APPENDIX

APPENDIX A

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 12, 2024 CASE NUMBER: 2023SC697
Certiorari to the Court of Appeals, 2020CA1084 District Court, City and County of Denver, 2018CR7865	
Petitioner: Ronald Leon Thompson, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2023SC697
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 12, 2024.

APPENDIX B

20CA1084 Peo v Thompson 08-03-2023

COLORADO COURT OF APPEALS

DATE FILED: August 3, 2023
CASE NUMBER: 2020CA1084

Court of Appeals No. 20CA1084
City and County of Denver District Court No. 18CR7865
Honorable John W. Madden IV, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ronald Leon Thompson,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE NAVARRO
Yun and Bernard*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 3, 2023

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Defendant, Ronald Leon Thompson, appeals the judgment of conviction entered on a jury verdict finding him guilty of sexual assault. We affirm.

I. Factual and Procedural History

¶ 2 In October 2018, H.G-R., the victim, was sitting outside of a church. Thompson approached her from behind, pulled her pants down, and sexually assaulted her. Two bystanders heard the victim "asking for help" and telling Thompson to "[p]lease get off of me." They saw Thompson "with his pants down below his knees" and "thrusting on top of" her. They called 911, and police officers arrested Thompson shortly thereafter.

¶ 3 The prosecution charged Thompson with sexual assault. Representing himself at trial, his defense theory was that the victim consented to the sexual acts. But a jury convicted him as charged.

¶ 4 On appeal, Thompson contends that the trial court erred by (1) failing "to instruct the jury on the affirmative defense of consent or, in the alternative, to provide the jury with the definition of 'consent'"; (2) refusing to admit evidence "that another male's DNA was recovered from the alleged victim's intimate swabs" and "that the alleged victim had told the SANE nurse that her last consensual

sexual encounter had been a year prior"; and (3) preventing cross-examination about the victim's "multiple police contacts for false reporting."

II. Jury Instructions

¶ 5 Although Thompson argues that the trial court erred by failing to instruct the jury on the affirmative defense of consent and the definition of the term "consent," we discern no basis for reversal.

A. Pertinent Background

¶ 6 Before the close of evidence, the prosecution tendered proposed jury instructions, including one defining the term "consent." Thompson did not tender any proposed instructions.

¶ 7 During the instruction conference, the court noted that it had removed the instruction defining "consent." The court explained that "other than in that definition . . . that word does not appear because we don't have a defense based on consent, and there's no need to define a word that's otherwise not used in the instructions."

¶ 8 The prosecutor requested "that the definition of consent stay in the instruction." She argued, "I know that the Court indicated that there's no defense in the case based on consent. It's certainly my understanding of listening to the defendant's testimony that his

defense is consent, and that it's something that he will be arguing to the jury in closing." She continued, "I think given that, it's proper for the jury to have that legal definition of what that means. It's also my understanding that that is a definition that's routinely given during sex assault trials when that is an issue in the case."

¶ 9 The court reiterated its concern about "defining a word that has no . . . actual use and doesn't otherwise appear in the instructions," though the court noted that the prosecutor's proposed definition was "a verbatim recitation of the pattern jury instruction." The court then ruled as follows:

> There are sections in the definitions of sexual assault that . . . include the word "consent," and in those particular offenses, consent has a specific legal meaning. What I'm going to find in this case is that certainly Mr. Thompson has raised . . . a factual issue in terms of his testimony and has indicated during his testimony that the sexual contact between himself and [the victim] was consensual, but I'm finding that to be the use of the word in a common sense.
>
> In other words, under the fifth element of sexual assault, defendant has to cause the submission of the victim, in this case, that . . . Mr. Thompson caused the submission of [the victim] by means of sufficient consequence reasonably calculated to cause submission against the person's will. I'm taking his use of

the word "consensual" to mean that it was not against her will.

To use the legal definition that applies to specific elements of criminal offenses would suggest that we're not using the ordinary definition of consent. That legal definition, although very similar to the ordinary definition of consent, applies only to certain legal situations as to certain offenses and would not serve to restrict a common understanding of saying it was not a submission against [the victim's] will because she had consented or agreed.

And so what I'd find is that looking at the . . . definition that we're using, consent means cooperation in act or attitude pursuant to an exercise of free will with knowledge of the nature of the act. I think that's largely consistent with the normal definition of the word "consent," as a factual matter, something that . . . is against someone's free will is not consensual.

. . . .

And, under the circumstances, I don't think there would be a risk of confusion. And so defining consent as its legal definition as it applies to certain specific offenses, I'll note the People's objection, but I'm going to continue to preclude the legal definition of consent and allow both sides to argue whether or not factually there was submission against [the victim's] will, and if that's called consent, that can be argued in terms of its common understanding of whether or not something was against a person's will.

B. Standard of Review and Pertinent Principles

¶ 10 We review de novo whether jury instructions adequately informed the jury of the governing law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). We review for an abuse of discretion the trial court's decision whether to give a particular instruction. *Walker v. Ford Motor Co.*, 2017 CO 102, ¶ 9. A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *People v. Oliver*, 2020 COA 97, ¶ 7.

¶ 11 Where, as here, a defendant does not request an affirmative defense instruction, we review for plain error. *People v. Jacobson*, 2017 COA 92, ¶ 8. Under this standard, we will reverse a conviction only if an error was obvious and so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment. *Hagos v. People*, 2012 CO 63, ¶ 11.

¶ 12 When a court misinstructs the jury on an element of an offense, either by omitting or misdescribing that element, that error is subject to constitutional harmless or plain error analysis, depending on whether the error was preserved. *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001). We will reverse under the constitutional harmless error standard unless the error was harmless beyond a

reasonable doubt. *Hagos*, ¶ 11. Under this standard, we reverse if there is a reasonable possibility that the error might have contributed to the conviction. *Id.*

¶ 13 As charged here, a person commits sexual assault if they "knowingly inflict[] sexual intrusion or sexual penetration on a victim" and "cause[] submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will." § 18-3-402(1)(a), C.R.S. 2018.[1] With respect to offenses involving unlawful sexual behavior, "[c]onsent" means "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act." § 18-3-401(1.5), C.R.S. 2022.

[1] After the acts charged in this case, section 18-3-402(1)(a) was amended to state, "Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if . . . (a) [t]he actor causes sexual intrusion or sexual penetration knowing the victim does not consent." § 18-3-402(1), C.R.S. 2022.

C. Analysis

1. Affirmative Defense Instruction

¶ 14 Thompson argues that the trial court erred by not sua sponte instructing the jury on the affirmative defense of consent. For three reasons, we discern no error, much less plain error.

¶ 15 First, Thompson's reliance on section 18-1-505, C.R.S. 2022, is misplaced. His argument goes like this: (1) the statutory elements of sexual assault negate the existence of a victim's consent, and vice versa; (2) section 18-1-505(1), which applies to offenses generally, says a victim's consent is a defense to a charge if the consent negates an element of the offense; and (3) section 18-1-505(4) says that "[a]ny defense authorized by this section is an affirmative defense." But section 18-1-505 says nothing about jury instructions. At any rate, Thompson's argument does not take account of section 18-3-408.5, C.R.S. 2022, which applies specifically to sexual assault as described in section 18-3-402(1)(a). As pertinent here, 18-3-408.5(1) provides that "*[n]otwithstanding the provisions of section 18-1-505(4)*, an instruction on the definition of consent given pursuant to this section *shall not constitute an affirmative defense*, but shall only act as a defense to the elements

of the offense." (Emphasis added). Under these statutes, therefore, consent is not an affirmative defense.

¶ 16 Second, even apart from the specific language of section 18-3-408.5, consent is not an affirmative defense to the sexual assault offense charged here. Rather, consent is an element-negating traverse. An affirmative defense admits the defendant's commission of the elements of the charged acts but seeks to justify, excuse, or mitigate the commission of the act. *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011). A traverse, on the other hand, is a defense that effectively refutes the possibility that the defendant committed the charged act by negating an element of the act. *Id.*

¶ 17 The distinction between the two types of defenses is important. If the defense is an affirmative defense, it is treated as an additional element of the offense, and the trial court ordinarily must instruct the jury that the prosecution has the burden of disproving the affirmative defense beyond a reasonable doubt. *People v. Nelson*, 2014 COA 165, ¶ 49. But if the defense is an elemental traverse, no such instruction need be given, although the jury may consider it in determining whether the prosecution has proved the element implicated by the defense. *Id.*; *People v. Marks*, 2015 COA 173,

¶ 54. In the latter circumstance, the prosecution need do no more than prove the elements of the offense beyond a reasonable doubt "because proof beyond a reasonable doubt of the element implicated by the traverse, by definition, disproves the traverse." *Roberts v. People*, 2017 CO 76, ¶ 22.

¶ 18 Thompson did not admit that he committed the elements of sexual assault. He denied that he had sex with the victim against her will. *See* § 18-3-402(1)(a), C.R.S. 2018. Therefore, he asserted a traverse, not an affirmative defense. *See Nelson*, ¶ 52 (explaining that consent is a traverse to motor vehicle theft despite statutory language characterizing consent as an affirmative defense).

¶ 19 Third, and relatedly, an affirmative defense instruction was not required notwithstanding the characterization of consent as an "affirmative defense" in section 18-1-505(4). *See Jacobson*, ¶ 22 ("[W]e decline to treat the statutory mandate as trumping the broader principle . . . that an affirmative defense instruction need not be given where the defense is only an element-negating traverse."). "Where proof of the elements of the charged offense necessarily requires disproof of the issue raised by the affirmative defense, a separate instruction on that defense need not be given."

Nelson, ¶ 52. The jury convicted Thompson of sexual assault, thereby finding that he had sex with the victim against her will. In other words, by finding him guilty of sexual assault, the jury necessarily rejected his consent defense. *See Platt v. People*, 201 P.3d 545, 549-50 (Colo. 2009).

¶ 20 For these reasons, we discern no error in the absence of an affirmative defense instruction.

2. Instruction Defining "Consent"

¶ 21 Alternatively, Thompson argues that the trial court reversibly erred by refusing to instruct the jury on the definition of the term "consent." We conclude that any error was harmless.

¶ 22 Initially, we reject the People's argument that this claim is unpreserved. The prosecution expressly asked the court to instruct the jury on the term "consent," and the court declined to do so. Because the question whether to instruct the jury on this definition was adequately presented to the court, we treat the issue as preserved. *See People v. Anderson*, 2020 COA 56, ¶ 11.

¶ 23 Although we deem the claim preserved, it is less clear whether the claimed error was constitutional in nature. As the trial court noted, the term "consent" did not appear in the elements of the

charged offense or any applicable affirmative defense. So the failure to define this term did not misdescribe or omit an element. *Cf. Griego*, 19 P.3d at 7 (applying the constitutional harmless error standard where the trial court failed to define an element of an offense). Even so, because it does not affect the outcome here, we assume without deciding that the constitutional harmless error standard applies.

¶ 24 Recall that the prosecution charged Thompson with sexual assault under section 18-3-402(1)(a), which stated at the time of his offense that a person commits sexual assault if they "cause[] submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will." § 18-3-402(1)(a), C.R.S. 2018. Section 18-3-408.5(1) provides that, upon request of any party, "the jury shall be instructed on the definition of consent as set forth in section 18-3-401(1.5)" in a prosecution for sexual assault as described in section 18-3-402(1)(a). Thus, under the plain language of section 18-3-408.5(1), we agree with the parties that the trial court erred by refusing to instruct the jury on the definition of "consent." But we conclude that the error was harmless beyond a reasonable doubt.

¶ 25 Thompson argued in closing that his sexual encounter with the victim was consensual, while the prosecutor argued that the victim did not consent. So the jury was well aware of this disputed issue. And, as discussed, by finding Thompson guilty of sexual assault, the jury necessarily found that the victim did not consent. Indeed, to convict Thompson of sexual assault, the jury had to find, among other things, that he "cause[d] submission of the victim . . . *against the victim's will.*" § 18-3-402(1)(a), C.R.S. 2018 (emphasis added). As noted, consent is defined as "cooperation in act or attitude pursuant to *an exercise of free will* and with knowledge of the nature of the act." § 18-3-401(1.5) (emphasis added). Because the jury found that Thompson committed all the elements of the offense and (as he acknowledges) proving the elements of the offense negates the victim's consent, we are confident that the absence of the definition of consent did not contribute to the verdict. *See Roberts*, ¶ 22.

¶ 26 Moreover, when determining whether the lack of a definitional instruction constitutes reversible error, we consider "whether the verdict . . . in this case is surely not attributable to any difference that may exist between the common understanding . . . and our

statutory definition." *Griego*, 19 P.3d at 9. The common and statutory meanings of "consent" are similar. *Compare* § 18-3-401(1.5) (defining consent as "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act"), *with* Webster's Third New International Dictionary 1392 (2002) (defining consent as "to give assent or approval"). Hence, we perceive no reversible error in the absence of an instruction defining "consent." *Griego*, 19 P.3d at 9-10 (concluding that it "strain[s] credulity" to attribute a jury's verdict to the trial court's choice not to define "knowingly" where "no meaningful difference" existed between the word's dictionary and statutory definitions).

¶ 27 For all these reasons, we reject Thompson's contention.

III. Exclusion of Evidence

¶ 28 Thompson contends that the trial court erred by refusing to admit evidence that (1) "other male DNA was recovered from the alleged victim's intimate swabs" and (2) the victim "had not had a consensual encounter within the last year." We disagree.

A. Pertinent Background

¶ 29 After the charged incident, a sexual assault nurse examiner (SANE) examined the victim. The SANE observed "bruising on her back, abdominal, kind of off to the side area, and her chest." The SANE also obtained intimate swabs from the victim's areola and vagina. Forensic analysis revealed that Thompson's DNA was not present on the victim's intimate swabs. DNA from Thompson's hands, however, was found on the victim. Other male DNA was found on her intimate swabs.

¶ 30 Before trial, the prosecution filed a motion in limine asking the trial court "to prohibit introduction of evidence relating to [the] victim's prior sexual conduct pursuant to" section 18-3-407, C.R.S. 2022 (the rape shield statute).[2] Specifically, the prosecution argued that the court should exclude (1) the victim's statement to the SANE that "my dude is in prison so I have been non sexually acted [sic] since then, for a year or something" and (2) evidence that DNA

[2] On appeal, Thompson asserts that he "has not been able to locate" this motion in the record. We note, however, that the motion is in the sealed documents file and Thompson's counsel had access to this file. Indeed, Thompson filed a specific request asking for access to the sealed documents (which he acknowledged included a "motion in limine"), and this court granted his request.

profiles from the victim's "bilateral areola swabs as well as the vaginal swabs contained male DNA that was not the defendant."

¶ 31 At a pretrial hearing, the prosecutor addressed the motion but described the victim's statement during the SANE evaluation as indicating that "her last consensual encounter was approximately a year prior." The prosecutor argued that, under the rape shield statute, this was evidence of the victim's prior sexual conduct that should not be admitted into evidence. As to the "other male DNA present on the intimate swabs," the prosecutor argued that this evidence was inadmissible "under rape shield as prior sexual activity or quite frankly may not even rise to the level of sexual activity." The prosecutor continued, "We can't necessarily state how the DNA is even present on the victim. She's indicated that her last consensual encounter was over a year prior . . . ." The prosecutor clarified that, while evidence that DNA testing excluded Thompson as a contributor on the victim's intimate swabs was admissible, the prosecutor wanted the court to prohibit evidence of the "presence of other male contributors and so forth."

¶ 32 After the court explained the rape shield statute to Thompson (including its exceptions), he said he wanted the evidence admitted

to show that the victim's statements to the SANE were "[n]ot consistent . . . with her testimony — her — her statements." He said he wanted to "attack her credibility" by presenting evidence that she had told the SANE that she had not had a sexual encounter for a year but there was an indication that she had.

¶ 33 The prosecutor responded, "I would first argue to the Court that it's not inconsistent. She indicated that her last consensual encounter was a year prior. The fact that she has other male DNA present on her person does not indicate a consensual encounter and does not necessarily make that first statement in — incorrect." She argued that evidence of other male DNA was not relevant because it does not indicate "whether or not this particular incident was consensual, and that's what rape shield is there to protect." Thompson reiterated that he wanted to elicit testimony showing that the victim "lied and says she didn't have sex."

¶ 34 As to the victim's statement to the SANE about her last sexual encounter, the court said,

> And I think we've heard that the reading of how that took place of talking about whether she was sexually active and she'd said essentially the person with whom she would be sexually active — I think she says her man is

-- was in custody, so it was at least a year -- for a year and that there was other male DNA found during the DNA swab issues I think goes into two -- three areas directly on point that all overlap, and that is C.R.S. 18-3-407 in terms of the statutory rape shield rules, also Colorado Rule of Evidence 403 and 608(b).

. . . .

Under Rule 608(b) specific instances of conduct for a witness for attacking or supporting their character for truthfulness may not be proved by extrinsic evidence. In other words, in any event, the testimony of the lab technicians or any of those things could not come in. That would be extrinsic evidence.

. . . .

An issue I need to look at is the probative value of that outweighed against the risk of unfair prejudicial under . . . 18-3-407. Ultimately there are certain situations where someone has done some false act that really implicates their character for truthfulness. It's probative of that. And where I think I currently lean and depending on how the victim testifies and what the circumstances -- and I may revisit, but my leaning at this point is that what I'm -- from what I'm hearing, the fact that during a SANE examination, she talked about her sexual activity in terms of when she'd used condoms and so forth, and when her last consensual -- consensual activity was I think is so far to the side in terms of probative of truthfulness. It's an impact on truthfulness, but it really raises all of the rape shield issues, all of the risk of

> unfair prejudice of trying to say — suggest that this person is less reliable because they've had sex with other -- other men during that time, that while they were having their person — they were in a committed relationship — was unavailable, they may have been cheating on them or something along those lines, those are all improper purposes for that in going into a victim's sexual history and background, her prior sexual partners carries enormous risk I think of the jury confusing the issues in terms of does that mean based on her character she's acting in conformity with that under 404. So given all the circumstances, I've got discretion in terms of how probative a single instance of untruthfulness is in terms of attacking a witness's character for untruthfulness given all the circumstances of being asked probing questions while in front of a SANE nurse and exercising that discretion, I'm going to sustain the People's objection. In other words, I find that the asking or eliciting information — Let me back up. Asking the victim herself about what she said a consensual encounter was the year before and I don't know if she would have knowledge. You'd have to ask about her directly about would there be some way other male DNA could have got either on her breasts or in her vaginal area, is so far afield from probative in terms of this, I'm going to find that that line of questioning — I'm going to preclude that line of questioning under Rule 403 as well as 404 and 18-3-407.

¶ 35 As to evidence that other male DNA was found on the victim's intimate swabs, the court said,

> Mr. Thompson, if the prosecution is -- if part of their evidence to get conviction from you is to say, well the SANE nurse saw that there was genital trauma, that changes my ruling, then we could talk about those DNA results at that point as well, so . . . — they — they can open a door to that. In other words, right now it's precluded and blocked, but if the prosecution opens the door by bringing that in, then I would change my position.

¶ 36 Later, during trial, Thompson said to the court, "I was going to ask you if I can give the jurors my — my results from my DNA? To the jurors, so they can look at it." The court noted that a witness already "testified as to what the results were." Thompson added, "And them bruises on [the victim], I want to challenge that, because I know they was old bruises on her." He asserted that another male was responsible for the bruises.

¶ 37 The prosecutor said, "I think this goes back to a pretrial order that the Court has already made. There is other male DNA present both on the areola swabs as well as the vaginal swab, which the Court has already ruled that that was excluded under rape shield." The prosecutor continued, "We were very careful not to talk about her genital injuries or anything of that nature that would have opened the door to those — to those comments." Thompson said,

"I'm saying whoever was male on her vagina, he had to do it or the dude from Mexico . . . I didn't do that." The prosecutor explained, "[T]here was other male DNA found on both the areola swabs and the vaginal swabs. I believe it was the bilateral areola swabs that ultimately resulted in a CODIS hit from an individual who was . . . his CODIS hit originated from a New Mexico contact." The prosecutor asserted that "the other DNA profiles from the vaginal swab indicated to be just simply unknown."

¶ 38 The court ruled as follows:

> Ultimately we're getting to an area of rampant speculation.
>
> . . . .
>
> The only reason — the only evidence that there was a bite on the victim's nipple is her claim that, Mr. Thompson, you bit her. If that's not true, then there's no physical evidence to say we need to explain where that bite came from. If her description of I was bitten isn't true, it's absolutely irrelevant to whether there's someone else that in theory, depending when and how that DNA sample could have come to bear in terms of location, if it's not the bite from you, then it's some — there's no, necessarily, other bite in that regard. It's a confusion of the issues, it's irrelevant, it's a rape shield issue.

> I'm going to agree at this point that somehow trying to bring up the fact that maybe somebody else in theory could have bitten her or that in theory something other than being on rocks on her back could have caused bruises at that point. It's — it's confusing the issues, it's basically irrelevant under the circumstances, it raises rape shield issues, and I'd sustain the objection to try to get him to say that maybe if she'd at some point had sex with another male at some point in the past, that maybe he might have beat her up or maybe he might have bit her.
>
> There's nothing tied to that suggestion other than absolute speculation, which can't be the basis or grounds for reasonable doubt in any event, and so I'm going to sustain the People's objection to opening the door for that issue.

B. Applicable Law

¶ 39 We review a trial court's evidentiary rulings, including a court's determination whether evidence falls within an exception to the rape shield statute, for an abuse of discretion. *People v. Sims*, 2019 COA 66, ¶ 44.

¶ 40 Section 18-3-407(1) "deems the prior or subsequent sexual conduct of any alleged victim to be presumptively irrelevant to the criminal trial." *People v. Lancaster*, 2015 COA 93, ¶ 36 (citation omitted). One exception to this presumption applies to "[e]vidence of specific instances of sexual activity showing the source or origin

of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant." § 18-3-407(1)(b).

¶ 41 But even evidence not excluded by the statute remains subject to the usual rules of evidence and is not automatically admissible. *People v. Garcia*, 179 P.3d 250, 254 (Colo. App. 2007). For instance, a trial court must apply CRE 403 and balance the probative value of the proffered evidence against any possible unfair prejudice. *People v. Morse*, 2023 COA 27, ¶ 44.

C. Analysis

¶ 42 On appeal, Thompson argues that evidence that another man's DNA was found on the victim's intimate swabs — together with evidence of the victim's statement to the SANE about her sexual history — was admissible under section 18-3-407(1)(b) to show that another man was responsible for the bruising found on the victim's body. According to Thompson, the prosecution pointed to these injuries to prove elements of the charge, i.e., that Thompson caused "submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the

victim's will." § 18-3-402(1)(a), C.R.S. 2018. The parties disagree about whether Thompson preserved this claim, but we need not resolve this debate because we do not see error regardless.

¶ 43 Thompson does not dispute that this evidence was presumptively irrelevant under the rape shield statute. We agree that it was presumptively irrelevant and further conclude that it did not come within the exception set forth in section 18-3-407(1)(b).

¶ 44 Initially, we note that the parties on appeal mischaracterize the victim's statement to the SANE as describing only her last "consensual" encounter. According to the prosecution's pretrial motion, however, the victim did not say that her last *consensual* sexual encounter was a year earlier — which would seem an unusual qualification because it might imply that she suffered a *nonconsensual* sexual encounter in the intervening year. Rather, her actual statement was broader and less exceptional. As mentioned, she said: "[M]y dude is in prison so I have been non sexually [active] since then, for a year or something." So her actual statement does not reasonably support the inference urged by Thompson on appeal — that she possibly had a *nonconsensual*

sexual encounter during that time or "had been assaulted previously," which could explain the bruises found on her body.

¶ 45 The DNA evidence showed, at most, that the victim had sexual intercourse during the year at issue. But this evidence did not reasonably support an inference that such a sexual encounter was responsible for the victim's bruising. In other words, evidence that the victim had sex with another man hardly supports the notion that the sexual encounter was nonconsensual and resulted in injuries. The DNA evidence, therefore, did not have the probative value Thompson attributes to it.

¶ 46 Moreover, Thompson admitted that he had sexual intercourse with the victim during the charged incident. So evidence showing simply that she had sex with another man in the preceding year did not make it less likely that Thompson had done so. Consequently, the evidence at issue did not tend to show that "the act or acts charged . . . were not committed by the defendant." § 18-3-407(1)(b).

¶ 47 Weighing against the nonexistent or minimal probative value of this evidence was the danger of unfair prejudice. As mentioned, evidence of a victim's prior sexual conduct presents a high risk of

confusing the issues and being unduly prejudicial. *People v. Osorio-Bahena*, 2013 COA 55, ¶ 42 n.6 ("We agree that evidence offered to show that a sex assault victim is 'highly sexualized' and 'obsessed with sex' would be unduly prejudicial."). So the trial court reasonably concluded that the evidence was inadmissible under CRE 403. *See Marks*, ¶ 42 (holding that unreliable DNA evidence should be excluded under CRE 403 where the danger of unfair prejudice is high).

¶ 48 Given all this, we do not disturb the court's ruling.

IV. Limitation on Cross-Examination

¶ 49 Finally, Thompson argues that the "trial court's refusal to allow [the victim] to be questioned before the jury regarding her false reporting police contacts violated [his] Sixth Amendment constitutional right to cross-examine witnesses." We discern no constitutional violation.

A. Pertinent Background

¶ 50 After the victim testified, the prosecutor informed the court that Thompson "wants to discuss what he believes to be prior false reporting convictions that [the victim] has." The prosecutor said, "[I]n my review of her most recent NCIC/CCIC, there are some very

old entries indicating that there are entries for making a false report; however, there is no indication that those ever resulted in convictions for those particular charges."

¶ 51 The court said, "[M]y understanding is there were older arrests, but no convictions. What was the time of the arrests?" The prosecutor responded, "There was one from 1992, one from 1994, one from 2000, and one from 2006." The prosecutor confirmed that these contacts were arrests. The prosecutor also indicated that Thompson wanted to cross-examine the victim about another sex assault case she was involved in from 2014, but the prosecutor said, "I do not have any further information about that case." Thompson replied, "[S]he has a lot of false reporting. You know, it's like perjury she's doing. You know, just like on the stand today."

¶ 52 The prosecutor reiterated that "[t]he dispositions of those cases are unknown, Your Honor. So I don't know whether or not [the victim was] found guilty. There's no good-faith basis to believe that she was convicted of the false reporting charges from what I can see on this NCIC record." The prosecutor continued, "And I can tell the Court when I previously looked at them, some of them indicate that convictions were obtained in these cases, but they

don't say for what. . . . [I]t's very unclear, mostly because of county court's record keeping."

¶ 53 The court ruled that the evidence was inadmissible under CRE 608(b), CRE 403, and the rape shield statute. The court said, however, that it would consider recalling the victim to ask her questions about the prior cases outside the jury's presence.

¶ 54 The next day, the court recalled the victim, explaining, "Your arrest record showed that . . . four times that you were contacted by police about false information." The victim said, "Yes. I have a bunch of them." She said that the cases were "for drinking in public" and she "got time served for all of them." The court responded, "[W]hat was it that they said was the false information? You got contacted for drinking in public. Do you remember what the false information was?" The victim replied, "False information. I'm trying to think. I don't even know what the answer is again. I'm sorry. I'm going through some medical stuff, so it's hard for me to think. I'm trying to think. False information? Wouldn't that be the drinking one?" She continued, "It's the drinking one. 'Cause I never lied about anything else. Just drinking." She confirmed she

did not "remember a charge of false information, like lying to the police officers or something like that."

¶ 55 After hearing additional arguments from the parties, the court made the following ruling:

> What I'll find first is I do want to go to the Rule 608 issue. The case law is clear, the rule is clear that in terms of misdemeanor even convictions or offenses or actions, it's not the same as a conviction for a felony. What's relevant — and I think we talked about the cases, and the People have cited to it that have the same discussion — is what's relevant is not the fact of an arrest or a conviction; it's a specific instance of untruthfulness which is governed by Rule 608. The Court has discretion in deciding if that should be able to come in under 608(b). . . . In the discretion of the Court, if the specific instance of untruthfulness is probative of truthfulness or untruthfulness, it can be inquired into on cross-examination. But extrinsic evidence cannot be introduced.
>
> And so in other words, in this case parties could ask a witness — or in this case, in theory Mr. Thompson could ask [the victim] what had happened. What was the false information? What were the circumstances of that? It's very clear from her earlier testimony outside the presence of the jury that she doesn't remember any of these specific instances of untruthfulness. She remembers a number of arrests for drinking in public but doesn't remember being charged with untruthfulness. And asking the questions

> would simply serve to suggest to the jury that there's a conviction for those or a charge or police conduct [sic]. But without going into the facts or details of them — in other words, it would suggest to the jury the inadmissible aspect of that without actually going into the admissible section.
>
> So I'm going to find that under 608(b) I would preclude recalling [the victim] to talk about and to explore whether or not there was some time she had been untruthful.

B. Analysis

¶ 56 Criminal defendants have a constitutional right to confront witnesses through effective cross-examination. *Merritt v. People*, 842 P.2d 162, 165-66 (Colo. 1992). But effective cross-examination does not mean unlimited cross-examination. Defendants are entitled only to cross-examine witnesses using admissible evidence. *People v. Dominguez-Castor*, 2020 COA 1, ¶ 68. A "trial court has wide latitude, insofar as the Confrontation Clause is concerned, to place reasonable limits on cross-examination based on concerns about, for example, harassment, prejudice, [and] confusion of the issues." *Merritt*, 842 P.2d at 166. Therefore, not "every restriction on a defendant's attempts to challenge the credibility of evidence against him" is a constitutional violation; rather, such a violation

occurs "only where the defendant was denied virtually his only means of effectively testing significant prosecution evidence." *Krutsinger v. People*, 219 P.3d 1054, 1062 (Colo. 2009).

¶ 57 We review a trial court's evidentiary rulings for an abuse of discretion and review a possible constitutional violation de novo. *People v. Elmarr*, 2015 CO 53, ¶ 20; *Dominguez-Castor*, ¶ 67.

¶ 58 Providing false information to a police officer is probative of a witness's untruthfulness. *People v. Segovia*, 196 P.3d 1126, 1131 (Colo. 2008). Evidence of a misdemeanor conviction, however, is generally inadmissible for impeachment purposes. *People v. Garcia*, 17 P.3d 820, 828-29 (Colo. App. 2000). Likewise, "[u]nproven accusations, by themselves, do not raise an inference of improper actions." *People v. Pratt*, 759 P.2d 676, 682 (Colo. 1988). For example, arrests and pending criminal charges are "an improper subject for impeachment." *Id.* Exclusion of an arrest is "generally required because 'the probative value of such evidence is so overwhelmingly outweighed by its inevitable tendency to inflame or prejudice the jury.'" *Id.* (citation omitted).

¶ 59 Applying these principles, we conclude that the trial court did not err by prohibiting Thompson from asking the victim about her

arrests for false reporting. As the court explained, the victim, if asked, would not have revealed any such specific instances of false reporting because she did not recall any such instances. Cross-examination about this topic, therefore, risked confusing the jury and creating a sideshow about her alleged criminal past. *See People v. Lane*, 2014 COA 48, ¶ 32 (finding no abuse of discretion in excluding witness testimony due to risk of "mini-trials"); *People v. Clark*, 2015 COA 44, ¶ 47 ("[A] trial court should 'exclude evidence that has little bearing on credibility, places undue emphasis on collateral matters, or has potential to confuse the jury.'") (citation omitted). Furthermore, the court's ruling precluding Thompson from asking about the victim's prior arrests for false reporting did not prejudice Thompson because, even if he had been permitted to do so, no such evidence would have been admitted. The victim would have testified that she did not remember such arrests, and extrinsic evidence of them was inadmissible. *See* CRE 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness other than conviction of crime as provided in § 13-90-101, may not be proved by extrinsic evidence.").

¶ 60 Therefore, the trial court neither abused its discretion nor violated Thompson's constitutional rights. *See Elmarr*, ¶ 27 ("[T]he right to present a defense is generally subject to, and constrained by, familiar and well-established limits on the admissibility of evidence."); *Dominguez-Castor*, ¶¶ 68, 70 (explaining that a defendant is entitled to introduce only admissible evidence and concluding that no constitutional error occurred because the trial court's ruling did not effectively bar the defendant from meaningfully testing evidence central to establishing his guilt).

V. Conclusion

¶ 61 The judgment is affirmed.

JUDGE YUN and JUDGE BERNARD concur.

Court of Appeals

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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

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.