Determination of the reasonableness of trial counsels actions in an ineffective assistance challenge is an objective standard. *Ardolino, supra; Strickland, supra.* It cannot be said that Mr. Simms witnessing trial counsel's testimony concerning her memory of and rational for trial decisions was essential to his expert opinion of whether Ms. Enichen's decisions were objectively reasonable. Mr. Simms was allowed to review a transcript of the testimony prior to his testimony. It was not essential for him to be present. Judge Sorice's decision to exclude Ms. Simms was not an abuse of discretion.

ORDER:
The Municipal Court's order denying post-conviction relief is affirmed.
Dated: February 20, 2018
BY THE COURT:
s/Edward C. Moss
District Court Judge

APPENDIX C

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203
Certiorari to the District Court, Adams County, 2017CV30021
Westminster Municipal Court, 2013-2484-DV
Petitioner: Joanna Joy Blauch, **v. Respondent:** The People of the State of Colorado, by and through the People of the City of Westminster.
Supreme Court Case No: 2018SC420
ORDER OF COURT
Upon consideration of the Petition for Writ of Certiorari to the District Court of Adams County and after review of the record, briefs, and the judgment of said District Court,
IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is,
DENIED.
BY THE COURT, EN BANC, SEPTEMBER 17, 2018.