NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT KEITH RAY, *Petitioner,*

v.

COLORADO, *Respondent.*

On Petition for Writ of Certiorari
to the Colorado Supreme Court

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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440 P.3d 412
Supreme Court of Colorado.

Robert Keith RAY, Petitioner
v.
The PEOPLE of the State of Colorado, Respondent.

Supreme Court Case No. 15SC268
|
April 8, 2019
|
Rehearing Denied May 20, 2019

Synopsis

Background: Defendant was convicted in the trial court of attempted first degree murder, first degree assault, and accessory to first degree murder. Defendant appealed. The Court of Appeals affirmed. Defendant petitioned for review.

Holdings: The Supreme Court, Coats, C.J., held that:

the trial court's jury instructions on self defense did not erroneously shift the burden of proof;

trial court erred when it allowed the jury to have unfettered access to videotape of witness's police interview in the jury room during deliberations; and

error was harmless.

Affirmed.

Gabriel, J., filed an opinion concurring in part and dissenting in part in which Hart, J., joined.

Procedural Posture(s): Appellate Review.

Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 07CA561

Attorneys and Law Firms

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Attorneys for Respondent: Philip J. Weiser, Attorney General, John T. Lee, Senior Assistant Attorney General, Denver, Colorado

En Banc

Opinion

CHIEF JUSTICE COATS delivered the Opinion of the Court.

¶1 ***413** Ray petitioned for review of the court of appeals' judgment affirming his convictions for attempted first degree murder, first degree assault, and accessory to first degree murder. As pertinent to the issues before the supreme court, the intermediate appellate court rejected Ray's claim that one of the self-defense-related instructions given by the district court implicitly shifted the burden of proof to him by improperly imposing conditions on the availability of that affirmative defense; and in the absence of any record indication that the jury later watched a recorded witness interview admitted as an exhibit at trial, the appellate court declined to address his claim that the district court abused its discretion in allowing the jury unrestricted access to that recording.

¶2 Because the language of the instruction in question did not permit the jury to reconsider the court's determination, based on the evidence at trial, that the affirmative defense of person was available to Ray, and because the jury was properly instructed concerning the People's burden to disprove that, and any, affirmative defense, the district court did not err in instructing the jury as to his assertion that he acted in defense of himself and a third person. Although error resulted from the district court's reliance on later-overruled case law permitting the jury to have unrestricted access to the exhibit in question, when the content of that exhibit is compared with the other evidence admitted at trial, the error was harmless. The judgment of the court of appeals is therefore affirmed.

I.

¶3 Robert Ray was charged with first degree murder and accessory to murder in connection with the shooting death of Gregory Vann, as well as attempted murder for trying to shoot Jeremy Green, and both first degree attempted murder and first degree assault for each of the separate shootings of Elvin Bell and Javad Marshall-Fields. He was acquitted of the murder of Vann and the attempted murder of Green but was convicted of being an accessory to the murder of Vann and of committing both attempted first degree murder and first degree assault for the shootings of Bell and Marshall-Fields. Ray was sentenced concurrently for his dual convictions of attempted murder and assault with regard to Bell and his dual convictions of attempted murder and assault with regard to Marshall-Fields, but consecutively for the crimes he committed against Bell, the crimes he committed against Marshall-Fields, and the crime he committed relative to the murder of Vann, resulting in a total sentence to the custody of the department of corrections for 108 years. [1]

[1] In a later trial not at issue here, the defendant was convicted as a complicitor for, among other crimes, the subsequent murders of Marshall-Fields and his fiancée. The attempted first degree murder convictions in the present case were used as sentence aggravators in the defendant's death sentence that resulted from the later trial. Evidence relating to these murders was not introduced at trial in the present case.

¶4 The charges all arose from events occurring at a melee at Lowry Park on July 4, 2004, and its aftermath. The evidence at trial included numerous first-hand witness accounts, a home video taken by one of the attendees, a recording of a police interview of Green made shortly after the events in question, and photographic, real, and testimonial evidence concerning the wounds of Bell and Marshall-Fields and the weapons used by Ray and Sir Mario Owens, Ray's very close friend. The defendant also testified on his own behalf.

***414** ¶5 Although there was much conflicting testimony, it was undisputed that the Lowry Park event, attended by as many as 200 people, was organized by Vann and Marshall-Fields as a musical event and barbeque, which was free and open to the public. Early in the evening, the defendant was confronted by Marshall-Fields about his behavior at the event, as a result of which interaction the defendant's wife, who was also in attendance with his sister, called Owens to come and support the defendant. Sometime later, about 9:00 p.m., as the wife and sister were attempting to drive away, they became embroiled in a confrontation with a crowd of people, which was joined by the defendant and Owens. A home video showed both men and women involved in the struggle. There was testimony that Vann was attempting to break up the fight, and Green expressly stated in the interview that he confronted the defendant about his aggressive behavior, head-butted him in the face, and heard him, at several points during the confrontation, threaten to kill everybody.

¶6 Shortly thereafter, the defendant admittedly lifted his shirt as he walked forward toward the crowd, revealing a handgun in his waistband, and the defendant's wife identified another man seen in the home video, similarly raising his shirt, as Owens. In the confrontation that ensued, Owens shot Vann in the chest at close range and once more after he fell. As Owens attempted to escape to the car being driven by the defendant, he was pursued by Bell and Marshall-Fields, both of whom were then shot several times. Although both men indicated that they initially thought they had been shot by Owens, being the only person they had seen with a gun, another witness testified that he saw the defendant calmly come around the car, put his gun under his left arm, and shoot both men repeatedly.

¶7 One nine-millimeter and two .380 caliber shell casings were found at the scene, and two .380 caliber bullets were recovered from the body of Vann, who was clearly shot by Owens. One bullet fragment that was later removed from the chest wall of Bell, whom the defendant admitted he shot, was identified as having splintered from a nine-millimeter bullet. Both of Marshall-Fields's wounds had clear entrance and exit wounds, leaving no identifiable bullets or bullet fragments. The defendant's wife testified that the defendant's stepfather disposed of both guns. No witness testified to seeing anyone other than Owens or the defendant with a weapon.

¶8 Although the defendant admitted that in the days following the shooting, he took active steps to help Owens evade capture, he also testified that he did not shoot Marshall-Fields and that although he did shoot Bell, he did so only in defense of himself and Owens. The defendant confirmed that he had a nine-millimeter semiautomatic handgun in his waistband, but he testified that he showed it only in an attempt to force the crowd back so that he could search for a chain he lost during the struggle. He also testified that he never saw Owens with a gun that night, but that he did see blood on Owens's shirt when he was being beaten by Bell and therefore believed Bell had shot Owens, causing the defendant to defensively shoot Bell. Finally, with regard to Green's statement that the defendant repeatedly threatened to kill everybody, the defendant testified simply that he did not recall doing so.

¶9 Following affirmance of his convictions by the court of appeals, the defendant petitioned this court for further review on a host of issues. We issued our writ of certiorari only with regard to the questions whether the district court's instructions erroneously shifted the burden of proof relative to the defendant's assertion of self-defense and whether the jury's having had unfettered access to the Green videotaped interview violated the defendant's federal and state constitutional rights to due process and a fair trial.

II.

¶10 The jury was instructed on the defendant's asserted affirmative defense of acting in defense of himself or a third person in four separate instructions. In addition to an instruction generally notifying the jury of and explaining the prosecution's burden of proof with regard to the elements of each offense, which included committing the other ***415** elements without the affirmative defense, the district court instructed the jury, in a separate instruction, that the evidence had raised an affirmative defense; that the prosecution had the burden to prove the defendant's guilt beyond a reasonable doubt as to that affirmative defense as well as the other elements of the crime charged; and that if after considering the evidence of the affirmative defense with the other evidence in the case the jury was not convinced beyond a reasonable doubt as to the defendant's guilt, it would be required to return a not guilty verdict. In a third instruction, the jury was then instructed as to the circumstances under which the defendant's use of physical force and deadly physical force would be justified in defense of himself or another person, including the requirement that the defendant must have had a reasonable belief that he or another person was in imminent danger of being killed or of receiving great bodily injury.

¶11 In the instruction challenged by the defendant here, numbered 25, the jury was further instructed concerning the question whether an actual belief by the defendant, if the jury were to find him to have had one, could be considered to have been supported by reasonable grounds. [2] Specifically, the defendant contends that by instructing the jury in the language, "[i]n deciding whether or not the defendant had reasonable grounds for believing," and further that the jury "should determine whether or not he

acted as a reasonable and prudent person," the court implicitly imposed conditions on even the "availability" of the defense, effectively shifting the burden to him to first prove these conditions before being entitled to have the prosecution disprove the defense beyond a reasonable doubt. Unlike our precedent upon which the defendant relies, Instruction No. 25 does not mention anything about the "availability" of the defense, much less suggest that the defendant bore a burden to prove preconditions to its availability; rather, on its face, the instruction purports to further explain the meaning of a statutory concept included in the defense itself.

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> In deciding whether or not the defendant had reasonable grounds for believing that he or another was in imminent danger of being killed or of receiving serious bodily injury, or that he or another was in imminent danger from the use of unlawful physical force, you should determine whether or not he acted as a reasonable and prudent person would have acted under like circumstances. In determining this, you should consider the totality of the circumstances, including the number of people reasonably appearing to be a threat.
>
> It is not enough that the defendant believed himself or another to be in danger, unless the facts and circumstances shown by the evidence and known by him at the time, or by him then believed to be true, are such that you can say that as a reasonable person he had grounds for that belief.

¶12 It is now well-settled that the issue of justification for intentionally or knowingly killing another person in defense of oneself or a third person is an affirmative defense, as to which the trial court is obliged to instruct the jury whenever the court determines that the defendant has presented some credible evidence on the issue and the defendant requests that the court do so. § 18-1-407(1), C.R.S. (2018); § 18-1-704(1), (2)(a), C.R.S. (2018); § 18-1-710, C.R.S. (2018); *Montoya v. People*, 2017 CO 40, ¶¶ 26–29, 394 P.3d 676, 686–88 (explaining *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) (stating that self-defense is an affirmative defense with respect to crimes requiring intent, knowledge, or willfulness)); *People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011). Once the defense has been adequately raised and presented by the court to the jury, the guilt of the defendant must be established by the prosecution beyond a reasonable doubt as to that affirmative defense, just as to the other elements of the offense against which the defendant is defending. § 18-1-407(2); *Pickering*, 276 P.3d at 555.

¶13 On several occasions in the past, we have drawn a clear distinction between the prosecution's burden to disprove an affirmative defense to the jury's satisfaction, beyond a reasonable doubt, once it has been placed at issue, and the question whether the defense has been placed at issue in the first place, finding in those cases that an instruction permitting the jury to redetermine the question of a defense's availability or applicability effectively permitted the jury to absolve the prosecution of its burden to disprove the defense and therefore its duty to ***416** prove all of the elements of the offense. *See* *People v. Janes*, 982 P.2d 300, 303–04 (Colo. 1999); *Lybarger v. People*, 807 P.2d 570, 574, 579, 581–83 (Colo. 1991). In *Lybarger*, where the jury was instructed both that it should find the defendant guilty if the affirmative defense in question was not "available" to him and that the defense would not be "available" to him if the People proved specified conditions virtually identical with the elements of the crime with which he was charged, we found that taken together these instructions not only erroneously relegated to the jury the function of determining the availability or non-availability of the affirmative defense but also effectively eliminated the prosecution's burden of proof with respect to that defense. 807 P.2d at 574, 581–82. Again, in *Janes*, which involved the virtually unique situation of the so-called "make-my-day" defense, which can operate as either a pre-trial immunity, which must be proved by the defendant, or an affirmative defense at trial, to be disproved by the prosecution, we held that instructing the jury in the language of the immunity—that the affirmative defense would not be "available" unless the jury first found the victim to have made a knowing unlawful entry—similarly relieved the prosecution of any burden to disprove the defense, until after proof of a precondition only the defendant could have an interest in proving. 982 P.2d at 303–04.

¶14 Unlike the erroneous instructions in *Lybarger* and *Janes*, Instruction No. 25 neither stated, nor even implied, anything about the availability or applicability of the defense. Rather, it expressly referenced, and embellished on a concept contained in, the immediately preceding affirmative defense instruction, which itself expressly spelled out the prosecution's burden to

disprove the defense beyond a reasonable doubt, by detailing the findings necessarily included in the conditions of the defense. To the extent the defendant suggests that the instruction's use of the phrase "whether or not" relieved the prosecution of its burden by implying an obligation of the jury to determine whether any belief actually held by the defendant was or was not reasonable prior to holding the prosecution to its burden to disprove that the defendant's conduct was justified, there was little chance the jury could have been misled by such a subtle and nuanced interpretation, especially in light of its other express instructions concerning the prosecution's burden. The jury was expressly instructed of the prosecution's burden to disprove the affirmative defense multiple times, in substantially the language of the statutes and pattern instructions, including in the very affirmative defense instruction whose terms were the subject of explanation in Instruction No. 25.

III.

¶15 Despite being refreshed with the transcript of the recording of his interview with the police, Green repeatedly asserted a lack of memory and therefore failed to answer a majority of the prosecutor's questions concerning the Lowry Park shootings. As a result, the videotaped interview was admitted into evidence as a prior inconsistent statement. Over the defendant's objection, the district court ruled that recent changes to the civil procedural rules had eliminated any limitation on exhibits being taken into the jury room during deliberations, and it ordered that the video and equipment to view it be made available to the jury. Although the cases of *Frasco v. People*, 165 P.3d 701 (Colo. 2007), and *DeBella v. People*, 233 P.3d 664 (Colo. 2010), had not yet been announced by this court, and the district court could therefore not have been aware of them, our rulings in those cases expressly overruled the precedents relied on by the district court and made clear that its ruling permitting unfettered access to Green's out-of-court interview, without any exercise of discretion on its part, was error. [3]

[3] To be clear, the error occurred when the court ruled, without considering the risk of undue prejudice, and consequently without exercising any discretion, that the jury must be allowed unfettered access to the exhibit. *See* *DeBella v. People*, 233 P.3d 664, 668 (Colo. 2010). Therefore, the question whether, or how many times, the jury watched the recorded interview could at most be relevant to the harmfulness of that erroneous ruling.

¶16 However, even a properly objected-to trial error will be disregarded as harmless if that error did not substantially ***417** influence the verdict or affect the fairness of the trial proceedings. *James v. People*, 2018 CO 72, ¶ 19, 426 P.3d 336, 341; *see also* Crim. P. 52(a). While the strength of the evidence supporting a verdict is often an important consideration in assessing harmlessness, so too is the specific nature of the error in question and the nature of the prejudice or risk of prejudice associated with that error. *People v. Roman*, 2017 CO 70, ¶ 14, 398 P.3d 134, 138; *Crider v. People*, 186 P.3d 39, 43 (Colo. 2008). As we made clear in *Frasco*, the reason trial courts have an obligation, at least where prompted to do so by a party, to exercise discretion in permitting testimonial exhibits to be viewed by deliberating juries is to guard against their being given undue weight or emphasis, much as they have an obligation with regard to jury requests to review transcripts of specific trial testimony. 165 P.3d at 703–05 (analogizing testimonial exhibits to the trial transcripts at issue in *Settle v. People*, 180 Colo. 262, 504 P.2d 680 (1972)); *see also Martinez v. People*, 2017 CO 36, ¶ 31, 393 P.3d 557, 563 ("[J]urors' unlimited access in the jury room to only one side of the story heightened the risk that they would give that side undue weight ...."). While we have never circumscribed the trial court's discretion in this regard by mandating time limitations on jury access or requiring particular limiting instructions, *see* *Frasco*, 165 P.3d at 704, we have consistently emphasized that the trial court must exercise its discretion in allowing such exhibits into the jury room, with the ultimate objective of assessing whether using the exhibit in question will aid the jury in its proper consideration of the case, and even if so, whether a party will nevertheless be unfairly prejudiced by the jury's use of it, *id.* at 704–05; *see also* *DeBella*, 233 P.3d at 668.

¶17 Because testimonial exhibits will, by definition, always have been admitted into evidence, unless they were erroneously admitted in the first place, allowing them into the jury room during deliberations will never risk exposure of the jury to evidence not properly before it. Nevertheless, the discretionary decision whether to permit the jury to view testimonial exhibits again,

and perhaps repeatedly, is not dissimilar from a trial court's discretionary determination with respect to the admissibility of cumulative testimony in the first instance: whether the incremental probative value of that cumulative testimony is substantially outweighed by the unfairly prejudicial impact of its repetition. *See* *People v. Saiz*, 32 P.3d 441, 446, 448 (Colo. 2001) (explaining that CRE 403 requires trial courts to balance the incremental probative value of evidence relative to other evidence in the case against the rule's policy reasons for exclusion of, among other things, cumulative evidence). In each case, the question for the court is whether the added jury exposure, in light of all the other evidence before it, will be more helpful or more harmful to its deliberations, *see* *Frasco*, 165 P.3d at 704–05; *Saiz*, 32 P.3d at 446, and because this discretionary choice involves a balance of helpfulness and harmfulness in the first instance, the question whether that balance was made erroneously or amounted to an abuse of discretion will necessarily be closely related to the question whether any error in admission, if it occurred, was harmless. With regard to the question of admissibility in the first instance, we have long recognized that the decision is a highly discretionary one, subject to review on appeal only on the assumption of maximum probative value and minimum unfair prejudice. *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995).

¶18 Accordingly, we have found the failure of trial courts to adequately control jury access to testimonial exhibits to be most problematic where the jury's ultimate determination would necessarily turn on its assessment of the credibility of witnesses, as distinguished from the force of real, or demonstrative, evidence. This has especially been the case where resolution of the issue in question must turn on the assessment of a witness account of the commission of the crime, by the only person other than the defendant to have purportedly witnessed the crime denied by him, which account is both contradictory of the principal defense and the only testimonial account the jury is permitted to repeatedly view. *People v. Jefferson*, 2017 CO 35, ¶ 59, 393 P.3d 493, 503–04; *DeBella*, 233 P.3d at 668–69. In *DeBella*, where the credibility of the child sexual-assault victim was severely challenged on ***418** cross-examination and the child's lack of credibility was the principal theory of the defense, we therefore found reversible the decision to allow unlimited jury access to his hour-long, out-of-court interview, which—being the only complete recounting of the assaults—we characterized as the "linchpin" of the prosecution's case. 233 P.3d at 668–69. Similarly, in *Jefferson*, where the principal theory of the defense was that the child sexual assault allegations were not credible, and having introduced no physical evidence of the crime, the prosecution's case once again rested on the alleged victim's often inconsistent allegations, we found reversible the trial court's decision to allow unlimited jury access to a DVD of the child sexual-assault victim's out-of-court interview. ¶¶ 59–60, 393 P.3d at 503–04; *cf*. *Martinez*, ¶¶ 30–33, 393 P.3d at 562–63 (distinguishing *DeBella* and *Jefferson* largely on grounds that DVDs of the victim interviews in *Martinez* did not similarly serve as linchpin of prosecution's case, where defendant did not base his defense on inconsistencies between victims' in- and out-of-court accounts and where victims' in-court testimony was sufficiently detailed that exhibits were not needed to fill gaps in that testimony).

¶19 Unlike the testimonial exhibits at issue in *DeBella* and *Jefferson*, the videotape of Green's interview made shortly after the shootings in this case was not inconsistent with anything to which he testified at trial and did not directly contradict any testimony of the defendant concerning the pertinent events. The exhibit was admitted on the basis of Green's failure to recall, a ruling not before this court, rather than any contradiction of his testimony at trial. And when confronted with Green's statement in the exhibit to the effect that he threatened to kill everyone, the defendant did not dispute making those statements but testified merely that he did not recall doing so.

¶20 Perhaps even more importantly, however, unlike in *DeBella* and *Jefferson*, the defendant's guilt in this case did not turn on the credibility of conflicting testimony of the principals, unsupported by corroborating physical evidence or the testimony of other disinterested witnesses. With regard to Bell, there was never any dispute that the defendant intentionally shot him at close range with a nine-millimeter semiautomatic handgun. The defendant merely disputed the number of shots fired and asserted that he shot Bell in defense of himself and Owens, a matter as to which Green's out-of-court statement that the defendant earlier in the evening threatened to kill everyone could have had but peripheral relevance. With regard to that defense,

the earlier, universal threat against everyone present at the event could at most suggest that the defendant had already formed an intent to kill Bell, without regard to any imminent threat from him. In stark contrast to this generalized threat, allegedly made in anger and in the midst of a confrontation against a number of people, however, the direct and primary evidence of the defendant's intent to kill came from the shooting itself and its surrounding circumstances, including the defendant's preparatory threatening gesture to the crowd, the fact of his shooting Bell multiple times at close range, the relatively weak evidence that he had reasonable grounds to believe he or Owens was being threatened with deadly force, and, most particularly, eye-witness testimony that he concealed his gun under his arm and calmly shot both Bell and Marshall-Fields during their struggle with Owens. *See People v. Dist. Court*, 779 P.2d 385, 388 (Colo. 1989) (stating that evidence of intent may include "the use of a deadly weapon, the manner in which it was used, and the existence of hostility ... between the accused and the victim" and noting that "[t]he fact finder may infer an intent to cause the natural and probable consequences of unlawful voluntary acts"); *see also People v. Opana*, 2017 CO 56, ¶ 17, 395 P.3d 757, 762 (stating that the intended, natural, and probable consequence of the defendant admittedly shooting the victim at close range was death). In consideration of this other and much more direct and powerful evidence that the defendant was not acting in self-defense, there is little likelihood that having the opportunity to see Green's pre-recorded statement more than once had a substantial impact on the jury's verdict as to Bell. *See James*, ¶ 19, 426 P.3d at 341.

¶21 With respect to the shooting of Marshall-Fields, in the absence of conclusive evidence ***419** that his wounds were inflicted with the defendant's gun, the defendant denied any responsibility for that shooting. Nevertheless, the relevance of Green's statements could at most have been equally peripheral. The universal threat to kill everyone at the event offered little motive or support for the shooting of Marshall-Fields, especially in light of the much more direct and powerful evidence that the defendant actually did so. Both Bell and Marshall-Fields were embroiled in a struggle with the defendant's friend Owens, and both were shot virtually simultaneously, with an eye-witness testifying that he personally watched the defendant conceal his gun beneath his arm and calmly shoot both men, one of whom the defendant admitted intentionally shooting in defense of his friend.

¶22 Unlike those instances in which we have found reversible error in allowing unrestricted access to testimonial exhibits, the exhibit in this case was therefore not only *not* the "linchpin" of the prosecution's case; rather, with regard to the shootings of Bell and Marshall-Fields, the crimes of which the defendant was actually convicted, it was neither substantially helpful nor harmful. While it may arguably have been peripherally meaningful with regard to the charge of being complicit with Owens in the murder of Vann, the charge of which the defendant was acquitted, the district court did not suggest that it considered the exhibit meaningful even for that purpose. Indeed, in closing argument, the prosecution relied on Green's, "I'll kill you all," statements only as evidence of the defendant's complicity in the murder of Vann. The error in this case resulted simply from the district court's reliance on existing precedent to the effect that the exhibit was to go to the jury as a matter of course, regardless of its possible impact on the jury's deliberations.

¶23 Under these circumstances, we can say with confidence that there was not even a reasonable possibility that allowing the jury to view the exhibit during deliberations adversely affected the jury's verdict, much less that it affected a substantial right of the defendant. *See* *Krutsinger v. People*, 219 P.3d 1054, 1058 (Colo. 2009) (making clear that the "reasonable possibility" standard for constitutional error is a more onerous harmless-error standard than the "substantially influence" standard for non-constitutional error).

IV.

¶24 Because the language of the instruction in question did not permit the jury to reconsider the court's determination, based on the evidence at trial, that the affirmative defense of person was available to the defendant, and because the jury was properly instructed concerning the People's burden to disprove that, and any, affirmative defense, the district court did not err in instructing the jury as to the defendant's assertion that he acted in defense of himself and a third person. Although error resulted from the district court's reliance on later-overruled case law permitting the jury to have unrestricted access to the exhibit in

question, when the content of that exhibit is compared with the other evidence admitted at trial, the error was harmless. The judgment of the court of appeals is therefore affirmed.

JUSTICE GABRIEL concurs in part and dissents in part, and JUSTICE HART joins in the concurrence in part and dissent in part.

JUSTICE GABRIEL, concurring in part and dissenting in part.

¶25 I agree with the majority's conclusion that the jury instructions at issue did not shift the burden of proof to petitioner Robert Ray. I cannot agree, however, with the majority's analysis of the issue relating to the jury's access to the video of the interview of witness Jeremy Green. Unlike the majority, I believe that this court's decisions in *DeBella v. People*, 233 P.3d 664 (Colo. 2010), and *People v. Jefferson*, 2017 CO 35, 393 P.3d 493, are dispositive and require reversal on this issue. Accordingly, I respectfully concur in Part II but dissent from Part III of the majority opinion.

I. Factual Background

¶26 After the incident that led to the charges in this case, the police interviewed ***420** Green about the events at issue. In this interview, Green repeatedly stated that Ray had shouted to the entire crowd, "I'll kill all you! I'll kill everybody!" Green stated that Ray yelled this at least six times.

¶27 When the prosecution called Green as a witness at Ray's trial, however, he testified that he had little memory of any part of the incident. Indeed, during his testimony, he stated, in words or substance, "I don't remember," well over one hundred times.

¶28 In light of this lack of memory, the prosecution proffered, and the trial court admitted into evidence, the video of Green's interview. This evidence was important because it was the only direct evidence establishing Ray's intent to kill, which was an essential element of numerous of the crimes for which the jury ultimately convicted Ray. Indeed, in its closing argument, the prosecution relied heavily on the video, which the prosecution several times noted the jury would get to see, to establish Ray's intent. By way of example, the prosecution repeatedly reminded the jury of Ray's threat to kill everyone and stated, "It was not an idle threat." The prosecution further observed that sometimes a defendant announces his intention very clearly, and it argued, based on the Green interview, "Mr. Ray intended to kill. His announcement of that fact over and over and over again was not playing around, was not a joke. It was not an idle boast." The prosecution then asked rhetorically, "Is his conscious objective[,] his goal and his desire to kill another person that night? I'll kill all you, I'll kill everybody."

¶29 At the time the court admitted the video of Green's interview, it advised the parties that it would allow further argument as to whether the video should be submitted to the jury during its deliberations. The court subsequently entertained argument, and Ray's counsel contended that if the court was going to provide the video to the jurors, then "there should be some restrictions because ... the case law is pretty clear when the jury wants to see a video ..., that's supposed to be done in the presence of the parties so they cannot keep playing it back and forth, back and forth." Counsel further asserted that the video should only be played if the jurors asked to see it because to allow the jurors to watch the video without restriction would highlight Green's testimony above that of the other witnesses.

¶30 The prosecution responded that defense counsel was incorrect about the law. In the prosecution's view, "any exhibit that was admitted goes back to the jury for their unfettered access, whether it's a statement of the defendant, whether it's a crime scene photograph, whether it's a witness statement."

¶31 The court agreed with the prosecution, citing *People v. Pahlavan*, 83 P.3d 1138 (Colo. App. 2003), and *People v. Isom*, 140 P.3d 100 (Colo. App. 2005). The court then ordered that the prosecution make available a DVD of the interview and

any associated equipment to allow the jury to watch the video. The court further asked that the prosecution provide "training" to its staff regarding the operation of the equipment and stated that the bailiff would be permitted to go into the jury room to show the jury how to operate the equipment, with the restriction that the jurors not discuss the case while the bailiff was in the room. Finally, the court explained that its procedure was to leave the equipment in a particular hallway until the jurors wanted to watch the video, at which point they would simply need to contact the bailiff. The court provided no limitation on when or how often the jurors could watch the video, nor did it instruct the jury not to afford undue weight or emphasis to the video.

¶32 Notably, no party appears to dispute that a request to the bailiff for the equipment would not have been on the record.

II. Analysis

¶33 I begin by addressing the People's argument that Ray did not preserve the argument that he is now making regarding the video of the Green interview, and I note our standard of review. I then address the applicable law and apply that law to the facts of this case.

*421 A. Preservation and Standard of Review

¶34 The People contend that Ray did not preserve the argument regarding the video of the Green interview that he is now making before us. In the division below, however, the People conceded that Ray preserved this argument, and the division so concluded. I believe that the record fully supports the People's prior concession and the division's conclusion. As noted above, the record shows that Ray made precisely the same argument that he is making here. Accordingly, in my view, he preserved this issue for our review.

¶35 Control over the use of exhibits during jury deliberations rests firmly within the trial court's discretion, and we may not substitute our own judgment for that of the trial court. *Jefferson*, ¶ 25, 393 P.3d at 498. Accordingly, we will not disturb the court's refusal to limit the use of an exhibit unless the court's decision was manifestly arbitrary, unreasonable, or unfair. *Id.* at ¶ 25, 393 P.3d at 498–99. In affording discretion to a trial court, however, an appellate court may not abdicate its responsibility to review the trial court's determinations. *Id.* at ¶ 25, 393 P.3d at 499. A trial court abuses its discretion when it misapplies the law. *Id.*

¶36 Not every abuse of discretion, however, impairs the reliability of a conviction to a degree that requires reversal. *Id.* at ¶ 26, 393 P.3d at 499. Pursuant to Crim. P. 52(a), "[a]ny error, defect, irregularity, or variance which does not affect substantial rights" is deemed harmless and "shall be disregarded." Thus, when a defendant objects to and preserves a non-constitutional trial error, the reviewing court will overturn his or her conviction only "if the error 'substantially influenced the verdict or affected the fairness of the trial proceedings.' " *Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116, 119 (quoting *Tevlin v. People,* 715 P.2d 338, 342 (Colo. 1986)).

B. Applicable Law

¶37 "In this jurisdiction we have long adhered to the rule that absent a specific exclusion of some particular class of exhibits, trial courts exercise discretionary control over jury access to trial exhibits during their deliberations." *Frasco v. People*, 165 P.3d 701, 704 (Colo. 2007).

¶38 In *DeBella*, 233 P.3d at 665–69, and *Jefferson*, ¶¶ 25–62, 393 P.3d at 498–504, we considered trial courts' exercise of such discretionary control in cases involving jury access to videotaped statements of child sexual assault victims. Because I believe that these cases should control our decision here, I discuss them in some detail.

¶39 In *DeBella*, 233 P.3d at 665, the People charged the defendant with sexual assault on a child and enticement. The evidence at trial included two videotaped interviews in which the victim had described the incidents underlying the charges to a detective and to a counselor. *Id.* Parts of the first videotape and all of the second were ultimately admitted into evidence and played for the jury in open court. *Id.* At the close of the evidence, the court announced its intent to provide the jury with a television and the second videotape, thus allowing the jury unconstrained access to the second videotape during deliberations. *Id.* at 665–66. The court decided not to provide the first videotape because it had not been redacted and thus contained portions of the interview that the court had ruled inadmissible. *Id.* at 666.

¶40 Defense counsel objected to the court's plan, contending that unless the court imposed restrictions on the jury's access to the second videotape, the jury's ability to review the videotape might result in undue prejudice to the defendant. *Id.* The court overruled this objection, relying on *People v. McKinney*, 80 P.3d 823, 829 (Colo. App. 2003), *rev'd*, 99 P.3d 1038 (Colo. 2004), in which the division had stated that pursuant to the amended C.R.C.P. 47(m), a basis no longer existed for prohibiting juror access during deliberations unless such access would be "infeasible." *DeBella*, 233 P.3d at 666 (quoting *McKinney*, 80 P.3d at 829).

¶41 The jury eventually found the defendant guilty as charged, and he appealed, arguing, as pertinent here, that the trial court had committed reversible error when it allowed the jury unfettered access to the videotape during deliberations. *See People v. DeBella*, 219 P.3d 390, 392 (Colo. App. 2009), *rev'd*, 233 P.3d 664 (Colo. 2010). Before the ***422** defendant's conviction was final, however, this court issued its decision in *Frasco*, 165 P.3d at 704, disapproving of the application of C.R.C.P. 47(m) to exhibits in criminal proceedings and clarifying that "control over the use of exhibits during jury deliberations in criminal proceedings must remain firmly within the discretion of the [trial] court." The *DeBella* division acknowledged that *Frasco* controlled but nonetheless affirmed. *DeBella*, 219 P.3d at 393–97.

¶42 We granted certiorari and reversed. *See DeBella*, 233 P.3d at 665. We began by noting that *Frasco* had not announced a new rule of law but rather had reaffirmed this court's decision in *Settle v. People*, 180 Colo. 262, 504 P.2d 680, 680–81 (1972), in which we had established that trial courts retain discretionary control over jury access to trial exhibits. *See DeBella*, 233 P.3d at 666. We thus viewed the question before us as whether the trial court had abused its discretion in providing the jury with unfettered access to the videotape during deliberations. *See id.* at 665.

¶43 In addressing this question, we observed that because the trial court felt bound by *McKinney*, "it thought its hands [were] tied with regard to the jury's access to the tape." *Id.* at 668. As a result, we concluded that the trial court had made no determination as to whether unfettered access to the videotape at issue would prejudice the defendant and, thus, the court had abused its discretion. *Id.* at 667–68.

¶44 Turning to the appropriate remedy, we determined that the trial court's abuse of discretion was not harmless and warranted reversal of the defendant's conviction. *See id.* at 668. We based this conclusion on the facts that (1) the trial court's failure to

exercise control over the jury's access to the videotape or to specify why such control was unnecessary left us with no record as to how—or even if—the jury reviewed the tape during deliberations; (2) the "nearly silent record" prevented us from determining whether the trial court had fulfilled its obligation to "observe caution" that the videotape was not used in such a manner as to create a likelihood of the jury's giving it undue weight or emphasis; (3) "the videotape was the linchpin of the prosecution's case" because it was the only complete recounting of the charged assaults; and (4) because the victim's testimony deviated from his videotaped statement, the inconsistencies "underscore[d] how central the victim's credibility was to the resolution of the trial, thus heightening the danger of providing the jury with unchaperoned access to only one side of the story." *Id.* at 668–69.

¶45 In reaching this conclusion, we rejected the People's assertion that it was speculative to presume that the jury watched the video at all, much less whether the jury gave it undue weight or emphasis. *Id.* at 668. We stated, "Where holes in the record are the result of the trial court's error and pertinent inquiries on appeal are reduced to exercises in speculation, the lack of record support should not weigh against the defendant's interests." *Id.*

¶46 We reached a similar conclusion in *Jefferson*, ¶¶ 39–62, 393 P.3d at 500–04. There, we acknowledged that the trial court understood its duty to exercise discretion in determining whether to allow the jury unfettered access to a DVD of the child victim's forensic interview. *Id.* at ¶ 41, 393 P.3d at 501. The factors that the court had considered in making this determination, however, did not support a conclusion that the court had fulfilled its duty to guard against unfair or prejudicial use of the video at issue. *Id.* This was because all three factors on which the court relied were "virtually ubiquitous" in cases like the one there before us. *Id.* at ¶ 48, 393 P.3d at 502. We thus concluded that a court that measured the potential for undue emphasis by relying on those factors was likely to find all three factors present, regardless of the risk actually presented by giving the jury unfettered access to the DVD at issue. *Id.* at ¶ 49, 393 P.3d at 502. Accordingly, we determined that the trial court had abused its discretion in granting the jury unfettered access to the DVD. *Id.* at ¶ 53, 393 P.3d at 503.

¶47 The question then became whether the error was harmless. For several reasons, we could not say that it was. *Id.* at ¶ 62, 393 P.3d at 504.

***423** ¶48 First, we observed that "[t]he nature of the DVD and the significant role that it played in [the defendant's] trial only exacerbate[d] our concerns regarding the verdict and the fairness of the proceedings." *Id.* at ¶ 59, 393 P.3d at 503. In support of this conclusion, we noted that (1) the prosecution had presented no physical evidence of the crime; (2) the case thus turned on the victim's allegations, which were at times inconsistent; and (3) because the video contained details that the victim could not remember when she testified at trial, the video likely served as the linchpin of the prosecution's case. *Id.* at ¶ 59, 393 P.3d at 503–04.

¶49 Second, we stated, "With unfettered access to the DVD during its deliberations, the jury was able to watch and re-watch [the victim] describe the abuse in a manner functionally equivalent to her live testimony, except with more—and more vivid—detail." *Id.* at ¶ 60, 393 P.3d at 504.

¶50 Finally, we noted that the prosecutor had told the jurors to review the DVD and to decide for themselves. *Id.* As a result, we believed that the jury was more likely to have placed undue emphasis on the DVD, particularly given the inconsistencies between the victim's recorded statement and her trial testimony and the dearth of physical evidence in the case. *Id.* We thus concluded that the jury's unfettered access to the DVD substantially influenced the verdict and fairness of the proceedings. *See id.*

¶51 In reaching this conclusion, we were not persuaded by the People's argument that the brevity of the jury's deliberations rendered any error harmless. *Id.* at ¶ 61, 393 P.3d at 504. We noted that the length of the jury's deliberations would have allowed the jurors to watch the DVD repeatedly had they wished to do so. *Id.* Moreover, we reiterated our statement in *DeBella* that when holes in the record (e.g., the absence of evidence regarding whether the jury actually watched the DVD) resulted from the trial court's error and pertinent inquiries on appeal were reduced to speculation, the lack of a record should not weigh against the defendant. *Id.*

C. Application

¶52 In my view, *DeBella* and *Jefferson* are dispositive in the present case.

¶53 As in *DeBella*, the trial court relied on now-discredited principles of law in allowing the jury to have unfettered access to the video at issue. In *DeBella*, 233 P.3d at 666, the trial court had relied on the court of appeals division's opinion in *McKinney*, which was subsequently disapproved in *Frasco*, 165 P.3d at 703. In the present case, the trial court similarly relied on *Pahlavan*, 83 P.3d at 1141, and *Isom*, 140 P.3d at 104, both of which had followed *McKinney*. Accordingly, for the reasons set forth in *DeBella*, 233 P.3d at 667–68, I believe that the trial court abused its discretion in affording the jury unfettered access to the videotape of the Green interview.

¶54 The question thus becomes whether this error was harmless. Unlike the majority, I cannot say that it was.

¶55 As an initial matter, I note that I am unpersuaded by the People's argument that it is unclear whether the jurors even watched the video. In my view, the record reveals that the trial court intended for the jury to have unrestricted access to the video. The prosecution argued for such unfettered access, and the court agreed with the prosecution's argument. Moreover, the court ordered the prosecution to make the video and associated equipment available for the jurors, and the court placed no restrictions on the jurors' viewing of that video. They needed only to contact the bailiff when they wanted to watch it, and the parties appear to agree that such requests would not have been on the record. And given the prosecution's repeated reminders to the jurors that they would have the opportunity to watch the video, I am unwilling to presume that they did not do so.

¶56 Even if there were a question as to whether the jurors had watched the video, however, as we stated in *DeBella* and reiterated in *Jefferson*, "[w]here holes in the record [e.g., the absence of evidence regarding whether the jury actually watched a video] are the result of the trial court's error and pertinent inquiries on appeal are reduced to exercises in speculation, the lack of record ***424** support should not weigh against the defendant's interests." *DeBella*, 233 P.3d at 668; *accord* *Jefferson*, ¶ 61, 393 P.3d at 504.

¶57 In addition to the foregoing, as was the case with the recorded interviews in *DeBella* and *Jefferson*, the video of Green's interview was important to the prosecution's case. As noted above, it appears to have been the principal evidence of Ray's intent to kill, which was an element of many of the offenses with which he was charged and of which he was convicted. Indeed, apparently acknowledging this fact, the prosecution relied heavily (and repeatedly) in closing arguments on the Green video to argue that Ray had the requisite intent.

¶58 Finally, at trial, Green had virtually no memory of the facts that he recounted in the interview, which was close in time to the incident at issue. As a result, the jury would have had to rely substantially on the Green interview to decide whether Ray had formed the requisite intent, and they were able to watch and re-watch Green describe the events at issue as if he were a witness inside the jury room, but without that testimony's being subject to cross-examination and without affording equal access to Ray's side of the story. *See* *DeBella*, 233 P.3d at 669 (noting that the inconsistencies between the victim's recorded statement and her trial testimony underscored how central the victim's credibility was in the case, "thus heightening the danger of providing the jury with unchaperoned access to only one side of the story").

¶59 For the reasons set forth in *Jefferson*, ¶ 60, 393 P.3d at 504, the jury's ability to review the video in this way presented a substantial risk that the jury would give the video undue weight, and this risk was exacerbated by the lack of any cautionary instruction from the court and by the prosecution's reminders in closing arguments that the jury would have the opportunity to watch the video in the jury room. *See also* *id.* (noting that the prosecutor's request in rebuttal closing argument that the jurors watch the DVD there at issue likely resulted in the jury's placing undue emphasis on the DVD and that, given the inconsistencies between the witness's recorded statement and her trial testimony, the likelihood of such undue emphasis substantially influenced the verdict and the fairness of the proceedings).

¶60 For these reasons, I believe that the trial court's error in allowing the jurors unfettered access to the video of the Green interview was not harmless.

III. Conclusion

¶61 In light of the foregoing, I would conclude that the trial court abused its discretion in affording the jury unfettered access to the videotape of the Green interview. Moreover, unlike the majority, I cannot say that this error was harmless. Accordingly, I would reverse the division's judgment on this point.

¶62 For these reasons, I respectfully concur in part and dissent in part from the majority opinion in this case.

I am authorized to state that JUSTICE HART joins in this concurrence in part and dissent in part.

All Citations

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COLORADO COURT OF APPEALS

DATE FILED: March 19, 2015
CASE NUMBER: 2007CA561

Court of Appeals No. 07CA0561
Arapahoe County District Court No. 04CR1805
Honorable Michael J. Spear, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Robert Keith Ray,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED

Division VII
Opinion by JUDGE J. JONES
Miller and Berger, JJ., concur

Opinion Modified and
Petition for Rehearing DENIED

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced January 22, 2015

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Defendant, Robert Keith Ray, appeals the district court's judgment entered on jury verdicts finding him guilty of two counts of attempted first degree murder, two counts of first degree assault, and accessory to first degree murder. He also appeals his sentence. We affirm.

I. Background

On July 4, 2004, defendant attended an outdoor musical event at Lowry Park in Aurora. Also attending were defendant's wife, defendant's sister, and defendant's friend, Sir Mario Owens. As the event was ending, defendant's wife and sister attempted to drive their vehicle out of the parking lot, but pedestrians leaving the event refused to move and then insulted the women. Defendant and Owens confronted the crowd; they traded insults with persons in the crowd; defendant grabbed a woman by her face; and defendant and Owens lifted their shirts to reveal pistols in their waistbands. Witness Jeremy Green told police that defendant repeatedly threatened to kill everyone. But at that point the hostilities did not escalate beyond shoving and insults.

After the initial fracas, defendant went to his SUV. Owens returned to the grassy area of the park. One of the event

organizers, Greg Vann, confronted Owens about bringing a gun and threw a punch. Owens shot and killed Vann. Green told police that Owens then pointed a gun at him but it did not fire. Witnesses said that Owens also shot into the crowd as he moved away, hitting Javad Marshall-Fields and possibly Elvin Bell. Owens ran toward defendant's SUV.

Defendant testified that Bell pursued Owens, caught him at defendant's SUV, and began beating Owens. Defendant said he tried to pull Bell away from Owens but could not, and then shot Bell once. The prosecution presented evidence that defendant shot Bell several times, and that defendant also shot Marshall-Fields. Defendant and Owens fled in defendant's vehicle.

Police officers arrested defendant a week later for unrelated traffic violations. Owens remained at large. Before defendant's trial began, Owens and an accomplice killed prosecution witness Marshall-Fields and Marshall-Fields's fiancée, Vivian Wolfe. These murders led to increased media coverage and enhanced security at defendant's trial. (But evidence of these murders was not presented at the trial.)

The People ultimately charged defendant with seven crimes against four victims: first degree murder (of Vann); first degree attempted murder (of Marshall-Fields); first degree attempted murder (of Bell); first degree attempted murder (of Green); first degree assault (of Marshall-Fields); first degree assault (of Bell); and accessory to first degree murder (of Vann).

At trial, the prosecution argued that defendant was guilty of the attacks on Vann and Green as a complicitor with Owens, and guilty of the attacks on Bell and Marshall-Fields as a complicitor or a principal. The jury acquitted defendant of the murder of Vann and the attempted murder of Green. The jury convicted defendant of the first degree attempted murders of Bell and Marshall-Fields, the first degree assaults of Bell and Marshall-Fields, and accessory to the first degree murder of Vann (based on evidence that defendant had helped Owens try to evade charges for Vann's murder). The district court subsequently sentenced him to 108 years in the custody of the Department of Corrections.

In a subsequent trial that is not the subject of this appeal, a jury convicted defendant of, among other offenses, the murders of Marshall-Fields and Wolfe. His prior convictions for attempted first

degree murder — being challenged here — together served as one of several sentence aggravators in the later trial. Defendant was sentenced to death in that case.

II. Plea for Heightened Scrutiny

At the outset, defendant argues that (1) we should regard this case as a capital case because convictions in this case served as an aggravating factor in the penalty phase of his subsequent capital case and (2) contentions of error receive increased scrutiny in capital cases. Thus, his argument continues, we should treat all of his claims of error as preserved or, in the alternative, apply a less rigid test of plain error to those contentions of error that are not preserved. This argument fails for two reasons.

First, this is not a capital case. Defendant cites no authority, and we have found none, standing for the proposition that a non-capital case should be treated as a capital case when convictions in the former serve as aggravating factors in a later capital case. Defendant relies on *Johnson v. Mississippi*, 486 U.S. 578, 584-86 (1988). But in that case the Court only overturned a death sentence because a prior-conviction aggravator had been reversed in another appeal. Neither the United States Supreme Court nor

the New York Court of Appeals (which had reversed the prior conviction, *see People v. Johnson*, 506 N.E.2d 1177 (N.Y. 1987)) held that the subsequent use of the conviction as a sentencing aggravator in a capital case changed the applicable standards of review.

Second, the Colorado Supreme Court has held that the generally applicable standards of review apply even in capital cases. Defendant's reliance on *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), in this regard is misplaced. It is true that, in *Rodriguez*, a capital case, the supreme court appears to have reviewed unpreserved contentions of error under the harmless error standard. *See id.* at 972. However, the supreme court has since made clear that unpreserved errors, even in capital cases, are subject to plain error review. *People v. Dunlap*, 975 P.2d 723, 737 (Colo. 1999) ("If the defendant lodges no objection to the evidence or procedure, then this court will consider the error only under the plain error standard even in a death penalty case."). We are bound to follow the supreme court's most recent pronouncement on the issue. *People v. Washington*, 2014 COA 41, ¶ 25.

Therefore, we will assess each of defendant's contentions of error under the standards of review applicable in any direct appeal of a criminal conviction.

III. Discussion

Defendant's contentions of error fall into eleven categories:

1. The district court erroneously instructed the jury.

2. The district court erred by not responding to a note from a deliberating juror asking to be excused.

3. The district court erroneously admitted a video recording of a witness's police interview and failed to limit the jurors' access to the video recording during deliberations.

4. The district court erred in connection with the jury selection process.

5. The prosecution engaged in numerous instances of misconduct.

6. The evidence was insufficient to support the convictions.

7. The district court erred in denying his motion to continue the trial.

8. The atmosphere of the trial was tainted by excessive security measures.

9. The district court erred by denying his motion to suppress evidence.

10. The district court erred by sentencing him to terms of incarceration that were not supported by the verdicts.

11. The cumulative effect of the errors pertaining to his convictions require reversal of the convictions.

We address defendant's contentions in the order in which he has presented them.

A. Jury Instructions

Defendant challenges: (1) the attempted murder instruction; (2) the self-defense/defense of others instructions; (3) the court's rejection of his mistake-of-fact defense and related instruction; (4) the complicity instruction; and (5) the court's response to the jury's question on the complicity instruction.

1. Attempted Murder Instruction

Defendant contends that the district court erred by giving the jury an attempted murder instruction that was erroneous in that it allowed the jury to convict him without finding that he had intended to kill after deliberation. We conclude that there was no error.

a. Relevant Instructions

Instruction Number 16, the elemental instruction for attempted first degree murder, provided, in relevant part:

> The elements of the crime of Criminal Attempt (to Commit Murder in the First Degree) are:
> 1. That the defendant,
> 2. in the State of Colorado, at or about the date and place charged,
> 3. after deliberation, and with intent
> 4. engaged in conduct constituting a substantial step toward the commission of Murder in the First Degree, as defined in Instruction No. 15,
> 5. without the affirmative defense in instruction number 24.[1]

Instruction Number 15, the elemental instruction for first degree murder, provided, in relevant part:

> The elements of the crime of Murder in the First Degree are:
>
> 1. That the defendant,
> 2. in the State of Colorado, at or about the date and place charged,
> 3. after deliberation, and with intent
>
> a. to cause the death of a person other than himself,
>
> b. caused the death of that person or of another,

[1] Instruction Number 24 explained the affirmative defense of self-defense for defendant or a complicitor, under the physical force standard.

4. without the affirmative defense in instruction number 23.[2]

Instruction Number 21 included the following definition of "substantial step": "A 'substantial step' is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense."

b. Standard of Review

We review de novo whether jury instructions accurately reflect the law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011).

A district court must instruct the jury as to each element of a charged offense. *People v. Mattas*, 645 P.2d 254, 257 (Colo. 1982). A court commits constitutional trial error when it misinforms the jury on an element of an offense. *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001). However, an omission or erroneous description of the required mens rea does not render an instruction constitutionally deficient when the instructions considered as a whole clearly

[2] Instruction Number 23 explained the affirmative defense of self-defense for Sir Mario Owens, under the deadly force standard.

instructed the jury regarding the element. *People v. Petschow*, 119 P.3d 495, 499 (Colo. App. 2004); *see also Mattas*, 645 P.2d at 258.[3]

c. Analysis

Under section 18-2-101(1), C.R.S. 2014, a conviction for criminal attempt requires a jury to find that the accused acted "with the kind of culpability otherwise required for commission of an offense" and "engage[d] in conduct constituting a substantial step toward the commission of the offense." Thus, where the defendant is charged with attempted first degree murder after deliberation, the mens rea element requires proof of the intent to commit first degree murder. *People v. Beatty*, 80 P.3d 847, 851 (Colo. App. 2003). A conviction for first degree murder after deliberation requires a finding that the defendant acted after deliberation and with the intent to kill the victim. § 18-3-102(1)(a), C.R.S. 2014.

Several Colorado cases have discussed instructional language for an attempt charge which could be read to apply the mens rea element to the commission of a substantial step but not explicitly to the decision to kill. *See Gann v. People*, 736 P.2d 37, 39 (Colo.

[3] The parties dispute whether defendant preserved this contention of error. We need not resolve that dispute because we conclude that there was no error.

1987); *Petschow*, 119 P.3d at 500-02; *Beatty*, 80 P.3d at 851; *People v. Caldwell*, 43 P.3d 663, 672 (Colo. App. 2001).

In *Gann*, the supreme court held that an attempt instruction was erroneous when viewed in isolation because it did not include the required mens rea. 736 P.2d at 39 ("We have consistently stated that the preferable practice is to include the *mens rea* element of an offense in the instruction defining the offense."). But the court concluded that the omission was not plain error because the instructions considered as a whole made clear the mens rea required for conviction. *Id.*

Several divisions of this court have also concluded that similar instructional deficiencies did not constitute reversible error when considered in light of the instructions as a whole. As explained in *Petschow*:

> Three divisions of this court have concluded that erroneous instructions that stated, as here, that the jury was required to find that the defendant "intentionally" engaged in conduct constituting a substantial step toward the commission of the completed crime, when read and considered in their entirety together with the instructions on the elements of the completed offense, clearly instructed the jury regarding the required mens rea.

Petschow, 119 P.3d at 501 (citing *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002); and *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001)).

Applying the reasoning of these cases, we conclude that, although the better practice would have been to include the mens rea for first degree murder in the attempt instruction, there was no error because the instructions as a whole adequately informed the jury of what it was required to consider and find. *See Riley*, 266 P.3d at 1094-95 (when instructions, considered together, accurately state the law applicable to a particular issue, there is no error).

The attempted murder instruction referred the jury to the murder instruction, stating that defendant must have "engaged in conduct constituting a substantial step toward the commission of Murder in the First Degree, as defined in Instruction No. 15." The murder instruction, in turn, made clear that the required mens rea for conviction was that defendant must have acted "after deliberation, and with intent . . . to cause the death of a person other than himself." Because the required mens rea for the attempt

offense was made clear to the jurors, the instructions were not constitutionally deficient. *See Mattas*, 645 P.2d at 257-58.[4]

2. Self-Defense/Defense of Others Instructions

Defendant contends that the self-defense/defense of others instructions were erroneous for eight reasons: (1) the reasonable belief instruction impermissibly shifted the burden to defendant to prove reasonableness of belief and conduct; (2) the reasonable belief instruction used an objective standard for reasonableness; (3) the instructions failed to adequately define use-of-force concepts; (4) the instructions failed to explain the relationship between self-defense and complicity; (5) the instructions confused defendant's affirmative defense as to the attempted murders of Marshall-Fields and Bell with Owens's affirmative defense as to the killing of Vann; (6) the court improperly modified defendant's tendered theory-of-defense instruction; (7) the affirmative-defense instruction lacked direction on the burden of proof; and (8) the instructions did not

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[4] Defendant's opening brief also states that the attempted murder instruction "merged the 'two distinct' elements of intent-to-kill and after-deliberation." But it does not develop the issue, and so we do not address it. *People v. Newmiller*, 2014 COA 84, ¶ 68; *People v. Venzor*, 121 P.3d 260, 264 (Colo. App. 2005) ("[W]e decline to review those issues, inasmuch as they are presented to us only in a perfunctory or conclusory manner.").

explain Colorado's no-retreat doctrine in light of the prosecution's argument that defendant should have retreated. We find no error.

a. Relevant Instructions

Several instructions told the jurors how to evaluate defendant's claimed affirmative defense and the People's complicity theory.

Instruction Number 22

> The evidence in this case has raised an affirmative defense.
>
> The prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged.
>
> After considering the evidence concerning the affirmative defense with all the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a not guilty verdict.

Instruction Number 23

> It is an affirmative defense to the crime of Murder in the First Degree that Sir Mario Owens used "deadly physical force" upon another person:
>
> 1. in order to defend himself or a third person from what he reasonable believed to be the use or imminent use of unlawful physical force by the other person, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose, and

3. he reasonably believed a lesser degree of force was inadequate, and

4. he had reasonable grounds to believe and did believe that he or another person was in imminent danger of being killed or of receiving serious bodily injury.

"Deadly physical force" means force, the intended, natural, and probable consequence of which, is to produce death, and which does in fact, produce death.

Instruction Number 24

It is an affirmative defense to the crimes of Criminal Attempt (to Commit Murder in the First Degree), its lesser included offense of Criminal Attempt (to Commit Murder in the Second Degree) and Assault in the First Degree, that the defendant or a complicitor used physical force upon another person:

1. in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose.

Instruction Number 25

In deciding whether or not the defendant had reasonable grounds for believing that he or another was in imminent danger of being killed or of receiving serious bodily injury, or that he or another was in imminent danger from the use of unlawful physical force, you

should determine whether or not he acted as a reasonable and prudent person would have acted under like circumstances. In determining this, you should consider the totality of the circumstances, including the number of people reasonably appearing to be a threat.

It is not enough that the defendant believed himself or another to be in danger, unless the facts and circumstances shown by the evidence and known by him at the time, or by him then believed to be true, are such that you can say that as a reasonable person he had grounds for that belief.

Whether the danger is actual or only apparent, actual danger is not necessary in order to justify the defendant acting in self-defense or defense of others.

Instruction Number 26

Mr. Ray can be found guilty of the acts committed by Mr. Owens by the theory of complicity only if it is proven beyond a reasonable doubt that Mr. Ray knew Mr. Owens intended to commit the crime. In other words, if you find Mr. Owens committed the crime of Murder in the First Degree, it must be proven beyond a reasonable doubt that Mr. Ray knew Mr. Owens intended to commit the crime of Murder in the First Degree. For Mr. Ray to be held accountable for Mr. Owens' acts, it must be proven beyond a reasonable doubt that Mr. Ray intended to promote or facilitate the crime that Mr. Owens actually committed. In the scenario above Mr. Ray would have to intend to promote or facilitate Mr. Owens in committing Murder in the First Degree. Mr. Ray is also not guilty of the acts of

> Mr. Owens if Mr. Owens[’] acts are justified under the law. The government must also prove beyond a reasonable doubt that Mr. Ray did aid, abet, advise or encourage Mr. Owens in the commission or planning of the crime.
>
> Mr. Ray may also act or rely upon apparent necessity in defending Mr. Owens or himself in shooting Mr. Bell. Mr. Ray may reasonably rely on appearances in defending Mr. Owens or himself even if those appearances turn out not to be true.

b. Standard of Review

A trial court must correctly instruct the jury on all matters of law applicable to the case. *Riley*, 266 P.3d at 1092; *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). We review jury instructions de novo to determine whether all of the instructions, read as a whole, adequately informed the jury of the governing law. *Riley*, 266 P.3d at 1092-93; *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). Instructions that accurately track the language of applicable statutes and pattern instructions are ordinarily sufficient. *People v. Gallegos*, 260 P.3d 15, 26 (Colo. App. 2010).

We review for an abuse of discretion whether a particular instruction should have been given to the jury, and will not disturb the district court’s decision absent a showing that it was manifestly

arbitrary, unreasonable, or unfair. *People v. Lane*, 2014 COA 48, ¶ 7.

c. Analysis

i. Shifting the Burden of Proof

Instruction Number 25 on reasonable belief did not impermissibly shift the burden to prove reasonableness to the defense. Defendant focuses on language instructing jurors to decide "whether or not" he acted on a reasonable belief of imminent danger and "whether or not" he acted as a reasonable person would have acted under like circumstances. He argues that this language put the onus on him to prove reasonableness. However, Instruction Number 22 informed the jurors that the "prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative defense." Telling jurors that they had to decide whether or not the prosecution had disproved the affirmative defense did not shift that burden; it merely informed jurors of their task.

Contrary to defendant's argument, the language "as to the affirmative defense" was not so vague that it lessened the burden of proof. The instruction tracked the language in section 18-1-407(2),

C.R.S. 2014 ("If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue . . . .").

Likewise, the instruction did not erroneously indicate that conduct was subject to the reasonableness inquiry. Under section 18-1-704(1), C.R.S. 2014, a "person is justified in using physical force" in self-defense when he uses "a degree of force which he reasonably believes to be necessary for that purpose." The statute necessarily requires jurors to consider whether the defendant reacted to the apparent threat with a reasonable degree of force, and therefore to consider the reasonableness of his conduct.

Defendant relies on *Kaufman v. People*, 202 P.3d 542 (Colo. 2009), for the proposition that his conduct should not have been considered. But, in *Kaufman*, the court said the opposite — that the defendant's perceptions and actions should be considered. *See id.* at 551 (holding that jury instruction was plain error because it incorrectly defined second degree assault).

Relying on *People v. Janes*, 982 P.2d 300 (Colo. 1999), defendant argues that the instructions forced him to prove a certain condition before his affirmative defense applied. He points to this

portion of Instruction Number 25: "It is not enough that the defendant believed himself or another to be in danger, unless . . . you can say that as a reasonable person he had grounds for that belief." But *Janes* is distinguishable. In *Janes*, the district court imported the pre-trial standard for "make-my-day" immunity — requiring the defendant to prove the elements of the statute — into post-trial instructions for an affirmative defense. *Id.* at 302-04. But, in addition to the instruction explaining the prosecution's burden to disprove an affirmative defense beyond a reasonable doubt, the court gave an instruction explaining circumstances when the "make-my-day" defense applies which did not refer to the burden of proof. The supreme court held that the additional instruction "eliminated" the prosecution's burden "by telling the jury that the 'make-my-day' statute does not apply unless the defendant proves that the instruder's entry was knowingly unlawful." *Id.* at 303. Because the additional instruction "was not identified as an affirmative defense[,] . . . the jury had no reason to know that the prosecution's burden of proof with respect to affirmative defenses . . . applied to" the additional instruction. *Id.* That is not the situation here. Instruction Number 22

unambiguously instructed the jury as to the proper burden of proof for defendant's affirmative defense. Instruction Number 25 merely stated that a subjective belief of danger must be accompanied by reasonable grounds for that belief: it did not shift the burden of proof. Therefore, the court did not impose any conditions for defendant to prove before the jury could consider his affirmative defense.

ii. Standard of Reasonableness

Contrary to defendant's assertion, Instruction Number 25 did not articulate an incorrect standard of reasonableness. It correctly told the jury to consider whether a reasonable person in like circumstances, knowing or believing those circumstances to exist, would have acted as defendant did. *See People v. Collins*, 730 P.2d 293, 307 (Colo. 1986). To the extent defendant challenges the instruction's reference to a "prudent" person, we conclude that word was essentially redundant of the instruction's reference to a "reasonable" person, and did not mislead the jury.

iii. Use-of-Force

Under Colorado law, "deadly physical force" is force that the defendant intended to cause death and that actually caused the

death of the victim, *see* § 18-1-901(3)(d), C.R.S. 2014 (defining "deadly physical force"); *People v. Vasquez*, 148 P.3d 326, 328-30 (Colo. App. 2006), whereas ordinary physical force includes any force that does not cause death. In this case, Owens used deadly physical force to kill Vann but defendant used only ordinary physical force when he shot Bell and allegedly shot Marshall-Fields.

Defendant concedes that the "deadly physical force" definition in Instruction Number 23 tracked the language of the statute, and does not dispute that the physical force standard in Instruction Number 24 was also correct. He argues, however, that more explanation was required because jurors might have confused deadly physical force with physical force by incorrectly assuming that use of a gun constituted deadly physical force. If jurors made that mistake, defendant argues, they might have then applied the wrong standard to the charges against him relating to victims other than Vann.

A reading of the instructions refutes this speculative argument. Instruction Number 23 (providing the standard for use of deadly physical force) specified not only the charge of "Murder in the First Degree" but also limited its application to "Sir Mario

Owens." It also explained that deadly physical force applies only when the force "does in fact cause death." Instruction Number 24 (providing the standard for use of physical force) specified the crimes of attempted murder and assault, and applied the standard to "defendant or a complicitor." Thus, the instructions made clear which use-of-force category applied to each charge.

iv. The Relationship Between Self-Defense and Complicity

Defendant contends that the instructions failed to explain the relationship between self-defense and complicity because the court did not instruct the jury that defendant was not guilty as a complicitor if Owens acted in self-defense.

Instruction Number 26, tendered by defendant's counsel, explained the theory-of-defense. The theory-of-defense instruction clarified that defendant could not be found guilty as a complicitor unless he knew Owens's intent, intended to promote or facilitate Owens's crime, and that Owens's acts were not legally justifiable. The instruction explained that defendant "is also not guilty of the acts of Mr. Owens if Mr. Owens['s] acts are justified under the law." How Owens's acts could have been justified under the law was made clear by the affirmative-defense instructions on self-defense.

Thus, the instructions clearly provided that if the jury found that Owens acted in self-defense, it could not find defendant guilty of Owens's acts as a complicitor.[5]

v. Justification Inquiries

We also reject defendant's contention that the instructions confused the deadly physical force inquiry regarding Owens's killing of Vann with the physical force inquiry regarding the subsequent shootings.

Defendant argues that the instructions should have explained that even if Owens was unjustified in killing Vann under the deadly force standard, defendant or Owens could still have been justified in shooting Bell or Marshall-Fields under the physical force standard. But the instructions made this distinction quite clear. As discussed above, Instruction Number 23 limited the deadly force inquiry to Owens's killing of Vann, whereas Instruction Number 24 specified that the physical force inquiry applied to the attempted murder and assault counts. Nothing in the instructions implied that

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[5] To the extent the theory-of-defense instruction should have further specified that self-defense was the possible justification for Owens's actions, any error was invited by defendant's counsel, who tendered the instruction. *See People v. Gross*, 2012 CO 60, ¶ 11. To be clear, however, we conclude that there was no error.

defendant's (or Owens's) justifiable use of physical force was contingent on Owens's justifiable use of deadly force against Vann. Rather, Instruction Number 24 properly advised the jury of the physical force inquiry applicable to the non-deadly shootings. And Instruction Number 11 explained to jurors that they must consider each charge separately.

vi. Modification of Theory-of-Defense Instruction

Defendant contends that the court erred by rejecting the last sentence of his tendered theory-of-defense instruction because it would have clarified the use-of-force categories.

Instruction Number 26, as tendered by defendant's counsel, included this final sentence: "It is not necessary that [defendant] believe that Mr. Owens was in danger of serious bodily injury or death because deadly force was not used on Mr. Bell." The court eliminated this sentence because it was argumentative and duplicative of other affirmative defense instructions.

The district court must give jurors a tendered theory-of-defense instruction if there is any evidence to support the defendant's theory. *People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992). But the court does not err by refusing to give a defense

theory instruction when the instruction's substance is embodied in other instructions. *Riley*, 266 P.3d at 1092-93.

The sentence that the court struck communicated that (1) non-deadly force was used on Bell and (2) the justified use of non-deadly (or physical) force does not require a reasonable belief in danger of serious bodily injury or death. Other affirmative defense instructions made these points clear. Instruction Number 23 on justifiable deadly force (which was expressly limited to the murder charge) explained that deadly force must "in fact, produce death." Because Bell did not die, it would have been obvious to the jurors that the deadly force standard did not apply to the attempted murder charge. Instruction Number 23 also included the deadly-force requirement of reasonable belief in danger of serious bodily injury or death. In contrast, Instruction Number 24 (on physical force) correctly advised the jurors that justifiable physical force required only the reasonable belief in the imminent use of unlawful force.

The court gave the theory-of-defense instruction to jurors with slight corrections, and the substance of the one sentence it omitted

was encompassed in other affirmative-defense instructions. Thus, the district court did not abuse its discretion. *See id.*

vii. General Affirmative-Defense Instruction

Defendant contends that the general affirmative-defense instruction, Instruction Number 22, erroneously failed to provide that the prosecution must "disprove" any affirmative defense.

Defendant's counsel tendered the general affirmative-defense instruction. The court accepted the defense-tendered instruction without significant changes. Thus, any error was invited and is not subject to review. *People v. Gross*, 2012 CO 60, ¶ 2 ("We hold that the invited error doctrine precludes plain error review of a defense-tendered instruction.").

But even if we assume that we may reach the merits of this contention, we conclude that there was no error, much less plain error. *Id.* at ¶ 9 (inadvertent instructional omissions are reviewed for plain error).

Instruction Number 22 provided, in relevant part: "The prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative

defense, as well as to all the elements of the crime charged." This is a correct statement of the burden of proof.

In any event, any error was not plain because it was not obvious or substantial. Defendant argues that the court should have instructed jurors that the prosecution must "disprove" the affirmative defense. Defendant relies on a 2008 revision to Colorado's pattern jury instructions that includes the word "disprove." Those revisions post-date the trial in this case and, therefore, would not have been obvious to the court at the time of trial. Further, the difference between Instruction Number 22 and an instruction including the word "disprove" is semantic rather than substantive, and would not have affected the fundamental fairness of the trial.

viii. Omission of a No-Duty-to-Retreat Instruction

Defendant contends that the district court erred by not instructing the jury that a person who is not the initial aggressor in a confrontation has no duty to retreat. We are not persuaded.

During the jury instruction conference, the parties considered instructions on the concepts of initial aggressor and duty to retreat. The prosecutor tendered an initial aggressor instruction regarding

defendant. Defense counsel tendered an instruction advising jurors that a person who is not an initial aggressor has no duty to retreat. Defense counsel argued that an initial aggressor instruction was not appropriate in light of the evidence, and explained to the court that she would withdraw her tendered instruction on duty to retreat if the court rejected the prosecution-tendered instruction on initial aggressor.

After additional research and discussion, the prosecutor withdrew the tendered initial-aggressor instruction. The court asked defense counsel whether she wished to withdraw her tendered instruction on duty to retreat or leave it in the record. Defense counsel said, "Withdraw it."

The record demonstrates that defense counsel made a calculated decision to withdraw the no-retreat instruction. She tendered the instruction, but maintained that it was necessary only in response to an initial aggressor instruction. Once the initial aggressor instruction was withdrawn, defense counsel withdrew the no-retreat instruction, just as she planned to do. "The invited error doctrine bars precisely such an intentional, strategic decision." *Id.* at ¶ 11. Therefore, any error was invited and is not subject to

review. *Id.* (whether counsel's trial strategy was reasonable is a question for a Crim. P. 35(c) proceeding).[6]

We address the merits only to the extent defendant contends on appeal that the prosecutor's closing argument — after the instruction conference — necessitated the no-retreat instruction. Because defense counsel did not request a no-retreat instruction in light of closing argument, we review for plain error. *See Hagos v. People*, 2012 CO 63, ¶ 14; *see also Gross*, ¶ 9.

During closing argument, the prosecutor said:

> [Defendant] doesn't fight Jeremy [Green] or anybody else there like a man. He had no intention of getting into a fist fight, nor does he leave even though he could. His friend Jamar Johnson tried to get him to leave, remember, and totally consistent with what you know about Greg Vann, Greg had gone to Jamar Johnson and said get him out of here, get him out of here because of the trouble he's causing.
>
> Jamar told Greg and he told you, I already tried. I tried. [Be]cause he saw what was happening, he saw the defendant's behavior. He tried to get him to leave. Defendant was not interested in leaving.
>
> His sister was gone, leaving wasn't on his agenda. Those lame asses needed a lesson and he was getting ready to teach it.

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[6] To be clear, we do not suggest that it was error not to give the jury a no-duty-to-retreat instruction.

Defendant argues that the prosecutor's comments led jurors to believe that he was not eligible for the affirmative defense of self-defense because he had a duty to retreat. That interpretation ignores the context of the comments. The prosecutor was discussing the element of intent. The prosecutor argued that defendant did not leave after the fracas in the parking lot, and after his threats to "kill everyone," because he intended to kill. The prosecutor did not argue that defendant was the initial aggressor, or that he had a resulting duty to retreat. The prosecutor did not even link defendant's opportunity to leave to self-defense or to the violence that occurred after Owens shot Vann. Rather, the prosecutor argued that defendant made threats and then chose to stay because he intended to kill. Because the prosecutor's argument did not implicate an initial aggressor's duty to retreat, we perceive no error in failing to give a no-retreat instruction.

In any event, even if we assume error, any error was not obvious. Defense counsel had decided to withdraw the no-retreat instruction, telling the court that it was unnecessary because the initial aggressor instruction had been withdrawn. The prosecutor's comments in closing argument about defendant refusing to leave

the scene because he intended to kill someone did not obviously raise the duty to retreat issue. Thus, if a no-retreat instruction was indeed warranted, it was not so obvious that the court should have included the instruction sua sponte, without the benefit of a request. *See People v. Wilson*, 2014 COA 114, ¶ 49 (to qualify as plain error, "an error must be so clear-cut that a trial judge should have been able to avoid it without benefit of objection").

3. Mistake-of-Fact Defense

Defendant contends that the district court erred by rejecting his mistake-of-fact instruction. We do not agree.

a. Relevant Facts

Defense counsel tendered a pattern mistake-of-fact instruction which read: "It is an affirmative defense to the crimes charged that the defendant engaged in the prohibited conduct under a mistaken belief of fact, if such mistaken belief of fact negates the existence of a particular mental state essential to the commission of the offense."

Despite the broad language of the proposed instruction, defense counsel argued that the defense applied specifically to the shooting of Bell, apparently because, according to defendant, he

had mistakenly believed that Bell had shot Owens and still had a gun.[7] The proposed instruction, counsel argued, would have informed the jurors that defendant could have acted in self-defense based on appearances, even if he was mistaken. (Counsel said, "What the mistake of fact does is address the apparent necessity [of] use of force in this case.") She did not explain how the mistake might negate the requisite mental states of the attempted murder and assault charges which stemmed from defendant's shooting of Bell.

The prosecutor argued that the apparent necessity concept was already explained in the self-defense instructions. She also argued that defendant's claimed misapprehension did not constitute a separate mistake-of-fact defense because it did not negate the requisite mental state.

The court agreed with the prosecutor that (1) the apparent necessity concept was already incorporated in other instructions and (2) defendant's mistaken belief, even when accepted as true, did

[7] At trial, defense counsel did not specify defendant's alleged factual mistake. On appeal, defense counsel asserts that this is the mistaken belief to which the tendered instruction referred.

not negate the requisite mental states for the crimes charged. Thus, the court rejected the tendered instruction.

b. Applicable Law and Standard of Review

There are two types of defenses to criminal charges: (1) elemental traverses, which seek to negate an element of the charged offense, thereby refuting the possibility that the defendant committed the offense; and (2) affirmative defenses, which admit commission of the elements of the offense, but seek to justify or excuse the defendant's behavior. *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011); *see also People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). When the evidence raises the issue of an elemental traverse, the jury may consider the evidence in deciding whether the prosecution has proven each element beyond a reasonable doubt; thus, the defendant is not entitled to an affirmative defense instruction. *Pickering*, 276 P.3d at 555. But when the evidence raises the issue of an affirmative defense, the trial court must instruct jurors that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable. *Id.*; *see also* § 18-1-407.

As relevant here, the defense of mistake-of-fact can function either as an elemental traverse that negates the requisite mental state or as a supplement to a justification defense. *See* § 18-1-504(1)(a),(c), C.R.S. 2014.

We review for an abuse of discretion whether the court should have given a particular instruction to the jury, and will not disturb the court's decision absent a showing that it was manifestly arbitrary, unreasonable, or unfair. *Lane*, ¶ 7; *People v. Walden*, 224 P.3d 369, 379 (Colo. App. 2009); *People v. Renfro*, 117 P.3d 43, 48 (Colo. App. 2004).

c. Analysis

Defendant's argument on appeal is logically inconsistent because he argues that the mistake-of-fact defense was both an elemental traverse and an affirmative defense. *See Pickering*, 276 P.3d at 555. Regardless, under either theory, the court did not err by rejecting a separate instruction on mistake-of-fact.

First, if defendant is correct that the mistake-of-fact was an elemental traverse, then he was not entitled to a separate instruction. *See id.* The elemental instructions included the requisite mental state and the prosecution's burden to prove each

element beyond a reasonable doubt; therefore, jurors could consider evidence of a mistaken belief when deciding whether the necessary mental state had been proven. *See id.*; *Dunton v. People*, 898 P.2d 571, 573 (Colo. 1995); *Walden*, 224 P.3d at 379.

Second, if the mistake-of-fact defense was an affirmative defense, the jury necessarily rejected it under the circumstances.[8]

In arguing that mistake-of-fact is a "stand-alone affirmative defense" because it is a statutory defense, defendant relies on section 18-1-504. However, subsection 18-1-504(c) addresses the scenario when a factual mistake "supports a defense of justification as defined in sections 18-1-701 to 18-1-707." Thus, the statute explicitly provides that mistake-of-fact is *not* an independent affirmative defense in that circumstance, but merely supports an affirmative defense.

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[8] It is unclear what defendant contends the jury would have done differently had the instruction been given. The alleged error of the court was refusing to give jurors the proposed mistake-of-fact instruction. The proposed instruction said nothing about justifiable use of force or an independent affirmative defense; it addressed only the negation of the requisite mental state. Therefore, giving the proposed mistake-of-fact instruction to jurors would have done nothing to repair the harm now alleged by defense counsel.

In keeping with the statute, defense counsel argued during the jury instruction conference that the proposed mistake-of-fact instruction supported self-defense. She said it served the same function as an apparent necessity instruction — to instruct jurors that a mistaken belief could still be the basis for a justified use of force. But the court fully instructed jurors on that concept.

- Instruction Number 25: "Whether the danger is actual or only apparent, actual danger is not necessary in order to justify the defendant acting in self-defense or defense of others."
- Instruction Number 26: "Mr. Ray may also act or rely upon apparent necessity in defending Mr. Owens or himself in shooting Mr. Bell. Mr. Ray may reasonably rely on appearances in defending Mr. Owens or himself even if those appearances turn out not to be true."

In fact, Instruction Number 26 more accurately conveyed defendant's mistake-of-fact argument than the broad language of his tendered mistake-of-fact instruction. Under the instructions actually given, if jurors had found the mistake-of-fact evidence convincing — that is, that defendant believed he was facing off with

an armed man who had already shot his friend and might shoot again at any moment — then they would have found that he was justified in using the force he employed. Put another way, in finding that the prosecution had disproved self-defense, the jury necessarily found that the prosecution had disproved his mistake-of-fact argument. Therefore, the instructions were sufficient. *People v. Nelson*, 2014 COA 165, ¶¶ 51-52; *People v. Bush*, 948 P.2d 16, 17-18 (Colo. App. 1997); *People v. Cruz*, 923 P.2d 311, 312 (Colo. App. 1996).

4. Complicity Instruction

Defendant contends that the complicity instruction (Instruction Number 13) was erroneous because (1) it was so vague that it allowed the jury to convict him for a partially completed, unspecified crime; (2) the inclusion of "all or part of" language "expanded [his] potential liability to partial and lesser, unnamed crimes"; (3) it lowered the burden of proof because it did not cross-reference the self-defense instructions; (4) it constituted a constructive amendment because the People had not charged him as a complicitor; and (5) when coupled with a general verdict form, it undermined unanimity in the absence of a specific unanimity

instruction concerning his culpability as a principal or a complicitor. We conclude that there is no reversible error.

a. Relevant Instructions

Instruction Number 11 stated, in part: "In this case, a separate offense is charged against the defendant in each count of the information. Each count charges a separate and distinct offense, and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count."

Instruction Number 12 stated, in part:

> A crime is committed when the defendant has committed a voluntary act prohibited by law accompanied by a culpable mental state. . . . Proof of the commission of the act alone is not sufficient to prove that the defendant had the required culpable mental state. The culpable mental state is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence.

Instruction Number 13 stated:

> A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:
> 1. A crime must have been committed;

> 2. another person must have committed all or part of the crime;
> 3. the defendant must have had knowledge that the other person intended to commit the crime;
> 4. the defendant must have had the intent to promote or facilitate the commission of the crime; and
> 5. the defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

The theory-of-defense instruction (Instruction Number 26, set forth above) also focused on the components of complicity liability and the prosecution's burden of proof under a complicity theory.

b. Standard of Review and Applicable Law

We review de novo whether an instruction accurately stated the law. *Riley*, 266 P.3d at 1092.

The parties agree that defendant preserved his first two contentions by objection, but did not preserve his remaining three contentions. Thus, we review his first two contentions for ordinary harmless error, and will reverse only if there is a reasonable probability that an error contributed to the conviction. Crim. P. 52(a); *People v. Rodriguez*, 914 P.2d 230, 276-77 (Colo. 1996) (applying harmless error standard to error in complicity instruction

in death penalty case). We review his remaining contentions for plain error. *Hagos*, ¶ 14.

Section 18-1-603, C.R.S. 2014, provides: "A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense."

The prosecution must prove dual mental states to establish complicity liability for an intentional crime. *Bogdanov v. People*, 941 P.2d 247, 250-51 (Colo.), *amended*, 955 P.2d 997 (Colo. 1997), *disapproved of on other grounds by Griego*, 19 P.3d 1. First, the complicitor must have the culpable mental state required for the underlying crime. Second, the complicitor must assist or encourage the commission of the crime, with the intent that his actions will promote or facilitate the crime. *Id.*; *People v. Close*, 22 P.3d 933, 937 (Colo. App. 2000), *aff'd*, 48 P.3d 528 (Colo. 2002).

c. Analysis

i. Vagueness

Defendant argues that because Instruction Number 13 did not specify the crime to which defendant might be complicit, it merged

the crimes against the four victims and allowed the jury to mix-and-match elements to find him guilty.

Instruction Number 13, however, was not ambiguous on this point. The instruction used an indefinite article ("a") only in the first step, as jurors decided if a crime had been committed. Once they determined the specific crime had been committed, the instruction used the definite article ("the") in the following paragraphs to refer to that specific crime. *See People v. Bernabei*, 979 P.2d 26, 33 (Colo. App. 1998) (reviewing a similar complicity instruction, the division concluded that once the jury determined a crime had been committed in the first step, the remainder of the instruction "referred only to this crime").[9] And other instructions eliminated any possible ambiguity. Instruction Number 11, for example, explained that each count in the information was "separate and distinct" and that consideration of one count should not influence consideration of any other count. Thus, the instructions specifically advised jurors not to merge their

[9] For the same reasons, the instructions did not allow the jury to convict defendant unless a crime had been committed. This refutes defendant's suggestion that he could have been convicted for a partially completed crime.

consideration of different counts. We note in this regard that the jurors apparently heeded this instruction because they convicted on some counts and acquitted on others. There was no error.

ii. "All or Part of" Language

Defendant also argues that the court erred by including "all or part of" language in Instruction Number 13 ("another person must have committed all or part of the crime") because it was inapplicable to the facts of the case.

The Colorado Supreme Court has distinguished between cases in which two or more people jointly commit a crime by each committing part of the offense and cases in which a principal commits the entire crime and the complicitor is accused of aiding or abetting the commission of that crime. "All or part of" language in a complicity instruction applies to a situation where "the principal and at least one other person, possibly the defendant, together commit the essential elements of the crime." *Bogdanov*, 941 P.2d at 256. For instance, in a case where the defendant was charged with robbery, the defendant assaulted the victim, and an accomplice took the victim's money, the "all or part of" language was appropriate. *Id.* (citing *Reed v. People*, 171 Colo. 421, 467 P.2d 809

(1970)). The language is not applicable to a situation where the complicitor is not accused of committing any act essential to establishing the elements of the underlying crime. *Id.*; *see Bernabei*, 979 P.2d at 33 (proper to include "all or part of" language if the defendant and another person allegedly committed an essential element of the underlying crime). However, if the evidence is ambiguous as to whether the defendant was among those who committed the essential elements of the crime, the "all or part of" language should be used in the complicity instruction. *Close*, 22 P.3d at 937-38 (group of people, possibly including the defendant, beat and robbed the victims).

Although including the "all or part of" language is error when the principal committed the crime in its entirety, courts have consistently found in such cases that the language is superfluous and any error is therefore harmless. *Rodriguez*, 914 P.2d at 276-77 (error harmless because evidence supported the defendant's conviction as a complicitor or a principal); *People v. Candelaria*, 107 P.3d 1080, 1091 (Colo. App. 2004) (error harmless because language superfluous), *rev'd on other grounds*, 148 P.3d 178 (Colo. 2006); *People v. Osborne*, 973 P.2d 666, 670 (Colo. App. 1998) (error

harmless because language superfluous); *see also Bogdanov*, 941 P.2d at 256 (not plain error because language "merely superfluous").

We conclude that inclusion of the "all or part of" language was erroneous only in regard to the attacks on Vann and Green. It was uncontested at trial that Owens shot Vann and Green; the prosecution did not accuse defendant of shooting these victims. Thus, the principal (Owens) committed the entire crime, and the "all or part of" language was inapplicable. *See Bogdanov*, 941 P.2d at 256. The People argue that defendant's culpable mental state was an element of the crime, and therefore he did commit an element of the underlying crime and the "all or part of" language was proper. However, in *Bogdanov*, the supreme court concluded that the defendant possessed the culpable mental state and acted to promote the crime, but, nevertheless, the contested language was inapplicable because the defendant did not commit any of the acts constituting the underlying crime. *Id.* at 256. We follow the supreme court in concluding that the "all or part of" language was inapplicable because defendant was not accused of committing any of the acts of the underlying crimes against Vann or Green.

However, because the jury acquitted defendant of the counts involving Vann and Green, any error in this context was obviously harmless. *See People v. Palmer*, 87 P.3d 137, 141 (Colo. App. 2003) (refusal to give self-defense instructions harmless where the jury acquitted the defendant of the charges to which the defense applied); *see also Hughes v. People*, 175 Colo. 351, 355, 487 P.2d 810, 812 (1971).

We conclude that inclusion of the "all or part of" language was not erroneous in regard to the attacks on Bell and Marshall-Fields. There was conflicting testimony as to whether defendant or Owens or both men shot Marshall-Fields and Bell. This is precisely the type of ambiguous situation where the "all or part of" language is appropriate. *See Close*, 22 P.3d at 938 (language proper because it was ambiguous as to whether the defendant was among the people who committed the essential elements of the crime). *Bogdanov* held that the "all or part of" language is proper where "the principal and at least one other person, possibly the defendant, together commit the essential elements of the crime." 941 P.2d at 256. Thus, as discussed, it is not error to include the language where, as here, two people are each accused of committing all the essential

elements of the same offense. *See Bernabei*, 979 P.2d at 33 ("[T]he prosecution charged both defendant and his son with committing essential elements of the offense. This is exactly the situation in which the *Bogdanov* court specifically found it appropriate to include the 'all or part of' language.").[10]

Even if we assume that the instruction was erroneous in relation to the Marshall-Fields and Bell counts, we conclude that the error was harmless, for two reasons. First, the language would have been merely superfluous. *Candelaria*, 107 P.3d at 1091; *Osborne*, 973 P.2d at 670; *see also Bogdanov*, 941 P.2d at 256-57 ("all or part of" language not plain error because it was superfluous). Second, contrary to defendant's argument that he could have been convicted merely for having a culpable mental state without committing any act, he was convicted only of those charges as to which he was accused of being the shooter. Therefore, the evidence on those counts supported his conviction as a principal or

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[10] Because of the differences in the theories of liability regarding different victims, perhaps it would have been preferable for the district court to explain complicity liability in relation to specific counts. *See* COLJI-Crim. G1:06 (2014) (recommending this approach in comment seven). But we cannot say that the complicity instruction misstated the law in relation to the Bell and Marshall-Fields counts.

a complicitor. *See Rodriguez*, 914 P.2d at 276-77 ("all or part of" language harmless because evidence supported the defendant's conviction as a principal or a complicitor).

iii. No Cross-Reference to Self-Defense

Defendant contends that the complicity instruction was erroneous because it did not cross-reference the self-defense instructions. We are not persuaded.

Defendant's argument ignores the fundamental principle that jury instructions must be read as a whole. *See People v. Galimanis*, 944 P.2d 626, 630 (Colo. App. 1997) ("All jury instructions must be read and considered together, and if, collectively, they adequately inform the jury of the law, there is no reversible error."). We agree that it would have been better for the complicity instruction to refer to the affirmative defense. *See* COLJI-Crim. G1:06 (2014) (including a paragraph that cross-references an affirmative defense, where applicable). However, defendant cites no authority indicating that the complicity instruction must cross-reference the affirmative defense.

As discussed, other instructions made clear that defendant was innocent under the complicity theory if Mr. Owens's actions

were justifiable. Instruction Number 24 on justifiable use of physical force directly referenced complicity liability by applying the defense to "defendant or a complicitor." The theory-of-defense instruction (Instruction Number 26) explained that defendant "is also not guilty of the acts of Mr. Owens if Mr. Owens['s] acts are justified under the law."

Therefore, we perceive no error, much less plain error.

iv. Constructive Amendment

Defendant contends that because the People did not charge him as a complicitor, the complicity instruction constructively amended the complaint. Again, we are not persuaded.

Complicity is not a separate and distinct crime, but rather is "'a theory by which a defendant becomes accountable for a criminal offense committed by another.'" *People v. Vecellio*, 2012 COA 40, ¶ 33 (quoting *People v. Thompson*, 655 P.2d 416, 418 (Colo. 1982)). Accordingly, the People need not separately charge a complicity theory. *See Rodriguez*, 914 P.2d at 276 n.46; *Thompson*, 655 P.2d at 417-18; *People v. Randell*, 2012 COA 108, ¶ 43.

v. Unanimity

Defendant next contends that the district court erred because the verdict forms did not require the jury to specify whether it found him guilty as a principal or a complicitor and, therefore, the verdicts might not have been unanimous on the theory of conviction.

Unanimity is required on the ultimate issue of whether a defendant is guilty or innocent of the crime charged. *People v. Taggart*, 621 P.2d 1375, 1387 n.5 (Colo. 1981). But a jury verdict need not be unanimous on the theory of liability; thus, a unanimity instruction on the verdict forms was not required. *See People v. Perez-Hernandez*, 2013 COA 160, ¶ 56 ("[J]urors are not generally required to agree about the evidence or theory by which a particular element is established."); *People v. Hall*, 60 P.3d 728, 731-34 (Colo. App. 2002) (collecting cases in which "the court concluded the jury may return a general verdict of guilty when instructed on theories of both principal and complicitor culpability"); *People v. Thurman*, 948 P.2d 69, 71 (Colo. App. 1997) (holding that no modified unanimity instruction was required when the prosecution presented alternative theories of guilt as a principal or a complicitor).

Defendant argues that, despite Colorado case law, the distinction between a theory of liability and a set of elements is untenable in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Supreme Court held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 490. Defendant attempts to analogize a theory of liability (complicity) to sentencing factors. But we conclude that *Apprendi* is not applicable to the circumstances in this case because (1) a theory of liability is not a sentencing factor and (2) regardless of the theory, the jury unanimously determined that the elements in question had been proved beyond a reasonable doubt.

5. Jury Question on Complicity Instruction

Defendant contends that the court erred by not substantively responding to a question from jurors about the complicity instruction because the question demonstrated confusion about a matter of law central to defendant's guilt or innocence. We conclude that any error was invited.

On the first day of deliberations, jurors sent this question to the court:

> Re: Instruction 13 [complicity]
> In questions 3, 4 and 5 do the words "the crime" mean the murder in 1st degree in reference to count 1 or specifically Greg Vann.

The court read the question to counsel and invited input on an appropriate response. The prosecutor suggested that the court inform jurors that "the crime" referred to the crime they found to be committed in paragraph one of the instruction. The prosecutor also expressed concern that the jurors might apply the complicity theory only to the murder count.

Defense counsel said,

> Judge, I think the court can either do nothing or the court can respond in a note saying you have been instructed on — or you have received all the instructions on this case, period.
>
> To do — to try to answer any question would be interfering with deliberations and could direct a verdict and, in other words, it is not the job of the court, it was the job of the prosecution to explain to the jury that complicity applies to all crimes, whatever crimes they were arguing applied to complicity. That was their job. It's not the court's job to interpret this and to do so would be unduly interfering with the deliberations, which the court cannot do.

> So I think either do nothing, you know, say I can't assist you, you are the jurors, it's up to you to — you know, or tell them you have been given all the instructions that you are permitted to have in this case.

The court agreed with defense counsel that it could not provide further instructions and proposed sending jurors a note reading, "I am unable to answer this question." Defense counsel said, "the proposed response is acceptable."

The invited error doctrine precludes appellate review of an error created by the appealing party. *Gross*, ¶ 8. One "'may not complain on appeal of an error that he has invited or injected into the case; he must abide the consequences of his acts.'" *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989) (quoting *Collins*, 730 P.2d at 304-05). The invited error doctrine does not preclude appellate review of errors stemming from attorney incompetence. *People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002) (error resulted from attorney oversight where counsel failed to submit a relevant jury instruction). But in *Stewart* the supreme court cautioned that if "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary

position." *Id.* at 119-20 (internal quotation marks omitted). In other words, the "attorney incompetence exception does not apply to deliberate, strategic acts of defense counsel but rather to inadvertent errors or oversights." *Gross*, ¶ 2.

Defense counsel vehemently argued to the district court that it should not substantively respond to the jurors' question. This was no inadvertent error or oversight. It was a deliberate, strategic act. And defense counsel even made clear her strategy: the prosecution had apparently failed adequately to explain to the jury that the complicity theory applied beyond the murder count, and she did not want to give the prosecution another opportunity to explain its theory. On appeal, defendant attempts to take the contrary position, and argues that the court erred by not making a substantive response. However, because any error was invited by the defense, we will not consider defendant's contention. *See Gross*, ¶ 2; *Zapata*, 779 P.2d at 1309.[11] [12]

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[11] Defendant's appellate attorneys portrayed the record in an incomplete manner in the opening brief by omitting defense counsel's position to the district court and creating the impression that the court responded to jurors without the parties' input.

B. Juror Who Asked to be Excused During Deliberations

Defendant contends that the district court erred by declining to respond to a juror's request for removal during deliberations because the court's silence impliedly authorized a compromise verdict. We conclude that defense counsel invited the alleged error and that, in any event, there was no plain error.

On the second day of deliberations, the court received this note from Juror S:

> Judge:
> The time has come to seek removal from this jury obligation. The cost is too great for my company, family, and time to continue this pursuit of justice.
> There does not appear to be a reasonable end in sight without compromising my beliefs in what those who came before me fought hard to defend . . . justice for all . . . .

The court sought the input of counsel on an appropriate response. The prosecutor suggested that the court question Juror S as to the "nature of the hardship." Defense counsel responded, in part:

> But I don't think we can let a juror go because he says — I mean, jurors are

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[12] Nothing in our discussion of this issue should be construed as concluding that there was an error.

> supposed to deliberate and stay by their beliefs, and that is what the jury system is all about, not if it's tough I want out.
>
> I don't think we can let him go. It sounds like a business hardship. I have no idea, but they are in deliberations.

The court also noted that Juror S had written on his juror questionnaire that he was self-employed and relied on commissions for income, thus jury service reduced his income. "So the parties have been well aware of his particular situation since the inception of this trial."

The court decided not to act absent an indication from the foreperson that the jury was deadlocked: "It does not appear, based upon this alone, that the jury has reached an impasse in terms of deliberations." The court also concluded that the note was "not sufficient at this point to make a determination that this juror should be excused or further inquiry should be made of the juror." Neither party objected to the court's resolution.

Roughly four hours after the court received the note from Juror S, the jury returned its verdicts.

Defendant argues on appeal that the court erred by not taking action in response to the note from Juror S. We conclude that

defense counsel invited the error now alleged. On the heels of the prosecutor's suggestion to inquire further, defense counsel argued that a deliberating juror could not be excused for a business hardship or simply because jury duty was "tough." Once the court adopted defense counsel's position, and decided against further inquiry, defense counsel did not signal any disagreement or misunderstanding.

In his reply brief on appeal, defendant argues that defense counsel's position at trial was only against dismissal of the juror, not against further inquiry. On this record, that is a distinction without a difference. Defense counsel argued that Juror S should not be excused; thus, further inquiry into his desire to be excused would have been futile. And when defense counsel's comments to the district court are read in context, it is apparent to us that counsel did in fact argue against the prosecutor's suggestion to inquire further.

Defense counsel made a deliberate, strategic decision to argue against excusing Juror S or inquiring further into his concerns; thus, any error was invited. *See Gross*, ¶ 2; *Zapata*, 779 P.2d at 1309.

Even if we consider the merits, we conclude there was no plain error.[13] Defense counsel also argued against the possibility of the specific harm now claimed on appeal — that Juror S might have been forced to compromise his beliefs because the court did not intercede. Defense counsel said, "jurors are supposed to deliberate and stay by their beliefs, and that is what the jury system is all about."

Defense counsel also correctly pointed out that the communication was from an individual juror, not the foreperson. One juror indicated frustration, but the foreperson did not indicate that the jury was deadlocked after only one day of deliberations. We find no authority for the proposition that a court must, or even should, give a supplemental instruction to a jury that does not indicate that it is deadlocked. *See Gibbons v. People*, 2014 CO 67, ¶ 1 ("When a jury is deadlocked, the court may provide a 'modified-*Allen*' instruction informing the jury . . . that each juror should decide the case for himself or herself . . . ."); *People v. Lewis*, 676

[13] Defendant's briefs do not say specifically what the court should have done. At oral argument, counsel suggested that the court should have instructed the jurors not to surrender their honest beliefs about the weight or effect of the evidence solely for the purpose of reaching a verdict.

P.2d 682, 690 (Colo. 1984) (holding that the district court erred when it gave a supplemental instruction without first determining that the jury was actually deadlocked), *superseded by statute on other grounds as stated in People v. Richardson*, 184 P.3d 755 (Colo. 2008). Neither have we found any authority for the proposition that a court's mere silence in this context is coercive. *Cf. Gibbons*, ¶¶ 28, 36 (holding that court's omission of mistrial advisement from modified-*Allen* instruction was not coercive). The court's silence was nothing like a time-fuse instruction or a command to compromise beliefs to reach a resolution.

Nor do we agree with defendant's characterization of Juror S's note as indicating that he thought deliberations would continue until a verdict was reached, regardless of how much time it might take to reach a verdict. Given the context, it is instead clear that Juror S simply thought deliberations were going to continue for longer than he liked.

The court did not err, much less plainly err, under the circumstances by refraining from intruding into the deliberative process.

C. Video

Defendant contends that the district court erred by admitting into evidence a video recording of Jeremy Green's interview with police because (1) the ruling violated his Confrontation Clause rights and (2) the interview was not admissible under the hearsay exception for a prior inconsistent statement. He also contends that the court erred in allowing the jury to have supposedly unlimited access to the video during deliberations. We reject each of these contentions.

1. Confrontation Clause

Defendant contends that admission of the video recording violated his Confrontation Clause rights because (1) the court admitted the video recording after Green had finished testifying and was no longer available and (2) Green's professed memory loss foreclosed meaningful cross-examination.

a. Procedural Facts

Detective Chuck Mehl of the Aurora Police Department interviewed Green the same night as the melee at Lowry Park. In that ninety-minute interview, Green described the event in detail to Detective Mehl. Green referred to Owens as "the shooter" and

defendant as "the accomplice." He insisted throughout the interview that Owens was the only shooter and that he never saw defendant with a gun. Green also said that defendant repeatedly threatened to kill everyone during the scuffle in the parking lot. "And now he's saying I'm gonna kill all you. I'll kill everybody."

At trial, Green testified that he had suffered extreme memory loss and blocked out many of the events of that night. He testified that he remembered setting up for the event, the confrontation began in the parking lot, seeing his friend Vann shot and killed, and talking to police at the scene and being interviewed at the Aurora Police station. However, he also testified that reviewing the transcript of that interview had not refreshed his memory as to the details of what had occurred.

The prosecutor questioned Green extensively based on the interview transcript, and Green testified that he remembered few details about defendant or Owens, other than that Vann's shooter was the taller of the two. "I remember seeing someone that worked hard and was a good person, I remember seeing him die. That's what I remember," Green said. As to details, he responded, "I don't remember," to dozens of questions.

Defense counsel also cross-examined Green extensively based on the interview transcript. Defense counsel concentrated on Green's insistence in the interview that Owens was the only shooter, and that defendant and Owens had felt threatened because they were badly outnumbered.

> [Defense Counsel:] Do you remember telling Detective Mehl that this first person [defendant] — that this action of throwing out the punches but not trying to hit, do you remember saying it's not like he was measuring me up . . . but he was just maybe he felt threatened, you know.
>
> [Green:] No, I don't remember that.
>
> [Defense Counsel:] You don't remember telling Detective Mehl that . . . you may have observed he felt threatened . . . .
>
> [Green:] No, I don't.
>
> [Defense Counsel:] Do you remember describing the shooter as a dark-skinned guy with braids?
>
> [Green:] I don't.
>
> [Defense Counsel:] Do you remember telling Detective Mehl that you head butted this first person that didn't shoot?
>
> [Green:] No, I don't.

> [Defense Counsel:] Do you remember telling Detective Mehl that this first person that you describe as not the person who did the shooting, not the person with the braids . . . as never — of not having a gun?
>
> [Green:] I don't remember that.
>
> [Defense Counsel:] Do you remember chasing the shooter with the intent after the shooting of kicking the shit out of him? Do you remember that?
>
> [Green:] I remember running, yeah.
>
> [Defense Counsel:] Do you remember at least ten people moving towards the shooter?
>
> [Green:] No, I don't.

During direct examination of Green, the prosecutor offered the interview transcript into evidence as a prior inconsistent statement, under CRE 613 and section 16-10-201, C.R.S. 2014. Defense counsel objected to admission of the transcript on Confrontation Clause grounds, arguing that the transcript was an out-of-court statement not subject to cross-examination because the witness could not remember the interview.

The court did not admit the interview transcript, primarily because it would have been cumulative of the interview video that the prosecution also planned to offer into evidence. But the court indicated that it probably would admit the video as a prior inconsistent statement. Before admitting the video, the court (1) wanted to give the defense more time to review the transcript and raise specific objections and (2) required the prosecution to call Detective Mehl and finish establishing the proper foundation before jurors heard the detective's comments during the interview.

At the conclusion of Green's testimony, the court told him that he was "free to go." Defense counsel did not object.

The prosecution called Detective Mehl to the stand several days later. After foundational questions to Detective Mehl, the prosecutor offered the video into evidence. Defense counsel objected to its admission as a prior inconsistent statement: "because much of what is said on that tape is what Mr. Green did remember and did testify to, it should not be admitted." The court also considered defense counsel's earlier arguments against admitting the transcript into evidence. The court admitted the video into evidence over defense counsel's objection, and the

prosecutor showed it, in full, to the jury. The record does not indicate that defense counsel attempted to recall Green for further cross-examination after the jurors had viewed the video.

b. Standard of Review and Applicable Law

We review de novo whether a Confrontation Clause violation occurred. *People v. Trevizo*, 181 P.3d 375, 378 (Colo. App. 2007). A preserved Confrontation Clause violation is a trial error subject to constitutional harmless error review. *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004); *People v. Phillips*, 2012 COA 176, ¶ 93. We review unpreserved claims of error, whether constitutional or nonconstitutional, for plain error. *Hagos*, ¶ 14.

The Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. U.S. Const. amend. VI; Colo. Const. art. II, § 16; *see also Compan v. People*, 121 P.3d 876, 885-86 (Colo. 2005) (refusing to "interpret the state Confrontation Clause to protect a broader range of rights than does the Sixth Amendment to the United States Constitution"). Witnesses are those who bear testimony. *Crawford v. Washington*, 541 U.S. 36, 51, 68 (2004); *see Fry*, 92 P.3d at 975 ("[W]e have followed U.S. Supreme Court law regarding the Confrontation Clause.").

Hearsay statements are testimonial when an objectively reasonable person in the declarant's position would have foreseen that his statements might be used in the investigation or prosecution of a crime. *People v. Vigil*, 127 P.3d 916, 924-25 (Colo. 2006); *accord Crawford*, 541 U.S. at 52; *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005). *Crawford* describes a "core class" of testimonial statements, including statements given during a police interrogation. *See* 541 U.S. at 52 ("Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard.").

Confrontation rights require that testimonial hearsay evidence be tested in the crucible of cross-examination, but courts disagree as to whether the Clause requires meaningful cross-examination or merely that the declarant appear at trial for cross-examination.

"[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* at 59 n.9 (citations omitted). Most courts have interpreted this language to mean that the

Confrontation Clause guarantees only that the declarant "is present at trial," and professed memory loss is irrelevant. *See, e.g.*, *State v. Cameron M.*, 55 A.3d 272, 282 n.18 (Conn. 2012) (collecting cases from several states), *overruled in part on other grounds by State v. Elson*, 91 A.3d 862 (Conn. 2014); *State v. Holliday*, 745 N.W.2d 556, 567 & n.6 (Minn. 2008) (collecting cases). Defendant points out that some courts, concentrating on the phrase "defend or explain," have concluded that the Clause requires an opportunity for meaningful cross-examination, and that severe memory loss might eliminate the ability to defend or explain a prior statement. *Cookson v. Schwartz*, 556 F.3d 647, 652 (7th Cir. 2009) (meaningful cross-examination satisfied where declarant forgot prior statement but remembered underlying events); *see also Goforth v. State*, 70 So. 3d 174, 184-85 (Miss. 2011) (testifying declarant's total memory loss rendered admission of his prior statement a violation of the defendant's confrontation rights under the Mississippi constitution); *but see United States v. Owens*, 484 U.S. 554, 560 (1988) ("The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.").

Colorado has adopted the majority position, with appellate courts consistently holding — before and after *Crawford* — that the declarant's appearance at trial satisfies the Confrontation Clause, regardless of professed memory loss. *E.g.*, *People v. Pepper*, 193 Colo. 505, 508, 568 P.2d 446, 448 (1977) (following courts that have held that "where a witness takes the stand and is available for cross-examination, the witness' actual or feigned memory loss regarding prior inconsistent statements does not violate a defendant's confrontation right"). *Crawford* "redefined the scope of the Confrontation Clause, and the safeguards necessary to satisfy its requirements when the hearsay declarant is unavailable at trial," but "did nothing to vitiate the principles concerning declarants who do testify at trial." *People v. Argomaniz-Ramirez*, 102 P.3d 1015, 1018 (Colo. 2004).

In *Argomaniz-Ramirez*, the Colorado Supreme Court analyzed the language in footnote nine of *Crawford*. The court rejected the argument that the footnote was merely dicta and concluded that "*Crawford* does not affect the analysis for admission of out-of-court statements where the declarant testifies at trial." *Id.* at 1018 & n.4. The supreme court reiterated its holding in *Pepper* and established

a bright-line rule: "Because the hearsay declarants will testify at trial and will be subject to cross-examination, admission of their out-of-court statements does not violate the Confrontation Clause." *Id.* at 1018. Divisions of this court have applied that rule. *See People v. Stackhouse*, 2012 COA 202, ¶ 27 ("[W]hen a witness takes the stand and is available for cross-examination, prior out-of-court statements may be admitted even if the witness does not remember making them."); *Candelaria*, 107 P.3d at 1087 (no violation of confrontation rights where defense counsel cross-examined the declarant, despite the fact that the declarant could not remember the statements or the underlying events).

c. Analysis

The parties agree that Green's police interview was testimonial hearsay. And there is no question that the declarant appeared at trial. Thus, the question before us is whether Green's testimony, marred by professed memory loss, satisfied the Confrontation Clause's guarantee that a defendant must be able to confront the witnesses against him. We conclude that it did.

First, we reject defendant's argument that his confrontation rights were violated because Green was no longer available when

the interview video was admitted into evidence. Because defendant did not object on this basis before the district court, we review for plain error. *Hagos*, ¶ 14; *People v. Banks*, 2012 COA 157, ¶ 26; *People v. Rodriguez*, 209 P.3d 1151, 1156 (Colo. App. 2008).

Defendant waived the argument that Green was unavailable. Defense counsel did not object when the court released Green and told him he was "free to go." Prior to Green's release, defense counsel was well aware that the court intended to admit the video recording of the interview. And defendant does not now claim, nor do we find any indication in the record, that defense counsel attempted to recall Green for further testimony after the video was admitted into evidence. It is mere speculation that Green was not available to return because he lived out-of-state. By not objecting to Green's release or attempting to recall Green after admission of the video, defense counsel waived the argument that Green was unavailable for further testimony. *See Cropper v. People*, 251 P.3d 434, 435, 438 (Colo. 2011) (defense counsel waived the defendant's right to confrontation by not requesting live testimony).

In any event, defendant does not claim that there was any substantive difference between the transcript and the video

recording. Having reviewed both, we conclude that they were nearly identical. Thus, for the purpose of the Confrontation Clause, there was no difference between the two. Defendant had the opportunity for extensive cross-examination of Green regarding the contents of the interview transcript. Because he confronted the testimonial hearsay through cross-examination, the subsequent admission of the same content into evidence did not violate his confrontation rights. *See Argomaniz-Ramirez*, 102 P.3d at 1018.[14]

Second, we conclude that despite Green's partial memory loss, defendant had the opportunity to cross-examine his accuser and, thus, there was no violation of his Confrontation Clause rights. The Colorado Supreme Court's rulings are clear. When a hearsay declarant appears at trial and is subject to cross-examination, admission of his out-of-court statement does not violate the Confrontation Clause. *Id.* The witness's memory loss regarding

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[14] We also observe that the prosecution offered the transcript into evidence during Green's direct examination, and defense counsel objected to its admission. Defense counsel argued that the transcript was inadmissible precisely because it violated defendant's confrontation rights. Defendant cannot now argue that, because the transcript of the interview was not admitted into evidence while the declarant was on the witness stand, the court violated his confrontation rights. *Gross*, ¶ 11.

prior inconsistent statements does not constitute a Confrontation Clause violation, "even where the witness' memory loss is total." *Pepper*, 193 Colo. at 508, 568 P.2d at 449.[15] We conclude that the holdings in *Pepper* and *Argomaniz-Ramirez* are dispositive in this case and, therefore, binding. *See, e.g.*, *People v. Smith*, 183 P.3d 726, 729 (Colo. App. 2008) (the court of appeals is bound by supreme court precedent).

2. Prior Inconsistent Statement

Defendant contends that the video recording should not have been admitted as a prior inconsistent statement under section 16-10-201 because the circumstances failed to support two statutory requirements: (1) the witness did not have the opportunity to explain or deny his prior statement and (2) the unredacted video

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[15] Many courts have decided this issue, and the only contrary authority that we have discovered is *Goforth v. State*, 70 So. 3d 174, 184-85 (Miss. 2011) (applying the Mississippi constitution). The holding in *Pepper* is contrary to the holding in *Goforth*. And this case is distinguishable from *Goforth*. In that case, the witness's memory loss was so complete that he could not even remember the people involved; thus, he could not answer questions on potential bias. In this case, Green forgot key details but remembered most of the underlying events, remembered the people involved, remembered being interviewed by the police, and admitted to impeaching information such as his marijuana use the night of the events in question.

contained speculation that was not within the witness's personal knowledge.

a. Standard of Review

We review a district court's evidentiary ruling for an abuse of discretion. *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009); *People v. Munoz-Casteneda*, 2012 COA 109, ¶ 7. A court abuses its discretion in admitting evidence if its decision was manifestly arbitrary, unreasonable, or unfair. *People v. Valencia*, 257 P.3d 1203, 1209 (Colo. App. 2011).

If we conclude that the district court abused its discretion, we assess whether the error warrants reversal. We review preserved evidentiary errors for harmless error. *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009). We review unpreserved errors, whether constitutional or nonconstitutional, for plain error. *Hagos*, ¶ 14.

At trial, defense counsel objected to the admission of the video by arguing that it contained not only prior inconsistent statements, but also prior consistent statements. Defendant abandons that argument on appeal; the only mention of consistent statements in the opening brief is in the statement of preservation. Defendant concedes that memory loss showed the statements were

inconsistent with the testimony, and argues instead that these inconsistent statements failed the statutory foundational requirements for admission. Defendant does not point to where in the record there was an objection on these bases. Thus, we review for plain error. CRE 103(a); *Banks*, ¶ 26; *Rodriguez*, 209 P.3d at 1156.

b. Applicable Law

CRE 801(c) provides that hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible unless it falls within an exception or exclusion in a statute or rule. CRE 802. The relevant exception is for a prior inconsistent statement.

Section 16-10-201 permits the introduction of a witness's previous statement that is inconsistent with his testimony at a criminal trial, not only to impeach the witness but also as substantive evidence. *See People v. Smith*, 182 Colo. 228, 234, 512 P.2d 269, 272 (1973) (section 16-10-201 creates "a new rule of substantive evidence"). However, (1) the witness must be given the opportunity to explain or deny the prior statement (or still be available to give further testimony) and (2) the prior statement must

relate to a matter within the witness's own knowledge. § 16-10-201(1)(a)-(b).

Memory loss is a proper basis for concluding that the witness's testimony at trial is inconsistent with a previous statement; the lack of memory functions as a denial. *Davis v. People*, 2013 CO 57, ¶ 7 n.2 (in the context of section 16-10-201, a "witness's actual or feigned memory loss is tantamount to denial"); *Pepper*, 193 Colo. at 508, 568 P.2d at 448; *People v. Thomas*, 2014 COA 64, ¶ 20; *People v. Baca*, 633 P.2d 528, 529 (Colo. App. 1981). A difference in "some details" between testimony and the previous statement justifies admission of the previous statement. *People v. Fisher*, 9 P.3d 1189, 1192 (Colo. App. 2000).

c. Analysis

We conclude that the district court did not abuse its discretion by admitting the prior inconsistent statement under section 16-10-201.

First, we cannot conclude on this record that Green was unavailable for further testimony. Defendant repeats the argument he made regarding confrontation, complaining that Green had no opportunity to explain the prior inconsistent statement because the

video was admitted into evidence after he testified. We reject this argument for the reasons already discussed: defense counsel waived the argument that Green was unavailable by making no attempt to call him for further testimony, the record does not indicate that Green could not be recalled, and Green responded to extensive questioning on the substance of the interview because the video and the transcript were almost identical.

Second, we conclude that Green did, in fact, deny his prior inconsistent statement. Defendant argues that Green was incapable of explaining or denying the statements in the police interview because of memory loss. As noted, our cases hold that memory loss is tantamount to a denial of the previous statements. *Davis*, ¶ 7 n.2; *Thomas*, ¶ 20. Green was asked repeatedly, by both parties, to explain or deny statements he made during the police interview. He effectively denied those statements by saying that he did not remember making them.

Finally, we conclude that Green's prior inconsistent statement related to matters within his personal knowledge. Defendant argues that the interview video should have been redacted to comply with section 16-10-201, because some statements were

outside Green's own knowledge. He points to examples such as Green saying defendant looked like he wanted to fight and appeared to know Owens had a gun. We reiterate that defendant did not propose specific redactions to the district court or object to the particular comments about which he now complains.

The fact that Green made inferences — even, perhaps, speculative inferences — from his observations of defendant does not mean that Green's statements were outside of his personal knowledge. *Cf. Bohannon v. Pegelow*, 652 F.2d 729, 732 (7th Cir. 1981) (applying personal knowledge requirement of Fed. R. Evid. 701: it was not an abuse of discretion to allow lay testimony of a witness speculating that the arrest she observed was motivated by racial prejudice); *John Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289, 1294 (5th Cir. 1978) (applying the personal knowledge requirements of Fed. R. Evid. 602 and 701: when "the witness observes first hand the altercation in question, her opinions on the feelings of the parties are based on her personal knowledge").

Because Green denied his previous statement, which related to matters within his personal knowledge, the prosecution established the proper statutory foundation for admission of a prior

inconsistent statement under section 16-10-201. Thus, the court did not abuse its discretion by admitting the video.

3. Unfettered Access During Deliberations

Defendant contends that the district court abused its discretion by allowing the jury unfettered access to the Green video during deliberations. We conclude that there is no factual predicate for this contention.

At the jury instruction conference, defense counsel objected to the jury having access to the Green video during deliberations, arguing that such access would place undue weight on one witness's testimony. The court ruled that under then-existing precedent it was required to grant jurors access to any exhibit admitted into evidence, including the Green video. The court explained that its procedure would be for the prosecution to provide the necessary video equipment and to leave the equipment in a particular hallway. The equipment would be left in the hallway until the jurors asked to view the video, which would require the jurors to contact the bailiff.[16] Defendant does not point to any place

[16] Contrary to defendant's suggestion, we do not read the court's statements as saying merely what its usual practice was with

in the record showing that the jurors ever asked to see the video, and we have not found one. We note that while this appeal was pending, defendant requested a remand to create a record of unrecorded conferences between the court and counsel and all contacts between jurors and court staff, but did not assert that any unrecorded conference or contact concerned the Green video. *See People v. Ray*, 2012 COA 32. Thus, we conclude that there is no record basis for defendant's contention of error.

Defendant is incorrect that the lack of a record showing that the video was in fact given to the jury to view during deliberations means that we must conclude that it was. It is the responsibility of the party asserting an error on appeal to demonstrate that the record includes a factual basis for the assertion. *See Schuster v. Zwicker*, 659 P.2d 687, 690 (Colo. 1983). The asserted error in this context was in allowing the jury unfettered access to view the video. At most, the record shows that the district court intended to allow such access once the jurors asked to see the video: it does not show, however, that the jurors ever asked to see the video and

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respect to the use of video evidence by juries. Rather, we think it clear that the court followed that practice in this case.

hence that they ever had unfettered access to the video. Thus, the facts in this case stand in contrast to those in *DeBella v. People*, 233 P.3d 664, 666 (Colo. 2010) ("The hour-long tape was provided to the jury . . . ."). *See also Frasco v. People*, 165 P.3d 701, 702 (Colo. 2007) ("During their deliberations, the jury requested permission to review the videotaped statement . . . . [T]he trial court provided the jurors with the videotape, a television, and a videocassette player.").

DeBella does not say anything which could be viewed as relieving a defendant of the obligation of showing that the jury actually received unfettered access to a video recording of a witness's statement. The People argued in that case that because there was no record of how the jury used the video in the jury room, "it would be speculative to presume that the jury watched the video at all, to say nothing of whether the jury gave it 'undue weight or emphasis.'" *DeBella*, 233 P.3d at 668. The court rejected that argument because the "holes in the record [were] the result of the trial court's error . . . ." *Id.* In this case, defendant has not shown that the record demonstrates an error — i.e., that the court actually gave the jury unfettered access to the video.

D. Jury Selection

Defendant contends that the district court erred during jury selection by (1) minimizing the jurors' duty to disclose information during juror orientation; (2) denying a *Batson* challenge; (3) denying two challenges for cause; (4) denying his motion to change venue; and (5) allowing a jury panel that did not represent a fair cross-section of the community.

1. Court Instructions During Juror Orientation

Defendant contends that the court erred during juror orientation by using language that diminished potential jurors' duty to disclose information on questionnaires. We are not persuaded.

a. Additional Facts

The court began the jury selection process by asking potential jurors to fill out a questionnaire. The questionnaire was more extensive than the standard juror questionnaire described in section 13-71-115, C.R.S. 2014. For example, it summarized the basic underlying events and participants, asked jurors if they had heard about the events in the media or the community, and asked jurors if they had racial prejudices. The form told the prospective jurors that it would help save time "when you complete this

questionnaire completely and accurately," and included the following admonition above the signature line: "I declare that the above information is, to the best of my knowledge, true. I know that if I have willfully misrepresented a material fact on this questionnaire, I have committed a Class 3 Misdemeanor punishable as provided in Section 18-1-106, C.R.S."

The court told jurors, in relevant part:

> Please keep in mind as you're filling out the questionnaire that we don't know much about you and the more information we can have about you that you're willing to share, the more intelligent our decisions will be as to whether or not you will remain and serve as a juror in this case and that is the goal of jury selection is to find out who does not have, say, biases or prejudices which would make it impossible for them to serve as a juror.
> . . .
> So we do very much appreciate your willingness to serve and we would ask that you recognize your importance in the system and be diligent in filling out those questionnaires, giving us as much information as you feel comfortable in sharing.

Defense counsel did not object to the court's comments.

On appeal, defendant argues that the phrases "the more information we can have about you that you're willing to share" and

"as much information as you feel comfortable in sharing" diminished the prospective jurors' duty to disclose information.

b. Standard of Review

A district court has wide discretion in conducting a trial. *People v. Coria*, 937 P.2d 386, 391 (Colo. 1997). We will not find an abuse of that discretion absent a showing that the court's conduct was manifestly arbitrary, unreasonable, or unfair. *Id.* We review unpreserved claims of error, whether constitutional or nonconstitutional, for plain error. *Hagos*, ¶ 14; *see also* Crim. P. 52(b).

c. Analysis

We conclude initially that the court acted within its discretion because its comments were not improper. The court's comments, viewed in context, did not lessen the prospective jurors' duty to disclose information on the questionnaires. To the contrary, the court encouraged the jurors to be diligent and to share information liberally so that the court could make intelligent jury selection decisions. *See People v. Martinez*, 224 P.3d 1026, 1030 (Colo. App. 2009) ("casual remarks" by district court do not constitute reversible error unless they reflect adversely on the defendant or the

issue of his guilt), *aff'd*, 244 P.3d 135 (Colo. 2010). The questionnaire itself also highlighted the prospective jurors' legal duty to be truthful. Thus, there was no error.

We also reject defendant's contention because he does not assert any prejudice related to the juror questionnaires.

Section 13-71-140, C.R.S. 2014, governs irregularities in selecting and managing jurors. The statute instructs the court not to set aside a verdict based on allegations of any irregularity in selecting jurors unless the moving party (1) "objects to such irregularity or defect as soon as possible after its discovery" and (2) "demonstrates specific injury or prejudice." § 13-71-140. Our cases also hold that "[w]ith respect to a trial court's comments, . . . more than mere speculation concerning the possibility of prejudice must be demonstrated to warrant a reversal." *Martinez*, 224 P.3d at 1030.

The People argue that defendant waived this contention because he did not follow the procedure in section 13-71-140. Defendant responds that the statute limits only the district court and is not applicable to the appellate court. We need not decide this issue. The statute and our case law together make clear that,

at any level of review, the defendant must at a minimum demonstrate specific prejudice stemming from the court's comments during jury selection.

Apart from a blanket assertion of structural error (for which there is no legal support), defendant does not assert any specific prejudice resulting from the court's comments. The expanded questionnaire was something that the district court added to the jury selection process beyond the statutory requirements. Defendant does not assert that any prospective juror failed to properly complete the questionnaire. Defense counsel had a full opportunity for voir dire after the questionnaires were completed. And defendant does not assert that any members of the jury who actually decided his guilt were unfit because of undisclosed information. Absent a showing of prejudice, there is no reversible error. *See id.*

2. *Batson* Challenge

Defendant contends that the district court erred by denying his *Batson* challenge to a prospective juror. We are not persuaded.

a. Additional Facts

On the second day of jury selection, eighty-one prospective jurors remained. The parties agreed that Mr. O appeared to be the lone African-American remaining on the panel.

In his juror questionnaire, Mr. O had indicated that he was a supervisor at a collections law office. During voir dire, the prosecutor asked Mr. O a series of thirteen questions related to his employment.

Following voir dire, the prosecutor used the People's fourth peremptory strike to excuse Mr. O. Defense counsel initially objected at an unrecorded bench conference. The court treated the objection as one pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and invited the parties to make a more complete record the following day.

Defense counsel objected that there was no race-neutral reason to dismiss Mr. O. The court ruled that the defense had met the initial burden of showing an improper challenge, and asked the prosecutor to articulate race-neutral reasons for excusing Mr. O.

The prosecutor gave several reasons: (1) Mr. O was a manager at a collections law firm and might try to apply his legal knowledge

to the case; (2) Mr. O's odd look in response to one of the judge's jokes; (3) Mr. O did not raise his hand to agree that murder is horrible (which the prosecutor interpreted as his lack of desire to participate); (4) Mr. O seemed to misinterpret the burden of proof to be neutral; (5) Mr. O had his eyes closed during voir dire and was not paying attention; (6) Mr. O was chatting with a fellow potential juror and not paying attention; and (7) defense counsel did not question him.

Defense counsel argued that the prosecutor's proffered reasons were only a pretext for excusing an African-American juror. Counsel argued that it was incredible that the prosecutor would excuse a juror for interpreting the burden of proof to the detriment of defendant and that the other reasons given — such as an odd look after a joke or closed eyes — were generic and unconvincing.

The court denied the *Batson* challenge, after considering the prosecutor's race-neutral reasons, voir dire examination of Mr. O, and information in Mr. O's juror questionnaire. The court noted the prosecutor's concerns about Mr. O's behavior during voir dire, specifically mentioning only the fact that it also observed Mr. O's conversation with another juror during voir dire. However, the

court relied primarily on Mr. O's role as a supervisor at a collections law firm, which Mr. O had noted in his juror questionnaire and discussed during voir dire: "[T]he court does find that the People have established a race-neutral reason for excusing Mr. O[] and I am primarily focusing on his employment in the legal area and the concerns the People would have about that particular aspect . . . ."

b. Applicable Law and Standard of Review

The use of peremptory challenges to purposefully discriminate against jurors of a protected class violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994); *Batson*, 476 U.S. at 89; *Craig v. Carlson*, 161 P.3d 648, 653 (Colo. 2007).

Batson outlines a three-step process for evaluating claims of racial discrimination in jury selection. *Batson*, 476 U.S. at 93–98; *see also People v. Cerrone*, 854 P.2d 178, 185 (Colo. 1993) (applying *Batson*'s three-step process). First, the defendant (or the opponent of the strike) must make a prima facie showing that the prosecution (or the proponent of the strike) excluded a potential juror on the basis of race. Second, if the defendant makes that showing, the

prosecution must articulate a race-neutral reason for excluding the juror in question. Third, if the prosecution articulates such a reason, the defendant must be given an opportunity to rebut the prosecution's reason and the court must determine whether the defendant has carried his ultimate burden of proving purposeful discrimination. *Cerrone*, 854 P.2d at 185; *People v. Collins*, 187 P.3d 1178, 1182 (Colo. App. 2008). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Defendant challenges only the district court's ultimate determination that he had not proved purposeful racial discrimination. Thus, we focus on the third step of the *Batson* analysis.

At step three, the court must review all the evidence to decide whether the defendant has shown, by a preponderance of evidence, that the prosecution sought to exclude a potential juror because of a discriminatory reason. *Craig*, 161 P.3d at 654; *Collins*, 187 P.3d at 1182. The decisive question is whether the prosecution's race-neutral explanation for a peremptory challenge should be

believed. *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion); *see also People v. Gabler*, 958 P.2d 505, 507 (Colo. App. 1997) (at step three "the plausibility of the prosecutor's race-neutral explanation becomes relevant"). The prosecution's rationale need not be sufficient to justify a challenge for cause — *see Cerrone*, 854 P.2d at 189 — but "implausible or fantastic justifications" for a peremptory strike do not overcome an inference of purposeful discrimination. *Purkett*, 514 U.S. at 768; *accord People v. Beauvais*, 2014 COA 143, ¶ 11.

In assessing the credibility of the race-neutral reasons proffered, the court may consider a number of factors, including the prosecutor's demeanor, how reasonable or improbable the prosecutor's explanations are, and whether the reasons have some basis in accepted trial strategy. *Craig*, 161 P.3d at 654; *Collins*, 187 P.3d at 1182.

Because a reviewing court is not as well positioned as the district court to make such determinations, we review a district court's decision at step three only for clear error. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998). "Thus, in the absence of exceptional

circumstances, we defer to the district court's finding." *People v. Robinson*, 187 P.3d 1166, 1174 (Colo. App. 2008). If the court clearly erred, then the defendant's convictions must be reversed. *Collins*, 187 P.3d at 1184; *Gabler*, 958 P.2d at 509.

c. Analysis

We conclude that the district court did not clearly err by denying defendant's *Batson* challenge.

The race-neutral reason on which the court relied — Mr. O's legal employment — was sufficient. The reason was amply supported by the record and the parties do not dispute its factual basis. The prosecutor had been concerned enough about Mr. O's employment that he probed the subject with thirteen questions during voir dire, refuting the implication that the concern was pretextual. *See Gabler*, 958 P.2d at 508 (failure to inquire into area of claimed concern suggests pretext).

Defendant's arguments that Mr. O's legal employment was clearly a pretextual reason are unavailing. He argues that Mr. O lacked formal legal training, but the prosecutor did not claim that formal training was the basis of Mr. O's legal knowledge. Relying on *Collins*, defendant also argues that the prosecutor accepted a white

juror who had a criminal-justice degree and worked for a private company in community corrections; thus, the prosecutor treated Mr. O differently than a similarly situated white juror. But we do not view a law office and community corrections as sufficiently analogous to support an inference of unequal treatment. In *Collins*, the prosecutor claimed that he had excused a black juror because she was a nurse; not only was the juror not a nurse, but the prosecutor had accepted three white jurors working in health care, including a nurse. 187 P.3d at 1183.

We acknowledge that, because Mr. O vouched that he could be fair, his legal employment may not have justified a challenge for cause. But that is not the standard. *See Cerrone*, 854 P.2d at 189. The race-neutral reason was not implausible, fantastic, or foreign to acceptable trial strategy. *See Craig*, 161 P.3d at 654; *Beauvais*, ¶ 11. Thus, this is not an exceptional circumstance where the district court clearly erred in its determination that defendant did not prove purposeful discrimination. *Robinson*, 187 P.3d at 1174.

3. Challenges for Cause

Defendant contends that the court abused its discretion by denying two of his challenges for cause. Again, we are not persuaded.

a. Procedural Facts

i. Prospective Juror G

Defendant argues that Ms. G should have been excused for cause because she had been exposed to pretrial publicity and was not properly rehabilitated.

In response to a question asking whether she knew anything about the case, Ms. G wrote on her juror questionnaire, "I remember hearing about it on the news." She also wrote, and then crossed out, "I believe a young engaged couple was killed." The questionnaire also asked, if the prospective juror had heard anything, "have you formed any attitudes or opinions about what happened at Lowry Park on July 4, 2004?" She wrote, "no."

During individual voir dire, defense counsel asked Ms. G about her exposure to media coverage of the case.

> [Ms. G]: You know, I really don't remember all that much. I just remember there was a shooting, I thought it happened in Aurora

> somewhere, where one person was killed and — when I first came in to answer the questionnaire, before I read the full amount of information that was given on the top of the questionnaire, I thought it was . . . a couple that had been shot and killed, and Marshall-Fields, that name rang a bell, stuck in my head for obvious reasons, but that's basically all of what I do remember.

Defense counsel then asked Ms. G, if the evidence in the case caused her to remember more details from news coverage, whether she could remain fair.

> [Ms. G:] I think it's a possibility that the more this case unfolds the more my memory will come back into play as far as what I'm remembering.
>
> [Defense counsel:] And I believe when the judge asked you about whether it would affect you, you said you thought you could not let it affect you, but it will a little.
>
> [Ms. G:] I don't know. I have to think about that.
>
> [Defense counsel:] So where do we stand on that now as far as had you — it's a tough question kind of, to be a fortune teller.
>
> [Ms. G:] As an individual, I feel like I'm a fair person. I am also wise enough to realize that by hearing something on the media or the news, or reading anything about it, that you could be influenced by one or the other. It's hard for me to say. . . .

> [Defense counsel:] . . . It sounds like you would do your very, very best not to have this happen but you have some doubts as to whether or not that would be a successful effort. Is that a fair characterization of what you're saying?
>
> [Ms. G:] Yes. I think so. I think that's true. I would try my very best to be fair . . . [but] as the story unfolds, I can't say that my opinion back then when I heard about it might not have some influence.

The prosecutor also questioned Ms. G. He explained that "to be fair" she must base her verdict "only on the evidence that is presented during the trial." The prosecutor said that media exposure did not disqualify her so long as she could separate the evidence actually presented from what she had heard. He asked if she believed she could do that and she answered, "I do." The prosecutor then asked, in the event that Ms. G remembered more details during trial, whether she could still decide the case based only on the evidence. She answered, "I think I could." Finally, the prosecutor asked, in the event that Ms. G remembered details during trial that might compromise her ability to be fair, whether she would notify the court. She answered, "I would, yes."

Defense counsel challenged Ms. G for cause, arguing that (1) she had expressed doubt that she could put media coverage from her mind and was equivocal on that point during rehabilitation because she had said, "I think I could"; and (2) she had commingled in her mind the Lowry Park incident and the subsequent killing of Marshall-Fields.

The prosecutor argued that Ms. G had said she understood that the case should be decided only on the evidence presented. Saying "I think I could" did not indicate doubt, he argued, but simply recognized that one cannot predict all future scenarios with certainty. The prosecutor argued that mere knowledge of outside facts did not justify a removal for cause when the juror assured the court she could decide the case on the evidence alone.

The court denied the challenge for cause:

> Ms. G[] did appear to me to understand the service she would have to serve as a juror and assured the Court in her responses as given to the prosecution that in the event outside knowledge became such a factor that she did not feel she could be fair and impartial she would call that to our attention. But at this point she indicated she could put aside what little she knew about the case and judge it based solely upon evidence presented during the trial, so I will deny the challenge for cause.

Defense counsel used a peremptory strike to remove Ms. G.

ii. Prospective Juror L

Ms. L disclosed in her juror questionnaire that she had strong feelings about gangs: "Too many for our enforcement depts [sic] to handle. Getting out of jail too soon."

During individual voir dire, the court asked Ms. L about her questionnaire response. She focused on people getting out of jail too soon, responding in a somewhat confusing fashion: "I like watching CNN, the news, and I just think there is too many people getting out of jail too soon . . . I think there is too many people in jail right now." The court explained that jurors would not be involved in deciding punishment if defendant was found guilty, and asked if she would set aside her feelings about sentences. She answered, "I would, yes."

The prosecutor asked Ms. L if she would be able to decide the case based on the evidence presented, even if there was evidence of gang involvement. She answered: "I can separate the two. I mean, I am adult, I know where the separation is, this one person and the entire, you know, community." The prosecutor followed up by

asking: "[B]asically your feelings about gangs are not going to determine how you decide the cases? Is that safe to say?" She answered, "yes."

Defense counsel asked Ms. L if she had any reason to believe defendant was a gang member. She said: "No. For what reason? I mean, I don't know. I don't know anything about the case."

Defense counsel challenged Ms. L for cause because of, among other things, "concern[] about her answers to the gang issues." The prosecutor argued that Ms. L "appeared to be somebody that could and would decide this case on the evidence."

The court denied the challenge for cause: "I find that she clearly indicated she can separate out any feelings she may have about gangs or not distort or determine her perception of the evidence in this case based upon her feelings in that regard."

Defense counsel removed Ms. L with a peremptory strike and exhausted his peremptory challenges.

b. Standard of Review and Applicable Law

We review a district court's ruling on a challenge for cause for an abuse of discretion, considering the entire voir dire. *Carrillo v. People*, 974 P.2d 478, 485-86 (Colo. 1999); *see Banks*, ¶ 98. We

apply this deferential standard because the district court is in the best position to accurately assess a prospective juror's state of mind, taking into consideration the prospective juror's tone, expression, and demeanor. *People v. Young*, 16 P.3d 821, 825-26 (Colo. 2001); *People v. Clemens*, 2013 COA 162, ¶ 9. Despite the broad discretion accorded the district court, we understand that we must not "abdicate [our] responsibility to ensure that the requirements of fairness are fulfilled." *Morgan v. People*, 624 P.2d 1331, 1332 (Colo. 1981).

A criminal defendant has a constitutional right to a fair and impartial jury. *Nailor v. People*, 200 Colo. 30, 32, 612 P.2d 79, 80 (1980); *People v. Hancock*, 220 P.3d 1015, 1016 (Colo. App. 2009). The right to challenge a prospective juror for cause is an integral part of this right. *Carrillo*, 974 P.2d at 486; *People v. Chavez*, 313 P.3d 594, 596 (Colo. App. 2011).

A court must sustain a challenge for cause based on "[t]he existence of a state of mind in the juror evincing enmity or bias toward the defendant." § 16-10-103(1)(j), C.R.S. 2014; *see* Crim. P. 24(b)(1)(X) (same). However, a prospective juror's mere expression of a preconceived opinion will not disqualify her "if the court is

satisfied, from the examination of the juror or from other evidence, that [s]he will render an impartial verdict according to the law and the evidence submitted." § 16-10-103(1)(j).

A court may excuse a prospective juror if the juror indicates a biased state of mind, but the court need not excuse such a juror if the juror "agrees to set aside any preconceived notions and make a decision based on the evidence and the court's instructions." *People v. Lefebre*, 5 P.3d 295, 301 (Colo. 2000), *abrogated on other grounds by People v. Novotny*, 2014 CO 18; *see Banks*, ¶ 110 (a court may properly conclude that a juror's assurance of fairness outweighs a statement of bias); *People v. Phillips*, 219 P.3d 798, 802 (Colo. App. 2009) (a court does not abuse its discretion if "the record contains a general statement by a juror that, despite any preconceived bias, he or she could follow the law and rely on the evidence at trial").

Thus, a prospective juror's expression of some doubt as to her ability to be fair and impartial does not require the court to excuse the juror, and a court may credit the juror's assurances that she can be fair and impartial, even if those assurances appear inconsistent or contradictory. *See Morrison v. People*, 19 P.3d 668,

672 (Colo. 2000); *People v. Honeysette*, 53 P.3d 714, 719 (Colo. App. 2002). A court errs in denying a challenge for cause only when a prospective juror's statements "compel the inference that he or she cannot decide crucial issues fairly," and no rehabilitative questioning or other information counters that inference. *People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007); *People v. Wilson*, 114 P.3d 19, 22 (Colo. App. 2004); *see Lefebre*, 5 P.3d at 299 ("A trial court must grant a challenge for cause if a prospective juror is unable or unwilling to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions.").

c. Analysis

i. Prospective Juror G

The court questioned Ms. G during individual voir dire because of her exposure to media reports. She had a vague recollection of the case. She remembered that perhaps a person was killed at Lowry Park, and remembered the name Marshall-Fields (and maybe that an engaged couple had been killed), but seemed to have no memory of defendant's name or his connection to the events. Ms. G said she had formed no opinions or attitudes

about the case. She did agree with defense counsel's suggestion that outside information could possibly influence her. However, she then assured the court that she could be fair and render a verdict based on the evidence presented. *See Phillips*, 219 P.3d at 802.

Defense counsel's concern about Ms. G's exposure to pretrial publicity was largely speculative. Counsel asked her whether, if the evidence jogged her memory during trial, she could remain fair with whatever new information she recalled. Ms. G responded that she thought she could remain fair, but could not say definitively because she could not possibly know what she might recall. Defense counsel admitted to Ms. G that he was asking her to be a "fortune teller." The prosecutor rehabilitated Ms. G even on this speculative point, because she assured the court that she would tell the court if the hypothetical situation unfolded in which she recalled details that compromised her ability to be fair.

Contrary to defendant's assertion, Ms. G was properly rehabilitated when she said that she would "try her very best to be fair" and that "I think I could" put aside any newly remembered information. "It is not necessary that a prospective juror state with absolute certainty that he or she will set aside all potential bias."

People v. Fleischacker, 2013 COA 2, ¶ 27. Our cases consistently hold that expressions such as "try" and "think" do not undermine a potential juror's assurances to be fair and impartial. *See People v. Tunis*, 2013 COA 161, ¶ 34 (juror's assurance sufficient when he said he "would make every effort to be fair and impartial"); *Wilson*, 114 P.3d at 23 (court abused its discretion because there was no "statement from the prospective juror that he could render or *would try to render* an impartial verdict") (emphasis added); *People v. Woellhaf*, 87 P.3d 142, 151 (Colo. App. 2003) (juror's assurance was sufficient when she said that she "would try" to put bias aside and "thought" she could be fair), *rev'd on other grounds*, 105 P.3d 209 (Colo. 2005).

In sum, Ms. G's statements did not compel the inference that she could not be fair and impartial. *See Merrow*, 181 P.3d at 321. Thus, the district court did not abuse its discretion by denying defendant's challenge for cause of Ms. G.

ii. Prospective Juror L

Defendant argues on appeal that Ms. L should have been excused for cause because there was no record support for the

district court's conclusion that her negative feelings about gangs would not compromise her ability to be fair.[17]

Ms. L disclosed strong feelings about gangs in her juror questionnaire. However, during individual voir dire, she made quite clear that she could separate her feelings in general from the evidence presented. She affirmed that her feelings about gangs would not determine how she decided the case. And she rebuffed defense counsel's suggestion that she had reason to believe defendant was a gang member. The record supports the district court's conclusion that her general feelings about gangs would not compromise her ability to be fair and impartial in this case. Thus, the court did not abuse its discretion in denying defendant's challenge for cause of Ms. L. *See Morrison*, 19 P.3d at 672; *Honeysette*, 53 P.3d at 719.

Because the district court did not err by denying these two challenges for cause, we need not consider whether the denials prejudiced defendant.

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[17] Defense counsel argued additional bases to the district court, but defendant asserts only this basis on appeal.

4. Motion for Change of Venue

Defendant contends that the district court erred by denying his motion to change venue. We are not persuaded.

a. Additional Facts

Defendant initially filed a motion to give jurors screening questionnaires that included questions on media exposure related to the case, and for individual voir dire of those jurors who had seen news coverage. The court granted that motion. Question number thirty of the juror questionnaire gave a brief recital of the facts of the case and identified some of the people involved, and asked prospective jurors if they recognized facts or names.

Defendant subsequently moved the court to change venue, arguing that prejudicial publicity had saturated the jurisdiction of Arapahoe County. The court deferred ruling on the motion until after voir dire, reasoning that voir dire would demonstrate whether an impartial jury could be seated. The court also denied related defense motions, such as those asking for severance of the counts related to Marshall-Fields and for individual voir dire of all prospective jurors. Defense counsel included more than 100 news articles with the motion requesting individual voir dire.

The court summoned a large jury pool, and 179 prospective jurors reported and filled out the questionnaire. Based on questionnaire responses, the court winnowed the juror pool to eighty-six people. In addition to general voir dire, the court allowed individual voir dire of twenty prospective jurors — fourteen of them because they had indicated on the juror questionnaire that they had heard something about the case.

Defense counsel challenged seven of the individually questioned prospective jurors for cause. The court granted two of those challenges. None of those challenged actually served on the jury.

b. Standard of Review

The district court may grant a change of venue "[w]hen a fair trial cannot take place in the county or district in which the trial is pending." § 16-6-101(1)(a), C.R.S. 2014. We review a district court's decision to deny a change of venue for an abuse of discretion. Crim. P. 21(a)(1); *People v. Harlan*, 8 P.3d 448, 468 (Colo. 2000), *overruled on other grounds by People v. Miller*, 113

P.3d 743 (Colo. 2005); *People v. Hankins*, 2014 COA 71, ¶ 6.[18] The district court "abuses its discretion if its rulings deny the defendant a fundamentally fair trial." *Harlan*, 8 P.3d at 468.

A defendant seeking to show a due process entitlement to change of venue must establish either a presumption of prejudice or actual prejudice. *People v. Botham*, 629 P.2d 589, 596 (Colo. 1981), *superseded by rule as stated in People v. Garner*, 806 P.2d 366 (Colo. 1991).

c. Analysis

i. Presumed Prejudice

We presume prejudice when the defendant shows "the existence of massive, pervasive, and prejudicial publicity that created a presumption that the defendant was denied a fair trial." *Harlan*, 8 P.3d at 468. Even extensive pretrial publicity triggers a presumption of prejudice only in "extreme circumstances." *Id.* at 469.

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[18] We acknowledge that federal courts review de novo a claim of presumed prejudice and review for an abuse of discretion a claim of actual prejudice, *see United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998), but the Colorado Supreme Court has not adopted this approach. Applying de novo review would not cause us to reach a different conclusion.

> To hold that jurors can have no familiarity through the news media with the facts of the case is to establish an impossible standard in a nation that nurtures freedom of the press. . . . Only when the publicity is so ubiquitous and vituperative that most jurors in a community could not ignore its influence is a change of venue required before voir dire examination.

People v. McCrary, 190 Colo. 538, 545, 549 P.2d 1320, 1325–26 (1976) (citations omitted).

In *McCrary*, *id.* at 546, 549 P.2d at 1326, the supreme court set forth several factors to guide our analysis of whether pretrial publicity biased a community: (1) the size and type of community; (2) the reputation of the victim; (3) the revealed sources of the news stories; (4) the specificity of the accounts of certain facts; (5) the volume and intensity of the coverage; (6) the extent of comment by the news reports on the facts of the case; (7) the manner of presentation; (8) the proximity to the time of trial; and (9) the publication of highly incriminating facts not admissible at trial.

Our review of pretrial publicity is necessarily limited to the newspaper articles that defendant has included as part of the record. *See Botham*, 629 P.2d at 596 n.3. He presents articles

from the Denver Post and the now-defunct Rocky Mountain News — newspapers based in Denver with statewide circulation.

After reviewing these articles, we conclude that defendant has not met the stringent standard to establish a presumption of prejudice. The supreme court's analysis in *Botham* is instructive. The events in the *Botham* case occurred in the "small rural community" of Mesa County. *Id.* at 599. The only local daily newspaper published more than 100 articles related to the defendant's crimes, up to the time of trial. *Id.* at 597 & n.4. Many of the sources in the articles were local law enforcement officials, adding credence to the information, and the articles included grisly details about the victims' corpses and incriminating, inadmissible evidence about the discovery of the possible murder weapon at Botham's former house. *Id.* at 597-99. Even under these circumstances, the supreme court held that there was no presumption of prejudice. *Id.* at 597 ("We have concluded that this was not a case where there was such massive, pervasive, and prejudicial publicity that the denial of a fair trial can be presumed.").

In this case, the events occurred in Arapahoe County, which has a population of more than 500,000 people. Two regional newspapers, collectively, published more than 100 articles related to the crimes. The coverage was extensive, and negative toward defendant. Many of the articles included information about the subsequent murders of Marshall-Fields and Wolfe, which was ruled inadmissible at this trial because it was deemed unduly prejudicial. The sources in these articles often included relatives of the victims and portrayed the victims in a positive light.

At the same time, however, defendant's name did not appear in early coverage of the Lowry Park shooting or in many of the later articles. Coverage was fairly prosaic until the murders of Marshall-Fields and Wolfe in June 2005. The most dramatic articles about those murders featured mainly Owens, and recounted evidence from his preliminary hearing. Even after those murders, much of the coverage focused on witness-protection legislation, and mentioned defendant and Owens, if at all, only in passing. And while some of the articles contained inadmissible information regarding defendant's character, few contained much detail about

the events and little or no key inadmissible evidence relating to the charged crimes.

The facts in this case are roughly similar to the facts in *Botham*, but even less indicative of prejudice. Along with the lack of grisly details or incriminating evidence in the news coverage here, there are two other main distinctions. First, much of the media coverage here did not focus on defendant as the primary perpetrator. *See People v. Carrillo*, 946 P.2d 544, 552 (Colo. App. 1997) (concluding that there was no presumed prejudice where "[m]any [articles] did not mention defendant, but instead focused on co-defendants or other crimes"), *aff'd*, 974 P.2d 478 (Colo. 1999). Second, Arapahoe County is a much larger community than Mesa County. *Cf. Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (plurality opinion) (reduced likelihood of prejudice where venire was drawn from a pool of more than 600,000 people).

Perhaps most telling, the jury acquitted defendant of the most serious charge against him (murder) and one count of attempted murder. In *Skilling v. United States*, 561 U.S. 358, 382-84 (2010), the Court evaluated a claim of presumed prejudice and held that the jury's acquittal of the defendant on some counts undermined

"the supposition of juror bias." The court concluded: "It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." *Id.* at 383.

Thus, despite the extensive and negative coverage, we conclude that the pretrial publicity did not constitute the extreme circumstance that gives rise to a presumption of prejudice. *See Harlan*, 8 P.3d at 469 (no presumed prejudice despite "impressive amount of publicity"); *McCrary*, 190 Colo. at 542, 549 P.2d at 1323 (no presumed prejudice despite news coverage of inadmissible allegations that the defendant may have committed twenty-two murders across the country); *People v. Bartowsheski*, 661 P.2d 235, 240-41 (Colo. 1983) (no presumed prejudice despite large volume of coverage where the articles were not sensational or inflammatory); *People v. Munsey*, 232 P.3d 113, 121–23 (Colo. App. 2009) (no presumed prejudice despite publication of ninety articles in small community, including a political cartoon that suggested the defendant be hanged); *see also Stafford v. Saffle*, 34 F.3d 1557, 1566 (10th Cir. 1994) (holding that extensive publicity did not show presumed prejudice in the absence of "a circus atmosphere or lynch mob mentality").

ii. Actual Prejudice

Next, we consider whether defendant established actual prejudice. A defendant establishes actual prejudice "based upon a nexus between extensive pretrial publicity and the jury panel." *Botham*, 629 P.2d at 597. In *Botham*, the supreme court considered the totality of the circumstances in deciding whether the defendant proved actual prejudice, "reviewing both the pretrial publicity and the voir dire examination of the jury." *Id.* In *Harlan*, 8 P.3d at 470, the supreme court concluded that the district court took sufficient measures — specifically, "extensive individualized voir dire concerning the jurors' exposure to publicity" — to ensure a fair trial. However, in a case where voir dire revealed that many of the jurors who rendered a verdict had detailed knowledge of the case and had formed an opinion on the defendant's guilt before trial, the court concluded that the defendant did not have a fair trial. *Botham*, 629 P.2d at 600. Thus, we look at the relationship between pretrial publicity and the jury panel to assess whether the district court took sufficient measures to ensure that the jurors who rendered a verdict did not have detailed knowledge of the case or preconceived opinions about defendant's guilt.

The pretrial publicity in this case necessitated extra care in selecting a jury. The extensive media coverage, peppered with inadmissible evidence of other bad acts, raised a danger that a portion of the venire would be biased against defendant. We conclude that the district court took measures sufficient to mitigate that danger.

The court summoned a large jury pool and used a screening questionnaire to reveal who had been exposed to pretrial publicity and to inquire about other potential bases for excusing potential jurors. The court excused roughly half the venire based on the screening questionnaire and individual voir dire. Only fourteen prospective jurors required individual voir dire based on media exposure, signaling that the effect of media coverage was not pervasive. The record shows that defense counsel (along with the court and the prosecutor) had a full opportunity at individual voir dire to explore potential jurors' knowledge of the case and possible biases. *See Harlan*, 8 P.3d at 470 (court took sufficient measures when it employed "extensive individualized voir dire"); *see also Skilling*, 561 U.S. at 384 ("extensive screening questionnaire and

follow-up *voir dire* were well suited to [the] task" of countering effects of pervasive pretrial publicity).

Defense counsel challenged only seven prospective jurors for cause, and none of those challenged for cause actually served on the jury. Defendant does not assert that any prospective juror with detailed knowledge of the case or a preconceived opinion about his guilt actually served. These facts stand in contrast to those in *Botham*, where the supreme court found actual prejudice. In *Botham*, 629 P.2d at 600, all fourteen jurors who served had detailed knowledge of the case, and seven of them had expressed preconceived opinions that defendant was guilty.

We conclude that defendant has not established actual prejudice based on a nexus between pretrial publicity and the jury panel. *See Bartowsheski*, 661 P.2d at 241 (no actual prejudice where extensive voir dire and defense counsel did not challenge for cause any of the jurors who actually served); *Botham*, 629 P.2d at 597; *Carrillo*, 946 P.2d at 552 (concluding that there was no actual prejudice where "during voir dire, jurors with any knowledge of the crime either stated they were capable of putting aside opinions already formed or were excused for cause"). This conclusion is

confirmed by the jury's split verdicts in this case, which demonstrated that jurors weighed the evidence rather than rendering verdicts based on prejudice against defendant.

5. Fair Cross-Section

Defendant contends that the jury pool did not comport with his right to a jury selected from a fair cross-section of the community because there were so few African-Americans. We are not persuaded.

Defense counsel moved to strike the jury panel, because of the lack of racial diversity, when only one of the eighty-one remaining prospective jurors appeared to be African-American. The court denied the motion, inviting more information but concluding that on the existing record it could not make the requisite findings to strike the panel. We review the court's factual determinations for clear error, and legal determinations de novo. *Washington v. People*, 186 P.3d 594, 600 (Colo. 2008).

The Sixth Amendment guarantees the defendant a jury drawn from a fair-cross section of the community. To establish a prima facie violation of the fair cross-section guarantee, the defendant must show: (1) a distinctive group; (2) was underrepresented in

venires in relation to that group's percentage of the community; (3) because of systematic exclusion in the jury-selection process. *Id.*

Defendant has identified a distinctive group — African-Americans. However, he did not present any statistical information to show that African-Americans were underrepresented in venires relative to their percentage of the community (except the venire in this trial). *See United States v. Weaver*, 267 F.3d 231, 240 (3d Cir. 2001) (requiring statistical evidence regarding venires in the relevant jurisdiction). And defendant does not claim systematic exclusion of African-Americans, except to argue that *People v. Washington*, 179 P.3d 153 (Colo. App. 2007), *aff'd*, 186 P.3d 594, established that African-Americans were being systematically excluded from jury panels in Arapahoe County at the time of his trial. However, the division in *Washington* held that "defendant's evidence was legally insufficient to establish constitutionally significant underrepresentation of African–Americans . . . in jury panels" and, thus, declined to consider systematic exclusion. *Id.* at 164. Because defendant has not established a prima facie violation of the fair cross-section guarantee, the district court did not err in denying his motion to strike the panel.

E. Prosecutorial Misconduct

Defendant contends that the prosecutors acted improperly by (1) asking him to comment on the veracity of other witnesses during cross-examination; (2) asking him to give too much information about a prior conviction during cross-examination; (3) making improper arguments; (4) introducing propensity evidence in violation of a court order; and (5) failing to timely disclose witness contact and impeachment information. He also asserts that the prosecutors' misconduct, cumulatively, is reversible error.

1. Eliciting Testimony on Witness Veracity

Defendant contends that the court reversibly erred by allowing the prosecutor to ask him to comment on the veracity of other witnesses. We conclude that some of the questions about which defendant complains were improper, but that reversal is not justified.

a. Procedural Facts

On appeal, defendant challenges several exchanges, set forth below. We have italicized the questions that, in our judgment, arguably called for comment on another witness's veracity.

- Questions about prosecution witness Jamar Johnson.

[Prosecutor:] *So when Jamar Johnson testified that that's how he saw you shoot, he was right?*

[Defendant:] He wasn't lying about that part.

. . .

[Prosecutor:] Okay, he was right about that.

. . .

[Prosecutor:] Did you hear Jamar Johnson, your friend, at least at the time, testify that he heard two and up to five shots at the Suburban that you were firing?

[Defendant:] I remember him saying that.

[Prosecutor:] But you only fired one shot.

[Defendant:] Only once.

- Questions about defendant's testimony that he did not know Owens was carrying a gun the night of the shooting.

[Prosecutor:] You knew that's what he always carried, right?

[Defendant:] That's what he sometimes carried.

[Prosecutor:] Sometimes carried? You heard again Latoya testify that she knew [Owens] always carried a gun. Did you hear that?

[Defendant:] I heard her say that.

[Prosecutor:] *Okay. Not true?*

[Defendant:] He didn't always carry one, he carried one sometimes, but not all the time.

- Questions about "snitches." During direct examination, defense counsel introduced a letter defendant had written to Owens, in which he wrote he was not a "snitch." The prosecutor followed up on cross-examination.

[Prosecutor:] What is a snitch?

[Defendant:] Somebody, Jamar Johnson, who lie to get out of trouble.

[Prosecutor:] *Was Askari Martin a snitch for talking to the police?*

[Defendant:] No, he wasn't. He told what he thought he seen what he thought he knew, but people that come in and lie, that's a snitch.

[Prosecutor:] *You have called him a snitch, have you not?*

[Defendant:] I never called him a snitch.

[Prosecutor:] *Is Latoya a snitch?*

[Defendant:] No she ain't a snitch. She told what happened. Some of the memories and stories is flaky because they don't remember. Some of it ain't right, some of it is.

[Prosecutor:] *Cashmeir [Owens's girlfriend] a snitch?*

[Defendant:] No, she ain't a snitch.

[Prosecutor:] *Why don't you tell us who the snitches were that night?*

. . .

[Objection sustained because question too broad.]

[Prosecutor:] So a snitch then in your definition is somebody who tells something that isn't true.

[Defendant:] To get out of trouble.

[Prosecutor:] Somebody simply tells the police what they saw, what they heard, they're not a snitch.

[Defendant:] No.

[Prosecutor:] *Is Jeremy Green a snitch?*

[Defendant:] He ain't — he got some of his story mixed up. I ain't just calling people snitches. Some people got their stories mixed up.

[Objection overruled.]

- Questions about the color of the gun defendant used at Lowry Park. Defendant had testified that it was black.

> [Prosecutor:] So why then when Latoya was testifying about you saying you needed to get a black and silver BB gun[,] why were you telling her specifically you needed a black and silver BB gun?
>
> [Defendant:] I told her I wanted a gun that looked real because I didn't have a gun at that time.
>
> [Prosecutor:] *So you did not tell her as she testified that you told her you wanted to get a black and silver BB gun?*
>
> [Defendant:] No.

- Questions about defendant's friendship with Owens.

> [Prosecutor:] Just friends?
>
> [Defendant:] Friends.
>
> [Prosecutor:] *You have heard people describe that relationship between you and him as —*

[Objection overruled.]

> [Prosecutor:] *You've heard other witnesses who knew you both describe his relationship to you as like being your girlfriend. You heard that, did you not?*

Defense counsel objected again, and told the court that he "want[ed] the record to reflect a continuing objection asking [defendant] to comment on other witness's testimony." The court

overruled the objection and did not address the continuing objection.

> [Prosecutor:] Was there anything in terms of the closeness of your relationship and his desire to please you that would make it appear to anybody that he was kind of like your girlfriend?
>
> [Defendant:] Only Latoya said that . . .

- Questions about defendant's request to [his sister-in-law] Brandi Taylor to clean out her garage after the shooting.

> [Prosecutor:] *She said that she did ask you why and you told her basically never mind or don't ask any questions. Is that true?*
>
> [Defendant:] I don't remember. But I don't remember them asking me why.

- Questions asking defendant to identify Owens in a video of the altercation at Lowry Park.

> [Prosecutor:] That's Sir Mario Owens lifting his shirt to show you his gun, isn't it?
>
> [Defendant:] How do you know it's Sir Mario? I don't know. . . .
>
> [Prosecutor:] *Well, you heard your wife testify that that was Breath or Sir Mario Owens?*

> [Defendant:] I heard a lot of people testify as to things they didn't see, people seeing me jump in the truck with four people, people seeing me slapping girls.

The district court explained its reason for allowing the testimony after overruling defense counsel's objections for a third time:

> This is not prohibited comment on testimony of other witnesses. In the event that questions are asked of the witness about his feeling about the veracity of another witness I'd be somewhat more concerned, but if it's simply asking, as I believe it is here, prefatory question to follow up questions as to whether or not this witness has heard another witness testify in this courtroom, I'm going to overrule the objection.

b. Standard of Review and Applicable Law

We review the district court's decision to allow these questions for an abuse of discretion. *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006). If we decide that the district court abused its discretion, we must decide whether the errors preserved by objection were harmless. *Id.* An error is deemed harmless where "viewing the evidence as a whole, the error did not substantially influence the verdict or impair the fairness of the trial." *Medina v. People*, 114 P.3d 845, 857 (Colo. 2005). We review errors not

preserved by objection for plain error. *Hagos*, ¶ 14; *Liggett*, 135 P.3d at 733.

In *Liggett*, 135 P.3d at 732, the supreme court held that questions asking a witness to opine on the veracity of other witnesses are "categorically improper." The court concluded that such questions are "prejudicial, argumentative, and ultimately invade[] the province of the fact-finder," outweighing "any supposed probative value." *Id.*; *accord Davis*, ¶ 16.

Questions framed as "were they lying" are the quintessential prohibited questions, but questions that ask if another witness was "mistaken" are also improper. *Liggett*, 135 P.3d at 735 ("[T]he assertion that [the other witness] was mistaken was less damaging than the later questions calling for assertions that [the other witness] was lying. Regardless, these remarks were improper."). In contrast, a cross-examiner may ask questions that highlight discrepancies in testimony, so long as the questions do not compel the witness to comment on the accuracy of that other testimony. *Id.* at 732.

c. Analysis

i. Abuse of Discretion

First, we must determine whether the district court abused its discretion in allowing the questions at issue.

Defendant specifically challenges nineteen of the prosecutor's questions. We conclude that thirteen of these questions (italicized above) were at least arguably improper. The remaining questions merely highlighted discrepancies in the testimony without asking defendant to comment on the competing testimony. *See id.*; *see also United States v. Harris*, 471 F.3d 507, 512 (3d Cir. 2006) ("[I]t is often necessary on cross-examination to focus a witness on the differences and similarities between his testimony and that of another witness. This is permissible provided he is not asked to testify as to the veracity of the other witness."). Among the thirteen arguably improper questions, the court sustained an objection to one, and one was merely repeated after an objection. Thus, we focus on eleven arguably improper questions posed to defendant during his cross-examination.

The district court reasoned that the challenged questions were merely asking whether defendant had heard other testimony, and

did not directly ask defendant to evaluate other witnesses' veracity. We agree that these questions did not use "were they lying" or "were they mistaken" language, and that the invitation to comment on other testimony was often implied rather than direct.[19] However, the particular words the prosecutor used are not dispositive; the critical inquiry is whether the purpose of the questioning was to elicit comment on other witnesses' testimony. *See Wilson*, ¶ 43 (defendant's desired line of questioning sought "testimony that another witness . . .is or was being truthful or untruthful on a particular occasion," and would have been inadmissible); *People v. Conyac*, 2014 COA 8, ¶ 104 (same).

We will assume that the prosecutor asked defendant eleven improper questions. These questions arguably crossed the line: rather than highlighting discrepancies in testimony, they could be understood as intended to compel defendant to comment on other witnesses' veracity. *See Liggett*, 135 P.3d at 732. Given defendant's stated definition of a "snitch," asking defendant if certain witnesses

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[19] In some jurisdictions, such indirect questions on veracity are allowed. *See, e.g.*, *United States v. Gaines*, 170 F.3d 72, 82 (1st Cir. 1999) (questioning may be acceptable if it simply avoids the "'L' word").

were "snitches" was a shorthand way of asking whether they were lying. Asking if defendant had heard particular testimony and then following up with a question such as "Is that true?" also called for comment on that testimony. Consequently, we will assume that the district court abused its discretion when it allowed the prosecutor to ask these questions.

The People argue that the questions were proper because defense counsel opened the door to such inquiries during his direct examination by asking defendant to comment on Green's testimony, and because defendant said repeatedly on direct examination that he was telling the truth. *See Harris*, 471 F.3d at 512 ("[S]uch questions would obviously be proper if a defendant opened the door by testifying on direct that another witness was lying."); *see also* CRE 608(b). The supreme court has not decided whether the opening-the-door exception applies in this context. *See Liggett*, 135 P.3d at 732 n.2. We need not resolve that issue because, as discussed below, even assuming the exception does not apply in this context, and that the questions were therefore improper, any error does not warrant reversal.

ii. Harmless Error

We review four of the questions under the harmless error standard because they were preserved for review by contemporaneous objection.[20] These four questions are:

- *Is Jeremy Green a snitch?*
- *You've heard other witnesses who knew you both describe his relationship to you as like being your girlfriend. You heard that, did you not?*
- *She said that she did ask you why and you told her basically never mind or don't ask any questions. Is that true?*
- *Well, you heard your wife testify that that was Breath* [a nickname for Sir Mario Owens] *or Sir Mario Owens?*

We conclude that allowing these improper questions did not "substantially influence the verdict or impair the fairness of the trial." *See id.* at 733 (internal quotation marks omitted). We reach this conclusion for three reasons.

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[20] Defense counsel specifically objected to two questions. Defense counsel also attempted to lodge a continuing objection to questions that asked defendant to comment on other witnesses' veracity. The district court did not rule on the continuing objection, but we will treat the claims of error as to the two questions after the continuing objection as preserved. *See People v. Dunlap*, 975 P.2d 723, 745 n.15 (Colo. 1999).

First, the four questions made up a very small part of the defendant's cross-examination, which stretched over eighty transcript pages. *Cf. Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005) (in the context of closing argument, the pervasiveness of the improper comments is relevant to the harmfulness analysis); *see also United States v. Ramirez*, 537 F.3d 1075, 1086 (9th Cir. 2008) (error not reversible where the prosecutor's improper questions "about whether other witnesses were lying played a small part in the trial"); *Commonwealth v. Long*, 462 N.E.2d 330, 331 (Mass. App. Ct. 1984) (reversible error where the prosecutor had asked defendant more than 100 improper questions; contrasting cases where improper questioning was less pervasive).

Second, the form of the questions made them less potentially damaging. In *Liggett*, 135 P.3d at 735, the court noted that questions asking if another witness was "mistaken" are "less damaging" than asking if another witness is "lying." The prosecutor in this case never asked defendant if another witness was "lying," even though defendant accused people of telling lies. *See United States v. Gaines*, 170 F.3d 72, 82 (1st Cir. 1999) (no error where

prosecutor avoided the "'L' word"). Three of the questions asked "is that true?" or "did you hear?" That formulation is even less direct than asking if a certain witness was "mistaken." Only one question — "Is Jeremy Green a snitch?" — pitted one witness against another more directly, and even that question avoided the "L" word.

Third, defendant attacked the credibility of other witnesses even when unprovoked by the prosecutor. For example, in the following exchange, the prosecutor asked defendant about his use of the word "snitch" in a letter, and defendant turned the answer into an accusation against another witness:

> [Prosecutor:] What is a snitch?
>
> [Defendant:] Somebody, Jamar Johnson, who lie to get out of trouble.

The prosecutor's improper questions about which witnesses were snitches followed up on defendant's accusation.

At other points during cross-examination, the prosecutor asked defendant about factual allegations, but defendant responded by attacking other witnesses:

> [Prosecutor:] Did you put your hand over her face and shove her backwards?
>
> [Defendant:] Lie. No.

> [Prosecutor:] Did you get up a head of steam at one point and run into the crowd and deliberately shove your shoulder into another girl?
>
> [Defendant:] Another lie. No.

As discussed above, we do not decide that defendant's testimony opened the door to the prosecutor's improper questions. However, the harm of "were they lying" type questions is most potent when the prosecutor puts the defendant in the "no-win situation" of calling another witness or himself a liar. *See State v. Graves*, 668 N.W.2d 860, 872 (Iowa 2003). That sort of harm did not occur in this case because defendant had already called other witnesses liars; the prosecutor did not foist a "no-win situation" on him.

We conclude that because the improper questions were a small part of the cross-examination, the form of the questions was not particularly damaging, and defendant volunteered his opinion on other witnesses' veracity even without the improper questions, the errors did not substantially influence the verdict or impair the fairness of the trial. *See Medina*, 114 P.3d at 857.

For the same reasons, we conclude that the seven improper questions as to which no contemporaneous objection was made did not constitute plain error. *See Hagos*, ¶ 14.

2. Cross-Examination on Prior Conviction

Defendant contends that the district court erred by allowing the prosecutor, during cross-examination, to elicit details about a prior conviction. We conclude that the court did not abuse its discretion.

a. Additional Facts

Nine days after the Lowry Park shootings, police officers stopped defendant's vehicle for a noise violation. They searched his vehicle, discovering a .40 caliber semiautomatic pistol inside the driver's door panel and a BB gun under the driver's seat. Defendant was convicted of possession of a weapon by a previous offender (POWPO) for his possession of the .40 caliber pistol before the trial in this case began.

During cross-examination, over defense counsel's objection, the prosecutor asked defendant if he had been convicted of possessing a ".40 caliber real semiautomatic." Defendant said, "Correct." The prosecutor then asked defendant about the black-

and-silver BB gun (which was admitted into evidence in this case), and whether he had bought the BB gun because it looked like the nine millimeter he had used at Lowry Park.

b. Standard of Review and Applicable Law

We review a district court's evidentiary rulings for an abuse of discretion. *Yusem*, 210 P.3d at 463; *Munoz-Casteneda*, ¶ 7. A court abuses its discretion in admitting evidence if its decision was manifestly arbitrary, unreasonable, or unfair. *Valencia*, 257 P.3d at 1209. If the court abused its discretion, we will reverse only if the error substantially influenced the verdict or impaired the fairness of the trial. *Krutsinger*, 219 P.3d at 1063; *People v. Garcia*, 169 P.3d 223, 229 (Colo. App. 2007).

If a defendant chooses to testify, the prosecutor may use his prior felony convictions to impeach his credibility. § 13-90-101, C.R.S. 2014; *Candelaria v. People*, 177 Colo. 136, 140, 493 P.2d 355, 357 (1972); *People v. McGhee*, 677 P.2d 419, 423 (Colo. App. 1983). A prosecutor's inquiry into prior convictions on cross-examination of the defendant is typically limited to the name of the offense and a brief recital of the circumstances. *People v. Clark*, 214 P.3d 531, 539 (Colo. App. 2009). The scope of inquiry is

limited to ensure that evidence of the prior conviction will "not be used to illustrate that a defendant is of bad character and likely acted accordingly in the present case." *Id.* Although the scope of cross-examination is within the discretion of the court, when the court allows questioning on the details surrounding the prior conviction, those details must be relevant. CRE 401; *McGhee*, 677 P.2d at 423.

c. Analysis

Defendant argues that the court should not have allowed the prosecutor to exceed the typical scope of inquiry and elicit the detail that he had possessed a .40 caliber semiautomatic pistol, which, he contends, was irrelevant.

We conclude that, contrary to defendant's assertion, the scope of inquiry was properly limited. The prosecutor asked defendant the name of the offense and the type of weapon he possessed. Thus, the scope of inquiry was limited to a brief recital of the circumstances of a POWPO conviction. *See Clark*, 214 P.3d at 539. The fact of a prior conviction is relevant to the witness's credibility. § 13-90-101. We conclude that the court was within its discretion in allowing this depth of inquiry.

Even if we assume that eliciting the type of weapon defendant possessed was a detail that went beyond a brief recital of the circumstances, we conclude that the information was relevant for reasons other than propensity. The prosecution's evidence showed that defendant took steps to hide his involvement in the Lowry Park shootings, including discarding the gun he used that night. In the week after the shootings, defendant acquired a replacement gun (the .40 caliber semiautomatic) that was markedly different, along with a BB gun that, according to the prosecutor, looked like the gun he had used at Lowry Park. The argument was that this was a ploy to throw off investigators who would be looking for a suspect who possessed a black-and-silver nine millimeter. Thus, the fact that defendant possessed a .40 caliber semiautomatic was relevant, not to show that defendant was a bad person, but to show a specific plan to elude apprehension. Affording this evidence its maximum reasonable probative value, therefore, we also conclude that, to the extent the question exceeded a brief recital of the circumstances of the prior conviction, the court was within its discretion to deem this evidence relevant for nonimpeachment purposes. *See* CRE 401; *McGhee*, 677 P.2d at 423.

3. Closing Argument

Defendant contends that the prosecutor made improper arguments in closing, including: (1) telling jurors they had a civic duty to convict; (2) sharing a personal opinion that defendant was guilty; (3) appealing to fear; (4) denigrating the self-defense theory and defense counsel; (5) misstating the law regarding the element of deliberation; (6) misstating the law regarding reasonable use of force; (7) misstating the law regarding complicity liability; and (8) misstating the evidence regarding defendant's alleged threats. He also asserts that, cumulatively, the prosecutor's improper statements in closing argument are reversible error.

We agree that some of the prosecutor's statements were improper, but conclude that the improper statements do not require reversal.

a. Applicable Law and Standard of Review

A prosecutor, while free to strike hard blows, is not at liberty to strike foul ones. *Berger v. United States*, 295 U.S. 78, 88 (1935). Closing argument properly includes the facts in evidence and any reasonable inferences drawn therefrom; thus, advocates may explain the significance of evidence and relevant legal concepts.

Domingo-Gomez, 125 P.3d at 1048. Also, "a prosecutor has wide latitude in the language and presentation style used to obtain justice." *Id.* A reviewing court should give a prosecutor the benefit of the doubt where comments are ambiguous or merely inartful. *People v. McBride*, 228 P.3d 216, 221 (Colo. App. 2009). But a prosecutor must stay within ethical bounds, and "[e]xpressions of personal opinion, personal knowledge, or inflammatory comments violate these ethical standards." *Domingo-Gomez*, 125 P.3d at 1049. Prosecutors have a fundamental duty to avoid comments that could mislead or prejudice the jury. *Id.*; *McBride*, 228 P.3d at 221.

In reviewing a claim of prosecutorial misconduct, we engage in a two-step analysis. We must determine whether any of the prosecutor's remarks were improper under the totality of the circumstances and, if so, whether they warrant reversal. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

First, we evaluate whether the statements were improper. "Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion." *Domingo-Gomez*, 125 P.3d at 1049. We consider "the context of the argument as a whole and in light of the evidence before the jury."

People v. Samson, 2012 COA 167, ¶ 30. And we will not disturb the district court's rulings regarding the prosecutor's statements absent a showing of abuse of discretion. *People v. Castillo*, 2014 COA 140, ¶ 53; *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010).

Second, we review the "combined prejudicial impact" of any improper statements to determine whether they require reversal under the applicable standard. *Domingo-Gomez*, 125 P.3d at 1053; *see also Wend*, 235 P.3d at 1098 ("We focus on the cumulative effect of the prosecutor's statements . . . ."). In this case, defense counsel did not object to any of the statements at issue; thus, we review for plain error. *Wend*, 235 P.3d at 1097; *Domingo-Gomez*, 125 P.3d at 1053.[21]

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[21] Defendant argues that we should apply constitutional harmless error review, despite the lack of objection, because the prosecutor's arguments generally violated his rights to due process and an impartial jury. Controlling case law forecloses this possibility. "Although any prosecutorial error can implicitly affect a defendant's right to a fair trial . . . . [we] hold that only errors that specifically and directly offend a defendant's constitutional rights are 'constitutional' in nature." *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010) (citations omitted) (for example, improper comments on a defendant's constitutional right not to testify, right to be tried by a jury, or right to post-arrest silence are constitutional error). However, "expressions of personal opinion or inflammatory comments . . . do[] not rise to the level of constitutional error." *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008). In any event, we

b. Whether Statements Were Improper

i. Civic Duty Argument

Defendant contends that the district court abused its discretion by allowing the prosecutor to tell jurors that it was their civic duty to convict. We are not persuaded.

The prosecutor told jurors that a "small army" of law enforcement officials had done their duty investigating the Lowry Park shootings, witnesses had done their duty by testifying, and that jurors had done their duty by serving. The prosecutor then said:

> The evidence, I submit, has proven the defendant to be guilty of each of the crimes he's charged with, it has disproven his claim, the absurd claim of self-defense or defense of others.
>
> As the instructions of law tell you, with each element of each crime having been proven, it's now your final duty to hold him accountable by returning verdicts of guilty . . . ."

It is improper for a prosecutor to tell jurors that it is their civic duty to return a guilty verdict; such an argument implies that jurors are part of the prosecutorial team rather impartial arbiters of

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review even a constitutional error for plain error if there was no timely objection. *Hagos v. People*, 2012 CO 63, ¶ 14.

the evidence. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 6, 20 (1985) (improper for prosecutor to express personal opinion of the defendant's guilt and to tell jurors that they would fail in "doing your job" unless they convicted); *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990) (improper to exhort jurors that they could only do their job by returning a certain verdict, "regardless of [their] duty to weigh the evidence and follow the court's instructions on the law").

But in this case the prosecutor did not tell jurors that it was their civic duty to convict defendant regardless of the evidence. The prosecutor told jurors that, because the evidence had proven each element of each crime, it was their duty under the law to convict. The prosecutor directly referenced the evidence and the "instructions of law" as the source of this duty. Thus, the argument in this case is distinguishable from those in cases where the prosecutor exhorted jurors that it was their duty to convict — without regard to the evidence — because they are a de facto part of the prosecution team. *See Solis v. State*, 315 P.3d 622, 635 (Wyo. 2013) ("[W]e have . . . concluded that asking the jury to hold the appellant responsible for the crime because the evidence shows you

he is guilty, is not the same as telling the jury that it has a duty to convict the defendant." (internal quotation marks omitted)); *see also Henwood v. People*, 57 Colo. 544, 569, 143 P. 373, 383 (1914) ("[A]ppealing to the jury to do their duty as the law provides, and why they should discharge their duty, was a proper matter for the district attorney to urge upon their attention."). The district court did not abuse its discretion by allowing this argument.

ii. Personal Opinion

Defendant contends that the district court abused its discretion by allowing the prosecutor to express a personal opinion as to defendant's guilt. We are not persuaded.

During closing argument the prosecutor said:

> How do you go about making that kind of a decision, especially when you have such two different conflicting arguments being presented to you because the People are telling you, I am telling you the evidence has proven beyond a reasonable doubt that [defendant] is guilty . . . . The defense lawyers told you in their opening statement, I suspect they may say something similar in their closing argument, that you should not and you may not hold him accountable at all.

Defendant argues that the phrase "I am telling you" was improper personal opinion. We conclude that this was not an

improper expression of personal opinion. Read in context, the prosecutor was simply presenting the two conflicting positions. In addition, the prosecutor did not say that he believed defendant was guilty; rather, he said that the evidence established defendant's guilt.

The prosecutor's statement did not present the risks commonly associated with improper personal opinion: there was no suggestion of personal knowledge of matters outside the evidence presented at trial or substitution of the prosecutor's opinion for evidence. *See Domingo-Gomez*, 125 P.3d at 1051-52 (finding opinion improper where it is not grounded in the evidence). The content of the sentence — "the evidence has proven beyond a reasonable doubt that [defendant] is guilty" — was a reasonable inference drawn from the evidence. *People v. Villa*, 240 P.3d 343, 358 (Colo. App. 2009) ("We read the prosecutor's statement asking the jury to '[f]ind [defendant] guilty, because he is guilty' as simply asking the jury to make a reasonable inference that defendant was guilty based on the evidence presented at trial."); *People v. Merchant*, 983 P.2d 108, 115 (Colo. App. 1999). Thus, the district court did not abuse its discretion in allowing this argument.

iii. Appeal to Fear

Defendant contends that the district court abused its discretion by allowing the prosecutor to make an appeal to the fears of jurors. Again, we are not persuaded.

During rebuttal closing, the prosecutor said:

> [Defense counsel] has told you that he is scared, he is scared that you'll convict [defendant] based on speculation. [Defense counsel] is correct. The verdict that you render in this case must be based on the evidence and when [defendant] tells you he's arguing in self-defense, that is contrary to the evidence. How scary is it to think that [defendant] could get away with murder based on what he told you from the stand.[22]

Defendant argues that the prosecutor's argument was improper because it suggested that acquitting him was a "scary" idea. The prosecutor's argument was inartful to the extent that it implied that it is scary to acquit a defendant. And, viewed in isolation, the final sentence might be improper. However, viewed in context, we interpret the prosecutor's argument to be grounded in the evidence. The prosecutor repeated defense counsel's fear that the jury would convict based on speculation, reiterated that the

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[22] Defendant specifically challenges the phrase "get away with murder" as a denigration of the defense; thus, we discuss it below.

verdict must be based on the evidence, argued that defendant's testimony was contrary to the evidence, and then argued that the real fear should be acquitting based on testimony that was contrary to the evidence.

Therefore, the prosecutor moored this argument to the evidence and reasonable inferences therefrom, and did not mislead jurors into thinking they should render a verdict based on fear for personal safety rather than an impartial weighing of the evidence. *See Domingo-Gomez*, 125 P.3d at 1048-49; *People v. Williams*, 996 P.2d 237, 243-44 (Colo. App. 1999) (the prosecutor's statement that "if you acquit, you let another drug dealer back out on the streets" resulted from "[r]easonable inferences from the evidence"). While we caution against use of the word "scary" because it may give rise to ambiguous implications, we are cognizant that prosecutors must be given "wide latitude" in use of language, and that we should give prosecutors the benefit of the doubt when language is merely ambiguous or inartful. *Domingo-Gomez*, 125 P.3d at 1048; *McBride*, 228 P.3d at 221.

iv. Denigrated Defense

We also reject defendant's contention that the district court abused its discretion by allowing the prosecutor to denigrate the defense. The prosecutor did not do so.

Defendant argues that the prosecutor denigrated the defense in three ways during closing argument. First, the prosecutor characterized defendant's self-defense argument as "nonsense," "ridiculous," and "absurd." Second, the prosecutor argued that defendant's letter to Owens was telling "because these are the words the defendant chose to write uninfluenced by any question from any lawyer." Third, the prosecutor described defendant's testimony and claim of self-defense as an attempt to "get away with murder."

We conclude that the prosecutor's descriptive terms for defendant's claim of self-defense were not improper. A prosecutor may comment on the evidence, including the lack of evidence supporting a defendant's theory of the case. *People v. Iversen*, 2013 COA 40, ¶ 37; *People v. Reeves*, 252 P.3d 1137, 1141 (Colo. App. 2010). So long as the prosecutor comments on the strength of the evidence presented — as opposed to implying personal knowledge of

matters outside the evidence — words like "absurd," "nonsense," and "ridiculous" do not make the argument improper. *See Iversen*, ¶ 37 (calling defense theory "laughable" not improper); *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010) (calling defense theory "absurd" not improper); *People v. Ramirez*, 997 P.2d 1200, 1211 (Colo. App. 1999) (characterizing defense argument as "blowing smoke" not improper), *aff'd*, 43 P.3d 611 (Colo. 2001).

Next, we consider defendant's second and third claims of impropriety together, because they were part of the same argument in closing.

During defendant's direct testimony, defense counsel introduced into evidence the letter that defendant had written to Owens while incarcerated, which authorities intercepted. Defendant testified that he wanted to tell Owens he was not a snitch, and that reciting his version of the events in the letter was not a plan to make their stories match. Defense counsel, during closing, argued that the letter stated that defendant planned to take the stand and tell the truth: "And, again, you can interpret it in a way that says, oh, he's concocting this. Well, that's not what it

says. It says I have to get up there and tell these folks what happened . . . ."

The prosecutor placed significance on the letter in rebuttal closing, arguing that it was important because it showed defendant's unfiltered thoughts and revealed that defendant had colluded with Owens to concoct a self-defense claim.

> [Defense counsel] indicated that in this letter he said I'm going to tell the truth. Not so. Not once in this letter does he say, Dear Sir Mario, I'm going to tell the truth. What he says in this letter is my lawyers think I should get on the stand. I am claiming self-defense. Claiming is the verb that he chose.
>
> The reason this letter is so interesting . . . is because these are the words the defendant chose to write uninfluenced by any question from any lawyer.

The prosecutor described what defendant said in his letter to Owens:

> I want to get on the stand because this is the only way I can win, this is the only way I can get away with murder.
>
> And you already know he's willing to do things to get away with murder [referring to efforts to hide his involvement].
>
> He's colluding with [Owens] so that he can get away with murder.

> How scary is it to think that [defendant] could get away with murder based on what he told you from the stand. So consider what he said, consider what else you know from other sources, and you will see that he is not to be relied upon and in fact he is guilty . . . .

We conclude that, considered in context, the prosecutor's arguments were not improper. Counsel argued over the meaning of a specific piece of evidence: defense counsel argued that the letter supported defendant's truthfulness, whereas the prosecutor argued that the letter undermined defendant's credibility. A prosecutor may argue that the evidence shows that a defendant's testimony should not be believed, so long as the prosecutor does not imply personal knowledge, assert a personal opinion about defendant's credibility, or use inflammatory language such as "lie." *Domingo-Gomez*, 125 P.3d at 1048-49.

The prosecutor did not imply personal knowledge, but referred only to a piece of evidence that jurors could evaluate.

The prosecutor did not assert a personal opinion, but argued that the letter showed defendant's lack of truthfulness. We emphasize that the implication that defendant concocted a self-defense story was proper only because it sprung directly from

defendant's letter. We distinguish this situation from that where a prosecutor argues that asserting the defense is, in a general sense, a miscarriage of justice. *Cf. People v. Scheidt*, 186 Colo. 142, 145, 526 P.2d 300, 302 (1974) (improper for prosecutor to characterize the defendant's exercise of a mental condition defense as a "miscarriage of justice"). It was also proper for the prosecutor to argue that jurors should attribute significance to evidence that showed defendant speaking freely in his own words. *See Domingo-Gomez*, 125 P.3d at 1048 (proper to argue the significance of pieces of evidence).

And the prosecutor did not use inflammatory language such as "lie," which is prohibited because of its rhetorical force and its insinuation of personal opinion. *See Wend*, 235 P.3d at 1096. In *Domingo-Gomez*, the supreme court held that accusing the defendant of "lying" was improper, but that saying he was "not truthful" was acceptable in context, because the prosecutor's comments "came while the prosecutor recounted the defense's theory of the events and pointed to inconsistencies in the testimony." 125 P.3d at 1051. Using the phrase "get away with murder" is not improper where the prosecutor argues that acquittal

would allow the defendant to get away with murder because the evidence shows that he is guilty. *See, e.g.*, *People v. Lane*, 2014 WL 5882246, ___ N.W.2d ___, ___ (Mich. Ct. App. Nov. 13, 2014); *State v. McNeil*, 313 P.3d 48, 57 (Idaho Ct. App. 2013). That logic applies with even more force here, because the prosecutor argued that a specific piece of evidence revealed defendant's plan to "get away with murder."

Thus, we conclude that, the district court did not abuse its discretion by allowing the prosecutor's argument.

v. Misstated Law on Deliberation

Defendant contends that the district court abused its discretion by allowing the prosecutor to describe deliberation as taking only a "heart beat." We agree.

During voir dire, the prosecutor told jurors that "a person can act after deliberation in a heart beat." During closing argument, the prosecutor again told jurors that people make "very important decisions in a heart beat and it's after deliberation after the exercise of judgment and reflection."

A prosecutor may not misstate the law. *People v. Grant*, 174 P.3d 798, 810 (Colo. App. 2007). Although deliberation need not

take long, the prosecutor's comments that deliberation takes only a heartbeat were similar to the formulation "that premeditation occurs as fast as one thought follows another," which the supreme court has rejected. *People v. Sneed*, 183 Colo. 96, 100, 514 P.2d 776, 778 (1973). Hence, we conclude that these comments were improper. *See McBride*, 228 P.3d at 225 (prosecutor's statement that deliberation takes only "a second" was improper); *Grant*, 174 P.3d at 810 (prosecutor's statement that deliberation takes only the time for "one thought to follow another" was improper); *People v. Cevallos-Acosta*, 140 P.3d 116, 123 (Colo. App. 2005) (same as *Grant*); *People v. Caldwell*, 43 P.3d 663, 672 (Colo. App. 2001) (same as *Grant*). Therefore, the district court abused its discretion by allowing this improper description of deliberation.

vi. Misstated Law on Use of Force

Defendant contends that the district court abused its discretion by allowing the prosecutor to misstate the law regarding reasonable use of force. We do not agree with this contention.

During rebuttal closing the prosecutor said:

> When you look at the self-defense instruction, because the defendant is claiming self-defense, you have to consider if what he does is

> reasonable. In light of that, how is taking out a gun and shooting somebody a reasonable use of force to try and protect somebody or protect yourself?

Defendant argues that this statement implied that shooting an attacker is, per se, an unreasonable use of force. We disagree with that characterization. *McBride*, 228 P.3d at 221 (reviewing court should give the prosecutor the benefit of the doubt where a statement is ambiguous). Defendant testified that he shot Bell to protect Owens. The prosecutor argued in closing that the evidence showed that defendant was not actually threatened, and the statement defendant challenges was part of that argument. The prosecutor's argument that it was not a reasonable use of force was tied to the evidence in this case — including that Owens and defendant were the only ones armed — and stated a reasonable inference which could be drawn from that evidence. *See Domingo-Gomez*, 125 P.3d at 1048.

vii. Misstated Law on Complicity

We also reject defendant's contention that the district court erred by allowing the prosecutor to misstate the law regarding complicity.

The prosecution's complicity theory was that defendant communicated to Owens that he wanted to kill people and then Owens helped him carry out that plan, with the duo shooting four victims. The prosecutor explained the concept of complicity during opening statement and closing argument, arguing several times that the two were "acting together" and that defendant was responsible for Owens's actions.

Defendant argues that these arguments reduced complicity liability to a single element of "acting together" (without regard to specific acts or intent), and implied that Owens's guilt established defendant's guilt. A general description of complicity liability as "acting together" to commit crimes does not mislead the jury. In fact, it roughly corresponds to language our cases have used to describe complicity. *See People v. Elie*, 148 P.3d 359, 365 (Colo. App. 2006) ("It is only necessary that the acts of the complicitor and the other actor or actors, together, constitute all acts necessary to complete the underlying offense."). Contrary to defendant's argument, the prosecutor also addressed specific elements of complicity during closing argument. (For example: "The defendant knew Owens intended to shoot somebody . . . .") The prosecutor

was not required to recite the elements of complicity liability each time the concept was discussed. *See Castillo*, ¶ 66. Likewise, the prosecutor's argument to jurors that defendant was guilty of Owens's acts under the complicity theory did not misstate the law. We conclude that, considered in context, the prosecutor's arguments were fair comment on the evidence and the relevant legal concepts. *See Domingo-Gomez*, 125 P.3d at 1048.

viii. Misstated Evidence on Defendant's Threats

Nor do we agree with defendant's contention that the district court abused its discretion by allowing the prosecutor to misstate the evidence regarding his alleged threats to kill everyone.

The prosecutor said during closing argument that defendant's threat to kill everyone was not an "idle boast" because he knew Owens was there, armed, and ready to do his bidding.

Defendant argues that there was no evidence that Owens actually heard his threats and, thus, the prosecutor's argument was improper. However, Green said during his police interview, which was admitted into evidence, that defendant repeatedly threatened to kill everyone during the altercation in the parking lot, when Owens was nearby. Defendant, during direct examination,

said that although he did not remember making those threats, he was yelling and Owens could have heard what he said. ("He could have heard. It was loud.") Defendant seems to argue that, because Green did not specifically assert that the threats were a communication to Owens, the prosecutor misstated the evidence. However, we conclude that the prosecutor's argument that the threats were also meant as a communication to Owens was a reasonable evidentiary inference. *See id.*

c. Whether Improper Statements Require Reversal

We conclude that the "combined prejudicial impact" of the improper statements does not require reversal under plain error review. *Id.* at 1053.[23]

Plain error is error that is both obvious and substantial, and we "reverse under plain error review only if the error 'so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.'" *Hagos*, ¶ 14 (quoting in part *Miller*, 113 P.3d at 750). We consider

[23] In his briefing, defendant separately argues cumulative error based on the prosecutor's comments. The proper standard of review requires us to weigh cumulatively all improper statements in the prosecutor's arguments; thus, defendant's cumulative error argument is subsumed in our prejudice analysis.

factors such as the exact language used, the nature of the misconduct, the degree of prejudice associated with the misconduct, and the context of the statements. *Wend*, 235 P.3d at 1098. "Only prosecutorial misconduct which is 'flagrantly, glaringly, or tremendously improper' warrants reversal" under the plain error standard. *Domingo-Gomez*, 125 P.3d at 1053 (quoting in part *People v. Avila*, 944 P.2d 673, 676 (Colo. App. 1997)). Even under this deferential standard, however, it is our responsibility to avoid a "miscarriage of justice" and ensure fundamental fairness. *Wend*, 235 P.3d at 1097-98.

We have determined that the prosecutor twice misstated the meaning of deliberation by saying that deliberation takes only a "heart beat." These comments did not substantially prejudice defendant, for two reasons.

First, the jurors received correct instruction which mitigated the effect of these comments. The court correctly instructed the jurors as to the definition of deliberation, in Instruction Number 12.[24] The court also instructed the jurors (Instruction Number 1)

[24] "'After deliberation' means not only intentionally, but, also, that the decision to commit the act has been made after the exercise of

that, "It is my job to decide what rules of law apply to the case. While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them." We presume that the jurors followed the court's instructions. *See People v. Moody*, 676 P.2d 691, 697 (Colo. 1984); *Cevallos-Acosta*, 140 P.3d at 123. Along with the improper comments, the prosecutor repeated correct aspects of the meaning of deliberation during closing, saying it must be "after the exercise of judgment and reflection" and not be "hasty or impulsive." *See Grant*, 174 P.3d at 811 (prosecutor's improper definition of deliberation not plain error where it happened only once and the jury instructions correctly defined deliberation); *Cevallos-Acosta*, 140 P.3d at 123 (prosecutor's improper definition of deliberation during voir dire and summation not plain error where jury instructions correctly defined the concept); *Caldwell*, 43 P.3d at 672 (prosecutor's improper definition of deliberation not plain error where it happened once, prosecutor also argued that deliberation required time to make a decision, and court correctly defined deliberation in instructions).

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reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner."

Second, the prosecutor did not argue that deliberation had actually occurred in a heart beat in this case. Rather, the prosecutor argued that, "here there was plenty of time from the time [defendant] saying [sic], I'll kill all you and the time [Vann] died."

The misstatements here did not rise to the level of the prosecutorial misconduct in those rare cases where our courts have reversed under plain error review. *See Wend*, 235 P.3d at 1098-99 (plain error where prosecutor's accusations that the defendant was "lying" permeated the opening and closing statements); *McBride*, 228 P.3d at 225-26 (plain error where a prosecutor made pervasive "liar" arguments and inflammatory personal attacks, and also argued an incorrect definition of deliberation).

The comments here were not pervasive; did not include inflammatory language; were offset by correct instructions of law; and did not ultimately impact an issue to be decided by the jury. *See Domingo-Gomez*, 125 P.3d at 1054-55; *Villa*, 240 P.3d at 358. In addition, the fact that the jurors acquitted defendant on two counts shows that they were not excited to "irrational behavior," and instead "could fairly and properly weigh and evaluate this evidence." *People v. Braley*, 879 P.2d 410, 414-15 (Colo. App.

1993).[25] We are not persuaded that the prosecutor's two improper comments denied defendant a fair trial.

4. Propensity Evidence

Defendant contends that the district court reversibly erred by denying his motion for a mistrial after the prosecutor introduced propensity evidence in violation of a court order. We are not persuaded.

a. Procedural Facts

Before trial, defendant filed a motion in limine seeking to exclude several types of evidence, including "[a]ny evidence from any witness that the defendant possessed a weapon at any time prior to the offense in this case." The court granted that portion of the motion.

At trial, during the direct examination of Jamar Johnson, the witness said he "assumed" defendant was armed at Lowry Park because he "saw the bulge in his shirt." Then the following exchange occurred:

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[25] For all of the same reasons, we would also conclude that the statements were harmless, and harmless beyond a reasonable doubt, were either of those standards of review to apply.

> [Prosecutor:] Based upon the knowledge of the acquaintance that you had with [defendant] and Mr. Owens, did you know them to carry guns?
>
> [Johnson:] Yeah.
>
> [Defense counsel:] Objection. That's in violation of a prior court ruling. I would move that the answer be stricken.
>
> . . .
>
> [Prosecutor:] I'm aware of no such order.
>
> [Court:] I will overrule the objection and allow the witness's response to stand.

The prosecutor then asked Johnson how defendant would typically carry his gun.

After Johnson's testimony, outside the hearing of the jury, defense counsel showed the court its ruling to exclude evidence of defendant's prior gun possession. The court acknowledged the order and heard argument on the appropriate remedy.

Defense counsel argued that the sanction should be a mistrial, or striking Johnson's entire testimony, or dismissing the charge of first degree murder. A drastic remedy was appropriate, defense counsel argued, "in a case such as this where whether or not [defendant] was armed with a gun is such an integral issue." The

prosecutor argued that he had not remembered the order and had not willfully violated it, and that instructing the jury to disregard the statement would be a sufficient remedy. The prosecutor also argued that, despite the order, the evidence was relevant and did not unduly prejudice defendant.

The court ruled that the prosecutor had violated the order, but had not done so willfully. The court further ruled that a sanction was appropriate. Relying on *Vigil v. People*, 731 P.2d 713 (Colo. 1987), the court reasoned that a curative instruction was a sufficient remedy, and offered to give the curative instruction to the jury immediately or with its instruction packet. Defense counsel declined the curative instruction.

b. Standard of Review and Applicable Law

We review a district court's denial of a motion for a mistrial for an abuse of discretion. *Bloom v. People*, 185 P.3d 797, 807 (Colo. 2008), *superseded by statute on other grounds as stated in People in Interest of W.P.*, 2013 CO 11; *People v. Pernell*, 2014 COA 157, ¶ 24. If we decide that the court abused its discretion, we must determine whether the error was harmless. Crim. P. 52; *Pernell*, ¶ 26.

"A mistrial is a drastic remedy that is warranted only when the prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means." *People v. Dore*, 997 P.2d 1214, 1221 (Colo. App. 1999); *accord People v. Cousins*, 181 P.3d 365, 373 (Colo. App. 2007). In deciding whether a mistrial is warranted after inadmissible character evidence has been presented to the jury, a court should consider the nature of the evidence and the value of a curative instruction. *People v. Vigil*, 718 P.2d 496, 505 (Colo. 1986); *People v. Everett*, 250 P.3d 649, 662 (Colo. App. 2010). A curative instruction ordinarily suffices unless the inadmissible evidence "is so highly prejudicial" that "it is conceivable that but for its exposure, the jury may not have found the defendant guilty." *People v. Goldsberry*, 181 Colo. 406, 410, 509 P.2d 801, 803 (1973); *accord Everett*, 250 P.3d at 663.

c. Analysis

First, we consider the nature of the evidence presented to the jury. Defendant argues that evidence of his prior gun possession was inadmissible character evidence, as indicated by the pretrial

order.[26] We agree that the evidence was inadmissible pursuant to the pretrial order, but we disagree that the evidence was actually forbidden by CRE 404(b).

Courts use the four-part *Spoto* test to analyze whether evidence of other acts is admissible under CRE 404(b). The test requires the party offering the evidence to show that (1) the other act evidence relates to a material fact; (2) the evidence is logically relevant under CRE 401; (3) the logical relevance of the other act evidence is independent of the impermissible inference that the crime was a product of the defendant's bad character; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990); *People v. Brown*, 2014 COA 130, ¶ 9.

Defendant argues that the gun-carrying evidence failed the third prong of *Spoto* because its relevance was inseparable from the inference that he was more likely to commit the crime because of his bad character. But the evidence was not presented to show that

[26] The People respond that the evidence did not even fall within the ambit of character evidence governed by CRE 404(b), because it was vague and because carrying a gun is not a bad or illegal act. We will assume, without deciding, that Rule 404(b) applies.

defendant often carried a gun and, therefore, had a bad character and, thus, committed the crimes. Once Johnson testified that he assumed defendant was armed because of the bulge in his shirt, it was logical to ask why he would make such an assumption. The prosecutor's questions — Did defendant often carry a gun? How did he carry it? — were limited to exploring why Johnson believed that defendant was armed at Lowry Park.

The contested evidence tended to show that defendant was armed when the conflict began, which, the prosecutor argued, tended to prove intent and rebut defendant's assertion of self-defense by showing that defendant's threat to kill people was not an idle one. *See* CRE 404(b) (evidence of prior acts is "admissible for other purposes, such as proof of . . . intent"). The relevance was independent of any inference that defendant carried a gun often and, thus, that he likely committed the crimes on this occasion. *See People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994) ("The third prong of the *Spoto* test does not demand the absence of the inference but merely requires that the proffered evidence be logically relevant independent of that inference."); *People v. Foster*, 2013 COA 85, ¶¶ 15-16. Therefore, we conclude that the gun-

carrying evidence was not barred by CRE 404(b). *Cf. People v. Willner*, 879 P.2d 19, 26-27 (Colo. 1994) (the defendant's previous use of firearms was admissible to prove intent after deliberation).

We further conclude that, even had it been inadmissible under CRE 404(b), the gun-carrying evidence was not "highly prejudicial" to defendant. *Goldsberry*, 181 Colo. at 410, 509 P.2d at 803. The evidence of defendant's gun-carrying habits was vague and brief, and did not necessarily implicate bad character. *See People v. Krueger*, 2012 COA 80, ¶ 72 (prejudice mitigated where witness made a "single, brief reference" to inadmissible evidence). Defense counsel argued to the district court that defendant was prejudiced because whether he was armed was an integral issue. But that issue was not contested at trial — throughout the trial, defendant conceded that he had been armed and had shot Bell. Neither was any argument in closing premised on the fact that defendant habitually carried a gun. The prosecutor argued in closing that being armed that night at Lowry Park might have emboldened defendant to "behave badly," but did not mention any previous incidents or habits. Other than a general assertion that evidence of a defendant's "past possession of a gun in a gun case is immensely

prejudicial," defendant does not explain how this evidence prejudiced him in this case. "Speculation of prejudice is insufficient to warrant reversal of a trial court's denial of a motion for mistrial." *People v. Ned*, 923 P.2d 271, 275 (Colo. App. 1996).

Because the evidence was not so highly prejudicial that "it is conceivable that but for its exposure, the jury may not have found the defendant guilty," a curative instruction would have sufficed. *See Goldsberry*, 181 Colo. at 410, 509 P.2d at 803. The district court offered to give a curative instruction like that in *Vigil*, 731 P.2d at 714 ("Such evidence is to be treated as if you had never heard it."). That remedy was sufficient, regardless of the fact that defendant's counsel declined the curative instruction. *See Krueger*, ¶ 72; *see also People v. Lovato*, 2014 COA 113, ¶¶ 70-72 (any potential prejudice was cured by the court's instruction to the jury to disregard the evidence); *People v. Shreck*, 107 P.3d 1048, 1060 (Colo. App. 2004) (denial of mistrial motion for a single inappropriate remark proper where the defendant declined a curative instruction).

Consequently, we conclude that the court did not abuse its discretion by denying the motion for a mistrial based on Johnson's testimony that defendant often carried a gun in his waistband.

5. Disclosure

Defendant next contends that the district court abused its discretion by not enforcing the prosecution's discovery obligations. We find no abuse of discretion.

About a month before trial, defendant's counsel moved for a continuance to obtain additional witness addresses. The prosecutor responded that all known witness information had been disclosed, and that any newly discovered information would be timely disclosed. The People maintain on appeal that all the information defendant sought was eventually provided to him. Defendant denies this, but does not specify which information he sought that was not ultimately disclosed.

The district court has broad discretion in determining the proper sanction for a Crim. P. 16 violation. *Cevallos-Acosta*, 140 P.3d at 125. We review a court's ruling on discovery sanctions for an abuse that discretion, and we will not disturb the court's ruling unless it was manifestly arbitrary, unreasonable, or unfair. *People*

v. Lee, 18 P.3d 192, 196 (Colo. 2001); *People v. Zadra*, 2013 COA 140, ¶ 14 (*cert. granted in part on other grounds* Sept. 29, 2014). "Failure to comply with discovery rules is not reversible error absent a demonstration of prejudice to the defendant." *Salazar v. People*, 870 P.2d 1215, 1220 (Colo. 1994).[27]

Defendant argues generally that the prosecution refused to provide "accurate, current contact information and criminal histories." This lack of information, he argues, impaired his ability to impeach prosecution witnesses. But defendant does not identify which witnesses he has in mind, the exact information that was withheld, or the specific prejudice to his case. The court did not find, and defendant does not identify, any discovery violations. Thus, it is not clear that any sanction was appropriate. Further, we are left to speculate as to the unspecified information defendant was denied regarding unspecified witnesses for an unspecified effect on the outcome of the case. We cannot find that the district court abused its discretion because defendant has not demonstrated a

[27] The parties disagree as to whether this issue is preserved for appeal. The People argue that, whereas defendant requested additional information, he never argued that alleged discovery violations denied him a fair trial. We need not resolve this dispute.

discovery violation or alleged or demonstrated any specific prejudice. *See id.*[28]

6. Cumulative Error

Defendant contends that the cumulative effect of the alleged prosecutorial improprieties discussed above require reversal. We disagree.

"[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal is required." *People v. Roy*, 723 P.2d 1345, 1349 (Colo.1986). However, "[a] conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant's right to a fair trial." *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007).

In light of all the circumstances, we conclude that the cumulative effect of the prosecutor's improper questions asking defendant to comment on witness veracity, improper description of deliberation in closing argument, and inadvertent violation of a

[28] We take judicial notice that defendant stands convicted of having murdered a prosecution witness and the witness's fiancée before the trial in this case. Discovery in this case was complicated by defendant's threats and violence against prosecution witnesses before trial.

court order excluding defendant's habit of carrying a gun did not deprive defendant of his right to receive a fair trial.

F. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support each of his convictions.

We review de novo challenges to the sufficiency of the evidence. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005); *Randell*, ¶ 30. We must determine whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. *People v. Roggow*, 2013 CO 70, ¶ 13; *People v. Sanchez*, 253 P.3d 1260, 1262 (Colo. App. 2010). The jury is the sole arbiter of the credibility of witnesses and the weight to be accorded to conflicting evidence. *People v. Quick*, 713 P.2d 1282, 1293 (Colo. 1986); *People v. Graybeal*, 155 P.3d 614, 620 (Colo. App. 2007).

1. Intent to Kill After Deliberation

Defendant first contends that the evidence was insufficient to show that he acted with intent to kill after deliberation as to either

Bell or Marshall-Fields; such intent was an element of the attempted murder charges.

A charge of first degree attempted murder requires the prosecution to prove the same mental state necessary to prove first degree murder. First degree murder is a specific intent crime; the prosecution must prove not only that the defendant intended to cause the death of another person, but that he acted after deliberation. § 18-3-102(1)(a), C.R.S. 2014. A defendant acts intentionally when his conscious objective is to cause the specific result proscribed by the statute defining the offense, which here is the death of another person. § 18-1-501(5), C.R.S. 2014 (defining intent); § 18-3-102(1)(a). The jury may infer intent to cause the natural and probable consequences of unlawful voluntary acts, considering the defendant's conduct and surrounding circumstances. *People v. Madison*, 176 P.3d 793, 798 (Colo. App. 2007). The element of deliberation requires proof that the defendant decided to commit the act "after the exercise of reflection and judgment"; thus, an "act committed after deliberation is never one which has been committed in a hasty or impulsive manner." § 18-3-101(3), C.R.S. 2014. Yet, "the length of time required for

deliberation need not be long." *People v. Bartowsheski*, 661 P.2d 235, 242 (Colo. 1983) (explaining that deliberation in the murder context "requires that a design to kill precede the killing"). The element of deliberation, like intent, can rarely be proven other than through circumstantial or indirect evidence. *People v. Dist. Court*, 779 P.2d 385, 388 (Colo. 1989). Such evidence may include the use of a deadly weapon, the manner in which it was used, and the existence of hostility between the accused and the victim. *Id.*

We first consider the evidence of defendant's intent to kill. The evidence allowed the jury to find that defendant used a gun to shoot both Bell and Marshall-Fields multiple times at close range. He shot them after hostility with them and their friends, and after threatening to kill them. Defendant admits that he shot Bell, but argues that he only meant to stop him from beating Owens, not to kill him. In essence, he asks us to weigh conflicting evidence, which we will not do. Because the natural and probable consequence of shooting someone multiple times at close range is that person's death, the jury could therefore infer defendant's intent to kill. *See Madison*, 176 P.3d at 798; *Caldwell*, 43 P.3d at 673 (holding that two gunshots fired at victim at close range was

sufficient evidence of intent to kill). Thus, we conclude that the evidence was sufficient to show to a reasonable juror's satisfaction that defendant intended to kill Bell and Marshall-Fields.[29]

The evidence also allowed the jury to find that defendant exercised reflection and judgment before shooting Bell and Marshall-Fields. Defendant actually voiced his intent to kill before he committed the act. Once hostilities began, defendant repeated several times that he would "kill all you." According to the prosecution's evidence, he communicated to Owens his desire to kill, not only through his threats — which defendant testified that

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[29] Defendant also contends that the evidence was insufficient to show that he intended to seriously injure Bell and Marshall-Fields, a required element of his first degree assault convictions. *See* § 18-3-202(1)(a), C.R.S. 2014. We conclude that the evidence that supports the conclusion that defendant had the specific intent to kill the two victims also supports the conclusion that he simultaneously intended to seriously injure them. *See* § 18-1-901(3)(p), C.R.S. 2014 (serious bodily injury means an injury which "involves a substantial risk of death"); *People v. McDavis*, 469 N.Y.S.2d 508, 510 (N.Y. App. Div. 1983) (holding that the same facts "provided sufficient evidence to permit the jury to infer that the defendant intended not only to injure the victim, but also to cause her death"); *see also People v. Sanchez*, 253 P.3d 1260, 1264 (Colo. App. 2010) ("[D]efendant could have possessed the intent to cause death, serious bodily harm, and bodily harm at the same time."); *People v. Gonzales*, 926 P.2d 153, 155 (Colo. App. 1996) ("[I]ntent to cause serious bodily injury is not necessarily an intent to cause *only* serious bodily injury.").

Owens might well have heard — but by lifting his shirt to show Owens his gun. (Video evidence showed that Owens mirrored the gesture back to defendant, supporting the inference that Owens understood the signal.) Instead of leaving the park, as one might do if he felt threatened, defendant and Owens remained. Once Owens shot Vann, defendant shot Bell and Marshall-Fields to aid his accomplice's escape. By his own admission, defendant had time to run around his SUV toward the fight and had a physical altercation with Bell before he pulled out his gun and shot him. He shot both victims multiple times.

Thus, the jury could have reasonably concluded that defendant decided to kill during the initial altercation, communicated that intention to Owens verbally and nonverbally, and then acted on his intent. *See Bartowsheski*, 661 P.2d at 242 (deliberation requires that a design to kill precede the killing); *see also Key v. People*, 715 P.2d 319, 324 (Colo. 1986) (the defendant's statement the day before the murder that he could kill the victim was evidence of deliberation). Defendant had ample time to exercise judgment and reflection between the moment he decided to kill and when he shot the victims. For the same reasons, under the

complicity theory, the jury could have reasonably believed that defendant deliberated in the time he was forming his design to kill and then communicating it to Owens.

Defendant argues that we should view the seconds before the shootings in isolation — disregarding evidence of his threats and actions in the preceding moments — to conclude that he did not have time to deliberate. Even discounting the direct evidence of defendant's earlier threats, the jury could also have inferred deliberation from defendant's use of a deadly weapon, the evidence that he fired several times at the victims, and the evidence that the shootings came after escalating hostilities. *See Dist. Court*, 779 P.2d at 388 (holding that these factors are evidence of deliberation); *see also Bartowsheski*, 661 P.2d at 241-42 (use of a deadly weapon is evidence of deliberation); *People v. Madson*, 638 P.2d 18, 26 (Colo. 1981) (manner in which a weapon is used reflects on requisite culpability for first degree murder); *People v. Beatty*, 80 P.3d 847, 852 (Colo. App. 2003) (conflict before attempted murder is evidence of deliberation). An appreciable length of time passed between the moment defendant saw Owens fleeing (and shooting into the crowd), and the moment when he shot the victims to

facilitate escape. *See Key*, 715 P.2d at 324 (time for defendant to reload his gun was an appreciable length of time; time for defendant to put down his gun and pick up a rock was an appreciable length of time); *Sanchez*, 253 P.3d at 1261 (sufficient evidence of deliberation where the defendant unfolded his knife before stabbing victims, stabbed the victims in vital locations on their bodies, and said "[w]e're ready for this" before attacking).

We conclude that, when viewed in the light most favorable to the prosecution, the evidence was sufficient that a reasonable juror could conclude beyond a reasonable doubt that defendant acted with an intent to kill after deliberation.

2. Disproving Self-Defense/Defense of Others

Defendant contends that the prosecution failed to disprove his affirmative defense of self-defense/defense of others. This contention pertains to the charges of attempted murder and assault of both Bell and Marshall-Fields.

The prosecution must disprove affirmative defenses beyond a reasonable doubt. § 18-1-407(2); *Vega v. People*, 893 P.2d 107, 111 (Colo. 1995). "An affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it."

People v. Reed, 932 P.2d 842, 844 (Colo. App. 1996) (citing *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989)). Use of physical force in defense of a person is an affirmative defense, and a person is justified in using such force to protect from "what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose." § 18-1-704(1).

Defendant testified that he shot Bell to defend himself and Owens. According to defendant, he saw blood on Owens's shirt and mistakenly believed that Bell had shot Owens. After trying to push Bell away from Owens, he felt that Bell was dangerous and shot him once. Defendant testified that he did not shoot Marshall-Fields.

On appeal, defendant attempts to broaden his claim of self-defense to the Marshall-Fields counts as well as the Bell counts. But defendant did not claim self-defense in regard to Marshall-Fields at trial; instead, he denied shooting Marshall-Fields. *See Reed*, 932 P.2d at 844 (a defendant claiming self-defense admits doing the act but seeks to justify it). Even if we consider

defendant's claim of self-defense as to Marshall-Fields, however, it does not change the result.

Defendant presents merely his own testimony in support of his argument. Indeed, he argues that his actions were reasonable based on the subjective beliefs he claimed. But it is the sole province of the jury to decide whether defendant's testimony was credible, and what weight should be assigned to conflicting evidence. *Graybeal*, 155 P.3d at 620.

The prosecution presented the evidence of the letter that defendant wrote to Owens, which, viewed in the light most favorable to the prosecution, showed that defendant colluded with Owens to concoct a self-defense theory and, in the prosecutor's words, "get away with murder." The jury could have reasonably concluded from that evidence — along with defendant's demeanor and the many intangibles involved in assessing credibility — that defendant's testimony was not credible. Further, based on the evidence discussed above that defendant had already intended to kill people at Lowry Park, the jury could have concluded that defendant shot his victims to facilitate escape and carry out his intent, rather than to stop their use of force. Finally, based on

testimony and ballistics evidence that defendant shot Bell and Marshall-Fields multiple times, the jury could have concluded that he did not use a reasonable degree of force.

Thus, we conclude that, viewing the evidence as a whole and in the light most favorable to the prosecution, it was sufficient to support a decision by a reasonable mind that defendant's actions were not justified by self-defense. *See Roggow*, ¶ 13; *People v. O'Mea*, 541 P.2d 133, 135 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (holding that, where the defendant's testimony regarding self-defense conflicted with prosecution evidence, the jury could find that self-defense had been disproved).

3. Shooting of Marshall-Fields

Defendant contends that there was insufficient evidence to show that he actually shot Marshall-Fields. This argument applies to the counts of attempted murder and assault of Marshall-Fields.

Prosecution witness Jamar Johnson testified unequivocally that he saw defendant shoot Marshall-Fields. Defendant concedes that Johnson's testimony would ordinarily constitute sufficient evidence. He argues, however, that Johnson's testimony should not be believed because Johnson received a plea deal on unrelated

charges in exchange for his testimony. In making the argument that an informant's testimony, standing on its own, is insufficient to support a conviction, defendant relies on authorities that do not support his proposition.[30] Moreover, defendant's argument lacks a factual predicate because Johnson was an eyewitness to the crime; he was not an absent informant or accomplice.

No Colorado case holds that the testimony of a witness who receives a plea deal in exchange for testimony is insufficient to support a conviction, though a defendant is entitled to cross-examine the witness about this possible bias to impeach his testimony. *People v. Bowman*, 669 P.2d 1369, 1376 (Colo. 1983); *see Kinney v. People*, 187 P.3d 548, 561 (Colo. 2008). Defendant

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[30] Defendant cites *State v. Patterson*, 886 A.2d 777, 789 (Conn. 2005) (holding that evidence was sufficient to support murder conviction, but the defendant was entitled to a special credibility instruction regarding the jailhouse informant); *State v. Bay*, 529 So. 2d 845, 851 (La. 1988) (witness was the defendant's girlfriend, and the court did not describe her as an "informant" as defendant claims in his opening brief; court held that her vague and uncorroborated testimony regarding a murder-for-hire scheme was insufficient to support first degree murder); and *Banks v. Dretke*, 540 U.S. 668, 702 (2004) (holding that the defendant had a colorable *Brady* claim where the prosecution did not disclose a witness's status as a paid police informant). Defendant also cites secondary sources that discuss the unreliability of jailhouse informants, but Johnson was not a jailhouse informant.

does not argue that the court curtailed his opportunity to cross-examine Johnson on these matters. The record shows that defense counsel did attempt to impeach Johnson. And defendant made certain the jury knew his opinion that Johnson was a "snitch" who was lying to get out of trouble.

Johnson's testimony was not "so palpably incredible and so totally unbelievable as to be absolutely impeached as a matter of law." *People v. Martinez*, 187 Colo. 413, 417, 531 P.2d 964, 966 (1975). It was the province of the jury to determine Johnson's credibility and to weigh the conflicting evidence. *Quick*, 713 P.2d at 1293; *Graybeal*, 155 P.3d at 620. And, viewed in the light most favorable to the prosecution, we conclude that Johnson's eyewitness testimony was sufficient evidence to support a conclusion by a reasonable mind that defendant shot Marshall-Fields.

4. Complicity

We also reject defendant's contention that there was insufficient evidence of his guilt as a complicitor as to the charges of attempted murder and assault of both Bell and Marshall-Fields.

Because we have concluded that the evidence was sufficient to show that defendant was guilty as a principal of the crimes pertaining to Bell and Marshall-Fields, it is not necessary for us also to conclude that the evidence was sufficient to support the alternative theory that he was guilty as a complicitor of these same crimes. *Cf. Randell*, ¶ 37 (holding that the evidence was sufficient to show that the defendant was guilty as a complicitor, and concluding that it was unnecessary to consider whether he was also guilty as a principal).[31] Nevertheless, we will briefly address defendant's argument.

Defendant argues that there was insufficient evidence that he knew Owens intended to shoot the victims, or aided him in committing the crime. *See* § 18-1-603 (requiring knowledge that the principal intends to commit the crime, and that the defendant aided, abetted, advised, or encouraged the principal to commit the crime). As discussed, not only did defendant know that Owens intended to commit the crimes, he signaled to Owens that they should commit the crimes with his verbal threats and his nonverbal

[31] The jury acquitted defendant of the counts pertaining to Vann and Green — the only counts that relied solely on complicity liability.

communication with Owens. Witnesses such as defendant's wife testified that Owens routinely followed defendant's orders. The evidence that showed defendant ordered the violence was also sufficient to show that defendant encouraged the commission of the crime.

Thus, if the jury believed that Owens rather than defendant shot Bell or Marshall-Fields, the evidence was sufficient to allow a reasonable mind to conclude that defendant was guilty beyond a reasonable doubt as a complicitor.

5. Accessory to the Murder of Vann

Defendant contends that the evidence was insufficient to show that he was an accessory to first degree murder because the prosecution did not prove that he knew that Owens had committed first degree murder.

"A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person." § 18-8-105(1), C.R.S. 2014. Rendering assistance includes harboring the other, or providing him with transportation or

disguise to help him avoid discovery, or concealing or destroying physical evidence. § 18-8-105(2)(a), (c), (e).

Defense counsel conceded at trial that defendant was guilty of being an accessory to murder. Defense counsel said in closing: "Is he guilty of accessory? Yeah, he is." Defendant also concedes on appeal that he rendered assistance to Owens; his reply brief states "there was evidence [defendant] helped Owens evade apprehension." Indeed, there was evidence that defendant helped Owens flee the crime scene, stayed with him at a motel, cut off his braids to change his appearance, discarded the guns they had used, bleached and dumped his clothes, and hid the vehicle they had driven.

Rather than disputing this evidence, defendant argues that the prosecution had to prove that he knew both that Owens had committed first degree murder after deliberation and that Owens's actions were not justified by self-defense. But the accessory to crime statute does not require such specific knowledge of the underlying crime. *People v. Young*, 192 Colo. 65, 68, 555 P.2d 1160, 1162 (1976) ("The relevant standard for knowledge in regard to the accessory statute is whether defendant knew the principal

had committed a crime. It is not necessary for the defendant to have known that the crime committed was of a particular class."); *see Barreras v. People*, 636 P.2d 686, 688 (Colo. 1981) (accessory statute "require[s] a showing that the accused have knowledge of the general character of the underlying offense"); *People v. Newmiller*, 2014 COA 84, ¶ 33 (same as *Barreras*).

The evidence was sufficient to show that defendant knew the general character of the underlying offense. Viewed in the light most favorable to the prosecution, the evidence showed that defendant had ordered Owens to shoot and then helped him escape. But even ignoring that evidence, defendant testified that Owens had told him he had shot someone after they escaped, and defendant was upset that Owens had not fired a warning shot. Defense counsel argued that this evidence showed that defendant had not been culpable in the shooting. But that testimony also tended to show that defendant knew Owens had committed the crime and knew the general character of that crime. *See Barreras*, 636 P.2d at 688; *Newmiller*, ¶ 33. Defendant's extensive efforts to elude apprehension served as additional evidence of his consciousness of guilt. *See People v. Curtis*, 2014 COA 100, ¶ 52.

Thus, we conclude that the evidence was sufficient to support a conclusion by a reasonable juror that defendant was guilty beyond a reasonable doubt of accessory to murder.

G. Denial of Motion for a Continuance

Defendant contends that the district court erroneously denied his motion for a continuance because the lack of a continuance precluded him from retaining an expert witness. We perceive no abuse of discretion.

1. Procedural Facts

The district court granted four continuances of defendant's trial, from an original setting on April 25, 2005, to the actual trial date of October 16, 2006. On September 1, 2006, defendant moved to delay his trial once again. He argued that previous defense counsel had conducted inadequate investigation and that current defense counsel, appointed to the case in April 2006, had had inadequate time to review voluminous discovery[32] or to interview the many witnesses who were present at Lowry Park during the shootings. He also argued that counsel also needed to review

[32] Discovery in the case consisted of more than 13,000 pages, according to defense counsel, in addition to ninety-eight recordings of witness interviews.

continuing discovery in his capital case and his co-defendant's cases.

Apart from the volume of discovery, defendant identified three specific discovery needs:

- He was awaiting the transcript from Owens's preliminary hearing.
- He wanted the prosecution to provide updated witness addresses, and the addresses of additional witnesses to the shooting who the prosecution had not contacted. And he was having difficulty contacting even those witnesses for whom he already had information, because they were reluctant and uncooperative.
- His expert witness needed additional discovery. Defendant explained that he had found an expert who could testify regarding ballistics, blood spatter analysis, and crime-scene reconstruction. The expert was available to testify in his case, but would be "out of state for the majority of September." That expert needed crime scene photographs, autopsy photographs, and autopsy diagrams to analyze. The prosecution had agreed to provide the autopsy information,

but had not yet done so. And defense counsel had not yet obtained crime scene photographs from the Aurora Police Department.

On September 7, 2006, the district court heard argument on the motion. By that time, the prosecution had provided the autopsy photographs to the defense. Defense counsel had also obtained some of the crime scene photographs, and indicated that the expert the defense had contacted would be available to review the materials after September 25.

Defense counsel would not divulge details about the expert, "because I have not endorsed an expert and I'm not required to until 30 days before trial." Counsel explained that expert testimony was material to establishing defendant's self-defense in the shootings of Bell and Marshall-Fields, and also to rebutting complicity liability by establishing Owens's self-defense in the shooting of Vann.[33] And counsel was concerned that the expert would not be ready in time.

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[33] Defendant points out in his opening brief that the prosecutor claimed at this hearing that defendant was accused of shooting only Bell, not Marshall-Fields or Vann. We cannot know whether the

The prosecutor argued that a continuance was not warranted. The prosecution had fulfilled all discovery obligations, providing all known witness addresses except for individuals in the witness protection program. Roughly fifteen percent of the discovery was related to the case, he argued; whereas, the bulk of discovery related to the murders of Marshall-Fields and Wolfe. Further, there would be an "endless cycle" of discovery as the prosecution updated witness information and the investigation of the capital case continued.

The court denied the motion, reasoning that discovery would indeed be an endless cycle, that the new discovery was not substantially different from the old, and that witnesses would continue to be reluctant to cooperate. The court expressed concern regarding retention of an expert for the defense: "So I continue to have some concerns in this particular area, but at this point the concerns are not such that I can grant a continuance, based upon

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prosecutor misspoke or whether the theory of culpability changed before trial. But neither defense counsel nor the court seemed to rely on that statement. Defense counsel subsequently argued that an expert was needed to show that defendant had not shot Marshall-Fields. And the court did not rule that an expert witness's testimony would be less material for that reason.

the state of the record in regards to the retention of experts and their importance to the case as well."

Defendant renewed his motion for a continuance at a pretrial hearing on October 2, 2006. Apart from incorporating previous arguments, defense counsel argued that defendant's expert witness was not yet ready to testify. Counsel indicated that the expert had reviewed some evidence in the case, but could not be endorsed until it was known whether his opinions would be helpful to defendant. The prosecutor responded that the expert evidence in the case was straightforward and "certainly there's still adequate time for the Defense to obtain this expert."

The court again denied the motion. It was two weeks until trial, and, the court estimated, the defense would not present its case until two weeks into trial. The court told defense counsel that the defense would not be required to disclose an expert report before the trial began.

> I find that there is still . . . time left for any Defense expert to be retained. And, based upon the fact that there has been a review of some of the evidence in this case, that therefore there will be sufficient time for that expert to come up to speed and be ready to

> present testimony if the Defense feels that to be appropriate.

Defense counsel did not call an expert witness to testify at trial.

2. Standard of Review and Applicable Law

The decision to deny a motion for a continuance is within the discretion of the district court, and we will not disturb its ruling absent a showing of an abuse of that discretion. *People v. Brown*, 2014 CO 25, ¶ 19. We find error only if the district court's "'decision was arbitrary or unreasonable and materially prejudiced the defendant.'" *Id.* (quoting *United States v. Simpson*, 152 F.3d 1241, 1251 (10th Cir. 1998)); *see People v. Gardenhire*, 903 P.2d 1165, 1168 (Colo. App. 1995). The determination is not mechanical, but depends on the circumstances of the case, particularly the reasons given for the delay. *People v. Hampton*, 758 P.2d 1344, 1353-54 (Colo. 1988); *People v. Roybal*, 55 P.3d 144, 150 (Colo. App. 2001).

3. Analysis

Defendant argues that his counsel did not have sufficient time to investigate his case and, in particular, did not have adequate

time to consult with experts. He further contends that an expert's opinion could have been important to refute testimony that he shot Marshall-Fields. We need not decide the possible importance of any expert testimony because the record does not support the conclusion that the denial of the motion for a continuance precluded the defense from retaining an expert.

Defense counsel told the court that it had been difficult to obtain an expert for the case, but also said that an expert had been consulted and would be available at trial. During argument on the renewed motion for a continuance, defense counsel explained that much of the evidence of crime-scene photographs and autopsy photographs had already been gathered, the expert had reviewed some evidence, and he was forming an opinion on the evidence.

The court decided that, because the expert was already reviewing evidence, the defense still had sufficient time to present this expert's opinion at trial. The record does not indicate why defendant did not call the expert witness at trial. We are left to speculate as to whether the expert did not have sufficient time or simply formed an opinion contrary to or at least neutral toward defendant's interests. Defendant does not point to a place in the

trial record where he renewed his motion for a continuance based on the expert not having had sufficient time to form an opinion and prepare for trial. Therefore, we cannot conclude that the denial of the motion for a continuance precluded defendant from retaining an expert. Because the court's ruling did not lead to the harm that defendant claims on appeal, the denial of the motion for a continuance did not materially prejudice defendant. *See Brown*, ¶ 19.

We also conclude that the district court's decision was not arbitrary or unreasonable. The court granted four continuances, pushing the trial date back a total of eighteen months. Defendant's new counsel had more than six months to obtain an expert. Defense counsel represented to the court that an expert had been contacted and was already reviewing evidence, but might not be ready in time for trial. *See Salazar*, 870 P.2d at 1220 ("mere speculation" as to what more an expert witness might have said if granted a continuance did not establish prejudice). The court reasoned that the expert still had four weeks to prepare for trial, but invited defense counsel to renew the motion for a continuance if circumstances materially changed. As noted, counsel did not.

Under these circumstances, the court's decision was reasonable. *See id.* (no abuse of discretion in denying a continuance where the defendant's expert witness had begun to review evidence and still had twenty-five days before trial to review the prosecution expert's untimely disclosed report and perform tests); *People v. Scarlett*, 985 P.2d 36, 42 (Colo. App. 1998) (no abuse of discretion in denying a continuance "even when a criminal defendant asserts a need to prepare to meet unexpected or newly discovered evidence or testimony").

Because the court's denial of the motion for a continuance was not arbitrary or unreasonable, and because the decision did not materially prejudice the defendant, we conclude that the court did not abuse its discretion. *See Brown*, ¶ 19.

H. Trial Atmosphere

Defendant contends that the trial atmosphere was unfair and that the district court erroneously denied (1) his motion for a mistrial on the basis of extra security measures and (2) his motion to move to a larger courtroom on the basis that the prosecution table was too close to the jury box.

1. Extra Security Measures

a. Additional Facts

Because a prosecution witness had been killed before trial and other witnesses allegedly had been threatened, law enforcement officials heightened security at the courthouse for defendant's trial. For example, law enforcement officers were on the rooftop some days of trial; more officers than usual were on duty inside the courthouse; two police cruisers were parked outside the rear courthouse entrance; and officers screened individuals at the courtroom entrance in addition to the typical screening at the courthouse entrance.

Defense counsel objected to the extra security measures on the first day of trial, the second day of trial, and the fifth day of trial. On the first day of trial, defense counsel objected that the security violated defendant's right to a fair trial because it was too visible and singled him out as dangerous. The parties disagreed as to the potential effect on jurors. The prosecutor argued that the extra security was outside the courtroom and only two uniformed officers were inside the courtroom, which was standard for any trial. Defense counsel argued that jurors could still see extra

security outside the courthouse, and called Lieutenant Bobbie Hartman to testify regarding the security measures. The court ruled that it was reasonable to believe that extra security was necessary, that jurors might not know that the level of security was unusual, and that the measures taken were not so pervasive that they denied defendant a fair trial.

On the second day of trial, defense counsel renewed the objection and noted that three uniformed officers were in the courtroom. The court responded that there were often up to four or five uniformed officers coming and going during proceedings, but that the court would ensure that the jurors' route to the courtroom did not expose them to extra security measures.

On the fifth day of trial, defense counsel moved for a mistrial based on the visibility of security measures. A security detail escorted the advisory witnesses to and from the courthouse each day and, defense counsel argued, jurors could have seen the flashing lights and blocked entrances marking their arrival and departure. Counsel argued that the security was unnecessary because the prosecution had not divulged details of the threats received, and that the method used was "indiscreet and obvious."

The court responded that it had told jurors there were many judges at the courthouse conducting many proceedings, that two felony criminal trials were also in progress, and that "I cannot make a finding at this time that there has been any sort of showing of exposure . . . to security measures that they may feel is outside the standard operating procedure." The court also refused defense counsel's suggestion to individually examine jurors on the issue of exposure to security measures.[34]

b. Standard of Review and Applicable Law

We review a court's denial of a motion for a mistrial for an abuse of discretion, and we will not disturb its ruling absent a clear showing of an abuse of that discretion and prejudice to the defendant. *People v. Santana*, 255 P.3d 1126, 1130 (Colo. 2011) (where a defendant claims that a court's refusal to declare a mistrial violated his constitutional rights, we first decide if an error occurred). "A mistrial is a drastic remedy that is warranted only when the prejudice to the accused is so substantial that its effect on

[34] Defendant attaches to his opening brief statements from interviews with certain jurors conducted after the trial, indicating that they did notice security measures. That information is not part of the record, and therefore we do not consider it. *People v. Henson*, 2013 COA 36, ¶ 7.

the jury cannot be remedied by other means." *Dore*, 997 P.2d at 1221; *accord Cousins*, 181 P.3d at 373.

A defendant is entitled to have his guilt or innocence determined solely on the basis of the evidence, and not on grounds of official suspicion or circumstances surrounding the trial. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986). Yet, "we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct." *Id.* To determine whether the district court struck the proper balance, the reviewing court should analyze (1) whether the circumstances at the defendant's trial were inherently prejudicial and, (2) if so, whether the government's practices at that particular trial served an essential state interest. *Id.* at 568-69; *see also People v. Dillon*, 655 P.2d 841, 846 (Colo. 1982) (juror exposure to security measures constitutes reversible error only when "unnecessary and prejudicial").

Inherently prejudicial practices include bringing a defendant to court wearing prison clothes, *see Estelle v. Williams*, 425 U.S. 501, 503-04 (1976), or bound and gagged, *see Illinois v. Allen*, 397

U.S. 337, 344 (1970), or wearing shackles visible to jurors, *see Hoang v. People*, 2014 CO 27, ¶ 24; *see also Deck v. Missouri*, 544 U.S. 622, 629 (2005). But the presence of uniformed security officers in the courtroom is not prejudicial in the same way as shackling and prison clothes because of the "wider range of inferences that a juror might reasonably draw from the officers' presence." *Holbrook*, 475 U.S. at 569. In other words, shackles on a defendant indicate that he is dangerous; whereas security officers may be guarding against disruptions from outside the courtroom, may be preventing violent eruptions in the courtroom, or may simply be part of the "impressive drama" of a courtroom proceeding. *Id.*

"Excessive guards" around a defendant may be inherently prejudicial and should be disallowed "except where special circumstances dictate the use of enhanced security measures." *People v. Tafoya*, 703 P.2d 663, 666 (Colo. App. 1985). In *Tafoya*, the division held that the district court acted within its discretion in deciding that extra security measures were necessary where there had been threats against the defendant and threats of terrorist acts.

Id. (also noting that "the extra security was concealed from the jury as much as possible").

c. Analysis

We conclude that the extra security measures employed in this case were not inherently prejudicial or unnecessary.

Most of the security measures that defendant complains of were outside the courtroom or even outside the courthouse. The court specifically found that jurors were not exposed to the extra screening process at the front entrance of the courtroom, and instructed law enforcement officials to be as discreet as possible in the courthouse. *Cf. People v. Ayala*, 1 P.3d 3, 19 (Cal. 2000) (court did not abuse its discretion when it deployed a magnetometer at the courtroom entrance in reliance on the prosecutor's representation of risks). The only circumstance defendant complains of inside the courtroom was the presence of three uniformed security officers at one time, with no indication that they were near him in particular. We conclude that the presence of three uniformed security officers in the courtroom was not excessive or inherently prejudicial. *See Holbrook*, 475 U.S. at 569; *Tafoya*, 703 P.2d at 666.

As explained in *Holbrook*, the existence of extra security is not inherently prejudicial unless it singles out the defendant as dangerous — for example, by forcing him to appear in front of the jury in shackles or prison clothes. 475 U.S. at 569. These classic examples of inherent prejudice occur not only inside the courtroom, but are directed at the defendant in particular. The extra security outside the courtroom may have been obvious to jurors at this trial, but that does not mean that it singled out defendant as dangerous. *Cf. Harlan*, 8 P.3d at 505 (not necessary to poll the jury or grant a mistrial where the jurors' possible exposure to the defendant in handcuffs was inadvertent). The extra security outside the courtroom was susceptible of a "wider range of inferences." *Holbrook*, 475 U.S. at 569; *cf. Lopez v. Thurmer*, 573 F.3d 484, 494 (7th Cir. 2009) ("Trial courts should have . . . significantly more latitude in gauging the appropriate security measures for a jury view outside the courtroom."). For example, the snipers on the courthouse roof and the police escort of advisory witnesses outside the courthouse most logically led to the inference that there was some danger outside the courthouse, not necessarily a danger from defendant. The jury could have inferred that the security was

standard procedure, was for a different trial, or was for defendant's protection. We conclude that these general security measures outside the courthouse, which did not single out defendant, were not inherently prejudicial.

Defendant does not argue on appeal that the security measures were unnecessary. The court specifically found that the heightened security was necessary. A prosecution witness had already been killed. Several of the witnesses appearing at trial had been placed in the witness protection program. Law enforcement officials claimed that other witnesses had been threatened. Thus, the court acted within its discretion in deciding that extra security measures were necessary. *See Tafoya*, 703 P.2d at 666.

Because the extra security measures were not prejudicial and were necessitated by the special circumstances of this case, the court did not abuse its discretion by denying defendant's motions for a mistrial.

2. Proximity of Prosecution Table to Jury Box

Defendant next contends that the district court erroneously denied his motion to move to a larger courtroom because the prosecution table was too close to the jury box.

Defense counsel argued that jurors likely could hear conversation at the prosecution table and requested that the court ask the juror seated closest to the prosecution table what she had heard. The court denied the request, responding that it had watched the juror and "her focus has never been on anybody at the prosecution side."

We review a court's decision regarding regulation of the courtroom for an abuse of discretion. *Whitman*, 205 P.3d at 379.

In essence, defendant asks us to speculate that a juror could hear conversation at the prosecution table despite the court's finding that, from its observations, the juror had not been focusing her attention on the prosecution table. Defendant asks us to further speculate that, if this juror did overhear and understand conversations, it might have affected her view of the trial in some way. In the absence of any record support for defendant's position, we cannot conclude that the court abused its discretion. *People v. Wells*, 776 P.2d 386, 390 (Colo. 1989) ("Any facts not appearing of record cannot be reviewed."); *People v. Clendenin*, 232 P.3d 210, 216 (Colo. App. 2009) (same).

I. Motion to Suppress

Defendant contends that the district court erred by denying his motion to suppress the BB gun police discovered in his vehicle. We are not persuaded.

1. Additional Facts

As discussed, several days after the Lowry Park shooting, police stopped defendant in his vehicle for violating a municipal noise ordinance and for careless driving. *See* § 42-4-1402, C.R.S. 2014. Police placed defendant in the back of a cruiser and then searched his vehicle, finding a BB gun under the driver's seat and a handgun in a door panel.

Defendant filed a motion to suppress any evidence obtained as a result of the search of his vehicle. After a suppression hearing at which several police officers testified, the court concluded that the officers had probable cause to arrest defendant because of careless driving and refusal to comply with commands. The court also concluded that defendant's behavior supported a reasonable belief that he posed a danger to the officers. The court found that police first discovered the BB gun under the driver's seat, and then noticed the loose door panel in the driver's door. An officer "merely

opened the panel a little bit wider and when he did that, a gun fell out on to the ground . . . ." Relying on *Michigan v. Long*, 463 U.S. 1032 (1983), the court concluded that the search of defendant's vehicle was lawful under the automobile exception. Accordingly, the court denied the motion to suppress evidence. The prosecutor admitted the BB gun (but not the handgun) into evidence at trial.

2. Standard of Review and Applicable Law

A challenge to a suppression order presents a mixed question of law and fact. *People v. Broder*, 222 P.3d 323, 326 (Colo. 2010). We defer to the district court's factual findings if they are supported by the record, but review its legal conclusions de novo. *Id.*; *People v. King*, 292 P.3d 959, 961 (Colo. App. 2011).

The law on adequate justification for a search of a vehicle's interior, incident to a lawful custodial arrest, has changed over time. In *New York v. Belton*, 453 U.S. 454, 460 (1981), the Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." A proper search included any closed containers within the passenger compartment, such as the

glove compartment or the console. *Id.* at 461 & n.4. "In Colorado, *Belton* was understood as establishing a bright line test: if an occupant of a car was arrested, the passenger compartment of that vehicle could be searched." *People v. Hopper*, 284 P.3d 87, 89 (Colo. App. 2011).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court curtailed the automobile exception, holding that it applies only when the search is necessary for officer safety or to prevent the destruction of evidence, or when officers reasonably believe the vehicle contains evidence relevant to the crime of arrest. *Id.* at 343-44; *see also People v. Chamberlain*, 229 P.3d 1054, 1055 (Colo. 2010) (search unreasonable where the defendant was already placed in a patrol car and there was no reason to believe the vehicle contained evidence relevant to the crime of arrest). But "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis v. United States*, ___ U.S. ___, ___, 131 S. Ct. 2419, 2429 (2011). In *Davis*, the Court applied the good-faith exception to a vehicle search that had complied with the law as perceived under *Belton*, even though the search was improper under the subsequent precedent of

Gant. *Id.* at ___, 131 S. Ct. at 2426, 2429; *see also Hopper*, 284 P.3d at 90 (applying the good-faith exception to police reliance on pre-*Gant* case law).

3. Analysis

The People do not dispute that the search of defendant's vehicle would have been unlawful under *Gant*. But *Gant* was decided five years after officers conducted the search in this case. Thus, the good-faith exception applies to the search in this case, so long as the search complied with the standard in *Belton*. *See Davis*, ___ U.S. at ___, 131 S. Ct. at 2429; *Hopper*, 284 P.3d at 90.

The BB gun, which was admitted into evidence at trial, was discovered under the driver's seat. This is clearly within the passenger compartment and, thus, within the scope of a search allowed under then-existing precedent. *See Belton*, 453 U.S. at 460.[35] It follows that the court did not err in denying the motion to suppress the BB gun.

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[35] Defendant argues that the search was unlawful even under *Belton* because an officer looked in the door panel to discover the second gun. We do not decide whether a reasonably well-trained officer would have known that pulling open the loose door panel was unlawful under *Belton*, if indeed it was unlawful in these circumstances. *Compare United States v. Infante-Ruiz*, 13 F.3d 498,

J. Sentencing

Defendant contends that the verdicts do not support thirty-two year sentences for first degree assault because the jury did not conclusively find that he had not been provoked. Provocation is a mitigating factor that reduces a defendant's sentencing range. Defendant specifically challenges the language "defendant, or Sir Mario Owens, did not act upon provoked passion," which appeared in special interrogatories on the verdict forms.

1. Procedural Facts

The verdict forms for the first degree assault charges (as to Bell and Marshall-Fields) included special interrogatories regarding use of a deadly weapon, serious bodily injury, and provocation. The provocation interrogatory read:

> If you find the defendant Guilty of Assault in the First degree, the law requires you to

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503 n.1 (1st Cir. 1994) ("The 'passenger compartment' has been interpreted to mean those areas reachable without exiting the vehicle and without dismantling door panels or other parts of the car."), *with United States v. Barnes*, 374 F.3d 601, 605 n.2 (8th Cir. 2004) ("It may well be that if the compartment could have been opened quickly by an occupant . . . rather than elaborately dismantling the vehicle, then removal of the door panels would be permissible under *Belton*."). Because the second gun was not admitted into evidence, the details of the search that occurred after discovery of the first gun are irrelevant to our analysis.

answer the following question: Was the defendant acting upon provoked passion?

The defendant was acting upon provoked passion if:

1. The act causing the injury was performed upon a sudden heat of passion, and

2. the sudden heat of passion was caused by a serious and highly provoking act of the intended victim, and

3. the intended victim's act of provocation was sufficient to excite an irresistible passion in a reasonable person, and

4. between the provocation and the assault, there was an insufficient interval of time for the voice of reason and humanity to be heard.

It is the prosecution's burden to prove, beyond a reasonable doubt, that the defendant was not acting upon provoked passion. The prosecution must prove, beyond a reasonable doubt, that one or more of the element above did not exist in this case.

After considering all the evidence, if you decide the prosecution has proven beyond a reasonable doubt that the defendant was not acting upon provoked passion, you should so indicate below.

After considering all of the evidence, if you decide the prosecution has failed to prove beyond a reasonable doubt that the defendant was not acting upon provoked passion, you should so indicate below.

> [ ] We the jury, unanimously find, that the defendant, or Sir Mario Owens, did not act upon provoked passion.
>
> OR
>
> [ ] We, the jury, do not so find.

The jury indicated on both first degree assault verdict forms that "defendant, or Sir Mario Owens, did not act upon provoked passion."

The parties discussed the verdict forms during the jury instruction conference. The prosecutor tendered the verdict forms. Defense counsel did not object to the interrogatories. (Altogether, the verdict forms included twelve special interrogatories, and each of them included the language "defendant, or Sir Mario Owens.")

> [The Court:] And does the defense have any objection to the jury verdict on Count 2?
>
> [Defense Counsel:] No, I think it's correct. I think the people are a hundred percent on point.
>
> [The Court:] All right, and the interrogatories are fine with the defense as well.
>
> [Defense Counsel:] That's correct.
>
> . . .

> [The Court:] Count 5, assault in the first degree for Mr. Marshall-Fields as named victim, there is two interrogatories plus the provocation interrogatory . . . . Does that meet with the defense approval?
>
> [Defense Counsel:] That's fine.

The court sentenced defendant to thirty-two years for each count of first degree assault, but each sentence is to run concurrently with a forty-eight year sentence for attempted murder against the same victim.

2. Standard of Review and Applicable Law

Arguably, we cannot reach the merits because defense counsel invited the alleged error into the case by affirmatively acquiescing to the verdict forms and interrogatories. *See Gross*, ¶ 8. But we will assume, without deciding, that counsel's acquiescence was inadvertent.

Because defendant did not object to the verdict forms, we review for plain error. *Id.* at ¶ 9 (inadvertent instructional omissions are reviewed for plain error); *Lehnert v. People*, 244 P.3d 1180, 1182 (Colo. 2010) (reviewing unobjected-to verdict forms for plain error).

3. Analysis

We agree with defendant that he presented sufficient evidence of provocation to entitle him to a provocation interrogatory, and that the prosecution bore the burden of proving beyond a reasonable doubt that he was not provoked. But we conclude that despite the obvious mistake of including Owens's name in addition to "defendant," the verdict forms demonstrate that the jury unanimously decided that defendant was not provoked.

The verdict form instructions made clear that the jury had to determine whether "the defendant" was provoked:

- "Was the defendant acting upon provoked passion?"
- "The defendant was acting upon provoked passion if . . ."
- "It is the prosecution's burden to prove, beyond a reasonable doubt, that the defendant was not acting upon provoked passion."
- "After considering all the evidence, if you decide the prosecution has proven beyond a reasonable doubt that the defendant was not acting upon provoked passion, you should so indicate below."

In light of these instructions, we cannot conclude that the unfortunate inclusion of Owens's name would have confused jurors as to whom the form referred.

But even if there was error, we conclude that the error did not affect defendant's substantial rights. The jury found defendant guilty of first degree attempted murder (after deliberation) as to Bell and Marshall-Fields. The same evidence supported the jury's finding that defendant was guilty of first degree assault as to Bell and Marshall-Fields. Because the jury decided that defendant had deliberated before attempting to murder these two victims, it necessarily found that he did not simultaneously act "upon a sudden heat of passion" when assaulting them. *Compare* § 18-3-101(3) ("'[A]fter deliberation' means . . . that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner."), *with* § 18-3-202(2)(a) ("If assault in the first degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion . . . and without an interval between the provocation and the injury sufficient for the voice of reason and

humanity to be heard, it is a class 5 felony."); *see also* COLJI-Crim. No. 10:20 (1983) ("The evidence in this case has raised the issue of provocation. Provocation means that the defendant's acts were performed, not after deliberation, but upon a sudden heat of passion . . . ."); *Rowe v. People*, 856 P.2d 486, 492 (Colo. 1993) (approving of COLJI-Crim. No. 10:20); *Sanchez*, 253 P.3d at 1263 (concluding that a guilty verdict for attempted first degree murder is inconsistent with a guilty verdict for first degree assault under heat of passion).

K. Cumulative Error

Finally, defendant contends that the cumulative effect of the alleged errors at his trial require reversal. We disagree.

"[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal is required." *Roy*, 723 P.2d at 1349. However, "[a] conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant's right to a fair trial." *Whitman*, 205 P.3d at 387.

We conclude that there is no cumulative error requiring reversal. Although he did not receive a perfect trial, defendant did

receive a fair trial. *People v. Flockhart*, 2013 CO 42, ¶ 36; *People v. Wise*, 2014 COA 83, ¶ 31 ("As is often said, a defendant is entitled to a fair trial, not a perfect one."). Indeed, the record shows that defendant was afforded far more process than is typical.

IV. Conclusion

For the foregoing reasons, we affirm defendant's convictions and sentence.

JUDGE MILLER and JUDGE BERGER concur.

07CA0561 Peo v Ray 01-22-2015

COLORADO COURT OF APPEALS

Court of Appeals No. 07CA0561
Arapahoe County District Court No. 04CR1805
Honorable Michael J. Spear, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Robert Keith Ray,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED

Division VII
Opinion by JUDGE J. JONES
Miller and Berger, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced January 22, 2015

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Table of Contents

Defendant, Robert Keith Ray, appeals the district court's judgment entered on jury verdicts finding him guilty of two counts of attempted first degree murder, two counts of first degree assault, and accessory to first degree murder. He also appeals his sentence. We affirm.

I. Background

On July 4, 2004, defendant attended an outdoor musical event at Lowry Park in Aurora. Also attending were defendant's wife, defendant's sister, and defendant's friend, Sir Mario Owens. As the event was ending, defendant's wife and sister attempted to drive their vehicle out of the parking lot, but pedestrians leaving the event refused to move and then insulted the women. Defendant and Owens confronted the crowd; they traded insults with persons in the crowd; defendant grabbed a woman by her face; and defendant and Owens lifted their shirts to reveal pistols in their waistbands. Witness Jeremy Green told police that defendant repeatedly threatened to kill everyone. But at that point the hostilities did not escalate beyond shoving and insults.

After the initial fracas, defendant went to his SUV. Owens returned to the grassy area of the park. One of the event

organizers, Greg Vann, confronted Owens about bringing a gun and threw a punch. Owens shot and killed Vann. Green told police that Owens then pointed a gun at him but it did not fire. Witnesses said that Owens also shot into the crowd as he moved away, hitting Javad Marshall-Fields and possibly Elvin Bell. Owens ran toward defendant's SUV.

Defendant testified that Bell pursued Owens, caught him at defendant's SUV, and began beating Owens. Defendant said he tried to pull Bell away from Owens but could not, and then shot Bell once. The prosecution presented evidence that defendant shot Bell several times, and that defendant also shot Marshall-Fields. Defendant and Owens fled in defendant's vehicle.

Police officers arrested defendant a week later for unrelated traffic violations. Owens remained at large. Before defendant's trial began, Owens and an accomplice killed prosecution witness Marshall-Fields and Marshall-Fields's fiancée, Vivian Wolfe. These murders led to increased media coverage and enhanced security at defendant's trial. (But evidence of these murders was not presented at the trial.)

The People ultimately charged defendant with seven crimes against four victims: first degree murder (of Vann); first degree attempted murder (of Marshall-Fields); first degree attempted murder (of Bell); first degree attempted murder (of Green); first degree assault (of Marshall-Fields); first degree assault (of Bell); and accessory to first degree murder (of Vann).

At trial, the prosecution argued that defendant was guilty of the attacks on Vann and Green as a complicitor with Owens, and guilty of the attacks on Bell and Marshall-Fields as a complicitor or a principal. The jury acquitted defendant of the murder of Vann and the attempted murder of Green. The jury convicted defendant of the first degree attempted murders of Bell and Marshall-Fields, the first degree assaults of Bell and Marshall-Fields, and accessory to the first degree murder of Vann (based on evidence that defendant had helped Owens try to evade charges for Vann's murder). The district court subsequently sentenced him to 108 years in the custody of the Department of Corrections.

In a subsequent trial that is not the subject of this appeal, a jury convicted defendant of, among other offenses, the murders of Marshall-Fields and Wolfe. His prior convictions for attempted first

degree murder — being challenged here — together served as one of several sentence aggravators in the later trial. Defendant was sentenced to death in that case.

II. Plea for Heightened Scrutiny

At the outset, defendant argues that (1) we should regard this case as a capital case because convictions in this case served as an aggravating factor in the penalty phase of his subsequent capital case and (2) contentions of error receive increased scrutiny in capital cases. Thus, his argument continues, we should treat all of his claims of error as preserved or, in the alternative, apply a less rigid test of plain error to those contentions of error that are not preserved. This argument fails for two reasons.

First, this is not a capital case. Defendant cites no authority, and we have found none, standing for the proposition that a non-capital case should be treated as a capital case when convictions in the former serve as aggravating factors in a later capital case. Defendant relies on *Johnson v. Mississippi*, 486 U.S. 578, 584-86 (1988). But in that case the Court only overturned a death sentence because a prior-conviction aggravator had been reversed in another appeal. Neither the United States Supreme Court nor

the New York Court of Appeals (which had reversed the prior conviction, *see People v. Johnson*, 506 N.E.2d 1177 (N.Y. 1987)) held that the subsequent use of the conviction as a sentencing aggravator in a capital case changed the applicable standards of review.

Second, the Colorado Supreme Court has held that the generally applicable standards of review apply even in capital cases. Defendant's reliance on *People v. Rodriguez*, 794 P.2d 965 (Colo. 1990), in this regard is misplaced. It is true that, in *Rodriguez*, a capital case, the supreme court appears to have reviewed unpreserved contentions of error under the harmless error standard. *See id.* at 972. However, the supreme court has since made clear that unpreserved errors, even in capital cases, are subject to plain error review. *People v. Dunlap*, 975 P.2d 723, 737 (Colo. 1999) ("If the defendant lodges no objection to the evidence or procedure, then this court will consider the error only under the plain error standard even in a death penalty case."). We are bound to follow the supreme court's most recent pronouncement on the issue. *People v. Washington*, 2014 COA 41, ¶ 25.

Therefore, we will assess each of defendant's contentions of error under the standards of review applicable in any direct appeal of a criminal conviction.

III. Discussion

Defendant's contentions of error fall into eleven categories:

1. The district court erroneously instructed the jury.

2. The district court erred by not responding to a note from a deliberating juror asking to be excused.

3. The district court erroneously admitted a video recording of a witness's police interview and failed to limit the jurors' access to the video recording during deliberations.

4. The district court erred in connection with the jury selection process.

5. The prosecution engaged in numerous instances of misconduct.

6. The evidence was insufficient to support the convictions.

7. The district court erred in denying his motion to continue the trial.

8. The atmosphere of the trial was tainted by excessive security measures.

9. The district court erred by denying his motion to suppress evidence.

10. The district court erred by sentencing him to terms of incarceration that were not supported by the verdicts.

11. The cumulative effect of the errors pertaining to his convictions require reversal of the convictions.

We address defendant's contentions in the order in which he has presented them.

A. Jury Instructions

Defendant challenges: (1) the attempted murder instruction; (2) the self-defense/defense of others instructions; (3) the court's rejection of his mistake-of-fact defense and related instruction; (4) the complicity instruction; and (5) the court's response to the jury's question on the complicity instruction.

1. Attempted Murder Instruction

Defendant contends that the district court erred by giving the jury an attempted murder instruction that was erroneous in that it allowed the jury to convict him without finding that he had intended to kill after deliberation. We conclude that there was no error.

a. Relevant Instructions

Instruction Number 16, the elemental instruction for attempted first degree murder, provided, in relevant part:

> The elements of the crime of Criminal Attempt (to Commit Murder in the First Degree) are:
> 1. That the defendant,
> 2. in the State of Colorado, at or about the date and place charged,
> 3. after deliberation, and with intent
> 4. engaged in conduct constituting a substantial step toward the commission of Murder in the First Degree, as defined in Instruction No. 15,
> 5. without the affirmative defense in instruction number 24.[1]

Instruction Number 15, the elemental instruction for first degree murder, provided, in relevant part:

> The elements of the crime of Murder in the First Degree are:
>
> 1. That the defendant,
> 2. in the State of Colorado, at or about the date and place charged,
> 3. after deliberation, and with intent
>
> a. to cause the death of a person other than himself,
>
> b. caused the death of that person or of another,

[1] Instruction Number 24 explained the affirmative defense of self-defense for defendant or a complicitor, under the physical force standard.

4. without the affirmative defense in instruction number 23.[2]

Instruction Number 21 included the following definition of "substantial step": "A 'substantial step' is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense."

b. Standard of Review

We review de novo whether jury instructions accurately reflect the law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011).

A district court must instruct the jury as to each element of a charged offense. *People v. Mattas*, 645 P.2d 254, 257 (Colo. 1982). A court commits constitutional trial error when it misinforms the jury on an element of an offense. *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001). However, an omission or erroneous description of the required mens rea does not render an instruction constitutionally deficient when the instructions considered as a whole clearly

[2] Instruction Number 23 explained the affirmative defense of self-defense for Sir Mario Owens, under the deadly force standard.

instructed the jury regarding the element. *People v. Petschow*, 119 P.3d 495, 499 (Colo. App. 2004); *see also Mattas*, 645 P.2d at 258.[3]

c. Analysis

Under section 18-2-101(1), C.R.S. 2014, a conviction for criminal attempt requires a jury to find that the accused acted "with the kind of culpability otherwise required for commission of an offense" and "engage[d] in conduct constituting a substantial step toward the commission of the offense." Thus, where the defendant is charged with attempted first degree murder after deliberation, the mens rea element requires proof of the intent to commit first degree murder. *People v. Beatty*, 80 P.3d 847, 851 (Colo. App. 2003). A conviction for first degree murder after deliberation requires a finding that the defendant acted after deliberation and with the intent to kill the victim. § 18-3-102(1)(a), C.R.S. 2014.

Several Colorado cases have discussed instructional language for an attempt charge which could be read to apply the mens rea element to the commission of a substantial step but not explicitly to the decision to kill. *See Gann v. People*, 736 P.2d 37, 39 (Colo.

[3] The parties dispute whether defendant preserved this contention of error. We need not resolve that dispute because we conclude that there was no error.

1987); *Petschow*, 119 P.3d at 500-02; *Beatty*, 80 P.3d at 851; *People v. Caldwell*, 43 P.3d 663, 672 (Colo. App. 2001).

In *Gann*, the supreme court held that an attempt instruction was erroneous when viewed in isolation because it did not include the required mens rea. 736 P.2d at 39 ("We have consistently stated that the preferable practice is to include the *mens rea* element of an offense in the instruction defining the offense."). But the court concluded that the omission was not plain error because the instructions considered as a whole made clear the mens rea required for conviction. *Id.*

Several divisions of this court have also concluded that similar instructional deficiencies did not constitute reversible error when considered in light of the instructions as a whole. As explained in *Petschow*:

> Three divisions of this court have concluded that erroneous instructions that stated, as here, that the jury was required to find that the defendant "intentionally" engaged in conduct constituting a substantial step toward the commission of the completed crime, when read and considered in their entirety together with the instructions on the elements of the completed offense, clearly instructed the jury regarding the required mens rea.

Petschow, 119 P.3d at 501 (citing *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003); *People v. Johnson*, 74 P.3d 349 (Colo. App. 2002); and *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001)).

Applying the reasoning of these cases, we conclude that, although the better practice would have been to include the mens rea for first degree murder in the attempt instruction, there was no error because the instructions as a whole adequately informed the jury of what it was required to consider and find. *See Riley*, 266 P.3d at 1094-95 (when instructions, considered together, accurately state the law applicable to a particular issue, there is no error).

The attempted murder instruction referred the jury to the murder instruction, stating that defendant must have "engaged in conduct constituting a substantial step toward the commission of Murder in the First Degree, as defined in Instruction No. 15." The murder instruction, in turn, made clear that the required mens rea for conviction was that defendant must have acted "after deliberation, and with intent . . . to cause the death of a person other than himself." Because the required mens rea for the attempt

offense was made clear to the jurors, the instructions were not constitutionally deficient. *See Mattas*, 645 P.2d at 257-58.[4]

2. Self-Defense/Defense of Others Instructions

Defendant contends that the self-defense/defense of others instructions were erroneous for eight reasons: (1) the reasonable belief instruction impermissibly shifted the burden to defendant to prove reasonableness of belief and conduct; (2) the reasonable belief instruction used an objective standard for reasonableness; (3) the instructions failed to adequately define use-of-force concepts; (4) the instructions failed to explain the relationship between self-defense and complicity; (5) the instructions confused defendant's affirmative defense as to the attempted murders of Marshall-Fields and Bell with Owens's affirmative defense as to the killing of Vann; (6) the court improperly modified defendant's tendered theory-of-defense instruction; (7) the affirmative-defense instruction lacked direction on the burden of proof; and (8) the instructions did not

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[4] Defendant's opening brief also states that the attempted murder instruction "merged the 'two distinct' elements of intent-to-kill and after-deliberation." But it does not develop the issue, and so we do not address it. *People v. Newmiller*, 2014 COA 84, ¶ 68; *People v. Venzor*, 121 P.3d 260, 264 (Colo. App. 2005) ("[W]e decline to review those issues, inasmuch as they are presented to us only in a perfunctory or conclusory manner.").

explain Colorado's no-retreat doctrine in light of the prosecution's argument that defendant should have retreated. We find no error.

a. Relevant Instructions

Several instructions told the jurors how to evaluate defendant's claimed affirmative defense and the People's complicity theory.

Instruction Number 22

> The evidence in this case has raised an affirmative defense.
>
> The prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged.
>
> After considering the evidence concerning the affirmative defense with all the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a not guilty verdict.

Instruction Number 23

> It is an affirmative defense to the crime of Murder in the First Degree that Sir Mario Owens used "deadly physical force" upon another person:
>
> 1. in order to defend himself or a third person from what he reasonable believed to be the use or imminent use of unlawful physical force by the other person, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose, and

3. he reasonably believed a lesser degree of force was inadequate, and

4. he had reasonable grounds to believe and did believe that he or another person was in imminent danger of being killed or of receiving serious bodily injury.

"Deadly physical force" means force, the intended, natural, and probable consequence of which, is to produce death, and which does in fact, produce death.

Instruction Number 24

It is an affirmative defense to the crimes of Criminal Attempt (to Commit Murder in the First Degree), its lesser included offense of Criminal Attempt (to Commit Murder in the Second Degree) and Assault in the First Degree, that the defendant or a complicitor used physical force upon another person:

1. in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose.

Instruction Number 25

In deciding whether or not the defendant had reasonable grounds for believing that he or another was in imminent danger of being killed or of receiving serious bodily injury, or that he or another was in imminent danger from the use of unlawful physical force, you

should determine whether or not he acted as a reasonable and prudent person would have acted under like circumstances. In determining this, you should consider the totality of the circumstances, including the number of people reasonably appearing to be a threat.

It is not enough that the defendant believed himself or another to be in danger, unless the facts and circumstances shown by the evidence and known by him at the time, or by him then believed to be true, are such that you can say that as a reasonable person he had grounds for that belief.

Whether the danger is actual or only apparent, actual danger is not necessary in order to justify the defendant acting in self-defense or defense of others.

Instruction Number 26

Mr. Ray can be found guilty of the acts committed by Mr. Owens by the theory of complicity only if it is proven beyond a reasonable doubt that Mr. Ray knew Mr. Owens intended to commit the crime. In other words, if you find Mr. Owens committed the crime of Murder in the First Degree, it must be proven beyond a reasonable doubt that Mr. Ray knew Mr. Owens intended to commit the crime of Murder in the First Degree. For Mr. Ray to be held accountable for Mr. Owens' acts, it must be proven beyond a reasonable doubt that Mr. Ray intended to promote or facilitate the crime that Mr. Owens actually committed. In the scenario above Mr. Ray would have to intend to promote or facilitate Mr. Owens in committing Murder in the First Degree. Mr. Ray is also not guilty of the acts of

> Mr. Owens if Mr. Owens[’] acts are justified under the law. The government must also prove beyond a reasonable doubt that Mr. Ray did aid, abet, advise or encourage Mr. Owens in the commission or planning of the crime.
>
> Mr. Ray may also act or rely upon apparent necessity in defending Mr. Owens or himself in shooting Mr. Bell. Mr. Ray may reasonably rely on appearances in defending Mr. Owens or himself even if those appearances turn out not to be true.

b. Standard of Review

A trial court must correctly instruct the jury on all matters of law applicable to the case. *Riley*, 266 P.3d at 1092; *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009). We review jury instructions de novo to determine whether all of the instructions, read as a whole, adequately informed the jury of the governing law. *Riley*, 266 P.3d at 1092-93; *People v. Pahl*, 169 P.3d 169, 183 (Colo. App. 2006). Instructions that accurately track the language of applicable statutes and pattern instructions are ordinarily sufficient. *People v. Gallegos*, 260 P.3d 15, 26 (Colo. App. 2010).

We review for an abuse of discretion whether a particular instruction should have been given to the jury, and will not disturb the district court’s decision absent a showing that it was manifestly

arbitrary, unreasonable, or unfair. *People v. Lane*, 2014 COA 48, ¶ 7.

c. Analysis

i. Shifting the Burden of Proof

Instruction Number 25 on reasonable belief did not impermissibly shift the burden to prove reasonableness to the defense. Defendant focuses on language instructing jurors to decide "whether or not" he acted on a reasonable belief of imminent danger and "whether or not" he acted as a reasonable person would have acted under like circumstances. He argues that this language put the onus on him to prove reasonableness. However, Instruction Number 22 informed the jurors that the "prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative defense." Telling jurors that they had to decide whether or not the prosecution had disproved the affirmative defense did not shift that burden; it merely informed jurors of their task.

Contrary to defendant's argument, the language "as to the affirmative defense" was not so vague that it lessened the burden of proof. The instruction tracked the language in section 18-1-407(2),

C.R.S. 2014 ("If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue . . . .").

Likewise, the instruction did not erroneously indicate that conduct was subject to the reasonableness inquiry. Under section 18-1-704(1), C.R.S. 2014, a "person is justified in using physical force" in self-defense when he uses "a degree of force which he reasonably believes to be necessary for that purpose." The statute necessarily requires jurors to consider whether the defendant reacted to the apparent threat with a reasonable degree of force, and therefore to consider the reasonableness of his conduct.

Defendant relies on *Kaufman v. People*, 202 P.3d 542 (Colo. 2009), for the proposition that his conduct should not have been considered. But, in *Kaufman*, the court said the opposite — that the defendant's perceptions and actions should be considered. *See id.* at 551 (holding that jury instruction was plain error because it incorrectly defined second degree assault).

Relying on *People v. Janes*, 982 P.2d 300 (Colo. 1999), defendant argues that the instructions forced him to prove a certain condition before his affirmative defense applied. He points to this

portion of Instruction Number 25: "It is not enough that the defendant believed himself or another to be in danger, unless . . . you can say that as a reasonable person he had grounds for that belief." But *Janes* is distinguishable. In *Janes*, the district court imported the pre-trial standard for "make-my-day" immunity — requiring the defendant to prove the elements of the statute — into post-trial instructions for an affirmative defense, but never identified the "make-my-day" defense as one of the defendant's affirmative defenses. *Id.* at 302-04. That is not the situation here. Instruction Number 22 unambiguously instructed the jury as to the proper burden of proof for defendant's affirmative defense. Instruction Number 25 merely stated that a subjective belief of danger must be accompanied by reasonable grounds for that belief. Therefore, the court did not impose any conditions for defendant to prove before the jury could consider his affirmative defense.

ii. Standard of Reasonableness

Contrary to defendant's assertion, Instruction Number 25 did not articulate an incorrect standard of reasonableness. It correctly told the jury to consider whether a reasonable person in like circumstances, knowing or believing those circumstances to exist,

would have acted as defendant did. *See People v. Collins*, 730 P.2d 293, 307 (Colo. 1986). To the extent defendant challenges the instruction's reference to a "prudent" person, we conclude that word was essentially redundant of the instruction's reference to a "reasonable" person, and did not mislead the jury.

iii. Use-of-Force

Under Colorado law, "deadly physical force" is force that the defendant intended to cause death and that actually caused the death of the victim, *see* § 18-1-901(3)(d), C.R.S. 2014 (defining "deadly physical force"); *People v. Vasquez*, 148 P.3d 326, 328-30 (Colo. App. 2006), whereas ordinary physical force includes any force that does not cause death. In this case, Owens used deadly physical force to kill Vann but defendant used only ordinary physical force when he shot Bell and allegedly shot Marshall-Fields.

Defendant concedes that the "deadly physical force" definition in Instruction Number 23 tracked the language of the statute, and does not dispute that the physical force standard in Instruction Number 24 was also correct. He argues, however, that more explanation was required because jurors might have confused deadly physical force with physical force by incorrectly assuming

that use of a gun constituted deadly physical force. If jurors made that mistake, defendant argues, they might have then applied the wrong standard to the charges against him relating to victims other than Vann.

A reading of the instructions refutes this speculative argument. Instruction Number 23 (providing the standard for use of deadly physical force) specified not only the charge of "Murder in the First Degree" but also limited its application to "Sir Mario Owens." It also explained that deadly physical force applies only when the force "does in fact cause death." Instruction Number 24 (providing the standard for use of physical force) specified the crimes of attempted murder and assault, and applied the standard to "defendant or a complicitor." Thus, the instructions made clear which use-of-force category applied to each charge.

iv. The Relationship Between Self-Defense and Complicity

Defendant contends that the instructions failed to explain the relationship between self-defense and complicity because the court did not instruct the jury that defendant was not guilty as a complicitor if Owens acted in self-defense.

Instruction Number 26, tendered by defendant's counsel, explained the theory-of-defense. The theory-of-defense instruction clarified that defendant could not be found guilty as a complicitor unless he knew Owens's intent, intended to promote or facilitate Owens's crime, and that Owens's acts were not legally justifiable. The instruction explained that defendant "is also not guilty of the acts of Mr. Owens if Mr. Owens['s] acts are justified under the law." How Owens's acts could have been justified under the law was made clear by the affirmative-defense instructions on self-defense. Thus, the instructions clearly provided that if the jury found that Owens acted in self-defense, it could not find defendant guilty of Owens's acts as a complicitor.[5]

v. Justification Inquiries

We also reject defendant's contention that the instructions confused the deadly physical force inquiry regarding Owens's killing of Vann with the physical force inquiry regarding the subsequent shootings.

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[5] To the extent the theory-of-defense instruction should have further specified that self-defense was the possible justification for Owens's actions, any error was invited by defendant's counsel, who tendered the instruction. *See People v. Gross*, 2012 CO 60, ¶ 11. To be clear, however, we conclude that there was no error.

Defendant argues that the instructions should have explained that even if Owens was unjustified in killing Vann under the deadly force standard, defendant or Owens could still have been justified in shooting Bell or Marshall-Fields under the physical force standard. But the instructions made this distinction quite clear. As discussed above, Instruction Number 23 limited the deadly force inquiry to Owens's killing of Vann, whereas Instruction Number 24 specified that the physical force inquiry applied to the attempted murder and assault counts. Nothing in the instructions implied that defendant's (or Owens's) justifiable use of physical force was contingent on Owens's justifiable use of deadly force against Vann. Rather, Instruction Number 24 properly advised the jury of the physical force inquiry applicable to the non-deadly shootings. And Instruction Number 11 explained to jurors that they must consider each charge separately.

vi. Modification of Theory-of-Defense Instruction

Defendant contends that the court erred by rejecting the last sentence of his tendered theory-of-defense instruction because it would have clarified the use-of-force categories.

Instruction Number 26, as tendered by defendant's counsel, included this final sentence: "It is not necessary that [defendant] believe that Mr. Owens was in danger of serious bodily injury or death because deadly force was not used on Mr. Bell." The court eliminated this sentence because it was argumentative and duplicative of other affirmative defense instructions.

The district court must give jurors a tendered theory-of-defense instruction if there is any evidence to support the defendant's theory. *People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992). But the court does not err by refusing to give a defense theory instruction when the instruction's substance is embodied in other instructions. *Riley*, 266 P.3d at 1092-93.

The sentence that the court struck communicated that (1) non-deadly force was used on Bell and (2) the justified use of non-deadly (or physical) force does not require a reasonable belief in danger of serious bodily injury or death. Other affirmative defense instructions made these points clear. Instruction Number 23 on justifiable deadly force (which was expressly limited to the murder charge) explained that deadly force must "in fact, produce death." Because Bell did not die, it would have been obvious to the jurors

that the deadly force standard did not apply to the attempted murder charge. Instruction Number 23 also included the deadly-force requirement of reasonable belief in danger of serious bodily injury or death. In contrast, Instruction Number 24 (on physical force) correctly advised the jurors that justifiable physical force required only the reasonable belief in the imminent use of unlawful force.

The court gave the theory-of-defense instruction to jurors with slight corrections, and the substance of the one sentence it omitted was encompassed in other affirmative-defense instructions. Thus, the district court did not abuse its discretion. *See id.*

vii. General Affirmative-Defense Instruction

Defendant contends that the general affirmative-defense instruction, Instruction Number 22, erroneously failed to provide that the prosecution must "disprove" any affirmative defense.

Defendant's counsel tendered the general affirmative-defense instruction. The court accepted the defense-tendered instruction without significant changes. Thus, any error was invited and is not subject to review. *People v. Gross*, 2012 CO 60, ¶ 2 ("We hold that

the invited error doctrine precludes plain error review of a defense-tendered instruction.").

But even if we assume that we may reach the merits of this contention, we conclude that there was no error, much less plain error. *Id.* at ¶ 9 (inadvertent instructional omissions are reviewed for plain error).

Instruction Number 22 provided, in relevant part: "The prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged." This is a correct statement of the burden of proof.

In any event, any error was not plain because it was not obvious or substantial. Defendant argues that the court should have instructed jurors that the prosecution must "disprove" the affirmative defense. Defendant relies on a 2008 revision to Colorado's pattern jury instructions that includes the word "disprove." Those revisions post-date the trial in this case and, therefore, would not have been obvious to the court at the time of trial. Further, the difference between Instruction Number 22 and an instruction including the word "disprove" is semantic rather

than substantive, and would not have affected the fundamental fairness of the trial.

viii. Omission of a No-Duty-to-Retreat Instruction

Defendant contends that the district court erred by not instructing the jury that a person who is not the initial aggressor in a confrontation has no duty to retreat. We are not persuaded.

During the jury instruction conference, the parties considered instructions on the concepts of initial aggressor and duty to retreat. The prosecutor tendered an initial aggressor instruction regarding defendant. Defense counsel tendered an instruction advising jurors that a person who is not an initial aggressor has no duty to retreat. Defense counsel argued that an initial aggressor instruction was not appropriate in light of the evidence, and explained to the court that she would withdraw her tendered instruction on duty to retreat if the court rejected the prosecution-tendered instruction on initial aggressor.

After additional research and discussion, the prosecutor withdrew the tendered initial-aggressor instruction. The court asked defense counsel whether she wished to withdraw her

tendered instruction on duty to retreat or leave it in the record. Defense counsel said, "Withdraw it."

The record demonstrates that defense counsel made a calculated decision to withdraw the no-retreat instruction. She tendered the instruction, but maintained that it was necessary only in response to an initial aggressor instruction. Once the initial aggressor instruction was withdrawn, defense counsel withdrew the no-retreat instruction, just as she planned to do. "The invited error doctrine bars precisely such an intentional, strategic decision." *Id.* at ¶ 11. Therefore, any error was invited and is not subject to review. *Id.* (whether counsel's trial strategy was reasonable is a question for a Crim. P. 35(c) proceeding).[6]

We address the merits only to the extent defendant contends on appeal that the prosecutor's closing argument — after the instruction conference — necessitated the no-retreat instruction. Because defense counsel did not request a no-retreat instruction in light of closing argument, we review for plain error. *See Hagos v. People*, 2012 CO 63, ¶ 14; *see also Gross*, ¶ 9.

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[6] To be clear, we do not suggest that it was error not to give the jury a no-duty-to-retreat instruction.

During closing argument, the prosecutor said:

> [Defendant] doesn't fight Jeremy [Green] or anybody else there like a man. He had no intention of getting into a fist fight, nor does he leave even though he could. His friend Jamar Johnson tried to get him to leave, remember, and totally consistent with what you know about Greg Vann, Greg had gone to Jamar Johnson and said get him out of here, get him out of here because of the trouble he's causing.
>
> Jamar told Greg and he told you, I already tried. I tried. [Be]cause he saw what was happening, he saw the defendant's behavior. He tried to get him to leave. Defendant was not interested in leaving.
>
> His sister was gone, leaving wasn't on his agenda. Those lame asses needed a lesson and he was getting ready to teach it.

Defendant argues that the prosecutor's comments led jurors to believe that he was not eligible for the affirmative defense of self-defense because he had a duty to retreat. That interpretation ignores the context of the comments. The prosecutor was discussing the element of intent. The prosecutor argued that defendant did not leave after the fracas in the parking lot, and after his threats to "kill everyone," because he intended to kill. The prosecutor did not argue that defendant was the initial aggressor, or that he had a resulting duty to retreat. The prosecutor did not even link defendant's opportunity to leave to self-defense or to the

violence that occurred after Owens shot Vann. Rather, the prosecutor argued that defendant made threats and then chose to stay because he intended to kill. Because the prosecutor's argument did not implicate an initial aggressor's duty to retreat, we perceive no error in failing to give a no-retreat instruction.

In any event, even if we assume error, any error was not obvious. Defense counsel had decided to withdraw the no-retreat instruction, telling the court that it was unnecessary because the initial aggressor instruction had been withdrawn. The prosecutor's comments in closing argument about defendant refusing to leave the scene because he intended to kill someone did not obviously raise the duty to retreat issue. Thus, if a no-retreat instruction was indeed warranted, it was not so obvious that the court should have included the instruction sua sponte, without the benefit of a request. *See People v. Wilson*, 2014 COA 114, ¶ 49 (to qualify as plain error, "an error must be so clear-cut that a trial judge should have been able to avoid it without benefit of objection").

3. Mistake-of-Fact Defense

Defendant contends that the district court erred by rejecting his mistake-of-fact instruction. We do not agree.

a. Relevant Facts

Defense counsel tendered a pattern mistake-of-fact instruction which read: "It is an affirmative defense to the crimes charged that the defendant engaged in the prohibited conduct under a mistaken belief of fact, if such mistaken belief of fact negates the existence of a particular mental state essential to the commission of the offense."

Despite the broad language of the proposed instruction, defense counsel argued that the defense applied specifically to the shooting of Bell, apparently because, according to defendant, he had mistakenly believed that Bell had shot Owens and still had a gun.[7] The proposed instruction, counsel argued, would have informed the jurors that defendant could have acted in self-defense based on appearances, even if he was mistaken. (Counsel said, "What the mistake of fact does is address the apparent necessity [of] use of force in this case.") She did not explain how the mistake might negate the requisite mental states of the attempted murder

[7] At trial, defense counsel did not specify defendant's alleged factual mistake. On appeal, defense counsel asserts that this is the mistaken belief to which the tendered instruction referred.

and assault charges which stemmed from defendant's shooting of Bell.

The prosecutor argued that the apparent necessity concept was already explained in the self-defense instructions. She also argued that defendant's claimed misapprehension did not constitute a separate mistake-of-fact defense because it did not negate the requisite mental state.

The court agreed with the prosecutor that (1) the apparent necessity concept was already incorporated in other instructions and (2) defendant's mistaken belief, even when accepted as true, did not negate the requisite mental states for the crimes charged. Thus, the court rejected the tendered instruction.

b. Applicable Law and Standard of Review

There are two types of defenses to criminal charges: (1) elemental traverses, which seek to negate an element of the charged offense, thereby refuting the possibility that the defendant committed the offense; and (2) affirmative defenses, which admit commission of the elements of the offense, but seek to justify or excuse the defendant's behavior. *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011); *see also People v. Miller*, 113 P.3d 743, 750 (Colo.

2005). When the evidence raises the issue of an elemental traverse, the jury may consider the evidence in deciding whether the prosecution has proven each element beyond a reasonable doubt; thus, the defendant is not entitled to an affirmative defense instruction. *Pickering*, 276 P.3d at 555. But when the evidence raises the issue of an affirmative defense, the trial court must instruct jurors that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable. *Id.*; *see also* § 18-1-407.

As relevant here, the defense of mistake-of-fact can function either as an elemental traverse that negates the requisite mental state or as a supplement to a justification defense. *See* § 18-1-504(1)(a),(c), C.R.S. 2014.

We review for an abuse of discretion whether the court should have given a particular instruction to the jury, and will not disturb the court's decision absent a showing that it was manifestly arbitrary, unreasonable, or unfair. *Lane*, ¶ 7; *People v. Walden*, 224 P.3d 369, 379 (Colo. App. 2009); *People v. Renfro*, 117 P.3d 43, 48 (Colo. App. 2004).

c. Analysis

Defendant's argument on appeal is logically inconsistent because he argues that the mistake-of-fact defense was both an elemental traverse and an affirmative defense. *See Pickering*, 276 P.3d at 555. Regardless, under either theory, the court did not err by rejecting a separate instruction on mistake-of-fact.

First, if defendant is correct that the mistake-of-fact was an elemental traverse, then he was not entitled to a separate instruction. *See id.* The elemental instructions included the requisite mental state and the prosecution's burden to prove each element beyond a reasonable doubt; therefore, jurors could consider evidence of a mistaken belief when deciding whether the necessary mental state had been proven. *See id.*; *Dunton v. People*, 898 P.2d 571, 573 (Colo. 1995); *Walden*, 224 P.3d at 379.

Second, if the mistake-of-fact defense was an affirmative defense, the jury necessarily rejected it under the circumstances.[8]

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[8] It is unclear what defendant contends the jury would have done differently had the instruction been given. The alleged error of the court was refusing to give jurors the proposed mistake-of-fact instruction. The proposed instruction said nothing about justifiable use of force or an independent affirmative defense; it addressed only the negation of the requisite mental state. Therefore, giving the

In arguing that mistake-of-fact is a "stand-alone affirmative defense" because it is a statutory defense, defendant relies on section 18-1-504. However, subsection 18-1-504(c) addresses the scenario when a factual mistake "supports a defense of justification as defined in sections 18-1-701 to 18-1-707." Thus, the statute explicitly provides that mistake-of-fact is *not* an independent affirmative defense in that circumstance, but merely supports an affirmative defense.

In keeping with the statute, defense counsel argued during the jury instruction conference that the proposed mistake-of-fact instruction supported self-defense. She said it served the same function as an apparent necessity instruction — to instruct jurors that a mistaken belief could still be the basis for a justified use of force. But the court fully instructed jurors on that concept.

- Instruction Number 25: "Whether the danger is actual or only apparent, actual danger is not necessary in order to justify the defendant acting in self-defense or defense of others."

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proposed mistake-of-fact instruction to jurors would have done nothing to repair the harm now alleged by defense counsel.

- Instruction Number 26: "Mr. Ray may also act or rely upon apparent necessity in defending Mr. Owens or himself in shooting Mr. Bell. Mr. Ray may reasonably rely on appearances in defending Mr. Owens or himself even if those appearances turn out not to be true."

In fact, Instruction Number 26 more accurately conveyed defendant's mistake-of-fact argument than the broad language of his tendered mistake-of-fact instruction. Under the instructions actually given, if jurors had found the mistake-of-fact evidence convincing — that is, that defendant believed he was facing off with an armed man who had already shot his friend and might shoot again at any moment — then they would have found that he was justified in using the force he employed. Put another way, in finding that the prosecution had disproved self-defense, the jury necessarily found that the prosecution had disproved his mistake-of-fact argument. Therefore, the instructions were sufficient. *People v. Nelson*, 2014 COA 165, ¶¶ 51-52; *People v. Bush*, 948 P.2d 16, 17-18 (Colo. App. 1997); *People v. Cruz*, 923 P.2d 311, 312 (Colo. App. 1996).

4. Complicity Instruction

Defendant contends that the complicity instruction (Instruction Number 13) was erroneous because (1) it was so vague that it allowed the jury to convict him for a partially completed, unspecified crime; (2) it lowered the burden of proof because it did not cross-reference the self-defense instructions; (3) it constituted a constructive amendment because the People had not charged him as a complicitor; and (4) when coupled with a general verdict form, it undermined unanimity in the absence of a specific unanimity instruction concerning his culpability as a principal or a complicitor. We conclude that there is no reversible error.

a. Relevant Instructions

Instruction Number 11 stated, in part: "In this case, a separate offense is charged against the defendant in each count of the information. Each count charges a separate and distinct offense, and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count."

Instruction Number 12 stated, in part:

> A crime is committed when the defendant has committed a voluntary act prohibited by law accompanied by a culpable mental state. . . . Proof of the commission of the act alone is not sufficient to prove that the defendant had the required culpable mental state. The culpable mental state is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence.

Instruction Number 13 stated:

> A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:
> 1. A crime must have been committed;
> 2. another person must have committed all or part of the crime;
> 3. the defendant must have had knowledge that the other person intended to commit the crime;
> 4. the defendant must have had the intent to promote or facilitate the commission of the crime; and
> 5. the defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

The theory-of-defense instruction (Instruction Number 26, set forth above) also focused on the components of complicity liability and the prosecution's burden of proof under a complicity theory.

b. Standard of Review and Applicable Law

We review de novo whether an instruction accurately stated the law. *Riley*, 266 P.3d at 1092.

The parties agree that defendant preserved his first contention by objection, but did not preserve his remaining three contentions. Thus, we review his first contention for ordinary harmless error, and will reverse only if there is a reasonable probability that an error contributed to the conviction. Crim. P. 52(a); *People v. Rodriguez*, 914 P.2d 230, 276-77 (Colo. 1996) (applying harmless error standard to error in complicity instruction in death penalty case). We review his remaining contentions for plain error. *Hagos*, ¶ 14.

Section 18-1-603, C.R.S. 2014, provides: "A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense."

The prosecution must prove dual mental states to establish complicity liability for an intentional crime. *Bogdanov v. People*, 941 P.2d 247, 250-51 (Colo.), *amended*, 955 P.2d 997 (Colo. 1997),

disapproved of on other grounds by Griego, 19 P.3d 1. First, the complicitor must have the culpable mental state required for the underlying crime. Second, the complicitor must assist or encourage the commission of the crime, with the intent that his actions will promote or facilitate the crime. *Id.*; *People v. Close*, 22 P.3d 933, 937 (Colo. App. 2000), *aff'd*, 48 P.3d 528 (Colo. 2002).

c. Analysis

i. Vagueness

Defendant argues that because Instruction Number 13 did not specify the crime to which defendant might be complicit, it merged the crimes against the four victims and allowed the jury to mix-and-match elements to find him guilty.

Instruction Number 13, however, was not ambiguous on this point. The instruction used an indefinite article ("a") only in the first step, as jurors decided if a crime had been committed. Once they determined the specific crime had been committed, the instruction used the definite article ("the") in the following paragraphs to refer to that specific crime. *See People v. Bernabei*, 979 P.2d 26, 33 (Colo. App. 1998) (reviewing a similar complicity instruction, the division concluded that once the jury determined a

crime had been committed in the first step, the remainder of the instruction "referred only to this crime").[9] And other instructions eliminated any possible ambiguity. Instruction Number 11, for example, explained that each count in the information was "separate and distinct" and that consideration of one count should not influence consideration of any other count. Thus, the instructions specifically advised jurors not to merge their consideration of different counts. We note in this regard that the jurors apparently heeded this instruction because they convicted on some counts and acquitted on others. There was no error.

ii. "All or Part of" Language

Defendant also argues that the court erred by including "all or part of" language in Instruction Number 13 ("another person must have committed all or part of the crime") because it was inapplicable to the facts of the case.

The Colorado Supreme Court has distinguished between cases in which two or more people jointly commit a crime by each

[9] For the same reasons, the instructions did not allow the jury to convict defendant unless a crime had been committed. This refutes defendant's suggestion that he could have been convicted for a partially completed crime.

committing part of the offense and cases in which a principal commits the entire crime and the complicitor is accused of aiding or abetting the commission of that crime. "All or part of" language in a complicity instruction applies to a situation where "the principal and at least one other person, possibly the defendant, together commit the essential elements of the crime." *Bogdanov*, 941 P.2d at 256. For instance, in a case where the defendant was charged with robbery, the defendant assaulted the victim, and an accomplice took the victim's money, the "all or part of" language was appropriate. *Id.* (citing *Reed v. People*, 171 Colo. 421, 467 P.2d 809 (1970)). The language is not applicable to a situation where the complicitor is not accused of committing any act essential to establishing the elements of the underlying crime. *Id.*; *see Bernabei*, 979 P.2d at 33 (proper to include "all or part of" language if the defendant and another person allegedly committed an essential element of the underlying crime). However, if the evidence is ambiguous as to whether the defendant was among those who committed the essential elements of the crime, the "all or part of" language should be used in the complicity instruction. *Close*, 22

P.3d at 937-38 (group of people, possibly including the defendant, beat and robbed the victims).

Although including the "all or part of" language is error when the principal committed the crime in its entirety, courts have consistently found in such cases that the language is superfluous and any error is therefore harmless. *Rodriguez*, 914 P.2d at 276-77 (error harmless because evidence supported the defendant's conviction as a complicitor or a principal); *People v. Candelaria*, 107 P.3d 1080, 1091 (Colo. App. 2004) (error harmless because language superfluous), *rev'd on other grounds*, 148 P.3d 178 (Colo. 2006); *People v. Osborne*, 973 P.2d 666, 670 (Colo. App. 1998) (error harmless because language superfluous); *see also Bogdanov*, 941 P.2d at 256 (not plain error because language "merely superfluous").

We conclude that inclusion of the "all or part of" language was erroneous only in regard to the attacks on Vann and Green. It was uncontested at trial that Owens shot Vann and Green; the prosecution did not accuse defendant of shooting these victims. Thus, the principal (Owens) committed the entire crime, and the "all or part of" language was inapplicable. *See Bogdanov*, 941 P.2d at

256. The People argue that defendant's culpable mental state was an element of the crime, and therefore he did commit an element of the underlying crime and the "all or part of" language was proper. However, in *Bogdanov*, the supreme court concluded that the defendant possessed the culpable mental state and acted to promote the crime, but, nevertheless, the contested language was inapplicable because the defendant did not commit any of the acts constituting the underlying crime. *Id.* at 256. We follow the supreme court in concluding that the "all or part of" language was inapplicable because defendant was not accused of committing any of the acts of the underlying crimes against Vann or Green. However, because the jury acquitted defendant of the counts involving Vann and Green, any error in this context was obviously harmless. *See People v. Palmer*, 87 P.3d 137, 141 (Colo. App. 2003) (refusal to give self-defense instructions harmless where the jury acquitted the defendant of the charges to which the defense applied); *see also Hughes v. People*, 175 Colo. 351, 355, 487 P.2d 810, 812 (1971).

We conclude that inclusion of the "all or part of" language was not erroneous in regard to the attacks on Bell and Marshall-Fields.

There was conflicting testimony as to whether defendant or Owens or both men shot Marshall-Fields and Bell. This is precisely the type of ambiguous situation where the "all or part of" language is appropriate. *See Close*, 22 P.3d at 938 (language proper because it was ambiguous as to whether the defendant was among the people who committed the essential elements of the crime). *Bogdanov* held that the "all or part of" language is proper where "the principal and at least one other person, possibly the defendant, together commit the essential elements of the crime." 941 P.2d at 256. Thus, as discussed, it is not error to include the language where, as here, two people are each accused of committing all the essential elements of the same offense. *See Bernabei*, 979 P.2d at 33 ("[T]he prosecution charged both defendant and his son with committing essential elements of the offense. This is exactly the situation in which the *Bogdanov* court specifically found it appropriate to include the 'all or part of' language.").[10]

[10] Because of the differences in the theories of liability regarding different victims, perhaps it would have been preferable for the district court to explain complicity liability in relation to specific counts. *See* COLJI-Crim. G1:06 (2014) (recommending this approach in comment seven). But we cannot say that the

Even if we assume that the instruction was erroneous in relation to the Marshall-Fields and Bell counts, we conclude that there was no plain error, for two reasons. First, the language would have been merely superfluous. *See Bogdanov*, 941 P.2d at 256-57 ("all or part of" language not plain error because it was superfluous); *Candelaria*, 107 P.3d at 1091; *Osborne*, 973 P.2d at 670. Second, contrary to defendant's argument that he could have been convicted merely for having a culpable mental state without committing any act, he was convicted only of those charges as to which he was accused of being the shooter. Therefore, the evidence on those counts supported his conviction as a principal or a complicitor. *See Rodriguez*, 914 P.2d at 276-77 ("all or part of" language harmless because evidence supported the defendant's conviction as a principal or a complicitor).

iii. No Cross-Reference to Self-Defense

Defendant contends that the complicity instruction was erroneous because it did not cross-reference the self-defense instructions. We are not persuaded.

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complicity instruction misstated the law in relation to the Bell and Marshall-Fields counts.

Defendant's argument ignores the fundamental principle that jury instructions must be read as a whole. *See People v. Galimanis*, 944 P.2d 626, 630 (Colo. App. 1997) ("All jury instructions must be read and considered together, and if, collectively, they adequately inform the jury of the law, there is no reversible error."). We agree that it would have been better for the complicity instruction to refer to the affirmative defense. *See* COLJI-Crim. G1:06 (2014) (including a paragraph that cross-references an affirmative defense, where applicable). However, defendant cites no authority indicating that the complicity instruction must cross-reference the affirmative defense.

As discussed, other instructions made clear that defendant was innocent under the complicity theory if Mr. Owens's actions were justifiable. Instruction Number 24 on justifiable use of physical force directly referenced complicity liability by applying the defense to "defendant or a complicitor." The theory-of-defense instruction (Instruction Number 26) explained that defendant "is also not guilty of the acts of Mr. Owens if Mr. Owens[']s] acts are justified under the law."

Therefore, we perceive no error, much less plain error.

iv. Constructive Amendment

Defendant contends that because the People did not charge him as a complicitor, the complicity instruction constructively amended the complaint. Again, we are not persuaded.

Complicity is not a separate and distinct crime, but rather is "'a theory by which a defendant becomes accountable for a criminal offense committed by another.'" *People v. Vecellio*, 2012 COA 40, ¶ 33 (quoting *People v. Thompson*, 655 P.2d 416, 418 (Colo. 1982)). Accordingly, the People need not separately charge a complicity theory. *See Rodriguez*, 914 P.2d at 276 n.46; *Thompson*, 655 P.2d at 417-18; *People v. Randell*, 2012 COA 108, ¶ 43.

v. Unanimity

Defendant next contends that the district court erred because the verdict forms did not require the jury to specify whether it found him guilty as a principal or a complicitor and, therefore, the verdicts might not have been unanimous on the theory of conviction.

Unanimity is required on the ultimate issue of whether a defendant is guilty or innocent of the crime charged. *People v. Taggart*, 621 P.2d 1375, 1387 n.5 (Colo. 1981). But a jury verdict

need not be unanimous on the theory of liability; thus, a unanimity instruction on the verdict forms was not required. *See People v. Perez-Hernandez*, 2013 COA 160, ¶ 56 ("[J]urors are not generally required to agree about the evidence or theory by which a particular element is established."); *People v. Hall*, 60 P.3d 728, 731-34 (Colo. App. 2002) (collecting cases in which "the court concluded the jury may return a general verdict of guilty when instructed on theories of both principal and complicitor culpability"); *People v. Thurman*, 948 P.2d 69, 71 (Colo. App. 1997) (holding that no modified unanimity instruction was required when the prosecution presented alternative theories of guilt as a principal or a complicitor).

Defendant argues that, despite Colorado case law, the distinction between a theory of liability and a set of elements is untenable in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Supreme Court held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 490. Defendant attempts to analogize a theory of liability (complicity) to sentencing factors. But we conclude that *Apprendi* is not applicable to the circumstances in

this case because (1) a theory of liability is not a sentencing factor and (2) regardless of the theory, the jury unanimously determined that the elements in question had been proved beyond a reasonable doubt.

5. Jury Question on Complicity Instruction

Defendant contends that the court erred by not substantively responding to a question from jurors about the complicity instruction because the question demonstrated confusion about a matter of law central to defendant's guilt or innocence. We conclude that any error was invited.

On the first day of deliberations, jurors sent this question to the court:

> Re: Instruction 13 [complicity]
> In questions 3, 4 and 5 do the words "the crime" mean the murder in 1st degree in reference to count 1 or specifically Greg Vann.

The court read the question to counsel and invited input on an appropriate response. The prosecutor suggested that the court inform jurors that "the crime" referred to the crime they found to be committed in paragraph one of the instruction. The prosecutor also

expressed concern that the jurors might apply the complicity theory only to the murder count.

Defense counsel said,

> Judge, I think the court can either do nothing or the court can respond in a note saying you have been instructed on — or you have received all the instructions on this case, period.
>
> To do — to try to answer any question would be interfering with deliberations and could direct a verdict and, in other words, it is not the job of the court, it was the job of the prosecution to explain to the jury that complicity applies to all crimes, whatever crimes they were arguing applied to complicity. That was their job. It's not the court's job to interpret this and to do so would be unduly interfering with the deliberations, which the court cannot do.
>
> So I think either do nothing, you know, say I can't assist you, you are the jurors, it's up to you to — you know, or tell them you have been given all the instructions that you are permitted to have in this case.

The court agreed with defense counsel that it could not provide further instructions and proposed sending jurors a note reading, "I am unable to answer this question." Defense counsel said, "the proposed response is acceptable."

The invited error doctrine precludes appellate review of an error created by the appealing party. *Gross*, ¶ 8. One "'may not

complain on appeal of an error that he has invited or injected into the case; he must abide the consequences of his acts.'" *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989) (quoting *Collins*, 730 P.2d at 304-05). The invited error doctrine does not preclude appellate review of errors stemming from attorney incompetence. *People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002) (error resulted from attorney oversight where counsel failed to submit a relevant jury instruction). But in *Stewart* the supreme court cautioned that if "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Id.* at 119-20 (internal quotation marks omitted). In other words, the "attorney incompetence exception does not apply to deliberate, strategic acts of defense counsel but rather to inadvertent errors or oversights." *Gross*, ¶ 2.

Defense counsel vehemently argued to the district court that it should not substantively respond to the jurors' question. This was no inadvertent error or oversight. It was a deliberate, strategic act. And defense counsel even made clear her strategy: the prosecution had apparently failed adequately to explain to the jury that the

complicity theory applied beyond the murder count, and she did not want to give the prosecution another opportunity to explain its theory. On appeal, defendant attempts to take the contrary position, and argues that the court erred by not making a substantive response. However, because any error was invited by the defense, we will not consider defendant's contention. *See Gross*, ¶ 2; *Zapata*, 779 P.2d at 1309.[11] [12]

B. Juror Who Asked to be Excused During Deliberations

Defendant contends that the district court erred by declining to respond to a juror's request for removal during deliberations because the court's silence impliedly authorized a compromise verdict. We conclude that defense counsel invited the alleged error and that, in any event, there was no plain error.

On the second day of deliberations, the court received this note from Juror S:

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[11] Defendant's appellate attorneys portrayed the record in a misleading manner in the opening brief by omitting defense counsel's position to the district court and creating the impression that the court responded to jurors without the parties' input. We remind counsel of the duty of candor to the court. *See* Colo. RPC 3.3(a)(1), (d).

[12] Nothing in our discussion of this issue should be construed as concluding that there was an error.

> Judge:
>
> The time has come to seek removal from this jury obligation. The cost is too great for my company, family, and time to continue this pursuit of justice.
>
> There does not appear to be a reasonable end in sight without compromising my beliefs in what those who came before me fought hard to defend . . . justice for all . . . .

The court sought the input of counsel on an appropriate response. The prosecutor suggested that the court question Juror S as to the "nature of the hardship." Defense counsel responded, in part:

> But I don't think we can let a juror go because he says — I mean, jurors are supposed to deliberate and stay by their beliefs, and that is what the jury system is all about, not if it's tough I want out.
>
> I don't think we can let him go. It sounds like a business hardship. I have no idea, but they are in deliberations.

The court also noted that Juror S had written on his juror questionnaire that he was self-employed and relied on commissions for income, thus jury service reduced his income. "So the parties have been well aware of his particular situation since the inception of this trial."

The court decided not to act absent an indication from the foreperson that the jury was deadlocked: "It does not appear, based upon this alone, that the jury has reached an impasse in terms of deliberations." The court also concluded that the note was "not sufficient at this point to make a determination that this juror should be excused or further inquiry should be made of the juror." Neither party objected to the court's resolution.

Roughly four hours after the court received the note from Juror S, the jury returned its verdicts.

Defendant argues on appeal that the court erred by not taking action in response to the note from Juror S. We conclude that defense counsel invited the error now alleged. On the heels of the prosecutor's suggestion to inquire further, defense counsel argued that a deliberating juror could not be excused for a business hardship or simply because jury duty was "tough." Once the court adopted defense counsel's position, and decided against further inquiry, defense counsel did not signal any disagreement or misunderstanding.

In his reply brief on appeal, defendant argues that defense counsel's position at trial was only against dismissal of the juror,

not against further inquiry. On this record, that is a distinction without a difference. Defense counsel argued that Juror S should not be excused; thus, further inquiry into his desire to be excused would have been futile. And when defense counsel's comments to the district court are read in context, it is apparent to us that counsel did in fact argue against the prosecutor's suggestion to inquire further.

Defense counsel made a deliberate, strategic decision to argue against excusing Juror S or inquiring further into his concerns; thus, any error was invited. *See Gross*, ¶ 2; *Zapata*, 779 P.2d at 1309.

Even if we consider the merits, we conclude there was no plain error.[13] Defense counsel also argued against the possibility of the specific harm now claimed on appeal — that Juror S might have been forced to compromise his beliefs because the court did not intercede. Defense counsel said, "jurors are supposed to deliberate and stay by their beliefs, and that is what the jury system is all about."

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[13] On appeal, defendant does not say what the court should have done, but instead complains simply of the court's "inaction."

Defense counsel also correctly pointed out that the communication was from an individual juror, not the foreperson. One juror indicated frustration, but the foreperson did not indicate that the jury was deadlocked after only one day of deliberations. We find no authority for the proposition that a court must, or even should, give a supplemental instruction to a jury that does not indicate that it is deadlocked. *See Gibbons v. People*, 2014 CO 67, ¶ 1 ("When a jury is deadlocked, the court may provide a 'modified-*Allen'* instruction informing the jury . . . that each juror should decide the case for himself or herself . . . ."); *People v. Lewis*, 676 P.2d 682, 690 (Colo. 1984) (holding that the district court erred when it gave a supplemental instruction without first determining that the jury was actually deadlocked), *superseded by statute on other grounds as stated in People v. Richardson*, 184 P.3d 755 (Colo. 2008). Neither have we found any authority for the proposition that a court's mere silence in this context is coercive. *Cf. Gibbons*, ¶¶ 28, 36 (holding that court's omission of mistrial advisement from modified-*Allen* instruction was not coercive). The court's silence was nothing like a time-fuse instruction or a command to compromise beliefs to reach a resolution.

Nor do we agree with defendant's characterization of Juror S's note as indicating that he thought deliberations would continue until a verdict was reached, regardless of how much time it might take to reach a verdict. Given the context, it is instead clear that Juror S simply thought deliberations were going to continue for longer than he liked.

The court did not err, much less plainly err, under the circumstances by refraining from intruding into the deliberative process.

C. Video

Defendant contends that the district court erred by admitting into evidence a video recording of Jeremy Green's interview with police because (1) the ruling violated his Confrontation Clause rights and (2) the interview was not admissible under the hearsay exception for a prior inconsistent statement. He also contends that the court erred in allowing the jury to have supposedly unlimited access to the video during deliberations. We reject each of these contentions.

1. Confrontation Clause

Defendant contends that admission of the video recording violated his Confrontation Clause rights because (1) the court admitted the video recording after Green had finished testifying and was no longer available and (2) Green's professed memory loss foreclosed meaningful cross-examination.

a. Procedural Facts

Detective Chuck Mehl of the Aurora Police Department interviewed Green the same night as the melee at Lowry Park. In that ninety-minute interview, Green described the event in detail to Detective Mehl. Green referred to Owens as "the shooter" and defendant as "the accomplice." He insisted throughout the interview that Owens was the only shooter and that he never saw defendant with a gun. Green also said that defendant repeatedly threatened to kill everyone during the scuffle in the parking lot. "And now he's saying I'm gonna kill all you. I'll kill everybody."

At trial, Green testified that he had suffered extreme memory loss and blocked out many of the events of that night. He testified that he remembered setting up for the event, the confrontation began in the parking lot, seeing his friend Vann shot and killed, and

talking to police at the scene and being interviewed at the Aurora Police station. However, he also testified that reviewing the transcript of that interview had not refreshed his memory as to the details of what had occurred.

The prosecutor questioned Green extensively based on the interview transcript, and Green testified that he remembered few details about defendant or Owens, other than that Vann's shooter was the taller of the two. "I remember seeing someone that worked hard and was a good person, I remember seeing him die. That's what I remember," Green said. As to details, he responded, "I don't remember," to dozens of questions.

Defense counsel also cross-examined Green extensively based on the interview transcript. Defense counsel concentrated on Green's insistence in the interview that Owens was the only shooter, and that defendant and Owens had felt threatened because they were badly outnumbered.

> [Defense Counsel:] Do you remember telling Detective Mehl that this first person [defendant] — that this action of throwing out the punches but not trying to hit, do you remember saying it's not like he was measuring me up . . . but he was just maybe he felt threatened, you know.

[Green:] No, I don't remember that.

[Defense Counsel:] You don't remember telling Detective Mehl that . . . you may have observed he felt threatened . . . .

[Green:] No, I don't.

[Defense Counsel:] Do you remember describing the shooter as a dark-skinned guy with braids?

[Green:] I don't.

[Defense Counsel:] Do you remember telling Detective Mehl that you head butted this first person that didn't shoot?

[Green:] No, I don't.

[Defense Counsel:] Do you remember telling Detective Mehl that this first person that you describe as not the person who did the shooting, not the person with the braids . . . as never — of not having a gun?

[Green:] I don't remember that.

[Defense Counsel:] Do you remember chasing the shooter with the intent after the shooting of kicking the shit out of him? Do you remember that?

[Green:] I remember running, yeah.

> [Defense Counsel:] Do you remember at least ten people moving towards the shooter?
>
> [Green:] No, I don't.

During direct examination of Green, the prosecutor offered the interview transcript into evidence as a prior inconsistent statement, under CRE 613 and section 16-10-201, C.R.S. 2014. Defense counsel objected to admission of the transcript on Confrontation Clause grounds, arguing that the transcript was an out-of-court statement not subject to cross-examination because the witness could not remember the interview.

The court did not admit the interview transcript, primarily because it would have been cumulative of the interview video that the prosecution also planned to offer into evidence. But the court indicated that it probably would admit the video as a prior inconsistent statement. Before admitting the video, the court (1) wanted to give the defense more time to review the transcript and raise specific objections and (2) required the prosecution to call Detective Mehl and finish establishing the proper foundation before jurors heard the detective's comments during the interview.

At the conclusion of Green's testimony, the court told him that he was "free to go." Defense counsel did not object.

The prosecution called Detective Mehl to the stand several days later. After foundational questions to Detective Mehl, the prosecutor offered the video into evidence. Defense counsel objected to its admission as a prior inconsistent statement: "because much of what is said on that tape is what Mr. Green did remember and did testify to, it should not be admitted." The court also considered defense counsel's earlier arguments against admitting the transcript into evidence. The court admitted the video into evidence over defense counsel's objection, and the prosecutor showed it, in full, to the jury. The record does not indicate that defense counsel attempted to recall Green for further cross-examination after the jurors had viewed the video.

b. Standard of Review and Applicable Law

We review de novo whether a Confrontation Clause violation occurred. *People v. Trevizo*, 181 P.3d 375, 378 (Colo. App. 2007). A preserved Confrontation Clause violation is a trial error subject to constitutional harmless error review. *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004); *People v. Phillips*, 2012 COA 176, ¶ 93. We review

unpreserved claims of error, whether constitutional or nonconstitutional, for plain error. *Hagos*, ¶ 14.

The Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. U.S. Const. amend. VI; Colo. Const. art. II, § 16; *see also Compan v. People*, 121 P.3d 876, 885-86 (Colo. 2005) (refusing to "interpret the state Confrontation Clause to protect a broader range of rights than does the Sixth Amendment to the United States Constitution"). Witnesses are those who bear testimony. *Crawford v. Washington*, 541 U.S. 36, 51, 68 (2004); *see Fry*, 92 P.3d at 975 ("[W]e have followed U.S. Supreme Court law regarding the Confrontation Clause.").

Hearsay statements are testimonial when an objectively reasonable person in the declarant's position would have foreseen that his statements might be used in the investigation or prosecution of a crime. *People v. Vigil*, 127 P.3d 916, 924-25 (Colo. 2006); *accord Crawford*, 541 U.S. at 52; *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005). *Crawford* describes a "core class" of testimonial statements, including statements given during a police interrogation. *See* 541 U.S. at 52 ("Statements taken by

police officers in the course of interrogations are . . . testimonial under even a narrow standard.").

Confrontation rights require that testimonial hearsay evidence be tested in the crucible of cross-examination, but courts disagree as to whether the Clause requires meaningful cross-examination or merely that the declarant appear at trial for cross-examination.

"[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* at 59 n.9 (citations omitted). Most courts have interpreted this language to mean that the Confrontation Clause guarantees only that the declarant "is present at trial," and professed memory loss is irrelevant. *See, e.g.*, *State v. Cameron M.*, 55 A.3d 272, 282 n.18 (Conn. 2012) (collecting cases from several states), *overruled in part on other grounds by State v. Elson*, 91 A.3d 862 (Conn. 2014); *State v. Holliday*, 745 N.W.2d 556, 567 & n.6 (Minn. 2008) (collecting cases). Defendant points out that some courts, concentrating on the phrase "defend or explain," have concluded that the Clause requires an opportunity

for meaningful cross-examination, and that severe memory loss might eliminate the ability to defend or explain a prior statement. *Cookson v. Schwartz*, 556 F.3d 647, 652 (7th Cir. 2009) (meaningful cross-examination satisfied where declarant forgot prior statement but remembered underlying events); *see also Goforth v. State*, 70 So. 3d 174, 184-85 (Miss. 2011) (testifying declarant's total memory loss rendered admission of his prior statement a violation of the defendant's confrontation rights under the Mississippi constitution); *but see United States v. Owens*, 484 U.S. 554, 560 (1988) ("The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.").

Colorado has adopted the majority position, with appellate courts consistently holding — before and after *Crawford* — that the declarant's appearance at trial satisfies the Confrontation Clause, regardless of professed memory loss. *E.g.*, *People v. Pepper*, 193 Colo. 505, 508, 568 P.2d 446, 448 (1977) (following courts that have held that "where a witness takes the stand and is available for cross-examination, the witness' actual or feigned memory loss regarding prior inconsistent statements does not violate a

defendant's confrontation right"). *Crawford* "redefined the scope of the Confrontation Clause, and the safeguards necessary to satisfy its requirements when the hearsay declarant is unavailable at trial," but "did nothing to vitiate the principles concerning declarants who do testify at trial." *People v. Argomaniz-Ramirez*, 102 P.3d 1015, 1018 (Colo. 2004).

In *Argomaniz-Ramirez*, the Colorado Supreme Court analyzed the language in footnote nine of *Crawford*. The court rejected the argument that the footnote was merely dicta and concluded that "*Crawford* does not affect the analysis for admission of out-of-court statements where the declarant testifies at trial." *Id.* at 1018 & n.4. The supreme court reiterated its holding in *Pepper* and established a bright-line rule: "Because the hearsay declarants will testify at trial and will be subject to cross-examination, admission of their out-of-court statements does not violate the Confrontation Clause." *Id.* at 1018. Divisions of this court have applied that rule. *See People v. Stackhouse*, 2012 COA 202, ¶ 27 ("[W]hen a witness takes the stand and is available for cross-examination, prior out-of-court statements may be admitted even if the witness does not remember making them."); *Candelaria*, 107 P.3d at 1087 (no violation of

confrontation rights where defense counsel cross-examined the declarant, despite the fact that the declarant could not remember the statements or the underlying events).

c. Analysis

The parties agree that Green's police interview was testimonial hearsay. And there is no question that the declarant appeared at trial. Thus, the question before us is whether Green's testimony, marred by professed memory loss, satisfied the Confrontation Clause's guarantee that a defendant must be able to confront the witnesses against him. We conclude that it did.

First, we reject defendant's argument that his confrontation rights were violated because Green was no longer available when the interview video was admitted into evidence. Because defendant did not object on this basis before the district court, we review for plain error. *Hagos*, ¶ 14; *People v. Banks*, 2012 COA 157, ¶ 26; *People v. Rodriguez*, 209 P.3d 1151, 1156 (Colo. App. 2008).

Defendant waived the argument that Green was unavailable. Defense counsel did not object when the court released Green and told him he was "free to go." Prior to Green's release, defense counsel was well aware that the court intended to admit the video

recording of the interview. And defendant does not now claim, nor do we find any indication in the record, that defense counsel attempted to recall Green for further testimony after the video was admitted into evidence. It is mere speculation that Green was not available to return because he lived out-of-state. By not objecting to Green's release or attempting to recall Green after admission of the video, defense counsel waived the argument that Green was unavailable for further testimony. *See Cropper v. People*, 251 P.3d 434, 435, 438 (Colo. 2011) (defense counsel waived the defendant's right to confrontation by not requesting live testimony).

In any event, defendant does not claim that there was any substantive difference between the transcript and the video recording. Having reviewed both, we conclude that they were nearly identical. Thus, for the purpose of the Confrontation Clause, there was no difference between the two. Defendant had the opportunity for extensive cross-examination of Green regarding the contents of the interview transcript. Because he confronted the testimonial hearsay through cross-examination, the subsequent admission of

the same content into evidence did not violate his confrontation rights. *See Argomaniz-Ramirez*, 102 P.3d at 1018.[14]

Second, we conclude that despite Green's partial memory loss, defendant had the opportunity to cross-examine his accuser and, thus, there was no violation of his Confrontation Clause rights. The Colorado Supreme Court's rulings are clear. When a hearsay declarant appears at trial and is subject to cross-examination, admission of his out-of-court statement does not violate the Confrontation Clause. *Id.* The witness's memory loss regarding prior inconsistent statements does not constitute a Confrontation Clause violation, "even where the witness' memory loss is total." *Pepper*, 193 Colo. at 508, 568 P.2d at 449.[15] We conclude that the

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[14] We also observe that the prosecution offered the transcript into evidence during Green's direct examination, and defense counsel objected to its admission. Defense counsel argued that the transcript was inadmissible precisely because it violated defendant's confrontation rights. Defendant cannot now argue that, because the transcript of the interview was not admitted into evidence while the declarant was on the witness stand, the court violated his confrontation rights. *Gross*, ¶ 11.

[15] Many courts have decided this issue, and the only contrary authority that we have discovered is *Goforth v. State*, 70 So. 3d 174, 184-85 (Miss. 2011) (applying the Mississippi constitution). The holding in *Pepper* is contrary to the holding in *Goforth*. And this case is distinguishable from *Goforth*. In that case, the witness's

holdings in *Pepper* and *Argomaniz-Ramirez* are dispositive in this case and, therefore, binding. *See, e.g.*, *People v. Smith*, 183 P.3d 726, 729 (Colo. App. 2008) (the court of appeals is bound by supreme court precedent).

2. Prior Inconsistent Statement

Defendant contends that the video recording should not have been admitted as a prior inconsistent statement under section 16-10-201 because the circumstances failed to support two statutory requirements: (1) the witness did not have the opportunity to explain or deny his prior statement and (2) the unredacted video contained speculation that was not within the witness's personal knowledge.

a. Standard of Review

We review a district court's evidentiary ruling for an abuse of discretion. *Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009); *People v. Munoz-Casteneda*, 2012 COA 109, ¶ 7. A court abuses its

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memory loss was so complete that he could not even remember the people involved; thus, he could not answer questions on potential bias. In this case, Green forgot key details but remembered most of the underlying events, remembered the people involved, remembered being interviewed by the police, and admitted to impeaching information such as his marijuana use the night of the events in question.

discretion in admitting evidence if its decision was manifestly arbitrary, unreasonable, or unfair. *People v. Valencia*, 257 P.3d 1203, 1209 (Colo. App. 2011).

If we conclude that the district court abused its discretion, we assess whether the error warrants reversal. We review preserved evidentiary errors for harmless error. *Krutsinger v. People*, 219 P.3d 1054, 1063 (Colo. 2009). We review unpreserved errors, whether constitutional or nonconstitutional, for plain error. *Hagos*, ¶ 14.

At trial, defense counsel objected to the admission of the video by arguing that it contained not only prior inconsistent statements, but also prior consistent statements. Defendant abandons that argument on appeal; the only mention of consistent statements in the opening brief is in the statement of preservation. Defendant concedes that memory loss showed the statements were inconsistent with the testimony, and argues instead that these inconsistent statements failed the statutory foundational requirements for admission. Defendant does not point to where in the record there was an objection on these bases. Thus, we review for plain error. CRE 103(a); *Banks*, ¶ 26; *Rodriguez*, 209 P.3d at 1156.

b. Applicable Law

CRE 801(c) provides that hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible unless it falls within an exception or exclusion in a statute or rule. CRE 802. The relevant exception is for a prior inconsistent statement.

Section 16-10-201 permits the introduction of a witness's previous statement that is inconsistent with his testimony at a criminal trial, not only to impeach the witness but also as substantive evidence. *See People v. Smith*, 182 Colo. 228, 234, 512 P.2d 269, 272 (1973) (section 16-10-201 creates "a new rule of substantive evidence"). However, (1) the witness must be given the opportunity to explain or deny the prior statement (or still be available to give further testimony) and (2) the prior statement must relate to a matter within the witness's own knowledge. § 16-10-201(1)(a)-(b).

Memory loss is a proper basis for concluding that the witness's testimony at trial is inconsistent with a previous statement; the lack of memory functions as a denial. *Davis v. People*, 2013 CO 57, ¶ 7 n.2 (in the context of section 16-10-201, a "witness's actual or

feigned memory loss is tantamount to denial"); *Pepper*, 193 Colo. at 508, 568 P.2d at 448; *People v. Thomas*, 2014 COA 64, ¶ 20; *People v. Baca*, 633 P.2d 528, 529 (Colo. App. 1981). A difference in "some details" between testimony and the previous statement justifies admission of the previous statement. *People v. Fisher*, 9 P.3d 1189, 1192 (Colo. App. 2000).

c. Analysis

We conclude that the district court did not abuse its discretion by admitting the prior inconsistent statement under section 16-10-201.

First, we cannot conclude on this record that Green was unavailable for further testimony. Defendant repeats the argument he made regarding confrontation, complaining that Green had no opportunity to explain the prior inconsistent statement because the video was admitted into evidence after he testified. We reject this argument for the reasons already discussed: defense counsel waived the argument that Green was unavailable by making no attempt to call him for further testimony, the record does not indicate that Green could not be recalled, and Green responded to

extensive questioning on the substance of the interview because the video and the transcript were almost identical.

Second, we conclude that Green did, in fact, deny his prior inconsistent statement. Defendant argues that Green was incapable of explaining or denying the statements in the police interview because of memory loss. As noted, our cases hold that memory loss is tantamount to a denial of the previous statements. *Davis*, ¶ 7 n.2; *Thomas*, ¶ 20. Green was asked repeatedly, by both parties, to explain or deny statements he made during the police interview. He effectively denied those statements by saying that he did not remember making them.

Finally, we conclude that Green's prior inconsistent statement related to matters within his personal knowledge. Defendant argues that the interview video should have been redacted to comply with section 16-10-201, because some statements were outside Green's own knowledge. He points to examples such as Green saying defendant looked like he wanted to fight and appeared to know Owens had a gun. We reiterate that defendant did not propose specific redactions to the district court or object to the particular comments about which he now complains.

The fact that Green made inferences — even, perhaps, speculative inferences — from his observations of defendant does not mean that Green's statements were outside of his personal knowledge. *Cf. Bohannon v. Pegelow*, 652 F.2d 729, 732 (7th Cir. 1981) (applying personal knowledge requirement of Fed. R. Evid. 701: it was not an abuse of discretion to allow lay testimony of a witness speculating that the arrest she observed was motivated by racial prejudice); *John Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289, 1294 (5th Cir. 1978) (applying the personal knowledge requirements of Fed. R. Evid. 602 and 701: when "the witness observes first hand the altercation in question, her opinions on the feelings of the parties are based on her personal knowledge").

Because Green denied his previous statement, which related to matters within his personal knowledge, the prosecution established the proper statutory foundation for admission of a prior inconsistent statement under section 16-10-201. Thus, the court did not abuse its discretion by admitting the video.

3. Unfettered Access During Deliberations

Defendant contends that the district court abused its discretion by allowing the jury unfettered access to the Green video

during deliberations. We conclude that there is no factual predicate for this contention.

At the jury instruction conference, defense counsel objected to the jury having access to the Green video during deliberations, arguing that such access would place undue weight on one witness's testimony. The court ruled that under then-existing precedent it was required to grant jurors access to any exhibit admitted into evidence, including the Green video. The court explained that its procedure would be for the prosecution to provide the necessary video equipment and to leave the equipment in a particular hallway. The equipment would be left in the hallway until the jurors asked to view the video, which would require the jurors to contact the bailiff.[16] Defendant does not point to any place in the record showing that the jurors ever asked to see the video, and we have not found one. We note that while this appeal was pending, defendant requested a remand to create a record of unrecorded conferences between the court and counsel and all

[16] Contrary to defendant's suggestion, we do not read the court's statements as saying merely what its usual practice was with respect to the use of video evidence by juries. Rather, we think it clear that the court followed that practice in this case.

contacts between jurors and court staff, but did not assert that any unrecorded conference or contact concerned the Green video. *See People v. Ray*, 2012 COA 32. Thus, we conclude that there is no record basis for defendant's contention of error.

Defendant is incorrect that the lack of a record showing that the video was in fact given to the jury to view during deliberations means that we must conclude that it was. It is the responsibility of the party asserting an error on appeal to demonstrate that the record includes a factual basis for the assertion. *See Schuster v. Zwicker*, 659 P.2d 687, 690 (Colo. 1983). The asserted error in this context was in allowing the jury unfettered access to view the video. At most, the record shows that the district court intended to allow such access once the jurors asked to see the video: it does not show, however, that the jurors ever asked to see the video and hence that they ever had unfettered access to the video. Thus, the facts in this case stand in contrast to those in *DeBella v. People*, 233 P.3d 664, 666 (Colo. 2010) ("The hour-long tape was provided to the jury . . . ."). *See also Frasco v. People*, 165 P.3d 701, 702 (Colo. 2007) ("During their deliberations, the jury requested permission to review the videotaped statement . . . . [T]he trial

court provided the jurors with the videotape, a television, and a videocassette player.").

DeBella does not say anything which could be viewed as relieving a defendant of the obligation of showing that the jury actually received unfettered access to a video recording of a witness's statement. The People argued in that case that because there was no record of how the jury used the video in the jury room, "it would be speculative to presume that the jury watched the video at all, to say nothing of whether the jury gave it 'undue weight or emphasis.'" *DeBella*, 233 P.3d at 668. The court rejected that argument because the "holes in the record [were] the result of the trial court's error . . . ." *Id.* In this case, defendant has not shown that the record demonstrates an error — i.e., that the court actually gave the jury unfettered access to the video.

D. Jury Selection

Defendant contends that the district court erred during jury selection by (1) minimizing the jurors' duty to disclose information during juror orientation; (2) denying a *Batson* challenge; (3) denying two challenges for cause; (4) denying his motion to change venue;

and (5) allowing a jury panel that did not represent a fair cross-section of the community.

1. Court Instructions During Juror Orientation

Defendant contends that the court erred during juror orientation by using language that diminished potential jurors' duty to disclose information on questionnaires. We are not persuaded.

a. Additional Facts

The court began the jury selection process by asking potential jurors to fill out a questionnaire. The questionnaire was more extensive than the standard juror questionnaire described in section 13-71-115, C.R.S. 2014. For example, it summarized the basic underlying events and participants, asked jurors if they had heard about the events in the media or the community, and asked jurors if they had racial prejudices. The form instructed the prospective jurors to fill out the questionnaire "completely and accurately" and included the following admonition above the signature line: "I declare that the above information is, to the best of my knowledge, true. I know that if I have willfully misrepresented a material fact on this questionnaire, I have committed a Class 3 Misdemeanor punishable as provided in Section 18-1-106, C.R.S."

The court told jurors, in relevant part:

> Please keep in mind as you're filling out the questionnaire that we don't know much about you and the more information we can have about you that you're willing to share, the more intelligent our decisions will be as to whether or not you will remain and serve as a juror in this case and that is the goal of jury selection is to find out who does not have, say, biases or prejudices which would make it impossible for them to serve as a juror.
> . . .
> So we do very much appreciate your willingness to serve and we would ask that you recognize your importance in the system and be diligent in filling out those questionnaires, giving us as much information as you feel comfortable in sharing.

Defense counsel did not object to the court's comments.

On appeal, defendant argues that the phrases "the more information we can have about you that you're willing to share" and "as much information as you feel comfortable in sharing" diminished the prospective jurors' duty to disclose information.

b. Standard of Review

A district court has wide discretion in conducting a trial. *People v. Coria*, 937 P.2d 386, 391 (Colo. 1997). We will not find an abuse of that discretion absent a showing that the court's conduct was manifestly arbitrary, unreasonable, or unfair. *Id.* We review

unpreserved claims of error, whether constitutional or nonconstitutional, for plain error. *Hagos*, ¶ 14; *see also* Crim. P. 52(b).

c. Analysis

We conclude initially that the court acted within its discretion because its comments were not improper. The court's comments, viewed in context, did not lessen the prospective jurors' duty to disclose information on the questionnaires. To the contrary, the court encouraged the jurors to be diligent and to share information liberally so that the court could make intelligent jury selection decisions. *See People v. Martinez*, 224 P.3d 1026, 1030 (Colo. App. 2009) ("casual remarks" by district court do not constitute reversible error unless they reflect adversely on the defendant or the issue of his guilt), *aff'd*, 244 P.3d 135 (Colo. 2010). The questionnaire itself also highlighted the prospective jurors' legal duty to be truthful. Thus, there was no error.

We also reject defendant's contention because he does not assert any prejudice related to the juror questionnaires.

Section 13-71-140, C.R.S. 2014, governs irregularities in selecting and managing jurors. The statute instructs the court not

to set aside a verdict based on allegations of any irregularity in selecting jurors unless the moving party (1) "objects to such irregularity or defect as soon as possible after its discovery" and (2) "demonstrates specific injury or prejudice." § 13-71-140. Our cases also hold that "[w]ith respect to a trial court's comments, . . . more than mere speculation concerning the possibility of prejudice must be demonstrated to warrant a reversal." *Martinez*, 224 P.3d at 1030.

The People argue that defendant waived this contention because he did not follow the procedure in section 13-71-140. Defendant responds that the statute limits only the district court and is not applicable to the appellate court. We need not decide this issue. The statute and our case law together make clear that, at any level of review, the defendant must at a minimum demonstrate specific prejudice stemming from the court's comments during jury selection.

Apart from a blanket assertion of structural error (for which there is no legal support), defendant does not assert any specific prejudice resulting from the court's comments. The expanded questionnaire was something that the district court added to the

jury selection process beyond the statutory requirements. Defendant does not assert that any prospective juror failed to properly complete the questionnaire. Defense counsel had a full opportunity for voir dire after the questionnaires were completed. And defendant does not assert that any members of the jury who actually decided his guilt were unfit because of undisclosed information. Absent a showing of prejudice, there is no reversible error. *See id.*

2. *Batson* Challenge

Defendant contends that the district court erred by denying his *Batson* challenge to a prospective juror. We are not persuaded.

a. Additional Facts

On the second day of jury selection, eighty-one prospective jurors remained. The parties agreed that Mr. O appeared to be the lone African-American remaining on the panel.

In his juror questionnaire, Mr. O had indicated that he was a supervisor at a collections law office. During voir dire, the prosecutor asked Mr. O a series of thirteen questions related to his employment.

Following voir dire, the prosecutor used the People's fourth peremptory strike to excuse Mr. O. Defense counsel initially objected at an unrecorded bench conference. The court treated the objection as one pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and invited the parties to make a more complete record the following day.

Defense counsel objected that there was no race-neutral reason to dismiss Mr. O. The court ruled that the defense had met the initial burden of showing an improper challenge, and asked the prosecutor to articulate race-neutral reasons for excusing Mr. O.

The prosecutor gave several reasons: (1) Mr. O was a manager at a collections law firm and might try to apply his legal knowledge to the case; (2) Mr. O's odd look in response to one of the judge's jokes; (3) Mr. O did not raise his hand to agree that murder is horrible (which the prosecutor interpreted as his lack of desire to participate); (4) Mr. O seemed to misinterpret the burden of proof to be neutral; (5) Mr. O had his eyes closed during voir dire and was not paying attention; (6) Mr. O was chatting with a fellow potential juror and not paying attention; and (7) defense counsel did not question him.

Defense counsel argued that the prosecutor's proffered reasons were only a pretext for excusing an African-American juror. Counsel argued that it was incredible that the prosecutor would excuse a juror for interpreting the burden of proof to the detriment of defendant and that the other reasons given — such as an odd look after a joke or closed eyes — were generic and unconvincing.

The court denied the *Batson* challenge, after considering the prosecutor's race-neutral reasons, voir dire examination of Mr. O, and information in Mr. O's juror questionnaire. The court noted the prosecutor's concerns about Mr. O's behavior during voir dire, specifically mentioning only the fact that it also observed Mr. O's conversation with another juror during voir dire. However, the court relied primarily on Mr. O's role as a supervisor at a collections law firm, which Mr. O had noted in his juror questionnaire and discussed during voir dire: "[T]he court does find that the People have established a race-neutral reason for excusing Mr. O[] and I am primarily focusing on his employment in the legal area and the concerns the People would have about that particular aspect . . . ."

b. Applicable Law and Standard of Review

The use of peremptory challenges to purposefully discriminate against jurors of a protected class violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994); *Batson*, 476 U.S. at 89; *Craig v. Carlson*, 161 P.3d 648, 653 (Colo. 2007).

Batson outlines a three-step process for evaluating claims of racial discrimination in jury selection. *Batson*, 476 U.S. at 93–98; *see also People v. Cerrone*, 854 P.2d 178, 185 (Colo. 1993) (applying *Batson*'s three-step process). First, the defendant (or the opponent of the strike) must make a prima facie showing that the prosecution (or the proponent of the strike) excluded a potential juror on the basis of race. Second, if the defendant makes that showing, the prosecution must articulate a race-neutral reason for excluding the juror in question. Third, if the prosecution articulates such a reason, the defendant must be given an opportunity to rebut the prosecution's reason and the court must determine whether the defendant has carried his ultimate burden of proving purposeful discrimination. *Cerrone*, 854 P.2d at 185; *People v. Collins*, 187

P.3d 1178, 1182 (Colo. App. 2008). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Defendant challenges only the district court's ultimate determination that he had not proved purposeful racial discrimination. Thus, we focus on the third step of the *Batson* analysis.

At step three, the court must review all the evidence to decide whether the defendant has shown, by a preponderance of evidence, that the prosecution sought to exclude a potential juror because of a discriminatory reason. *Craig*, 161 P.3d at 654; *Collins*, 187 P.3d at 1182. The decisive question is whether the prosecution's race-neutral explanation for a peremptory challenge should be believed. *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion); *see also People v. Gabler*, 958 P.2d 505, 507 (Colo. App. 1997) (at step three "the plausibility of the prosecutor's race-neutral explanation becomes relevant"). The prosecution's rationale need not be sufficient to justify a challenge for cause — *see Cerrone*, 854 P.2d at 189 — but "implausible or

fantastic justifications" for a peremptory strike do not overcome an inference of purposeful discrimination. *Purkett*, 514 U.S. at 768; *accord People v. Beauvais*, 2014 COA 143, ¶ 11.

In assessing the credibility of the race-neutral reasons proffered, the court may consider a number of factors, including the prosecutor's demeanor, how reasonable or improbable the prosecutor's explanations are, and whether the reasons have some basis in accepted trial strategy. *Craig*, 161 P.3d at 654; *Collins*, 187 P.3d at 1182.

Because a reviewing court is not as well positioned as the district court to make such determinations, we review a district court's decision at step three only for clear error. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998). "Thus, in the absence of exceptional circumstances, we defer to the district court's finding." *People v. Robinson*, 187 P.3d 1166, 1174 (Colo. App. 2008). If the court clearly erred, then the defendant's convictions must be reversed. *Collins*, 187 P.3d at 1184; *Gabler*, 958 P.2d at 509.

c. Analysis

We conclude that the district court did not clearly err by denying defendant's *Batson* challenge.

The race-neutral reason on which the court relied — Mr. O's legal employment — was sufficient. The reason was amply supported by the record and the parties do not dispute its factual basis. The prosecutor had been concerned enough about Mr. O's employment that he probed the subject with thirteen questions during voir dire, refuting the implication that the concern was pretextual. *See Gabler*, 958 P.2d at 508 (failure to inquire into area of claimed concern suggests pretext).

Defendant's arguments that Mr. O's legal employment was clearly a pretextual reason are unavailing. He argues that Mr. O lacked formal legal training, but the prosecutor did not claim that formal training was the basis of Mr. O's legal knowledge. Relying on *Collins*, defendant also argues that the prosecutor accepted a white juror who had a criminal-justice degree and worked for a private company in community corrections; thus, the prosecutor treated Mr. O differently than a similarly situated white juror. But we do not view a law office and community corrections as sufficiently

analogous to support an inference of unequal treatment. In *Collins*, the prosecutor claimed that he had excused a black juror because she was a nurse; not only was the juror not a nurse, but the prosecutor had accepted three white jurors working in health care, including a nurse. 187 P.3d at 1183.

We acknowledge that, because Mr. O vouched that he could be fair, his legal employment may not have justified a challenge for cause. But that is not the standard. *See Cerrone*, 854 P.2d at 189. The race-neutral reason was not implausible, fantastic, or foreign to acceptable trial strategy. *See Craig*, 161 P.3d at 654; *Beauvais*, ¶ 11. Thus, this is not an exceptional circumstance where the district court clearly erred in its determination that defendant did not prove purposeful discrimination. *Robinson*, 187 P.3d at 1174.

3. Challenges for Cause

Defendant contends that the court abused its discretion by denying two of his challenges for cause. Again, we are not persuaded.

a. Procedural Facts

i. Prospective Juror G

Defendant argues that Ms. G should have been excused for cause because she had been exposed to pretrial publicity and was not properly rehabilitated.

In response to a question asking whether she knew anything about the case, Ms. G wrote on her juror questionnaire, "I remember hearing about it on the news." She also wrote, and then crossed out, "I believe a young engaged couple was killed." The questionnaire also asked, if the prospective juror had heard anything, "have you formed any attitudes or opinions about what happened at Lowry Park on July 4, 2004?" She wrote, "no."

During individual voir dire, defense counsel asked Ms. G about her exposure to media coverage of the case.

> [Ms. G]: You know, I really don't remember all that much. I just remember there was a shooting, I thought it happened in Aurora somewhere, where one person was killed and — when I first came in to answer the questionnaire, before I read the full amount of information that was given on the top of the questionnaire, I thought it was . . . a couple that had been shot and killed, and Marshall-Fields, that name rang a bell, stuck in my

> head for obvious reasons, but that's basically all of what I do remember.

Defense counsel then asked Ms. G, if the evidence in the case caused her to remember more details from news coverage, whether she could remain fair.

> [Ms. G:] I think it's a possibility that the more this case unfolds the more my memory will come back into play as far as what I'm remembering.
>
> [Defense counsel:] And I believe when the judge asked you about whether it would affect you, you said you thought you could not let it affect you, but it will a little.
>
> [Ms. G:] I don't know. I have to think about that.
>
> [Defense counsel:] So where do we stand on that now as far as had you — it's a tough question kind of, to be a fortune teller.
>
> [Ms. G:] As an individual, I feel like I'm a fair person. I am also wise enough to realize that by hearing something on the media or the news, or reading anything about it, that you could be influenced by one or the other. It's hard for me to say. . . .
>
> [Defense counsel:] . . . It sounds like you would do your very, very best not to have this happen but you have some doubts as to whether or not that would be a successful effort. Is that a fair characterization of what you're saying?

> [Ms. G:] Yes. I think so. I think that's true. I would try my very best to be fair . . . [but] as the story unfolds, I can't say that my opinion back then when I heard about it might not have some influence.

The prosecutor also questioned Ms. G. He explained that "to be fair" she must base her verdict "only on the evidence that is presented during the trial." The prosecutor said that media exposure did not disqualify her so long as she could separate the evidence actually presented from what she had heard. He asked if she believed she could do that and she answered, "I do." The prosecutor then asked, in the event that Ms. G remembered more details during trial, whether she could still decide the case based only on the evidence. She answered, "I think I could." Finally, the prosecutor asked, in the event that Ms. G remembered details during trial that might compromise her ability to be fair, whether she would notify the court. She answered, "I would, yes."

Defense counsel challenged Ms. G for cause, arguing that (1) she had expressed doubt that she could put media coverage from her mind and was equivocal on that point during rehabilitation because she had said, "I think I could"; and (2) she had commingled

in her mind the Lowry Park incident and the subsequent killing of Marshall-Fields.

The prosecutor argued that Ms. G had said she understood that the case should be decided only on the evidence presented. Saying "I think I could" did not indicate doubt, he argued, but simply recognized that one cannot predict all future scenarios with certainty. The prosecutor argued that mere knowledge of outside facts did not justify a removal for cause when the juror assured the court she could decide the case on the evidence alone.

The court denied the challenge for cause:

> Ms. G[] did appear to me to understand the service she would have to serve as a juror and assured the Court in her responses as given to the prosecution that in the event outside knowledge became such a factor that she did not feel she could be fair and impartial she would call that to our attention. But at this point she indicated she could put aside what little she knew about the case and judge it based solely upon evidence presented during the trial, so I will deny the challenge for cause.

Defense counsel used a peremptory strike to remove Ms. G.

ii. Prospective Juror L

Ms. L disclosed in her juror questionnaire that she had strong feelings about gangs: "Too many for our enforcement depts [sic] to handle. Getting out of jail too soon."

During individual voir dire, the court asked Ms. L about her questionnaire response. She focused on people getting out of jail too soon, responding in a somewhat confusing fashion: "I like watching CNN, the news, and I just think there is too many people getting out of jail too soon . . . I think there is too many people in jail right now." The court explained that jurors would not be involved in deciding punishment if defendant was found guilty, and asked if she would set aside her feelings about sentences. She answered, "I would, yes."

The prosecutor asked Ms. L if she would be able to decide the case based on the evidence presented, even if there was evidence of gang involvement. She answered: "I can separate the two. I mean, I am adult, I know where the separation is, this one person and the entire, you know, community." The prosecutor followed up by asking: "[B]asically your feelings about gangs are not going to

determine how you decide the cases? Is that safe to say?" She answered, "yes."

Defense counsel asked Ms. L if she had any reason to believe defendant was a gang member. She said: "No. For what reason? I mean, I don't know. I don't know anything about the case."

Defense counsel challenged Ms. L for cause because of, among other things, "concern[] about her answers to the gang issues." The prosecutor argued that Ms. L "appeared to be somebody that could and would decide this case on the evidence."

The court denied the challenge for cause: "I find that she clearly indicated she can separate out any feelings she may have about gangs or not distort or determine her perception of the evidence in this case based upon her feelings in that regard."

Defense counsel removed Ms. L with a peremptory strike and exhausted his peremptory challenges.

b. Standard of Review and Applicable Law

We review a district court's ruling on a challenge for cause for an abuse of discretion, considering the entire voir dire. *Carrillo v. People*, 974 P.2d 478, 485-86 (Colo. 1999); *see Banks*, ¶ 98. We apply this deferential standard because the district court is in the

best position to accurately assess a prospective juror's state of mind, taking into consideration the prospective juror's tone, expression, and demeanor. *People v. Young*, 16 P.3d 821, 825-26 (Colo. 2001); *People v. Clemens*, 2013 COA 162, ¶ 9. Despite the broad discretion accorded the district court, we understand that we must not "abdicate [our] responsibility to ensure that the requirements of fairness are fulfilled." *Morgan v. People*, 624 P.2d 1331, 1332 (Colo. 1981).

A criminal defendant has a constitutional right to a fair and impartial jury. *Nailor v. People*, 200 Colo. 30, 32, 612 P.2d 79, 80 (1980); *People v. Hancock*, 220 P.3d 1015, 1016 (Colo. App. 2009). The right to challenge a prospective juror for cause is an integral part of this right. *Carrillo*, 974 P.2d at 486; *People v. Chavez*, 313 P.3d 594, 596 (Colo. App. 2011).

A court must sustain a challenge for cause based on "[t]he existence of a state of mind in the juror evincing enmity or bias toward the defendant." § 16-10-103(1)(j), C.R.S. 2014; *see* Crim. P. 24(b)(1)(X) (same). However, a prospective juror's mere expression of a preconceived opinion will not disqualify her "if the court is satisfied, from the examination of the juror or from other evidence,

that [s]he will render an impartial verdict according to the law and the evidence submitted." § 16-10-103(1)(j).

A court may excuse a prospective juror if the juror indicates a biased state of mind, but the court need not excuse such a juror if the juror "agrees to set aside any preconceived notions and make a decision based on the evidence and the court's instructions." *People v. Lefebre*, 5 P.3d 295, 301 (Colo. 2000), *abrogated on other grounds by People v. Novotny*, 2014 CO 18; *see Banks*, ¶ 110 (a court may properly conclude that a juror's assurance of fairness outweighs a statement of bias); *People v. Phillips*, 219 P.3d 798, 802 (Colo. App. 2009) (a court does not abuse its discretion if "the record contains a general statement by a juror that, despite any preconceived bias, he or she could follow the law and rely on the evidence at trial").

Thus, a prospective juror's expression of some doubt as to her ability to be fair and impartial does not require the court to excuse the juror, and a court may credit the juror's assurances that she can be fair and impartial, even if those assurances appear inconsistent or contradictory. *See Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *People v. Honeysette*, 53 P.3d 714, 719 (Colo. App.

2002). A court errs in denying a challenge for cause only when a prospective juror's statements "compel the inference that he or she cannot decide crucial issues fairly," and no rehabilitative questioning or other information counters that inference. *People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007); *People v. Wilson*, 114 P.3d 19, 22 (Colo. App. 2004); *see Lefebre*, 5 P.3d at 299 ("A trial court must grant a challenge for cause if a prospective juror is unable or unwilling to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions.").

c. Analysis

i. Prospective Juror G

The court questioned Ms. G during individual voir dire because of her exposure to media reports. She had a vague recollection of the case. She remembered that perhaps a person was killed at Lowry Park, and remembered the name Marshall-Fields (and maybe that an engaged couple had been killed), but seemed to have no memory of defendant's name or his connection to the events. Ms. G said she had formed no opinions or attitudes about the case. She did agree with defense counsel's suggestion

that outside information could possibly influence her. However, she then assured the court that she could be fair and render a verdict based on the evidence presented. *See Phillips*, 219 P.3d at 802.

Defense counsel's concern about Ms. G's exposure to pretrial publicity was largely speculative. Counsel asked her whether, if the evidence jogged her memory during trial, she could remain fair with whatever new information she recalled. Ms. G responded that she thought she could remain fair, but could not say definitively because she could not possibly know what she might recall. Defense counsel admitted to Ms. G that he was asking her to be a "fortune teller." The prosecutor rehabilitated Ms. G even on this speculative point, because she assured the court that she would tell the court if the hypothetical situation unfolded in which she recalled details that compromised her ability to be fair.

Contrary to defendant's assertion, Ms. G was properly rehabilitated when she said that she would "try her very best to be fair" and that "I think I could" put aside any newly remembered information. "It is not necessary that a prospective juror state with absolute certainty that he or she will set aside all potential bias." *People v. Fleischacker*, 2013 COA 2, ¶ 27. Our cases consistently

hold that expressions such as "try" and "think" do not undermine a potential juror's assurances to be fair and impartial. *See People v. Tunis*, 2013 COA 161, ¶ 34 (juror's assurance sufficient when he said he "would make every effort to be fair and impartial"); *Wilson*, 114 P.3d at 23 (court abused its discretion because there was no "statement from the prospective juror that he could render or *would try to render* an impartial verdict") (emphasis added); *People v. Woellhaf*, 87 P.3d 142, 151 (Colo. App. 2003) (juror's assurance was sufficient when she said that she "would try" to put bias aside and "thought" she could be fair), *rev'd on other grounds*, 105 P.3d 209 (Colo. 2005).

In sum, Ms. G's statements did not compel the inference that she could not be fair and impartial. *See Merrow*, 181 P.3d at 321. Thus, the district court did not abuse its discretion by denying defendant's challenge for cause of Ms. G.

ii. Prospective Juror L

Defendant argues on appeal that Ms. L should have been excused for cause because there was no record support for the

district court's conclusion that her negative feelings about gangs would not compromise her ability to be fair.[17]

Ms. L disclosed strong feelings about gangs in her juror questionnaire. However, during individual voir dire, she made quite clear that she could separate her feelings in general from the evidence presented. She affirmed that her feelings about gangs would not determine how she decided the case. And she rebuffed defense counsel's suggestion that she had reason to believe defendant was a gang member. The record supports the district court's conclusion that her general feelings about gangs would not compromise her ability to be fair and impartial in this case. Thus, the court did not abuse its discretion in denying defendant's challenge for cause of Ms. L. *See Morrison*, 19 P.3d at 672; *Honeysette*, 53 P.3d at 719.

Because the district court did not err by denying these two challenges for cause, we need not consider whether the denials prejudiced defendant.

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[17] Defense counsel argued additional bases to the district court, but defendant asserts only this basis on appeal.

4. Motion for Change of Venue

Defendant contends that the district court erred by denying his motion to change venue. We are not persuaded.

a. Additional Facts

Defendant initially filed a motion to give jurors screening questionnaires that included questions on media exposure related to the case, and for individual voir dire of those jurors who had seen news coverage. The court granted that motion. Question number thirty of the juror questionnaire gave a brief recital of the facts of the case and identified some of the people involved, and asked prospective jurors if they recognized facts or names.

Defendant subsequently moved the court to change venue, arguing that prejudicial publicity had saturated the jurisdiction of Arapahoe County. The court deferred ruling on the motion until after voir dire, reasoning that voir dire would demonstrate whether an impartial jury could be seated. The court also denied related defense motions, such as those asking for severance of the counts related to Marshall-Fields and for individual voir dire of all prospective jurors. Defense counsel included more than 100 news articles with the motion requesting individual voir dire.

The court summoned a large jury pool, and 179 prospective jurors reported and filled out the questionnaire. Based on questionnaire responses, the court winnowed the juror pool to eighty-six people. In addition to general voir dire, the court allowed individual voir dire of twenty prospective jurors — fourteen of them because they had indicated on the juror questionnaire that they had heard something about the case.

Defense counsel challenged seven of the individually questioned prospective jurors for cause. The court granted two of those challenges. None of those challenged actually served on the jury.

b. Standard of Review

The district court may grant a change of venue "[w]hen a fair trial cannot take place in the county or district in which the trial is pending." § 16-6-101(1)(a), C.R.S. 2014. We review a district court's decision to deny a change of venue for an abuse of discretion. Crim. P. 21(a)(1); *People v. Harlan*, 8 P.3d 448, 468 (Colo. 2000), *overruled on other grounds by People v. Miller*, 113

P.3d 743 (Colo. 2005); *People v. Hankins*, 2014 COA 71, ¶ 6.[18] The district court "abuses its discretion if its rulings deny the defendant a fundamentally fair trial." *Harlan*, 8 P.3d at 468.

A defendant seeking to show a due process entitlement to change of venue must establish either a presumption of prejudice or actual prejudice. *People v. Botham*, 629 P.2d 589, 596 (Colo. 1981), *superseded by rule as stated in People v. Garner*, 806 P.2d 366 (Colo. 1991).

c. Analysis

i. Presumed Prejudice

We presume prejudice when the defendant shows "the existence of massive, pervasive, and prejudicial publicity that created a presumption that the defendant was denied a fair trial." *Harlan*, 8 P.3d at 468. Even extensive pretrial publicity triggers a presumption of prejudice only in "extreme circumstances." *Id.* at 469.

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[18] We acknowledge that federal courts review de novo a claim of presumed prejudice and review for an abuse of discretion a claim of actual prejudice, *see United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998), but the Colorado Supreme Court has not adopted this approach. Applying de novo review would not cause us to reach a different conclusion.

> To hold that jurors can have no familiarity through the news media with the facts of the case is to establish an impossible standard in a nation that nurtures freedom of the press. . . . Only when the publicity is so ubiquitous and vituperative that most jurors in a community could not ignore its influence is a change of venue required before voir dire examination.

People v. McCrary, 190 Colo. 538, 545, 549 P.2d 1320, 1325–26 (1976) (citations omitted).

In *McCrary*, *id.* at 546, 549 P.2d at 1326, the supreme court set forth several factors to guide our analysis of whether pretrial publicity biased a community: (1) the size and type of community; (2) the reputation of the victim; (3) the revealed sources of the news stories; (4) the specificity of the accounts of certain facts; (5) the volume and intensity of the coverage; (6) the extent of comment by the news reports on the facts of the case; (7) the manner of presentation; (8) the proximity to the time of trial; and (9) the publication of highly incriminating facts not admissible at trial.

Our review of pretrial publicity is necessarily limited to the newspaper articles that defendant has included as part of the record. *See Botham*, 629 P.2d at 596 n.3. He presents articles

from the Denver Post and the now-defunct Rocky Mountain News — newspapers based in Denver with statewide circulation.

After reviewing these articles, we conclude that defendant has not met the stringent standard to establish a presumption of prejudice. The supreme court's analysis in *Botham* is instructive. The events in the *Botham* case occurred in the "small rural community" of Mesa County. *Id.* at 599. The only local daily newspaper published more than 100 articles related to the defendant's crimes, up to the time of trial. *Id.* at 597 & n.4. Many of the sources in the articles were local law enforcement officials, adding credence to the information, and the articles included grisly details about the victims' corpses and incriminating, inadmissible evidence about the discovery of the possible murder weapon at Botham's former house. *Id.* at 597-99. Even under these circumstances, the supreme court held that there was no presumption of prejudice. *Id.* at 597 ("We have concluded that this was not a case where there was such massive, pervasive, and prejudicial publicity that the denial of a fair trial can be presumed.").

In this case, the events occurred in Arapahoe County, which has a population of more than 500,000 people. Two regional newspapers, collectively, published more than 100 articles related to the crimes. The coverage was extensive, and negative toward defendant. Many of the articles included information about the subsequent murders of Marshall-Fields and Wolfe, which was ruled inadmissible at this trial because it was deemed unduly prejudicial. The sources in these articles often included relatives of the victims and portrayed the victims in a positive light.

At the same time, however, defendant's name did not appear in early coverage of the Lowry Park shooting or in many of the later articles. Coverage was fairly prosaic until the murders of Marshall-Fields and Wolfe in June 2005. The most dramatic articles about those murders featured mainly Owens, and recounted evidence from his preliminary hearing. Even after those murders, much of the coverage focused on witness-protection legislation, and mentioned defendant and Owens, if at all, only in passing. And while some of the articles contained inadmissible information regarding defendant's character, few contained much detail about

the events and little or no key inadmissible evidence relating to the charged crimes.

The facts in this case are roughly similar to the facts in *Botham*, but even less indicative of prejudice. Along with the lack of grisly details or incriminating evidence in the news coverage here, there are two other main distinctions. First, much of the media coverage here did not focus on defendant as the primary perpetrator. *See People v. Carrillo*, 946 P.2d 544, 552 (Colo. App. 1997) (concluding that there was no presumed prejudice where "[m]any [articles] did not mention defendant, but instead focused on co-defendants or other crimes"), *aff'd*, 974 P.2d 478 (Colo. 1999). Second, Arapahoe County is a much larger community than Mesa County. *Cf. Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (plurality opinion) (reduced likelihood of prejudice where venire was drawn from a pool of more than 600,000 people).

Perhaps most telling, the jury acquitted defendant of the most serious charge against him (murder) and one count of attempted murder. In *Skilling v. United States*, 561 U.S. 358, 382-84 (2010), the Court evaluated a claim of presumed prejudice and held that the jury's acquittal of the defendant on some counts undermined

"the supposition of juror bias." The court concluded: "It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." *Id.* at 383.

Thus, despite the extensive and negative coverage, we conclude that the pretrial publicity did not constitute the extreme circumstance that gives rise to a presumption of prejudice. *See Harlan*, 8 P.3d at 469 (no presumed prejudice despite "impressive amount of publicity"); *McCrary*, 190 Colo. at 542, 549 P.2d at 1323 (no presumed prejudice despite news coverage of inadmissible allegations that the defendant may have committed twenty-two murders across the country); *People v. Bartowsheski*, 661 P.2d 235, 240-41 (Colo. 1983) (no presumed prejudice despite large volume of coverage where the articles were not sensational or inflammatory); *People v. Munsey*, 232 P.3d 113, 121–23 (Colo. App. 2009) (no presumed prejudice despite publication of ninety articles in small community, including a political cartoon that suggested the defendant be hanged); *see also Stafford v. Saffle*, 34 F.3d 1557, 1566 (10th Cir. 1994) (holding that extensive publicity did not show presumed prejudice in the absence of "a circus atmosphere or lynch mob mentality").

ii. Actual Prejudice

Next, we consider whether defendant established actual prejudice. A defendant establishes actual prejudice "based upon a nexus between extensive pretrial publicity and the jury panel." *Botham*, 629 P.2d at 597. In *Botham*, the supreme court considered the totality of the circumstances in deciding whether the defendant proved actual prejudice, "reviewing both the pretrial publicity and the voir dire examination of the jury." *Id.* In *Harlan*, 8 P.3d at 470, the supreme court concluded that the district court took sufficient measures — specifically, "extensive individualized voir dire concerning the jurors' exposure to publicity" — to ensure a fair trial. However, in a case where voir dire revealed that many of the jurors who rendered a verdict had detailed knowledge of the case and had formed an opinion on the defendant's guilt before trial, the court concluded that the defendant did not have a fair trial. *Botham*, 629 P.2d at 600. Thus, we look at the relationship between pretrial publicity and the jury panel to assess whether the district court took sufficient measures to ensure that the jurors who rendered a verdict did not have detailed knowledge of the case or preconceived opinions about defendant's guilt.

The pretrial publicity in this case necessitated extra care in selecting a jury. The extensive media coverage, peppered with inadmissible evidence of other bad acts, raised a danger that a portion of the venire would be biased against defendant. We conclude that the district court took measures sufficient to mitigate that danger.

The court summoned a large jury pool and used a screening questionnaire to reveal who had been exposed to pretrial publicity and to inquire about other potential bases for excusing potential jurors. The court excused roughly half the venire based on the screening questionnaire and individual voir dire. Only fourteen prospective jurors required individual voir dire based on media exposure, signaling that the effect of media coverage was not pervasive. The record shows that defense counsel (along with the court and the prosecutor) had a full opportunity at individual voir dire to explore potential jurors' knowledge of the case and possible biases. *See Harlan*, 8 P.3d at 470 (court took sufficient measures when it employed "extensive individualized voir dire"); *see also Skilling*, 561 U.S. at 384 ("extensive screening questionnaire and

follow-up *voir dire* were well suited to [the] task" of countering effects of pervasive pretrial publicity).

Defense counsel challenged only seven prospective jurors for cause, and none of those challenged for cause actually served on the jury. Defendant does not assert that any prospective juror with detailed knowledge of the case or a preconceived opinion about his guilt actually served. These facts stand in contrast to those in *Botham*, where the supreme court found actual prejudice. In *Botham*, 629 P.2d at 600, all fourteen jurors who served had detailed knowledge of the case, and seven of them had expressed preconceived opinions that defendant was guilty.

We conclude that defendant has not established actual prejudice based on a nexus between pretrial publicity and the jury panel. *See Bartowsheski*, 661 P.2d at 241 (no actual prejudice where extensive voir dire and defense counsel did not challenge for cause any of the jurors who actually served); *Botham*, 629 P.2d at 597; *Carrillo*, 946 P.2d at 552 (concluding that there was no actual prejudice where "during voir dire, jurors with any knowledge of the crime either stated they were capable of putting aside opinions already formed or were excused for cause"). This conclusion is

confirmed by the jury's split verdicts in this case, which demonstrated that jurors weighed the evidence rather than rendering verdicts based on prejudice against defendant.

5. Fair Cross-Section

Defendant contends that the jury pool did not comport with his right to a jury selected from a fair cross-section of the community because there were so few African-Americans. We are not persuaded.

Defense counsel moved to strike the jury panel, because of the lack of racial diversity, when only one of the eighty-one remaining prospective jurors appeared to be African-American. The court denied the motion, inviting more information but concluding that on the existing record it could not make the requisite findings to strike the panel. We review the court's factual determinations for clear error, and legal determinations de novo. *Washington v. People*, 186 P.3d 594, 600 (Colo. 2008).

The Sixth Amendment guarantees the defendant a jury drawn from a fair-cross section of the community. To establish a prima facie violation of the fair cross-section guarantee, the defendant must show: (1) a distinctive group; (2) was underrepresented in

venires in relation to that group's percentage of the community; (3) because of systematic exclusion in the jury-selection process. *Id.*

Defendant has identified a distinctive group — African-Americans. However, he did not present any statistical information to show that African-Americans were underrepresented in venires relative to their percentage of the community (except the venire in this trial). *See United States v. Weaver*, 267 F.3d 231, 240 (3d Cir. 2001) (requiring statistical evidence regarding venires in the relevant jurisdiction). And defendant does not claim systematic exclusion of African-Americans, except to argue that *People v. Washington*, 179 P.3d 153 (Colo. App. 2007), *aff'd*, 186 P.3d 594, established that African-Americans were being systematically excluded from jury panels in Arapahoe County at the time of his trial. However, the division in *Washington* held that "defendant's evidence was legally insufficient to establish constitutionally significant underrepresentation of African–Americans . . . in jury panels" and, thus, declined to consider systematic exclusion. *Id.* at 164. Because defendant has not established a prima facie violation of the fair cross-section guarantee, the district court did not err in denying his motion to strike the panel.

E. Prosecutorial Misconduct

Defendant contends that the prosecutors acted improperly by (1) asking him to comment on the veracity of other witnesses during cross-examination; (2) asking him to give too much information about a prior conviction during cross-examination; (3) making improper arguments; (4) introducing propensity evidence in violation of a court order; and (5) failing to timely disclose witness contact and impeachment information. He also asserts that the prosecutors' misconduct, cumulatively, is reversible error.

1. Eliciting Testimony on Witness Veracity

Defendant contends that the court reversibly erred by allowing the prosecutor to ask him to comment on the veracity of other witnesses. We conclude that some of the questions about which defendant complains were improper, but that reversal is not justified.

a. Procedural Facts

On appeal, defendant challenges several exchanges, set forth below. We have italicized the questions that, in our judgment, arguably called for comment on another witness's veracity.

- Questions about prosecution witness Jamar Johnson.

[Prosecutor:] *So when Jamar Johnson testified that that's how he saw you shoot, he was right?*

[Defendant:] He wasn't lying about that part.

. . .

[Prosecutor:] Okay, he was right about that.

. . .

[Prosecutor:] Did you hear Jamar Johnson, your friend, at least at the time, testify that he heard two and up to five shots at the Suburban that you were firing?

[Defendant:] I remember him saying that.

[Prosecutor:] But you only fired one shot.

[Defendant:] Only once.

- Questions about defendant's testimony that he did not know Owens was carrying a gun the night of the shooting.

[Prosecutor:] You knew that's what he always carried, right?

[Defendant:] That's what he sometimes carried.

[Prosecutor:] Sometimes carried? You heard again Latoya testify that she knew [Owens] always carried a gun. Did you hear that?

[Defendant:] I heard her say that.

[Prosecutor:] *Okay. Not true?*

[Defendant:] He didn't always carry one, he carried one sometimes, but not all the time.

- Questions about "snitches." During direct examination, defense counsel introduced a letter defendant had written to Owens, in which he wrote he was not a "snitch." The prosecutor followed up on cross-examination.

[Prosecutor:] What is a snitch?

[Defendant:] Somebody, Jamar Johnson, who lie to get out of trouble.

[Prosecutor:] *Was Askari Martin a snitch for talking to the police?*

[Defendant:] No, he wasn't. He told what he thought he seen what he thought he knew, but people that come in and lie, that's a snitch.

[Prosecutor:] *You have called him a snitch, have you not?*

[Defendant:] I never called him a snitch.

[Prosecutor:] *Is Latoya a snitch?*

[Defendant:] No she ain't a snitch. She told what happened. Some of the memories and stories is flaky because they don't remember. Some of it ain't right, some of it is.

[Prosecutor:] *Cashmeir [Owens's girlfriend] a snitch?*

[Defendant:] No, she ain't a snitch.

[Prosecutor:] *Why don't you tell us who the snitches were that night?*

. . .

[Objection sustained because question too broad.]

[Prosecutor:] So a snitch then in your definition is somebody who tells something that isn't true.

[Defendant:] To get out of trouble.

[Prosecutor:] Somebody simply tells the police what they saw, what they heard, they're not a snitch.

[Defendant:] No.

[Prosecutor:] *Is Jeremy Green a snitch?*

[Defendant:] He ain't — he got some of his story mixed up. I ain't just calling people snitches. Some people got their stories mixed up.

[Objection overruled.]

- Questions about the color of the gun defendant used at Lowry Park. Defendant had testified that it was black.

> [Prosecutor:] So why then when Latoya was testifying about you saying you needed to get a black and silver BB gun[,] why were you telling her specifically you needed a black and silver BB gun?
>
> [Defendant:] I told her I wanted a gun that looked real because I didn't have a gun at that time.
>
> [Prosecutor:] *So you did not tell her as she testified that you told her you wanted to get a black and silver BB gun?*
>
> [Defendant:] No.

- Questions about defendant's friendship with Owens.

> [Prosecutor:] Just friends?
>
> [Defendant:] Friends.
>
> [Prosecutor:] *You have heard people describe that relationship between you and him as —*

[Objection overruled.]

> [Prosecutor:] *You've heard other witnesses who knew you both describe his relationship to you as like being your girlfriend. You heard that, did you not?*

Defense counsel objected again, and told the court that he "want[ed] the record to reflect a continuing objection asking [defendant] to comment on other witness's testimony." The court

overruled the objection and did not address the continuing objection.

> [Prosecutor:] Was there anything in terms of the closeness of your relationship and his desire to please you that would make it appear to anybody that he was kind of like your girlfriend?
>
> [Defendant:] Only Latoya said that . . .

- Questions about defendant's request to [his sister-in-law] Brandi Taylor to clean out her garage after the shooting.

> [Prosecutor:] *She said that she did ask you why and you told her basically never mind or don't ask any questions. Is that true?*
>
> [Defendant:] I don't remember. But I don't remember them asking me why.

- Questions asking defendant to identify Owens in a video of the altercation at Lowry Park.

> [Prosecutor:] That's Sir Mario Owens lifting his shirt to show you his gun, isn't it?
>
> [Defendant:] How do you know it's Sir Mario? I don't know. . . .
>
> [Prosecutor:] *Well, you heard your wife testify that that was Breath or Sir Mario Owens?*

> [Defendant:] I heard a lot of people testify as to things they didn't see, people seeing me jump in the truck with four people, people seeing me slapping girls.

The district court explained its reason for allowing the testimony after overruling defense counsel's objections for a third time:

> This is not prohibited comment on testimony of other witnesses. In the event that questions are asked of the witness about his feeling about the veracity of another witness I'd be somewhat more concerned, but if it's simply asking, as I believe it is here, prefatory question to follow up questions as to whether or not this witness has heard another witness testify in this courtroom, I'm going to overrule the objection.

b. Standard of Review and Applicable Law

We review the district court's decision to allow these questions for an abuse of discretion. *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006). If we decide that the district court abused its discretion, we must decide whether the errors preserved by objection were harmless. *Id.* An error is deemed harmless where "viewing the evidence as a whole, the error did not substantially influence the verdict or impair the fairness of the trial." *Medina v. People*, 114 P.3d 845, 857 (Colo. 2005). We review errors not

preserved by objection for plain error. *Hagos*, ¶ 14; *Liggett*, 135 P.3d at 733.

In *Liggett*, 135 P.3d at 732, the supreme court held that questions asking a witness to opine on the veracity of other witnesses are "categorically improper." The court concluded that such questions are "prejudicial, argumentative, and ultimately invade[] the province of the fact-finder," outweighing "any supposed probative value." *Id.*; *accord Davis*, ¶ 16.

Questions framed as "were they lying" are the quintessential prohibited questions, but questions that ask if another witness was "mistaken" are also improper. *Liggett*, 135 P.3d at 735 ("[T]he assertion that [the other witness] was mistaken was less damaging than the later questions calling for assertions that [the other witness] was lying. Regardless, these remarks were improper."). In contrast, a cross-examiner may ask questions that highlight discrepancies in testimony, so long as the questions do not compel the witness to comment on the accuracy of that other testimony. *Id.* at 732.

c. Analysis

i. Abuse of Discretion

First, we must determine whether the district court abused its discretion in allowing the questions at issue.

Defendant specifically challenges nineteen of the prosecutor's questions. We conclude that thirteen of these questions (italicized above) were at least arguably improper. The remaining questions merely highlighted discrepancies in the testimony without asking defendant to comment on the competing testimony. *See id.*; *see also United States v. Harris*, 471 F.3d 507, 512 (3d Cir. 2006) ("[I]t is often necessary on cross-examination to focus a witness on the differences and similarities between his testimony and that of another witness. This is permissible provided he is not asked to testify as to the veracity of the other witness."). Among the thirteen arguably improper questions, the court sustained an objection to one, and one was merely repeated after an objection. Thus, we focus on eleven arguably improper questions posed to defendant during his cross-examination.

The district court reasoned that the challenged questions were merely asking whether defendant had heard other testimony, and

did not directly ask defendant to evaluate other witnesses' veracity. We agree that these questions did not use "were they lying" or "were they mistaken" language, and that the invitation to comment on other testimony was often implied rather than direct.[19] However, the particular words the prosecutor used are not dispositive; the critical inquiry is whether the purpose of the questioning was to elicit comment on other witnesses' testimony. *See Wilson*, ¶ 43 (defendant's desired line of questioning sought "testimony that another witness . . .is or was being truthful or untruthful on a particular occasion," and would have been inadmissible); *People v. Conyac*, 2014 COA 8, ¶ 104 (same).

We will assume that the prosecutor asked defendant eleven improper questions. These questions arguably crossed the line: rather than highlighting discrepancies in testimony, they could be understood as intended to compel defendant to comment on other witnesses' veracity. *See Liggett*, 135 P.3d at 732. Given defendant's stated definition of a "snitch," asking defendant if certain witnesses

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[19] In some jurisdictions, such indirect questions on veracity are allowed. *See, e.g.*, *United States v. Gaines*, 170 F.3d 72, 82 (1st Cir. 1999) (questioning may be acceptable if it simply avoids the "'L' word").

were "snitches" was a shorthand way of asking whether they were lying. Asking if defendant had heard particular testimony and then following up with a question such as "Is that true?" also called for comment on that testimony. Consequently, we will assume that the district court abused its discretion when it allowed the prosecutor to ask these questions.

The People argue that the questions were proper because defense counsel opened the door to such inquiries during his direct examination by asking defendant to comment on Green's testimony, and because defendant said repeatedly on direct examination that he was telling the truth. *See Harris*, 471 F.3d at 512 ("[S]uch questions would obviously be proper if a defendant opened the door by testifying on direct that another witness was lying."); *see also* CRE 608(b). The supreme court has not decided whether the opening-the-door exception applies in this context. *See Liggett*, 135 P.3d at 732 n.2. We need not resolve that issue because, as discussed below, even assuming the exception does not apply in this context, and that the questions were therefore improper, any error does not warrant reversal.

ii. Harmless Error

We review four of the questions under the harmless error standard because they were preserved for review by contemporaneous objection.[20] These four questions are:

- *Is Jeremy Green a snitch?*
- *You've heard other witnesses who knew you both describe his relationship to you as like being your girlfriend. You heard that, did you not?*
- *She said that she did ask you why and you told her basically never mind or don't ask any questions. Is that true?*
- *Well, you heard your wife testify that that was Breath* [a nickname for Sir Mario Owens] *or Sir Mario Owens?*

We conclude that allowing these improper questions did not "substantially influence the verdict or impair the fairness of the trial." *See id.* at 733 (internal quotation marks omitted). We reach this conclusion for three reasons.

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[20] Defense counsel specifically objected to two questions. Defense counsel also attempted to lodge a continuing objection to questions that asked defendant to comment on other witnesses' veracity. The district court did not rule on the continuing objection, but we will treat the claims of error as to the two questions after the continuing objection as preserved. *See People v. Dunlap*, 975 P.2d 723, 745 n.15 (Colo. 1999).

First, the four questions made up a very small part of the defendant's cross-examination, which stretched over eighty transcript pages. *Cf. Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005) (in the context of closing argument, the pervasiveness of the improper comments is relevant to the harmfulness analysis); *see also United States v. Ramirez*, 537 F.3d 1075, 1086 (9th Cir. 2008) (error not reversible where the prosecutor's improper questions "about whether other witnesses were lying played a small part in the trial"); *Commonwealth v. Long*, 462 N.E.2d 330, 331 (Mass. App. Ct. 1984) (reversible error where the prosecutor had asked defendant more than 100 improper questions; contrasting cases where improper questioning was less pervasive).

Second, the form of the questions made them less potentially damaging. In *Liggett*, 135 P.3d at 735, the court noted that questions asking if another witness was "mistaken" are "less damaging" than asking if another witness is "lying." The prosecutor in this case never asked defendant if another witness was "lying," even though defendant accused people of telling lies. *See United States v. Gaines*, 170 F.3d 72, 82 (1st Cir. 1999) (no error where

prosecutor avoided the "'L' word"). Three of the questions asked "is that true?" or "did you hear?" That formulation is even less direct than asking if a certain witness was "mistaken." Only one question — "Is Jeremy Green a snitch?" — pitted one witness against another more directly, and even that question avoided the "L" word.

Third, defendant attacked the credibility of other witnesses even when unprovoked by the prosecutor. For example, in the following exchange, the prosecutor asked defendant about his use of the word "snitch" in a letter, and defendant turned the answer into an accusation against another witness:

> [Prosecutor:] What is a snitch?
>
> [Defendant:] Somebody, Jamar Johnson, who lie to get out of trouble.

The prosecutor's improper questions about which witnesses were snitches followed up on defendant's accusation.

At other points during cross-examination, the prosecutor asked defendant about factual allegations, but defendant responded by attacking other witnesses:

> [Prosecutor:] Did you put your hand over her face and shove her backwards?
>
> [Defendant:] Lie. No.

> [Prosecutor:] Did you get up a head of steam at one point and run into the crowd and deliberately shove your shoulder into another girl?
>
> [Defendant:] Another lie. No.

As discussed above, we do not decide that defendant's testimony opened the door to the prosecutor's improper questions. However, the harm of "were they lying" type questions is most potent when the prosecutor puts the defendant in the "no-win situation" of calling another witness or himself a liar. *See State v. Graves*, 668 N.W.2d 860, 872 (Iowa 2003). That sort of harm did not occur in this case because defendant had already called other witnesses liars; the prosecutor did not foist a "no-win situation" on him.

We conclude that because the improper questions were a small part of the cross-examination, the form of the questions was not particularly damaging, and defendant volunteered his opinion on other witnesses' veracity even without the improper questions, the errors did not substantially influence the verdict or impair the fairness of the trial. *See Medina*, 114 P.3d at 857.

For the same reasons, we conclude that the seven improper questions as to which no contemporaneous objection was made did not constitute plain error. *See Hagos*, ¶ 14.

2. Cross-Examination on Prior Conviction

Defendant contends that the district court erred by allowing the prosecutor, during cross-examination, to elicit details about a prior conviction. We conclude that the court did not abuse its discretion.

a. Additional Facts

Nine days after the Lowry Park shootings, police officers stopped defendant's vehicle for a noise violation. They searched his vehicle, discovering a .40 caliber semiautomatic pistol inside the driver's door panel and a BB gun under the driver's seat. Defendant was convicted of possession of a weapon by a previous offender (POWPO) for his possession of the .40 caliber pistol before the trial in this case began.

During cross-examination, over defense counsel's objection, the prosecutor asked defendant if he had been convicted of possessing a ".40 caliber real semiautomatic." Defendant said, "Correct." The prosecutor then asked defendant about the black-

and-silver BB gun (which was admitted into evidence in this case), and whether he had bought the BB gun because it looked like the nine millimeter he had used at Lowry Park.

b. Standard of Review and Applicable Law

We review a district court's evidentiary rulings for an abuse of discretion. *Yusem*, 210 P.3d at 463; *Munoz-Casteneda*, ¶ 7. A court abuses its discretion in admitting evidence if its decision was manifestly arbitrary, unreasonable, or unfair. *Valencia*, 257 P.3d at 1209. If the court abused its discretion, we will reverse only if the error substantially influenced the verdict or impaired the fairness of the trial. *Krutsinger*, 219 P.3d at 1063; *People v. Garcia*, 169 P.3d 223, 229 (Colo. App. 2007).

If a defendant chooses to testify, the prosecutor may use his prior felony convictions to impeach his credibility. § 13-90-101, C.R.S. 2014; *Candelaria v. People*, 177 Colo. 136, 140, 493 P.2d 355, 357 (1972); *People v. McGhee*, 677 P.2d 419, 423 (Colo. App. 1983). A prosecutor's inquiry into prior convictions on cross-examination of the defendant is typically limited to the name of the offense and a brief recital of the circumstances. *People v. Clark*, 214 P.3d 531, 539 (Colo. App. 2009). The scope of inquiry is

limited to ensure that evidence of the prior conviction will "not be used to illustrate that a defendant is of bad character and likely acted accordingly in the present case." *Id.* Although the scope of cross-examination is within the discretion of the court, when the court allows questioning on the details surrounding the prior conviction, those details must be relevant. CRE 401; *McGhee*, 677 P.2d at 423.

c. Analysis

Defendant argues that the court should not have allowed the prosecutor to exceed the typical scope of inquiry and elicit the detail that he had possessed a .40 caliber semiautomatic pistol, which, he contends, was irrelevant.

We conclude that, contrary to defendant's assertion, the scope of inquiry was properly limited. The prosecutor asked defendant the name of the offense and the type of weapon he possessed. Thus, the scope of inquiry was limited to a brief recital of the circumstances of a POWPO conviction. *See Clark*, 214 P.3d at 539. The fact of a prior conviction is relevant to the witness's credibility. § 13-90-101. We conclude that the court was within its discretion in allowing this depth of inquiry.

Even if we assume that eliciting the type of weapon defendant possessed was a detail that went beyond a brief recital of the circumstances, we conclude that the information was relevant for reasons other than propensity. The prosecution's evidence showed that defendant took steps to hide his involvement in the Lowry Park shootings, including discarding the gun he used that night. In the week after the shootings, defendant acquired a replacement gun (the .40 caliber semiautomatic) that was markedly different, along with a BB gun that, according to the prosecutor, looked like the gun he had used at Lowry Park. The argument was that this was a ploy to throw off investigators who would be looking for a suspect who possessed a black-and-silver nine millimeter. Thus, the fact that defendant possessed a .40 caliber semiautomatic was relevant, not to show that defendant was a bad person, but to show a specific plan to elude apprehension. Affording this evidence its maximum reasonable probative value, therefore, we also conclude that, to the extent the question exceeded a brief recital of the circumstances of the prior conviction, the court was within its discretion to deem this evidence relevant for nonimpeachment purposes. *See* CRE 401; *McGhee*, 677 P.2d at 423.

3. Closing Argument

Defendant contends that the prosecutor made improper arguments in closing, including: (1) telling jurors they had a civic duty to convict; (2) sharing a personal opinion that defendant was guilty; (3) appealing to fear; (4) denigrating the self-defense theory and defense counsel; (5) misstating the law regarding the element of deliberation; (6) misstating the law regarding reasonable use of force; (7) misstating the law regarding complicity liability; and (8) misstating the evidence regarding defendant's alleged threats. He also asserts that, cumulatively, the prosecutor's improper statements in closing argument are reversible error.

We agree that some of the prosecutor's statements were improper, but conclude that the improper statements do not require reversal.

a. Applicable Law and Standard of Review

A prosecutor, while free to strike hard blows, is not at liberty to strike foul ones. *Berger v. United States*, 295 U.S. 78, 88 (1935). Closing argument properly includes the facts in evidence and any reasonable inferences drawn therefrom; thus, advocates may explain the significance of evidence and relevant legal concepts.

Domingo-Gomez, 125 P.3d at 1048. Also, "a prosecutor has wide latitude in the language and presentation style used to obtain justice." *Id.* A reviewing court should give a prosecutor the benefit of the doubt where comments are ambiguous or merely inartful. *People v. McBride*, 228 P.3d 216, 221 (Colo. App. 2009). But a prosecutor must stay within ethical bounds, and "[e]xpressions of personal opinion, personal knowledge, or inflammatory comments violate these ethical standards." *Domingo-Gomez*, 125 P.3d at 1049. Prosecutors have a fundamental duty to avoid comments that could mislead or prejudice the jury. *Id.*; *McBride*, 228 P.3d at 221.

In reviewing a claim of prosecutorial misconduct, we engage in a two-step analysis. We must determine whether any of the prosecutor's remarks were improper under the totality of the circumstances and, if so, whether they warrant reversal. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

First, we evaluate whether the statements were improper. "Whether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion." *Domingo-Gomez*, 125 P.3d at 1049. We consider "the context of the argument as a whole and in light of the evidence before the jury."

People v. Samson, 2012 COA 167, ¶ 30. And we will not disturb the district court's rulings regarding the prosecutor's statements absent a showing of abuse of discretion. *People v. Castillo*, 2014 COA 140, ¶ 53; *People v. Strock*, 252 P.3d 1148, 1152 (Colo. App. 2010).

Second, we review the "combined prejudicial impact" of any improper statements to determine whether they require reversal under the applicable standard. *Domingo-Gomez*, 125 P.3d at 1053; *see also Wend*, 235 P.3d at 1098 ("We focus on the cumulative effect of the prosecutor's statements . . . ."). In this case, defense counsel did not object to any of the statements at issue; thus, we review for plain error. *Wend*, 235 P.3d at 1097; *Domingo-Gomez*, 125 P.3d at 1053.[21]

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[21] Defendant argues that we should apply constitutional harmless error review, despite the lack of objection, because the prosecutor's arguments generally violated his rights to due process and an impartial jury. Controlling case law forecloses this possibility. "Although any prosecutorial error can implicitly affect a defendant's right to a fair trial . . . . [we] hold that only errors that specifically and directly offend a defendant's constitutional rights are 'constitutional' in nature." *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010) (citations omitted) (for example, improper comments on a defendant's constitutional right not to testify, right to be tried by a jury, or right to post-arrest silence are constitutional error). However, "expressions of personal opinion or inflammatory comments . . . do[] not rise to the level of constitutional error." *Crider v. People*, 186 P.3d 39, 42 (Colo. 2008). In any event, we

b. Whether Statements Were Improper

i. Civic Duty Argument

Defendant contends that the district court abused its discretion by allowing the prosecutor to tell jurors that it was their civic duty to convict. We are not persuaded.

The prosecutor told jurors that a "small army" of law enforcement officials had done their duty investigating the Lowry Park shootings, witnesses had done their duty by testifying, and that jurors had done their duty by serving. The prosecutor then said:

> The evidence, I submit, has proven the defendant to be guilty of each of the crimes he's charged with, it has disproven his claim, the absurd claim of self-defense or defense of others.
>
> As the instructions of law tell you, with each element of each crime having been proven, it's now your final duty to hold him accountable by returning verdicts of guilty . . . ."

It is improper for a prosecutor to tell jurors that it is their civic duty to return a guilty verdict; such an argument implies that jurors are part of the prosecutorial team rather impartial arbiters of

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review even a constitutional error for plain error if there was no timely objection. *Hagos v. People*, 2012 CO 63, ¶ 14.

the evidence. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 6, 20 (1985) (improper for prosecutor to express personal opinion of the defendant's guilt and to tell jurors that they would fail in "doing your job" unless they convicted); *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990) (improper to exhort jurors that they could only do their job by returning a certain verdict, "regardless of [their] duty to weigh the evidence and follow the court's instructions on the law").

But in this case the prosecutor did not tell jurors that it was their civic duty to convict defendant regardless of the evidence. The prosecutor told jurors that, because the evidence had proven each element of each crime, it was their duty under the law to convict. The prosecutor directly referenced the evidence and the "instructions of law" as the source of this duty. Thus, the argument in this case is distinguishable from those in cases where the prosecutor exhorted jurors that it was their duty to convict — without regard to the evidence — because they are a de facto part of the prosecution team. *See Solis v. State*, 315 P.3d 622, 635 (Wyo. 2013) ("[W]e have . . . concluded that asking the jury to hold the appellant responsible for the crime because the evidence shows you

he is guilty, is not the same as telling the jury that it has a duty to convict the defendant." (internal quotation marks omitted)); *see also Henwood v. People*, 57 Colo. 544, 569, 143 P. 373, 383 (1914) ("[A]ppealing to the jury to do their duty as the law provides, and why they should discharge their duty, was a proper matter for the district attorney to urge upon their attention."). The district court did not abuse its discretion by allowing this argument.

ii. Personal Opinion

Defendant contends that the district court abused its discretion by allowing the prosecutor to express a personal opinion as to defendant's guilt. We are not persuaded.

During closing argument the prosecutor said:

> How do you go about making that kind of a decision, especially when you have such two different conflicting arguments being presented to you because the People are telling you, I am telling you the evidence has proven beyond a reasonable doubt that [defendant] is guilty . . . . The defense lawyers told you in their opening statement, I suspect they may say something similar in their closing argument, that you should not and you may not hold him accountable at all.

Defendant argues that the phrase "I am telling you" was improper personal opinion. We conclude that this was not an

improper expression of personal opinion. Read in context, the prosecutor was simply presenting the two conflicting positions. In addition, the prosecutor did not say that he believed defendant was guilty; rather, he said that the evidence established defendant's guilt.

The prosecutor's statement did not present the risks commonly associated with improper personal opinion: there was no suggestion of personal knowledge of matters outside the evidence presented at trial or substitution of the prosecutor's opinion for evidence. *See Domingo-Gomez*, 125 P.3d at 1051-52 (finding opinion improper where it is not grounded in the evidence). The content of the sentence — "the evidence has proven beyond a reasonable doubt that [defendant] is guilty" — was a reasonable inference drawn from the evidence. *People v. Villa*, 240 P.3d 343, 358 (Colo. App. 2009) ("We read the prosecutor's statement asking the jury to '[f]ind [defendant] guilty, because he is guilty' as simply asking the jury to make a reasonable inference that defendant was guilty based on the evidence presented at trial."); *People v. Merchant*, 983 P.2d 108, 115 (Colo. App. 1999). Thus, the district court did not abuse its discretion in allowing this argument.

iii. Appeal to Fear

Defendant contends that the district court abused its discretion by allowing the prosecutor to make an appeal to the fears of jurors. Again, we are not persuaded.

During rebuttal closing, the prosecutor said:

> [Defense counsel] has told you that he is scared, he is scared that you'll convict [defendant] based on speculation. [Defense counsel] is correct. The verdict that you render in this case must be based on the evidence and when [defendant] tells you he's arguing in self-defense, that is contrary to the evidence. How scary is it to think that [defendant] could get away with murder based on what he told you from the stand.[22]

Defendant argues that the prosecutor's argument was improper because it suggested that acquitting him was a "scary" idea. The prosecutor's argument was inartful to the extent that it implied that it is scary to acquit a defendant. And, viewed in isolation, the final sentence might be improper. However, viewed in context, we interpret the prosecutor's argument to be grounded in the evidence. The prosecutor repeated defense counsel's fear that the jury would convict based on speculation, reiterated that the

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[22] Defendant specifically challenges the phrase "get away with murder" as a denigration of the defense; thus, we discuss it below.

verdict must be based on the evidence, argued that defendant's testimony was contrary to the evidence, and then argued that the real fear should be acquitting based on testimony that was contrary to the evidence.

Therefore, the prosecutor moored this argument to the evidence and reasonable inferences therefrom, and did not mislead jurors into thinking they should render a verdict based on fear for personal safety rather than an impartial weighing of the evidence. *See Domingo-Gomez*, 125 P.3d at 1048-49; *People v. Williams*, 996 P.2d 237, 243-44 (Colo. App. 1999) (the prosecutor's statement that "if you acquit, you let another drug dealer back out on the streets" resulted from "[r]easonable inferences from the evidence"). While we caution against use of the word "scary" because it may give rise to ambiguous implications, we are cognizant that prosecutors must be given "wide latitude" in use of language, and that we should give prosecutors the benefit of the doubt when language is merely ambiguous or inartful. *Domingo-Gomez*, 125 P.3d at 1048; *McBride*, 228 P.3d at 221.

iv. Denigrated Defense

We also reject defendant's contention that the district court abused its discretion by allowing the prosecutor to denigrate the defense. The prosecutor did not do so.

Defendant argues that the prosecutor denigrated the defense in three ways during closing argument. First, the prosecutor characterized defendant's self-defense argument as "nonsense," "ridiculous," and "absurd." Second, the prosecutor argued that defendant's letter to Owens was telling "because these are the words the defendant chose to write uninfluenced by any question from any lawyer." Third, the prosecutor described defendant's testimony and claim of self-defense as an attempt to "get away with murder."

We conclude that the prosecutor's descriptive terms for defendant's claim of self-defense were not improper. A prosecutor may comment on the evidence, including the lack of evidence supporting a defendant's theory of the case. *People v. Iversen*, 2013 COA 40, ¶ 37; *People v. Reeves*, 252 P.3d 1137, 1141 (Colo. App. 2010). So long as the prosecutor comments on the strength of the evidence presented — as opposed to implying personal knowledge of

matters outside the evidence — words like "absurd," "nonsense," and "ridiculous" do not make the argument improper. *See Iversen*, ¶ 37 (calling defense theory "laughable" not improper); *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010) (calling defense theory "absurd" not improper); *People v. Ramirez*, 997 P.2d 1200, 1211 (Colo. App. 1999) (characterizing defense argument as "blowing smoke" not improper), *aff'd*, 43 P.3d 611 (Colo. 2001).

Next, we consider defendant's second and third claims of impropriety together, because they were part of the same argument in closing.

During defendant's direct testimony, defense counsel introduced into evidence the letter that defendant had written to Owens while incarcerated, which authorities intercepted. Defendant testified that he wanted to tell Owens he was not a snitch, and that reciting his version of the events in the letter was not a plan to make their stories match. Defense counsel, during closing, argued that the letter stated that defendant planned to take the stand and tell the truth: "And, again, you can interpret it in a way that says, oh, he's concocting this. Well, that's not what it

says. It says I have to get up there and tell these folks what happened . . . ."

The prosecutor placed significance on the letter in rebuttal closing, arguing that it was important because it showed defendant's unfiltered thoughts and revealed that defendant had colluded with Owens to concoct a self-defense claim.

> [Defense counsel] indicated that in this letter he said I'm going to tell the truth. Not so. Not once in this letter does he say, Dear Sir Mario, I'm going to tell the truth. What he says in this letter is my lawyers think I should get on the stand. I am claiming self-defense. Claiming is the verb that he chose.
>
> The reason this letter is so interesting . . . is because these are the words the defendant chose to write uninfluenced by any question from any lawyer.

The prosecutor described what defendant said in his letter to Owens:

> I want to get on the stand because this is the only way I can win, this is the only way I can get away with murder.
>
> And you already know he's willing to do things to get away with murder [referring to efforts to hide his involvement].
>
> He's colluding with [Owens] so that he can get away with murder.

> How scary is it to think that [defendant] could get away with murder based on what he told you from the stand. So consider what he said, consider what else you know from other sources, and you will see that he is not to be relied upon and in fact he is guilty . . . .

We conclude that, considered in context, the prosecutor's arguments were not improper. Counsel argued over the meaning of a specific piece of evidence: defense counsel argued that the letter supported defendant's truthfulness, whereas the prosecutor argued that the letter undermined defendant's credibility. A prosecutor may argue that the evidence shows that a defendant's testimony should not be believed, so long as the prosecutor does not imply personal knowledge, assert a personal opinion about defendant's credibility, or use inflammatory language such as "lie." *Domingo-Gomez*, 125 P.3d at 1048-49.

The prosecutor did not imply personal knowledge, but referred only to a piece of evidence that jurors could evaluate.

The prosecutor did not assert a personal opinion, but argued that the letter showed defendant's lack of truthfulness. We emphasize that the implication that defendant concocted a self-defense story was proper only because it sprung directly from

defendant's letter. We distinguish this situation from that where a prosecutor argues that asserting the defense is, in a general sense, a miscarriage of justice. *Cf. People v. Scheidt*, 186 Colo. 142, 145, 526 P.2d 300, 302 (1974) (improper for prosecutor to characterize the defendant's exercise of a mental condition defense as a "miscarriage of justice"). It was also proper for the prosecutor to argue that jurors should attribute significance to evidence that showed defendant speaking freely in his own words. *See Domingo-Gomez*, 125 P.3d at 1048 (proper to argue the significance of pieces of evidence).

And the prosecutor did not use inflammatory language such as "lie," which is prohibited because of its rhetorical force and its insinuation of personal opinion. *See Wend*, 235 P.3d at 1096. In *Domingo-Gomez*, the supreme court held that accusing the defendant of "lying" was improper, but that saying he was "not truthful" was acceptable in context, because the prosecutor's comments "came while the prosecutor recounted the defense's theory of the events and pointed to inconsistencies in the testimony." 125 P.3d at 1051. Using the phrase "get away with murder" is not improper where the prosecutor argues that acquittal

would allow the defendant to get away with murder because the evidence shows that he is guilty. *See, e.g.*, *People v. Lane*, 2014 WL 5882246, ___ N.W.2d ___, ___ (Mich. Ct. App. Nov. 13, 2014); *State v. McNeil*, 313 P.3d 48, 57 (Idaho Ct. App. 2013). That logic applies with even more force here, because the prosecutor argued that a specific piece of evidence revealed defendant's plan to "get away with murder."

Thus, we conclude that, the district court did not abuse its discretion by allowing the prosecutor's argument.

v. Misstated Law on Deliberation

Defendant contends that the district court abused its discretion by allowing the prosecutor to describe deliberation as taking only a "heart beat." We agree.

During voir dire, the prosecutor told jurors that "a person can act after deliberation in a heart beat." During closing argument, the prosecutor again told jurors that people make "very important decisions in a heart beat and it's after deliberation after the exercise of judgment and reflection."

A prosecutor may not misstate the law. *People v. Grant*, 174 P.3d 798, 810 (Colo. App. 2007). Although deliberation need not

take long, the prosecutor's comments that deliberation takes only a heartbeat were similar to the formulation "that premeditation occurs as fast as one thought follows another," which the supreme court has rejected. *People v. Sneed*, 183 Colo. 96, 100, 514 P.2d 776, 778 (1973). Hence, we conclude that these comments were improper. *See McBride*, 228 P.3d at 225 (prosecutor's statement that deliberation takes only "a second" was improper); *Grant*, 174 P.3d at 810 (prosecutor's statement that deliberation takes only the time for "one thought to follow another" was improper); *People v. Cevallos-Acosta*, 140 P.3d 116, 123 (Colo. App. 2005) (same as *Grant*); *People v. Caldwell*, 43 P.3d 663, 672 (Colo. App. 2001) (same as *Grant*). Therefore, the district court abused its discretion by allowing this improper description of deliberation.

vi. Misstated Law on Use of Force

Defendant contends that the district court abused its discretion by allowing the prosecutor to misstate the law regarding reasonable use of force. We do not agree with this contention.

During rebuttal closing the prosecutor said:

> When you look at the self-defense instruction, because the defendant is claiming self-defense, you have to consider if what he does is

> reasonable. In light of that, how is taking out a gun and shooting somebody a reasonable use of force to try and protect somebody or protect yourself?

Defendant argues that this statement implied that shooting an attacker is, per se, an unreasonable use of force. We disagree with that characterization. *McBride*, 228 P.3d at 221 (reviewing court should give the prosecutor the benefit of the doubt where a statement is ambiguous). Defendant testified that he shot Bell to protect Owens. The prosecutor argued in closing that the evidence showed that defendant was not actually threatened, and the statement defendant challenges was part of that argument. The prosecutor's argument that it was not a reasonable use of force was tied to the evidence in this case — including that Owens and defendant were the only ones armed — and stated a reasonable inference which could be drawn from that evidence. *See Domingo-Gomez*, 125 P.3d at 1048.

vii. Misstated Law on Complicity

We also reject defendant's contention that the district court erred by allowing the prosecutor to misstate the law regarding complicity.

The prosecution's complicity theory was that defendant communicated to Owens that he wanted to kill people and then Owens helped him carry out that plan, with the duo shooting four victims. The prosecutor explained the concept of complicity during opening statement and closing argument, arguing several times that the two were "acting together" and that defendant was responsible for Owens's actions.

Defendant argues that these arguments reduced complicity liability to a single element of "acting together" (without regard to specific acts or intent), and implied that Owens's guilt established defendant's guilt. A general description of complicity liability as "acting together" to commit crimes does not mislead the jury. In fact, it roughly corresponds to language our cases have used to describe complicity. *See People v. Elie*, 148 P.3d 359, 365 (Colo. App. 2006) ("It is only necessary that the acts of the complicitor and the other actor or actors, together, constitute all acts necessary to complete the underlying offense."). Contrary to defendant's argument, the prosecutor also addressed specific elements of complicity during closing argument. (For example: "The defendant knew Owens intended to shoot somebody . . . .") The prosecutor

was not required to recite the elements of complicity liability each time the concept was discussed. *See Castillo*, ¶ 66. Likewise, the prosecutor's argument to jurors that defendant was guilty of Owens's acts under the complicity theory did not misstate the law. We conclude that, considered in context, the prosecutor's arguments were fair comment on the evidence and the relevant legal concepts. *See Domingo-Gomez*, 125 P.3d at 1048.

viii. Misstated Evidence on Defendant's Threats

Nor do we agree with defendant's contention that the district court abused its discretion by allowing the prosecutor to misstate the evidence regarding his alleged threats to kill everyone.

The prosecutor said during closing argument that defendant's threat to kill everyone was not an "idle boast" because he knew Owens was there, armed, and ready to do his bidding.

Defendant argues that there was no evidence that Owens actually heard his threats and, thus, the prosecutor's argument was improper. However, Green said during his police interview, which was admitted into evidence, that defendant repeatedly threatened to kill everyone during the altercation in the parking lot, when Owens was nearby. Defendant, during direct examination,

said that although he did not remember making those threats, he was yelling and Owens could have heard what he said. ("He could have heard. It was loud.") Defendant seems to argue that, because Green did not specifically assert that the threats were a communication to Owens, the prosecutor misstated the evidence. However, we conclude that the prosecutor's argument that the threats were also meant as a communication to Owens was a reasonable evidentiary inference. *See id.*

c. Whether Improper Statements Require Reversal

We conclude that the "combined prejudicial impact" of the improper statements does not require reversal under plain error review. *Id.* at 1053.[23]

Plain error is error that is both obvious and substantial, and we "reverse under plain error review only if the error 'so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction.'" *Hagos*, ¶ 14 (quoting in part *Miller*, 113 P.3d at 750). We consider

[23] In his briefing, defendant separately argues cumulative error based on the prosecutor's comments. The proper standard of review requires us to weigh cumulatively all improper statements in the prosecutor's arguments; thus, defendant's cumulative error argument is subsumed in our prejudice analysis.

factors such as the exact language used, the nature of the misconduct, the degree of prejudice associated with the misconduct, and the context of the statements. *Wend*, 235 P.3d at 1098. "Only prosecutorial misconduct which is 'flagrantly, glaringly, or tremendously improper' warrants reversal" under the plain error standard. *Domingo-Gomez*, 125 P.3d at 1053 (quoting in part *People v. Avila*, 944 P.2d 673, 676 (Colo. App. 1997)). Even under this deferential standard, however, it is our responsibility to avoid a "miscarriage of justice" and ensure fundamental fairness. *Wend*, 235 P.3d at 1097-98.

We have determined that the prosecutor twice misstated the meaning of deliberation by saying that deliberation takes only a "heart beat." These comments did not substantially prejudice defendant, for two reasons.

First, the jurors received correct instruction which mitigated the effect of these comments. The court correctly instructed the jurors as to the definition of deliberation, in Instruction Number 12.[24] The court also instructed the jurors (Instruction Number 1)

[24] "'After deliberation' means not only intentionally, but, also, that the decision to commit the act has been made after the exercise of

that, "It is my job to decide what rules of law apply to the case. While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them." We presume that the jurors followed the court's instructions. *See People v. Moody*, 676 P.2d 691, 697 (Colo. 1984); *Cevallos-Acosta*, 140 P.3d at 123. Along with the improper comments, the prosecutor repeated correct aspects of the meaning of deliberation during closing, saying it must be "after the exercise of judgment and reflection" and not be "hasty or impulsive." *See Grant*, 174 P.3d at 811 (prosecutor's improper definition of deliberation not plain error where it happened only once and the jury instructions correctly defined deliberation); *Cevallos-Acosta*, 140 P.3d at 123 (prosecutor's improper definition of deliberation during voir dire and summation not plain error where jury instructions correctly defined the concept); *Caldwell*, 43 P.3d at 672 (prosecutor's improper definition of deliberation not plain error where it happened once, prosecutor also argued that deliberation required time to make a decision, and court correctly defined deliberation in instructions).

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reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner."

Second, the prosecutor did not argue that deliberation had actually occurred in a heart beat in this case. Rather, the prosecutor argued that, "here there was plenty of time from the time [defendant] saying [sic], I'll kill all you and the time [Vann] died."

The misstatements here did not rise to the level of the prosecutorial misconduct in those rare cases where our courts have reversed under plain error review. *See Wend*, 235 P.3d at 1098-99 (plain error where prosecutor's accusations that the defendant was "lying" permeated the opening and closing statements); *McBride*, 228 P.3d at 225-26 (plain error where a prosecutor made pervasive "liar" arguments and inflammatory personal attacks, and also argued an incorrect definition of deliberation).

The comments here were not pervasive; did not include inflammatory language; were offset by correct instructions of law; and did not ultimately impact an issue to be decided by the jury. *See Domingo-Gomez*, 125 P.3d at 1054-55; *Villa*, 240 P.3d at 358. In addition, the fact that the jurors acquitted defendant on two counts shows that they were not excited to "irrational behavior," and instead "could fairly and properly weigh and evaluate this evidence." *People v. Braley*, 879 P.2d 410, 414-15 (Colo. App.

1993).[25] We are not persuaded that the prosecutor's two improper comments denied defendant a fair trial.

4. Propensity Evidence

Defendant contends that the district court reversibly erred by denying his motion for a mistrial after the prosecutor introduced propensity evidence in violation of a court order. We are not persuaded.

a. Procedural Facts

Before trial, defendant filed a motion in limine seeking to exclude several types of evidence, including "[a]ny evidence from any witness that the defendant possessed a weapon at any time prior to the offense in this case." The court granted that portion of the motion.

At trial, during the direct examination of Jamar Johnson, the witness said he "assumed" defendant was armed at Lowry Park because he "saw the bulge in his shirt." Then the following exchange occurred:

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[25] For all of the same reasons, we would also conclude that the statements were harmless, and harmless beyond a reasonable doubt, were either of those standards of review to apply.

> [Prosecutor:] Based upon the knowledge of the acquaintance that you had with [defendant] and Mr. Owens, did you know them to carry guns?
>
> [Johnson:] Yeah.
>
> [Defense counsel:] Objection. That's in violation of a prior court ruling. I would move that the answer be stricken.
>
> . . .
>
> [Prosecutor:] I'm aware of no such order.
>
> [Court:] I will overrule the objection and allow the witness's response to stand.

The prosecutor then asked Johnson how defendant would typically carry his gun.

After Johnson's testimony, outside the hearing of the jury, defense counsel showed the court its ruling to exclude evidence of defendant's prior gun possession. The court acknowledged the order and heard argument on the appropriate remedy.

Defense counsel argued that the sanction should be a mistrial, or striking Johnson's entire testimony, or dismissing the charge of first degree murder. A drastic remedy was appropriate, defense counsel argued, "in a case such as this where whether or not [defendant] was armed with a gun is such an integral issue." The

prosecutor argued that he had not remembered the order and had not willfully violated it, and that instructing the jury to disregard the statement would be a sufficient remedy. The prosecutor also argued that, despite the order, the evidence was relevant and did not unduly prejudice defendant.

The court ruled that the prosecutor had violated the order, but had not done so willfully. The court further ruled that a sanction was appropriate. Relying on *Vigil v. People*, 731 P.2d 713 (Colo. 1987), the court reasoned that a curative instruction was a sufficient remedy, and offered to give the curative instruction to the jury immediately or with its instruction packet. Defense counsel declined the curative instruction.

b. Standard of Review and Applicable Law

We review a district court's denial of a motion for a mistrial for an abuse of discretion. *Bloom v. People*, 185 P.3d 797, 807 (Colo. 2008), *superseded by statute on other grounds as stated in People in Interest of W.P.*, 2013 CO 11; *People v. Pernell*, 2014 COA 157, ¶ 24. If we decide that the court abused its discretion, we must determine whether the error was harmless. Crim. P. 52; *Pernell*, ¶ 26.

"A mistrial is a drastic remedy that is warranted only when the prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means." *People v. Dore*, 997 P.2d 1214, 1221 (Colo. App. 1999); *accord People v. Cousins*, 181 P.3d 365, 373 (Colo. App. 2007). In deciding whether a mistrial is warranted after inadmissible character evidence has been presented to the jury, a court should consider the nature of the evidence and the value of a curative instruction. *People v. Vigil*, 718 P.2d 496, 505 (Colo. 1986); *People v. Everett*, 250 P.3d 649, 662 (Colo. App. 2010). A curative instruction ordinarily suffices unless the inadmissible evidence "is so highly prejudicial" that "it is conceivable that but for its exposure, the jury may not have found the defendant guilty." *People v. Goldsberry*, 181 Colo. 406, 410, 509 P.2d 801, 803 (1973); *accord Everett*, 250 P.3d at 663.

c. Analysis

First, we consider the nature of the evidence presented to the jury. Defendant argues that evidence of his prior gun possession was inadmissible character evidence, as indicated by the pretrial

order.[26] We agree that the evidence was inadmissible pursuant to the pretrial order, but we disagree that the evidence was actually forbidden by CRE 404(b).

Courts use the four-part *Spoto* test to analyze whether evidence of other acts is admissible under CRE 404(b). The test requires the party offering the evidence to show that (1) the other act evidence relates to a material fact; (2) the evidence is logically relevant under CRE 401; (3) the logical relevance of the other act evidence is independent of the impermissible inference that the crime was a product of the defendant's bad character; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990); *People v. Brown*, 2014 COA 130, ¶ 9.

Defendant argues that the gun-carrying evidence failed the third prong of *Spoto* because its relevance was inseparable from the inference that he was more likely to commit the crime because of his bad character. But the evidence was not presented to show that

[26] The People respond that the evidence did not even fall within the ambit of character evidence governed by CRE 404(b), because it was vague and because carrying a gun is not a bad or illegal act. We will assume, without deciding, that Rule 404(b) applies.

defendant often carried a gun and, therefore, had a bad character and, thus, committed the crimes. Once Johnson testified that he assumed defendant was armed because of the bulge in his shirt, it was logical to ask why he would make such an assumption. The prosecutor's questions — Did defendant often carry a gun? How did he carry it? — were limited to exploring why Johnson believed that defendant was armed at Lowry Park.

The contested evidence tended to show that defendant was armed when the conflict began, which, the prosecutor argued, tended to prove intent and rebut defendant's assertion of self-defense by showing that defendant's threat to kill people was not an idle one. *See* CRE 404(b) (evidence of prior acts is "admissible for other purposes, such as proof of . . . intent"). The relevance was independent of any inference that defendant carried a gun often and, thus, that he likely committed the crimes on this occasion. *See People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994) ("The third prong of the *Spoto* test does not demand the absence of the inference but merely requires that the proffered evidence be logically relevant independent of that inference."); *People v. Foster*, 2013 COA 85, ¶¶ 15-16. Therefore, we conclude that the gun-

carrying evidence was not barred by CRE 404(b). *Cf. People v. Willner*, 879 P.2d 19, 26-27 (Colo. 1994) (the defendant's previous use of firearms was admissible to prove intent after deliberation).

We further conclude that, even had it been inadmissible under CRE 404(b), the gun-carrying evidence was not "highly prejudicial" to defendant. *Goldsberry*, 181 Colo. at 410, 509 P.2d at 803. The evidence of defendant's gun-carrying habits was vague and brief, and did not necessarily implicate bad character. *See People v. Krueger*, 2012 COA 80, ¶ 72 (prejudice mitigated where witness made a "single, brief reference" to inadmissible evidence). Defense counsel argued to the district court that defendant was prejudiced because whether he was armed was an integral issue. But that issue was not contested at trial — throughout the trial, defendant conceded that he had been armed and had shot Bell. Neither was any argument in closing premised on the fact that defendant habitually carried a gun. The prosecutor argued in closing that being armed that night at Lowry Park might have emboldened defendant to "behave badly," but did not mention any previous incidents or habits. Other than a general assertion that evidence of a defendant's "past possession of a gun in a gun case is immensely

prejudicial," defendant does not explain how this evidence prejudiced him in this case. "Speculation of prejudice is insufficient to warrant reversal of a trial court's denial of a motion for mistrial." *People v. Ned*, 923 P.2d 271, 275 (Colo. App. 1996).

Because the evidence was not so highly prejudicial that "it is conceivable that but for its exposure, the jury may not have found the defendant guilty," a curative instruction would have sufficed. *See Goldsberry*, 181 Colo. at 410, 509 P.2d at 803. The district court offered to give a curative instruction like that in *Vigil*, 731 P.2d at 714 ("Such evidence is to be treated as if you had never heard it."). That remedy was sufficient, regardless of the fact that defendant's counsel declined the curative instruction. *See Krueger*, ¶ 72; *see also People v. Lovato*, 2014 COA 113, ¶¶ 70-72 (any potential prejudice was cured by the court's instruction to the jury to disregard the evidence); *People v. Shreck*, 107 P.3d 1048, 1060 (Colo. App. 2004) (denial of mistrial motion for a single inappropriate remark proper where the defendant declined a curative instruction).

Consequently, we conclude that the court did not abuse its discretion by denying the motion for a mistrial based on Johnson's testimony that defendant often carried a gun in his waistband.

5. Disclosure

Defendant next contends that the district court abused its discretion by not enforcing the prosecution's discovery obligations. We find no abuse of discretion.

About a month before trial, defendant's counsel moved for a continuance to obtain additional witness addresses. The prosecutor responded that all known witness information had been disclosed, and that any newly discovered information would be timely disclosed. The People maintain on appeal that all the information defendant sought was eventually provided to him. Defendant denies this, but does not specify which information he sought that was not ultimately disclosed.

The district court has broad discretion in determining the proper sanction for a Crim. P. 16 violation. *Cevallos-Acosta*, 140 P.3d at 125. We review a court's ruling on discovery sanctions for an abuse that discretion, and we will not disturb the court's ruling unless it was manifestly arbitrary, unreasonable, or unfair. *People*

v. Lee, 18 P.3d 192, 196 (Colo. 2001); *People v. Zadra*, 2013 COA 140, ¶ 14 (*cert. granted in part on other grounds* Sept. 29, 2014). "Failure to comply with discovery rules is not reversible error absent a demonstration of prejudice to the defendant." *Salazar v. People*, 870 P.2d 1215, 1220 (Colo. 1994).[27]

Defendant argues generally that the prosecution refused to provide "accurate, current contact information and criminal histories." This lack of information, he argues, impaired his ability to impeach prosecution witnesses. But defendant does not identify which witnesses he has in mind, the exact information that was withheld, or the specific prejudice to his case. The court did not find, and defendant does not identify, any discovery violations. Thus, it is not clear that any sanction was appropriate. Further, we are left to speculate as to the unspecified information defendant was denied regarding unspecified witnesses for an unspecified effect on the outcome of the case. We cannot find that the district court abused its discretion because defendant has not demonstrated a

[27] The parties disagree as to whether this issue is preserved for appeal. The People argue that, whereas defendant requested additional information, he never argued that alleged discovery violations denied him a fair trial. We need not resolve this dispute.

discovery violation or alleged or demonstrated any specific prejudice. *See id.*[28]

6. Cumulative Error

Defendant contends that the cumulative effect of the alleged prosecutorial improprieties discussed above require reversal. We disagree.

"[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal is required." *People v. Roy*, 723 P.2d 1345, 1349 (Colo.1986). However, "[a] conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant's right to a fair trial." *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007).

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[28] Discovery was complicated in this case because of defendant's threats and violence against prosecution witnesses before trial. The supreme court later held, in the context of the post-conviction proceedings for defendant's subsequent death penalty case, that the defense was not entitled to all witness addresses. *People v. Ray*, 252 P.3d 1042, 1049 (Colo. 2011) ("Given the uniquely alarming circumstances of this case, where Ray killed both a prosecution witness and an innocent bystander, we hold that the trial court abused its discretion by ordering disclosure of the witnesses' addresses upon a minimal showing of materiality.").

In light of all the circumstances, we conclude that the cumulative effect of the prosecutor's improper questions asking defendant to comment on witness veracity, improper description of deliberation in closing argument, and inadvertent violation of a court order excluding defendant's habit of carrying a gun did not deprive defendant of his right to receive a fair trial.

F. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support each of his convictions.

We review de novo challenges to the sufficiency of the evidence. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005); *Randell*, ¶ 30. We must determine whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt. *People v. Roggow*, 2013 CO 70, ¶ 13; *People v. Sanchez*, 253 P.3d 1260, 1262 (Colo. App. 2010). The jury is the sole arbiter of the credibility of witnesses and the weight to be accorded to conflicting evidence.

People v. Quick, 713 P.2d 1282, 1293 (Colo. 1986); *People v. Graybeal*, 155 P.3d 614, 620 (Colo. App. 2007).

1. Intent to Kill After Deliberation

Defendant first contends that the evidence was insufficient to show that he acted with intent to kill after deliberation as to either Bell or Marshall-Fields; such intent was an element of the attempted murder charges.

A charge of first degree attempted murder requires the prosecution to prove the same mental state necessary to prove first degree murder. First degree murder is a specific intent crime; the prosecution must prove not only that the defendant intended to cause the death of another person, but that he acted after deliberation. § 18-3-102(1)(a), C.R.S. 2014. A defendant acts intentionally when his conscious objective is to cause the specific result proscribed by the statute defining the offense, which here is the death of another person. § 18-1-501(5), C.R.S. 2014 (defining intent); § 18-3-102(1)(a). The jury may infer intent to cause the natural and probable consequences of unlawful voluntary acts, considering the defendant's conduct and surrounding circumstances. *People v. Madison*, 176 P.3d 793, 798 (Colo. App.

2007). The element of deliberation requires proof that the defendant decided to commit the act "after the exercise of reflection and judgment"; thus, an "act committed after deliberation is never one which has been committed in a hasty or impulsive manner." § 18-3-101(3), C.R.S. 2014. Yet, "the length of time required for deliberation need not be long." *People v. Bartowsheski*, 661 P.2d 235, 242 (Colo. 1983) (explaining that deliberation in the murder context "requires that a design to kill precede the killing"). The element of deliberation, like intent, can rarely be proven other than through circumstantial or indirect evidence. *People v. Dist. Court*, 779 P.2d 385, 388 (Colo. 1989). Such evidence may include the use of a deadly weapon, the manner in which it was used, and the existence of hostility between the accused and the victim. *Id.*

We first consider the evidence of defendant's intent to kill. The evidence allowed the jury to find that defendant used a gun to shoot both Bell and Marshall-Fields multiple times at close range. He shot them after hostility with them and their friends, and after threatening to kill them. Defendant admits that he shot Bell, but argues that he only meant to stop him from beating Owens, not to kill him. In essence, he asks us to weigh conflicting evidence,

which we will not do. Because the natural and probable consequence of shooting someone multiple times at close range is that person's death, the jury could therefore infer defendant's intent to kill. *See Madison*, 176 P.3d at 798; *Caldwell*, 43 P.3d at 673 (holding that two gunshots fired at victim at close range was sufficient evidence of intent to kill). Thus, we conclude that the evidence was sufficient to show to a reasonable juror's satisfaction that defendant intended to kill Bell and Marshall-Fields.[29]

The evidence also allowed the jury to find that defendant exercised reflection and judgment before shooting Bell and

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[29] Defendant also contends that the evidence was insufficient to show that he intended to seriously injure Bell and Marshall-Fields, a required element of his first degree assault convictions. *See* § 18-3-202(1)(a), C.R.S. 2014. We conclude that the evidence that supports the conclusion that defendant had the specific intent to kill the two victims also supports the conclusion that he simultaneously intended to seriously injure them. *See* § 18-1-901(3)(p), C.R.S. 2014 (serious bodily injury means an injury which "involves a substantial risk of death"); *People v. McDavis*, 469 N.Y.S.2d 508, 510 (N.Y. App. Div. 1983) (holding that the same facts "provided sufficient evidence to permit the jury to infer that the defendant intended not only to injure the victim, but also to cause her death"); *see also People v. Sanchez*, 253 P.3d 1260, 1264 (Colo. App. 2010) ("[D]efendant could have possessed the intent to cause death, serious bodily harm, and bodily harm at the same time."); *People v. Gonzales*, 926 P.2d 153, 155 (Colo. App. 1996) ("[I]ntent to cause serious bodily injury is not necessarily an intent to cause *only* serious bodily injury.").

Marshall-Fields. Defendant actually voiced his intent to kill before he committed the act. Once hostilities began, defendant repeated several times that he would "kill all you." According to the prosecution's evidence, he communicated to Owens his desire to kill, not only through his threats — which defendant testified that Owens might well have heard — but by lifting his shirt to show Owens his gun. (Video evidence showed that Owens mirrored the gesture back to defendant, supporting the inference that Owens understood the signal.) Instead of leaving the park, as one might do if he felt threatened, defendant and Owens remained. Once Owens shot Vann, defendant shot Bell and Marshall-Fields to aid his accomplice's escape. By his own admission, defendant had time to run around his SUV toward the fight and had a physical altercation with Bell before he pulled out his gun and shot him. He shot both victims multiple times.

Thus, the jury could have reasonably concluded that defendant decided to kill during the initial altercation, communicated that intention to Owens verbally and nonverbally, and then acted on his intent. *See Bartowsheski*, 661 P.2d at 242 (deliberation requires that a design to kill precede the killing); *see*

also Key v. People, 715 P.2d 319, 324 (Colo. 1986) (the defendant's statement the day before the murder that he could kill the victim was evidence of deliberation). Defendant had ample time to exercise judgment and reflection between the moment he decided to kill and when he shot the victims. For the same reasons, under the complicity theory, the jury could have reasonably believed that defendant deliberated in the time he was forming his design to kill and then communicating it to Owens.

Defendant argues that we should view the seconds before the shootings in isolation — disregarding evidence of his threats and actions in the preceding moments — to conclude that he did not have time to deliberate. Even discounting the direct evidence of defendant's earlier threats, the jury could also have inferred deliberation from defendant's use of a deadly weapon, the evidence that he fired several times at the victims, and the evidence that the shootings came after escalating hostilities. *See Dist. Court*, 779 P.2d at 388 (holding that these factors are evidence of deliberation); *see also Bartowsheski*, 661 P.2d at 241-42 (use of a deadly weapon is evidence of deliberation); *People v. Madson*, 638 P.2d 18, 26 (Colo. 1981) (manner in which a weapon is used reflects on

requisite culpability for first degree murder); *People v. Beatty*, 80 P.3d 847, 852 (Colo. App. 2003) (conflict before attempted murder is evidence of deliberation). An appreciable length of time passed between the moment defendant saw Owens fleeing (and shooting into the crowd), and the moment when he shot the victims to facilitate escape. *See Key*, 715 P.2d at 324 (time for defendant to reload his gun was an appreciable length of time; time for defendant to put down his gun and pick up a rock was an appreciable length of time); *Sanchez*, 253 P.3d at 1261 (sufficient evidence of deliberation where the defendant unfolded his knife before stabbing victims, stabbed the victims in vital locations on their bodies, and said "[w]e're ready for this" before attacking).

We conclude that, when viewed in the light most favorable to the prosecution, the evidence was sufficient that a reasonable juror could conclude beyond a reasonable doubt that defendant acted with an intent to kill after deliberation.

2. Disproving Self-Defense/Defense of Others

Defendant contends that the prosecution failed to disprove his affirmative defense of self-defense/defense of others. This

contention pertains to the charges of attempted murder and assault of both Bell and Marshall-Fields.

The prosecution must disprove affirmative defenses beyond a reasonable doubt. § 18-1-407(2); *Vega v. People*, 893 P.2d 107, 111 (Colo. 1995). "An affirmative defense is a defense that admits the doing of the act charged but seeks to justify, excuse, or mitigate it." *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (citing *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989)). Use of physical force in defense of a person is an affirmative defense, and a person is justified in using such force to protect from "what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose." § 18-1-704(1).

Defendant testified that he shot Bell to defend himself and Owens. According to defendant, he saw blood on Owens's shirt and mistakenly believed that Bell had shot Owens. After trying to push Bell away from Owens, he felt that Bell was dangerous and shot him once. Defendant testified that he did not shoot Marshall-Fields.

On appeal, defendant attempts to broaden his claim of self-defense to the Marshall-Fields counts as well as the Bell counts. But defendant did not claim self-defense in regard to Marshall-Fields at trial; instead, he denied shooting Marshall-Fields. *See Reed*, 932 P.2d at 844 (a defendant claiming self-defense admits doing the act but seeks to justify it). Even if we consider defendant's claim of self-defense as to Marshall-Fields, however, it does not change the result.

Defendant presents merely his own testimony in support of his argument. Indeed, he argues that his actions were reasonable based on the subjective beliefs he claimed. But it is the sole province of the jury to decide whether defendant's testimony was credible, and what weight should be assigned to conflicting evidence. *Graybeal*, 155 P.3d at 620.

The prosecution presented the evidence of the letter that defendant wrote to Owens, which, viewed in the light most favorable to the prosecution, showed that defendant colluded with Owens to concoct a self-defense theory and, in the prosecutor's words, "get away with murder." The jury could have reasonably concluded from that evidence — along with defendant's demeanor and the

many intangibles involved in assessing credibility — that defendant's testimony was not credible. Further, based on the evidence discussed above that defendant had already intended to kill people at Lowry Park, the jury could have concluded that defendant shot his victims to facilitate escape and carry out his intent, rather than to stop their use of force. Finally, based on testimony and ballistics evidence that defendant shot Bell and Marshall-Fields multiple times, the jury could have concluded that he did not use a reasonable degree of force.

Thus, we conclude that, viewing the evidence as a whole and in the light most favorable to the prosecution, it was sufficient to support a decision by a reasonable mind that defendant's actions were not justified by self-defense. *See Roggow*, ¶ 13; *People v. O'Mea*, 541 P.2d 133, 135 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)) (holding that, where the defendant's testimony regarding self-defense conflicted with prosecution evidence, the jury could find that self-defense had been disproved).

3. Shooting of Marshall-Fields

Defendant contends that there was insufficient evidence to show that he actually shot Marshall-Fields. This argument applies to the counts of attempted murder and assault of Marshall-Fields.

Prosecution witness Jamar Johnson testified unequivocally that he saw defendant shoot Marshall-Fields. Defendant concedes that Johnson's testimony would ordinarily constitute sufficient evidence. He argues, however, that Johnson's testimony should not be believed because Johnson received a plea deal on unrelated charges in exchange for his testimony. In making the argument that an informant's testimony, standing on its own, is insufficient to support a conviction, defendant relies on authorities that do not support his proposition.[30] Moreover, defendant's argument lacks a

[30] Defendant cites *State v. Patterson*, 886 A.2d 777, 789 (Conn. 2005) (holding that evidence was sufficient to support murder conviction, but the defendant was entitled to a special credibility instruction regarding the jailhouse informant); *State v. Bay*, 529 So. 2d 845, 851 (La. 1988) (witness was the defendant's girlfriend, and the court did not describe her as an "informant" as defendant claims in his opening brief; court held that her vague and uncorroborated testimony regarding a murder-for-hire scheme was insufficient to support first degree murder); and *Banks v. Dretke*, 540 U.S. 668, 702 (2004) (holding that the defendant had a colorable *Brady* claim where the prosecution did not disclose a witness's status as a paid police informant). Defendant also cites

factual predicate because Johnson was an eyewitness to the crime; he was not an absent informant or accomplice.

No Colorado case holds that the testimony of a witness who receives a plea deal in exchange for testimony is insufficient to support a conviction, though a defendant is entitled to cross-examine the witness about this possible bias to impeach his testimony. *People v. Bowman*, 669 P.2d 1369, 1376 (Colo. 1983); *see Kinney v. People*, 187 P.3d 548, 561 (Colo. 2008). Defendant does not argue that the court curtailed his opportunity to cross-examine Johnson on these matters. The record shows that defense counsel did attempt to impeach Johnson. And defendant made certain the jury knew his opinion that Johnson was a "snitch" who was lying to get out of trouble.

Johnson's testimony was not "so palpably incredible and so totally unbelievable as to be absolutely impeached as a matter of law." *People v. Martinez*, 187 Colo. 413, 417, 531 P.2d 964, 966 (1975). It was the province of the jury to determine Johnson's credibility and to weigh the conflicting evidence. *Quick*, 713 P.2d at

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secondary sources that discuss the unreliability of jailhouse informants, but Johnson was not a jailhouse informant.

1293; *Graybeal*, 155 P.3d at 620. And, viewed in the light most favorable to the prosecution, we conclude that Johnson's eyewitness testimony was sufficient evidence to support a conclusion by a reasonable mind that defendant shot Marshall-Fields.

4. Complicity

We also reject defendant's contention that there was insufficient evidence of his guilt as a complicitor as to the charges of attempted murder and assault of both Bell and Marshall-Fields.

Because we have concluded that the evidence was sufficient to show that defendant was guilty as a principal of the crimes pertaining to Bell and Marshall-Fields, it is not necessary for us also to conclude that the evidence was sufficient to support the alternative theory that he was guilty as a complicitor of these same crimes. *Cf. Randell*, ¶ 37 (holding that the evidence was sufficient to show that the defendant was guilty as a complicitor, and concluding that it was unnecessary to consider whether he was also

guilty as a principal).[31] Nevertheless, we will briefly address defendant's argument.

Defendant argues that there was insufficient evidence that he knew Owens intended to shoot the victims, or aided him in committing the crime. *See* § 18-1-603 (requiring knowledge that the principal intends to commit the crime, and that the defendant aided, abetted, advised, or encouraged the principal to commit the crime). As discussed, not only did defendant know that Owens intended to commit the crimes, he signaled to Owens that they should commit the crimes with his verbal threats and his nonverbal communication with Owens. Witnesses such as defendant's wife testified that Owens routinely followed defendant's orders. The evidence that showed defendant ordered the violence was also sufficient to show that defendant encouraged the commission of the crime.

Thus, if the jury believed that Owens rather than defendant shot Bell or Marshall-Fields, the evidence was sufficient to allow a

[31] The jury acquitted defendant of the counts pertaining to Vann and Green — the only counts that relied solely on complicity liability.

reasonable mind to conclude that defendant was guilty beyond a reasonable doubt as a complicitor.

5. Accessory to the Murder of Vann

Defendant contends that the evidence was insufficient to show that he was an accessory to first degree murder because the prosecution did not prove that he knew that Owens had committed first degree murder.

"A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person." § 18-8-105(1), C.R.S. 2014. Rendering assistance includes harboring the other, or providing him with transportation or disguise to help him avoid discovery, or concealing or destroying physical evidence. § 18-8-105(2)(a), (c), (e).

Defense counsel conceded at trial that defendant was guilty of being an accessory to murder. Defense counsel said in closing: "Is he guilty of accessory? Yeah, he is." Defendant also concedes on appeal that he rendered assistance to Owens; his reply brief states "there was evidence [defendant] helped Owens evade apprehension."

Indeed, there was evidence that defendant helped Owens flee the crime scene, stayed with him at a motel, cut off his braids to change his appearance, discarded the guns they had used, bleached and dumped his clothes, and hid the vehicle they had driven.

Rather than disputing this evidence, defendant argues that the prosecution had to prove that he knew both that Owens had committed first degree murder after deliberation and that Owens's actions were not justified by self-defense. But the accessory to crime statute does not require such specific knowledge of the underlying crime. *People v. Young*, 192 Colo. 65, 68, 555 P.2d 1160, 1162 (1976) ("The relevant standard for knowledge in regard to the accessory statute is whether defendant knew the principal had committed a crime. It is not necessary for the defendant to have known that the crime committed was of a particular class."); *see Barreras v. People*, 636 P.2d 686, 688 (Colo. 1981) (accessory statute "require[s] a showing that the accused have knowledge of the general character of the underlying offense"); *People v. Newmiller*, 2014 COA 84, ¶ 33 (same as *Barreras*).

The evidence was sufficient to show that defendant knew the general character of the underlying offense. Viewed in the light most favorable to the prosecution, the evidence showed that defendant had ordered Owens to shoot and then helped him escape. But even ignoring that evidence, defendant testified that Owens had told him he had shot someone after they escaped, and defendant was upset that Owens had not fired a warning shot. Defense counsel argued that this evidence showed that defendant had not been culpable in the shooting. But that testimony also tended to show that defendant knew Owens had committed the crime and knew the general character of that crime. *See Barreras*, 636 P.2d at 688; *Newmiller*, ¶ 33. Defendant's extensive efforts to elude apprehension served as additional evidence of his consciousness of guilt. *See People v. Curtis*, 2014 COA 100, ¶ 52.

Thus, we conclude that the evidence was sufficient to support a conclusion by a reasonable juror that defendant was guilty beyond a reasonable doubt of accessory to murder.

G. Denial of Motion for a Continuance

Defendant contends that the district court erroneously denied his motion for a continuance because the lack of a continuance

precluded him from retaining an expert witness. We perceive no abuse of discretion.

1. Procedural Facts

The district court granted four continuances of defendant's trial, from an original setting on April 25, 2005, to the actual trial date of October 16, 2006. On September 1, 2006, defendant moved to delay his trial once again. He argued that previous defense counsel had conducted inadequate investigation and that current defense counsel, appointed to the case in April 2006, had had inadequate time to review voluminous discovery[32] or to interview the many witnesses who were present at Lowry Park during the shootings. He also argued that counsel also needed to review continuing discovery in his capital case and his co-defendant's cases.

Apart from the volume of discovery, defendant identified three specific discovery needs:

- He was awaiting the transcript from Owens's preliminary hearing.

[32] Discovery in the case consisted of more than 13,000 pages, according to defense counsel, in addition to ninety-eight recordings of witness interviews.

- He wanted the prosecution to provide updated witness addresses, and the addresses of additional witnesses to the shooting who the prosecution had not contacted. And he was having difficulty contacting even those witnesses for whom he already had information, because they were reluctant and uncooperative.
- His expert witness needed additional discovery. Defendant explained that he had found an expert who could testify regarding ballistics, blood spatter analysis, and crime-scene reconstruction. The expert was available to testify in his case, but would be "out of state for the majority of September." That expert needed crime scene photographs, autopsy photographs, and autopsy diagrams to analyze. The prosecution had agreed to provide the autopsy information, but had not yet done so. And defense counsel had not yet obtained crime scene photographs from the Aurora Police Department.

On September 7, 2006, the district court heard argument on the motion. By that time, the prosecution had provided the autopsy

photographs to the defense. Defense counsel had also obtained some of the crime scene photographs, and indicated that the expert the defense had contacted would be available to review the materials after September 25.

Defense counsel would not divulge details about the expert, "because I have not endorsed an expert and I'm not required to until 30 days before trial." Counsel explained that expert testimony was material to establishing defendant's self-defense in the shootings of Bell and Marshall-Fields, and also to rebutting complicity liability by establishing Owens's self-defense in the shooting of Vann.[33] And counsel was concerned that the expert would not be ready in time.

The prosecutor argued that a continuance was not warranted. The prosecution had fulfilled all discovery obligations, providing all known witness addresses except for individuals in the witness

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[33] Defendant points out in his opening brief that the prosecutor claimed at this hearing that defendant was accused of shooting only Bell, not Marshall-Fields or Vann. We cannot know whether the prosecutor misspoke or whether the theory of culpability changed before trial. But neither defense counsel nor the court seemed to rely on that statement. Defense counsel subsequently argued that an expert was needed to show that defendant had not shot Marshall-Fields. And the court did not rule that an expert witness's testimony would be less material for that reason.

protection program. Roughly fifteen percent of the discovery was related to the case, he argued; whereas, the bulk of discovery related to the murders of Marshall-Fields and Wolfe. Further, there would be an "endless cycle" of discovery as the prosecution updated witness information and the investigation of the capital case continued.

The court denied the motion, reasoning that discovery would indeed be an endless cycle, that the new discovery was not substantially different from the old, and that witnesses would continue to be reluctant to cooperate. The court expressed concern regarding retention of an expert for the defense: "So I continue to have some concerns in this particular area, but at this point the concerns are not such that I can grant a continuance, based upon the state of the record in regards to the retention of experts and their importance to the case as well."

Defendant renewed his motion for a continuance at a pretrial hearing on October 2, 2006. Apart from incorporating previous arguments, defense counsel argued that defendant's expert witness was not yet ready to testify. Counsel indicated that the expert had reviewed some evidence in the case, but could not be endorsed until

it was known whether his opinions would be helpful to defendant. The prosecutor responded that the expert evidence in the case was straightforward and "certainly there's still adequate time for the Defense to obtain this expert."

The court again denied the motion. It was two weeks until trial, and, the court estimated, the defense would not present its case until two weeks into trial. The court told defense counsel that the defense would not be required to disclose an expert report before the trial began.

> I find that there is still . . . time left for any Defense expert to be retained. And, based upon the fact that there has been a review of some of the evidence in this case, that therefore there will be sufficient time for that expert to come up to speed and be ready to present testimony if the Defense feels that to be appropriate.

Defense counsel did not call an expert witness to testify at trial.

2. Standard of Review and Applicable Law

The decision to deny a motion for a continuance is within the discretion of the district court, and we will not disturb its ruling absent a showing of an abuse of that discretion. *People v. Brown*,

2014 CO 25, ¶ 19. We find error only if the district court's "'decision was arbitrary or unreasonable and materially prejudiced the defendant.'" *Id.* (quoting *United States v. Simpson*, 152 F.3d 1241, 1251 (10th Cir. 1998)); *see People v. Gardenhire*, 903 P.2d 1165, 1168 (Colo. App. 1995). The determination is not mechanical, but depends on the circumstances of the case, particularly the reasons given for the delay. *People v. Hampton*, 758 P.2d 1344, 1353-54 (Colo. 1988); *People v. Roybal*, 55 P.3d 144, 150 (Colo. App. 2001).

3. Analysis

Defendant argues that his counsel did not have sufficient time to investigate his case and, in particular, did not have adequate time to consult with experts. He further contends that an expert's opinion could have been important to refute testimony that he shot Marshall-Fields. We need not decide the possible importance of any expert testimony because the record does not support the conclusion that the denial of the motion for a continuance precluded the defense from retaining an expert.

Defense counsel told the court that it had been difficult to obtain an expert for the case, but also said that an expert had been

consulted and would be available at trial. During argument on the renewed motion for a continuance, defense counsel explained that much of the evidence of crime-scene photographs and autopsy photographs had already been gathered, the expert had reviewed some evidence, and he was forming an opinion on the evidence.

The court decided that, because the expert was already reviewing evidence, the defense still had sufficient time to present this expert's opinion at trial. The record does not indicate why defendant did not call the expert witness at trial. We are left to speculate as to whether the expert did not have sufficient time or simply formed an opinion contrary to or at least neutral toward defendant's interests. Defendant does not point to a place in the trial record where he renewed his motion for a continuance based on the expert not having had sufficient time to form an opinion and prepare for trial. Therefore, we cannot conclude that the denial of the motion for a continuance precluded defendant from retaining an expert. Because the court's ruling did not lead to the harm that defendant claims on appeal, the denial of the motion for a continuance did not materially prejudice defendant. *See Brown*, ¶ 19.

We also conclude that the district court's decision was not arbitrary or unreasonable. The court granted four continuances, pushing the trial date back a total of eighteen months. Defendant's new counsel had more than six months to obtain an expert. Defense counsel represented to the court that an expert had been contacted and was already reviewing evidence, but might not be ready in time for trial. *See Salazar*, 870 P.2d at 1220 ("mere speculation" as to what more an expert witness might have said if granted a continuance did not establish prejudice). The court reasoned that the expert still had four weeks to prepare for trial, but invited defense counsel to renew the motion for a continuance if circumstances materially changed. As noted, counsel did not. Under these circumstances, the court's decision was reasonable. *See id.* (no abuse of discretion in denying a continuance where the defendant's expert witness had begun to review evidence and still had twenty-five days before trial to review the prosecution expert's untimely disclosed report and perform tests); *People v. Scarlett*, 985 P.2d 36, 42 (Colo. App. 1998) (no abuse of discretion in denying a continuance "even when a criminal defendant asserts a need to

prepare to meet unexpected or newly discovered evidence or testimony").

Because the court's denial of the motion for a continuance was not arbitrary or unreasonable, and because the decision did not materially prejudice the defendant, we conclude that the court did not abuse its discretion. *See Brown*, ¶ 19.

H. Trial Atmosphere

Defendant contends that the trial atmosphere was unfair and that the district court erroneously denied (1) his motion for a mistrial on the basis of extra security measures and (2) his motion to move to a larger courtroom on the basis that the prosecution table was too close to the jury box.

1. Extra Security Measures

a. Additional Facts

Because a prosecution witness had been killed before trial and other witnesses allegedly had been threatened, law enforcement officials heightened security at the courthouse for defendant's trial. For example, law enforcement officers were on the rooftop some days of trial; more officers than usual were on duty inside the courthouse; two police cruisers were parked outside the rear

courthouse entrance; and officers screened individuals at the courtroom entrance in addition to the typical screening at the courthouse entrance.

Defense counsel objected to the extra security measures on the first day of trial, the second day of trial, and the fifth day of trial. On the first day of trial, defense counsel objected that the security violated defendant's right to a fair trial because it was too visible and singled him out as dangerous. The parties disagreed as to the potential effect on jurors. The prosecutor argued that the extra security was outside the courtroom and only two uniformed officers were inside the courtroom, which was standard for any trial. Defense counsel argued that jurors could still see extra security outside the courthouse, and called Lieutenant Bobbie Hartman to testify regarding the security measures. The court ruled that it was reasonable to believe that extra security was necessary, that jurors might not know that the level of security was unusual, and that the measures taken were not so pervasive that they denied defendant a fair trial.

On the second day of trial, defense counsel renewed the objection and noted that three uniformed officers were in the

courtroom. The court responded that there were often up to four or five uniformed officers coming and going during proceedings, but that the court would ensure that the jurors' route to the courtroom did not expose them to extra security measures.

On the fifth day of trial, defense counsel moved for a mistrial based on the visibility of security measures. A security detail escorted the advisory witnesses to and from the courthouse each day and, defense counsel argued, jurors could have seen the flashing lights and blocked entrances marking their arrival and departure. Counsel argued that the security was unnecessary because the prosecution had not divulged details of the threats received, and that the method used was "indiscreet and obvious." The court responded that it had told jurors there were many judges at the courthouse conducting many proceedings, that two felony criminal trials were also in progress, and that "I cannot make a finding at this time that there has been any sort of showing of exposure . . . to security measures that they may feel is outside the standard operating procedure." The court also refused defense

counsel's suggestion to individually examine jurors on the issue of exposure to security measures.[34]

b. Standard of Review and Applicable Law

We review a court's denial of a motion for a mistrial for an abuse of discretion, and we will not disturb its ruling absent a clear showing of an abuse of that discretion and prejudice to the defendant. *People v. Santana*, 255 P.3d 1126, 1130 (Colo. 2011) (where a defendant claims that a court's refusal to declare a mistrial violated his constitutional rights, we first decide if an error occurred). "A mistrial is a drastic remedy that is warranted only when the prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means." *Dore*, 997 P.2d at 1221; *accord Cousins*, 181 P.3d at 373.

A defendant is entitled to have his guilt or innocence determined solely on the basis of the evidence, and not on grounds of official suspicion or circumstances surrounding the trial. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986). Yet, "we have never

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[34] Defendant attaches to his opening brief statements from interviews with certain jurors conducted after the trial, indicating that they did notice security measures. That information is not part of the record, and therefore we do not consider it. *People v. Henson*, 2013 COA 36, ¶ 7.

tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct." *Id.* To determine whether the district court struck the proper balance, the reviewing court should analyze (1) whether the circumstances at the defendant's trial were inherently prejudicial and, (2) if so, whether the government's practices at that particular trial served an essential state interest. *Id.* at 568-69; *see also People v. Dillon*, 655 P.2d 841, 846 (Colo. 1982) (juror exposure to security measures constitutes reversible error only when "unnecessary and prejudicial").

Inherently prejudicial practices include bringing a defendant to court wearing prison clothes, *see Estelle v. Williams*, 425 U.S. 501, 503-04 (1976), or bound and gagged, *see Illinois v. Allen*, 397 U.S. 337, 344 (1970), or wearing shackles visible to jurors, *see Hoang v. People*, 2014 CO 27, ¶ 24; *see also Deck v. Missouri*, 544 U.S. 622, 629 (2005). But the presence of uniformed security officers in the courtroom is not prejudicial in the same way as shackling and prison clothes because of the "wider range of inferences that a juror might reasonably draw from the officers'

presence." *Holbrook*, 475 U.S. at 569. In other words, shackles on a defendant indicate that he is dangerous; whereas security officers may be guarding against disruptions from outside the courtroom, may be preventing violent eruptions in the courtroom, or may simply be part of the "impressive drama" of a courtroom proceeding. *Id.*

"Excessive guards" around a defendant may be inherently prejudicial and should be disallowed "except where special circumstances dictate the use of enhanced security measures." *People v. Tafoya*, 703 P.2d 663, 666 (Colo. App. 1985). In *Tafoya*, the division held that the district court acted within its discretion in deciding that extra security measures were necessary where there had been threats against the defendant and threats of terrorist acts. *Id.* (also noting that "the extra security was concealed from the jury as much as possible").

c. Analysis

We conclude that the extra security measures employed in this case were not inherently prejudicial or unnecessary.

Most of the security measures that defendant complains of were outside the courtroom or even outside the courthouse. The

court specifically found that jurors were not exposed to the extra screening process at the front entrance of the courtroom, and instructed law enforcement officials to be as discreet as possible in the courthouse. *Cf. People v. Ayala*, 1 P.3d 3, 19 (Cal. 2000) (court did not abuse its discretion when it deployed a magnetometer at the courtroom entrance in reliance on the prosecutor's representation of risks). The only circumstance defendant complains of inside the courtroom was the presence of three uniformed security officers at one time, with no indication that they were near him in particular. We conclude that the presence of three uniformed security officers in the courtroom was not excessive or inherently prejudicial. *See Holbrook*, 475 U.S. at 569; *Tafoya*, 703 P.2d at 666.

As explained in *Holbrook*, the existence of extra security is not inherently prejudicial unless it singles out the defendant as dangerous — for example, by forcing him to appear in front of the jury in shackles or prison clothes. 475 U.S. at 569. These classic examples of inherent prejudice occur not only inside the courtroom, but are directed at the defendant in particular. The extra security outside the courtroom may have been obvious to jurors at this trial, but that does not mean that it singled out defendant as dangerous.

Cf. Harlan, 8 P.3d at 505 (not necessary to poll the jury or grant a mistrial where the jurors' possible exposure to the defendant in handcuffs was inadvertent). The extra security outside the courtroom was susceptible of a "wider range of inferences." *Holbrook*, 475 U.S. at 569; *cf. Lopez v. Thurmer*, 573 F.3d 484, 494 (7th Cir. 2009) ("Trial courts should have . . . significantly more latitude in gauging the appropriate security measures for a jury view outside the courtroom."). For example, the snipers on the courthouse roof and the police escort of advisory witnesses outside the courthouse most logically led to the inference that there was some danger outside the courthouse, not necessarily a danger from defendant. The jury could have inferred that the security was standard procedure, was for a different trial, or was for defendant's protection. We conclude that these general security measures outside the courthouse, which did not single out defendant, were not inherently prejudicial.

Defendant does not argue on appeal that the security measures were unnecessary. The court specifically found that the heightened security was necessary. A prosecution witness had already been killed. Several of the witnesses appearing at trial had

been placed in the witness protection program. Law enforcement officials claimed that other witnesses had been threatened. Thus, the court acted within its discretion in deciding that extra security measures were necessary. *See Tafoya*, 703 P.2d at 666.

Because the extra security measures were not prejudicial and were necessitated by the special circumstances of this case, the court did not abuse its discretion by denying defendant's motions for a mistrial.

2. Proximity of Prosecution Table to Jury Box

Defendant next contends that the district court erroneously denied his motion to move to a larger courtroom because the prosecution table was too close to the jury box.

Defense counsel argued that jurors likely could hear conversation at the prosecution table and requested that the court ask the juror seated closest to the prosecution table what she had heard. The court denied the request, responding that it had watched the juror and "her focus has never been on anybody at the prosecution side."

We review a court's decision regarding regulation of the courtroom for an abuse of discretion. *Whitman*, 205 P.3d at 379.

In essence, defendant asks us to speculate that a juror could hear conversation at the prosecution table despite the court's finding that, from its observations, the juror had not been focusing her attention on the prosecution table. Defendant asks us to further speculate that, if this juror did overhear and understand conversations, it might have affected her view of the trial in some way. In the absence of any record support for defendant's position, we cannot conclude that the court abused its discretion. *People v. Wells*, 776 P.2d 386, 390 (Colo. 1989) ("Any facts not appearing of record cannot be reviewed."); *People v. Clendenin*, 232 P.3d 210, 216 (Colo. App. 2009) (same).

I. Motion to Suppress

Defendant contends that the district court erred by denying his motion to suppress the BB gun police discovered in his vehicle. We are not persuaded.

1. Additional Facts

As discussed, several days after the Lowry Park shooting, police stopped defendant in his vehicle for violating a municipal noise ordinance and for careless driving. *See* § 42-4-1402, C.R.S. 2014. Police placed defendant in the back of a cruiser and then

searched his vehicle, finding a BB gun under the driver's seat and a handgun in a door panel.

Defendant filed a motion to suppress any evidence obtained as a result of the search of his vehicle. After a suppression hearing at which several police officers testified, the court concluded that the officers had probable cause to arrest defendant because of careless driving and refusal to comply with commands. The court also concluded that defendant's behavior supported a reasonable belief that he posed a danger to the officers. The court found that police first discovered the BB gun under the driver's seat, and then noticed the loose door panel in the driver's door. An officer "merely opened the panel a little bit wider and when he did that, a gun fell out on to the ground . . . ." Relying on *Michigan v. Long*, 463 U.S. 1032 (1983), the court concluded that the search of defendant's vehicle was lawful under the automobile exception. Accordingly, the court denied the motion to suppress evidence. The prosecutor admitted the BB gun (but not the handgun) into evidence at trial.

2. Standard of Review and Applicable Law

A challenge to a suppression order presents a mixed question of law and fact. *People v. Broder*, 222 P.3d 323, 326 (Colo. 2010).

We defer to the district court's factual findings if they are supported by the record, but review its legal conclusions de novo. *Id.*; *People v. King*, 292 P.3d 959, 961 (Colo. App. 2011).

The law on adequate justification for a search of a vehicle's interior, incident to a lawful custodial arrest, has changed over time. In *New York v. Belton*, 453 U.S. 454, 460 (1981), the Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." A proper search included any closed containers within the passenger compartment, such as the glove compartment or the console. *Id.* at 461 & n.4. "In Colorado, *Belton* was understood as establishing a bright line test: if an occupant of a car was arrested, the passenger compartment of that vehicle could be searched." *People v. Hopper*, 284 P.3d 87, 89 (Colo. App. 2011).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court curtailed the automobile exception, holding that it applies only when the search is necessary for officer safety or to prevent the destruction of evidence, or when officers reasonably believe the

vehicle contains evidence relevant to the crime of arrest. *Id.* at 343-44; *see also People v. Chamberlain*, 229 P.3d 1054, 1055 (Colo. 2010) (search unreasonable where the defendant was already placed in a patrol car and there was no reason to believe the vehicle contained evidence relevant to the crime of arrest). But "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis v. United States*, ___ U.S. ___, ___, 131 S. Ct. 2419, 2429 (2011). In *Davis*, the Court applied the good-faith exception to a vehicle search that had complied with the law as perceived under *Belton*, even though the search was improper under the subsequent precedent of *Gant*. *Id.* at ___, 131 S. Ct. at 2426, 2429; *see also Hopper*, 284 P.3d at 90 (applying the good-faith exception to police reliance on pre-*Gant* case law).

3. Analysis

The People do not dispute that the search of defendant's vehicle would have been unlawful under *Gant*. But *Gant* was decided five years after officers conducted the search in this case. Thus, the good-faith exception applies to the search in this case, so

long as the search complied with the standard in *Belton*. *See Davis*, ___ U.S. at ___, 131 S. Ct. at 2429; *Hopper*, 284 P.3d at 90.

The BB gun, which was admitted into evidence at trial, was discovered under the driver's seat. This is clearly within the passenger compartment and, thus, within the scope of a search allowed under then-existing precedent. *See Belton*, 453 U.S. at 460.[35] It follows that the court did not err in denying the motion to suppress the BB gun.

J. Sentencing

Defendant contends that the verdicts do not support thirty-two year sentences for first degree assault because the jury did not

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[35] Defendant argues that the search was unlawful even under *Belton* because an officer looked in the door panel to discover the second gun. We do not decide whether a reasonably well-trained officer would have known that pulling open the loose door panel was unlawful under *Belton*, if indeed it was unlawful in these circumstances. *Compare United States v. Infante-Ruiz*, 13 F.3d 498, 503 n.1 (1st Cir. 1994) ("The 'passenger compartment' has been interpreted to mean those areas reachable without exiting the vehicle and without dismantling door panels or other parts of the car."), *with United States v. Barnes*, 374 F.3d 601, 605 n.2 (8th Cir. 2004) ("It may well be that if the compartment could have been opened quickly by an occupant . . . rather than elaborately dismantling the vehicle, then removal of the door panels would be permissible under *Belton*."). Because the second gun was not admitted into evidence, the details of the search that occurred after discovery of the first gun are irrelevant to our analysis.

conclusively find that he had not been provoked. Provocation is a mitigating factor that reduces a defendant's sentencing range. Defendant specifically challenges the language "defendant, or Sir Mario Owens, did not act upon provoked passion," which appeared in special interrogatories on the verdict forms.

1. Procedural Facts

The verdict forms for the first degree assault charges (as to Bell and Marshall-Fields) included special interrogatories regarding use of a deadly weapon, serious bodily injury, and provocation. The provocation interrogatory read:

> If you find the defendant Guilty of Assault in the First degree, the law requires you to answer the following question: Was the defendant acting upon provoked passion?
>
> The defendant was acting upon provoked passion if:
>
> 1. The act causing the injury was performed upon a sudden heat of passion, and
>
> 2. the sudden heat of passion was caused by a serious and highly provoking act of the intended victim, and
>
> 3. the intended victim's act of provocation was sufficient to excite an irresistible passion in a reasonable person, and

4. between the provocation and the assault, there was an insufficient interval of time for the voice of reason and humanity to be heard.

It is the prosecution's burden to prove, beyond a reasonable doubt, that the defendant was not acting upon provoked passion. The prosecution must prove, beyond a reasonable doubt, that one or more of the element above did not exist in this case.

After considering all the evidence, if you decide the prosecution has proven beyond a reasonable doubt that the defendant was not acting upon provoked passion, you should so indicate below.

After considering all of the evidence, if you decide the prosecution has failed to prove beyond a reasonable doubt that the defendant was not acting upon provoked passion, you should so indicate below.

[ ] We the jury, unanimously find, that the defendant, or Sir Mario Owens, did not act upon provoked passion.

OR

[ ] We, the jury, do not so find.

The jury indicated on both first degree assault verdict forms that "defendant, or Sir Mario Owens, did not act upon provoked passion."

The parties discussed the verdict forms during the jury instruction conference. The prosecutor tendered the verdict forms. Defense counsel did not object to the interrogatories. (Altogether, the verdict forms included twelve special interrogatories, and each of them included the language "defendant, or Sir Mario Owens.")

> [The Court:] And does the defense have any objection to the jury verdict on Count 2?
>
> [Defense Counsel:] No, I think it's correct. I think the people are a hundred percent on point.
>
> [The Court:] All right, and the interrogatories are fine with the defense as well.
>
> [Defense Counsel:] That's correct.
>
> . . .
>
> [The Court:] Count 5, assault in the first degree for Mr. Marshall-Fields as named victim, there is two interrogatories plus the provocation interrogatory . . . . Does that meet with the defense approval?
>
> [Defense Counsel:] That's fine.

The court sentenced defendant to thirty-two years for each count of first degree assault, but each sentence is to run concurrently with a forty-eight year sentence for attempted murder against the same victim.

2. Standard of Review and Applicable Law

Arguably, we cannot reach the merits because defense counsel invited the alleged error into the case by affirmatively acquiescing to the verdict forms and interrogatories. *See Gross*, ¶ 8. But we will assume, without deciding, that counsel's acquiescence was inadvertent.

Because defendant did not object to the verdict forms, we review for plain error. *Id.* at ¶ 9 (inadvertent instructional omissions are reviewed for plain error); *Lehnert v. People*, 244 P.3d 1180, 1182 (Colo. 2010) (reviewing unobjected-to verdict forms for plain error).

3. Analysis

We agree with defendant that he presented sufficient evidence of provocation to entitle him to a provocation interrogatory, and that the prosecution bore the burden of proving beyond a reasonable doubt that he was not provoked. But we conclude that despite the obvious mistake of substituting Owens's name for that of defendant, the verdict forms demonstrate that the jury unanimously decided that defendant was not provoked.

The verdict form instructions made clear that the jury had to determine whether "the defendant" was provoked:

- "Was the defendant acting upon provoked passion?"
- "The defendant was acting upon provoked passion if . . ."
- "It is the prosecution's burden to prove, beyond a reasonable doubt, that the defendant was not acting upon provoked passion."
- "After considering all the evidence, if you decide the prosecution has proven beyond a reasonable doubt that the defendant was not acting upon provoked passion, you should so indicate below."

In light of these instructions, we cannot conclude that the unfortunate substitution of names would have confused jurors as to whom the form referred.

But even if there was error, we conclude that the error did not affect defendant's substantial rights. The jury found defendant guilty of first degree attempted murder (after deliberation) as to Bell and Marshall-Fields. The same evidence supported the jury's finding that defendant was guilty of first degree assault as to Bell

and Marshall-Fields. Because the jury decided that defendant had deliberated before attempting to murder these two victims, it necessarily found that he did not simultaneously act "upon a sudden heat of passion" when assaulting them. *Compare* § 18-3-101(3) ("'[A]fter deliberation' means . . . that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner."), *with* § 18-3-202(2)(a) ("If assault in the first degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion . . . and without an interval between the provocation and the injury sufficient for the voice of reason and humanity to be heard, it is a class 5 felony."); *see also* COLJI-Crim. No. 10:20 (1983) ("The evidence in this case has raised the issue of provocation. Provocation means that the defendant's acts were performed, not after deliberation, but upon a sudden heat of passion . . . ."); *Rowe v. People*, 856 P.2d 486, 492 (Colo. 1993) (approving of COLJI-Crim. No. 10:20); *Sanchez*, 253 P.3d at 1263 (concluding that a guilty verdict for attempted first degree murder is

inconsistent with a guilty verdict for first degree assault under heat of passion).

K. Cumulative Error

Finally, defendant contends that the cumulative effect of the alleged errors at his trial require reversal. We disagree.

"[N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal is required." *Roy*, 723 P.2d at 1349. However, "[a] conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice the defendant's right to a fair trial." *Whitman*, 205 P.3d at 387.

We conclude that there is no cumulative error requiring reversal. Although he did not receive a perfect trial, defendant did receive a fair trial. *People v. Flockhart*, 2013 CO 42, ¶ 36; *People v. Wise*, 2014 COA 83, ¶ 31 ("As is often said, a defendant is entitled to a fair trial, not a perfect one."). Indeed, the record shows that defendant was afforded far more process than is typical.

IV. Conclusion

For the foregoing reasons, we affirm defendant's convictions and sentence.

JUDGE MILLER and JUDGE BERGER concur.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 20, 2019 CASE NUMBER: 2015SC268
Certiorari to the Court of Appeals, 2007CA561 District Court, Arapahoe County, 2004CR1805	
Petitioner: Robert Keith Ray, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2015SC268
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

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

BY THE COURT, EN BANC, MAY 20, 2019.
JUSTICE GABRIEL and JUSTICE HART would grant the petition.
JUSTICE SAMOUR does not participate.

DISTRICT COURT ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County Justice Center 7325 South Potomac Street, Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO vs. Defendants: **ROBERT KEITH RAY**	☐ COURT USE ONLY ☐
	Case Number: **04 CR 1805** Division/Ctrm: **207**

JURY INSTRUCTIONS

Instruction Nos. 1 through 29 given by the Court this 1st day of October, 2006.

Michael Spear

MICHAEL SPEAR
District Court Judge

RA

INSTRUCTION NO. 3

Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative, or imaginary doubt, but such doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

As to each count, if you find from the evidence that each and every element has been proven beyond a reasonable doubt, you will find the defendant guilty as to that count. If you find from the evidence that the People have failed to prove any one or more of the elements of any count beyond a reasonable doubt, you will find the defendant not guilty as to that count.

INSTRUCTION NO. 13

A person is guilty of an offense committed by another person if he is a complicitor. To be guilty as a complicitor, the following must be established beyond a reasonable doubt:

1. A crime must have been committed;
2. another person must have committed all or part of the crime;
3. the defendant must have had knowledge that the other person intended to commit the crime;
4. the defendant must have had the intent to promote or facilitate the commission of the crime; and
5. the defendant must have aided, abetted, advised, or encouraged the other person in the commission or planning of the crime.

INSTRUCTION NO. 15

The elements of the crime of Murder in the First Degree are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. after deliberation, and with intent

   a. to cause the death of a person other than himself,

   b. caused the death of that person or of another,

4. without the affirmative defense in instruction number 23.

After considering all the evidence, if you decide the prosecution has proven all of the elements beyond a reasonable doubt, you should find the defendant guilty of Murder in the First Degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Murder in the First Degree.

INSTRUCTION NO. 16

The elements of the crime of Criminal Attempt (to Commit Murder in the First Degree) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. after deliberation, and with intent
4. engaged in conduct constituting a substantial step toward the commission of Murder in the First Degree, as defined in Instruction No. 15,
5. without the affirmative defense in instruction number 24.

After considering all the evidence, if you decide the prosecution has proven all of the elements beyond a reasonable doubt, you should find the defendant guilty of Criminal Attempt (to Commit Murder in the First Degree).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Criminal Attempt (to Commit Murder in the First Degree).

INSTRUCTION NO. 17

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, he may, however, be found guilty of any lesser offense, the commission of which is necessarily included in the offense charged if the evidence is sufficient to establish his guilt of the lesser offense beyond a reasonable doubt. The offense of Criminal Attempt (to Commit Murder in the First Degree) necessarily includes the offenses of Criminal Attempt (to Commit Murder in the Second Degree).

The elements of the crime of Criminal Attempt (to Commit Murder in the Second Degree) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. engaged in conduct constituting a substantial step toward the commission of Murder in the Second Degree, as defined in Instruction No. 18,
5. without the affirmative defense in instruction number 24.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every material element of any lesser included offense which is necessarily included in any offense charged in the information; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all of the evidence, if you decide that the prosecution has proven all of the elements of the offense charged or of a lesser included offense, you should find the defendant guilty

of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide that the prosecution has failed to prove any one or more elements of the offense charged or of a lesser included offense, you should find the defendant not guilty of the offense which has not been proved, and you should so state in your verdict.

While you may find the defendant not guilty of the offense charged, or of the lesser included offense, you may not find the defendant guilty of more than one of the following offenses:

Criminal Attempt (to Commit Murder in the First Degree), or

Criminal Attempt (to Commit Murder in the Second Degree)

INSTRUCTION NO. 18

The elements of the crime of Murder in the Second Degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused the death of another person,
5. without the affirmative defense in instruction number 24.

INSTRUCTION NO. 19

The elements of the crime of Assault in the First Degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent to cause serious bodily injury to another person,
4. caused serious bodily injury to any person,
5. by means of a deadly weapon,
6. without the affirmative defense in instruction number 24.

After considering all the evidence, if you decide the prosecution has proven all of the elements beyond a reasonable doubt, you should find the defendant guilty of Assault in the First Degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Assault in the First Degree.

INSTRUCTION NO. 20

The elements of Accessory to Murder in the First Degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. rendered assistance to Sir Mario Owens,
4. with intent to hinder, delay, or prevent,
5. the discovery, detention, apprehension, prosecution, conviction, or punishment of Sir Mario Owens,
6. for the commission of Murder in the First Degree,
7. knowing that Sir Mario Owens had committed the crime of Murder in the First Degree.

After considering all the evidence, if you decide the prosecution has proven all of the of the elements beyond a reasonable doubt, you should find the defendant guilty of Accessory to Murder in the First Degree.

After considering all the evidence, if you find the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Accessory to Murder in the First Degree.

INSTRUCTION NO. 21

Concerning the charges in this case, certain words and phrases have a particular meaning.

The following are the definitions of those words and phrases.

"Bodily Injury" means physical pain, illness, or any impairment of physical or mental condition.

"Serious Bodily Injury" means bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.

"Deadly Weapon" means a firearm, whether loaded or unloaded.

A "substantial step" is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

"Render assistance" means to:

a. harbor or conceal the other; or

b. provide such person with money, transportation, weapon, disguise, or other thing to be used in avoiding discovery or apprehension; or

c. by force, intimidation, or deception, obstruct anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction or punishment of such person; or

d. conceal, destroy, or alter any physical or testimonial evidence that might aid in the discovery, detection, apprehension, prosecution, conviction or punishment of such person.

INSTRUCTION NO. 22

The evidence presented in this case has raised an affirmative defense.

The prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged.

After considering the evidence concerning the affirmative defense with all the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a not guilty verdict.

INSTRUCTION NO. 23

It is an affirmative defense to the crime of Murder in the First Degree that Sir Mario Owens used "deadly physical force" upon another person:

1. in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person, and
2. he used a degree of force which he reasonably believed to be necessary for that purpose, and
3. he reasonably believed a lesser degree of force was inadequate, and
4. he had reasonable grounds to believe and did believe that he or another person was in imminent danger of being killed or of receiving serious bodily injury.

"Deadly physical force" means force, the intended, natural, and probable consequence of which, is to produce death, and which does in fact, produce death.

INSTRUCTION NO. 24

It is an affirmative defense to the crimes of Criminal Attempt (to Commit Murder in the First Degree), its lesser included offense of Criminal Attempt (to Commit Murder in the Second Degree) and Assault in the First Degree, that the defendant or a complicitor used physical force upon another person:

1. in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person, and
2. he used a degree of force which he reasonably believed to be necessary for that purpose.

INSTRUCTION NO. 25

In deciding whether or not the defendant had reasonable grounds for believing that he or another was in imminent danger of being killed or of receiving serious bodily injury, or that he or another was in imminent danger from the use of unlawful physical force, you should determine whether or not he acted as a reasonable and prudent person would have acted under like circumstances. In determining this, you should consider the totality of the circumstances, including the number of people reasonably appearing to be a threat.

It is not enough that the defendant believed himself or another to be in danger, unless the facts and circumstances shown by the evidence and known by him at the time, or by him then believed to be true, are such that you can say that as a reasonable person he had grounds for that belief.

Whether the danger is actual or only apparent, actual danger is not necessary in order to justify the defendant acting in self-defense or defense of others.

INSTRUCTION # 26

Mr. Ray can be found guilty of the acts committed by Mr. Owens by the theory of complicity only if it is proven beyond a reasonable doubt that Mr. Ray knew Mr. Owens intended to commit the crime. In other words, if you find Mr. Owens committed the crime of Murder in the First Degree, it must be proven beyond a reasonable doubt that Mr. Ray knew Mr. Owens intended to commit the crime of Murder in the First Degree. For Mr. Ray to be held accountable for Mr. Owens' acts, it must be proven beyond a reasonable doubt that Mr. Ray intended to promote or facilitate the crime that Mr. Owens actually committed. In the scenario above Mr. Ray would have to intend to promote or facilitate Mr. Owens in committing Murder in the First Degree. Mr. Ray is also not guilty of the acts of Mr. Owens if Mr. Owens acts are justified under the law. The government must also prove beyond a reasonable doubt that Mr. Ray did aid, abet, advise or encourage Mr. Owens in the commission or planning of the crime.

Mr. Ray may also act or rely upon apparent necessity in defending Mr. Owens or himself in shooting Mr. Bell. Mr. Ray may reasonably rely on appearances in defending Mr. Owens or himself even if those appearances turn out not to be true.