COLORADO COURT OF APPEALS DATE FILED: April 7, 2022

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Court of Appeals No. 19CA1740
Pueblo County District Court No. 17CR2114
Honorable Larry C. Schwartz, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Perry Taylor Armstrong,

Defendant-Appellant.

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JUDGMENTS AND SENTENCE AFFIRMED

Division II
Opinion by JUDGE DAVIDSON*
Pawar and Kuhn, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**
Announced April 7, 2022

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Philip J. Weiser, Attorney General, Brittany L. Limes, Assistant Solicitor General, Denver, Colorado, for Plaintiff-Appellee

Robert P. Borquez, Alternate Defense Counsel, 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. 2021.

¶ 1 Defendant, Perry Taylor Armstrong, appeals his sixteen convictions entered after a jury trial finding him guilty of five counts of felony child abuse (serious bodily injury), one count of felony child abuse (pattern), nine counts of misdemeanor child abuse, and first degree assault (deadly weapon). He also appeals from his 192-year sentence. The charges stemmed from allegations of repeated daily abuse of his stepdaughter (child victim) over two years, including ordering his dogs to attack and bite her, beating her with a rubber snake, breaking her arm, and striking her ear. We affirm the convictions and sentence.

¶ 2 Armstrong's theory of defense at trial was that he was not the person responsible for the child victim's injuries. He did not dispute the extent of the child victim's injuries but claimed that she had been coached by her mother to frame him. On appeal, he contends that the trial court reversibly erred by (1) admitting res gestae evidence; (2) prohibiting a line of cross-examination with a cold expert psychologist witness; (3) admitting cumulative testimony; and (4) that the cumulative effect of these three alleged errors requires reversal. He also contends that the trial court erred by (5) not merging the felony child abuse counts into a single

pattern count and (6) imposing the maximum consecutive sentences. We disagree with each contention.

## I. Alleged Evidentiary Errors

¶ 3 We review a trial court's evidentiary rulings for abuse of discretion. *Zapata v. People*, 2018 CO 82, ¶ 25. We review the erroneous admission of evidence for nonconstitutional harmless error. *Id.* at ¶ 61; *Hagos v. People*, 2012 CO 63, ¶ 12; Crim. P. 52(a). Under this standard, we must reverse if the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Hagos*, ¶ 12 (quoting *Tevlin v. People*, 715 P.2d 338, 342 (Colo. 1986)); *see* Crim. P. 52(a). To determine if that occurred, we look to whether the prosecution has shown that "there is no reasonable possibility that [the error] contributed to the defendant's conviction." *Pernell v. People*, 2018 CO 13, ¶ 22.

¶ 4 "If properly admitted evidence overwhelmingly shows guilt, the error is harmless." *People v. Summitt*, 132 P.3d 320, 327 (Colo. 2006); *see People v. Delgado-Elizarras*, 131 P.3d 1110, 1112 (Colo. App. 2005) (error in admitting other-acts evidence was harmless beyond a reasonable doubt in light of overwhelming evidence of the defendant's guilt).

A. Res Gestae

¶ 5 We conclude that the admission of evidence of prior acts of animal cruelty as res gestae, even if error, was harmless. We note that the abolition of the res gestae doctrine in *Rojas v. People*, 2022 CO 8 (submitted as supplemental authority by Armstrong), does not affect the harmless error analysis of any erroneously admitted res gestae evidence. *Id.* at ¶ 53.

¶ 6 At trial, the victim testified to the following:

- Armstrong would get mad at the dogs for relieving themselves in the house and would throw them into a wall or onto the ground.
- A dog named "Patches" got in trouble for peeing on the carpet. Armstrong picked the dog up and threw her on her back. The dog started bleeding from the mouth and was dead by the next day.
- That on three different occasions when the dogs had defecated on the floor, Armstrong tried to put the child victim's face in the feces and make her eat it. When she refused, he threw her.

¶ 7 Although the prosecution sought to admit this evidence under CRE 404(b), the trial court admitted it as res gestae.

¶ 8 We conclude that any error in admitting the evidence as res gestae here was harmless because there was overwhelming evidence that Armstrong had abused the victim, as charged, over a period of two years. *See Summitt,* 132 P.3d at 327. The child victim testified to a long list of abusive acts and was unequivocal that Armstrong was the person who abused her. More specifically, she testified that Armstrong

- beat her with various objects (belts, chains, toy rubber snake, metal chain, metal bat, etc.) so badly that she had permanent scars and injuries all over her body;
- broke several of her bones multiple times, broke her fingers by smashing them with a hammer, and broke her arm by throwing her on the ground then rebroke it a year later;
- repeatedly threw her onto the floor, into walls, and down flights of stairs;
- permanently disfigured her ear by stomping on her head and punching her;
- trained the dogs to attack her on his command;

- regularly locked her in the basement and an empty water tank outside to hide her bruises from visitors;
- starved her and refused her water, forced her to eat hot peppers until she vomited, forced her to eat disgusting food concoctions and dog feces, forced her to exercise to the point of exhaustion, and made her sleep without blankets in front of an air conditioner; and
- burned her with hot water and shot her with a BB gun.

¶ 9 In addition, the child victim's mother testified that she had witnessed numerous acts of abuse. She testified that Armstrong forced the child victim to eat different food from the rest of the family and that the food was either a disgusting combination or overly spicy. When the child victim tried to eat other food, Armstrong accused her of stealing and hit her with a metal bat and hammer, forced her to sleep on the floor in the living room, and shower with only cold water. She also testified that Armstrong kicked the child victim in her ear until it swelled up into cauliflower ear, regularly threw the child victim with great force, and twice broke the child victim's arm. The child victim's mother explained

that she had been too afraid to stand up to Armstrong because he was beating her as well as the child victim.

¶ 10 The child victim's injuries were corroborated by medical professionals who opined that the injuries reflected prolonged and frequent abuse.

¶ 11 Consequently, in light of this overwhelming evidence that Armstrong horrifically abused the child victim over a series of years, we do not see how the brief testimony that Armstrong also abused dogs substantially influenced the verdict or affected the fairness of the trial proceedings. *See People v. Herron*, 251 P.3d 1190, 1198 (Colo. App. 2010) (concluding that admission of "unfavorable" evidence was harmless when this evidence was "vastly overshadowed by evidence of defendant's more threatening acts").

B. Cross-Examination

¶ 12 Similarly, we find harmless any trial court error in preventing Armstrong from cross-examining the cold expert on the traumatic impact of forensic interviews.

¶ 13 The prosecutor tendered a psychologist as a cold expert in "dynamics of child physical abuse to include characteristics of child disclosures and the impact of trauma on child disclosures."

Armstrong elicited testimony during voir dire that the psychologist lacked expertise to opine on whether forensic interviews cause trauma to children.

> [Prosecutor]: She is an expert in the dynamics of child physical abuse to include characteristics of child disclosures and the impact of trauma on child disclosures.
>
> . . . .
>
> [Prosecutor]: I do not think, Judge, she is an expert in forensic interviews. That's not how I qualified her.
>
> [Armstrong]: Do you agree that you are not an expert or are not qualified to talk to that trauma that children are exposed to as it comes to forensic interviews?
>
> [Psychologist]: So I'm not going to agree that forensic interviews are traumatizing to children, but I would agree that I am not currently an expert in forensic interviews. I haven't been doing forensic interviews for quite some time.

The trial court then accepted the psychologist "as an expert in the dynamics of child physical abuse including the characteristics of child disclosures and the impact that it has on child disclosures."

¶ 14 Later, Armstrong attempted to cross-examine the expert on the impact of suggestive questions on a child during forensic interviews, but the court determined that the questions were

outside the psychologist's field of expertise for which she was endorsed. When Armstrong clarified that he was asking questions about forensic interviewing, the court again explained that the psychologist was "not qualified in forensic interviewing."

¶ 15 On appeal, Armstrong contends that the exclusion of this testimony unfairly undermined his theory of defense. He explains that he "wanted to cross[-]examine [the psychologist on] whether the forensic interviews caused any of the victim's trauma."

¶ 16 More specifically, he asserts that such cross-examination was relevant to the child victim's credibility at trial and precluding it, therefore, prejudiced his defense that the child victim was protecting her mother by attributing all of her injuries to her stepfather.

¶ 17 We are not convinced. We see no prejudice from the trial court's ruling, let alone prejudice that "substantially influenced the verdict or affected the fairness of the trial proceedings" as to merit reversal under the harmless error standard. *See Hagos*, ¶ 12. Armstrong himself elicited testimony during voir dire that the psychologist was not qualified to testify as an expert on forensic interviews. And we do not see how Armstrong was prejudiced by

being limited in his ability to explore whether the forensic interviewing process caused new trauma to the child victim with an expert witness that he himself established was not an expert in forensic interviewing. To the extent he contends that the child victim had the opportunity "to practice" explaining her injuries without "falsely attribut[ing] injuries to accidents" on the stand, Armstrong had the opportunity to challenge the child victim's credibility by examining the child victim and the witnesses to whom she made those initial allegedly false attributions.

C. Cumulative Testimony

¶ 18 Next, we conclude that the trial court did not abuse its discretion in admitting the testimony of the Emergency Room (ER) doctor and the Sexual Assault Nurse Examiner (SANE) nurse practitioner over Armstrong's objection that this testimony was cumulative to that of the child victim and the ER nurse who treated her.

¶ 19 "Although 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 undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403.

¶ 20 The fact that evidence is cumulative does not, by itself, render the evidence inadmissible. *People v. Morrison*, 985 P.2d 1, 6 (Colo. App. 1999), *aff'd*, 19 P.3d 668 (Colo. 2000). "Admission of cumulative evidence is an abuse of discretion only if manifestly arbitrary, unreasonable, or unfair under the circumstances," or a misapplication of the law. *People v. Rodriguez*, 888 P.2d 278, 288 (Colo. App. 1994). The reviewing court is required to assume the maximum probative value that a reasonable jury might give the evidence and the minimum unfair prejudice reasonably expected. *See Morrison*, 985 P.2d at 6.

¶ 21 As discussed, at trial, the child victim testified to the events that caused her injuries. The ER nurse then provided limited testimony on the initial observations and treatment of injuries. The ER doctor testified about additional injuries that neither the child victim nor the nurse had mentioned, diagnosis of the child victim's injuries, and determinations as to whether those injuries constituted serious bodily injury. The SANE nurse practitioner only identified the depiction of those injuries in her photographs — the

admission of which Armstrong waived any objection to — and testified to her serious bodily injury form.

¶ 22 We conclude that the trial court did not abuse its discretion in finding that the probative value of the testimony from the ER doctor and the SANE nurse practitioner was not "outweighed by the danger of . . . needless presentation of cumulative evidence." *See* CRE 403. The testimony of the ER doctor and the SANE nurse practitioner offered unique probative evidence that was not cumulative to the testimony of the victim and the ER nurse. And we "assume the maximum probative value that a reasonable jury might give the evidence and the minimum unfair prejudice reasonably expected." *See Morrison*, 985 P.2d at 6.

D. Cumulative Evidentiary Error

¶ 23 As discussed in Parts I.A, B, and C above, we find any error in two of the three evidentiary rulings challenged by Armstrong to be harmless. Contrary to Armstrong's assertion, the record shows that the cumulative effect of these alleged errors did not in any way affect the fairness of the trial proceedings and the integrity of the factfinding process and, therefore, reversal is not required. *See also Howard-Walker v. People*, 2019 CO 69, ¶ 24 ("Though an error,

when viewed in isolation, may be harmless or not affect the defendant's substantial rights, reversal will nevertheless be required when 'the cumulative effect of [multiple] errors and defects substantially affected the fairness of the trial proceedings and the integrity of the fact-finding process.'" (quoting *People v. Lucero*, 200 Colo. 335, 344, 615 P.2d 660, 666 (1980))).

II. Sentencing: Merger into a Single Pattern Count

¶ 24 Next, we conclude that the trial court did not err in denying Armstrong's request to merge the felony child abuse counts into the single pattern count.

A. The Charges

¶ 25 The prosecution charged Armstrong with five counts of felony child abuse resulting in serious bodily injury. It amended the charging document so only count seven included the "continued pattern of conduct" theory of liability.

¶ 26 The prosecution elected specific factual incidents for the nonpattern counts of felony child abuse causing serious bodily injury. Count one was for the dog bites. Count two was for the rubber snake scars. Count three was for two separate dates on which Armstrong broke the victim's arm. Count four was for

Armstrong hitting the victim's ear, causing her to develop cauliflower ear. These specific factual incidents were identified on the verdict forms.

¶ 27 The rubber snake (count two) incident took place at the W. 8th Street house when the child victim was about nine years old. Although she testified that Armstrong beat her with the rubber snake over a period of a couple weeks, the last and most detailed incident was when Armstrong broke the snake across her back in the bedroom. This resulted in permanent scarring across her back.

¶ 28 The broken arm (count three) incidents took place at the W. 8th Street house when she was ten and eleven. When she was ten, Armstrong broke the victim's arm when he threw her, and she landed on the floor. A year later, the victim testified that Armstrong rebroke her arm by twisting it backward.

¶ 29 The dog bite (count one) and ear injury (count four) both took place at the Carteret house. Although the child victim gave no additional temporal details, her testimony indicated that these were separate incidents. In the dog bite incident, Armstrong trained the pit bulls to respond to his command to attack her by biting her, grabbing her clothes, and biting her skin. In the forensic interview,

the child victim described one incident when Armstrong had been drinking with a friend and, after the friend left, he told the dog to attack her and watched until the dog tired of biting her. The child victim then left the room to change out of her bloody clothes and avoid Armstrong. The dog bites caused permanent scarring on the child victim's stomach and throat. In the ear injury incident, Armstrong stomped on her head and punched her ear. The child victim and her mother described one incident when this occurred because she had eaten frosting. This resulted in cauliflower ear.

¶ 30 The pattern count was for the other abuse that occurred so frequently that the child victim couldn't provide specifics of how or when but resulted in an accumulation of injuries. This included almost daily beatings with a metal bat as well as Armstrong forcing her to exercise and throwing her on the floor, into walls, and down the stairs. The child victim testified that the repeated striking with the bat caused indented tissue in her leg that was still present at the time of trial.

B. Applying *Friend*

¶ 31 Armstrong asked the trial court to merge the felony child abuse counts into a single pattern count, relying on *Friend v. People*, 2018 CO 90.

¶ 32 *Friend* states that "[i]f each legally distinct offense has been charged with sufficient specificity to distinguish it from other offenses and if the evidence at trial supported convictions on each such count, then general verdicts of guilt will support multiple convictions." *Id.* at ¶ 22. Factors for determining if "the defendant's conduct constituted factually distinct offenses, we may consider whether, among other things, the acts 'occurred at different locations, were the product of new volitional departures, or were separated by intervening events.'" *Id.* (quoting *Woellhaf v. People*, 105 P.3d 209, 219 (Colo. 2005)).

¶ 33 In *Friend*, the prosecution "did not allege specific facts supporting each of these individual counts." *Id.* at ¶ 23. Instead, the prosecution had alleged five counts of child abuse for the same continuous transaction of abuse, each under a different theory of guilt. And the record revealed that "at trial, the prosecution did not seek to prove discrete injuries differentiating the various child

abuse counts. Instead, it established a number of acts comprising a single pattern of abuse that caused [the victim's] death." *Id.* So, the supreme court merged the convictions, reasoning that "the prosecution proved only one count of child abuse resulting in death — pattern of conduct." *Id.* at ¶ 24.

¶ 34 We conclude that the trial court did not err in denying Armstrong's request to merge the felony child abuse counts. Each count of felony child abuse causing serious bodily injury was charged with specificity to the acts alleged and proven at trial with evidence supporting separate convictions. *See id.* at ¶ 22. And the acts were not part of continuous transaction of abuse but were instead factually distinct offenses. *See id.* The acts occurred at different locations at different times and resulted in distinct serious bodily injuries. And the distance between the acts and the different methods of committing the abuse also demonstrate that the four charges were each the product of new volitional departures.

III. Sentencing: Alleged Abuse of Discretion

¶ 35 Finally, we conclude that the sentencing court did not abuse its discretion in imposing a 192-year sentence.

¶ 36 "Because sentencing requires familiarity with the circumstances of a case, a trial court's sentencing decision will not be disturbed absent a clear abuse of discretion." *People v. Leske*, 957 P.2d 1030, 1042 (Colo. 1998).

¶ 37 A sentencing court abuses its discretion if it fails to consider "the nature of the offense, the character and rehabilitative potential of the offender, the development of respect for the law and the deterrence of crime, and the protection of the public." *Id.* at 1043 (quoting *People v. Fuller*, 791 P.2d 702, 708 (Colo. 1990)).

¶ 38 If the sentence "is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case, an appellate court must uphold the sentence." *Fuller*, 791 P.2d at 708. "Only in exceptional cases will an appellate court substitute its judgment for that of the trial court in sentencing matters." *Id.*

¶ 39 As set forth above, the jury convicted Armstrong of five counts of felony child abuse (serious bodily injury), one count of felony child abuse (pattern), nine counts of misdemeanor child abuse, and first degree assault (deadly weapon).

¶ 40 The sentencing court made specific findings on the aggravating and mitigating factors in this case, including the following:

- Armstrong had repeatedly subjected the child victim, "a defenseless child," to daily "despicable" acts of physical and emotional abuse that "will have a lifelong impact on [the victim] that will color her emotions and psychological functioning, and overall well-being for the rest of her life."
- Armstrong "deflected blame" to the child victim's mother, "fails to acknowledge any of his actions," and "attempted to feign mental impairment to escape punishment for these crimes."
- Armstrong's behavior during the videotaped police interview showed his awareness of his guilt for the crimes for which he was accused. *See People v. Everett*, 250 P.3d 649, 664 (Colo. App. 2010) (sentencing court may rely on any evidence in the record to justify a finding that defendant lacked remorse).

¶ 41 The sentencing court then sentenced Armstrong to the maximum presumptive sentence on each count and ordered each sentence to run consecutively, effectively a sentence of 192 years.

¶ 42 We conclude that the court did not abuse its discretion. *See Leske*, 957 P.2d at 1042-43. This sentence is "within the range required by law" and Armstrong does not dispute that the sentences were the maximum end of the aggravated range. *See Fuller*, 791 P.2d at 708. The court discussed the necessary factors, demonstrating that the sentence was based on appropriate considerations as reflected in the record and was factually supported by the circumstances of the case. *See Leske*, 957 P.2d at 1043; *Fuller*, 791 P.2d at 708. The court's findings are supported by the record. Thus, we conclude that the trial court's imposition of this maximum sentence — though long — was not an abuse of discretion under the facts of this case.

¶ 43 To the extent that Armstrong appears to allege a violation of his constitutional right to be free from cruel and unusual punishment, he provides no argument or analysis in support of this claim. "We decline to consider a bald legal proposition presented

without argument or development." *People v. Simpson*, 93 P.3d 551, 555 (Colo. App. 2003).

## IV. Conclusion

¶ 44 We affirm the judgments of conviction and sentence.

JUDGE PAWAR and JUDGE KUHN concur.

# Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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**No. 22SC311, Court of Appeals Case No. 19CA1740**
**Petitioner:**
Perry Taylor Armstrong,
v.
**Respondent:**
The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.
JUSTICE HOOD does not participate.

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**No. 22SC312, Court of Appeals Case No. 19CA1688**
**Petitioner:**
David Matthew Everet Strunk,
v.
**Respondent:**
The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.
JUSTICE HOOD does not participate.

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**No. 22SC316, Court of Appeals Case No. 21CA2101**
**In re the Marriage of**
**Petitioner:**
Johnathan Luke Warnick,
and
**Respondent:**
Tanja B. Warnick,
**and Concerning**
**Intervenor:**
Jefferson County Department of Human Services.

Petition for Writ of Certiorari DENIED. EN BANC.
JUSTICE HOOD does not participate.

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| Colorado Court of Appeals<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: September 12, 2022<br>CASE NUMBER: 2019CA1740 |
| Pueblo County<br>2017CR2114 | |
| **Plaintiff-Appellee:**<br><br>People of the State of Colorado,<br><br>**v.**<br><br>**Defendant-Appellant:**<br><br>Perry Taylor Armstrong. | Court of Appeals Case Number:<br>2019CA1740 |

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:

JUDGMENTS AND SENTENCE AFFIRMED

POLLY BROCK
CLERK OF THE COURT OF APPEALS

DATE: SEPTEMBER 12, 2022

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