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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 18, 2022 CASE NUMBER: 2021SC431
Certiorari to the Court of Appeals, 2017CA1025 District Court, Adams County, 2015CR4021	
Petitioner: Anthony Gerald Wernsman, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2021SC431
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, JANUARY 18, 2022.

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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 20, 2022 CASE NUMBER: 2017CA1025
Adams County 2015CR4021	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Anthony Gerald Wernsman.	Court of Appeals Case Number: 2017CA1025
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: JANUARY 20, 2022

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17CA1025 Peo v Wernsman 04-29-2021 modified

COLORADO COURT OF APPEALS

Court of Appeals No. 17CA1025
Adams County District Court No. 15CR4021
Honorable Ted C. Tow, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Anthony Gerald Wernsman,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE TAUBMAN*
Lipinsky and Pawar, JJ., concur

Opinion Modified
on the Court's Own Motion

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 29, 2021

Philip J. Weiser, Attorney General, William G. Kozeliski, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Meghan M. Morris, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 4 On appeal, Wernsman contends that his conviction should be reversed because the trial court erroneously (1) limited the defense's cross-examination of two prosecution witnesses; (2) found the evidence proffered by the defense's expert witness to be inadmissible; and (3) denied Wernsman's motion for a mistrial when the prosecution mistakenly cross-examined him about a protection order no longer in effect. We are not persuaded.

II. Limited Cross-Examination

¶ 5 C.Z. and R.C., an eyewitness to the shooting, testified as prosecution witnesses that they were drug users. The defense asserted that they had displayed mannerisms indicating that they had been testifying while under the influence and sought to impeach their credibility by asking about their drug use at or shortly before their testimony. The prosecution objected to the questions on Fifth Amendment grounds, asserting that each witness was on probation.

¶ 6 The trial court sustained the prosecution's objections. It found that the witnesses did not appear to be under the influence and ruled that (1) the relevance of any recent drug use was of marginal value because it would not automatically affect their

¶ 1 Defendant, Anthony Gerald Wernsman, appeals the judgment of conviction entered on jury verdicts finding him guilty of first degree felony murder, second degree murder, and first degree burglary. We affirm the judgment.

I. Background

¶ 2 Wernsman was twenty-three years old when he entered the house of his ex-girlfriend, C.Z., and shot J.D. at least five times, killing him. He was charged with first degree murder (causing death during the commission of a felony), first degree murder (after deliberation), and first degree burglary. At his jury trial, he did not deny shooting J.D. There were only two material disputed issues: Did he unlawfully enter C.Z.'s house? What was his mental state during the shooting?

¶ 3 The jury answered the first question "yes," and it found Wernsman guilty of burglary and first degree felony murder. In answering the second question, the jury found that Wernsman knowingly caused J.D.'s death and that he did not act on a provoked and sudden heat of passion. It found Wernsman guilty of second degree murder. The three guilty verdicts merged into a single conviction for first degree felony murder.

witness as to bias, prejudice, and motivation for testifying." *People v. Bowman*, 669 P.2d 1369, 1375 (Colo. 1983). A limitation on cross-examination implicates constitutional rights only when it deprives a defendant of his right to present a complete defense or to conduct a meaningful cross-examination on material issues. *People v. Garcia*, 179 P.3d 250, 255 (Colo. App. 2007).

¶ 8 A defendant's right to present a defense is violated when the defendant is denied virtually his or her only means of effectively testing significant prosecution evidence. *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009). When the trial court severely limits cross-examination, especially "concerning the witness' bias, prejudice, or motive for testifying," it may constitute a denial of a defendant's confrontation right. *Merritt v. People*, 842 P.2d 162, 167 (Colo. 1992); *see People v. Raffaelli*, 647 P.2d 230, 234 (Colo. 1982. Unless a limitation rises to constitutional error, we review for abuse of discretion. *Raffaelli*, 647 P.2d at 234. As discussed below, we conclude that Wernsman was able to effectively test the prosecution evidence. The challenged limitation on his cross-examination of C.Z. and R.C. did not concern bias, prejudice, or motive, and he was able to pursue multiple avenues of

credibility insofar as an ability to accurately recall; (2) the witnesses' Fifth Amendment right against self-incrimination prevailed over Wernsman's confrontation right; and (3) Wernsman's ability to cross-examine or to mount a defense was not significantly impacted by the inability to ask C.Z. and R.C. about recent drug use.[1] Wernsman asserts that each of these rulings was erroneous. Because we agree with the court's third ruling and conclude that any error in excluding the questions was harmless, we address the relevance ruling in only a limited fashion, and we need not address whether the court abused its discretion with respect to the Fifth Amendment arguments raised on appeal.

A. Applicable Law and Standard of Review

¶ 7 A defendant enjoys a constitutionally protected right to confront witnesses against him or her. U.S. Const. amends. IV, XIV; Colo. Const. art. II, § 16. To give the proper scope to this right, "a court must allow broad cross-examination of a prosecution's

[1] The trial court did not explicitly make each of these rulings for R.C., but R.C. testified immediately after C.Z., the relevant question and objection were nearly identical, and the court ruled that "we have the same situation" in sustaining the objection to the cross-examination of R.C. We thus interpret these rulings to implicitly apply to both witnesses.

drug impairment on the witness stand. A trial court should generally allow questions to elucidate that information.[2]

¶ 11 In this case, however, the trial court had to weigh the countervailing rights of the witnesses against self-incrimination. Wernsman raises numerous arguments about how the court should have weighed these rights and whether it should have required each witness to invoke his or her right, in front of the jury, after being asked whether he or she had recently used drugs. We decline to address whether any of the court's decisions on this issue amount to an abuse of discretion, because, for the reasons below, we conclude that the exclusion of these questions does not constitute reversible error.

¶ 12 The excluded questions did not concern bias, prejudice, or motive for testifying, *see Bowman*, 669 P.2d at 1375; they concerned the witnesses' credibility. The witnesses' credibility was otherwise brought into question when they testified to (1) using

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[2] We need not address whether a defendant has a right to confront a witness about his or her pre-testimony drug use when, as here, the trial court concludes that the witness does not appear to be under the influence because we conclude that any error is harmless.

impeachment of these witnesses. Accordingly, we review for abuse of discretion.

¶ 9 An abuse of discretion does not constitute reversible error if the error is harmless. A harmless error is one that does not "substantially influence[] the verdict or affect[] the fairness of the trial proceedings." *Hagos v. People*, 2012 CO 63, ¶ 12, 288 P.3d 116, 119 (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)).

B. Discussion

¶ 10 We agree with Wernsman that, in Colorado, a witness's intoxicated or impaired state while testifying is relevant to his or her credibility. *See, e.g., People v. Roberts*, 37 Colo. App. 490, 491, 553 P.2d 93, 94 (1976) (holding that cross-examination "attempting to prove that the witnesses were under the influence of [a] narcotic substance . . . at the time of testifying at trial, [a] matter[] which might affect the witnesses' ability to . . . testify[,] . . . was properly related to a material matter"). We agree that a criminal defendant has a constitutional right to ask whether any substance has altered a witness's mental state when, as here, the witness is an admitted drug user and purportedly demonstrates physical manifestations of

making credibility determinations. An explicit statement of recent drug use would not likely have affected those determinations.

¶ 15 Because the limitation on cross-examination did not substantially influence the verdict or affect the fairness of the trial proceedings, any error was harmless. *See Hagos*, ¶ 12, 288 P.3d at 119.

III. Expert Testimony

¶ 16 Less than six weeks prior to Wernsman's second trial setting, he moved for a continuance to accommodate an expert witness who would testify that human brains do not fully mature until individuals reach age twenty-five. The defense wished to use the expert's testimony to support an argument that because Wernsman was only twenty-three when the shooting occurred, he had reduced impulse control and was therefore less culpable for his conduct. The trial court denied the motion because it concluded that the testimony was inadmissible as irrelevant or, "at the very least[,] what marginal relevance it has would be substantially outweighed by the danger of confusion of the jury on the issues." Moreover, the court found that the proffered testimony would amount to improper mental condition evidence.

methamphetamine and drinking liquor shortly before the shooting; (2) being a current drug user; and (3) having prior felony convictions. The defense further challenged C.Z.'s credibility by cross-examining her about (1) inconsistencies between her testimony and the statements she made to police on the night of the shooting, and (2) her bias against Wernsman as exemplified by her prior statement that she "would never help that son of a bitch." The defense further challenged R.C.'s credibility by cross-examining him about inconsistencies between his deposition testimony and his testimony at trial.

¶ 13 Considering this record, we cannot conclude that "a reasonable jury would have had a 'significantly different impression' of the witness[es'] credibility had [Wernsman] been allowed to pursue the desired cross-examination." *Kinney v. People*, 187 P.3d 548, 559 (Colo. 2008) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). Thus, any error was not sufficiently prejudicial to warrant reversal. *Id.*

¶ 14 Moreover, if C.Z. and R.C. showed symptoms of being under the influence while testifying, as Wernsman asserts, the jury could have observed those symptoms and taken them into account when

that his possible lack of impulse control could have contributed to whether his entry was knowing, but he does not explain how this could be so. According to the relevant statutory definition, "[a] person acts 'knowingly' . . . with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." § 18-1-501(6), C.R.S. 2020.

¶ 20 Because "knowing" requires only awareness, we cannot conceive of how Wernsman's possible lack of impulse control could be relevant to whether his entry was knowing. Similarly, we conclude that Wernsman's possible lack of impulse control could not have affected the jury's determination that he acted "knowingly" in regard to his second degree murder conviction. Accordingly, we conclude that even an erroneous exclusion of the proposed testimony would not merit reversal.

IV. Denied Mistrial

¶ 21 Wernsman testified at trial. Before beginning cross-examination, the prosecution represented to the trial court that there was "an active protection order in place that prohibited . . . [Wernsman] from contacting [C.Z.] and from

¶ 17 On appeal, Wernsman contends that this ruling impaired his rights to due process and to present a defense and constituted reversible error. We perceive no abuse of discretion, but we need not resolve this issue on appeal because it is immaterial to Wernsman's felony murder conviction.

¶ 18 The defense sought to use the proposed expert testimony to support the theory of defense propounded at trial and reiterated on appeal — Wernsman had not deliberated before shooting J.D.; rather, he had acted recklessly or on a sudden and provoked heat of passion. Contrary to Wernsman's contention, this defense properly related only to Wernsman's first degree murder (with deliberation) charge. However, Wernsman was not convicted of that charge; he was convicted of felony murder, based on burglary with the intent to commit assault.

¶ 19 As to burglary, the theory of defense was simply that Wernsman had not knowingly and unlawfully entered C.Z.'s home because he had been permitted to enter through an unlocked door for years. Indeed, Wernsman testified that after J.D. declined to meet him in a park to fight, he went to C.Z.'s house to fight J.D. — in other words, to commit assault. On appeal, Wernsman contends

> WERNSMAN: To my knowledge, there was not. There was at one point. However, I had, there was a warrant for my arrest [at] one point because I violated probation, which is when that protection order was put into place. However, I turned myself in; and that case was resolved. I had been arrested at a point after that for possession of marijuana, which --

¶ 22 The prosecutor moved to strike the answer as nonresponsive. The trial court struck the testimony and instructed the jury to disregard Wernsman's answer. The prosecutor asked again whether there was a protection order in effect when the shooting occurred, and Wernsman responded, "To my knowledge, there was not."

¶ 23 Before redirect examination, the trial court learned that although court records indicated there was an active protection order in effect on the night of the shooting, it was there due to a clerical error. The court offered to cure any prejudice by (1) taking judicial notice that there was no protection order in effect and instructing the jury to disregard the exchange regarding the protection order, or (2) taking another curative action suggested by the defense. The defense asked for a mistrial, arguing manifest necessity because the jury had heard about Wernsman's criminal

possessing a firearm" on the night of the shooting. Defense counsel argued that it was not relevant but did not disagree. The court then allowed the prosecution to ask about the protection order, and it did so in the following exchange:

> PROSECUTOR: So, Mr. Wernsman, you knew that on [the night of the shooting], you weren't lawfully allowed at [C.Z.'s] home, were you?
>
> WERNSMAN: I wouldn't say that.
>
> PROSECUTOR: You wouldn't say that?
>
> WERNSMAN: No. Like I said, when [my attorney] was asking me, she [C.Z.] told me I was always welcome there.
>
> PROSECUTOR: Sir, I'm not asking you what [C.Z.] told you.
>
> . . . .
>
> PROSECUTOR: You were not lawfully permitted to contact [C.Z.] on [that night], were you?
>
> WERNSMAN: Why would I not be allowed to contact her?
>
> . . . .
>
> PROSECUTOR: Mr. Wernsman, is it your testimony today that there was not a protection order in place that prohibited you from contacting [C.Z.]?

conviction only in determining the credibility of the defendant as a witness, and for no other purpose"; and (2) "A judicially noticed fact is one which the court determines is not subject to reasonable dispute and has accepted as being true. *You may or may not accept this fact as true.*"[3] (Emphasis added.) We are not persuaded.

A. Standard of Review

¶ 26 "A mistrial is a drastic remedy and is warranted only when prejudice to the accused is so substantial that its effect on the jury cannot be remedied by other means." *People v. Johnson*, 2017 COA 11, ¶ 40, 446 P.3d 826, 832. Because a trial court is in a better position to determine whether improper testimony may prejudice the jury, it has considerable discretion to grant or deny a mistrial. *People v. Tillery*, 231 P.3d 36, 43 (Colo. App. 2009), *aff'd sub nom. People v. Simon*, 266 P.3d 1099 (Colo. 2011). We review a trial court's decision to deny a mistrial for abuse of discretion. *See, e.g., People v. Williams*, 2012 COA 165, ¶ 13, 297 P.3d 1011, 1014. A

[3] The challenged portion of this instruction is consistent with, and mandated by, CRE 201(g), which states, "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

history as a result of the error. It did not suggest any alternative curative action.

¶ 24 The trial court denied Wernsman's request for a mistrial, finding, as relevant here, that he had testified to marijuana use on direct examination, and the prosecutor had a good faith basis to inquire about the protection order. The court instructed the jury as follows:

> [F]olks, there was testimony during cross regarding a protection order. The [c]ourt has reviewed the court records, and I take judicial notice that there was no protection order in effect on December 23rd or 24th; and the jury will disregard the question and answers regarding the protection order or lack thereof and simply accept the judicially noticed fact as true.

¶ 25 Wernsman contends that the court erred because the prejudice arising from the quoted exchange concerning his criminal history was too substantial to be remedied by other means. In addition, for the first time on appeal, he argues that prejudice arose from testimony implying that a protection order existed at some point. He further argues that this prejudice was exacerbated by the final jury instructions, which, in the context of broader instructions, stated, (1) "You may consider testimony of a previous

had used methamphetamine. From this testimony, the jury might have inferred that Wernsman had a criminal history.[4]

¶ 30 There was substantial evidence of Wernsman's guilt from his own properly admitted testimony. As discussed in Parts I and III, Wernsman testified that he walked into C.Z.'s home and shot J.D. and that he entered with the intent to fight J.D. Moreover, C.Z. testified that Wernsman was not welcome in her home for several months before he entered without permission.

¶ 31 The trial court gave multiple instructions to disregard the damaging testimony. Even before the curative instruction regarding protection order testimony, the court struck Wernsman's testimony about his criminal history and instructed the jury to disregard it. "A jury is presumed to have followed a curative instruction to disregard improper testimony or statements." *Tillery*, 231 P.3d at 43. Unless there is evidence to the contrary, we presume the jury followed the instructions. *People v. Cousins*, 181 P.3d 365, 374 (Colo. App. 2007). We are not persuaded that the cited final jury

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[4] We recognize that the use of marijuana does not necessarily indicate criminal activity under Colorado law. *See People v. McKnight*, 2019 CO 36, ¶¶ 41-42, 446 P.3d 397, 408.

instructions defeat this presumption, and thus we presume that the jury followed the instructions to disregard the prejudicial testimony.

¶ 32 Accordingly, we conclude that the trial court acted within its discretion in finding that the prejudice arising from testimony about Wernsman's criminal history was not so substantial as to require a mistrial. *See Tillery*, 231 P.3d at 43 ("[A] trial court is in a better position to evaluate any adverse effect of improper statements or testimony on a jury.").

¶ 33 With respect to Wernsman's new argument that he was prejudiced by the implication that there had once been a protection order prohibiting his presence at C.Z.'s house, we do not discern that issue to be so obvious that the court should have considered it without the benefit of an objection. Therefore, we perceive no plain error.

V. Conclusion

¶ 34 The judgment is affirmed.

JUDGE LIPINSKY and JUDGE PAWAR concur.

18-1-401

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