

APPENDICES

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Appendix A

Court of Appeals No. 15CA0050
El Paso County District Court No. 13CR123
Honorable Robert L. Lowrey, Judge

DATE FILED: March 23, 2017
CASE NUMBER: 2015CA50

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Randall Eric Leverton,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by JUDGE BERGER
Dailey and J. Jones, JJ., concur

Announced March 23, 2017

Cynthia H. Coffman, Attorney General, Lisa K. Michaels, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Katayoun A. Donnelly, Alternative Defense Counsel, Denver, Colorado, for Defendant-Appellant

¶ 1 A jury convicted defendant, Randall Eric Leverton, of theft by receiving and possession of drug paraphernalia. He appeals, contending the trial court erred by (1) joining the two offenses in a single trial and not allowing him to plead guilty to the paraphernalia charge before joining them and (2) admitting into evidence two witnesses' prior inconsistent statements. He also contends that the evidence is insufficient to support his convictions. We address and reject these contentions and affirm.

I. Relevant Facts and Procedural History

¶ 2 On a cold evening, the victim started her car and left it running while she collected some belongings from inside her home. She returned to where the car had been parked a few minutes later and saw that the car was gone. She immediately reported the theft to the police.

¶ 3 A few days later, a police officer pulled over the stolen car. Leverton was seated in the front passenger side of the car, another man was driving, and two women were in the back seat. When asked who owned the car, Leverton told the officer that it belonged to his girlfriend, the victim. The victim later testified at trial that she did not know and had never met Leverton.

¶ 4 The officer searched the vehicle and discovered several small baggies which he suspected contained cocaine and methamphetamine. All four passengers were patted down, arrested, and transported to the police station.¹

¶ 5 Leverton and the other man were transported in the same police vehicle. One of the transporting officers testified at trial that while the other man apparently slept during the drive to the police station, Leverton, who was handcuffed, “started moving around in the seat, kind of bending over and just acting not normal.” After removing Leverton from the vehicle, the officer searched the back seat and discovered a type of pipe commonly used to smoke methamphetamine.

¶ 6 Based on the discovery of the pipe, Leverton was charged with possession of drug paraphernalia, a petty offense under section 18-18-428(2), C.R.S. 2016. Approximately two weeks later, in a separate case filed in the same judicial district, Leverton was

¹ Leverton was not charged with any crimes associated with the officer’s discovery of these drugs.

charged with theft by receiving, a felony under section 18-4-410(1), (4), C.R.S. 2012.²

¶ 7 The day before trial on the felony theft charge, the prosecution moved to amend the complaint to join the paraphernalia charge and dismiss the petty offense case. Leverton’s counsel objected, stating that his client intended to “enter a straight guilty plea” to the paraphernalia charge, and then move to dismiss the felony case “for failure to join.” The court granted the prosecution’s motion, stating that the prosecution’s dismissal of the paraphernalia case and the amendment of the complaint in the felony case “in fact, does join [the petty offense case] into [the felony case]” and dismissed the petty offense case because “it doesn’t have a count anymore.” Leverton pleaded not guilty to both charges.

¶ 8 At trial, the two women in the back seat of the stolen car testified under subpoena. Both women testified that, due to drug use, they could not remember the events of that night, nor could they remember making any statements to the police. The prosecutor questioned both women based on oral statements they

² Section 18-4-410 has since been repealed, effective June 5, 2013, and consolidated with the general theft statute, section 18-4-401, C.R.S. 2016.

allegedly had made to the police following their arrests. For instance, the prosecutor asked one of the women, “Do you recall telling [the police] that Mr. Leverton had had the vehicle for several days and that someone had given it to him?”

¶ 9 Leverton’s counsel objected to these questions because he argued that they “essentially just end up being testimony via the question itself, particularly when the witness has testified she has no recollection.” The court ruled that the questions were proper impeachment questions. The witnesses’ oral statements later were admitted into evidence over Leverton’s objection through the testimony of the two police officers to whom the witnesses made their statements.

¶ 10 The jury convicted Leverton as charged and the trial court sentenced him to three years of probation and forty-eight hours of useful public service.

II. Joinder of the Theft and Paraphernalia Charges

¶ 11 Leverton argues that the trial court erred when it rejected his guilty plea on the paraphernalia charge and then permitted the prosecution to add that charge to the complaint. He claims that the trial court’s actions violated Colorado’s mandatory joinder statute,

section 18-1-408, C.R.S. 2016, as well as the Double Jeopardy Clauses of both the United States and Colorado Constitutions. We reject these arguments.

¶ 12 The Attorney General argues that because Leverton did not object to the procedure for joining the offenses, but only requested that the trial court accept his guilty plea prior to joining them, his claims should be reviewed only for plain error. We need not decide whether Leverton preserved these claims because we perceive no error, plain or otherwise. *Cf. Marshall v. People*, 2013 CO 51, ¶ 15 n.5 (declining to address whether the defendant preserved a Confrontation Clause challenge because there was no confrontation error).

¶ 13 The mandatory joinder statute “seeks to prevent vexatious prosecution and harassment of a defendant by a district attorney who initiates successive prosecutions for crimes which stem from the same criminal episode.” *People v. Talarico*, 192 Colo. 445, 446, 560 P.2d 90, 91 (1977); *see* § 18-1-408(2). The statute requires that all such offenses known to the prosecutor which were committed in the same judicial district must be prosecuted by separate counts in a single prosecution. § 18-1-408(2). Any offense

not joined “cannot thereafter be the basis of a subsequent prosecution[.]” § 18-1-408(2).

¶ 14 Whether a trial court properly joined multiple offenses under the mandatory joinder statute presents a mixed question of law and fact. *See People v. Marshall*, 2014 COA 42, ¶ 19 (applying the “mixed question of law and fact” standard of review to the question whether a trial court properly dismissed a criminal case under the mandatory joinder statute). The trial court’s interpretation of the joinder statute is a question of law we review de novo, *People v. Garcia*, 2016 COA 124, ¶ 6, but we defer to factual findings supported by the record, *People v. Marshall*, ¶ 19.

¶ 15 Leverton argues that the trial court erred in refusing to accept his guilty plea in the paraphernalia case and in granting the prosecution’s motion to amend the theft complaint because the result was that he was effectively charged in two separate cases with the same offense. He insists that “the only way the prosecution could go forward with charging [him] for both charges was to file a motion to *join* the two cases before the trial.” (Emphasis added.)

¶ 16 We conclude, as did the trial court, that while the prosecution's motion was styled as a motion to amend, it was effectively a motion to join the two offenses. In *Jeffrey v. Dist. Court*, 626 P.2d 631, 638-39 (Colo. 1981), the supreme court held that "section 18-1-408(2) does not prohibit the court from permitting the district attorney to add to a criminal information other counts that arise from the same criminal episode as the original count so long as the additional counts are filed prior to the jeopardy stage of the prosecution." That holding is dispositive here; the prosecution moved to join the offenses prior to Leverton's attempt to plead guilty to the paraphernalia charge. See *Jeffrey*, 626 P.2d at 636.

¶ 17 Moreover, irrespective of whether the procedure utilized by the court complied strictly with the mandatory joinder statute, it nevertheless met the statute's purpose of preventing successive prosecutions. Leverton points to no unfair prejudice resulting from the procedure used.

¶ 18 The court also did not abuse its discretion in rejecting Leverton's guilty plea. Trial courts have discretion to accept or to reject a guilty plea because "[t]here is no absolute right to have a

guilty plea accepted.” *People v. Jasper*, 17 P.3d 807, 812 (Colo. 2001) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

¶ 19 Had the court accepted Leverton’s guilty plea on the paraphernalia charge prior to joining the two offenses, the mandatory joinder statute may have prohibited prosecution of the felony theft charge. Indeed, Leverton expressly sought to plead guilty to the paraphernalia charge — a petty offense — for the purpose of preventing prosecution of the felony charge. While neither this court nor the supreme court has addressed such an attempt to manipulate the criminal justice system to escape additional charges, courts in other jurisdictions have squarely rejected it.

¶ 20 In *State v. Turner*, 980 P.2d 1188, 1190 (Utah Ct. App. 1998), the Utah Court of Appeals held that the trial court abused its discretion when it accepted the defendant’s guilty plea on a traffic violation because doing so effectively nullified the state’s right to prosecute the defendant on the more serious charge of negligent homicide.

¶ 21 The Wisconsin Supreme Court similarly held that the trial court did not err in rejecting a defendant’s guilty plea when the

defendant intended to “create a situation of double jeopardy” to protect himself from additional charges. *State v. Waldman*, 203 N.W.2d 691, 693 (Wis. 1973).

¶ 22 And in *Newsome v. State*, 797 N.E.2d 293, 298 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that “a trial court does not abuse its discretion in rejecting a guilty plea where the court reasonably could have concluded that the request was a ‘ruse’ intended to manipulate the system.”

¶ 23 Consistent with these cases, and in view of society’s interest in maintaining the integrity of the criminal justice system, *People v. Wiedemer*, 852 P.2d 424, 440 (Colo. 1993), we conclude that the court acted within its discretion when it rejected Leverton’s guilty plea to the petty offense.

¶ 24 Finally, we reject Leverton’s argument that his constitutional right to be free from double jeopardy was somehow violated when the theft and paraphernalia charges were joined. The Double Jeopardy Clauses comprise “three separate but related prohibitions: (1) a rule which bars a reprosecution for the same offense after acquittal; (2) a rule barring reprosecution for the same offense after conviction, and; (3) a rule barring multiple punishment[s] for the

same offense.” *People v. Henderson*, 810 P.2d 1058, 1060 (Colo. 1991) (citation omitted). Leverton does not allege that he was reprosecuted for either the paraphernalia or theft offense after he was convicted, or that he was sentenced or otherwise punished multiple times for those offenses.

¶ 25 Moreover, double jeopardy protection does not attach until the jury has been impaneled and sworn (or, in a bench trial, when the first witness is sworn), or when the trial court accepts the defendant’s guilty plea. *Jeffrey*, 626 P.2d at 636. Because the court had not accepted Leverton’s guilty plea on the paraphernalia charge (which, as we have concluded above, was appropriate under these circumstances), double jeopardy had not attached, and there was no double jeopardy violation.

III. Admission of Prior Inconsistent Statements

¶ 26 Leverton next argues that the trial court erred in permitting the prosecution to examine two witnesses about their prior statements to the police. He asserts that the prosecutor’s questions exposed the jury to inadmissible evidence and violated his confrontation rights. These arguments ignore well-established case law and we reject them.

A. Admissibility Under CRE 613 and
Section 16-10-201, C.R.S. 2016

¶ 27 Generally, we review a trial court’s evidentiary rulings for an abuse of discretion. *People v. Tyme*, 2013 COA 59, ¶ 8. But when a defendant asserts that the trial court’s evidentiary rulings violated his confrontation rights, we review de novo. *People v. Brown*, 2014 COA 155M-2, ¶ 18.

¶ 28 CRE 613(a) authorizes impeachment by prior inconsistent statement “[w]here the witness denies or does not remember making the prior statement[.]” To do so, “the examiner must call the attention of the witness to the particular time and occasion when, the place where, and the person to whom he made the statement” and may give “[t]he exact language of the prior statement.” CRE 613(a).

¶ 29 Similarly, section 16-10-201(1), C.R.S. 2016, provides as follows:

Where a witness in a criminal trial has made a previous statement inconsistent with his testimony at the trial, the previous inconsistent statement may be shown by any otherwise competent evidence and is admissible not only for the purpose of impeaching the testimony of the witness, but also for establishing a fact to which his

testimony and the inconsistent statement relate, if . . . [t]he witness, while testifying, was given an opportunity to explain or deny the statement or the witness is still available to give further testimony in the trial; and . . . [t]he previous inconsistent statement purports to relate to a matter within the witness's own knowledge.

Under the statute, a witness's inability to remember a statement "is tantamount to a denial that [s]he made the statement." *People v. Baca*, 633 P.2d 528, 529 (Colo. App. 1981) (citing *People v. Pepper*, 193 Colo. 505, 568 P.2d 446 (1977)). The same result obtains under the express language of CRE 613.

¶ 30 Both women testified that they did not remember what happened the night the stolen car was pulled over, nor did they remember any statements they made to the police. To impeach the witnesses, the prosecutor was entitled to confront them with the exact language of their prior statements. CRE 613. Indeed, under section 16-10-201(1)(a), the prosecutor was *required* to give the witnesses "an opportunity to explain or deny the statement[s]" prior to introducing evidence of those statements for purposes of impeachment or to prove a matter related to the statement.

¶ 31 Leverton argues that because the witnesses testified that they did not recall making any statements to the police, they effectively did not testify, and therefore their prior statements were not admissible as inconsistent with their testimony. But this argument was squarely rejected in *Baca*. In that case, the witness testified that he did not remember the testimony he gave in a prior trial, nor did he remember the facts underlying his statements at the prior trial. *Baca*, 633 P.2d at 529. This court held the witness's testimony that he could not remember was inconsistent with his prior testimony, and therefore his prior testimony was admissible under section 16-10-201.

¶ 32 We believe that *Baca* was correctly decided and we apply it here. Because both witnesses' testimony amounted to a denial that they made the statements to the police, the prosecution was entitled to impeach the witnesses with the statements, and the court properly admitted those statements. *See also People v. Thomas*, 2014 COA 64, ¶ 20 (applying *Baca*).

B. Confrontation Clause

¶ 33 We also reject Leverton’s related argument that admission of the witnesses’ prior statements violated his right of confrontation under the Sixth Amendment.

¶ 34 Out-of-court, testimonial statements by a declarant who is unavailable to testify at trial are barred by the Confrontation Clause unless the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 50 (2004).³

¶ 35 Leverton argues that when a witness claims to have no memory of either the prior statements or the events that produced those statements (or perhaps both), she is not “available” for cross-examination within the meaning of the Confrontation Clause and thus her prior statements are inadmissible. While Leverton acknowledges that United States Supreme Court decisions have rejected this argument, he nevertheless argues that these cases

³ Leverton does not make a separate argument that the state constitutional confrontation guarantee in article II, section 16 of the Colorado Constitution provides greater protection than the Federal Confrontation Clause, nor did he raise that argument in the trial court. Consequently, we do not further address the Colorado Constitution. *People v. Ujaama*, 2012 COA 36, ¶ 10 n.3.

have been silently overruled by *Crawford*. Our reading of *Crawford* does not support this argument.

¶ 36 The Supreme Court addressed the effect of a witness’s memory loss on a defendant’s right of confrontation in three pre-*Crawford* decisions: *California v. Green*, 399 U.S. 149 (1970); *Delaware v. Fensterer*, 474 U.S. 15 (1985); and *United States v. Owens*, 484 U.S. 554 (1988). Each of these cases rejected the argument that the testifying witness was unavailable for confrontation purposes because he or she suffered from some memory loss.

¶ 37 In *Green*, the witness had stated, in both a police interview and at a preliminary hearing, that the defendant was his marijuana supplier. 399 U.S. at 151. But at trial, the witness testified that he could not remember how he had obtained the marijuana because he was under the influence of drugs the day it was delivered. *Id.* at 151-52. Rejecting his Confrontation Clause challenge, the Court concluded that “where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem.” *Id.* at 162.

¶ 38 In *Fensterer*, an expert witness presented his opinion at trial, but could not recollect the basis of that opinion. The Court held that because “[t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion,” there was no Confrontation Clause violation. 474 U.S. at 21-22.

¶ 39 Finally, in *Owens*, the victim had been beaten with a metal pipe, resulting in severe memory impairment. 484 U.S. at 556. Despite these injuries, the victim identified the defendant as his attacker. *Id.* At trial, however, the victim testified that while he remembered telling the police who had attacked him, he had no memory that the defendant was his attacker. *Id.* The defendant argued that the victim’s loss of memory on this critical matter rendered ineffective any cross-examination of the victim and that as a result, he could not confront the witness in violation of his Sixth Amendment confrontation right. *Id.* at 556-57. The Court rejected this argument, holding that the defendant’s confrontation rights were not violated because “[t]he Confrontation Clause guarantees only ‘an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever

extent, the defense might wish.” *Id.* at 559 (citation omitted).

Because “the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness’ demeanor” were satisfied, there was no Confrontation Clause violation. *Id.* at 560.

¶ 40 Leverton does not contend that *Crawford* expressly overruled *Owens* and nothing in *Crawford* would support such a contention. Instead, Leverton claims that several words buried in one of *Crawford*’s footnotes silently overruled *Owens*.

¶ 41 Footnote nine of *Crawford* states as follows: “[t]he [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it.*” 541 U.S. at 59 n.9 (emphasis added). From these italicized words, Leverton argues that if a witness claims some memory loss, she cannot “defend or explain” her prior statements and thus is unavailable for confrontation purposes.

¶ 42 Virtually every court that has addressed this argument has rejected it and has squarely held that the physical presence of the witness at trial avoids any confrontation issue. *See, e.g., State v. Real*, 150 P.3d 805, 807 (Ariz. Ct. App. 2007); *State v. Pierre*, 890 A.2d 474, 502 (Conn. 2006); *People v. Bryant*, 909 N.E.2d 391, 399

(Ill. App. Ct. 2009); *Smith v. State*, 25 So. 3d 264, 270 (Miss. 2009); *State v. Legere*, 958 A.2d 969, 977 (N.H. 2008); *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011); *Abney v. Commonwealth*, 657 S.E.2d 796, 802 (Va. Ct. App. 2008); *State v. Price*, 146 P.3d 1183, 1191 (Wash. 2006).

¶ 43 Two courts have taken a more nuanced view. In *Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009), relying on footnote nine’s language, the Seventh Circuit held that *Crawford*’s statement that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on this use of his prior testimonial statements” is not dispositive of whether a witness suffering from total memory loss is “available” for confrontation purposes. The court entertained the possibility that total, extreme memory loss could render a witness unavailable for Confrontation Clause purposes. Still, noting that the witness remembered at least some of the underlying events described in her out-of-court statements, the court concluded that the defendant had had “ample opportunity to confront his accuser at trial,” and thus his confrontation rights were not violated. *Id.* at 652.

¶ 44 The Mississippi Supreme Court relied on *Cookson* in construing the Mississippi Constitution’s confrontation clause in *Goforth v. State*, 70 So. 3d 174 (Miss. 2011). After the witness made his statement to the police, but before the trial, he was injured in an automobile accident that “substantially impaired his physical and mental conditions,” and he testified that he “could not remember anything that had occurred two years prior to the wreck.” *Id.* at 182. The court, observing that the witness’s “total loss of memory” was undisputed, held that the witness, “though physically present at trial, did not have the requisite, minimal ability or capacity” under the Mississippi Constitution to be cross-examined. *Id.* at 186.⁴

¶ 45 This case does not require us to determine whether total memory loss coupled with extreme physical disabilities could ever

⁴ Although *Goforth v. State*, 70 So. 3d 174 (Miss. 2011), analyzed both *Crawford v. Washington*, 541 U.S. 36 (2004), and *United States v. Owens*, 484 U.S. 554 (1988), its holding was predicated on the Mississippi Constitution’s confrontation clause, not the federal clause. As a result, it provides little, if any, support for the federal constitutional argument made by Leverton.

render a witness unavailable under the Confrontation Clause and we express no opinion on that question.⁵

¶ 46 Though both witnesses claimed at trial that they had no memory of the night in question or of any of the statements they made to the police, their actual trial testimony belied those claims. Both witnesses testified that they remembered their car being pulled over, that they remembered being arrested, and both were able to identify who was in the car at the time. Thus, like in *Cookson*, the witnesses were able to recall at least some of the events underlying their statements to the police, and, unlike in *Goforth*, neither witness suffered from “total loss of memory.”

¶ 47 Though Leverton claims that he could not effectively cross-examine the witnesses, in fact he did so, emphasizing the witnesses’ alleged drug-induced memory loss in an effort to discredit their testimony. As the Court observed in *Owens*, 484 U.S. at 559, attacking a witness’s memory is often one of the prime objectives of cross-examination. Leverton was able to do so in this case and that dooms his Confrontation Clause argument.

⁵ We note that the Supreme Court recognized such a possibility both in *California v. Green*, 399 U.S. 149, 168-69 (1970), and *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

¶ 48 We also observe that a rule that a witness is unavailable for Confrontation Clause purposes based entirely upon the witness's testimony that she suffers from memory loss is unworkable. Memory loss may be real or feigned. It may be total or partial. Sometimes lost memory may be refreshed in whole or in part. To permit a witness to unilaterally control the admission into evidence of the witness's prior relevant statements merely by professing a lack of memory is intolerable to the criminal justice system.

¶ 49 For similar reasons, we reject Leverton's analogy of a witness's exercise of his Fifth Amendment right not to incriminate himself or herself to a witness's professed lack of memory.

¶ 50 These situations are not analogous. In the Fifth Amendment context, the witness has a constitutional right not to testify; so long as that Fifth Amendment right has not been waived, the right is absolute. A court cannot overrule the exercise of the right on the basis that the testimony is essential, and no inquiry into the reasons for the exercise of the right is permissible (other than whether testimony on the subject might tend to incriminate the witness). *People v. Razatos*, 699 P.2d 970, 976 (Colo. 1985). Thus, a witness who exercises her Fifth Amendment right not to testify is

unavailable for Confrontation Clause purposes. *United States v. Smalls*, 605 F.3d 765, 776 (10th Cir. 2010). In contrast, the availability inquiry in the memory loss context depends on a multitude of factors beyond simply an assertion of constitutional rights.

¶ 51 For all of these reasons, we hold that Leverton’s right to confrontation was not violated.

IV. Sufficiency of the Evidence

¶ 52 Leverton argues that the prosecution did not present sufficient evidence to prove beyond a reasonable doubt that he committed theft or possessed drug paraphernalia. We disagree.

¶ 53 “The due process clauses of the United States and Colorado Constitutions prohibit the criminal conviction of any person except on proof of guilt beyond a reasonable doubt.” *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988), *abrogated on other grounds by Erickson v. People*, 951 P.2d 919 (Colo. 1998). A reviewing court faced with a sufficiency challenge must determine whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable person that the defendant

is guilty of the charge beyond a reasonable doubt. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005); *People v. Gonzales*, 666 P.2d 123, 127 (Colo. 1983).

¶ 54 In determining whether the evidence is sufficient to sustain a conviction, “[t]he prosecution is entitled to the benefit of every reasonable inference that may fairly be drawn from the evidence, even if the record also contains evidence to the contrary.” *People v. Thornton*, 251 P.3d 1147, 1149 (Colo. App. 2010).

¶ 55 The determination of the credibility of witnesses is solely within the province of the jury, as is the specific weight to be accorded to that testimony. *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999); *see also People v. Duncan*, 109 P.3d 1044, 1045-46 (Colo. App. 2004).

¶ 56 We review the record de novo to determine whether the evidence is sufficient to sustain a criminal conviction. *Dempsey*, 117 P.3d at 807.⁶

⁶ Relying on *People v. Lacallo*, 2014 COA 78, ¶¶ 4-23, the Attorney General argues that because Leverton did not raise the issue of sufficiency in the trial court, we should review only for plain error. We need not resolve that issue here because we conclude that sufficient evidence supported Leverton’s convictions. *People v. Sena*, 2016 COA 161, ¶ 8.

A. Theft

¶ 57 “[A] person commits theft by receiving when he receives, retains . . . or disposes of anything of value of another, knowing or believing that said thing of value has been stolen, and when he intends to deprive the lawful owner permanently of the use or benefit of the thing of value.” § 18-4-410(1), C.R.S. 2012.

¶ 58 A few days after the car had been reported stolen, the police found Leverton sitting in the car’s front passenger seat. Though Leverton told the police that the car had been given to him by the victim, his statement was directly refuted by the victim’s testimony that she had never met him. Evidence also was presented at trial that Leverton himself drove the vehicle to a gas station.

¶ 59 Based on all of this evidence, we conclude that the jury was entitled to infer that Leverton intended to permanently deprive the owner of the car of the rights of ownership. Thus, sufficient evidence supported the theft by receiving conviction.

B. Possession of Paraphernalia

¶ 60 “[A] person commits possession of drug paraphernalia if he or she possesses drug paraphernalia and knows or reasonably should know that the drug paraphernalia could be used under

circumstances in violation of the laws of this state.” § 18-18-428(1)(a).

¶ 61 The prosecution presented evidence that, prior to placing Leverton into the police vehicle, a police officer searched the vehicle’s back seat and found nothing. While Leverton was being transported to the police station, he was fidgeting. After removing Leverton from the vehicle, the officer discovered in the back seat where Leverton had been sitting a pipe of the sort commonly used to smoke methamphetamine. The pipe contained a white residue which the officer testified was consistent with methamphetamine.

¶ 62 Leverton argues that no jury rationally could have concluded that the pipe belonged to him because if he had had the pipe on his person, it would have been discovered when he was patted down before he was placed into the police vehicle. He also argues that the pipe could have belonged to the driver of the stolen car, who rode in the police vehicle with him. But the fact that the officer did not find the pipe during the pat-down search goes to the weight of the officer’s testimony, an inquiry that is irrelevant in determining sufficiency. *Sprouse*, 983 P.2d at 778. And while the pipe might

have belonged to the other man, it was the jury's role to decide to whom the pipe belonged.

¶ 63 Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence for the jury to convict Leverton of possession of drug paraphernalia.

V. Guilt by Association

¶ 64 Leverton also contends that “the trial court erred by allowing the prosecution to seek Mr. Leverton's convictions on the basis of guilt by association.” We have held that the prosecution presented sufficient evidence for the jury to conclude that every element of the charged crimes was proved beyond a reasonable doubt. Leverton's convictions were not based on his association with other persons; they were based on evidence that proved that Leverton, not some other person, committed the crimes.

¶ 65 To the extent that Leverton asserts a back-door Fourth Amendment argument — that the police officer's search of the police vehicle after Leverton exited the vehicle was unreasonable — we reject it for two reasons: (1) it was not sufficiently developed and we do not address skeletal arguments, *People v. Simpson*, 93 P.3d 551, 555 (Colo. App. 2003); and (2) it was not raised in the trial court

and thus was waived, *People v. Cordova*, 293 P.3d 114, 120 (Colo. App. 2011).

VI. Conclusion

¶ 66 The judgment of conviction is affirmed.

JUDGE DAILEY and JUDGE J. JONES concur.

Appendix B

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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203		DATE FILED: October 9, 2015 11:58 PM FILING ID: F87B7AB21C9F2 CASE NUMBER: 2015CA50
Appeal from the District Court, El Paso County Honorable Robert Lowrey, District Judge Case No. 13CR123		▲ COURT USE ONLY ▲
Defendant-Appellant: Randall Leverton v. Plaintiff-Appellee: The People of the State of Colorado		
Attorney for Appellant (<i>Appointed by the office of the Alternate Defense Counsel</i>): Katayoun A. Donnelly Azizpour Donnelly LLC 2373 Central Park Boulevard, Suite 100 Denver CO 80238 Phone Number: 720-675-8584 E-mail: katy@kdonnellylaw.com Atty. Reg. #: 38439		
Case No. 2015CA50		
DEFENDANT-APPELLANT'S OPENING BRIEF		

The prosecution's theft by receiving case was built on out-of-court testimonial statements of Ms. Harbaugh. Before the trial started, though, the prosecution knew that their main witness, Ms. Harbaugh, would not respond to any questions regarding the events at issue in this trial, as she had asked the prosecution to release her from her subpoena due to a drug-induced total lack of memory regarding any prior statements and the events related to this case. (*See id.*, p.15, ll.12-19.) Over Mr. Leverton's *ad nauseam* objections throughout the trial, the trial court allowed the prosecution to read Ms. Harbaugh out-of-court testimonial statements to the jury line by line, after she represented that she could not remember having made any statements at all. And again, over Mr. Leverton's objection, the prosecution re-read them to the jury while questioning officers Widner and Ryan Jacobsen.²

The other main witness in the case was the driver of the stolen vehicle, Mr. Carter. The trial court, over Mr. Leverton's objection, excused Mr. Carter from taking the stand because the prosecution refused to offer him immunity to respond to Mr. Leverton's questions. Outside the presence of the jury, Mr. Leverton tendered the specific questions he planned to ask Mr. Carter. (Rec. Tr. Vol. II [Sep. 17, 2014], p.23.) The questions were

² Ms. Engler, similarly, could not remember having made any statements to the police. Mr. Leverton raised the same objections as to reading her alleged testimony to the jury. (*See, e.g.,* Rec. Tr. Vol. I, pp.85-6.)

dismiss 2013CR123 for violation of the mandatory joinder rule. The court orders, therefore, violated Mr. Leverton's rights under the double jeopardy and due process clauses of the United States and Colorado Constitutions. This was a structural error.

Third, the trial court erred when it allowed the prosecution to call Ms. Harbaugh to the stand, over Mr. Leverton's objection, knowing that she would assert total loss of memory as to existence of any prior statements and their contents. Under these circumstances, Ms. Harbaugh's assertion of complete loss of memory regarding making any statements regarding Mr. Leverton's involvement did not constitute a *statement*, for the purposes of rules of evidence, to allow admission of any prior *inconsistent statements*. And more importantly, even if those prior statements could be admissible under the rules of evidence, Ms. Harbaugh was an unavailable witness under *Crawford v. Washington*. Her out-of-court testimonial statements were introduced to the jury without Mr. Leverton ever having had the opportunity for a meaningful cross-examination of those prior statements that implicated him.⁴ This error violated the rules of evidence and Mr. Leverton's rights under the confrontation clauses of the United States and Colorado

⁴ The same analysis applies to Ms. Engler's statements. Like Ms. Harbaugh, Ms. Engler asserted that she could not remember having made any statements that night. And Mr. Leverton objected to the improper admission of her prior statements. (See Rec. Vol. I., pp. 118-20.)

examination violated the defendant's right of confrontation.”), *cert. denied*, 546 U.S. 996, 126 S.Ct. 597, 163 L.Ed.2d 496 (2005).

Whether the admission of objected-to evidence under Rule[s] . . . [of] Evidence, was proper is a mixed question of law and fact; the factual determinations are reviewed for clear error and the legal issues are reviewed *de novo*. See *United States v. Bagley*, 537 F.2d 162, 166 (5th Cir. 1976).

Legal Analysis

In all state and federal criminal prosecutions, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, “to be confronted with the witnesses against him.” U.S. Const. amends. VI, XIV; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004).

The only statements against Mr. Leverton in the theft case came from the other passengers in the car (who had received favorable plea deals from the prosecution, (*see* Rec. Tr. Vol. I, pp. 82.)).⁷ Both Ms. Harbaugh and Ms. Widner stated at trial that they did not remember having made any statements in this case and that they could not remember any specifics about Mr. Leverton’s involvement. The statements read to the jury were out-of-

⁷ Mr. Leverton also requests that the court take judicial notice of Ms. Engler’s plea of deferred sentence in El Paso County case No. 2012CR4671.

court testimonial statements that Mr. Leverton never got the chance to cross-examine. Therefore, he was not able to confront the witnesses against him concerning either their statements or their loss of memory.

The prosecution at trial relied on Colorado Revised Statute section 16-10-201 as the basis for admission of these statements. Mr. Leverton objected to admission of Ms. Harbaugh and Ms. Engler's out-of-court testimonial statements on the basis that when the witness denies remembering having ever made the statement, there is no statement made and therefore prior inconsistent statements cannot be admitted. (*See, e.g.,* Rec. Tr. Vol. I. pp.62-64, 71-2, 75-6, 85-6.) Nevertheless, the court allowed the prosecution to read the prior statements, in their entirety, to the jury, multiple times, once when questioning the witnesses who did not remember making the statements and again and again by asking the officers. (*See* Rec. Tr. Vol. I. pp.62-64, 71-2, 75-6, 85-6, 118-19, 120, 122, 153, 155.) And it did this knowing that Mr. Leverton would not be able to cross-examine them on those statements since they denied remembering ever making them. Mr. Leverton, again, objected relying on *Crawford* that under the circumstances created by the court's rulings he was deprived of his right to meaningfully cross-examine prior statements that involved him. (*See, e.g.,* Rec. Tr. Vol. I. pp.85-6.)

As Mr. Leverton argued during trial, the statements in question here are not admissible under Section 16-10-201 because a witness is not “testifying” as to an issue, even if she is physically present, if she claims complete loss of memory regarding making a statement.⁸ And as such, she cannot be impeached by prior inconsistent statements, since no statement has been made to be impeached. “A claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements *when the witness does not deny that the previous statements were in fact made.*” *United States v. Brown*, 788 F.3d 830, 834 (8th Cir. 2015) (emphasis added) (quoting *United States v. Rogers*, 549 F.2d 490, 496 (8th Cir. 1976)).

Accordingly, the trial court erred when it allowed the prosecution to read and re-read those statements to the jury.

⁸ (1) Where a witness in a criminal trial has made a previous statement inconsistent with his testimony at the trial, the previous inconsistent statement may be shown by any otherwise competent evidence and is admissible not only for the purpose of impeaching the testimony of the witness, but also for the purpose of establishing a fact to which his testimony and the inconsistent statement relate, if:

- (a) The witness, while testifying, was given an opportunity to explain or deny the statement or the witness is still available to give further testimony in the trial; and
- (b) The previous inconsistent statement purports to relate to a matter within the witness’s own knowledge.

More importantly, even if the statements were admissible under the rules of evidence, they still violated Mr. Leverton's Sixth Amendment rights.

The Confrontation Clause of the Sixth Amendment is violated when cross-examination is limited to such a degree that "the trial court did not permit defense counsel to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the credibility of the witness." *Delaware v. Fensterer*, 474 U.S. 15, 19, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (quotation marks omitted). If the limits imposed violate the right of confrontation, we must "consider whether the record shows 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States v. Love*, 329 F.3d 981, 985 (8th Cir.2003) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

United States v. Bentley, 561 F.3d 803, 808 (8th Cir. 2009).

"The Supreme Court has refocused its analysis of confrontation clause violations, mandating not that evidence necessarily be reliable, but that its reliability be assessed in a particular manner—through cross-examination."

People v. Fry, 92 P.3d 970, 976 (Colo. 2004) (discussing *Crawford*).

Here, Mr. Leverton could not cross-examine Ms. Harbaugh and Ms. Engler regarding their prior statements about him because they asserted that they could not remember having made such statements and that they had a complete loss of memory regarding those statements. As a result, for the

purposes of meaningful cross-examination and the Sixth Amendment confrontation guarantee under *Crawford*, much like witnesses invoking their Fifth Amendment rights, they were unavailable witnesses, even though they appeared physically present.⁹ See e.g., *United States v. Thomas*, 62 F.3d 1332, 1337 (11th Cir. 1995) (“[b]ecause they invoked their Fifth Amendment privilege to remain silent, it is clear that the McCoys were unavailable”); *Fensterer*, 474 U.S. at 20, 106 S.Ct. 292; *California v. Green*, 399 U.S. 149, 168-69, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (supporting the proposition that forgetfulness on the part of a witness can render a cross-examination so ineffective as to make the witness unavailable in instances where the accused is unable to cross-examine a witness as to both the statement and the event itself); *Crawford v. Washington*, 541 U.S. 36, 54, 124 S. Ct. 1354, 1365-66, 158 L. Ed. 2d 177 (2004) (“As the English authorities above reveal, the common law in 1791 conditioned admissibility

⁹ It should be noted that the trial court did not allow Mr. Leverton to ask the very narrow questions designed to avoid any self-incriminatory response, even though Mr. Carter was charged with aggravated motor vehicle theft, because Mr. Carter told the court that he would refuse to answer questions regarding the events of that night. But at the same time, under almost identical circumstances, where everyone knew that both Ms. Harbaugh and Ms. Engler were refusing to respond to any questions regarding the events of that night and denied remembering ever having made any statements regarding those events, the court allowed the prosecution to read their prior testimonies into evidence.

of an absent witness's examination on unavailability and a prior opportunity to cross-examine.")

In sum, the confrontation clause was implicated here because the prosecution used out-of-court testimonial statements about which the declarant could not be cross-examined due to memory loss. And there was no other evidence of Mr. Leverton's guilt presented.

Accordingly, Mr. Leverton's conviction for theft should be reversed because there should be no doubt that there is a reasonable possibility that the error might have contributed to the conviction. The prosecution cannot carry its burden to show the trial court's error was harmless beyond a reasonable doubt.

IV. MR. LEVERTON'S CONVICTIONS WERE UNSUPPORTED BY PROOF OF SUFFICIENT EVIDENCE BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

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COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

El Paso County District Court
Honorable Robert Lowrey, Judge
Case No. 13CR123

THE PEOPLE OF THE STATE OF
COLORADO,

Plaintiff-Appellee,

v.

RANDALL LEVERTON,

Defendant-Appellant.

CYNTHIA H. COFFMAN, Attorney General
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CASE NUMBER: 2015CA50

▲ COURT USE ONLY ▲

Case No. 15CA50

PEOPLE'S ANSWER BRIEF

to jail, one of the officers observed the defendant moving around, bending down and “acting not normal.” (R. Tr. 9-16-14, p. 139). The officer then found a methamphetamine pipe hidden in the seat where the defendant was sitting. (Id. , p. 140, 141).

SUMMARY OF THE ARGUMENT

The trial court properly joined the two offenses into a single prosecution by granting the prosecution’s motion to amend the felony case and dismiss the misdemeanor case. This procedure properly served the purpose of the joinder rule—to join the related offenses to prevent a technical, arbitrary ban on prosecution of the felony offense.

The trial court also properly admitted the witnesses’s prior statements as prior inconsistent statements when they testified that they could not remember either the events they witnessed or their statements. The inability to remember a statement is tantamount to a denial of the statement.

Finally, the evidence was sufficient to establish that the defendant committed the offenses of theft by receiving and possession of

A. Preservation and Standard of Review

The People agree that the issue was preserved when the defendant objected at trial as set forth below in section B. The People also agree that evidentiary errors are reviewed for an abuse of discretion, *People v. Tyme*, 2013 COA 59, ¶ 8, and confrontation clause claims are reviewed de novo, *People v. Brown*, 2014 COA 155M, ¶ 18. Preserved evidentiary errors are harmless unless they “substantially influenced the verdict or affected the fairness of the trial proceedings.” *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012) (internal quotations omitted).

B. Additional Facts

Four occupants were in the vehicle when it was pulled over: the defendant, the driver, and two female passengers, J.H. and A.E. (R. Tr. 9-16-14, pp. 105, 114). J.H. testified that she did not remember any details about the night the vehicle was pulled over. (*Id.*, pp. 57-60). She also testified that she did not remember talking to police about what happened the night they were pulled over or a couple weeks later at the jail. (*Id.*, pp. 60-61).

As the prosecutor prepared to confront J.H. with her specific statements to police, the defendant objected, arguing that the prior statements were inadmissible because the witness did not remember making them. (R. Tr. 9-16-14, pp. 61-62). The defendant also objected to the prosecutor confronting the witness with the statements. (Id., p. 63). The trial court overruled the objection, stating that the prior statements were admissible and the prosecutor was required to confront the witness with the statements to lay the foundation for their admission. (Id., p. 63).

The prosecutor confronted J.H. with her statements to police, which J.H. testified she did not remember making. (R. Tr. 9-16-14, pp. 65-73, 75-78). The defendant objected on the same grounds, and the trial court overruled the objection. (Id., pp. 71-72). After the examination, the defendant objected to the impeachment procedure as violating his confrontation rights. (Id., pp. 85-86). The trial court again ruled that the impeachment procedure was proper under the governing law. (Id., pp. 85-87).

A.E. also testified that she did not remember any details about the night the vehicle was pulled over. (R. Tr. 9-16-14, pp. 91-94). She also testified that she did not remember talking to police about what happened that night or getting a call from the detective. (Id., pp. 94-96).

The prosecution presented J.H. and A.E.'s statements to police through the testimony of Officer Widner and Detective Jacobsen. (R. Tr. 9-16-14, pp. 120-22, 150-52; R. Tr. 9-17-14, pp. 5-9, 12).

C. Law and Analysis

Section 16-10-201, C.R.S. (2015) allows the admission of prior inconsistent statements for impeachment. CRE 613 permits the admission of prior inconsistent statements by extrinsic evidence “[w]here the witness denies or *does not remember* making the prior statement.” (emphasis added). “For the purpose of introducing the prior testimony of a witness, the witness’ inability to remember a statement is tantamount to a denial that he made the statement.” *People v. Baca*, 633 P.2d 528, 529 (Colo. App. 1981).

Here, the witnesses’s prior statements to police were admitted to impeach their inconsistent testimony at trial, and in accordance with

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **KATAYOUN A. DONNELLY**, via Integrated Colorado Courts E-filing System (ICCES) on July 29, 2016.

/s/ Tiffany Kallina

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203		DATE FILED: October 7, 2016 11:28 PM FILING ID: 919AB31785405 CASE NUMBER: 2015CA50
Appeal from the District Court, El Paso County Honorable Robert Lowrey, District Judge Case No. 13CR123		▲ COURT USE ONLY ▲
Defendant-Appellant: Randall Leverton v. Plaintiff-Appellee: The People of the State of Colorado		
Attorney for Appellant (<i>Appointed by the Office of the Alternate Defense Counsel</i>): Katayoun A. Donnelly Azizpour Donnelly LLC 2373 Central Park Boulevard, Suite 100 Denver CO 80238 Phone Number: 720-675-8584 E-mail: katy@kdonnellylaw.com Atty. Reg. #: 38439		
Case No. 2015CA50		
DEFENDANT-APPELLANT'S REPLY BRIEF		

the district court or to the jury that the two offenses were not a part of the same criminal episode and there was no proof beyond a reasonable doubt that they were.³ As such, this argument is waived and has no merit.

Finally, in this case, there was no dispute before the trial court that the prosecution knew⁴ about both offenses and had ample opportunity to (1) join the two cases in a single prosecution under Colorado Rule of Criminal Procedure 8(a) in the beginning, (2) add Case No. 2013CR123 to Case. No 2013M116 by amendment under Colorado Rule of Criminal Procedure 7(e),

³ Indeed, as discussed in the Opening Brief, the only evidence relating to the details of the underlying incident was presented by the prosecution, not any witnesses, in violation of the confrontation clause, since both witnesses asserted that they could not remember anything about the offenses.

Now, they both claim not to have memory. And, again, you can decide if someone has incredible detailed recall on January 8th in the jail, someone that says, “Hey, he had it several days” to Sergeant Widner but then tells Officer Jacobsen, “Oh, no, the only time I seen him with that vehicle was that night, the 22nd into the 23rd.”

(Tr. Sep. 17, 2014; closing argument, p. 66, ll. 7-11.)

⁴ “Deputy, chief deputy, and assistant district attorneys have all the powers of the district attorney. Sections 20-1-202, 20-1-204, & 20-1-207, C.R.S. (1986 Repl.Vol. 8B). Because deputy, chief deputy, and assistant district attorneys function only by virtue of the district attorney's authority, the official actions and knowledge of the deputy, chief deputy, and assistant district attorneys are imputable to the district attorney for purposes of the compulsory joinder requirement.” *People v. Robinson*, 774 P.2d 884, 886 (Colo. 1989).

at 1369 n. 9; and *California v. Green*, 399 U.S. 149, 151, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)).

In this case, the only witnesses who could testify against Mr. Leverton were Ms. Harbaugh and Ms. Wider. Characterizing them as “prior inconsistent statements,” the prosecution read their testimony to the jury multiple times. But Mr. Leverton was not able to cross-examine either of them because they both stated that they had no memory of ever having made any statements in this case and that they could not remember any specifics about Mr. Leverton’s involvement in the case. (*See*, e.g., R. Tr. [Sep. 16, 2014 (Vol. I)], p. 83, ll. 19-23; p. 94, ll. 12-3, 19-20; p. 95, ll. 10-21; *see also* Res. Br., at 7, 15, 16, 17, 18.) Mr. Leverton’s arguments on this issue and on applicability of Colorado Rules of Evidence and Colorado Revised Statute section 16-10-201 regarding the “prior inconsistent statements” are fully briefed in the Opening Brief. (*See* Op. Br., 17-29 [whether, based on these facts, for the purposes of Colorado Rules of Evidence and Colorado Revised Statute section 16-10-201, any “statements” were made].)

The main question before the Court is whether the holdings of the pre-*Crawford* cases the prosecution cites survive *Crawford*.

Respectfully submitted on October 7, 2016.

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DISTRICT COURT, EL PASO COUNTY,
STATE OF COLORADO
270 South Tejon Street
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THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

RANDALL ERIC LEVERTON,

Defendant.

COURT USE ONLY

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Case Nos. 13CR123
15CA50
Division 12

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REPORTER'S TRANSCRIPT - VOLUME I

The above-entitled matter came on for jury trial on
Tuesday, September 16, 2014, before the HONORABLE ROBERT LOWREY,
Judge of the District Court.

1 up here timely. I don't know if we can, because I don't know how
2 many trials are going and who's going to try to grab a part of the
3 panel first from downstairs, but presumably we can get up here
4 timely. We'll plan to go start to finish, even if it runs a bit
5 into the noon hour. If I see that that's not realistic, we will
6 break sometime probably between 12:00 and 12:30, but if it looks
7 like we can finish by 12:30 to 12:45, we'll just rush right on and
8 try to get it done.

9 All right. Aside from the issue we still have to resolve
10 about the in limine motion, any other questions or comments from
11 counsel?

12 MS. FLAHERTY: Your Honor, I just wanted to make a
13 record. I provided Mr. Cassens some additional information this
14 morning. One of our witnesses, Jennifer Harbaugh, who was a
15 passenger in the vehicle, contacted me about what time to appear at
16 court today. And I advised her how to find the courtroom and what
17 time to be here. She wanted to know if she could be released from
18 her subpoena because she doesn't remember anything. So I passed
19 that information on to Mr. Cassens.

20 In addition, another witness that we have listed, Victor
21 Carter, in rerunning the criminal histories this morning to make
22 sure there was nothing new, Mr. Carter, in fact, does have
23 something new. He has a 14CR case where he is charged with
24 aggravated motor vehicle theft. I printed the information off of
25 state judicial and I have provided it to Mr. Cassens, so that has

1 A. No.

2 Q. -- 2012?

3 But you know it wasn't you?

4 A. Well, I don't know how to drive, Your Honor -- sir.

5 Q. Do you remember whether it was the white guy or the black
6 guy?

7 A. I don't remember. I mean, I would have said it was the
8 black guy, but I don't want to say I remember because I don't.

9 Q. Now, earlier you testified you get mad when you go to
10 jail?

11 A. Yes.

12 Q. Why is that?

13 A. Because I lose my freedom.

14 Q. Does that getting mad make you do things?

15 A. Sometimes.

16 Q. Like, make stories up?

17 A. Sometimes.

18 Q. Seek revenge against people?

19 A. Yes. I mean, I don't remember if I did or not. I don't
20 even remember anything of that night. I don't remember if I made
21 up a story that night. I don't remember if a cop took my word
22 wrong and wrote it in the book differently. I don't remember
23 anything that I said.

24 Q. But, again, to be clear, one of the things -- you just
25 testified that one of the things you do when you get mad when you

1 MS. FLAHERTY: That's fine. I have Ashley Engler here.

2 I would want to take a break after her at the very least.

3 THE COURT: Is it going to be long?

4 MS. FLAHERTY: I don't believe so.

5 THE COURT: We will take a break beforehand, if you think
6 she's going to take a while.

7 (Whereupon the following proceedings were held in the
8 hearing of the courtroom:)

9 THE COURT: All right, Folks. We'll take an afternoon
10 recess at this time.

11 Let me remind you again not to discuss this case among
12 yourselves or with any third persons. If anyone tries to talk to
13 you, let me know. Do not read or listen to anything about this
14 case in any form of media. Do not undertake any investigation of
15 any kind on your own. Don't visit any premises you've heard about.
16 And do not form a final opinion until you are allowed to
17 deliberate.

18 We'll probably take a 15-minute recess. If you'll go
19 with my clerk, please.

20 (At 3:11 p.m. - jury excused from courtroom.)

21 THE COURT: Anything before we break?

22 MR. CASSENS: Your Honor, not to violate my own rule of
23 never continuing to argue after I've been told no, but I think I do
24 need to make some additional record. I have zero ability to
25 cross-examine.

1 Yes, Ms. Harbaugh was called and, yes, we'll have the
2 officer later; but, again, I can't cross-examine "I don't know." I
3 have no zero ability to do that. I have absolutely no ability to
4 cross-examine the officer and his veracity of repeating something
5 that was told him at a later date in time.

6 I just under -- under *Crawford* and all the confrontation
7 cases, I have -- again, I have no ability to cross-examine "I don't
8 know." There's no way to get at that.

9 THE COURT: Anything else, Ms. Flaherty?

10 MS. FLAHERTY: Your Honor, *Pepper* -- I acknowledge his
11 difficulty, but took the position that where a witness takes the
12 stand and is available for cross-examination, the witness's actual
13 or feigned memory loss regarding prior inconsistent statements does
14 not violate a defendant's confrontation right.

15 THE COURT: Well, I'm not sure the rule could be any
16 other way under these circumstances. In this Court's view, based
17 upon the statute and the rules of evidence, you have to be able to
18 lay the foundation. Ms. Flaherty is trying to do that specifically
19 with specific questions. I am not sure there's any better way to
20 do that.

21 The fact this witness, as she said, either doesn't
22 remember or feigns lack of memory certainly doesn't really aid
23 either side, unfortunately. I don't know what to make of this
24 witness, frankly. I don't know that I've seen someone who had
25 virtually zero memory of a period of time a year and a half ago.

1 A. In the police car.

2 Q. In the police car. Was there anyone else in the car with
3 you?

4 A. I don't remember.

5 Q. Do you remember if Jennifer was in the car with you?

6 A. Yeah, she was in the car with me.

7 Q. Okay. Do you remember if you and she had any
8 conversation on the way to Fountain?

9 A. No, I don't.

10 Q. Do you remember speaking with a Sergeant Widner down at
11 Fountain?

12 A. No.

13 Q. Do you remember him taking you aside, away from Jennifer,
14 to speak with you privately?

15 A. No, I don't.

16 Q. Do you remember him asking you how you came to be in that
17 vehicle that night?

18 A. No, I don't.

19 Q. Do you remember telling Sergeant Widner that Mr. Leverton
20 had picked you up in that vehicle that night?

21 A. I don't remember.

22 Q. Do you remember what your telephone number was back then?

23 A. No, I don't.

24 Q. If I told you 216.9450, was that ever your telephone
25 number?

Appendix C

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: October 2, 2017 CASE NUMBER: 2017SC311
Certiorari to the Court of Appeals, 2015CA50 District Court, El Paso County, 2013CR123	
Petitioner: Randall Eric Levertton, v. Respondent: The People of the State of Colorado.	Supreme Court Case No: 2017SC311
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 2, 2017.