UNITED STATES SUPREME COURT

JOSHUA CARRIER

-V-

STATE OF COLORADO

APPENDIX TO BRIEF

APPENDIX

1. Colorado Court of Appeals Decision
2. Portion of Transcript by Det. Romine
3. Search Warrant
4. Colorado Supreme Court Decision
5. Mr. Carrier's Motion for Reconsideration, and Enlargement of time.

APPENDIX 1

13CA0645 Peo v Carrier 06-21-2018

COLORADO COURT OF APPEALS

Court of Appeals No. 13CA0645
El Paso County District Court No. 11CR1695
Honorable David A. Gilbert, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Joshua Dwayne Carrier,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE HARRIS
J. Jones and Ashby, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 21, 2018

Cynthia H. Coffman, Attorney General, Katherine Gillespie, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Jason C. Middleton, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Joshua Dwayne Carrier, a former middle school resource officer and wrestling coach, was convicted by a jury of more than 200 counts of sexual assault on a child, unlawful sexual contact, sexual exploitation, and enticement.

¶ 2 At trial, he defended against the charges on a theory that he touched the victims, mostly members of the wrestling team, while conducting legitimate pre-match physical examinations.

¶ 3 On appeal, he raises a host of issues, contending that the court erred in denying his motion to suppress evidence, admitting expert and lay opinion testimony and evidence of prior bad acts, allowing prosecutorial misconduct, failing to instruct the jury on prior acquittals, and giving an incorrect instruction on the unlawful sexual contact offense. He also says the evidence was insufficient to support certain of his convictions for sexual exploitation of a child.

¶ 4 We review nearly all of his contentions under a plain error standard of review and, discerning no reversible error, we affirm.

I. Factual and Procedural Background

¶ 5 Carrier was a police officer with the Colorado Springs Police Department (CSPD), assigned to a middle school as its school

resource officer. When that position was eliminated, Carrier continued his association with the school as a volunteer wrestling coach.

¶ 6 He was arrested after the police, acting on a tip from a federal law enforcement agency, discovered child pornography during a search of his home. After receiving news of Carrier's arrest, parents from the middle school contacted the police, expressing concerns about Carrier's examinations of their children. As a result of the ensuing investigation, twenty-two students alleged that Carrier had touched their genitals, mostly during physical examinations, or "skin checks," purportedly conducted in connection with wrestling competition requirements. The students' allegations were corroborated by secret videos Carrier had made of the skin checks.

¶ 7 Carrier ultimately faced over 200 charges alleging sexual assault on a child, unlawful sexual contact, sexual exploitation of a child, and enticement.

¶ 8 In the first trial, the jury found Carrier guilty of only twenty counts, all of them for sexual exploitation of a child, based on his possession of child pornography. The jury acquitted Carrier of forty-six counts. It could not reach verdicts on the remaining

counts, and a mistrial was declared as to those counts. In the second trial, those counts were retried together with some newly added counts, and a jury convicted Carrier of 123 counts and acquitted him of 19; 8 counts were dismissed.

¶ 9 The court sentenced Carrier to a controlling indeterminate prison sentence of seventy years to life.

II. Motion to Suppress

¶ 10 Carrier contends that the district court erred in denying his motion to suppress evidence obtained during a search of his home. He argues that the affidavit in support of the search warrant was so lacking in probable cause that no officer could have reasonably relied on it.

A. Facts

¶ 11 In May 2011, Detective Adam Romine of the CSPD prepared a detailed affidavit in support of his request for a search warrant of Carrier's home. The affidavit recited the following information.

¶ 12 In March 2011, Detective Romine was contacted by a special agent with the Air Force Office of Special Investigations (AFOSI) regarding a child pornography investigation. The AFOSI agent told Detective Romine, who is a member of a Department of Homeland

Security task force and an expert in internet crimes against children, that the AFOSI had received information implicating a person identified as Joshua D. Carrier, who lived in Colorado Springs.

¶ 13 According to the AFOSI agent, U.S. Immigration and Customs Enforcement (ICE) had initiated an investigation in 2006. The target of the investigation was an organization operating hundreds of child pornography websites. On January 17, 2007, a person using the email address joshuacarrier@adelphia.net and an identifiable Internet Protocol (IP) address made a purchase from one of the organization's websites. On February 23, 2007, a person using the same email address and the same IP address made a second purchase from another of the organization's websites.

¶ 14 The investigation then led the AFOSI to an address and social security number for that Joshua Carrier in Colorado Springs. But when the AFOSI learned that Joshua Carrier was a dependent of an Air Force member, it did not pursue the investigation further.

¶ 15 In 2010, however, a congressional review prompted the AFOSI to reinitiate lapsed investigations or to forward information to local law enforcement agencies. When Detective Romine received the

information about a Joshua Carrier, he recognized the name as belonging to a fellow CSPD officer. Detective Romine then conducted further investigation based on the information received from the AFOSI.

¶ 16 He confirmed that the IP address used by the website purchaser "geo-located" to Colorado Springs and that there is only one Josh Carrier in Colorado Springs. The IP address was now associated with Comcast, which had acquired Adelphia in mid-2006. Romine learned that in 2007, Carrier had been a youth sports coach for a police athletic league. Records from the athletic league showed that in 2007, Carrier used the email address joshuacarrier@comcast.net. Detective Romine knew that Carrier managed a haunted house business in Colorado Springs. Business records showed that Carrier was then using the email address joshcarrier@comcast.net. Detective Romine also confirmed that Carrier still lived at the same address provided by the AFOSI.

¶ 17 At the end of March 2011, Detective Romine requested that the U.S. Postal Inspection Service deliver a flyer advertising the sale of child pornography videos to Carrier's address. The flyer was

delivered at the beginning of April. Carrier did not report receipt of the flyer to anyone at CSPD.

¶ 18 Detective Romine's affidavit also included several pages of information about the electronic receipt and storage of child pornography. He opined that people interested in child pornography tended to retain files for a long period of time.

¶ 19 A county court judge approved the warrant. Police recovered child pornography DVDs and a computer from Carrier's house. A forensic search of the computer revealed "short stories" describing sexual acts between teen boys and adults, images of child pornography, and videos of Carrier performing the skin checks.

¶ 20 Carrier filed a motion to suppress all of the evidence recovered from his house. The district court held a hearing, made detailed findings, and denied the motion.

¶ 21 On appeal, Carrier contends that the affidavit failed to establish a sufficient nexus between the place to be searched and the existence of contraband. He argues that the two website purchases described in the affidavit did not establish probable cause for the search because the affidavit did not demonstrate a sufficient likelihood that (1) Carrier made the purchases; (2) the

purchases were of child pornography; and (3) child pornography would still be present at his home in 2011.

B. Probable Cause Principles

¶ 22 "The Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution prohibit the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized." *People v. Cooper*, 2016 CO 73, ¶ 8 (quoting *People v. Miller*, 75 P.3d 1108, 1112 (Colo. 2003)). Probable cause must be established within the four corners of the warrant or its supporting affidavit. *People v. Scott*, 227 P.3d 894, 897 (Colo. 2010). A presumption of validity attaches to the affidavit submitted in support of a search warrant. *People v. Rabes*, 258 P.3d 937, 940 (Colo. 2010).

¶ 23 An affidavit establishes probable cause when it alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. *People v. Quintana*, 785 P.2d 934, 936-37 (Colo. 1990). To determine whether probable cause exists, we examine the totality of the circumstances. *People v. Mapps*, 231

P.3d 5, 8 (Colo. App. 2009). The probable cause standard does not lend itself to mathematical certainties and should not be "laden with hypertechnical interpretations or rigid legal rules." *Mendez v. People*, 986 P.2d 275, 280 (Colo. 1999). Thus, the affidavit must be interpreted "in a common sense and realistic fashion," and courts should not impose "technical requirements of elaborate specificity." *People v. Hearty*, 644 P.2d 302, 310 (Colo. 1982) (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)).

C. Standard of Review

¶ 24 An issuing judge's probable cause determination is given great deference. *People v. Gall*, 30 P.3d 145, 150 (Colo. 2001). Thus, we do not review the affidavit de novo and ask whether we would have found probable cause in the first instance; instead, we ask only whether the issuing judge had a "substantial basis" for finding the requisite probable cause. *People v. Hebert*, 46 P.3d 473, 481 (Colo. 2002) (quoting *Gall*, 30 P.3d at 150). We resolve doubts in favor of the issuing judge's determination of probable cause, *id.*, because such deference acknowledges that reasonable minds frequently may differ on the question of whether a particular affidavit establishes probable cause, *People v. Randolph*, 4 P.3d 477, 482 (Colo. 2000).

D. The Affidavit Establishes Probable Cause to Support the Issuance of the Search Warrant

1. The Affidavit States Probable Cause That Carrier Was the Purchaser

¶ 25 Carrier says that the only information connecting him to the purchases made from the organization's websites is an email address, joshuacarrier@adelphia.net. He argues that this information does not amount to probable cause to believe that he was the purchaser.

¶ 26 We disagree, because the affidavit stated the following:

- The purchases were made by someone using the email address joshuacarrier@adelphia.net.
- The IP address associated with the transactions "geo-located" to Colorado Springs.
- Defendant is the only Joshua Carrier in Colorado Springs.
- At some point in 2007, defendant was using an email address joshuacarrier@comcast.net.
- In mid-2006, Comcast acquired Adelphia and all of the Adelphia email addresses were eventually transferred to Comcast.
- In 2011, defendant was using the email address joshcarrier@comcast.net.

• Carrier's home address did not change between 2007 and 2011.

¶ 27 True, as Carrier points out, the AFOSI investigators did not obtain payment or internet subscriber information that directly and definitively connected Carrier to the purchases or the email address joshuacarrier@adelphia.net. But probable cause to search a particular place can be established entirely by circumstantial evidence and reasonable inferences drawn from that evidence. *People v. Green*, 70 P.3d 1213, 1214-15 (Colo. 2003). And because probable cause "deals with probabilities, not certainties," *People v. Altman*, 960 P.2d 1164, 1171 (Colo. 1998), an affidavit need only establish "a fair probability" that officers executing the warrant will find evidence of a crime at the place to be searched. *Green*, 70 P.3d at 1214.

¶ 28 We conclude that the affidavit established a fair probability that Carrier was the person who made the purchases from the organization's websites.

2. The Affidavit States Probable Cause That Carrier Purchased Child Pornography

¶ 29 Carrier contends that the affidavit fails to establish that he purchased child pornography rather than lawful materials.

¶ 30 We disagree, because the affidavit stated the following:

• In 2006, ICE initiated an investigation into a criminal organization. ICE learned that the organization was operating over 200 child pornography websites, including a website known as "Home Collection."

• On January 17, 2007, Carrier made a $79.95 purchase from one of the organization's websites (the invoice was sent by an email address known to ICE to be linked to the organization), but ICE could not identify the particular website.

• On February 23, 2007, Carrier purchased a membership for $99.95 to "the member website titled 'Home Collection CP Archive,' and the advertising website titled 'Pure Child Fuck.'"

• The website contained several sections, including "News," "Photos," "Videos," and "Software." The "photos" section contained a single gallery of nineteen images, including images of child pornography. The "Videos" section contained child pornography.

¶ 31 It is theoretically possible, as Carrier contends, that he made a purchase from a website associated with an organization operating child pornography websites, and also paid to subscribe to a website titled "Pure Child Fuck," without ever accessing child pornography. Still, the "mere fact that 'innocent explanations for the activity may be imagined' is not enough to defeat the probable cause showing." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.2(e), Westlaw (5th ed. database updated Oct. 2017) (quoting *Peterkin v. United States*, 281 A.2d 567, 569 (D.C. 1971)).

¶ 32 And based on the evidence in the affidavit, the issuing judge could reasonably have decided that an innocent explanation was unlikely. "[E]vidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed" child pornography. *United States v. Wagers*, 452 F.3d 534, 540 (6th Cir. 2006); *see also United States v. Martin*, 426 F.3d 68, 77 (2d Cir. 2005) (evidence that the defendant belonged to a child pornography website established probable cause even without direct evidence that the defendant downloaded material from the website because "[a]t its core, the modus operandi" of the website "was criminal").

¶ 33 We conclude, therefore, that the affidavit established a fair probability that Carrier purchased or accessed child pornography in January and February 2007.

3. The Affidavit States Probable Cause That Evidence of a Crime Would Be Found at the Time of the Search

¶ 34 Carrier's primary argument is that any information establishing probable cause that he had possessed child pornography in 2007 was too stale to establish probable cause for a search of his home in 2011.

¶ 35 We readily acknowledge that an affidavit for a search warrant must demonstrate that evidence of criminal activity is located in the place to be searched "at the time of the warrant application, not merely some time in the past." *Cooper*, ¶ 8 (quoting *Miller*, 75 P.3d at 1112). Thus, whether the information in the affidavit is stale is an important consideration. *People v. Krueger*, 2012 COA 80, ¶ 41. Staleness, though, is "not simply a question of the passage of time." *Id.* (quoting *People v. Crippen*, 223 P.3d 114, 118 (Colo. 2010)). Instead, staleness depends on the type of crime and the factual circumstances of the case. *Mapps*, 231 P.3d at 8; *see also Crippen*, 223 P.3d at 118 (reasoning that the staleness inquiry "is a function

of a host of variables unrelated to the calendar, chief among which are the nature of the criminal activity at issue and the way the items being sought are related to it").

¶ 36 Detective Romine's affidavit stated that Carrier was a suspect in a child pornography investigation and that he had used his computer to purchase and access child pornography. The affidavit included several pages explaining the basis of the detective's belief that evidence of a crime would be found at Carrier's home, even four years after the initial investigation. For example, the affidavit stated the following:

- The computer is "an ideal repository for child pornography."
- "[C]omputer files or remnants of such files can be recovered months or even years after they have been downloaded onto a storage medium, deleted, or viewed via the Internet."
- "Even when files have been deleted, they can be recovered months or years later using forensic tools." This is so because when a person "deletes" a file on the computer, "the data contained in the file does not actually disappear." Rather, deleted files often reside in "free space" or "slack space" for "long periods of time before they are overwritten."

• "Files that have been viewed via the Internet are sometimes automatically downloaded into a temporary Internet directory or 'cache.'" Those files "are only overwritten as they are replaced by more recently viewed Internet pages or if a user takes steps to delete them."

• A computer's internal hard drive "contain[s] electronic evidence of how a computer has been used, what it has been used for, and who has used it." Computer users "typically do not erase or delete this evidence, because special software is typically required for that task."

• "Many individuals who collect child pornography maintain books, magazines, newspapers and other writings, in hard copy or digital medium, on the subject of sexual activities with children . . . ." Such individuals "rarely destroy these materials because of the psychological support they provide."

¶ 37 The staleness argument takes on a different meaning in the context of child pornography because, as courts have uniformly recognized, persons interested in child pornography "rarely, if ever, dispose of their collections." *United States v. Prideaux-Wentz*, 543 F.3d 954, 958 (7th Cir. 2008); *see also United States v. Irving*, 452

F.3d 110, 125 (2d Cir. 2006) (the staleness inquiry in the context of child pornography investigations is "unique"). And electronic images of child pornography "can have an infinite life span." *United States v. Frechette*, 583 F.3d 374, 378 (6th Cir. 2009).

¶ 38 In *Irving*, for example, officers obtained a warrant to search for child pornography at the defendant's home five years after he was detained briefly at an airport on suspicion of traveling internationally to engage in sexual acts with minors. 452 F.3d at 115. The court concluded that the information in the affidavit was not stale, primarily because "it is well known that 'images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes.'" *Id.* at 125 (quoting *United States v. Lamb*, 945 F. Supp. 441, 460 (N.D.N.Y. 1996)); *see also United States v. Riccardi*, 405 F.3d 852, 861 (10th Cir. 2005) (warrant based primarily on five-year-old receipt was not invalid due to staleness).

¶ 39 Carrier does not dispute the general proposition that images of child pornography may be recovered long after the defendant accesses them, or that this proposition affects the staleness inquiry. Instead, he contends that the affidavit failed to demonstrate that he

was the type of person who was likely to store images of child pornography for many years.

¶ 40 We agree that, when the affiant relies on the characterization of the defendant as a person interested in child pornography to defeat a staleness challenge, the affidavit must contain some evidence to support that characterization. *See, e.g.*, *United States v. Raymonda*, 780 F.3d 105, 117 (2d Cir. 2015). But the requirement can be satisfied by evidence that the defendant paid for membership to a child pornography website. *See id.* at 114; *see also Frechette*, 583 F.3d at 379 (no staleness where the defendant purchased website subscription); *United States v. Gourde*, 440 F.3d 1065, 1072 (9th Cir. 2006) (the defendant fit the collector profile because he joined a paid subscription website).

¶ 41 In light of these principles, we find Carrier's reliance on *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990), misplaced. For one thing, *Weber* did not involve the search of a computer. The uniqueness of the staleness inquiry in child pornography cases turns to a great extent on the fact that electronic images can remain on a computer indefinitely, even after the suspect deletes them. *See United States v. Kleinkauf*, 487 F. App'x 836, 839 (5th Cir. 2012)

(information about purchase of child pornography was not stale, in part because "it is common to retrieve computer files or images long after they were viewed, downloaded, or deleted").

¶ 42 Moreover, in *Weber*, the suspect engaged in a single transaction involving the purchase, by mail, of child pornography. 923 F.2d at 1340. The court concluded that the affidavit, which did not attempt to demonstrate that the defendant was a "collector" of child pornography, failed to state probable cause to search for items beyond those ordered by the defendant. *Id.* at 1344-45.

¶ 43 In contrast, Carrier bought a membership to a child pornography website. The issuing judge could reasonably have inferred that Carrier sought unlimited access to the content of the website, and that Carrier was therefore a person interested in child pornography. *See Raymonda*, 780 F.3d at 114-15; *see also Prideaux-Wentz*, 543 F.3d at 961 (affidavit demonstrated that the defendant might be a "collector" of child pornography where evidence showed that he downloaded "a fair number of child pornography images").

¶ 44 Accordingly, we conclude that the affidavit established a fair probability that evidence of a crime would be found at Carrier's home at the time of the search.

E. Good Faith Exception

¶ 45 Even if we assume that the information in the affidavit was too stale to establish probable cause, we nonetheless agree with the district court that suppression of the evidence was not required.

¶ 46 The good faith exception to the exclusionary rule applies when, despite an invalid warrant, the officers who executed the warrant had a reasonable good faith belief that the search comported with the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 906 (1984). We presume that an officer's actions are in "reasonable good faith" when the evidence was obtained pursuant to and within the scope of the warrant, unless the warrant was obtained by misrepresentation. § 16-3-308(4)(b), C.R.S. 2017.

¶ 47 The good faith exception does not apply, however, where the warrant is based on a "bare bones" affidavit — an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *Cooper*, ¶¶ 12-13. Thus, the exception provides a safe harbor for the "middle ground" between

an affidavit setting forth probable cause and a bare bones affidavit. *People v. Gutierrez*, 222 P.3d 925, 942 (Colo. 2009) (quoting *Altman*, 960 P.2d at 1169).

¶ 48 Carrier says the affidavit qualifies as a "bare bones" affidavit because the information was stale. But the affidavit reliably establishes that Carrier had purchased access to a child pornography website. And Detective Romine provided detailed information concerning the likelihood of recovering evidence of a crime from the home, including the computer, of a person interested in child pornography. Under these circumstances, even if the affidavit failed to establish probable cause, we cannot characterize it as a bare bones affidavit containing "wholly conclusory statements devoid of facts from which a magistrate can independently determine probable cause." *Altman*, 960 P.2d at 1170; *see also Prideaux-Wentz*, 543 F.3d at 960-61 (although four-year-old information in affidavit was stale, officer's reliance on warrant was objectively reasonable because affidavit included "specifics" suggesting that the defendant might be a "collector" of child pornography).

¶ 49 We therefore conclude that, even if the warrant was not supported by the requisite probable cause, the good faith exception applies, and the district court did not err in denying Carrier's motion to suppress.

III. The Admission of the *Child Molesters* Book was Not Plain Error

¶ 50 In both trials, the prosecution introduced a book entitled Child Molesters: A Behavioral Analysis for Law Enforcement Officers Investigating The Sexual Exploitation of Children By Acquaintance Molesters. The book was discovered in July 2011, in an envelope on Carrier's desk at the CSPD.

¶ 51 Carrier contends that the court committed plain error in admitting the book because it (1) contained unreliable expert evidence; (2) constituted impermissible lay opinion; (3) contained improper opinions on the credibility of child victims; (4) constituted inadmissible hearsay;[1] (5) amounted to impermissible profile evidence; and (6) was unduly prejudicial.

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[1] The book is not a testimonial statement for purposes of a Confrontation Clause analysis. *See Raile v. People*, 148 P.3d 126, 130 (Colo. 2006) (describing testimonial hearsay).

A. Standard of Review

¶ 52 We review a trial court's evidentiary rulings for an abuse of discretion. *People v. Relaford*, 2016 COA 99, ¶ 15. A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or if it misapplies the law. *Id.*

¶ 53 The parties agree that Carrier did not object to the admission of the book. The People say the failure to object means that Carrier waived the claim; Carrier says we should review for plain error.

¶ 54 We assume, without deciding, that Carrier did not waive his claim. *See People v. Rediger*, 2018 CO 32, ¶¶ 39-40. But Carrier cannot demonstrate plain error. Plain error is error that is obvious and substantial and so undermines the fundamental fairness of the trial as to raise serious doubts about the outcome. *People v. Douglas*, 2015 COA 155, ¶ 41.

B. Analysis

¶ 55 The People defend the admission of the book on the ground that it was not admitted for the truth of its content but to show that Carrier possessed it. We acknowledge that no witness testified about the statements in the book. But the record does not establish that the prosecutor expressly offered the book for a limited

purpose. If he had, Carrier could have requested an instruction, and the court would have provided one. *See* CRE 105. As it was, the jury was not instructed that it could consider the book only for a limited purpose and not for the truth of its content.

¶ 56 Because the People offer no other justification for the book's admission, we will assume that its admission was error for the reasons asserted by Carrier.

¶ 57 We understand Carrier's primary objection to be that the book sets forth "indicators" and "behavior patterns" of "acquaintance child molesters," some of which Carrier shares. For example, the author says that these sex offenders tend to victimize boys between the ages of ten and sixteen, collect child pornography and child erotica, and control their victims through a "grooming" process. The book mentions that child molesters use their status as an authority figure — as coaches or police officers — to manipulate victims and escape responsibility. And the book specifically warns that these authority figures can "claim that certain acts of physical touching were a legitimate part of their examination or treatment."

¶ 58 We agree that this information would be prejudicial to Carrier's defense. The problem, though, is that the same

information was properly admitted, without objection, through two experts.

¶ 59 The experts testified at length about behaviors and characteristics of sexual offenders, including the process of grooming victims and the exploitation of their position of trust (as a teacher, coach, or police officer) to lend legitimacy to their actions. One of the experts testified in detail about child molesters' "cognitive sets," using a formal typology akin to the one presented in the book.

¶ 60 When improperly admitted lay evidence is cumulative of properly admitted expert testimony, there is no plain error. *Douglas*, ¶ 41; *see also People v. Herdman*, 2012 COA 89, ¶ 72 (improper admission of lay opinion testimony concerning post-traumatic stress disorder was not plain error because experts on both sides testified about the condition).

¶ 61 We agree that the author's opinion that "children rarely lie about sexual victimization" improperly bolstered the credibility of the child victims. *See People v. Wittrein*, 221 P.3d 1076, 1081 (Colo. 2009). But considered in context, we cannot say that the single sentence in a 150-page document amounted to plain error. The

sentence is followed by an explanation of when a child *might* lie about sexual abuse, including a cautionary statement that "just because a child is not lying does not mean he or she is making an accurate statement." Thus, the error was not substantial. *See Relaford*, ¶ 43.

¶ 62 As for the statements in the book about sex offenders' potential to commit violence against their victims, or to victimize multiple children, we discern no reversible error. First, multiple children testified that Carrier had in fact victimized them; that properly admitted testimony was surely more damaging than generic statements in the book. And, unlike the statements about characteristics of sex offenders that actually matched Carrier, the statements about potential for violence were unrelated to any of the allegations in the case. In any event, that a sex offender might commit violence to avoid detection is a conclusion a jury is likely to draw on its own. *See People v. Howard-Walker*, 2017 COA 81M, ¶ 63 (no plain error from officer's testimony that the defendant would have used gun if he had encountered homeowner during burglary because jury would have inferred that on its own) (*cert. granted* May 21, 2018).

¶ 63 Finally, we note that in the first trial at least, the book appears to have had no effect on the jury: Carrier was not convicted of any of the sexual contact or sexual assault charges. We therefore will not attribute to the book a high potential for inflaming the jury.

¶ 64 To the extent Carrier has other objections to the book's admission, he has not explained why those objections matter. For example, Carrier says that the book's author, who is not a psychiatrist, rendered opinions "regarding psychological and mental health disorders" and "adolescent development and behavior." But it is not clear how the admission of those opinions was harmful to Carrier's defense. We will not speculate as to possible prejudice. Without any allegation, much less a demonstration, of prejudice, we cannot find plain error. *See People v. Palacios*, 2018 COA 6M, ¶ 29 (court will not speculate as to what the party's argument might be).

IV. Admission of Certain Lay Testimony Was Not Plain Error

¶ 65 Carrier contends that the court erred by admitting (1) expert testimony in the guise of lay testimony; (2) testimony regarding witnesses' credibility and Carrier's guilt; and (3) improper character evidence.

A. Standard of Review

¶ 66 We will not disturb a trial court's evidentiary rulings absent a showing of an abuse of discretion. *People v. McFee*, 2016 COA 97, ¶ 17. A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or is based on an erroneous understanding or application of the law. *Id.*

¶ 67 Mostly, Carrier did not object to the admission of evidence he now says should not have been admitted. Thus, even if we conclude that the court abused its discretion, we will not reverse unless the error amounted to plain error. Crim. P. 52(b); *Hagos v. People*, 2012 CO 63, ¶ 14.

B. Expert Testimony

1. Expert Versus Lay Testimony

¶ 68 A witness gives lay testimony when the testimony is rationally based on the perception of the witness and not based on scientific, technical, or other specialized knowledge. CRE 701. A witness gives expert testimony when the testimony is based on scientific, technical, or specialized knowledge. CRE 702.

¶ 69 The "critical factor" in distinguishing between lay and expert testimony is the basis for the witness's opinion. *Venalonzo v.*

People, 2017 CO 9, ¶ 23. Lay testimony is "testimony that could be expected to be based on an ordinary person's experiences or knowledge," *id.*, whereas expert testimony "goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have," *id.* at ¶ 16.

2. The Challenged Testimony

¶ 70 *Handwriting Comparison.* We perceive no error in the admission of a detective's lay opinion testimony that handwriting on a sticky note was similar to a known sample of Carrier's handwriting. *See* § 13-25-104, C.R.S. 2017 (handwriting comparison "shall be permitted to be made by witnesses in all trials and proceedings"); *Lewis v. People*, 174 Colo. 334, 340, 483 P.2d 949, 952 (1971) ("[U]nder our statutes, it is not necessary that an expert testify as to the authenticity of the writing."); *see also People v. Vigil*, 2015 COA 88M, ¶ 59 (allowing lay testimony that shoeprints appeared to match) (*cert. granted* Mar. 20, 2017).

¶ 71 *"Tanner Stages" of Development.* Even assuming that testimony about the "Tanner Stages" of development in children, adolescents, and adults constituted expert testimony, we discern no plain error in the admission of the testimony through a police

officer testifying as a lay witness. Carrier has not alleged prejudice and we perceive none. *See People v. Boykins*, 140 P.3d 87, 95 (Colo. App. 2005) (to demonstrate plain error, the defendant must establish that error affected his substantial rights).

¶ 72 *Mandatory Duty to Report Flyer.* Two officers testified that Carrier had a statutory duty to report receipt of the flyer advertising child pornography sent by the postal inspector to Carrier's home. One of the officers also testified that Carrier would have had both a moral and legal duty to turn over the DVDs found in Carrier's home if they had been obtained mistakenly.

¶ 73 Admission of the officers' interpretation of the mandatory reporting statute, section 19-3-304, C.R.S. 2017, to require Carrier to report the flyer, and their conclusion that Carrier had violated the statute, was error. A witness may not usurp the function of the court by expressing an opinion of the applicable law or legal standards. *Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. App. 2000); *see also People v. Beilke*, 232 P.3d 146, 152 (Colo. App. 2009) ("[A] witness may not testify that a particular legal standard has or has not been met.").

¶ 74 Still, we conclude that the error was harmless. An evidentiary error is harmless where, viewing the evidence as a whole, it does not substantially affect the verdict or impair the fairness of the trial. *Beilke*, 232 P.3d at 152. The upshot of the officers' testimony was that Carrier had received the flyer but had decided, despite his statutory duty, not to report it. From there, the jury could have inferred that Carrier disregarded his duty because disclosure might have raised questions as to why he would have been a recipient of a child pornography advertisement, or because he intended to order a video offered on the flyer. Either way, the worst possible inference the jury could have drawn from the officers' testimony was that Carrier was so intent on hiding his interest in child pornography that he disregarded a mandatory duty. But other evidence, such as the child pornography discovered on his computer, directly established that Carrier had an interest in child pornography that he attempted to hide. Thus, we are confident that the officers' inadmissible legal opinions did not substantially affect the verdict.

¶ 75 *Medical Opinions.* In both trials, a mother of one of the victims explained the symptoms of appendicitis. In the first trial, another victim's mother, a medical assistant, testified that medical protocol

required the presence of a third party during the examination of a minor's genitals. In the second trial, a wrestling coach testified about the procedure for identifying ringworm.

¶ 76 Even if we assume that the testimony amounts to expert testimony, *see Melville v. Southward*, 791 P.2d 383, 387 (Colo. 1990) ("[M]atters relating to medical diagnosis and treatment ordinarily involve a level of technical knowledge and skill beyond the realm of lay knowledge and experience."), its admission was not plain error. The first mother's and the coach's testimony was cumulative of properly admitted expert testimony of an emergency medicine expert and a pediatrician. *Douglas*, ¶ 41. As for the medical assistant's testimony, it was prejudicial only because it undermined Carrier's defense that he performed the skin checks, during which he touched the children's genitals, according to reasonable medical protocol. But in the first trial, Carrier was not convicted of any of the charges related to touching the children's genitals. Thus, we can be sure that the testimony did not cast serious doubt on the reliability of the judgment of conviction.

C. Lay Opinions on Credibility and Guilt

¶ 77 Carrier contends that the following testimony, admitted at the first trial, impermissibly commented on the credibility of the victims and his guilt:

- A father testified that his son would not lie to him about Carrier touching his genitals.

- In response to a question about whether she was told what her son had disclosed in his forensic interview, a mother stated, "I know that he was . . . sexually assaulted."

- In response to a jury question ("Do you recall when you formed the opinion that the defendant is guilty?") a forensic investigator testified that she usually determines whether there has been a criminal violation near the end of an interview.

¶ 78 In a video of an interview played for the jury, the same forensic interviewer explained to one of the victims that she believed that what Carrier had done to the victim was grooming, a violation of policy, a misuse of power and trust, and criminal.

¶ 79 Testimony that a witness was truthful on a particular occasion is not admissible, particularly when it does not relate to an issue other than credibility. *Relaford*, ¶ 27; *see also* CRE 608 (allowing

evidence of a witness's *character* for truthfulness). As well, a witness cannot testify that he believes that the defendant committed the crime at issue. *People v. Penn*, 2016 CO 32, ¶ 31. Accordingly, the court abused its discretion in admitting the testimony.

¶ 80 However, the admission of this testimony did not rise to the level of plain error. In the first trial, Carrier was acquitted of charges related to the father's and mother's sons; thus, the impermissible bolstering of those victims' credibility could not have affected the verdict. *Relaford*, ¶ 43.

¶ 81 The forensic investigator's comments during the interview about Carrier's misconduct and guilt were also not plain error; in the scheme of the month-long trials, we cannot say that these brief comments undermined the reliability of the verdicts.

¶ 82 As for the response to the jury question, Carrier approved the question and should have anticipated the answer, which was directly responsive. Thus, any error in admitting the investigator's response was either invited or, at a minimum, not plain. *See Wittrein*, 221 P.3d at 1082 (admission of testimony was invited or

not plain error where the "responses were a foreseeable result of the form of questioning").

D. Improper Personal Opinions About Carrier

¶ 83 Carrier contends that the following testimony amounted to improper personal opinions about him:

¶ 84 *Detective's Impressions about Carrier's State of Mind.* In the first trial, a detective testified that, in an effort to have Carrier return home while the police conducted the search of his home, he told Carrier that his home had been burglarized. The detective testified that during the telephone call, he had the impression that Carrier did not want him at his home.

¶ 85 Under CRE 701, a lay witness may state an opinion about another person's motivation or intent if the witness had sufficient opportunity to observe the person and to draw a rational conclusion about the person's state of mind. *People v. Hoskay*, 87 P.3d 194, 197 (Colo. App. 2003).

¶ 86 Thus, the court did not abuse its discretion in permitting the detective to testify as to his conclusion about Carrier's state of mind. In any event, even if the testimony were inadmissible, the detective acknowledged that he was speculating as to Carrier's state

of mind and thus any error would not warrant reversal. *See Wittrein*, 221 P.3d at 1082 (where a witness disclaimed the certainty of her opinion, testimony could not affect the fairness of the trial).

¶ 87 *Parents' Testimony.* A victim's mother testified that when she and her husband, "who had issues with Carrier already," learned of Carrier's arrest, her husband stated, "I knew he was a chomo." Another victim's mother testified that she "knew something was wrong" with Carrier, that she "always knew something was off," and that she "had a bad feeling" about him all along. A father testified that he did not like Carrier because he wrestled with the children while continuing to wear his gun.

¶ 88 Even if we assume that the admission of this testimony was error, the error was not plain. The witnesses' references to their opinions of Carrier were fleeting, particularly in the context of two lengthy trials. *People v. Armijo*, 179 P.3d 134, 139 (Colo. App. 2007) ("[T]here is no reasonable possibility that the brief testimony, without any elaboration or subsequent reference to it, influenced the jury's verdict or affected the fairness of the trial."); *People v. Cardenas*, 25 P.3d 1258, 1263 (Colo. App. 2000) (a statement by a

witness about why the victim feared the defendant was harmless "because it was brief and general in nature").

¶ 89 Moreover, with respect to the "chomo" evidence, Carrier's lawyer elicited the most damaging aspects of this testimony on cross-examination. *See Wittrein*, 221 P.3d at 1082.

E. Witnesses' Comments on Carrier's Assertion of His Constitutional Rights

¶ 90 Carrier contends that certain evidence constituted an improper comment on his exercise of his constitutional rights:

- A police officer testified that Carrier "demanded" to see the search warrant.
- Another officer, while recounting the circumstances of executing the warrant, mentioned that Carrier called his mother and asked her to call an attorney.
- Recordings of pretextual phone calls were admitted in which Carrier repeatedly noted that he had hired an attorney and, at one point, told a friend that he could not discuss the case with him.

¶ 91 It is well settled that the prosecution may not use the defendant's assertion of his constitutional rights to imply guilt. *See People v. Pollard*, 2013 COA 31M, ¶ 25. The prosecution

impermissibly "uses" a person's assertion of his constitutional rights when it introduces evidence of the assertion without having a proper purpose for admission of the evidence, or when it argues to the jury that such evidence is probative of guilt. *Id.* at ¶ 30.

¶ 92 The People do not offer any proper purpose for the introduction of the challenged testimony. Still, any error in admitting the testimony was not plain.

¶ 93 First, the officer's comment that Carrier demanded to see the warrant was cumulative of other testimony (not challenged on appeal) that Carrier requested to see the warrant. And at least one officer testified that CSPD protocol required officers to show the warrant to the homeowner. The officer's comment that Carrier asked his mother to call a lawyer was nonresponsive to the prosecution's question. *See People v. Petschow*, 119 P.3d 495, 507 (Colo. App. 2004) (admission of testimony was not plain error where the "defendant made no objection and . . . the portions of the testimony he now challenges were volunteered by the witnesses and were not responsive to the prosecutor's questions"). And Carrier did not request that the audiotapes, which were admitted for a proper purpose, be redacted to exclude any reference to an attorney.

¶ 94 But more importantly, none of the evidence implied that Carrier's assertion of his constitutional rights demonstrated guilt. "The prosecutor did not direct the jury's attention to defendant's [assertion of his constitutional rights], expand on the testimony, or refer to it later." *Id.* at 506; *see also People v. Hall*, 107 P.3d 1073, 1078 (Colo. App. 2004) (admission of testimony was not plain error where prosecutor did not argue that the defendant's assertion of his rights implied guilt).

V. The Admission of Prior Acts Evidence Was Not Plain Error

¶ 95 Carrier contends that the prosecution's admission of the following evidence was improper under CRE 404(b): (1) testimony about the tip that led investigators to Carrier; (2) testimony about why the postal inspector sent the flyer to Carrier; (3) testimony about other potential victims; (4) evidence of Carrier's possession of legal adult pornography; and (5) testimony that Carrier failed to report the child pornography flyer or the child pornography he possessed.

A. Legal Principles and Standard of Review

¶ 96 CRE 404(b) prohibits the admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in

order to show that he acted in conformity therewith." Such evidence may be admissible for other purposes "provided that upon request by the accused, the prosecution in a criminal case . . . provide[s] reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial." *Id.*

¶ 97 However, admission of prior acts evidence does not always fall within the scope of Rule 404(b). *People v. Gee*, 2015 COA 151, ¶ 27. Instead, such evidence may constitute the "res gestae" of the charged offense and is not subject to Rule 404(b)'s procedural requirements. *People v. Miranda*, 2014 COA 102, ¶ 50.

¶ 98 Res gestae is a theory of relevance recognizing that certain evidence is relevant because of its unique relationship to the charged crime. *People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009). Res gestae evidence is linked in time and circumstances with the charged crime, forms an integral and natural part of an account of a crime, or is necessary to complete the story of the crime for the jury. *Miranda*, ¶ 47.

¶ 99 Regardless of whether other acts evidence is admissible as res gestae or for a permissible purpose under CRE 404(b), the evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice. *See* CRE 403; *People v. Jaramillo*, 183 P.3d 665, 668 (Colo. App. 2008).

¶ 100 We review a trial court's decision to admit evidence under CRE 404(b) or as res gestae for an abuse of discretion. *Gee*, ¶ 23. A trial court abuses its discretion if its decision was manifestly arbitrary, unreasonable, or unfair, or if it misconstrued or misapplied the law. *Id.*

B. Some of the Evidence Was Properly Admitted As Res Gestae

¶ 101 The evidence about the investigation — the AFOSI tip that led CSPD officers to Carrier and the reason for sending the flyer — was part of the res gestae of the offense, admissible to explain why the CSPD initiated its investigation of Carrier and how the investigation unfolded. *See People v. Gomez*, 211 P.3d 53, 58 (Colo. App. 2008) (officer's testimony about tip that led to undercover investigation was admissible as res gestae), *abrogated on other grounds by Moore v. People*, 2014 CO 8; *see also People v. Asberry*, 172 P.3d 927, 933 (Colo. App. 2007) (testimony explaining the investigation was admissible as res gestae).

¶ 102 We discern no unfair prejudice from the admission of the evidence. Carrier says the evidence unfairly suggested that he was

"predisposed to possess child pornography." But Carrier *did* possess child pornography, and evidence of his possession of child pornography was properly admitted at both trials.

C. Any Error in Admitting Other Prior Bad Acts Evidence Did Not Amount to Plain Error

¶ 103 With respect to the testimony about other potential victims, any error in admitting the testimony was not plain. In a case involving twenty-two alleged victims, testimony that the police could not identify a couple of students depicted in Carrier's secret skin-check videos or that students discussed the allegations against Carrier with other students was unlikely to have affected the outcome. *See People v. Lopez*, 129 P.3d 1061, 1065 (Colo. App. 2005).

¶ 104 As for evidence that Carrier possessed adult pornography, we agree that this evidence was inadmissible under Rule 404(b), but conclude that its admission was not plain error. In light of all of the evidence presented during the month-long trials, including evidence that Carrier possessed child pornography, we cannot say that admission of some adult pornographic magazines and videos cast

serious doubt on the reliability of the verdicts. *See Relaford*, ¶¶ 66-67.

¶ 105 Finally, for the reasons we have already explained, we conclude that any error in admitting evidence that Carrier violated a mandatory duty to report the flyer was not plain error.

VI. Any Prosecutorial Misconduct Did not Amount to Plain Error

A. Legal Principles and Standard of Review

¶ 106 In evaluating a claim of prosecutorial misconduct, we engage in a two-step analysis: we must determine, first, whether the prosecutor's questionable conduct was improper based on the totality of the circumstances and, second, whether such actions warrant reversal according to the proper standard of review. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

¶ 107 If defense counsel objected at trial, we review for harmless error, but if there was no contemporaneous objection to the prosecutor's statements, we apply a plain error standard of review. *Id.* at 1097.

¶ 108 "To constitute plain error, misconduct must be flagrant or glaring or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the

reliability of the judgment of conviction." *People v. Weinreich*, 98 P.3d 920, 924 (Colo. App. 2004), *aff'd*, 119 P.3d 1073 (Colo. 2005).

B. The Challenged Statements

¶ 109 Carrier argues that, during the two trials, the prosecutor committed misconduct in the following ways:

• In his opening statement, the prosecutor told the jury that Carrier "will not fool you" like he fooled the parents and staff of the middle school. In closing argument, the prosecutor argued that Carrier's secrecy about touching the children's genitals demonstrated that he was conducting the skin checks for sexual gratification, not for legitimate purposes. Contrary to Carrier's assertion, we cannot conclude that these comments were calculated or intended to direct the attention of the jury to Carrier's decision not to testify. *See People v. Todd*, 189 Colo. 117, 120, 538 P.2d 433, 436 (1975).

• The prosecutor called Carrier's theory that he touched the children's genitals for a bona fide medical purpose "foolish" and explained to the jury that Carrier's defense had changed from denial to "legitimate purpose" after the prosecution discovered the videos of the skin checks. These statements merely characterized Carrier's

defense in order to illustrate the prosecutor's view "that the evidence in support of defendant's [theory] lacked substance." *People v. Ramirez*, 997 P.2d 1200, 1211 (Colo. App. 1999), *aff'd*, 43 P.3d 611 (Colo. 2001).

• During closing argument, the prosecutor suggested that Carrier had deleted the skin-check videos because he was no longer using them for masturbatory purposes. In our view, the comment was a reasonable inference drawn from expert testimony. *See People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010) ("A prosecutor has wide latitude to make arguments based on facts in evidence and reasonable inferences drawn from those facts.").

• The prosecutor argued that there was no evidence that Carrier touched the children's genitals for a medical purpose or that Carrier made the videos to protect himself from potential accusations. These comments did not improperly shift the burden of proof to Carrier. *See id.* at 1155 (citing cases for proposition that prosecutor's comments on lack of evidence to support defense theory did not improperly shift burden of proof to defendant).

• In the first trial, the prosecutor argued that two of the victims would not have lied about being touched on their genitals

because the disclosure was so embarrassing. As a general matter, a prosecutor may not interject his or her personal belief regarding the veracity of a witness's testimony, but he or she may properly reference facts supporting the witness's credibility. *People v. Serpa*, 992 P.2d 682, 685-86 (Colo. App. 1999). But even if the comments constituted improper vouching, *see People v. Villa*, 240 P.3d 343, 358 (Colo. App. 2009), we cannot say that, in light of the prosecutor's entire closing argument, the comments were so flagrant or prejudicial as to warrant a new trial, *id.* Moreover, in the first trial, the jury acquitted Carrier of all charges related to those two victims; thus, the verdict was not rendered unreliable by the supposed vouching. *Weinreich*, 98 P.3d at 924.

• The prosecutor characterized the child victims as "innocent." Even assuming the comment was error, we cannot say that his brief characterization of the victims rose to the level of plain error. *See Stout v. People*, 171 Colo. 142, 148, 464 P.2d 872, 875 (1970) (no reversible error where prosecutor argued the complaining witnesses were "good and fine girls" when the jury was instructed such comments were just argument and not evidence).

• The prosecutor stated that the short stories depicting boys engaging in sexual activities were "disgusting, appalling" and showed Carrier's intent to touch the children for sexual gratification. Contrary to Carrier's contention, this statement does not impermissibly "paint Carrier as a bad person." Rather, the comment was an acceptable "oratorical embellishment," *Strock*, 252 P.3d at 1153 (quoting *People v. Collins*, 250 P.3d 668, 678 (Colo. App. 2010)); *see also People v. Lovato*, 2014 COA 113, ¶ 69 (where context supports a descriptive term, the descriptive term is admissible), and a proper direction to the jury to use the evidence for the limited purpose of considering Carrier's intent.

• During the second trial, the prosecutor stated throughout closing argument that Carrier was "the great manipulator," "the distorter," and "a con." We agree that these remarks crossed the line and were improper. *See People v. Mason*, 643 P.2d 745, 752 (Colo. 1982). But based on the mixed verdicts, we are confident that the remarks did not so "inflame[] and impassion[] the jury that it could not render a fair and impartial verdict." *Id.* at 753 (quoting *People v. Elliston*, 181 Colo. 118, 126, 508 P.2d 379, 383 (1973)).

VII. The Court Did Not Abuse Its Discretion in Denying the Request for a *Kinney* Instruction

¶ 110 In the first trial, the jury returned mixed verdicts related to two victims, A.H. and D.E., acquitting on some counts and hanging on others. In the second trial, the prosecution retried counts on which the jury had hung. It also provided notice of its intent to introduce evidence through those victims of the acquitted conduct under Rule 404(b).[2]

¶ 111 Carrier requested an instruction, pursuant to *Kinney v. People*, 187 P.3d 548 (Colo. 2008), informing the jury that he had been acquitted of that conduct in the first trial. The court denied the request, citing both the unlikelihood that the jury would learn of the earlier trial or speculate about the verdict as well as the high potential for juror confusion.

A. Legal Principles and Standard of Review

¶ 112 Prior acts evidence can be admitted even though the defendant was acquitted of the criminal charges arising out of the act,

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[2] The prosecution endorsed two other victims under CRE 404(b), but we assume that those victims did not ultimately testify concerning acquitted conduct, as their testimony is not mentioned in either party's briefing.

provided that the district court finds by a preponderance of the evidence that the prior act occurred and that the evidence is otherwise admissible under the four-part test adopted in *People v. Spoto*, 795 P.2d 1314, 1318 (Colo. 1990). *Kinney*, 187 P.3d at 554.

¶ 113 In *Kinney*, the court concluded that, under certain circumstances, where acquitted conduct is admitted under Rule 404(b), the defendant is entitled to have the jury instructed that he was acquitted of the prior act. The instruction is appropriate when "the testimony or evidence presented at trial about the prior act indicates that the jury has likely learned or concluded that the defendant was tried for the prior act and may be speculating as to the defendant's guilt or innocence in that prior trial." *Id.* at 557.

¶ 114 We review the district court's denial of a request for a *Kinney* instruction for an abuse of discretion. *Id.* at 558. A district court's discretionary ruling will not be overturned unless it is manifestly arbitrary, unreasonable, or unfair. *Id.*

¶ 115 Carrier argues that the *Kinney* rule was implicated in three ways during the second trial: first, he says that, when the prosecutor introduced DVDs recovered from his house during the search, the court should have instructed the jury that the prior jury

acquitted Carrier of exploitation in connection with those DVDs; second, he says that when A.H. and D.E. testified about the acquitted conduct, the court should have told the jury that Carrier was acquitted of those charges in a prior trial; and third, he says the court should have permitted him to cross-examine officers about the effect of acquittals in the prior trial on the subsequent police investigation.

B. Analysis

1. The DVDs

¶ 116 In the first trial, seven of the sexual exploitation counts related to Carrier's possession of DVDs allegedly containing child pornography. The first jury apparently disagreed that the videos contained child pornography and acquitted Carrier of six counts. At the second trial, the prosecutor introduced the videos under Rule 404(b). According to Carrier, the court should have instructed the second jury that the prior jury did not believe that the videos constituted child pornography.

¶ 117 We disagree that *Kinney* applies in this instance. Information about a prior acquittal is relevant "for the limited purpose of challenging the weight the jury should give the prior act evidence."

Id. at 557. In other words, the instruction "helps the jury weigh the evidence of the prior act and reasonably infer a greater probability of factual innocence because the defendant was acquitted." *Id.* at 556. But if the only question is whether the videos depicted child pornography, the fact of a prior acquittal is not useful to the jury because there is no evidence to weigh — the videos speak for themselves. Thus, the second jury was in precisely the same position as the first jury to evaluate the content of the videos. *Cf. McFee*, ¶¶ 76, 79 (officer's interpretation of video was improper lay opinion testimony because jurors were in the same position as the officer to evaluate the content of the video).

2. The Victims' Testimony

¶ 118 In the first trial, Carrier was charged with six counts related to victim A.H. (sexual assault and unlawful sexual contact – first office incident; sexual assault and unlawful sexual contact – second office incident; and sexual assault and unlawful sexual contact – fitness room incident) and six counts related to victim D.E. (sexual assault, unlawful sexual contact, and enticement – first bed bug check; sexual assault, unlawful contact, and enticement – second, third, and fourth bed bug checks). With respect to A.H., Carrier was

acquitted of the counts related to the fitness room incident and the jury could not reach a verdict on the remaining counts. With respect to D.E., Carrier was acquitted of the counts related to the second, third, and fourth bed bug checks, and the jury could not reach a verdict on the remaining counts. At the second trial, those victims testified about both charged and acquitted conduct.

¶ 119 Carrier contends that the court should have instructed the jury that he was acquitted of certain acts about which the victims testified. He says the jury likely knew about the prior trial and would have necessarily speculated that Carrier was found guilty of the uncharged prior acts.

¶ 120 A *Kinney* instruction is not required simply because the jury might speculate that a prior trial occurred. An instruction is necessary only where the jury would likely have concluded that the defendant was previously tried *for the prior act* and would necessarily speculate as to the defendant's guilt or innocence regarding *the prior act*. *Kinney*, 187 P.3d at 557.

¶ 121 Thus, in the context of this case, the court should have given an instruction only if it determined that the jury was likely speculating as to whether Carrier had previously been tried and

convicted for touching A.H. in the fitness room and for touching D.E. during certain bed bug checks. Carrier offers no evidence to suggest that the jury was speculating about the resolution of those particular charges. Unlike in *Kinney*, where the jury asked for transcripts of the prior proceedings, here, the jury did not ask any questions about the prior acts or request any additional evidence related to them. And, unlike in *Kinney*, the testimony about those acts made up a minuscule portion of the evidence presented during a month-long trial. Thus, we cannot say that the court's decision not to instruct the jury about the acquitted conduct was manifestly arbitrary, unreasonable, or unfair. *Id.* at 558.

3. Cross-Examination of the Officers Regarding Their Investigation

¶ 122 Carrier argues that the court erred in precluding him from cross-examining police officers about the acquittals in the first trial. According to Carrier, the officers had a "motive" or "bias" following the first trial to conduct additional investigation to obtain a more favorable outcome at the second trial. The district court found the proposed examination irrelevant and likely to confuse the jury.

¶ 123 A criminal defendant has a constitutional right under the Confrontation Clause to cross-examine witnesses, and it is error to excessively limit cross-examination, especially when it concerns a witness's bias, prejudice, or motive for testifying. *People v. Chavez*, 2012 COA 61, ¶ 31. Still, "[t]he trial court must exercise its discretion to preclude inquiries that have no probative value, are irrelevant, or are prejudicial." *People v. Marsh*, 396 P.3d 1, 18 (Colo. App. 2011) (quoting *People v. Hendrickson*, 45 P.3d 786, 788 (Colo. App. 2001)), *aff'd*, 2017 CO 10M.

¶ 124 Like the district court, we deem the earlier acquittals irrelevant. The point Carrier was apparently trying to convey in his questioning was that the officers did not conduct a thorough investigation until after the first trial. The district court expressly allowed that line of questioning.

¶ 125 The purpose of allowing cross-examination related to a witness's bias is to give the jury a fair impression of the witness's credibility. *Id.* But Carrier does not explain — and we cannot discern — why the jury would have had a significantly different impression of the officers' credibility had it known that the later

investigation was motivated by the acquittals rather than a general desire to shore up an inadequate initial investigation.

¶ 126 Accordingly, we conclude that the district court did not abuse its discretion in refusing to give a *Kinney* instruction or otherwise precluding evidence of the prior acquittals.

VIII. The District Court Did Not Commit Plain Error in Instructing the Jury on Unlawful Sexual Contact

¶ 127 As to the charge of unlawful sexual contact (medical examination), the court's elemental instruction to the jury listed the following elements:

> 1. That the defendant,
>
> 2. in the State of Colorado, at or about the date and place charged,
>
> 3. knowingly subjected a person to sexual contact, and
>
> 4. engaged in the treatment or examination of the victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

¶ 128 Carrier contends that the instruction was an inaccurate statement of the law because the "knowingly" mens rea did not modify both elements three and four of the offense. According to Carrier, the erroneous instruction would have permitted the jury to

convict him of unlawful sexual contact (medical examination) based on his good faith, but mistaken, belief that he was conducting the examinations for a bona fide medical purpose and consistent with reasonable medical practices.

A. Standard of Review

¶ 129 We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011).

¶ 130 When the defendant fails to object to an instruction, we will reverse only on a finding of plain error. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005). To obtain reversal under this standard, the defendant must demonstrate not only that the instruction affected a substantial right, but also that the record reveals a reasonable probability that the error contributed to his conviction. *Id.* at 750. The court's failure to instruct the jury properly does not constitute plain error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the law. *Id.*

B. Analysis

¶ 131 We conclude, for two reasons, that even if the instruction improperly omitted a mens rea requirement from the fourth element

of the offense, the district court did not commit plain error in instructing the jury.

¶ 132 First, the jury was instructed that "sexual contact" means "the knowing touching of the victim's intimate parts" if "that sexual contact is for the purposes of sexual arousal, gratification, or abuse." Thus, to convict Carrier of unlawful sexual contact (medical examination), the jury necessarily had to find that the sexual contact was not for a "bona fide medical purpose," *see People v. Terry*, 720 P.2d 125, 127 (Colo. 1986) (a "bona fide medical purpose[]" means the examiner is acting in good faith and sincerely to investigate, prevent, or cure a malady), but instead was for the purpose of sexual arousal, gratification, or abuse.

¶ 133 Second, Carrier was convicted of unlawful sexual contact (medical examination) with respect to only five victims. The jury found that, as to each of those victims, Carrier had also committed sexual assault on a child. The court gave an affirmative defense instruction for the sexual assault on a child counts, instructing the jury that the prosecution bore the burden of proving beyond a reasonable doubt that Carrier had *not* subjected the victim to sexual contact for bona fide medical purposes and in accordance

with reasonable medical practices. With respect to those five victims, then, the jury necessarily rejected Carrier's defense.

¶ 134 Thus, we conclude that the record does not reveal a reasonable probability that the instructional error contributed to Carrier's convictions. *Miller*, 113 P.3d at 750.

IX. The Evidence Was Sufficient to Support Carrier's Conviction for Sexual Exploitation of a Child

¶ 135 To obtain a conviction for sexual exploitation of a child, in violation of section 18-6-403(3)(b.5), C.R.S. 2017, the prosecution must prove beyond a reasonable doubt that the defendant knowingly possessed or controlled any sexually exploitative material. "Sexually exploitative material" includes any "photograph . . . or other . . . electronically . . . or digitally reproduced visual material that depicts a child engaged in . . . or being used for explicit sexual conduct." § 18-6-403(2)(j).

¶ 136 In his opening brief, Carrier argued that the prosecution had failed to meet its burden with respect to images recovered from the "internet cache/Web Preview" folder of his laptop computer. According to Carrier, the prosecution had presented no evidence that he knew about his computer's automatic-caching function or

that he exercised control over the images that were automatically saved as cache files.

¶ 137 While the appeal was pending, the supreme court issued its decision in *Marsh v. People*, 2017 CO 10M, which, as Carrier appears to concede in his reply brief, forecloses his argument.

¶ 138 In *Marsh*, ¶ 28, the supreme court concluded that a defendant knowingly possesses and controls child pornography for purposes of section 18-6-403(3) when he knowingly seeks out and views child pornography on the internet. It further concluded that cache images can constitute evidence that the defendant knowingly possessed the images when he viewed them online. *Id.* at ¶ 29.

¶ 139 The evidence demonstrated that Carrier's internet cache contained sexually exploitative images. The computer forensic expert testified that the evidence found on Carrier's hard drive and in the computer's cached files established that the computer's user had visited the membership-only child pornography website over 100 times. Accordingly, we conclude that the evidence was sufficient to support Carrier's sexual exploitation convictions.

X. Conclusion

¶ 140 The judgment of conviction is affirmed.

JUDGE J. JONES and JUDGE ASHBY concur.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203.	DATE FILED: September 9, 2019 CASE NUMBER: 2018SC706
Certiorari to the Court of Appeals, 2013CA645 District Court, El Paso County, 2011CR1695	
Petitioner: Joshua Dwayne Carrier, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2018SC706
ORDER OF COURT	

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

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

BY THE COURT, EN BANC, SEPTEMBER 9, 2019.

Additional material from this filing is available in the Clerk's Office.