

APPENDIX A

12CA2502 Peo v Clark 09-29-2016

COLORADO COURT OF APPEALS

Court of Appeals No. 12CA2502
Boulder County District Court No. 12CR222
Honorable Thomas F. Mulvahill, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Michael Martin Clark,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE BERNARD
Richman and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced September 29, 2016

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Douglas K. Wilson, Colorado State Public Defender, James S. Hardy, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 This appeal arose from a murder that went unsolved for eighteen years. Police questioned defendant, Michael Martin Clark, within days of Marty Grisham's death in 1994. But the prosecution did not charge him with murdering the victim until 2011. After a trial in 2012, the jury found defendant guilty of first degree murder after deliberation. We affirm.

I. Background

¶ 2 Defendant was a friend of the victim's daughter. One weekend in late September 1994, he agreed to look after the victim's cat while the victim was away. He stole the victim's checkbook from the victim's apartment in Boulder. He wrote more than four thousand dollars' worth of checks to himself over the next four weeks. Then, at the beginning of November 1994, he called the victim's credit union to find out how much money was left in the account.

¶ 3 The employee who answered the telephone became suspicious, so he contacted the victim to report the call. That same night, someone knocked on the door of the victim's apartment while he was eating dinner with his girlfriend. When the victim answered

the door, someone shot him four times in the head and chest, killing him. The shooter fled.

¶ 4 The prosecution's theory at trial was that defendant had a motive to kill the victim. Defendant dreamed of enlisting in the Marine Corps, but he knew that the Marines would not accept him if he picked up a check fraud charge.

II. The Evidence Was Sufficient to Sustain the Conviction

¶ 5 Defendant first contends that the evidence in this case was insufficient "in quantity and quality" to support his conviction beyond a reasonable doubt. We disagree.

A. Preservation and Standard of Review

¶ 6 Defendant moved for a judgment of acquittal at the close of the prosecution's case-in-chief "based on the record." Counsel renewed the motion at the close of trial, "stand[ing] on the record." The prosecution now asserts that counsel's broadly worded motions did not preserve his sufficiency challenge.

¶ 7 We disagree because a division of this court held that a defendant had preserved a sufficiency contention under similar circumstances. *See People v. Peay*, 5 P.3d 398, 400 (Colo. App. 2000)(considering situation where defense counsel argued that the

prosecution failed to prove defendant committed an act violating the applicable statute). And we note that the prosecution does not cite any authority from Colorado appellate courts that generally requires defendants to preserve sufficiency contentions with more specificity than defendant used in this case.

¶ 8 We review defendant's sufficiency contention de novo. *People v. Halbert*, 2013 COA 95, ¶ 10. The pertinent inquiry is whether "any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of the accused's guilt beyond a reasonable doubt." *Id.* (citation omitted).

B. Law

¶ 9 To sustain a conviction for first degree murder, the prosecution must prove that the defendant, "[a]fter deliberation and with the intent to cause the death of a person other than himself, . . . cause[d] the death of that person or of another person." § 18-3-102(1)(a), C.R.S. 2016. The term "after deliberation" means "not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act." § 18-3-101(3), C.R.S. 2016. "An act

committed after deliberation is never one which has been committed in a hasty or impulsive manner.” *Id.*; see *People v. Sanchez*, 253 P.3d 1260, 1262 (Colo. App. 2010)(“The length of time required for deliberation . . . is not long.”).

¶ 10 Several principles guide our assessment of the sufficiency of the evidence. To begin, an appellate court will not set aside a conviction because it would have reached a different verdict than the jury. *People v. Anderson*, 2016 COA 47, ¶ 13. The court must “give the prosecution the benefit of every reasonable inference which might be fairly drawn from the evidence.” *People v. Perez*, 2016 CO 12, ¶ 25 (citation omitted). The jury alone weighs the witnesses’ credibility, and we do not resolve conflicts in evidence or attach different weight to evidence. *People v. Randell*, 2012 COA 108, ¶ 31. A mere “modicum” of relevant evidence cannot support a conviction, and a conviction cannot be rooted in guessing, speculation, or conjecture. *Id.*

C. Application

¶ 11 Our review of the record shows that there was not any direct evidence that linked defendant to the murder. But we nonetheless conclude that the record contains evidence, taken as a whole and in

the light most favorable to the prosecution, that “any rational trier of fact might accept . . . as sufficient to support a finding” that defendant intended to kill the victim, that he caused the victim’s death, and that he acted after deliberation. *Halbert*, ¶ 10 (citation omitted); *see also People v. Johnson*, 2015 COA 54, ¶ 33 (“Although no direct evidence established that defendant committed [the crime], we cannot say the circumstantial evidence was insufficient to prove beyond a reasonable doubt that he did so.”).

¶ 12 This evidence included the following:

- The testimony of a jailhouse informant, who had shared a cell with defendant and who had spent time with him in the same intake area at the jail. The informant said that, when he asked defendant whether he had killed anyone, defendant nodded “yes.” The informant also knew details about defendant that the police had not released to the public. So it was up to the jury to decide whether it believed the informant’s testimony that defendant had admitted that he had killed someone, and a rational jury might have found that it believed the informant, and it then might have found that the person whom defendant had killed was the victim. *See*

People v. Penn, 2016 CO 32, ¶ 36 (noting that the jury makes credibility determinations).

- The fact that the victim had been killed with nine-millimeter ball ammunition, which a pathologist had discovered during an autopsy and a weapons expert had identified. One of defendant's acquaintances testified that he had given defendant a Bryco-Jennings brand nine-millimeter pistol and some ball, "full metal jacket" ammunition. (The acquaintance had hired a third person to buy the gun at a pawn shop, and a pawn shop receipt confirmed this testimony.) A Marine Corps recruiter testified that defendant had once showed him a nine-millimeter gun and some rounds of full metal jacket ball ammunition with "brass colored" casings. A ballistics expert testified that, given the markings on the bullets, a Bryco-Jennings nine-millimeter pistol could have fired them. That ballistics expert also identified rounds retrieved from the scene as ball ammunition with full metal jackets. So a rational jury might have found that the murder weapon had been defendant's Bryco-Jennings pistol and that this pistol had fired the ball ammunition that had killed the victim.

- The fact that defendant could not be excluded as a contributor to a partial DNA profile on the inside of a lip balm container that the police had found close to the victim's apartment shortly after the murder. A DNA expert testified that 99.4% of the male population was excluded as the source of the sample, while defendant's DNA profile was in the .6% of the male population that could have left the sample. Although defendant had visited the victim's apartment in late September 1994 to take care of the victim's cat, the apartment manager testified that he picked up trash around the complex daily. So a rational jury might have found that defendant had left the lip balm container near the victim's apartment on the night of the murder instead of earlier in September.
- The fact that, on the day after the murder, defendant asked the Marine recruiter how soon he could "get out of here." (Although defendant's trial occurred many years after the murder, a police officer interviewed the recruiter during the initial investigation of the murder.) So a rational jury might have found that defendant was anxious to enlist and to "ship out" because he had killed the victim.

- The fact that defendant's theory was that he could not have committed the murder because he had been in Denver on that night. He had told police officers that he had attended a soccer game in Denver, that he had dropped his friend off at the friend's Denver apartment, and that he had then returned home to Gunbarrel, which is a development that is partially in the City of Boulder and partially in unincorporated Boulder County. But the officers drove the route that defendant likely would have driven had he killed the victim, and it took them, at most, thirty-two minutes to drive from the friend's Denver apartment to the victim's Boulder apartment. Defendant's friend said that defendant had left his apartment by 9 p.m., and, immediately after the shooting, the victim's girlfriend called 911 at 9:34 p.m. So a rational jury might have found that defendant would have had enough time to commit the murder after dropping off his friend.
- The combination of defendant's dream of joining the Marine Corps, the fact that a Marine Corps recruiter had told him that the Marines would not take him if he got into trouble, his theft of more than four thousand dollars from the victim via check

fraud, and the fact that the credit union employee had become suspicious when defendant had called to inquire about the balance in the victim's account. So a rational jury might have had found that defendant had a motive to kill the victim: to protect his dream of becoming a Marine by avoiding arrest and prosecution for check fraud.

- The inferences that (1) defendant's motive provided him with ample opportunity to exercise reflection and judgment concerning his decision to murder the victim; and (2) the murder was neither hasty nor impulsive. See § 18-3-101(3); *see also People v. Webster*, 987 P.2d 836, 843 (Colo. App. 1998) ("Circumstantial and indirect evidence are almost always required to prove deliberation and intention to kill."). So a rational jury might have found that defendant used the period between his telephone conversation with the credit union employee and the murder, including his time at the soccer game and driving from Denver to the victim's apartment, to plan and to prepare to kill the victim. See *id.* ("[T]he time for deliberation need not be long.").

III. Defendant's Statements in 1994 Were Voluntary and Therefore Admissible

¶ 13 Defendant next challenges the trial court's decision to allow the prosecution to admit his 1994 interview with police into evidence. Two days after the victim's death, police arrested defendant for check fraud. Defendant waived his *Miranda* rights, and he was interviewed for about three hours at the Boulder Police Department, with a forty-eight-minute break at the two-hour mark. According to defendant, his statements during this interview were involuntary. We do not agree.

A. Standard of Review

¶ 14 We will uphold the trial court's findings of fact on the voluntariness of statements as long as they are "supported by adequate evidence in the record." *People v. Travis*, 2016 COA 88, ¶ 31 (citation omitted). But we review the ultimate determination of voluntariness de novo. *Id.*

B. Law

¶ 15 A defendant's involuntary statements cannot be admitted at trial. See *Jackson v. Denno*, 378 U.S. 368, 376 (1964). Statements are involuntary if (1) they are the product of "coercive governmental

conduct,” *Travis*, ¶ 32 (citation omitted); and (2) the coercion played a “significant role” in inducing the defendant to make the statements, *People v. Theander*, 2013 CO 15, ¶ 45. “In essence, the question at issue is whether the individual’s will has been overborne.” *People v. Valdez*, 969 P.2d 208, 211 (Colo. 1998).

¶ 16 To determine whether police officers’ conduct was coercive, courts examine several nonexclusive factors:

- (1) whether the defendant was in custody;
- (2) whether the defendant was free to leave;
- (3) whether the defendant was aware of the situation;
- (4) whether the police read *Miranda* rights to the defendant;
- (5) whether the defendant understood and waived *Miranda* rights;
- (6) whether the defendant had an opportunity to confer with counsel or anyone else prior to or during the interrogation;
- (7) whether the statement was made during the interrogation or volunteered later;
- (8) whether the police threatened [the] defendant or promised anything directly or impliedly;
- (9) the method of the interrogation;

- (10) the defendant's mental and physical condition just prior to the interrogation;
- (11) the length of the interrogation;
- (12) the location of the interrogation; and
- (13) the physical conditions of the location where the interrogation occurred.

People v. Zadran, 2013 CO 69, ¶ 11 (citation omitted).

C. Application

¶ 17 Defendant contends that his statements during the 1994 interview were involuntary because of his youth, because he was afraid when he made them, because the officers made implied promises of leniency if he would talk with them, and because the officers deceived him. We disagree.

¶ 18 The trial court found that the officers reminded defendant that he did not have to answer any specific questions if he did not want to and that he could take breaks during the interview. The court thought that the tone of the interview was "conversational," and that the officers were "measured and calm and respectful."

¶ 19 The interview lasted less than three hours. The court found that the only "minimally implied promise" occurred when the detectives offered to call the district attorney to discuss the case

with defendant, but that the officers made clear that they could not make any promises on the district attorney's behalf.

¶ 20 All of these findings have support in the record. And, after making these findings at the suppression hearing, the trial court then assessed the applicable factors listed in *Zadran*. The court therefore correctly applied the law of voluntariness. We likewise conclude that the record and the law establish that defendant's statements were voluntary and that the trial court did not err when it admitted the statements into evidence.

¶ 21 The trial court did not specifically address whether defendant's age rendered his statements involuntary, a claim that was peripherally raised in defendant's motion to suppress these statements. To begin our analysis of this issue, youth is not dispositive of the voluntariness inquiry. *See People v. Thorpe*, 641 P.2d 935, 941 (Colo. 1982)(noting that "youth is but one factor to be considered").

¶ 22 Defendant was nineteen years old when he was interviewed in 1994. Some officers had arrested him six weeks before the murder on unrelated charges, and he therefore had experience with the police. He spoke articulately during the interview, and he

repeatedly told the officers that he understood what they were asking him and why they were asking those questions. We therefore conclude that defendant's age did not render the interview involuntary. *See, e.g., People v. Blankenship*, 30 P.3d 698, 704 (Colo. App. 2000)(noting that a sixteen-year-old's age and absence of a guardian during an interview was a factor to consider, but age alone was not determinative of voluntariness); *People v. Lucas*, 992 P.2d 619, 623-24 (Colo. App. 1999)(holding that a sixteen-year-old's statements were voluntary where he could read and write in English, had completed the tenth grade, and had prior contact with police).

¶ 23 The trial court also did not address the effect of defendant's fear or whether the officers had deceived him. But our review of the record, including the audio of the interview, leads us to conclude that defendant's statement was not rendered involuntary by either factor. *See People v. Ramadan*, 2013 CO 68, ¶ 21 ("When the interrogation is audio or video-recorded, and there are no disputed facts outside the recording pertinent to the suppression issue, we are in the same position as the trial court in determining whether the statements should . . . be suppressed").

¶ 24 It is true that defendant told the officers that he was scared several times during the interview. But he did not ask them to stop the interview. And he asked them questions, which they answered, and he told them that he wanted to help.

¶ 25 In an effort to obtain more information about the murder weapon, the officers performed a gunshot residue test on defendant's hands. The officers knew that this test would probably not reveal any useful results because they conducted it more than two days after defendant would have fired the pistol. But, even if the test was a "deceptive tactic," an officer's use of deception in an interview does not automatically render statements involuntary. *See People v. Klausner*, 74 P.3d 421, 425 (Colo. App. 2003) ("While it is improper for a police officer to make false representations regarding the evidence of a defendant's guilt, a single impropriety of this kind, standing alone, will not necessarily render a confession involuntary.").

IV. Because Defendant Was Not in Custody in April 2011, His Statements Were Admissible Even Though the Federal Agents Did Not Read Him His *Miranda* Rights

¶ 26 Defendant next contends that he was in custody when two federal agents arrived at his workplace in 2011 and interviewed

him. According to defendant, the trial court should have suppressed these statements because they did not read him the *Miranda* warning before they questioned him. We disagree.

A. Standard of Review

¶ 27 We will not disturb the trial court's findings of fact if the record supports them. *See People v. King*, 16 P.3d 807, 812 (Colo. 2001). But "we review de novo the legal question of whether the facts, taken together, establish that a defendant was in custody for *Miranda* purposes." *Travis*, ¶ 12.

B. Law

¶ 28 Officers must inform suspects of their constitutional rights if (1) suspects are in custody; and (2) the officers interrogate them. *See Mumford v. People*, 2012 CO 2, ¶ 12. Whether suspects are in custody turns on whether, from an objective standpoint, reasonable people would believe that they have been deprived of their freedom of action to "the degree associated with a formal arrest." *See People v. Matheny*, 46 P.3d 453, 467 (Colo. 2002). Several nonexclusive factors guide this inquiry:

(1) the time, place, and purpose of the encounter;

- (2) the persons present during the interrogation;
- (3) the words spoken by the officer to the defendant;
- (4) the officer's tone of voice and general demeanor;
- (5) the length and mood of the interrogation;
- (6) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation;
- (7) the officer's response to any questions asked by the defendant;
- (8) whether directions were given to the defendant during the interrogation; and
- (9) the defendant's verbal or nonverbal response to such directions.

Travis, ¶ 13 (citation omitted).

C. Application

¶ 29 At the suppression hearing, the trial court cited the applicable factors listed in *Travis*, and it then concluded that defendant was not in custody during the April 2011 interview. Specifically, the court pointed out that the tone of the interview was conversational and friendly; defendant and the agents were calm; defendant's movement was not limited; defendant took a telephone call and

made a telephone call during the interview; and defendant asked the agents questions, which they answered. The record supports all of these factual findings.

¶ 30 But defendant contends that the location of the interview — his workplace — rendered it custodial. *See, e.g., People v. LaFrankie*, 858 P.2d 702, 707 n.5 (Colo. 1993) (“[T]here can be few places more intimidating or potentially coercive to an individual than one’s place of employment.”), *abrogated on other grounds by Matheny*, 46 P.3d 453. He adds that this intimidation was heightened because he was interviewed in a back room and other employees were present outside the closed office door. He finishes by asserting that the agents did not tell him that he was free to leave, that he was not under arrest, or that he could end the conversation.

¶ 31 A police interview at a suspect’s workplace may be coercive. *See id.* at 706-07, 706 n.5 (collecting cases); *but see Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 218 (1984) (noting, in the seizure context, that “when people are at work their freedom to move about has been meaningfully restricted, not by the actions of

law enforcement officials, but by the workers' voluntary obligations to their employers").

¶ 32 But in this case, unlike in *LaFrankie*, the conversation was friendly, calm, and conversational. See *People v. Klinck*, 259 P.3d 489, 494 (Colo. 2011)(noting that, among other factors, the interview was conversational and calm, rendering it noncustodial). The agents did not tell defendant that he was free to leave, but they told him that he did not “have to cooperate with” them. Defendant answered a call on his cellular telephone, and he made another call during the interview. The interview lasted less than an hour. See *Matheny*, 46 P.3d at 457, 468 (interview lasting ninety minutes was not custodial). Defendant was not handcuffed, the agents did not use force, and they did not tell him that he was under arrest. See *People v. Barraza*, 2013 CO 20, ¶ 19 (noting that “traditional indicia of a custodial interrogation” — handcuffing, physical restraint, or telling the defendant he was under arrest — were not present). Finally, the interview ended when defendant told the agents that he had plans with his wife.

¶ 33 Given all of this, we conclude that (1) a reasonable person in defendant's position would not have felt deprived of his or her

freedom to the degree associated with a formal arrest, *see Matheny*, 46 P.3d at 467; (2) the agents were not required to read him his *Miranda* rights because he was not in custody, *see Mumford*, ¶ 12; and (3) the trial court therefore properly denied defendant's motion to suppress the 2011 interview.

V. The Trial Court Did Not Abuse its Discretion When it Admitted the "Motorcycle Incident" as Res Gestae

¶ 34 Defendant next contends the trial court erred when it allowed the prosecution to introduce res gestae evidence. We disagree.

¶ 35 Six weeks before the victim's murder, police arrested defendant for possessing a stolen motorcycle. After that arrest, defendant's Marine Corps recruiter told him that any further trouble would bar defendant from enlisting in the Corps. The prosecutor contended, and the trial court agreed, that the incident was "inextricably intertwined" with the victim's murder because it established defendant's motive to kill the victim: to cover up defendant's check fraud so that he could still enlist.

A. Standard of Review

¶ 36 We examine the trial court's decision to admit evidence as res gestae for an abuse of discretion. *People v. Zapata*, 2016 COA 75M,

¶ 37. A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or if the court misconstrues or misapplies the law. *People v. Williams*, 2016 COA 48, ¶ 18.

B. Law

¶ 37 “Res gestae evidence is ‘generally linked in time and circumstances with the charged crime, forms an integral and natural part of an account of a crime, or is necessary to complete the story of the crime for the jury.’” *People v. Miranda*, 2014 COA 102, ¶ 47 (quoting *People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009))(cert. granted in part Aug. 31, 2015). Res gestae evidence is admissible as long as it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice. CRE 403; *People v. Relaford*, 2016 COA 99, ¶ 61. When reviewing a contention that res gestae evidence should not have been admitted because it was too prejudicial, we begin by assuming the maximum probative value and the minimum prejudice that we would reasonably expect from the introduction of this evidence in a trial. *People v. Asberry*, 172 P.3d 927, 933 (Colo. App. 2007).

C. Application

¶ 38 We conclude, for the following reasons, that the trial court did not abuse its discretion when it admitted the evidence of the motorcycle incident as res gestate.

¶ 39 First, we agree with the trial court that the motorcycle incident, and the consequences stemming from it, provided the jury with a complete picture of the crime because it helped to show defendant's motive for the murder. And divisions of this court have pointed out that res gestae evidence may be offered to show a defendant's motive. *See, e.g., People v. Jimenez*, 217 P.3d 841, 865 (Colo. App. 2008).

¶ 40 Second, the probative value of the motorcycle incident was not substantially outweighed by the danger of unfair prejudice. *See* CRE 403. The fact that defendant was arrested and pled guilty to a misdemeanor in connection with the motorcycle incident did not "suggest a decision made on an improper basis," such as bias, sympathy, anger, or shock. *People v. Coney*, 98 P.3d 930, 933 (Colo. App. 2004)(citation omitted)("Evidence is not unfairly prejudicial simply because it damages the defendant's case."). And we must assume that the jury would have given the motorcycle

incident the maximum probative value — establishing defendant's motive — coupled with the minimum unfair prejudice that we would reasonably expect. *Asberry*, 172 P.3d at 933.

VI. We Will Not Reverse Defendant's Conviction Because the Trial Court Erred When it Admitted Certain Evidence Concerning Defendant's Credibility, but the Court Did Not Err When it Excluded Other Evidence Concerning the Jailhouse Informant's Credibility

¶ 41 Defendant next raises two somewhat related issues.

¶ 42 First, he asserts that the trial court should have allowed him to cross-examine a detective about his perception of the jailhouse informant's credibility because the detective's opinion pertained to the detective's interrogation tactics or investigative decisions. We disagree.

¶ 43 Second, defendant contends that the same detective should not have been permitted to testify about defendant's credibility. Specifically, defendant submits that the court should not have allowed the detective to testify that defendant did not tell the truth during the 1994 interview. We agree, but we conclude that, when applying the plain error test, this error did not seriously affect the fundamental fairness of the trial so as to cast doubt on the reliability of the conviction.

A. Preservation and Standard of Review

¶ 44 Defendant asserts that he preserved his contention that the testimony pertaining to the jailhouse informant's credibility should have been admitted. We disagree.

¶ 45 At trial, defendant raised a different rationale for permitting this cross-examination: "If [the detective] has questions about [the informant's] credibility and he is a lead investigator at the time, we're allowed to follow up on that and say, Did you ever do that and why did you write that." But defendant did not submit that this testimony should have been admitted to explain the detective's interrogation tactics or investigative decisions. *See People v. Rogers*, 2012 COA 192, ¶ 24 ("An issue is unpreserved . . . when an objection . . . was made to the trial court, but on different grounds than those raised on appeal."). We therefore conclude that defendant did not preserve this contention.

¶ 46 Defendant concedes he did not object when the detective testified defendant did not tell the truth during the 1994 interview, so this assertion is not preserved.

¶ 47 While we review the trial court's evidentiary rulings for an abuse of discretion, *People v. Campos*, 2015 COA 47, ¶ 26, we will

only reverse his conviction if we conclude that any error was plain because defendant did not preserve these assertions, *People v. Valdez*, 2014 COA 125, ¶ 18. Plain error is obvious and substantial, and it so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of conviction. *See id.*

B. Law

¶ 48 In general, “[t]his state’s case law disfavors comments by one witness about another witness’s truthfulness.” *Davis v. People*, 2013 CO 57, ¶ 15. But a detective may provide his or her assessment of an interviewee’s credibility if that information provides “context for the detective’s interrogation tactics and investigative decisions.” *Id.* at ¶ 19. But whether this testimony is admissible “hinges on the circumstances under which it is elicited and offered.” *People v. Conyac*, 2014 COA 8M, ¶ 60.

C. Application

1. The Jailhouse Informant’s Credibility

¶ 49 Defendant asserts that the detective’s perception of the informant’s credibility explained his interrogation tactics and investigative decisions. So, according to defendant, *Davis* required the trial court to allow him to cross-examine the detective on this

point. We disagree, and we conclude, for the following reasons, that the trial court did not abuse its discretion when it limited defendant's cross-examination.

¶ 50 The detective's skepticism about the informant's truthfulness — he noted that the informant might be a “psychopath” and wondered whether the informant should undergo a polygraph examination — did not explain *why* the detective proceeded to investigate the case in the manner that he chose to investigate it. In other words, the detective's opinion about the informant's credibility did not provide any context for why the detective took or did not take any subsequent investigative steps, *see Davis*, ¶ 19; *Miranda*, ¶ 20 n.3, particularly because the record does not contain any evidence to indicate that the detective made any investigative decisions based on his misgivings about the informant's credibility. (For example, the record contains no evidence that the detective asked the informant to submit to a polygraph examination.)

¶ 51 Instead, the prospective line of cross-examination that defendant proposes on appeal falls squarely within the prohibition that one witness may not comment on another witness's truthfulness. *See Davis*, ¶ 15. Those sorts of credibility

determinations fall uniquely within the jury's province. *See People v. Bridges*, 2014 COA 65, ¶ 15 (“[A]n interviewer may not usurp the jury’s role of assessing the credibility of a particular witness’s statement by offering an ultimate conclusion about the statement’s truthfulness.”).

¶ 52 And, contrary to defendant’s assertion, the prosecutor did not open the door to this testimony by “walking [the informant] through the transcript of his November 1994 interview” with the detective. This testimony did not open the door to *all* testimony regarding the informant’s interview with police. *See, e.g., People v. Ramos*, 2012 COA 191, ¶¶ 24-31 (holding the defendant did not open the door to expert testimony on blood spatter testimony by describing blood on victim’s clothing and saying the words “spatter” and “transferred”)(*cert. granted* Feb. 18, 2014). And the informant’s discussion of the 1994 interview did not “create[] an incorrect or misleading impression,” *People v. Melillo*, 25 P.3d 769, 775 (Colo. 2001), which the court could have only corrected by admitting the detective’s opinion about the informant’s credibility.

¶ 53 We are not persuaded by defendant’s contention that the trial court could have permitted this testimony with a limiting

instruction. See, e.g., *Davis*, ¶ 21. Counsel did not request a limiting instruction at trial. And “absent a special statutory requirement, the supreme court has consistently held that trial courts have no duty to give limiting instructions sua sponte.” *People v. Griffin*, 224 P.3d 292, 298 (Colo. App. 2009)(collecting cases).

2. Defendant’s Credibility

¶ 54 The defense called the same detective during its case-in-chief. During cross-examination, the prosecutor and the detective had the following exchange.

Q Now throughout the course of the interview, did you . . . repeatedly ask [defendant] to tell you the truth?

A Yes, we did.

. . . .

Q Did he tell you the truth about where he got the gun?

A He did not.

Q Did he tell you the truth about what he did with the gun?

A I don’t believe so.

¶ 55 Defendant asserts that the detective impermissibly commented on his credibility. *See Davis*, ¶ 15. The prosecution counters that the testimony is admissible, *see id.* at ¶ 19, because it provided context for the detective's investigative decision to mislead defendant about the gunshot residue test in the hope that the test would convince defendant to provide more information about the pistol.

¶ 56 That defendant did not tell the truth in *response* to an investigative tactic does not provide context for why the detectives used the investigative tactic in the first place. Put differently, the detective did not justify the test by explaining that he thought that defendant was not telling the truth. Instead, the testimony fell within *Davis*'s prohibition of credibility testimony. *See Conyac*, ¶ 73 (noting that questions and answers aimed at commenting on the veracity of the defendant's testimony are impermissible). So we conclude that, had defendant objected to this testimony, the trial court would have abused its discretion if it had overruled defendant's objection. But defendant did not object to this testimony, so we will only reverse his conviction if we conclude that

the error was plain. *See Valdez*, ¶ 18. And we conclude that the error was not plain for the following reasons.

¶ 57 We will assume, without deciding, that the error was obvious and substantial because the detective expressed a personal opinion that defendant had been untruthful. *See, e.g., Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006). But we conclude that this testimony did not seriously affect the fundamental fairness of defendant's trial so as to cast doubt on the reliability of defendant's conviction.

¶ 58 Defendant gave decidedly different stories in 1994 and in 2011 about how he obtained a pistol and how he got rid of it. This conflict suggested that defendant had been untruthful in at least one of the stories. The jury was therefore alerted to questions about the credibility of defendant's statements by the content of the statements themselves. So the detective's testimony did not interject a question about defendant's veracity into the case that was not already there.

VII. The Trial Court Did Not Abuse its Discretion When it Excluded Testimony About a Police Tip

¶ 59 Defendant asserts that the trial court impermissibly excluded testimony that a gas station attendant told police officers that he

had seen a green Chrysler Regal quickly drive away from the victim's apartment complex between 9 and 9:30 p.m. on the night of the victim's murder. (Recall that the first 911 call was placed at 9:34 p.m.) Around the time of the murder, defendant drove a gray or silver Ford Mustang that sported some green paint spots.

¶ 60 By the time the case went to trial in 2012, the attendant had died. Defendant stated that he wanted to ask an officer about the attendant's statement to "clear up" some "confusion" about why the police had been searching for a green car. Importantly for our analysis, defendant added that he was not offering the attendant's statement for the truth of the matter asserted in it.

¶ 61 But the trial court excluded the attendant's statement. It explained that the evidence that had been introduced in the trial about the color of defendant's car — the Ford — had not been confusing, and that testimony about the attendant's statement could have *injected* confusion into the trial.

A. Standard of Review

¶ 62 We review a trial court's decision to exclude evidence for an abuse of discretion. *See, e.g., People v. Manyik*, 2016 COA 42, ¶ 89.

B. Law

¶ 63 Hearsay is a statement made by someone other than the declarant while testifying at trial offered to prove the truth of the matter asserted. *See* CRE 801(c). Hearsay is inadmissible unless it falls under an exception to the rule. *See* CRE 802. But if the statement is not offered for its truth, “it is admissible as nonhearsay evidence as long as it is relevant.” *People v. Welsh*, 176 P.3d 781, 790 (Colo. App. 2007).

¶ 64 Evidence is relevant if it has any tendency to make “the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” CRE 401. Even relevant evidence may be excluded, however, if “its probative value is substantially outweighed by the danger of . . . confusion of the issues.” CRE 403.

C. Application

¶ 65 Defendant asserts that the attendant’s statement was not hearsay because he had not offered it for its truth; he had offered it instead to show its effect on the police because they had looked for a green car. *See, e.g., People v. Phillips*, 2012 COA 176, ¶ 107 (“Under CRE 801(c), if an out-of-court statement is offered solely to

show its effect on the listener, it is not offered to prove the truth of the matter asserted and is not hearsay.”). And defendant asserts that the attendant’s statement was relevant to clear up confusion created by the prosecution’s questions about the color of defendant’s car and to “rebut prosecutorial implications that [defendant’s] car was sighted driving away from the scene.”

¶ 66 We conclude, for the following reasons, that the trial court did not abuse its discretion when it excluded the hearsay statement.

¶ 67 First, the attendant’s statement was not relevant to clear up any confusion. *See* CRE 401. At least three witnesses told the jury that defendant’s car had green paint spots in addition to its primarily gray or silver color. No one had testified that he or she had seen a car like defendant’s leaving the murder scene. So there was no confusion about defendant’s car for him to “clear up” with the attendant’s statement.

¶ 68 But the context of defendant’s contention suggests that he wanted to introduce the attendant’s statement for another, more exculpatory, reason. If the jury heard that a green Chrysler had sped away from the victim’s apartment complex around the time of the murder, the jury might have thought that a different person had

murdered the victim. But, if that was the real reason why defendant wanted to introduce the attendant's statement, then he would have had to offer it for the truth of the matter asserted in the statement, which would have meant that it was inadmissible hearsay. See CRE 801(c); CRE 802; *People v. Zubiato*, 2013 COA 69, ¶ 16 ("[T]he statement was only relevant if it was offered for the truth of the matter asserted")(cert. granted June 16, 2014).

VIII. The Trial Court Did Not Abuse its Discretion When it Declined to Give the Jury Defendant's Proposed Jury Instruction

¶ 69 Defendant contends the trial court erred when it did not give the jury the following instruction that he had requested.

While it is true that in a criminal case, any jury verdict must be unanimous, the justice system recognizes that, in some cases, a unanimous verdict is simply not possible. Jurors are never faulted for failing to reach a unanimous decision. One of the safeguards in our system, to make sure that innocent people are not wrongly convicted, is to allow a jury to be hung if all of its members do not agree on a verdict. A hung jury is every bit as much a part of our legal system as a unanimous verdict.

¶ 70 The trial court declined to give the instruction because "it really has the [e]ffect of discouraging jury deliberations or frankly giving them an indication that they don't have to deliberate at all."

A. Standard of Review

¶ 71 We review de novo whether the jury instructions as a whole accurately informed the jury of the law. *People v. Waller*, 2016 COA 115, ¶ 55. We review the issue whether the trial court erred when it denied a defendant's request for a particular instruction for an abuse of discretion. *People v. Marks*, 2015 COA 173, ¶ 53. A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair. *Id.*

B. Law and Application

¶ 72 We conclude, for the following reasons, that the trial court did not abuse its discretion when it declined defendant's request to give this instruction to the jury.

¶ 73 First, in *United States v. Rey*, 811 F.2d 1453, 1460 (11th Cir. 1987), on which defendant relies, the Eleventh Circuit Court of Appeals explained that the "jury trial system has not malfunctioned when the jury cannot reach a verdict." It went on to note that a mistrial is a safeguard of the criminal justice system. *See id.*

¶ 74 But the *Rey* court did not state that an instruction similar to the one that defendant offered is required. And defendant does not

cite any Colorado authority, and we are not aware of any, which states that an instruction like this one is required.

¶ 75 Second, looking to the authority that we can find, our supreme court has held a trial court does not have to instruct a jury about the possibility of a mistrial when the jury is deadlocked. See *Gibbons v. People*, 2014 CO 67, ¶¶ 36-37. “Instead, it should consider exercising its discretion to do so in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations.” *Id.* at ¶ 36.

¶ 76 Third, contrary to defendant’s contention, the trial court did not instruct the jury that it *had* to reach a unanimous decision. Instead, one instruction accurately told that jury that any *verdict* must be unanimous. See § 16-10-108, C.R.S. 2016 (“The verdict of the jury shall be unanimous.”). A mistrial is not a verdict. See *Mistrial*, Black’s Law Dictionary 1154 (10th ed. 2014)(“A trial that ends inconclusively because the jury cannot agree on a verdict.”).

IX. The Prosecutor’s Putative Misconduct During Opening Statement and Closing Argument Was Not Reversible Error

¶ 77 Defendant next challenges various arguments that the prosecutor made in opening statement and closing argument. We

conclude that any improper statements were not so prejudicial that we should reverse defendant's conviction.

A. Preservation and Standard of Review

¶ 78 Defendant objected to some of the prosecutor's statements to which he now points, but he did not object to others. The former were preserved for the purposes of our review, but the latter were not.

¶ 79 Prosecutorial misconduct claims are analyzed in two steps. First, we decide whether the statements were improper. *See Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010).

Second, we must decide whether any misconduct that we have concluded occurred requires us to reverse the defendant's conviction. *See id.* We will reverse a conviction if any preserved errors were not harmless. *See People v. Rhea*, 2014 COA 60, ¶ 42. "[T]he trial court's rulings on prosecutorial misconduct 'will not be disturbed by an appellate court in the absence of a gross abuse of discretion resulting in prejudice and a denial of justice.'" *Id.* (quoting *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984)).

¶ 80 We will only reverse unpreserved errors based on prosecutorial misconduct if they were plain. *See People v. Garner*, 2015 COA

175, ¶ 34. To amount to plain error, the misconduct must be “flagrant or glaring or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction.” *Id.* (citation omitted). Prosecutorial misconduct during opening statement or closing argument rarely rises to the level of plain error. *Id.*

B. Law

¶ 81 A prosecutor may “use every legitimate means to bring about a just conviction,” but the prosecutor must avoid “improper methods designed to obtain an unjust result.” *People v. Iversen*, 2013 COA 40, ¶ 31. A prosecutor has wide latitude in “choosing what language and rhetorical style to employ during argument to the jury.” *People v. Krueger*, 2012 COA 80, ¶ 50; *see also People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010)(noting that a prosecutor may “employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance”)(citations omitted). But a prosecutor cannot misstate the evidence or the law, attempt to inflame the passions or prejudices of the jury, or present the jury with his or her opinion of the defendant’s guilt. *Krueger*, ¶ 50.

C. Application

1. Preserved Claims

- a. “I Wish That Life Could Always Have a Man Like [the Trial Court]”

¶ 82 Defendant contends that the prosecutor impermissibly aligned himself with the authority of the court by asserting that “I wish things could be clean and pristine and as orderly as things are in this courtroom. I wish that life could always have a man like [the trial court].” Defense counsel objected, and the trial court sustained the objection.

¶ 83 Defendant asserts that, “[w]hile the objection was sustained, the court did nothing more to alleviate the misconduct’s impact.” But defense counsel did not ask the court to instruct the jury to disregard the statement. So we conclude that we do not need to consider this contention further. *See People v. Douglas*, 2012 COA 57, ¶ 65 (“[D]efendant’s contemporaneous objection to the comment was sustained, and he requested no further relief. Accordingly, we need not consider this alleged error.”).

- b. "If Someone Did This to My Family, I Would Want Someone to Step Forward"

¶ 84 During rebuttal, the prosecutor paraphrased the jailhouse informant's testimony that he had disclosed defendant's comments to police because "[i]f someone did this to my family, I would want someone to step forward." Defendant asserts that this statement impermissibly inflamed the passions of the jury and left "the impression in jurors' minds that sympathy for [the victim's] family was an appropriate consideration."

¶ 85 But the prosecutor's statements occurred during rebuttal argument, and a prosecutor has "considerable latitude in replying to opposing counsel's arguments." *Conyac*, ¶ 133. Defense counsel had stated during closing argument that the prosecutor "wants to say you ought to believe [the informant] because he told you how much he had to lose" by testifying and that "he's a changed man, except he's still in prison right now." In other words, defendant challenged the informant's credibility during closing. Given this "opening salvo," the prosecutor was entitled to remind the jury of the reasons that the informant had provided for testifying. See *People v. Vialpando*, 804 P.2d 219, 225 (Colo. App. 1990). We

therefore conclude that the prosecutor's comment was not misconduct.

2. Unpreserved Claims

a. Defendant Had a "Chip on His Shoulder" Because "Some of His Friends Were the Haves, and He Was a Have Not"

¶ 86 During opening statement, the prosecutor asserted that witnesses "will describe [defendant] as a guy who had a chip on his shoulder . . . because . . . some of his friends were the haves, and he was a have not."

¶ 87 Defendant asserts that this statement was improper because no witness testified that defendant had a "chip on his shoulder." But, although no witness used that phrase, the record contains evidence that supports such an inference. For example, during defendant's 1994 interview with police, he explained that his friends never discussed financial matters with him because his family had "never been well off at all." He noted that his friends were "suburban," "Boulder"-type kids. The victim's daughter told the jury that defendant had been "staying with various friends," implying that he did not have a permanent home. And a former

girlfriend testified that defendant “didn’t have a lot of opportunities that other kids that grow up in Boulder did.”

¶ 88 A prosecutor may use “rhetorical device[s]” during opening statement. *Douglas*, ¶ 66. The prosecutor in this case employed a rhetorical device — “chip on his shoulder” — to preview the coming testimony. We therefore conclude that the prosecutor’s reference to a “chip” on defendant’s “shoulder” was not misconduct.

¶ 89 Defendant next asserts that the statement was improper character evidence. Even assuming, without deciding, that it was, we conclude that the statement did not rise to the level of plain error. The statement was not substantial; instead, it was “brief and isolated.” *People v. Carter*, 2015 COA 24M, ¶ 60. And it was not repeated over the course of the entire opening statement. *Contra Harris v. People*, 888 P.2d 259, 266-68 (Colo. 1995)(holding that reversal required where improper statements were repeated multiple times throughout entire closing argument).

b. Defendant Wanted to Join the Marine Corps “So Badly” He Wore a Marine T-Shirt “All the Time,” Kept a Marine Sticker on His Car, and Kept His Hair “High and Tight”

¶ 90 The prosecutor told the jury during opening statement that “witness after witness” would explain that defendant wanted to join

the Marine Corps so badly that he wore a Marines T-shirt regularly, kept his hair “high and tight,” and that his car sported a Marine Corps sticker. During rebuttal, the prosecutor again referred to “the T-shirt and the stickers and he tells all of his friends [that being a Marine is] his dream.” Defendant asserts that this statement mischaracterized the evidence because “witness after witness” did not testify about the T-shirt, sticker, and “high and tight” hairstyle.

¶ 91 As to the haircut, the jailhouse informant told the jury that defendant had a “military cut.” We conclude that the prosecutor was merely engaging in oratorical embellishment when he described defendant’s hair as “high and tight.” *Strock*, 252 P.3d at 1153 (noting that a prosecutor may engage in oratorical embellishment or metaphorical nuance).

¶ 92 But we agree with defendant that no witnesses testified that defendant had a Marine Corps sticker on his car and that he regularly wore a Marine Corps T-shirt. “Remarks later proved to be unsupported by the evidence will ordinarily constitute reversible error if there has been an affirmative showing of bad faith and manifest prejudice.” *People v. Wallace*, 97 P.3d 262, 269 (Colo.

App. 2004). But defendant makes no showing that the prosecutor had a bad motive, aside from baldly asserting that the prosecutor's "bad faith was apparent." And he does not make any showing that there was manifest prejudice.

¶ 93 Defendant also argues these statements "improperly bolster[ed] the [prosecution's] motive theory." But defendant does not cite any authority for this proposition, and he does not provide any further explanation of it. We therefore will not consider it. See, e.g., *People v. Venzor*, 121 P.3d 260, 264 (Colo. App. 2005)("[W]e decline to review those issues, inasmuch as they are presented to us only in a perfunctory or conclusory manner.").

c. "I Know From [One] to [Two] Feet Away He Was Able to Hit" the Victim

¶ 94 Defendant next asserts that the prosecutor improperly conveyed his personal opinion about defendant's guilt by arguing during rebuttal that "I know from [one] to [two] feet away he was able to hit [the victim] four times. That's what I know and that's what this evidence shows. And that's not me speculating, that's not me saying what might have been."

¶ 95 Recall that a prosecutor has “wide latitude to respond to a defendant’s opening salvos” during closing argument. *People v. Roadcap*, 78 P.3d 1108, 1114 (Colo. App. 2003). And, during defendant’s closing argument, defense counsel argued that the perpetrator, unlike defendant, “knew how to handle a firearm” based on the difficulty of firing a nine-millimeter pistol and “hit[ting] your target” during a “narrow timeframe.” The prosecutor’s arguments, properly framed, therefore responded to defendant’s argument that it would have been unduly difficult for defendant to have killed the victim.

d. “Everything [Defendant] Said Was Untrue . . . [Defendant] Wasn’t Telling the Truth”

¶ 96 Defendant contends that the prosecutor offered a personal opinion about defendant’s credibility when he asserted during closing argument that “everything” defendant said during his 1994 interview with police “was untrue” and that “[e]verything he said was misleading, everything was . . . designed to steer the police away from his gun.” See, e.g., *Domingo-Gomez v. People*, 125 P.3d 1043, 1050 (Colo. 2005)(“[I]t is improper for a lawyer to assert his opinion that a witness is lying.”)(citations omitted). The prosecution

counters that these statements reflected the evidence and were therefore permissible. *See People v. Nerud*, 2015 COA 27, ¶ 53 (noting that a prosecutor should not “interject his or her personal beliefs as to the veracity of witness testimony, . . . but prosecutors may properly argue inferences, anchored in evidence, about the truthfulness of a witness’s testimony”)(citations omitted).

¶ 97 We agree with the prosecution.

¶ 98 First, the prosecutor did not state that defendant “lied.” *See Domingo-Gomez*, 125 P.3d at 1050 (noting that a prosecutor “can argue to the jury that they should not believe a witness, but he should not call him a liar”)(citations omitted).

¶ 99 Second, the prosecutor’s statements were reasonable inferences drawn from facts in evidence: his comments referred to the conflicting statements that defendant made to police in 1994 and 2011 about the pistol. *See id.* at 1051 (concluding that the prosecutor’s statement — defendant “did not tell you the truth He was not truthful with you” — was a reasonable, though inartful, attempt to point out inconsistencies in the testimony).

¶ 100 But even if these statements were improper, we further conclude that they did not so undermine the trial’s fundamental

fairness as to cast doubt on the reliability of defendant's conviction. The statements were a small part of the prosecution's closing argument; the trial court properly instructed the jury that it determined the credibility of witnesses; and the court instructed the jury that the arguments of counsel were not evidence.

e. "Do Justice" to the Victim and "Do Justice and Make Sure That the Right Thing Happens"

¶ 101 Defendant next asserts that the prosecutor impermissibly suggested that a guilty verdict was necessary to do justice for a sympathetic victim. During closing argument, the prosecutor told the jury it could "feel confident that returning a verdict of guilty in this case will support the truth and will finally after 18 years do justice to" the victim. During rebuttal, the prosecutor urged the jury to "do justice and make sure that the right thing happens."

¶ 102 We will assume, without deciding, that these statements were error. See *Conyac*, ¶¶ 146-48 (concluding that prosecutor's statement — "[f]ind justice for" the victim — was improper); *People v. McBride*, 228 P.3d 216, 223 (Colo. App. 2009)(stating that a prosecutor may not suggest that guilty verdicts are necessary to do justice for a sympathetic victim).

¶ 103 Even so, we conclude that any error was not plain. First, the divisions in *Conyac* and *McBride* concluded that similar statements were not plain error. See *Conyac*, ¶¶ 148-50; *McBride*, 228 P.3d at 223.

¶ 104 Second, the statements were a “small part of the prosecutor’s closing argument.” *People v. Marko*, 2015 COA 139, ¶ 223 (concluding that while statement suggested a guilty verdict was necessary to do justice for the victim, it did not constitute plain error).

X. Cumulative Error Does Not Warrant Reversing Defendant’s Conviction

¶ 105 Finally, defendant asserts that the doctrine of cumulative error requires us to reverse his conviction, including cumulative prosecutorial misconduct. See, e.g., *Conyac*, ¶ 152. But, although we have “found some errors, because we do not perceive that they substantially prejudiced defendant’s right to a fair trial, there is no reversible cumulative error.” *Id.*

¶ 106 The judgment of conviction is affirmed.

JUDGE RICHMAN and JUDGE FOX concur.

APPENDIX B

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: October 10, 2017 CASE NUMBER: 2016SC908
Certiorari to the Court of Appeals, 2012CA2502 District Court, Boulder County, 2012CR222	
Petitioner: Michael Martin Clark, v. Respondent: The People of the State of Colorado.	Supreme Court Case No: 2016SC908
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 10, 2017.