17CA0469 Peo v Anderson 08-15-2019

COLORADO COURT OF APPEALS

DATE FILED: August 15, 2019
CASE NUMBER: 2017CA469

Court of Appeals No. 17CA0469
Larimer County District Court No. 15CR1466
Honorable Julie K. Field, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Chayce Aaron Anderson,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE FOX
Freyre and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 15, 2019

Philip J. Weiser, Attorney General, Jennifer L. Carty, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Cynthia A. Harvey, Alternate Defense Counsel, Castle Rock, Colorado, for Defendant-Appellant

APPENDIX A

¶ 1 Chayce Aaron Anderson appeals the judgment of conviction entered on a jury verdict finding him guilty of sex assault (victim helpless) in violation of section 18-3-402(1)(h), C.R.S. 2018. Anderson asserts that the trial court erred by (1) precluding cross-examination of a prosecution witness such that Anderson's right to confrontation was violated; (2) admitting prejudicial evidence under CRE 403; and (3) denying his mistrial motion. Regarding the first contention, we conclude that while the trial court erred, the error was harmless beyond a reasonable doubt. We also conclude that the trial court's rulings described in the second two contentions do not constitute error. We therefore affirm the judgment of conviction.

I. Background

¶ 2 S.W., the victim, and her roommate, K.M., met Anderson on their college campus. S.W. and Anderson exchanged phone numbers and texted later that day.

¶ 3 The next evening, S.W. and K.M. had drinks with friends in their apartment before going to bars. S.W. became very intoxicated, and her friends took her back to her apartment. The friends put

S.W. to bed where she immediately fell asleep. When her friends left the apartment, S.W. was still asleep.

¶ 4 K.M. was not part of the group that took S.W. home; she stayed out and ran into Anderson at a bar. K.M., who was also very intoxicated, said she was going home, and Anderson suggested they share a ride because he lived nearby. When they arrived at K.M. and S.W.'s apartment, Anderson also exited the car and tried to enter the apartment. K.M. told him he needed to leave. K.M. checked on S.W., who she saw was still asleep in her own bed. K.M. then fell asleep in her own room.

¶ 5 Instead of leaving, Anderson apparently entered the apartment and went into S.W.'s room. S.W. woke up to Anderson penetrating her. At trial, she testified that she fought Anderson off her and told him to "get off, get out." Anderson yelled at S.W. that he had given her and K.M. HIV and smashed bottles of alcohol in their kitchen.

¶ 6 S.W. reported the rape to the police the next morning, and DNA testing revealed Anderson's DNA on her underwear and vaginal swabs.

¶ 7 Anderson was charged with sexual assault (victim helpless) and second degree burglary. Anderson's defense at trial was that

S.W. lied about the rape because she did not want her boyfriend to discover that she had cheated on him. Anderson further asserted that S.W. was not asleep or significantly impaired and the sex was consensual. The jury found him guilty of sexual assault but acquitted him of burglary. The court sentenced Anderson to four years to life in the Department of Corrections' custody and ordered him to register as a sex offender.

II. Confrontation Evidence

¶ 8 Anderson asserts that the trial court violated his confrontation rights by precluding cross-examination of a prosecution witness, M.D., on the different penalties M.D. faced before and after his plea agreement. We conclude that any error was harmless beyond a reasonable doubt.

A. Additional Background

¶ 9 The prosecution called M.D., a jailhouse witness, to testify about statements Anderson made to him during their time in the Larimer County Detention Center. The prosecutor asked M.D. about his extensive criminal history, including his February 2016 incarceration when he met Anderson. When the prosecutor asked M.D. why he disclosed that Anderson discussed raping S.W., M.D.

stated, "It is the right thing to do," and "I would hope someone would do it for my children, my family." When the prosecutor asked if M.D. received any benefit or was promised anything in exchange for his testimony, M.D. replied, "No."

¶ 10 On cross-examination, defense counsel asked M.D., "And you were in Larimer County Detention Center because you had been charged with a Class 3 felony escape, correct?" The prosecutor objected, and the following exchange at a bench conference occurred:

> [Defense Counsel]: Your Honor, [M.D.] was given a plea bargain on those charges, which is what I am asking. As part of the plea bargain, he agreed to testify truthfully in any future proceedings, including this one. . . . And I think I am allowed to inquire into that as well as the charges he faced which were reduced by the Prosecution.
>
> [Prosecutor]: I didn't know where he was going given the questions prior to that. I agree that [Defense Counsel] can question on what [M.D.'s] charges were, what he pled to, and whether or not there were any promises made to him for that disposition. . . .
>
> THE COURT: I agree. . . .
>
> [Defense Counsel]: I do plan on asking [M.D.] if he knows what the possible penalty was for

> the charges he faced while in custody that he pled down from.
>
> THE COURT: So the original charge?
>
> [Defense Counsel]: Yes, that he pled up to 24 years, and he pled down to 6 months
>
> [Prosecutor]: Judge, I think that's beyond the scope. I think he can say you were charged with a Class 3 felony and you pled to a Class 2 misdemeanor. But I don't think inquiring about the time, I think that would be used for improper purposes. So I think the scope should be narrowed to the charge and the plea.
>
> THE COURT: I would agree.

¶ 11 Defense counsel then elicited from M.D. that he was charged with a Class 3 Felony in November 2015 for attempted escape, and in April 2016, after sharing the February 2016 conversation he had with Anderson with the district attorney's office, pleaded down to a Class 3 misdemeanor and agreed to testify truthfully in pending cases in which he was called as witness.

B. Standard of Review, Law, and Analysis

¶ 12 We assume without deciding that Anderson preserved this issue for appeal.

¶ 13 A trial court has broad discretion to limit the scope of cross-examination; we review the trial court's evidentiary rulings for

an abuse of discretion, and we will not disturb a ruling unless it was manifestly arbitrary, unreasonable, or unfair. *People v. Skufca*, 176 P.3d 83, 89 (Colo. 2008). "[P]ossible confrontation right violations are reviewed de novo." *People v. Houser*, 2013 COA 11, ¶ 57.

¶ 14 "The right to confront and cross-examine witnesses is guaranteed by the federal and Colorado Constitutions." *Id.* at ¶ 58. Thus, a defendant must be allowed to conduct "appropriate cross-examination designed to show a prototypical form of bias on the part of [a] witness." *Kinney v. People*, 187 P.3d 548, 559 (Colo. 2008). Accordingly, the trial court may not "limit excessively a defendant's cross-examination of a witness regarding the witness' credibility, especially cross-examination concerning the witness' bias, prejudice, or motive for testifying." *Merritt v. People*, 842 P.2d 162, 167 (Colo. 1992). Nevertheless, the right to confrontation is satisfied when an accused is allowed to present "adequate facts from which [the jury] can appropriately draw inferences relating to bias and motive." *People v. Montoya*, 942 P.2d 1287, 1293 (Colo. App. 1996); *see also Kinney*, 187 P.3d at 559 (noting that error in a Confrontation Clause violation is prejudicial when "a reasonable

jury would have had a 'significantly different impression' of the witness's credibility had the defendant been allowed to pursue the desired cross-examination") (citation omitted).

¶ 15 When a witness facing criminal charges enters a plea agreement, "the defendant must be allowed to provide the jury 'with adequate facts from which it can appropriately draw inferences relating to bias and motive.'" *Houser*, ¶ 60 (quoting *Montoya*, 942 P.2d at 1293); *see also Kinney*, 187 P.3d at 561 (concluding that the defendant must be allowed to cross-examine a prosecution witness on two pending charges, even though there had not been an explicit promise of leniency, because the charges showed the witness' testimony may have been influenced by a "promise for, or simply a hope or expectation of, leniency in exchange for favorable testimony").

¶ 16 Colorado cases have found the Confrontation Clause satisfied where "the jury is fully informed as to the original charge brought against a prosecution witness as well as the charge to which the witness later pleaded guilty in exchange for his or her testimony, *and* the jury also hears about the penalty actually received." *Montoya*, 942 P.2d at 1293 (emphasis added); *see also People v.*

Collins, 730 P.2d 293, 300 (Colo. 1986) (concluding there was no error in precluding inquiry into potential penalties where the jury was informed of the original charges, the charges pled to, *and* the penalty actually imposed); *People v. McKinney*, 80 P.3d 823, 829 (Colo. App. 2003) ("A defendant's right to confrontation is not violated . . . as long as the jury was informed of the original charges, the charges to which the witness pleaded guilty, *and* the penalty imposed.") (emphasis added), *rev'd on other grounds*, 99 P.3d 1038 (Colo. 2004); *cf. People v. Gilbert*, 12 P.3d 331, 339 (Colo. App. 2000) (stating that, where the defendant asserted that the trial court erred in not providing a limiting instruction, the jury had to be informed only "as to the original charge brought against a prosecution witness as well as the charge to which the witness later pleaded guilty in exchange for his or her testimony," but not indicating that the jury had to be informed of the penalty actually imposed).

¶ 17 Here, the court allowed defense counsel to ask M.D. about the original charges he faced and the lesser charges he pleaded to in exchange for truthful testimony if he was called as a witness. However, the court, by agreeing with the prosecutor's argument

that inquiring about "the time" would be improper, effectively precluded defense counsel from inquiring into the length of the sentence M.D. originally faced (twenty-four years) and the length of the sentence he received under his plea agreement (six months). Because similar Colorado cases — with the exception of *Gilbert*, 12 P.3d at 339, which considered a jury instruction question — hold that the jury must be informed of the original charges, the charges pleaded to, *and* the penalty imposed, the trial court improperly limited cross-examination. *See, e.g.*, *Montoya*, 942 P.2d at 1293.

¶ 18 However, we conclude that this error was harmless beyond a reasonable doubt. *See Houser*, ¶ 64.

C. Harmlessness

¶ 19 Constitutional errors — including confrontation violations — do not require reversal where the error is harmless beyond a reasonable doubt. *Id.* Factors we consider in determining if the defendant was prejudiced include "the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted,

and the overall strength of the prosecution's case." *Merritt*, 842 P.2d at 169; *see also People v. Garcia*, 2012 COA 79, ¶30 (concluding that where the jury acquitted a defendant of certain charges, the defendant failed to demonstrate prejudice because the jury was clearly "able to separate the facts, legal principles, and defenses applicable to these charges from others"). The prosecution bears the burden of proof in a harmlessness inquiry. *Houser*, ¶ 65.

¶ 20 The *Houser* division concluded that the trial court's error in precluding cross-examination on any plea details was harmless beyond a reasonable doubt where the witness' testimony was not the only evidence of defendant's guilt — the court specifically relied on the presence of the defendant's uncontroverted and highly inculpatory email admissions — and defense counsel was able to cross-examine the witness on inconsistencies in her testimony. *Id.* at ¶¶ 66-70.

¶ 21 Similarly, in this case, while M.D.'s testimony was significant, it was not the only evidence of Anderson's guilt. *See id.* at ¶ 66. Anderson was convicted of sexual assault on a helpless victim under section 18-3-402(1)(h). That subsection provides that "[a]ny actor who knowingly inflicts sexual intrusion or sexual penetration

on a victim commits sexual assault if . . . [t]he victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented." At trial, multiple witnesses — including S.W. — testified that S.W. was severely intoxicated to the point that she was slurring her words and had trouble standing. *See Fletcher v. People*, 179 P.3d 969, 976 (Colo. 2007) ("[T]he only issue at trial was whether [the defendant] knew the victim was incapable of consenting because she was too intoxicated."); *see also People v. Watson*, 53 P.3d 707, 712 (Colo. App. 2001) ("[D]efendant testified that the victim was intoxicated, but not so intoxicated as to be unable to consent to the contact."). There was also testimony that S.W. was passed out in bed after her friends took her home. K.M. testified that she and Anderson shared a ride to S.W. and K.M.'s apartment, and Anderson followed her inside. K.M. stated that after she arrived home, she looked in S.W.'s room, and S.W. was still asleep. S.W. testified that she awoke, still intoxicated, to find Anderson penetrating her, and she yelled at him to "get off, get out." Finally, Anderson's DNA was found on S.W.'s underwear and vaginal swabs. Thus, there was overwhelming evidence that Anderson inflicted sexual intrusion or penetration on S.W., and that

she was physically helpless due to being asleep or intoxicated or both and was thus unable to consent to sexual contact. *See Fletcher*, 179 P.3d at 976; *Watson*, 53 P.3d at 712; *see also Houser*, ¶ 69 ("[T]he record overwhelmingly supports the prosecution's case and lacks support for defendant's assertions.").

¶ 22 Further, even without eliciting the sentence M.D. originally faced and the sentence he received under his plea agreement, defense counsel's cross-examination drew out inconsistencies in M.D.'s testimony that suggested possible bias or motive. *See Houser*, ¶ 70. On direct examination, when the prosecutor asked M.D. if he received any benefit or was promised anything in exchange for his testimony, M.D. replied, "No." But on cross-examination, defense counsel elicited that M.D. had entered into a plea agreement after disclosing his conversation with Anderson to the district attorney and agreed to testify truthfully in pending cases if called as a witness. Given this inconsistent testimony, the jury could "appropriately draw inferences relating to bias and motive." *Montoya*, 942 P.2d at 1293; *see also Houser*, ¶ 70. The jury could also reasonably infer that a Class 3 felony and a Class 2 misdemeanor would carry significantly different

consequences. *See People v. Wilson*, 2014 COA 114, ¶ 67 ("It is not expected that jurors should leave their common sense and cognitive functions at the door before entering the jury room. Nor is it expected that jurors should not apply their own knowledge, experience, and perceptions acquired in the everyday affairs of life to reach a verdict.") (citation omitted).

¶ 23 Finally, the jury acquitted Anderson of the burglary charge; thus, we are not persuaded that the jury was unable to parse the testimony, legal principles, and defenses applicable to the two charges. *See Garcia*, ¶ 30.

¶ 24 Thus, the trial court's error in limiting cross-examination was harmless beyond a reasonable doubt.

III. Evidentiary Rulings

¶ 25 Anderson asserts that the trial court erred in admitting S.W.'s testimony about her text messages to K.M. and M.D.'s testimony as both suggested that S.W. was drugged. Regarding S.W.'s testimony, Anderson argues that the trial court erred in denying his mistrial motion based on the erroneous testimony. We discern no error.

A. S.W.'s Testimony

¶ 26 During cross-examination, defense counsel rigorously questioned S.W. on her memory, her level of intoxication, and how she was able to fight Anderson off her if she was so intoxicated. Defense counsel then asked S.W. about a text message she sent to K.M. after Anderson broke the liquor bottles and left the apartment.

> [Defense Counsel]: And after you spoke with [K.M.], you each went back into your separate bedrooms, correct?
>
> [S.W.]: Yep.
>
> [Defense Counsel]: Once you were back in your bedroom, you texted [K.M.], correct?
>
> [S.W.]: Yeah.
>
> [Defense Counsel]: And this is when you finally told [K.M.] that Mr. Anderson raped you in that text, correct?
>
> [S.W.]: Yeah.
>
> [Defense Counsel]: Really? Isn't it true that the actual wording of your text was something different; that you actually texted, Should I call the cops on this guy about breaking the bottles?
>
> [S.W.]: I don't remember.
>
> [Defense Counsel]: Okay. You never actually texted [K.M.] to tell her that Mr. Anderson assaulted you?

[S.W.]: I don't remember.

¶ 27 S.W. stated that she turned her phone over to detectives the next day, and she believed the police were able to retrieve the text messages from her phone.

¶ 28 On redirect examination, the prosecutor asked S.W., "Were you having difficulty putting together various pieces of information from the course of that evening[?]" and S.W. answered, "Kind of. But I knew in the back of my mind exactly what had happened." The prosecutor then inquired further into S.W.'s text messages to K.M.:

> [Prosecutor]: [Defense Counsel] asked you about some text messages that you sent to [K.M.] after the defendant left. Did you send a text massage to [K.M.] saying, Should I call the cops on that guy?
>
> [S.W.]: Yeah.
>
> [Prosecutor]: Okay. Do you recall sending a text message to [K.M.] immediately or thereafter saying, I honestly feel like I got roofied.

¶ 29 Defense counsel objected. At a bench conference he argued that the question was improper because there was no evidence S.W. was drugged. The prosecutor argued that because defense counsel cross-examined S.W. on the text messages she sent to K.M., defense

counsel had opened the door to the text messages, and they provided the jury a context for S.W.'s state of mind at the time.[1]

¶ 30 The court overruled the objection, concluding defense counsel opened the door:

> I am going to overrule the objection. I do believe that [Defense Counsel] opened the door in terms of text messages that this witness said to her roommate immediately after. . . . [I]n weighing the relevance [against] the unfair prejudice, I don't believe that unfair prejudice outweighs the relevance of that and the fact that [Defense Counsel] opened the door on that . . . if you would like me to give a limiting instruction to the jury to the extent that they are not to take it for the truth of whether or not [S.W.] was roofied, I would be fine with doing that.

¶ 31 Defense counsel requested a mistrial, which the court denied on the grounds that defense counsel opened the door. Defense counsel then requested the limiting instruction be given, and the court obliged, telling the jury, "In regard to the text message concerning the roofie . . . the jury is directed to not take that as a

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[1] The prosecutor also stated that she anticipated testimony from M.D. that Anderson had told him he roofied S.W.

statement of truth as to whether or not [S.W.] was or was not roofied."

1. Evidentiary Ruling Law and Analysis

¶ 32 The parties agree Anderson preserved his objection to S.W.'s testimony.

¶ 33 We review evidentiary claims for an abuse of discretion. *People v. Quintana*, 882 P.2d 1366, 1371 (Colo. 1994); *see also People v. Friend*, 2014 COA 123M, ¶ 36 ("A trial court abuses its discretion if its ruling is manifestly arbitrary, unreasonable, or unfair."), *aff'd in part and rev'd in part*, 2018 CO 90.

¶ 34 Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of . . . needless presentation of cumulative evidence." CRE 403; *see also* CRE 401. The trial court has considerable discretion under CRE 403's balancing test. *People v. Hall*, 107 P.3d 1073, 1080 (Colo. App. 2004). This balancing test strongly favors the admission of evidence. *Id.* On review, we must give the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice reasonably to be expected. *Id.*

¶ 35 Redirect examination may be used to explain inconsistencies in a witness' testimony or to otherwise rehabilitate the witness. *See People v. Lesney*, 855 P.2d 1364, 1367 (Colo. 1993) ("A witness should be allowed to explain or rebut any adverse inferences resulting from cross-examination in order to place matters in context . . . ."); *see also Golob v. People*, 180 P.3d 1006, 1012 (Colo. 2008) ("The concept of 'opening the door' represents an effort by courts to prevent one party in a criminal trial from gaining and maintaining an unfair advantage by the selective presentation of facts that, without being elaborated or placed in context, create an incorrect or misleading impression.").

¶ 36 On review of the record, we conclude that the trial court did not abuse its discretion in admitting, on redirect examination, S.W.'s statement that she texted K.M., "I honestly feel like I got roofied." Defense counsel challenged S.W.'s credibility by eliciting testimony suggesting S.W. changed her story about when she told K.M. she had been raped and by questioning S.W. about her level of intoxication and ability to remember the rape. Given this, the statement was relevant to explain why S.W. might not have the clearest memory of her text messages just after the rape — she felt

drugged when she sent the text messages. Because S.W. did not say she believed Anderson had drugged her (only that she *felt* drugged), the likelihood of Anderson being unfairly prejudiced was minimal whereas the probative value to S.W.'s credibility was substantial. *See Hall*, 107 P.3d at 1080.

¶ 37 Because defense counsel drew out inconsistencies in S.W.'s testimony and attacked her credibility on cross-examination, the prosecutor was entitled to delve further into S.W.'s text immediately after the rape to rehabilitate S.W.'s credibility. *See Lesney*, 855 P.2d at 1367; *see also Golob*, 180 P.3d at 1012. Thus, the trial court did not abuse its discretion in admitting S.W.'s testimony.

2. Mistrial Motion

¶ 38 Anderson preserved this issue by requesting a mistrial.

¶ 39 We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v. Pernell*, 2014 COA 157, ¶ 24, *aff'd on other grounds*, 2018 CO 13. The "trial court is in a better position to evaluate any adverse effect of improper statements or testimony on a jury, [so] it has considerable discretion to determine whether a mistrial is warranted." *People v. Tillery*, 231 P.3d 36, 43 (Colo. App. 2009), *aff'd sub nom., People v. Simon*, 266 P.3d 1099 (Colo. 2011).

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); *see also People v. Segovia*, 196 P.3d 1126, 1133 (Colo. 2008) ("[T]here was no error in the proceedings. Without error, there was no reason to declare a mistrial.").

¶ 40 Because a mistrial is the most drastic of remedies, one is "only warranted where the prejudice to the accused is too substantial to be remedied by other means." *Collins*, 730 P.2d at 303. Factors relevant to whether a mistrial is warranted include the nature of the inadmissible evidence, the weight of the admissible evidence of the defendant's guilt, and the value of a cautionary instruction. *People v. Vigil*, 718 P.2d 496, 505 (Colo. 1986); *Tillery*, 231 P.3d at 43. A jury is presumed to have followed a curative instruction to disregard improper testimony. *Tillery*, 231 P.3d at 43.

¶ 41 We conclude the trial court did not abuse its discretion in denying Anderson's mistrial motion because the testimony was not inadmissible evidence, there was overwhelming evidence of Anderson's guilt, and the court provided a limiting instruction on the purpose for which the jury could consider the testimony. *See Vigil*, 718 P.2d at 505; *Tillery*, 231 P.3d at 43. Where no improper

testimony was admitted, a mistrial is improper. *See Segovia*, 196 P.3d at 1133. Further, we presume, absent a showing of actual prejudice, that the jury followed the court's instruction and considered the statement only as it related to S.W.'s credibility and mental state and not for whether she was actually drugged or by whom. *See Tillery*, 231 P.3d at 43; *Ned*, 923 P.2d at 275.[2] Thus, the court did not abuse its discretion in denying Anderson's mistrial motion.

B. M.D.'s Testimony

¶ 42 M.D. testified that Anderson admitted he gave S.W. a date rape drug and that S.W. did not know Anderson had sex with her:

> On a few different occasions he told me that he had had sex with [S.W.]. That she did not know that he had given her a roofie, which is, I guess, a date rape drug, I guess we would call it. . . .
>
> He basically had told me that he had sex with her and that — I don't know how graphic I can

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[2] While Anderson notes several times that the court did not provide a written limiting instruction (though Anderson did not request one), he offers no law supporting a position that an oral instruction alone is insufficient. *See People v. Hill*, 228 P.3d 171, 176 (Colo. App. 2009) (declining to address an issue where the defendant provided "no analysis or argument to support [his] conclusory statements" and so did not adequately present the issue).

> be — but he told me that he had sex with her and she basically didn't know it. . . .
>
> On one occasion he described the woman as a dead fuck. He said that he tried to get her to do oral sex, and she couldn't do it because she was out of it. He got angry, and that is when the whole anger thing started. . . .
>
> He said basically that the roofie had kept her from knowing what was going on.

¶ 43 Defense counsel did not object and so this issue is unpreserved.

¶ 44 We review evidentiary issues for an abuse of discretion, *Quintana*, 882 P.2d at 1366, and will reverse unpreserved claims for plain error only, *People v. Eppens*, 979 P.2d 14, 18 (Colo. 1999).

¶ 45 Anderson argues that the trial court erred in admitting this evidence because it contravenes Rule 403. We disagree.

¶ 46 Anderson was charged with sexual assault of a physically helpless victim. "Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if . . . [t]he victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented." § 18-3-402(1)(h). A physically helpless victim is "unconscious, asleep, or otherwise unable to indicate willingness to act."

§ 18-3-401(3), C.R.S. 2018. Thus, evidence relating to (1) Anderson's knowledge and (2) S.W. being physically helpless was relevant. *See* CRE 401. Anderson's statement to M.D. demonstrates that he knowingly had sex with S.W. while she was physically helpless.

¶ 47 Anderson argues that even if the evidence was relevant, it was unduly prejudicial under Rule 403. The balancing required by Rule 403 contemplates the consideration of

> the importance of the fact of consequence for which the evidence is offered, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, if appropriate, the potential effectiveness of a limiting instruction in the event of admission.

Vialpando v. People, 727 P.2d 1090, 1096 (Colo. 1986). Balancing these factors, we cannot conclude that the probative value of Anderson's statement was substantially outweighed by the danger of unfair prejudice.

¶ 48 The evidence was offered to prove two of the essential elements of sexual assault on a helpless victim — knowledge and physically helplessness — so the evidence bore directly, not merely

incidentally, on these elements. The evidence also rebutted Anderson's claim that the sex was consensual. Whether or not Anderson actually drugged S.W. was not the focus of the testimony; the focus was on whether Anderson knew S.W. was physically helpless when he had sex with her. That testimony was corroborated by S.W.'s own testimony. Finally, Anderson did not object to — or request a limiting instruction after — M.D.'s testimony. *See Davis v. People*, 2013 CO 57, ¶ 21 ("Unless a limiting instruction is either required by statute or requested by a party, a trial court has no duty to provide one sua sponte.").[3] Thus

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[3] Further, defense counsel affirmatively used the comment about Anderson giving S.W. a roofie to undercut M.D.'s credibility. On cross-examination, defense counsel inquired further into this testimony:

> [Defense Counsel]: Now, [M.D.], you said that Mr. Anderson told you that he used a roofie on [S.W.]?
>
> [M.D.]: Yes, sir.
>
> [Defense Counsel]: According to what you say, he actually told you that he gave [S.W.] a roofie when he went into her room when he got to their apartment, correct?
>
> [M.D.]: Is that what I said?

we perceive no error, let alone plain error, in the trial court allowing M.D.'s testimony.

IV. Conclusion

¶ 49 We affirm the judgment of conviction.

JUDGE FREYRE and JUDGE WELLING concur.

> [Defense Counsel]: I am asking you, sir. You are the one that has the story. . . .
>
> [M.D.]: When he gave her the roofie, I have no idea. Maybe I misspoke and said he gave her the roofie at that time. What I meant to say was that he gave her the roofie and then he ended up going into her room. I have no idea when he gave her the roofie, sir. . . .
>
> [Defense Counsel]: [D]o you remember telling Detective Shutters that Mr. Anderson said he had given [S.W.] a roofie when he went into her room when he first got into the apartment?
>
> [M.D.]: Yes.
>
> [Defense Counsel]: You do remember telling him that?
>
> [M.D.]: Yes.

During closing argument, defense counsel pointed out the inconsistencies in M.D.'s testimony about when Anderson told him he drugged S.W. to undercut M.D.'s credibility. *See People v. Garcia*, 2018 COA 180, ¶ 7 (discussing invited error and stating that "a party must abide by the consequences of her actions at trial").

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SUPREME COURT, STATE OF COLORADO 2 East 14th Ave Denver, CO 80203	
Court of Appeals Case No. 17CA469 Larimer County District Court Honorable Julie Kunce Field, Judge Case No. 15CR1466	
PETITIONER: CHAYCE AARON ANDERSON **RESPONDENT**: PEOPLE OF THE STATE OF COLORADO	▲ COURT USE ONLY ▲ Case Number: 2019SC627
Attorney for Petitioner: Cynthia A. Harvey, Reg. No. 38511(ADC) THE HARVEY LAW FIRM P.O. Box 158 Castle Rock, CO 80104 Tel: (720) 242-6543 Fax: (720) 889-9703 E-mail: charvey@harveylawfirm.net	Opinion by JUDGE FOX, Freyre and Welling, JJ., concur Aug. 15, 2019 NOT PUBLISHED PURSUANT TO C.A.R. 35(f).

PETITION FOR WRIT OF CERTIORARI

APPENDIX B:

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JURISDICTION

The Court of Appeals issued its opinion here on August 15, 2019. *People v. Chayce Aaron Anderson* (Colo. App. Aug. 15, 2019, unpublished decision). Pursuant to C.A.R. 53, a copy of the opinion is attached to this Petition. This division of the Court of Appeals has decided questions of substance in a way probably not in accord with applicable decisions of this Court, and in conflict with decisions of other divisions of the Court of Appeals and federal courts. C.A.R. 49(b)(c). This Court extended the time to file the petition up to November 21, 2019, and pursuant to C.A.R. 52(b)(1) it is timely filed.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals erred in determining the error in restricting cross-examination of the jail house witness not to allow questioning of the sentencing risk reduction received as the result of testifying in Mr. Anderson's trial was harmless beyond a reasonable doubt. This Court should provide guidance to the lower courts to provide for uniformity and consistent direction in assessing constitutional harmless error.

Additionally, this decision is likely not in accordance with and conflicts with decisions by other divisions of the Court of Appeals, and by this Court and federal courts. C.A.R. 49(b)(c).

ISSUE PRESENTED

The Division erred when it affirmed the district court's decision not to allow sufficient cross-examination of the jail house witness as harmless error.

STATEMENT OF THE CASE AND FACTS

Mr. Anderson was charged with one count sexual assault, victim helpless (F3), and one count second-degree burglary (F3). [R. Supr., Complaint, pp. 9-10, 14].

The prosecution's theory at trial was Mr. Anderson, who met S.W. and K.M. on campus about a day earlier, left a bar with K.M. and shared a ride to S.W. and K.M.'s apartment. S.W. was already at home, asleep in her bed, passed out after drinking.

Mr. Anderson then unlawfully entered the apartment of K.M. and S.W. where he made sexual advances to K.M. who rebuffed him. Mr. Anderson then found S.W. in her bed and sexually assaulted her. S.W. woke up and eventually pushed him off. Mr. Anderson then became angry, started shouting, and broke liquor bottles as he left the apartment. S.W. and K.M. heard the glass breaking as he left. S.W. recognized Mr. Anderson that morning because of his tattoos. [TR 11/15/16, pp. 63:1-67:17].

The next day S.W. called police and then went for a SANE examination. Mr. Anderson's DNA was found on the swabs taken from S.W. [TR 11/15/16, pp. 67:18-69:12].

Mr. Anderson's theory was Mr. Anderson met S.W. on the CSU campus the week before and they exchanged numbers. S.W. and Mr. Anderson sent flirty text messages to each other. On the night of August 27, S.W. went out to bars with friends, including her roommate K.M. Eventually, S.W. was feeling the effects of drinking, and her friends took S.W. home about 1:00 a.m. August 28.

K.M. stayed at the bars and met up with Mr. Anderson who was working at the Old Town bar. The two went to S.W. and K.M.'s apartment at closing. Later, Mr. Anderson and S.W. had consensual sex. [TR 11/15/16, pp. 69:14-75:16].

S.W. testified at trial. She testified she met Mr. Anderson on campus at CSU the first week of school on her way to class. They exchanged numbers. At the time, S.W. was roommates with K.M. She exchanged texts with Mr. Anderson over the next couple of days. [TR 11/15/16, pp. 77:2-81:6].

On August 27, she, her roommate and other friends started drinking at their apartment and later went to bars in Old Town. The Rec Room was the last bar she went to. S.W. did not remember how much alcohol she drank, but testified it was a lot. Her friends helped her a little leaving the bar, and drove her home. She went

to sleep in her room and about 3:30 a.m., she woke up to find Mr. Anderson on top of her trying to violate her. She testified Mr. Anderson was engaged in sexual intercourse with her without her consent. S.W. testified she was passed out; incapacitated and still very intoxicated when she woke up. S.W. asked him to get off, to get out and was confused and angry. He went into the hall, shouted he gave her HIV, and then was smashing things, smashing a bottle. S.W. got up to call for K.M. and saw Mr. Anderson leave through the door. [TR 11/15/16, pp. 82:2-94:3].

S.W. said she was too drunk to make a phone call but later in the morning she called the police. She did not show police text messages with Mr. Anderson because she deleted them that night. She spoke with Detective Shutters about what happened. The Detective took her to Medical Center of the Rockies for a sexual assault exam. [TR 11/15/16, pp. 94:16-99:23].

S.W. met with a nurse and had the exam. The exam lasted about five to six hours, and during the exam, S.W. told the nurse what happened. [TR 11/15/16, pp. 104:14-106:1].

On the next day of trial, a jailhouse witness, Delano, testified for the prosecution. Delano testified he had multiple felony convictions. Delano was not currently incarcerated. He had felony convictions for motor vehicle theft and attempted motor vehicle theft, a probation revocation for his motor vehicle theft

conviction, two felony convictions for possession of a controlled substance and one for attempted felony escape. He also had another felony motor vehicle theft conviction and a conviction for felony criminal impersonation. He was incarcerated at Larimer County detention facility where he met Mr. Anderson. [TR 11/16/16, pp. 105:12-107:11].

Delano testified Mr. Anderson talked to him about the facts and said Mr. Anderson told him he had sex with S.W. and had given her a date rape drug. He testified Mr. Anderson told him he had sex with S.W. and S.W. didn't know it. He said Mr. Anderson used profanity when he described the sex, that Mr. Anderson tried to get S.W. to do oral sex and got angry when she couldn't, because she was out of it, so there was yelling and some liquor bottles were broken and then Mr. Anderson left.

Delano said Mr. Anderson got angry about the oral sex, went into the kitchen, grabbed two liquor bottles and smashed them together so glass was all over the floor and ground outside. He said Mr. Anderson met both S.W. and K.M. at a bar, S.W. and K.M. were roommates, both S.W. and K.M. rode in a Silver Mine Sub delivery car with Mr. Anderson and the delivery driver back to the apartment from the bar. He testified he never looked at any police reports and he contacted his lawyer who contacted the prosecution so he could provide

information. Delano said he was not promised anything about his own court matters for providing information. [TR 11/16/16, pp. 108:5-113:20].

During cross-examination, defense counsel asked Delano if he had been to prison before and Delano said he had. Counsel then asked if Delano didn't like being in prison and the prosecution objected arguing it was beyond the scope of permitted questions about criminal history. Counsel withdrew the question and the court sustained the objection, and told the jurors to disregard the question.

Counsel asked if Delano was in Larimer County detention when he spoke with Mr. Anderson, and he asked if he was there because he was charged with a class three felony escape. The prosecutor objected and the parties approached. Defense counsel argued the prosecution gave Delano a plea bargain on those charges and as part of the bargain Delano agreed to testify truthfully in future proceedings, including this one. The prosecutor then replied that defense counsel can question on the charges, what Delano pled to and whether any promises were made to him for that disposition. She insisted the scope is narrow. The court agreed. [TR 11/16/16, pp. 114:5-115:18].

Defense counsel next stated he planned to ask if Delano knows the possible penalty he faced while in custody that he pled down from. The range was up to 24 years and he pled down to 6 months. The prosecutor argued asking about the time

would be improper and the scope should only include the charge and plea. The court agreed and sustained the objection. The court instructed defense counsel to rephrase the question. [TR 11/16/16, pp. 115:19-116:25].

Counsel then asked Delano if he was in Larimer County detention because he was charged with a class three, felony violation of escape, and Delano said he was. Delano faced this charge when he talked to the prosecution and a detective about his conversations with Mr. Anderson. Delano spoke with them in February, and in April, he entered a plea bargain. The plea bargain reduced the charge to a class three misdemeanor of escape. One of the conditions was Delano must testify truthfully in any pending case in which he was called as a witness including this trial. [TR 11/16/16, pp. 117:1-118:5]. The jury was not informed during questioning of the length of time Delano originally faced, or the reduced time he ultimately faced from his plea bargain.

Delano also testified that Mr. Anderson said he gave S.W. a roofie when he went into her room at the apartment. He then said he didn't know when Mr. Anderson gave her the roofie but that he did and then he ended up going into her room. Finally, Delano testified he remembered telling the Detective Mr. Anderson gave S.W. a roofie when he went into her room after he got to the apartment. [TR 11/16/16, pp. 118:6-120:25].

Finally, Delano testified he had to be at the trial and told to tell the truth. He said the prosecutor was not the prosecutor who handled his case. [TR 11/16/16, pp. 121:22-122:7].

After trial, the jury convicted Mr. Anderson of sexual assault, helpless victim and acquitted him of second degree burglary. [TR 11/17/16, pp. 52:17-53:9]. Later, the court sentenced Mr. Anderson to a term of four years to life in the Department of Corrections. [TR 2/3/17, pp. 49:14-50:23; CF, p. 44].

Mr. Anderson appealed the judgment of conviction. On March 14, 2019, a division of the Court of Appeals affirmed the denial. The Division found the district court erred in limiting the cross-examination but found the error harmless. Slip Opinion, pp. 8-12.

ARGUMENT

I. The Division erred when it affirmed the district court's decision not to allow sufficient cross-examination of the jail house witness as harmless error.

The Division found the court erred in limiting the cross-examination of the jail house witness about the sentence risk reduction received as the result of testifying in Mr. Anderson's trial, but held the error harmless beyond a reasonable doubt. [Slip Op. pp. 8-12]. This decision is flawed.

An accused's right to confront the witnesses against him is guaranteed by the Confrontation Clauses of the United States and Colorado Constitutions. U.S. Const. Amends. VI, XIV; Colo. Const. art. II, § 16. The purpose behind this right is to, *inter alia,* "prevent conviction by [e]x parte affidavits" and to afford an accused an opportunity to cross-examine the witnesses against him. *People v. Bastardo,* 554 P.2d 297, 300 (Colo. 1976); *People v. Dement,* 661 P.2d 675, 679 (Colo. 1983); *Crawford v. Washington,* 541 U.S. 36, 50 (2004). "Accordingly, we must protect the most obvious manifestation of that right - the opportunity for cross-examination." *People v. Fry,* 92 P.3d 970, 975 (Colo. 2004).

And when, as here, questioning designed to show a prototypical form of bias is precluded, and the jury is not provided information about the original charges, the reduced charges, including the actual penalty Delano is subject to and the sentence he receives, the defendant's Confrontation Rights are violated and the error is reversible. See, *People v. Houser*, 2013 COA 11, ¶¶ 58-63, *reh'g denied* (Apr. 18, 2013), *cert. denied,* 13SC350, 2014 WL 4403023 (Colo. Sept. 8, 2014).

At trial, the prosecution called a jailhouse witness, Delano, to testify regarding statements Mr. Anderson allegedly made to Delano about this case. As in *Houser*, Delano received significant leniency in the charges and sentencing

range for the offense he ultimately pled guilty to. Part of his plea deal required he testify here.

Delano testified he had multiple felony convictions, and was not in jail when he testified. He was incarcerated before at Larimer County detention facility where he met Mr. Anderson. [TR 11/16/16, pp. 105:12-107:11].

Delano testified Mr. Anderson told him he had sex with S.W. and had given her a date rape drug. Mr. Anderson told him he had sex with S.W. and S.W. didn't know it. He said Mr. Anderson used profanity when he described the sex, that Mr. Anderson tried to get S.W. to do oral sex and got angry when she couldn't. Mr. Anderson yelled and broke some liquor bottles when he left.

Delano said he was not promised anything for providing information. [TR 11/16/16, pp. 108:5-113:20].

Counsel asked if Delano was in Larimer County detention when he spoke with Mr. Anderson, and he asked if he was there because he was charged with a class three felony escape. The prosecutor objected and the parties approached. Defense counsel argued Delano received a plea bargain on those charges and as part of the bargain Delano agreed to testify in future proceedings, including this one. The prosecutor argued counsel could only ask what the original charge was,

what the plea was, and whether he was promised anything insisting the scope was very narrow. The court agreed. [TR 11/16/16, pp. 114:5-115:18].

Defense counsel argued he wanted to ask Delano about the original range of up to 24 years and the plea of a maximum of six months. The prosecutor argued only the charge and plea were permissible. The court sustained the objection. [TR 11/16/16, pp. 115:19-116:25].

The proposed questions went to the heart of Mr. Anderson's Confrontation rights, because the questioning would elicit answers that went to whether Delano had any particular motive for testifying so his testimony might be influenced by a promise of, or hope or expectation of, immunity or leniency about the pending charges against him, as a consideration for testifying against Mr. Anderson. This is exactly the type of questioning for which trial courts should allow broad cross-examination and is at the center of what the Confrontation Clause protects.

Here, counsel's basis for the desired questions, to show Delano's plea agreement, including testifying against Mr. Anderson, led to a sentence risk reduction of 24 years down to a maximum of 6 months, surely provides a potential motive or bias because Delano wants leniency for entering the agreement and testifying against Mr. Anderson, and was enough to preserve the Confrontation

violation. The proposed testimony, and argument for allowing the questions, goes to the heart of the Confrontation Clause and was sufficient to alert the court.

The jury was not informed during questioning of the length of time Delano originally faced, or his ultimate sentence, amounting to benefit of a decreased risk of approximately 23 ½ years exposure. Here again, the proposed questions about this slashed sentencing exposure, go to the heart of the Confrontation Clause, the did not go to the jury and Mr. Anderson's constitutional right to confrontation is violated.

Here, the court reversibly erred, and the Division agreed (Slip Op. p. 8) by limiting cross-examination to solely the fact of an original felony charge and a misdemeanor plea. The jury was not informed the actual sentence received, nor the extent of the sentence Delano originally faced up to 24 years in the Department of Corrections. Delano was the prosecution's star witness, and his credibility or lack thereof key. The evidence against Mr. Anderson was not substantial and Delano's testimony was critical to either corroborating or calling into doubt the testimony of S.W. Delano also injected baseless date rape drugs into Mr. Anderson's trial and to the jury. His motive for providing this testimony was also critical and Mr. Anderson could not cross-examine him as to this motive.

The error is not harmless. If a reasonable possibility exists that the error

contributed to the verdict, then the error is not harmless beyond a reasonable doubt. *People v. Owens*, 183 P.3d 568, 575 (Colo. App. 2007); citing, *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *People v. Jurado,* 30 P.3d 769, 772 (Colo. App. 2001). The prosecution bears the burden of proof in a harmlessness inquiry. *Houser*, ¶ 65.

As the result of this error, Mr. Anderson's constitutional right to confrontation is violated and the error is reversible. The testimony counsel sought to elicit goes to the heart of Delano's potential bias and motive to testify against Mr. Anderson, based on hope of leniency which he received in the form of a sentencing risk reduction of more than 23 years. This testimony also is of the sort where courts should exercise broad discretion in cross-examination.

"[T]he trial court should allow broad cross-examination regarding a witness's motive for testifying when the witness has a pending case and his or her testimony against the defendant might be influenced by a promise of, or hope or expectation of, immunity or leniency with respect to the pending charges against him, as a consideration for testifying against the defendant." *People v. Wilson*, 2014 COA 114, ¶ 37; quoting, *Kinney v. People*, 187 P.3d 548, 559 (Colo. 2008)(emphasis in original, internal quotation marks omitted).

Other than the alleged victim, her roommate and their friends, *all of whom had been drinking*, (emphasis added), Delano provided much of testimony against Mr. Anderson and Delano's credibility at trial, along with his potential bias, motive or hope for leniency affecting his bias, was key. Regardless the jury could potentially draw inferences relating to bias and motive, or about potential differences in the level of charges, or defense counsel elicited testimony Delano entered a plea agreement and agreed to testify truthfully in pending cases, Delano's testimony provided the vast bulk of testimony against Mr. Anderson and the error is not harmless beyond a reasonable doubt. (see, Slip Op. p. 12).

For these reasons, this Court should grant review and reverse and remand with instructions to suppress the unconstitutionally obtained evidence, and such further action as this Court deems appropriate.

CONCLUSION

Mr. Anderson's constitutional right to confrontation is violated and the error is not harmless beyond a reasonable doubt, and this Court should grant review and reverse and remand for a new trial, or any other relief the Court considers prudent.

Respectfully submitted,
HARVEY LAW FIRM, LLC

Cynthia Harvey

Digitally signed by Cynthia Harvey
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Date: 2019.11.21 12:55:20 -07'00'

Cynthia A. Harvey, #38511

CERTIFICATE OF SERVICE

I certify that on Nov. 21, 2019, I filed a copy of this petition via the CCE online filing system sent to the parties as follows:

Colorado Dept of Law, Appellate Division
ATTN: Jennifer L. Carty, Esquire
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Fl
Denver, CO 80203

Cynthia Harvey

Digitally signed by Cynthia Harvey
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Date: 2019.11.21 12:55:37 -07'00'

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 3, 2020 CASE NUMBER: 2019SC627
Certiorari to the Court of Appeals, 2017CA469 District Court, Larimer County, 2015CR1466	
Petitioner: Chayce Aaron Anderson, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2019SC627
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, FEBRUARY 3, 2020.

APPENDIX C

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 7, 2020 CASE NUMBER: 2017CA469
Larimer County 2015CR1466	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Chayce Aaron Anderson.	Court of Appeals Case Number: 2017CA469
MANDATE	

This proceeding was presented to this Court on the record on appeal. In accordance with its announced opinion, the Court of Appeals hereby ORDERS:

JUDGMENT AFFIRMED

POLLY BROCK
CLERK OF THE COURT OF APPEALS

DATE: FEBRUARY 7, 2020

Word Count Certification: 9,471

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Larimer County District Court Honorable Julie Kunce Field, Judge Case Number: 15CR1466 PLAINTIFF-APPELLEE: PEOPLE OF THE STATE OF COLORADO vs DEFENDANT-APPELLANT: CHAYCE AARON ANDERSON Attorney for Defendant/Appellant: Harvey Law Firm Cynthia A. Harvey, Reg. No. 38511(ADC) PO Box 158 Castle Rock, CO 80104 Phone: 720-242-6543/ Fax: 720-889-9703 email: charvey@harveylawfirm.net	▲ COURT USE ONLY ▲ Case Number: 17CA469
OPENING BRIEF	

APPENDIX D

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

xIt contains 9,471 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

x**For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐**In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

Cynthia Harvey

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Signature of attorney or party

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TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

(1) Whether the district court reversibly erred when it improperly limited the scope of cross-examination of the jailhouse informant thereby denying Mr. Anderson his constitutional right to confrontation.

(2) Whether the district court reversibly erred in admitting highly prejudicial and irrelevant evidence describing uncharged, worse crimes.

(3) Whether the district court reversibly erred when it denied Mr. Anderson's motion for mistrial after allowing inadmissible testimony describing uncharged worse crimes.

STATEMENT OF THE CASE AND FACTS

Mr. Anderson was charged with one count sexual assault, victim helpless (F3), and one count second-degree burglary (F3). [R. Supr., Complaint, pp. 9-10, 14].

The prosecution's theory at trial was Mr. Anderson, who met S.W. and K.M. on campus a day or so earlier, left a bar with K.M. and shared a ride to S.W. and K.M.'s apartment. S.W. was already at home, asleep in her bed, passed out after drinking.

Mr. Anderson then unlawfully entered the apartment of K.M. and S.W. where he made sexual advances to K.M. who rebuffed him. Mr. Anderson then

found S.W. in her bed and sexually assaulted her. S.W. woke up and eventually pushed him off. Mr. Anderson then became angry, started shouting, and broke liquor bottles as he left the apartment. S.W. and K.M. heard the glass breaking as he left. S.W. recognized Mr. Anderson that morning because of his tattoos. [R. Tr, 11/15/16, pp. 63:1-67:17].

The next day S.W. called police and then went for a SANE examination. Mr. Anderson's DNA was found on the swabs taken from S.W. [R. Tr, 11/15/16, pp. 67:18-69:12].

Mr. Anderson's theory was Mr. Anderson met S.W. on the CSU campus the week before and they exchanged numbers. S.W. and Mr. Anderson sent flirty text messages to each other. On the night of August 27, S.W. went out to bars with friends, including her roommate K.M. Eventually, S.W. was feeling the effects of drinking, and her friends took S.W. home about 1:00 a.m. August 28.

K.M. stayed at the bars and met up with Mr. Anderson who was working at the Old Town bar. The two went to S.W. and K.M.'s apartment at closing. Later, Mr. Anderson and S.W. had consensual sex. [R. Tr, 11/15/16, pp. 69:14-75:16].

S.W. testified at trial. She testified she met Mr. Anderson on campus at CSU the first week of school on her way to class. They exchanged numbers. At

the time, S.W. was roommates with K.M. She exchanged texts with Mr. Anderson over the next couple of days. [R. Tr, 11/15/16, pp. 77:2-81:6].

On August 27, she, her roommate and other friends started drinking at their apartment and later went to bars in Old Town. The Rec Room was the last bar she went to. S.W. did not remember how much alcohol she drank, but testified it was a lot. Her friends helped her a little leaving the bar, and drove her home. She went to sleep in her room and about 3:30 a.m., she woke up to find Mr. Anderson on top of her trying to violate her. She testified Mr. Anderson was engaged in sexual intercourse with her without her consent. S.W. testified she was passed out; incapacitated and still very intoxicated when she woke up. S.W. asked him to get off, to get out and was confused and angry. He went into the hall, shouted he gave her HIV, and then was smashing things, smashing a bottle. S.W. got up to call for K.M. and saw Mr. Anderson leave through the door. [R. Tr, 11/15/16, pp. 82:2-94:3].

S.W. said she was too drunk to make a phone call but later in the morning she called the police. She did not show police text messages with Mr. Anderson because she deleted them that night. She spoke with Detective Shutters about what happened. The Detective took her to Medical Center of the Rockies for a sexual assault exam. [R. Tr, 11/15/16, pp. 94:16-99:23].

S.W. met with a nurse and had the exam. The exam lasted about five to six hours, and during the exam, S.W. told the nurse what happened. [R. Tr, 11/15/16, pp. 104:14-106:1].

During cross-examination, defense counsel asked S.W. when she finally told K.M. that Mr. Anderson raped her. S.W. said she told her in a text. She testified after she, S.W. screamed loud enough to wake up K.M. and K.M. came out of her room. They spoke in the hallway. They each then went into their rooms and S.W. texted K.M. Counsel asked if the text to K.M. asked if S.W. should call the cops about the guy breaking the bottles and did not mention rape. S.W. said she did not remember if that was what her text said. S.W. and K.M. went back to bed and S.W. did not call the police. S.W., after speaking with K.M. and her friends who were out at the bars with her and K.M., called the police and told police she was sexually assaulted. [R. Tr, 11/15/16, pp. 127:7-131:4].

During redirect examination, the prosecution asked S.W. if she remembered texting K.M. after Mr. Anderson left, and asking if she should call police. The prosecutor then asked if S.W. shortly after sent a text to K.M. saying S.W. felt like she got roofied. Defense counsel objected and the parties approached for a bench conference. [R. Tr, 11/15/16, pp. 135:18-136:3].

Defense counsel argued no evidence in drug testing that S.W. was roofied. The prosecutor argued defense counsel thoroughly cross-examined on text messages S.W. sent to K.M. Defense counsel argued he only asked about one text S.W. sent to K.M., and there is no basis for her being roofied that night, and it is far more prejudicial than probative.

The prosecutor continued to argue there was extensive cross-examination regarding text messages and the text shows S.W.'s state of mind at the time. She argued defense counsel opened the door. Defense counsel argued his question was about a single text. He argued there was extensive cross-examination about texts between Mr. Anderson and S.W., but not between S.W. and K.M. [R.Tr, 11/15/16, pp. 136:5-137:14].

The court overruled the objection, finding defense counsel opened the door and offered to provide a limiting instruction to the jury not to take the text as for the truth of whether or not S.W. was roofied. Defense counsel then made a motion for mistrial to preserve the record. The prosecution argued the court should deny the motion. She argued defense counsel opened the door and the text message was to show S.W.'s mental state at the time she sent the messages. The court denied the motion for mistrial, again finding defense counsel opened the door to the text messages. [R. Tr, 11/15/16, pp. 137:15-138:24].

Defense counsel then, based on the court's ruling requested a limiting instruction. The court provided a limiting instruction over the prosecution's objection. [R. Tr, 11/15/16, pp. 138:25-139:21].

On the next day of trial, a jailhouse witness, Delano, testified for the prosecution. Delano testified he had multiple felony convictions. Delano was not currently incarcerated. He had felony convictions for motor vehicle theft and attempted motor vehicle theft, a probation revocation for his motor vehicle theft conviction, two felony convictions for possession of a controlled substance and one for attempted felony escape. He also had another felony motor vehicle theft conviction and a conviction for felony criminal impersonation. He was incarcerated at Larimer County detention facility where he met Mr. Anderson. [R. Tr, 11/16/16, pp. 105:12-107:11].

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Counsel asked if Delano was in Larimer County detention when he had conversations with Mr. Anderson, and he asked if he was there because he was charged with a class three felony escape. The prosecutor objected and the parties approached. Defense counsel argued Delano was given a plea bargain on those charges and as part of the bargain Delano agreed to testify truthfully in future

proceedings, including this one. The prosecutor then replied that defense counsel can question on the charges, what Delano pled to and whether there were any promises made to him for that disposition. She insisted the scope is very narrow. The court agreed. [R. Tr, 11/16/16, pp. 114:5-115:18].

Defense counsel next stated he planned to ask if Delano knows the possible penalty he faced while in custody that he pled down from. The range was up to 24 years and he pled down to 6 months. The prosecutor argued inquiring about the time would be improper and the scope should be narrowed to only the charge and plea. The court agreed and sustained the objection. The court instructed defense counsel to rephrase the question. [R. Tr, 11/16/16, pp. 115:19-116:25].

Counsel then asked Delano if he was in Larimer County detention because he was charged with a class three, felony violation of escape, and Delano said he was. Delano faced this charge at the time he talked to the prosecution and a detective about his conversations with Mr. Anderson. Delano spoke with them in February, and in April, he entered a plea bargain. The plea bargain reduced the charge to a class three misdemeanor of escape. One of the conditions was Delano must testify truthfully in any pending case in which he was called as a witness including this trial. [R. Tr, 11/16/16, pp. 117:1-118:5]. The jury was not informed

during questioning of the length of time Delano originally faced, or the reduced time he ultimately faced from his plea bargain.

Delano also testified that Mr. Anderson said he gave S.W. a roofie when he went into her room at the apartment. He then said he didn't know when Mr. Anderson gave her the roofie but that he did and then he ended up going into her room. Finally, Delano testified he remembered telling the Detective Mr. Anderson gave S.W. a roofie when he went into her room after he got to the apartment. [R. Tr, 11/16/16, pp. 118:6-120:25].

Finally, Delano testified he was required to be at the trial and told to tell the truth. He said the prosecutor was not the prosecutor who handled his case. [R. Tr, 11/16/16, pp. 121:22-122:7].

The court did not provide a written instruction to the jury about the limited purpose testimony regarding the text between S.W. and K.M. Nor did counsel's request it do so. [R. Tr, 11/16/16, pp. 211:2-219:9 ; 11/17/16, p. 3:6-16 ; R. CF, pp. 17-40].

After trial, the jury convicted Mr. Anderson of sexual assault, helpless victim and acquitted him of second degree burglary. [R. Tr, 11/17/16, pp. 52:17-53:9]. Subsequently, the court sentenced Mr. Anderson to a term of four years to

life in the Department of Corrections. [R. Tr, 2/3/17, pp. 49:14-50:23; R. CF, p. 44].

Mr. Anderson appeals his conviction and sentence.

SUMMARY OF ARGUMENT

The court improperly limited cross-examination of prosecution witness Delano, thereby depriving Mr. Anderson his constitutional right of confrontation.

Witness Delano met Mr. Anderson while in Larimer County Detention Center. At the time, Delano faced F3 felony escape charges. He went to his attorney, and eventually the prosecution and a detective, claiming Mr. Anderson discussed the facts of this case with him. Subsequently, he pled guilty to M3 escape. The initial sentencing range included up to 24 years in the Department of Corrections, but after the plea, his maximum exposure was six months in the county jail.

He testified at trial that Mr. Anderson told him, several time, he had sex with S.W. without S.W's knowledge, that he met S.W. and K.M. at a bar and went home with them in a sub delivery car. He also testified Mr. Anderson said he roofied, or gave a date rape drug, to S.W.

Defense counsel wanted to cross-examine him as to his disparate initial sentencing range and what he ultimately received, however, after objection the

court confined the testimony to the original charge and the plead charge, but not the sentences.

Delano was the prosecution's star witness and his credibility was key. Any potential bias in his motive for testifying was also critical, and the court's limitation prevented the jury from this critical information. Thus, the court violated Mr. Anderson's constitutional right to confrontation and the error is reversible.

The court also reversibly erred in admitting highly prejudicial and irrelevant evidence in the form of the content of a text message from S.W. to K.M. stating she felt roofied, and testimony of Delano stating Mr. Anderson told him he gave S.W. date rape drugs.

During S.W.'s testimony, she described the events she alleged occurred that evening, that she went out with friends and eventually her friends took her home where she passed out. About two and a half hours later, she woke up and Mr. Anderson was sexually assaulting her. She eventually pushed him off, and as he left he was yelling and broke some liquor bottles. The noise woke her roommate, K.M. and the two left their bedrooms and met in the hallway. They did not call police, and went back to bed. Later in the day, S.W. called police, gave a statement, and had a sexual assault exam at a local medical center.

On cross-examination, counsel asked her if she texted K.M. and told her she was raped, or if she instead just asked K.M. if she should call police because of the breaking glass. S.W. said she did not remember what she said.

On redirect, the prosecutor asked S.W. about her text she sent to K.M. that said S.W. felt she was roofied. Counsel objected, but the court overruled the objection and provided a verbal limiting instruction. Counsel also asked for a mistrial, and the court denied the motion.

There was no evidence to indicate S.W. was roofied and the prosecution did not suggest otherwise. The contested issue was whether S.W. consented, or whether she was passed out from drinking and unable to consent. Any injection of potential date rape drugs could only have served to inflame the passions of the jury, evoking horror or retribution impacting and violating Mr. Anderson's constitutional right to a fair trial and impartial jury. The potential use of date rape drugs had no relevance to any fact of consequence, and even if it had some minute probative value, this was substantially outweighed by undue prejudice and the admission of this testimony was an abuse of discretion and reversible error.

Compounding this error, Delano testified Mr. Anderson told him he gave roofies, or a date rape drug, to S.W. and then had sex with S.W. without her knowledge. Defense counsel did not object to this testimony.

However, nothing substantiated that date rape drugs were involved, that S.W. had ingested any, or that Mr. Anderson drugged her. Mr. Anderson was not charged with drugging S.W. and a purported untruthful statement by Mr. Anderson, as relayed by Delano, could serve no legitimate purpose at trial. It would, however, portray Mr. Anderson in the most sinister light possible and undermine the fundamental fairness of the proceedings calling into question the reliability of the verdict.

Therefore, the error was substantial and obvious and reversible plain error.

Finally, the court reversibly erred in denying counsel's motion for mistrial for improper admission of the text message that S.W. felt roofied.

As noted, the prosecutor did not contend S.W. had been roofied, and there was no evidence of any date rape drug. Counsel did not cross-examine S.W. on multiple text messages, nor any in depth examination on the one message counsel asked about. Further, the limiting instruction provided by the court did not instruct the jury to consider the testimony only to determine S.W.'s state of mind, nor did the jury hear the side bar discussion disclosing no date rape drug was used.

Rather, the jury was left with a question whether S.W. indeed could have been roofied, and a portrayal of Mr. Anderson in as sinister a light as possible and the further testimony by Delano only compounds the harm.

The injection of objectionable, inadmissible evidence of a date rape drug subjects Mr. Anderson to the type of harm an instruction could not cure, and the court's denial of the motion for mistrial violated Mr. Anderson's constitutional right to a fair trial. The court's denial is reversible error.

Therefore, this Court should reverse Mr. Anderson's conviction and remand the matter for a new trial.

ARGUMENT

I. Whether the district court reversibly erred when it improperly limited the scope of cross-examination of the jailhouse informant thereby denying Mr. Anderson his constitutional right to confrontation.

A. Issue raised and ruled upon

During cross-examination, defense counsel tried to question Delano about his prior experience in the criminal justice system, the charges he faced and eventually pled to, and the sentencing ranges he faced originally and his ultimate sentencing exposure. The court sustained the prosecution's objections.

[R. Tr, 11/16/16, pp. 114:5-116:25; 117:1-118:5].

B. Standard of review

"[A] trial court has substantial discretion in deciding questions concerning the admissibility of evidence. Therefore, absent an abuse of discretion the evidentiary rulings of a trial court will be affirmed." *People v. Quintana,* 882 P.2d

1366, 1371 (Colo.1994). However, this discretion does not permit limitations on cross-examination that unduly restrict a defendant's right to question a witness about bias or motive. *Merritt v. People,* 842 P.2d 162, 166–67 (Colo.1992). Review of a discretionary ruling asks if the court's decision was "manifestly arbitrary, unreasonable, or unfair, or based on an erroneous understanding or application of the law." *People v. Orozco,* 210 P.3d 472, 475 (Colo. App. 2009). In contrast, possible confrontation right violations are reviewed de novo. *Bernal v. People,* 44 P.3d 184, 198 (Colo.2002).

C. Discussion

An accused's right to confront the witnesses against him is guaranteed by the Confrontation Clauses of the United States and Colorado Constitutions. U.S. Const. Amends. VI, XIV; Colo. Const. art. II, § 16. The purpose behind this right is to, *inter alia,* "prevent conviction by [e]x parte affidavits" and to afford an accused an opportunity to cross-examine the witnesses against him. *People v. Bastardo,* 554 P.2d 297, 300 (Colo. 1976); *People v. Dement,* 661 P.2d 675, 679 (Colo. 1983); *Crawford v. Washington,* 541 U.S. 36, 50 (2004). "Accordingly, we must protect the most obvious manifestation of that right - the opportunity for cross-examination." *People v. Fry,* 92 P.3d 970, 975 (Colo. 2004).

People v. Houser, 2013 COA 11, ¶¶ 58-63, *reh'g denied* (Apr. 18, 2013), *cert. denied,* 13SC350, 2014 WL 4403023 (Colo. Sept. 8, 2014) provides useful analysis.

> ¶ 58 The right to confront and cross-examine witnesses is guaranteed by the federal and Colorado Constitutions. *Kinney v. People,* 187 P.3d 548, 558–59 (Colo.2008). Thus, while courts have wide latitude to reasonably limit cross-examination, *id.* at 559, they must "allow *broad cross-examination of a prosecution witness with respect to the witness'[s] motive for testifying*, especially ... where [her] testimony against the defendant *might be influenced by a promise of, or hope or expectation of, immunity or leniency*." *People v. King,* 179 Colo. 94, 98, 498 P.2d 1142, 1144–45 (1972) (emphasis added).
>
> ¶ 59 A confrontation violation occurs if the defendant "was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness," which leaves the jury with a "significantly different impression of the witness's credibility." *Kinney,* 187 P.3d at 559 (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (internal quotations omitted).
>
> ¶ 60 As relevant here, when a witness faced criminal charges and entered into a plea agreement, the defendant must be allowed to provide the jury "with adequate facts from which it can appropriately draw inferences relating to bias and motive." *People v. Montoya,* 942 P.2d 1287, 1293 (Colo.App.1996). For example, the Confrontation Clause is satisfied when the jury has been provided with adequate facts to be "fully informed as to the original charge brought against a prosecution witness as well as the charge to which the witness later pleaded guilty in exchange for his or her testimony, and the jury also hears about the penalty actually received." *Id.; accord People v. McKinney,* 80 P.3d 823, 829 (Colo.App.2003) ("A defendant's right to confrontation is not violated ... as long as the jury was informed of the original charges, the charges to which the witness pleaded guilty, and the penalty imposed."), *rev'd on other grounds,* 99 P.3d 1038

(Colo.2004); *cf. People v. Collins,* 730 P.2d 293, 300 (Colo.1986) ("[When] the jury was fully informed that [the witness] had been charged with first degree assault and accessory to a violent crime, and, in exchange for his testimony, was allowed to plead guilty to the accessory charge, receiving two years probation and a deferred sentence[, t]he jury had the facts from which it could appropriately draw inferences relating to [the witness's] reliability. The defendant was not denied the right to effective cross-examination.").

¶ 61 Here, contrary to these cases, the jury heard only that A.J. had been arrested, agreed to plead guilty, and provided information to police. As the prosecutor acknowledged in argument before the trial court, the disparity between the originally-charged class three felony (drug possession) and the class three misdemeanor (prostitution) to which A.J. pled was likely to cause an average juror to infer that she had received significant benefit from testifying. Yet, the trial court's limitations left the jury to believe that A.J. had merely pled guilty to the original charges, as the jury never was informed of the original charges she faced. Hence, defense counsel's attempt to show bias in the restricted recross-examination may have appeared as "a speculative and baseless line of attack" on A.J.'s credibility. *Davis v. Alaska,* 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

¶ 62 A.J.'s equivocation about whether her plea agreement was conditioned on providing testimony against defendant underscores the need to expose the jury to "facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *People v. Pate,* 625 P.2d 369, 370 (Colo.1981) (quoting *Davis,* 415 U.S. at 318, 94 S.Ct. 1105). The wide disparity between the charges, as well as the leniency of deferred adjudication, plausibly suggest that A.J.'s testimony "might [have] be[en] influenced by a promise of, or hope or expectation of, immunity or leniency." *King,* 179 Colo. at 98, 498 P.2d at 1144–45.

¶ 63 Therefore, by precluding cross-examination on the plea details, the trial court denied defendant his constitutional right to confrontation.

At trial, the prosecution called a jailhouse witness, Delano, to testify regarding statements Mr. Anderson allegedly made to Delano regarding this case. As in *Houser*, above, Delano received significant leniency in the charges and sentencing range for the offense he ultimately pled guilty. Part of his plea deal required he testify in this case.

Delano testified he had multiple felony convictions, and was not in jail at the time he testified. He was incarcerated at Larimer County detention facility where he met Mr. Anderson. [R. Tr, 11/16/16, pp. 105:12-107:11].

Delano testified Mr. Anderson told him he had sex with S.W. and had given her a date rape drug. Mr. Anderson told him he had sex with S.W. and S.W. didn't know it. He said Mr. Anderson used profanity when he described the sex, that Mr. Anderson tried to get S.W. to do oral sex and got angry when she couldn't. Mr. Anderson yelled and broke some liquor bottles when he left.

Delano said he was not promised anything for providing information. [R. Tr, 11/16/16, pp. 108:5-113:20].

Counsel asked if Delano was in Larimer County detention when he had conversations with Mr. Anderson, and he asked if he was there because he was charged with a class three felony escape. The prosecutor objected and the parties approached. Defense counsel argued Delano was given a plea bargain on those

charges and as part of the bargain Delano agreed to testify in future proceedings, including this one. The prosecutor argued counsel could only ask what the original charge was, what the plea was, and whether he was promised anything insisting the scope was very narrow. The court agreed. [R. Tr, 11/16/16, pp. 114:5-115:18].

Defense counsel argued he wanted to ask Delano about the original range of up to 24 years and the plea of a maximum of six months. The prosecutor argued only the charge and plea were permissible. The court sustained the objection. [R. Tr, 11/16/16, pp. 115:19-116:25].

Counsel then asked Delano if he was in Larimer County detention because he was charged with a class three, felony violation of escape, and Delano said he was. Delano faced this charge at the time he talked to the prosecution and a detective about his conversations with Mr. Anderson. Delano spoke with them in February, and in April, he entered a plea bargain. The plea bargain reduced the charge to a class three misdemeanor of escape. [R. Tr, 11/16/16, pp. 117:1-118:5]. The jury was not informed during questioning of the length of time Delano originally faced, or his ultimate sentence.

Here, the court reversibly erred by limiting cross-examination to solely the fact of an original felony charge and a misdemeanor plea. The jury was not informed the actual sentence received, nor the extent of the sentence Delano

originally faced, which was up to 24 years in the Department of Corrections. Delano was the prosecution's star witness, and his credibility or lack thereof key. The evidence against Mr. Anderson was not substantial and Delano's testimony was critical to either corroborating or calling into doubt the testimony of S.W. His motive for providing this testimony was also critical and Mr. Anderson was unable to cross-examine him as to this motive.

Further, just as in *Houser*, there was a wide disparity in the charges, his ultimate plea deal provided significant lenience in that he did not face any time in the Department of Corrections and would not have or face an additional felony conviction. Thus, and as with *Houser*, it is reasonable that Delano's testimony "might [have] be[en] influenced by a promise of, or hope or expectation of, immunity or leniency." *King*, 179 Colo. at 98, 494 P.2d at 1144-45.

As the result of this error, Mr. Anderson's constitutional right to confrontation was violated and the error is reversible.

This Court should reverse Mr. Anderson's conviction and remand his case for a new trial.

II. Whether the district court reversibly erred in admitting highly prejudicial and irrelevant evidence describing uncharged, worse crimes.

A. Issue raised and ruled upon

During redirect examination, the prosecution asked S.W. about a text to K.M. regarding roofies. Defense counsel objected. [R. Tr, 11/15/16, pp. 135:18-136:3].

Defense counsel and the prosecutor argued their positions. [R.Tr, 11/15/16, pp. 136:5-137:14].

The court overruled the objection and provided a verbal limiting instruction over the prosecution's objection. [R. Tr, 11/15/16, pp. 137:15-9:21].

The next day of trial, the prosecution elicited testimony from witness Delano that Mr. Anderson claimed he used a date rape drug on S.W. [R. Tr, 11/16/16, pp. 108:5-113:20].

The court did not provide a written limiting instruction to the jury. [R. Tr, 11/16/16, pp. 211:2-219:9 ; 11/17/16, p. 3:6-16 ; R. CF, pp. 17-40].

B. Standard of review

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v. Melillo*, 25 P.3d 769, 773 (Colo. 2001). When a court's ruling is manifestly arbitrary, unreasonable, or unfair the court has abused its discretion. *Id.*

Errors not preserved by objection are reviewed for plain error. *Hagos v. People*, 288 P.3d 116, 120 (Colo. 2012); *citing*, *People v. Miller*, 113 P.3d 743, 748-50 (Colo. 2005). Plain errors are obvious and substantial. *Hagos*, 288 P.3d at 120; *Miller*, 113 P.3d. at 750. Where the error undermines the fundamental fairness of the trial and casts serious doubt on the reliability of the judgment of conviction, the error is reversible. *Hagos*, at 120; *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003).

C. Discussion

The Constitution provides that every criminal defendant has a fundamental right to a fair trial. U.S. Const., Amend. VI; Colo. Const., art. II, sec. 16; *Morrison v. People,* 19 P.3d 668 (Colo. 2000). An essential element of a fair trial is a fair and impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (U.S. Ill. 1992); *People v. Ellis*, 148 P.3d 205, 208 (Colo. App. 2006). *People v. Harlan* 8 P.3d 448(Colo. 2000) ("Every individual, whether detested or revered, is entitled to a fair trial.").

Evidence is not admissible if it is not relevant. CRE 402. To be relevant, evidence must have a tendency to make the existence of any fact of consequence to determination of the action more or less probable than it would be without the evidence. CRE 401.

Where the probative value of logically relevant evidence is substantially outweighed by the danger of unfair prejudice, a trial court may exclude it. CRE 403. Although CRE 403 favors admission of relevant evidence, "the rule is an important tool to exclude matters of scant or cumulative probative force." *People v. McClelland*, 350 P.3d 976,983-84 (Colo. App. 2015); *quoting*, *Yusem v. People*, 210 P.3d 458, 467 (Colo. 2009) (internal quotation marks and alterations omitted).

Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision using an improper basis, *commonly but not necessarily an emotional one*, such as sympathy, hatred, contempt, retribution, or horror. *McClelland*, 350 P.3d at 984 (emphasis added); *citing People v. Herrera*, 2012 COA 13, 41, 272 P.3d 1158, 1166 (*citing Masters v. People*, 58 P.3d 979, 1001 (Colo. 2002)).

The balancing required by CRE 403 requires consideration of the available alternative means of proof, whether the evidence is offered to prove a disputed fact, and the importance of the fact of consequence the evidence is offered to prove. *McClelland*, 350 P.3d at 984; *citing Yusem*, 210 P.3d at 467; *Vialpando v. People*, 727 P.2d 1090, 1096 (Colo. 1986).

Eliciting legally objectionable testimony is "manifestly improper." *People v. Fortson*, 2018 COA 46M, ¶ 31, 421 P.3d 1236, 1242 (Colo. App. 2018); *citing*, *People v. Estep*, 196 Colo. 340, 344, 583 P.2d 927, 930 (1978); *see also Standards*

for the Prosecution Function 3-6.6(d) ("The prosecutor should not bring to the attention of the trier of fact matters that the prosecutor knows to be inadmissible ... by ... asking legally objectionable questions.").

Further, even where defense counsel fails to object to the improper use and admission of objectionable testimony elicited by the prosecutor at trial, ..."above all, it is the appellate court's responsibility to avoid a miscarriage of justice for a defendant even when defense counsel seriously lapses at trial." *Fortson*, 2018 COA at ¶ 24, 421 P.3d at 1241; *quoting*, *Wend v. People*, 235 P.3d , 1086, 1097 (Colo. 2010).

Generally, instructing the jurors to disregard erroneously admitted evidence is a sufficient remedy. *People v. Johnson*, 2017 COA 11,¶ 42; *citing*, *People v. Lahr*, 2013 COA 57, ¶ 25. Yet, no curative instruction will suffice when inadmissible evidence "is so highly prejudicial . . . it is conceivable that but for its exposure, the jury may not have found the defendant guilty." *Johnson*, 2017 COA at ¶ 42; *citing*, *People v. Everett*, 250 P.3d 649, 663 (Colo. App. 2010) (*quoting*, *People v. Goldsberry*, 181 Colo. 406, 410, 509 P.2d 801, 803 (1973)).

See People v. Harlan 8 P.3d 448(Colo. 2000) ("Every individual, whether detested or revered, is entitled to a fair trial.") There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the

consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. *People v. Goldsberry*, 181 Colo. 406, 410, 509 P.2d 801, 803 (Colo. 1973); citing, *Bruton v. United States*, 391 U.S. 123 (1968). The *Goldsberry* Court went on to state that in its case, the district attorney was fully cognizant the witness would respond as it did and expose the jury to inadmissible and highly prejudicial evidence. The court cannot condone this conduct and has repeatedly held the duty of a prosecutor is to see justice is done, by seeking the truth through the presentation of proper evidence and not merely to convict. *Goldsberry*, at 803. Where the prosecutor clearly lacked adherence to elementary principles of fairness in its zeal to win a case, that can only be condemned. *Id.*

1. Improper admission of text message

The events here created prejudice to Mr. Anderson that was too substantial to be remedied by other means, and the prosecutor elicited the improper information. The prosecutor asked S.W. to reveal she sent a text to K.M., shortly after Mr. Anderson left the apartment, that she felt roofied. This portrayed Mr. Anderson in the most sinister light possible and injected inadmissible and irrelevant evidence into the trial.

This evidence is not relative to any fact of consequence and it is not relevant, thus its admission error. Further, any possible probative value is outweighed by undue prejudice in suggesting a decision based on improper emotions of hatred, contempt, horror or retribution of Mr. Anderson. The prosecutor elicited testimony of worse, uncharged crime and no limiting instruction could cure this harm.

S.W. testified she met Mr. Anderson on campus at CSU the first week of school on her way to class. They exchanged numbers. At the time, S.W. was roommates with K.M. She exchanged texts with Mr. Anderson over the next couple of days. [R. Tr, 11/15/16, pp. 77:2-81:6].

S.W. went out drinking with friends. S.W.'s friends took her home and she went to bed about 1 a.m. About 3:30 a.m., she woke up to find Mr. Anderson on top of her engaged in sexual intercourse with her without her consent. S.W. said she was passed out and couldn't consent. Eventually, S.W. pushed him off, he became angry, and shouted and broke glass bottles as he left. S.W. got up to call for K.M. and saw Mr. Anderson leave. [R. Tr, 11/15/16, pp. 82:2-94:3].

S.W. called police later that day about what happened. The Detective took her for a sexual assault exam. She had the exam and told the nurse what happened. [R. Tr, 11/15/16, pp. 94:16-99:23; 104:14-106:1].

During cross-examination, defense counsel asked S.W. when she finally told K.M. that Mr. Anderson raped her. S.W. said she told her in a text. S.W. screamed loud enough to wake up K.M. and K.M. came out of her room. They went back to bed, and S.W. texted K.M. Counsel asked if the text to K.M. only mentioned the breaking bottles and did not mention rape. S.W. didn't remember. S.W. did not call the police until later in the day. [R. Tr, 11/15/16, pp. 127:7-131:4].

During redirect examination, the prosecution asked S.W. if she remembered texting K.M. after Mr. Anderson left, and asking if she should call police. The prosecutor then asked if S.W. shortly after sent a text to K.M. saying S.W. felt like she got roofied. Defense counsel objected and the parties approached for a bench conference. [R. Tr, 11/15/16, pp. 135:18-136:3].

Defense counsel argued no evidence in drug testing that S.W. was roofied. The prosecutor argued defense counsel thoroughly cross-examined on text messages S.W. sent to K.M. Defense counsel argued he only asked about one text S.W. sent to K.M., and there is no basis for her being roofied that night, and it is far more prejudicial than probative.

The prosecutor argued defense counsel opened the door. Defense counsel argued his question was about a single text. [R.Tr, 11/15/16, pp. 136:5-137:14].

The court overruled the objection, finding defense counsel opened the door and offered to provide a limiting instruction to the jury not to take the text as for the truth of whether or not S.W. was roofied. Defense counsel then made a motion for mistrial. The prosecution argued the text message was to show S.W.'s mental state. The court denied the motion for mistrial. [R. Tr, 11/15/16, pp. 137:15-138:24].

Defense counsel then, based on the court's ruling requested a limiting instruction. The court provided a limiting instruction over the prosecution's objection. [R. Tr, 11/15/16, pp. 138:25-139:21].

The court did not provide a written limiting instruction to the jury. [R. Tr, 11/16/16, pp. 211:2-219:9 ; 11/17/16, p. 3:6-16 ; R. CF, pp. 17-40].

That the court provided a limiting instruction after it allowed the testimony, telling the jury they were not to consider the text to determine the truth of whether S.W. was or was not roofied, did not cure the harm. The instruction also did not inform the jury the text was solely to show S.W.'s state of mind, the basis the prosecution used to argue for its admissibility. There was no substantiation based on any testing that S.W. was roofied, and during the bench conference, the prosecution provided none. This testimony was highly prejudicial.

Additionally, the prosecution argued against providing any limiting instruction at all. Further, the jury did not hear that S.W. was not roofied because the bench conference where counsel pointed this out to the court was outside their hearing.

The contested issue was whether or not S.W. consented to sexual intercourse, or whether S.W. was passed out and unable to consent. There was no allegation S.W. was given any date rape drug. Mr. Anderson was not charged with using a date rape drug. The prosecution did not contest there was no evidence of any date rape drug. The only potential use for this evidence would be to cast Mr. Anderson in the most sinister light possible encouraging a jury verdict based on emotion, including hatred, retribution or disgust with Mr. Anderson.

A date rape drug would show that a person targeted and then drugged someone with the intent to rape the drugged person and could reasonably result in inflaming the passions of the jury leading to decisions resulting from hatred, horror or retribution. The later testimony by Delano, claiming Mr. Anderson told Delano he roofied S.W., would only exacerbate the harm.

That S.W. had been drinking was undisputed, but there was no basis to suggest she had been roofied. By eliciting this testimony, the prosecution

portrayed, wrongfully, Mr. Anderson in as sinister a manner as possible and did so with no basis for the assertion or suggestion any date rape drug was ever used.

Additionally, defense counsel asked about only one text during his cross-examination of S.W., and his cross-examination on this one text was minimal. Counsel did not open the door to this line of questioning by the prosecution, S.W. was not roofied, and the court's decision otherwise was error.

Thus, by allowing this testimony, Mr. Anderson was deprived his right to a fair trial and this Court should reverse his conviction and remand for a new trial.

2. Improper admission of date rape drug statement

The primary issue at trial was whether S.W. consented to sexual intercourse with Mr. Anderson or whether S.W. was passed out and unable to consent, from drinking she participated in that evening. There was no claim, charge, or other evidence that any date rape drug was used and the prosecution did not contest this. Any testimony regarding date rape drugs or being roofied was irrelevant. Even if it has any slight relevancy, that relevance was outweighed by substantial prejudice.

Further, the error is substantial and obvious. The error undermines the fundamental fairness of the trial and casts serious doubt on the reliability of the judgment of conviction, the error is reversible.

On the next day of trial, a jailhouse witness, Delano, testified for the prosecution. Delano testified he had multiple felony convictions. He was incarcerated at Larimer County detention facility where he met Mr. Anderson. [R. Tr, 11/16/16, pp. 105:12-107:11].

Delano testified Mr. Anderson talked to him about the facts in this case and said Mr. Anderson told him he had sex with S.W. and had given her a date rape drug. He testified Mr. Anderson told him he had sex with S.W. and S.W. didn't know it. He said Mr. Anderson used profanity when he described the sex, that Mr. Anderson tried to get S.W. to do oral sex and got angry when she couldn't, because she was out of it, so there was yelling and some liquor bottles were broken and then Mr. Anderson left.

Delano said Mr. Anderson got angry about the oral sex, went into the kitchen, grabbed two liquor bottles and smashed them together so glass was all over the floor and ground outside. He said Mr. Anderson met both S.W. and K.M. at a bar, S.W. and K.M. were roommates, both S.W. and K.M. rode in a Silver Mine Sub delivery car with Mr. Anderson and the delivery driver back to the apartment from the bar. [R. Tr, 11/16/16, pp. 108:5-113:20].

During cross-examination, Delano also testified that Mr. Anderson said he gave S.W. a roofie when he went into her room at the apartment. He then said he

didn't know when Mr. Anderson gave her the roofie but that he did and then he ended up going into her room. Finally, Delano testified he remembered telling the Detective Mr. Anderson gave S.W. a roofie when he went into her room after he got to the apartment. [R. Tr, 11/16/16, pp. 118:6-120:25].

There was no substantiation based on any testing that S.W. was roofied, and during the bench conference, the prosecution provided none. This testimony was highly prejudicial.

Additionally, the prosecution argued against providing any limiting instruction at all. Further, the jury did not hear that S.W. was not roofied because the bench conference where counsel pointed this out to the court was outside their hearing.

The contested issue was whether or not S.W. consented to sexual intercourse, or whether S.W. was passed out and unable to consent. There was no allegation S.W. was given any date rape drug. Mr. Anderson was not charged with using a date rape drug. The prosecution did not contest there was no evidence of any date rape drug. The only potential use for this evidence would be to cast Mr. Anderson in the most sinister light possible encouraging a jury verdict based on emotion, including hatred, retribution or disgust with Mr. Anderson.

A date rape drug would show that a person targeted and then drugged someone with the intent to rape the drugged person and could reasonably result in inflaming the passions of the jury leading to decisions resulting from hatred, horror or retribution. This is precisely what Delano testified Mr. Anderson said he did, though no substantiation exists that any date rape drugs, or any drugs, were involved or given to S.W.

That S.W. had been drinking was undisputed, but there was no basis to suggest she had been roofied. By eliciting this testimony, the prosecution portrayed, wrongfully, Mr. Anderson in as sinister a manner as possible and did so with no basis for the assertion or suggestion any date rape drug was ever used. Further, because no evidence existed that date rape drugs were involved, the evidence is not relevant, its probative value, if any, substantially outweighed by its substantial prejudice, and, there is no legitimate use for alleged untruthful statements of Mr. Anderson about date rape drugs.

Eliciting inadmissible testimony, by introducing Delano's testimony Mr. Anderson told him he gave S.W. a date rape drug, where it is undisputed no date rape drug was involved, is obvious and substantial error. The error cast serious doubt on the fairness of Mr. Anderson's conviction because it is likely the jury may have convicted Mr. Anderson, deciding their verdict, based on emotions

caused by testimony he used date rape drugs, such as hatred, contempt, retribution or horror. As such, Mr. Anderson was denied his constitutional right to a fair trial with an impartial jury.

The error in admission of Delano's testimony injecting date rape drugs into the trial, undermines the fundamental fairness of the trial and casts serious doubt on the reliability of Mr. Anderson's convictions. Therefore, this Court should reverse Mr. Anderson's conviction and remand for a new trial.

III. Whether the district court reversibly erred when it denied Mr. Anderson's motion for mistrial after allowing inadmissible testimony describing uncharged worse crimes.

A. Issue raised and ruled upon

During redirect examination, the prosecution asked if S.W. sent a text to K.M. saying S.W. felt like she got roofied. Defense counsel objected and the parties approached for a bench conference. [R. Tr, 11/15/16, pp. 135:18-136:3].

Defense counsel and the prosecutor argued their positions to the court. [R.Tr, 11/15/16, pp. 136:5-137:14].

The court overruled the objection. Defense counsel then made a motion for mistrial. The court denied the motion for mistrial. [R. Tr, 11/15/16, pp. 137:15-138:24].

B. Standard of review

We review a court's denial of a motion for a mistrial for an abuse of discretion. *People v. Cousins*, 181 P.3d 365, 373 (Colo. App. 2007). A court abuses its discretion when its ruling is (1) based on an erroneous understanding or application of the law or (2) manifestly arbitrary, unreasonable, or unfair. *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011).

Factors relevant in considering whether a mistrial should be declared include the value of a cautionary instruction and the nature of the inadmissible evidence. *People v. Vigil*, 718 P.2d 496, 505 (Colo. 1986). Notably, "[a] motion for a mistrial is more likely to be granted where the prosecutor intentionally elicited" the improper evidence. *People v. Everett*, 250 P.3d 649, 662 (Colo. App. 2010).

An error in a trial court's ruling on a motion for mistrial is subject to harmless error review. *See, e.g., United States v. Lucas*, 516 F.3d 316, 345 (5th Cir. 2008) ("When improper evidence is introduced to the jury but a defendant's subsequent motion for mistrial is denied, we review the denial for abuse of discretion, and if we find error, we apply harmless error review." (footnote omitted)); *see also People v. Santana*, 240 P.3d 302, 309 (Colo. App. 2009) (court's error in refusing to grant mistrial based on a constitutional violation subjected to constitutional harmless error review), *rev'd on other grounds*, 255

P.3d 1126 (Colo. 2011) (finding no constitutional violation and, consequently, declining to address whether constitutional harmless error review applies).

Under general harmless error review, we will disregard the error as harmless if there is no reasonable probability that it contributed to the defendant's conviction. *People v. Acosta*, 338 P.3d 472, 486 (Colo. App. 2014); *citing People v. Herdman*, 310 P.3d 170, 175 (Colo. App. 2012).

C. Discussion

The Constitution provides that every criminal defendant has a fundamental right to a fair trial. U.S. Const., Amend. VI; Colo. Const., art. II, sec. 16; *Morrison v. People,* 19 P.3d 668 (Colo. 2000). An essential element of a fair trial is a fair and impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (U.S. Ill. 1992); *People v. Ellis*, 148 P.3d 205, 208 (Colo. App. 2006). *People v. Harlan* 8 P.3d 448(Colo. 2000) ("Every individual, whether detested or revered, is entitled to a fair trial.").

While a mistrial is a drastic remedy, it is warranted "where the prejudice to the defendant is too substantial to be remedied by other means." *People v. St. James,* 75 P.3d. 1122, 1125(Colo. App. 2002). Generally, instructing the jurors to disregard erroneously admitted evidence is a sufficient remedy. *People v. Johnson*, 2017 COA 11,¶ 42; *citing*, *People v. Lahr*, 2013 COA 57, ¶ 25. Yet, no curative

instruction will suffice when inadmissible evidence "is so highly prejudicial . . . it is conceivable that but for its exposure, the jury may not have found the defendant guilty." *Johnson*, 2017 COA at 42; *citing*, *People v. Everett*, 250 P.3d 649, 663 (Colo. App. 2010) (*quoting*, *People v. Goldsberry*, 181 Colo. 406, 410, 509 P.2d 801, 803 (1973)). The trial court's refusal to grant the mistrial constituted a gross abuse of discretion and was reversible error. *See People v. Abbott*, 690 P.2d 1263, 1269 (Colo. 1984).

The events here created prejudice to Mr. Anderson that was too substantial to be remedied by other means, and the prosecutor elicited the improper information. The prosecutor specifically elicited roofies, or date rape drugs, into the trial where it was uncontested these drugs were not involved. The prosecutor asked S.W. to reveal she sent a text to K.M., shortly after Mr. Anderson left the apartment, that she felt roofied. This portrayed Mr. Anderson in the most sinister light possible, and injected inadmissible and irrelevant evidence into the trial. This prejudice is too substantial to be remedied by other means and the denial of the mistrial is a reversible abuse of discretion.

S.W. testified at trial. She testified she met Mr. Anderson on campus at CSU the first week of school on her way to class. They exchanged numbers. At

the time, S.W. was roommates with K.M. She exchanged texts with Mr. Anderson over the next couple of days. [R. Tr, 11/15/16, pp. 77:2-81:6].

S.W. went out with friends to the local bars. S.W. did not remember how much alcohol she drank, but testified it was a lot. Her friends helped her a little leaving the bar, and drove her home. She went to sleep in her room and about 3:30 a.m., she woke up to find Mr. Anderson engaged in sexual intercourse with her without her consent. S.W. eventually pushed him off and he was confused and angry. He went into the hall, shouted he gave her HIV, and then was smashing things, smashing a bottle. S.W. got up to call for K.M. and saw Mr. Anderson leave through the door. [R. Tr, 11/15/16, pp. 82:2-94:3].

S.W. said she was too drunk to make a phone call but later in the morning she called the police. She did not show police text messages with Mr. Anderson because she deleted them that night. She spoke with Detective Shutters about what happened. The Detective took her to Medical Center of the Rockies for a sexual assault exam. [R. Tr, 11/15/16, pp. 94:16-99:23].

S.W. met with a nurse and had the exam. The exam lasted about five to six hours, and during the exam, S.W. told the nurse what happened. [R. Tr, 11/15/16, pp. 104:14-106:1].

During cross-examination, defense counsel asked S.W. when she finally told K.M. that Mr. Anderson raped her. S.W. said she told her in a text. She testified after she and K.M. heard the glass breaking, S.W. screamed loud enough to wake up K.M. and K.M. came out of her room. They spoke in the hallway. They each then went into their rooms and S.W. texted K.M. Counsel asked if the text to K.M. asked if S.W. should call the cops about the guy breaking the bottles. S.W. did not remember if that was what her text said. S.W. and K.M. went back to bed and did not call the police. S.W. called the police the next morning and said she was sexually assaulted. [R. Tr, 11/15/16, pp. 127:7-131:4].

During redirect examination, the prosecution asked S.W. if she remembered texting K.M. after Mr. Anderson left, and asking if she should call police. The prosecutor then asked if S.W. shortly after sent a text to K.M. saying S.W. felt like she got roofied. Defense counsel objected and the parties approached for a bench conference. [R. Tr, 11/15/16, pp. 135:18-136:3].

Defense counsel argued no evidence in drug testing that S.W. was roofied. The prosecutor argued defense counsel thoroughly cross-examined on text messages S.W. sent to K.M. Defense counsel argued he only asked about one text S.W. sent to K.M., and there is no basis for her being roofied that night, and it is far more prejudicial than probative.

The prosecutor continued to argue there was extensive cross-examination regarding text messages and the text shows S.W.'s state of mind at the time. She argued defense counsel opened the door. Defense counsel argued his question was about a single text. He argued there was extensive cross-examination about texts between Mr. Anderson and S.W., but not between S.W. and K.M. [R.Tr, 11/15/16, pp. 136:5-137:14].

The court overruled the objection, finding defense counsel opened the door and offered to provide a limiting instruction to the jury not to take the text as for the truth of whether or not S.W. was roofied. Defense counsel then made a motion for mistrial to preserve the record. The prosecution argued the court should deny the motion. She argued defense counsel opened the door and the text message was to show S.W.'s mental state at the time she sent the messages. The court denied the motion for mistrial, again finding defense counsel opened the door to the text messages. [R. Tr, 11/15/16, pp. 137:15-138:24].

Defense counsel then, based on the court's ruling requested a limiting instruction. The court provided a limiting instruction over the prosecution's objection. [R. Tr, 11/15/16, pp. 138:25-139:21].

The court did not provide a written instruction to the jury about the limited purpose testimony regarding the text between S.W. and K.M. Nor did counsel's

request it do so. [R. Tr, 11/16/16, pp. 211:2-219:9 ; 11/17/16, p. 3:6-16 ; R. CF, pp. 17-40].

That the court provided a limiting instruction after it allowed the testimony, telling the jury they were not to consider the text to determine the truth of whether S.W. was or was not roofied, did not cure the harm. The instruction also did not inform the jury the text was solely to show S.W.'s state of mind, the basis the prosecution used to argue for its admissibility. There was no substantiation based on any testing that S.W. was roofied, and during the bench conference, the prosecution provided none. This testimony was highly prejudicial. The prosecutor elicited testimony of uncharged and worse crime and no limiting instruction could cure this harm.

Additionally, the prosecution argued against providing any limiting instruction at all. Further, the jury did not hear that S.W. was not roofied because the bench conference where counsel pointed this out to the court was outside their hearing. The later testimony by Delano, claiming Mr. Anderson told Delano he roofied S.W., would only exacerbate the harm.

That S.W. had been drinking was undisputed, but there was no basis to suggest she had been roofied. By eliciting this testimony, the prosecution

portrayed, wrongfully, Mr. Anderson in as sinister a manner as possible and did so with no basis for the assertion or suggestion any date rape drug was ever used.

Additionally, defense counsel asked about only one text during his cross-examination of S.W., and his cross-examination on this one text was minimal. Counsel did not open the door to this line of questioning by the prosecution, S.W. was not roofied, and the court's decision otherwise was error.

The trial court's refusal to grant the mistrial under these circumstances constituted a gross abuse of discretion and was reversible error. *See People v. Abbott*, 690 P.2d 1263, 1269 (Colo.1984).

Thus, by allowing this testimony injecting highly prejudicial inadmissible testimony of date rape drugs, Mr. Anderson was deprived his right to a fair trial. The refusal to grant the motion for mistrial is reversible error and this Court should reverse Mr. Anderson's conviction and remand for a new trial.

CONCLUSION

For the reasons set forth above, Mr. Anderson's conviction should be reversed and his case remanded for a new trial, or such other relief this Court deems appropriate.

Respectfully submitted, 21st day of August, 2018.

Harvey Law Firm

Cynthia Harvey

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CERTIFICATE OF MAILING

I hereby certify that on the 21st day of August 2018, a true and correct copy of the foregoing **OPENING BRIEF** was served via the ICCES online filing system, to all parties in this action as follows:

Colorado Department of Law, Appellate Division
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