APPENDIX A

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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: October 10, 2022 CASE NUMBER: 2022SC337
Certiorari to the Court of Appeals, 2018CA1519 District Court, Weld County, 2016CR742	
Petitioner: Samuel Lucas Pinney, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2022SC337
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, OCTOBER 10, 2022.

APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA1519
Weld County District Court No. 16CR742
Honorable Thomas J. Quammen, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Samuel Lucas Pinney,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE WELLING
Dunn and Yun, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 31, 2022

Philip J. Weiser, Attorney General, Trina K. Kissel, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Andrew C. Heher, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Samuel Lucas Pinney, appeals his judgment of conviction for conspiracy to commit aggravated robbery and two counts of felony murder. We affirm.

I. Background

¶ 2 On a mid-October evening, Pinney, his brother Jack Larkin, his friend Jordan Johnson, and his girlfriend Samantha Simmons were all at Larkin's home. Larkin and Pinney were in the dining room, Johnson was in the bathroom, and Simmons was in a separate room watching television. Around 8:20 p.m., the victims, J.F. and Z.M., knocked on the front door and entered Larkin's house.

¶ 3 Why the victims were there was disputed. Pinney contends that he didn't know the victims were coming to the house at that time and that the victims had asked if they could buy marijuana from Larkin. According to the People's theory, J.F. had approximately $19,000 in cash on him, purportedly for the purchase of marijuana. Per Pinney's testimony, J.F. pulled a gun from his bag and attempted to rob Larkin. The People contend that Pinney had been planning to rob J.F. and Z.M. for months and had lured them to the home.

¶ 4 Pinney testified that after J.F. pulled out a gun, Johnson emerged from the bathroom and fatally shot Z.M. Pinney also testified that he didn't know what happened between Larkin and J.F. leading to J.F.'s death, only that he saw "a fight." Pinney testified that he, Larkin, and Johnson then decided to clean up the scene. They removed the two victims' bodies and all blood-stained items from the home and placed them in the truck that J.F. and Z.M. had driven to the home. At about 9 p.m., Pinney drove the truck for thirty minutes before dumping it into a drainage ditch where it was lit on fire.[1]

¶ 5 Pinney was arrested and charged in connection with the events related to J.F.'s and Z.M.'s killings. Following a trial, Pinney was found guilty of two counts of felony murder, conspiracy to commit aggravated robbery, second degree arson, criminal mischief, and two counts of abuse of a corpse; he was acquitted of first degree murder - after deliberation.

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[1] It's not clear who lit the truck on fire. Pinney testified that he participated in the disposal of the truck, but that it was Johnson who poured the gasoline over the bodies. But defense counsel conceded Pinney's guilt to second degree arson, criminal mischief, abuse of a corpse, and menacing.

II. Analysis

¶ 6 On appeal, Pinney contends that the trial court erred by

- excluding an out-of-court statement made by Pinney;
- allowing the prosecution to argue a legally inadequate theory of conviction;
- excluding expert testimony proffered by Pinney; and
- excluding evidence of J.F.'s out-of-state deferred judgment as impeachment.

¶ 7 We review each contention below.

A. Pinney's Hearsay Statement Should Have Come in for Impeachment Purposes, But the Error was Harmless

1. Additional Facts

¶ 8 While Pinney, Larkin, Johnson, and Simmons were at Larkin's home, Simmons was in a side room watching television. Simmons testified that while she was watching television, she heard casual conversation between Pinney, Larkin, Johnson, and the victims. Simmons testified she then heard Larkin say, "Where's the money?" Next, she heard J.F. and Z.M. step outside, and then return a minute later. After J.F. and Z.M. reentered the house, Simmons heard shouting. Simmons heard Pinney twice yell "get the fuck

out," which she believed was directed at her, and so she left the home. Simmons waited outside in Pinney's car. While waiting in the car, Simmons watched Pinney and Larkin carry boxes and the victims' bodies out of Larkin's home and put them in J.F.'s truck. After loading the truck, Pinney instructed Simmons to follow him while he drove J.F.'s truck to a drainage ditch, where it was lit on fire.

¶ 9 Simmons offered two different versions of what Pinney said following the burning of the truck. During a motions hearing, Simmons testified that Pinney repeatedly said "they tried to rob Jack [Larkin]," and one of the times that Pinney made this statement may have been in response to Simmons asking Pinney "what the fuck happened?"

¶ 10 At trial, during direct examination, Simmons offered a different version of what Pinney said following the burning of the truck. Simmons testified that when Pinney came out of the drainage ditch away from the burning truck, he was yelling "incoherent things," and not yelling any specific words, just "yelling, like, out of frustration."

¶ 11 On cross-examination, defense counsel attempted to introduce Simmons's pretrial testimony regarding Pinney saying "they tried to rob Jack" both as a prior inconsistent statement and as an excited utterance. The prosecutor objected and the trial court sustained the objection, concluding that Pinney's statements were "self-serving hearsay" under *People v. Cunningham*, 194 Colo. 198, 202, 570 P.2d 1086, 1089 (1977), and that the proper foundation for the excited utterance and prior inconsistent statement exceptions had not been laid.

2. Analysis

¶ 12 On appeal, Pinney contends that Simmons's prior testimony that Pinney said "they tried to rob Jack" should have come in as both an excited utterance and a prior inconsistent statement, as well as under the common law principle of "opening the door."

¶ 13 We review preserved evidentiary rulings for an abuse of discretion, *Campbell v. People*, 2019 CO 66, ¶ 21, and unpreserved evidentiary rulings for plain error, *People v. Shanks*, 2019 COA 160, ¶ 72.

¶ 14 Hearsay is a "statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove

the truth of the matter asserted." CRE 801(c). Hearsay is not admissible "except as provided by [the Colorado Rules of Evidence] or by the civil and criminal procedural rules applicable to the courts of Colorado or by any statutes of the State of Colorado." CRE 802.

¶ 15 Colorado law does not contain any bar, separate from the provisions of the Colorado Rules of Evidence, to the admission of self-serving hearsay statements by a criminal defendant. *See People v. Vanderpauye*, 2021 COA 121, ¶ 29. Accordingly, if the proffered statement meets an exception to the hearsay rule, it may be admitted, subject to CRE 403. *Vanderpauye*, ¶ 29. The question remains whether Pinney's statement to Simmons was admissible under the Colorado Rules of Evidence. *Id.* at ¶ 30.

¶ 16 We address Pinney's arguments for admitting Simmons's prior testimony under the excited utterance, prior inconsistent statement, and opening the door exceptions separately.

a. Excited Utterance

¶ 17 An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." CRE 803(2). A hearsay statement is admissible as an excited utterance if (1) the

occurrence or event was sufficiently startling to render inoperative the normal reflective thought process of an observer; (2) the declarant's statement was a spontaneous reaction to the event; and (3) the circumstantial evidence supports an inference that the declarant had the opportunity to observe the startling event. *People v. King*, 121 P.3d 234, 237-38 (Colo. App. 2005).

¶ 18 Pinney contends on appeal that all three elements of an excited utterance were satisfied, and therefore Simmons's prior testimony regarding his statement should have come in. We disagree that the trial court abused its discretion in concluding otherwise.

¶ 19 Because defense counsel sought to introduce Pinney's hearsay statement as an excited utterance, this issue is preserved for our review. The trial court is in the best position to consider the effect of a startling event on a declarant and is afforded wide discretion in determining admissibility under this exception. *People v. Abdulla*, 2020 COA 109M, ¶ 65.

¶ 20 While it's undisputed that Pinney observed the killings, we conclude that the trial court didn't abuse its discretion when it found that the other two elements weren't met. The evidence

showed that after the killings and before the disputed statement, Pinney removed the clothing from the bodies, wrapped the bodies in rugs, removed all blood-stained items from the home, directed Simmons to follow him, planted the truck in a drainage ditch, started a fire to burn the truck and the bodies inside, and then directed Simmons where to drive next. The trial court reasonably found that the statement wasn't an excited utterance based on Pinney's presence of mind to clean up the crime scene and direct others to help, which indicated that Pinney's actions were part of a "normal reflective thought process[]," rather than a spontaneous reaction. *Id.* (quoting *People v. Stephenson*, 56 P.3d 1112, 1115-16 (Colo. App. 2001)). Accordingly, the trial court didn't abuse its discretion in concluding that Pinney's statement wasn't an excited utterance.

b. Prior Inconsistent Statement

¶ 21 Pinney also sought to introduce Simmons's prior testimony as a prior inconsistent statement, both to impeach Simmons's credibility and for the truth of the matter asserted (i.e. that Pinney's statement that "they tried to rob Jack" was true, not just that he made such a statement). We agree that Simmons's prior testimony

should have come in as a prior inconsistent statement but disagree that was admissible to prove the truth of the matter asserted.

¶ 22 First, we will address the admissibility of Simmons's statement to prove the truth of the matter asserted. Where a witness in a criminal trial has made a previous statement inconsistent with her testimony, the previous inconsistent statement may be shown by any otherwise competent evidence and is admissible not only to impeach the witness's testimony but also to establish a fact, if (1) the witness, while testifying, is given an opportunity to explain or deny; and (2) the previous statement relates to a matter within the witness's own knowledge. § 16-10-201, C.R.S. 2021. While the first factor is satisfied — Simmons would have had the opportunity while testifying to explain or deny her prior inconsistent statement — the second factor isn't.

¶ 23 Simmons did have knowledge that Pinney said "they tried to rob Jack," but she had no knowledge of whether that statement was true — that is, whether they (the victims) did try to rob Jack. Simmons wasn't in the home when the incident took place: she left the home after Pinney yelled to get out, and she waited outside in the car until she saw Pinney and Larkin start to load J.F.'s truck.

Because Simmons had no personal knowledge of whether J.F. and Z.M. tried to rob Jack — and, more generally, no personal knowledge of what happened in the house at all once she left — the statement was therefore properly excluded to prove the truth of the matter asserted.

¶ 24 Pinney also contends that Simmons's statement should have been admitted for the limited purpose of impeaching her credibility. With this contention, we agree.

¶ 25 Simmons's prior testimony was inconsistent with her trial testimony — she had previously testified that Pinney said "they tried to rob Jack" but at trial she testified that Pinney was just yelling incoherent things.

¶ 26 Under CRE 801(d)(1)(A), a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with her testimony. Here, defense counsel attempted to lay a proper foundation for impeachment by asking Simmons if Pinney had said anything in response to her asking him what had happened. And she responded, "No." Still, the trial court didn't allow defense counsel to ask Simmons about her prior testimony in which she

had said Pinney said "they tried to rob Jack" after she had asked him what had happened. Because Simmons was testifying, she would've had ample opportunity to explain or deny the validity of her previous statements, and, therefore, the trial court should've allowed Simmons's prior testimony to come in for impeachment purposes.

¶ 27 We don't agree, however, that this error requires reversal. A trial court's decision is reversible only if the error substantially influenced the verdict or impaired the fairness of the trial. *Campbell*, ¶ 22. In assessing the prejudicial effect of evidentiary error, we consider several factors, including the overall strength of the state's case, the impact of the improperly admitted or excluded evidence on the trier of fact, whether the proffered evidence was cumulative, and the presence of other evidence corroborating or contradicting the point for which the evidence was offered. *People v. Short*, 2018 COA 47, ¶ 55.

¶ 28 Defense counsel impeached Simmons's credibility with other prior inconsistent statements by pointing out inconsistencies between her testimony during cross-examination and statements she had made to the detective and the prosecutor, and by

highlighting gaps in her memory. Adding another instance of inconsistent testimony would have been largely cumulative. The real thrust of Pinney's argument is that the jury didn't get to hear Simmons testify about the substance of Pinney's statement — namely, that the victims had tried to rob Jack. But, as discussed above, Simmons's testimony wasn't admissible for that purpose. Thus, the improper exclusion of Simmons's prior testimony for impeachment purposes didn't substantially influence the verdict and, therefore, doesn't require reversal.

c. Opening the Door

¶ 29 For the first time on appeal, Pinney argues that Simmons's prior testimony should have been admitted under the doctrine of "opening the door." The rationale for admitting evidence based on a party "opening the door" is to prevent one party from gaining an unfair advantage by presenting evidence that, without being placed in context, creates an incorrect or misleading impression. *People v. Krueger*, 2012 COA 80, ¶ 66.

¶ 30 Pinney argues that the prosecutor opened the door to Simmons's prior testimony by repeatedly asking Simmons whether Pinney had said anything in particular to her after the killings, and

she repeatedly said that he had not. Pinney contends that Simmons's testimony that Pinney was just incoherently yelling (rather than saying "they tried to rob Jack") left the jury with a misleading impression of what happened. Specifically, Pinney contends this left the jury with the impression that he was "coolly covering up a murder." We disagree.

¶ 31 Simmons's testimony didn't give the impression Pinney claims. Simmons repeatedly described Pinney as "frantic," scared, hyperventilating, and hysterical, and said that "he was just yelling." This description doesn't convey the picture of a person coolly covering up a crime and didn't obviously leave the jury with a misleading impression of Pinney's state of mind during the aftermath of the killings and cover-up. Thus, we can't conclude that the trial court plainly erred by failing to invoke, sua sponte, the doctrine of opening the door to admit Simmons's earlier testimony.

B. The "Truck Theory" Wasn't Plainly Legally Inadequate

¶ 32 Pinney's next contention is that the trial court erred by allowing the prosecution to argue an alternative, legally inadequate theory of conviction during closing argument or, in the alternative,

that the jury should have been given a modified unanimity instruction. We disagree on both fronts.

1. Additional Facts

¶ 33 The prosecution charged Pinney with two counts of felony murder and one count of aggravated robbery. Per the complaint, Pinney was alleged to have committed robbery or attempted robbery as the predicate crime for felony murder. The People didn't separately charge Pinney with the offenses of robbery or attempted robbery but did charge him separately with two counts of aggravated robbery. In the complaint, the "thing of value" allegedly taken in the aggravated robbery was specified as "U.S. currency."[2]

¶ 34 During trial, the prosecution presented evidence that Pinney and Larkin planned to rob J.F.; that J.F. had approximately $19,000 in cash the day he was killed, which was never found; and that Pinney took the truck J.F. had been driving and drove it into a drainage ditch and set it, and the bodies inside of it, on fire.

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[2] Pinney was acquitted of aggravated robbery but convicted of conspiracy to commit aggravated robbery.

¶ 35 During closing argument, the prosecution reviewed the elements of felony murder and argued that the predicate crime of robbery had been proved, as follows:

> There are a lot of instructions related to robbery that you'll see. I'm not going to go through all of those. But we talked about some of those elements a moment ago. Took anything of value. I.e.[,] the money, *the truck*, clothing, anything that's removed from [J.F.]'s person or presence, which would include *the truck* that's park[ed] right outside that he arrived in. By use of force. Death is force. [Pinney] is guilty of robbery as well.

(Emphasis added.)

2. Contentions

¶ 36 Pinney advances two related challenges to the court permitting the prosecution to argue that the taking of the truck could satisfy the predicate felony of robbery. First, Pinney argues that the truck theory is legally inadequate because Pinney took the truck only as an afterthought to cover up the crime. Therefore, Pinney contends, the intent to kill J.F. and Z.M. couldn't have been imputed from the intent to rob them of the truck because the intent to do so formed after the killing. Pinney argues because the truck wasn't the object

of the robbery associated with the killings, it couldn't serve as a basis for the predicate crime of felony murder.

¶ 37 Second, Pinney contends that, in the alternative, and assuming arguendo that the truck theory was legally adequate, Pinney was entitled to a modified unanimity instruction, requiring the jury to unanimously agree on the object or objects of the predicate robbery.

3. Standard of Review

¶ 38 With these interrelated contentions in mind, we turn to the question of preservation. Pinney didn't object to the prosecutor's statements during closing argument. Because Pinney didn't object to the prosecution's argument of the truck theory during closing argument, his first contention — the legal adequacy of the truck theory — isn't preserved, so we review it for plain error. *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010). Plain error is error that is both "obvious and substantial." *Hagos v. People*, 2012 CO 63, ¶ 14. To qualify as plain error, the error must be so clear cut that a trial judge should have been able to avoid it without benefit of objection. *People v. Pollard*, 2013 COA 31M, ¶ 39.

¶ 39 Whether the second contention — that he was entitled to a modified unanimity instruction — is preserved is a closer call. Pinney contends that it's preserved because he requested that the trial court give a modified unanimity instruction. But the special unanimity instruction he requested wasn't in connection with the object of the robbery. Instead, the special unanimity instruction he requested was in connection with the "conspiracy to commit robbery" and "what happened inside that house."

¶ 40 Specifically, defense counsel argued to the trial court that the special unanimity instruction was necessary for the conspiracy to commit robbery charge because "you might have six jurors that believe beyond a reasonable doubt that the conversations in Oklahoma constituted conspiracy to commit robbery," another six jurors might "think it's what happened in Colorado." Additionally, defense counsel argued that a special unanimity instruction was necessary with regard to what happened "inside, you know, the way the testimony has played out regarding what happened inside that house, because . . . you could have six jurors that think that it went down like this, but yes, he technically did it, and you could

have another six jurors that think he did it but he did it in a different way."

¶ 41 The trial court denied this request, finding that "for this conspiracy, if they all agree that there was a conspiracy, but it just manifested itself at different times, I don't think that a unanimity instruction is warranted."

¶ 42 But, Pinney never requested an unanimity instruction on which act of robbery constituted the offense charged (i.e., the money or the truck). Because Pinney didn't request such an instruction, or afford the trial court the opportunity to rule on whether it was necessary with respect to the object of the predicate robbery, we review for plain error. *People v. Miller*, 113 P.3d 743, 749 (Colo. 2005); *People v. Ujaama*, 2012 COA 36, ¶ 37 (an issue is unpreserved for review when an objection or request was made in the trial court, but on grounds different from those raised on appeal).

4. Analysis

¶ 43 Both of Pinney's contentions share a common premise: that the taking of the money and the taking of the truck constitute two separate or distinct offenses or transactions. And because we are

reviewing both contentions for plain error, to prevail Pinney must establish that the transactions are *obviously* separate. *See, e.g.*, *Ujaama*, ¶ 42 ("To qualify as plain error, the error must be one that 'is so clear-cut, so obvious,' a trial judge should be able to avoid it without benefit of objection." (quoting *People v. Taylor*, 159 P.3d 730, 738 (Colo. App. 2006)). Because, as discussed below, we reject this premise and instead conclude that the taking of the money and the taking of the truck were not obviously two separate transactions, we conclude that the trial court didn't plainly err in either regard.

¶ 44 When a defendant is charged with crimes occurring in a "single transaction," the prosecutor need not elect among the acts, and the trial court need not give a modified unanimity instruction. *Melina v. People*, 161 P.3d 635, 639-40 (Colo. 2007). When, however, the prosecution presents evidence of multiple distinct acts, any one of which could constitute the offense charged, and the jury could reasonably disagree regarding which act was committed, the trial court must either (1) require the prosecution to elect the transaction on which it relies for the conviction or (2) instruct the

jury that it must unanimously agree that the defendant committed the same act or all of the acts. *People v. Hines*, 2021 COA 45, ¶ 50.

¶ 45 As to the narrow question in front of us, whether the robbery of J.F.'s and Z.M.'s personal belongings and their killings, on the one hand, and the later taking of their truck, on the other hand, obviously constituted two separate transactions, we answer "no."

¶ 46 "[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts." *Id.* at ¶ 51 (quoting *State v. Fiallo-Lopez*, 899 P.2d 1294, 1299 (Wash. Ct. App. 1995)). Here, the killings and the taking of the truck occurred at the same residence, with the same individuals, and within approximately forty minutes. Put differently, Pinney and Larkin robbed or attempted to rob J.F. and Z.M. of cash, J.F. and Z.M. were killed, the scene was cleaned up, and not long after Pinney took the truck as part of the continuing crime spree.

¶ 47 Still, Pinney contends that *Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005), requires a different result. We aren't persuaded.

Quintano involved determining the unit of prosecution for sexual assault on a child. In that case, the defendant was charged with five counts of sexual assault on a child. *Id.* at 587. All five offenses occurred on the same day and against the same victim. *Id.* The defendant was convicted on three of the five counts. *Id.* On appeal, the defendant contended that the entire assault (all the offenses charged) constituted one offense, while the People argued that each instance of sexual contact could constitute a separate violation of the statute, and that every distinguishable act of sexual contact constitutes an "allowable unit of prosecution." *Id.* at 590.

¶ 48 Our supreme court held that the defendant's acts of sexual assault on a victim constituted separate offenses where each touching was separated by time and space. Specifically, *Quintano* held:

> The record evidences that the defendant had sufficient time to reflect after each encounter. He persisted after the victim admonished him to stop several times. Each incident occurred in a different location, or after the victim had left a location and returned there. As well, the record reflects sufficient breaks between each incident to allow the defendant time to reflect. Moreover, the defendant's statements supported the forming of renewed intentions. Though the record does not disclose

> specifically how long each incident lasted, the facts prove that the defendant's conduct was separate in temporal proximity and constituted a new volitional departure in his course of conduct.

Id. at 592.

¶ 49 *Quintano* doesn't dictate the outcome that Pinney urges for two reasons. First, the events in this case were sufficiently closely connected that the trial court didn't obviously err by allowing the prosecution to argue during closing argument that the robbery of the truck satisfied the predicate offense of felony murder. Even applying an expansive interpretation of *Quintano*, the "new volitional departure" wasn't obvious here -- it's not clear from the evidence that Pinney's intent or conduct changed throughout the incident in a way that obviously delineates what happened in the home from the taking of the truck. Because the robbery of the truck wasn't obviously a separate transaction from the robbery of the U.S. currency, no plain error occurred. *See Scott v. People*, 2017 CO 16, ¶ 16 ("For an error to be this obvious, the action challenged on appeal ordinarily 'must contravene (1) a clear statutory command; (2) a well-settled legal principle; or (3) Colorado case law.'" (quoting *Pollard*, ¶ 40)).

¶ 50 Second, *Quintano* addresses the issue of whether the unit of prosecution prescribed by the legislature permits the charging of multiple offenses. 105 P.3d at 590. *Quintano* doesn't, however, stand for the proposition that the prosecution must charge multiple offenses for each instance of sexual contact in a sex assault on a child case. *Quintano* tells us, instead, that the prosecution has the ability to charge each instance of sexual contact as a separate violation of the statute. *Id.* at 592.

¶ 51 Ultimately, we conclude there was no obvious error. And, because it wasn't obviously two separate transactions, the truck theory wasn't legally deficient and a modified unanimity instruction wasn't required.

C. The Expert Testimony Proffered by Pinney was Properly Excluded

¶ 52 Next, Pinney contends that the trial court erred by excluding expert testimony on coercive techniques used by police officers during interrogations. We discern no error.

1. Additional Facts

¶ 53 Nathaniel Youngman was part of Pinney, J.F., and Z.M.'s marijuana smuggling operation in 2014 and 2015. In 2015, J.F.

stopped working with Youngman and Pinney. Eventually, Youngman was arrested in connection with the events surrounding J.F.'s and Z.M.'s deaths. Following his arrest, Youngman was interrogated by the police over the course of multiple interviews. During those interviews, Youngman made statements incriminating Pinney. Eventually, Youngman pleaded guilty to conspiracy to commit aggravated robbery and, as part of his plea deal, agreed to testify at Pinney's trial.

¶ 54 In anticipation of Youngman testifying at trial, Pinney endorsed an expert who would've testified to coercive interview techniques used by police. The expert reviewed Youngman's interviews and would have opined that certain interrogation techniques used by police result in unreliable or false statements.[3] Pinney argued that the expert's testimony would have been helpful to the jury in assessing Youngman's credibility.

¶ 55 Before trial, the court preliminarily ruled that the expert's deposition testimony would be inadmissible, finding that it wouldn't

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[3] Because the expert witness wasn't available to testify at trial, she was deposed before trial. Pinney sought to introduce the expert's video recorded deposition.

be helpful to the jury because Youngman hadn't yet testified, let alone recanted his statements to police, and because other evidence corroborated his anticipated testimony. The trial court, however, added that if Youngman did recant his earlier statements to police during his trial testimony, the expert's testimony would be admissible. At trial, Youngman didn't recant any of the statements he made during his police interviews, and the court didn't admit the expert's testimony.

2. Standard of Review and Analysis

¶ 56 The trial court's determination of the admissibility of expert testimony is reviewed for an abuse of discretion. *Kutzly v. People*, 2019 CO 55, ¶ 8. CRE 702 governs the admissibility of expert testimony: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In determining whether expert testimony is admissible, the trial court should consider the reliability and relevance of the proffered evidence. *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001). Specifically, it should

determine: (1) the reliability of the scientific principles; (2) the qualifications of the witness; and (3) the usefulness of the testimony to the jury. *Golob v. People*, 180 P.3d 1006, 1011 (Colo. 2008).

¶ 57 The trial court reasonably found that the expert's testimony wouldn't be helpful and, instead, would be confusing to the jury because Youngman had never indicated that he made false statements to the police or was coerced, and he did not otherwise recant. Indeed, Youngman's trial testimony was consistent with his statements to police. Thus, the jury wasn't presented with conflicting statements from Youngman — e.g., inculpatory statements during a police interrogation and conflicting exculpatory testimony at trial --- that it had to discern between. Moreover, there was never any inference that Youngman had been coerced during his police interrogations. Accordingly, the trial court didn't abuse its discretion by finding that the expert testimony would have been confusing to the jury and, thus, excluding the expert's testimony.

D. The Victim's Out-of-State Deferred Judgment and Sentence Agreement was Properly Excluded

¶ 58 Finally, Pinney contends that the trial court abused its discretion in denying his request to impeach J.F.'s credibility under

CRE 806 by presenting evidence of J.F.'s uncompleted deferred judgment and sentence agreement. Again, we disagree.

¶ 59 CRE 806 provides that when hearsay statements are admitted into evidence, "the credibility of the declarant may be attacked . . . by any evidence which would be admissible for those purposes if declarant had testified as a witness." Hearsay statements from J.F. were admitted at trial through his fiance, putting his credibility at issue and subjecting him to impeachment. CRE 806.

¶ 60 Section 13-90-101, C.R.S. 2021, allows evidence of "the conviction of any person for any felony" for the purposes of affecting the credibility of such witness.

¶ 61 At trial, Pinney made an offer of proof that, before his death, J.F. had entered into an agreement for a deferred judgment and sentence for felony robbery in Oklahoma. J.F.'s deferred judgment and sentence agreement would have ended in April 2016, but J.F. was killed in October 2015, before he could complete the terms of the agreement. The trial court didn't allow Pinney to impeach J.F.'s credibility with the deferred judgment and sentence, reasoning that "there is no evidence that the Court has that [J.F.], if he testified

today, would have a felony conviction" because the agreement would have terminated by the time of trial.

¶ 62 We agree that J.F.'s felony deferred judgment and sentence were properly excluded but for slightly different reasons than the trial court.

¶ 63 J.F. didn't have a "conviction" in Oklahoma; he had a deferred judgment and sentence. Under Oklahoma law, "[a] deferred sentence 'is not a conviction until such time as the trial court pronounces judgment and sentence.'" *Starkey v. Okla. Dep't of Corr.*, 2013 OK 43, ¶ 9 n.11 (quoting *Belle v. State*, 516 P.2d 551, 552 (Okla. Crim. App. 1973)). Under the deferred sentence procedure in Oklahoma, no judgment is entered at the time of the agreement, and if the defendant complies with the agreement, no judgment is ever entered. Okla. Stat. tit. 22, § 991c (2021).

¶ 64 J.F.'s deferred judgment and sentence agreement was scheduled to end in April 2016. But J.F. died before being able to complete the agreement, and, more importantly, it was never revoked before his death. Because J.F. died while he was still under the agreement for a deferred judgment and sentence for a felony, he didn't have a conviction under Oklahoma law at the time

of his death. Because J.F. had no felony conviction at the time of his death (or at the time of trial), the trial court properly excluded the evidence of his deferred sentence.

III. Conclusion

¶ 65 For the reasons set forth above, we affirm the judgment of conviction.

JUDGE DUNN and JUDGE YUN concur.

APPENDIX C