COLORADO COURT OF APPEALS

DATE FILED: September 28, 2023
CASE NUMBER: 2021CA52

Court of Appeals No. 21CA0052
Eagle County District Court No. 18CR85
Honorable Paul R. Dunkelman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Leigha Page Ackerson,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART AND VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FURMAN
Fox and Richman*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 28, 2023

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Defendant, Leigha Page Ackerson, and her husband broke into the home of the victim — an elderly woman — while she was away; strangled, stabbed, and bludgeoned the victim to death when the victim returned home; and stole items from the victim's home. After a twelve-day trial, a jury found Ackerson guilty of one count of first degree felony murder (with the predicate offense of aggravated robbery), one count of first degree burglary, one count of aggravated robbery, one count of conspiracy to commit first degree burglary, one count of conspiracy to commit aggravated robbery, and one count of first degree criminal trespass.

¶ 2 The trial court sentenced Ackerson to life in the custody of the Department of Corrections (DOC) without the possibility of parole for her conviction of first degree felony murder. (The court merged Ackerson's conviction of aggravated robbery into this conviction.) The court then sentenced Ackerson to an aggregate sentence of forty-eight years in DOC custody on the remaining convictions, ordering that this sentence run consecutively to Ackerson's life sentence.

¶ 3 On appeal, Ackerson contends that (1) the trial court committed plain error by allowing the prosecution to ask her on

cross-examination whether another witness was lying; (2) the trial court committed plain error by admitting certain testimony; (3) the prosecution committed reversible misconduct during closing arguments; (4) the trial court abused its discretion by not exempting her domestic violence expert witness from a sequestration order and by limiting this expert witness's testimony; (5) the cumulative effect of the foregoing errors requires reversal; (6) her sentence to life without the possibility of parole for her conviction of first degree felony murder was constitutionally disproportionate; and (7) her conviction for first degree criminal trespass must merge into her conviction for first degree burglary. Because we disagree with Ackerson's first six contentions, we affirm the judgment of conviction. But because we agree with her last contention, we remand this case to the trial court to merge her conviction for first degree criminal trespass into her conviction for first degree burglary.

I. Lying

¶ 4 We first consider whether the trial court committed plain error by allowing the prosecution to ask Ackerson on cross-examination

whether the informant who had shared a cell with Ackerson was lying. We conclude that any error was not reversible.

A. Standard of Review

¶ 5 Because Ackerson did not object to any of the prosecution's questions she challenges on appeal, we review for plain error. *See Hagos v. People*, 2012 CO 63, ¶ 14. An error is plain if it is obvious and substantial, and so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See id.* To show plain error, the defendant must establish that an error occurred, and that it was "so clear cut and so obvious" that a trial judge should have intervened sua sponte to avoid it without the benefit of an objection. *People v. Conyac*, 2014 COA 8M, ¶ 54.

B. Questions About Lying

¶ 6 It is improper for counsel to ask a "defendant or witness to comment on the veracity of another witness." *Liggett v. People*, 135 P.3d 725, 729-31 (Colo. 2006). So it is improper for counsel to ask a defendant or witness whether another witness was lying or similar questions. *People v. Koper*, 2018 COA 137, ¶¶ 31-32. Ultimately, counsel's asking a witness to opine on the veracity of another

witness is improper because it invades the province of the fact finder and puts the defendant in the untenable position of calling someone a liar. *See id.* at ¶¶ 31, 45; *see also Venalonzo v. People*, 2017 CO 9, ¶ 32.

C. The Trial

¶ 7 Before trial, along with the charges of which Ackerson was ultimately convicted, the prosecution also charged Ackerson with one count of first degree murder (after deliberation), one count of conspiracy to commit first degree murder (after deliberation), and one count of tampering with physical evidence.

¶ 8 During opening statements, defense counsel stated that the jury would "see that the only evidence that the prosecution will put in front of [them] indicating that [Ackerson] had anything to do with this was the word of a jailhouse snitch" — the informant. Defense counsel told the jury that it would hear that the informant had multiple felonies, was facing many years in prison, and sought out information from Ackerson to exchange for favorable treatment. Defense counsel then told the jury about the informant:

> She knew exactly what she needed to say to the police to try and reduce her upcoming prison sentence. When you . . . hear her story,

> you will see that she exaggerated and she fabricated. You will see that. And you will see that [the informant] actually later admitted that she lied. She sent a letter to the prosecution, wrote it on the back of her subpoena. She said, "I lied to the police to gain a benefit."

¶ 9 At trial, the informant testified that she had multiple felonies and had been in jail or prison multiple times. She said that sometime after the victim's murder, she had shared a cell with Ackerson for a few days. She explained that she had heard that Ackerson and her husband had murdered someone and that she asked Ackerson about this.

¶ 10 The informant then testified that Ackerson relayed the following story. Ackerson and her husband left Denver to go camping and to "live off the land." On the way, their vehicle got a flat tire, so they went into the woods, where they stayed a few days. In the woods, they were extremely cold, and it was snowing. Ackerson and her husband eventually began fighting because she was cold and hungry and they needed shelter. Ackerson's husband became physical; he hit Ackerson in the back of her head and gave her a black eye.

¶ 11 Ackerson and her husband then walked to find shelter. Her husband "had seen a house on the way to wherever they were camping . . . and told [Ackerson] that it looked empty and there would be fresh water, warmth, and they could go there." At this house, the husband "found a window in the back and broke in through the window and went around and unlocked the door for [Ackerson]. And they ended up staying in the house for a few days." Ackerson and her husband ate the food in the house and slept in an unused guest bedroom. "They pretty much wandered around the house whenever [the victim] wasn't home. And whenever she did come home, they would hide in the bedroom."

¶ 12 On the day of the murder, Ackerson and her husband "were planning on making a meal, making chicken." This was "earlier in the day; and they weren't expecting [the victim] to come home." But "they heard her pull up . . . while they were trying to make their chicken. And so they took it and ran to the back bedroom where they were staying."

¶ 13 Ackerson and her husband then "discussed what they were going to do." And that is "when they talked about killing" the victim; they "talked about either stabbing her or strangling her, but

they didn't want to make a mess, and so they were trying to figure out the easiest way to do it." Ackerson told her husband that "if he loved her, then he would do it." Ultimately, they decided to "kill [the victim] with a paracord and strangle her."

¶ 14 So Ackerson and her husband "crept out of the bedroom, and [the victim] was in the living room, in her recliner, listening to music." They "approached her," and Ackerson "asked her to use her phone." The victim told Ackerson that it did not work. But Ackerson "snatched it from her hand, took it anyways. [The victim] said to use the house phone because the cell phone didn't work, but [Ackerson] had snatched the cell phone and then grabbed the house phone." The victim then "told her that she was a woman of God, and that she would help them out. She could get them food." The victim then "went to the kitchen to go look for food for them."

¶ 15 The victim went to the refrigerator, and Ackerson's husband "followed her to the fridge. And [Ackerson] gave him the head nod to do it, and he had the paracord already on him, and he strangled" the victim. As he was strangling her, he asked Ackerson "to stab [the victim] in the neck." Ackerson "attempted to, but it wouldn't penetrate the skin or wouldn't pierce it." The victim's skin "felt like

lead." They then took the victim to a bathroom. Ackerson and her husband "were saying that they didn't think that she was all the way dead or that she might come back. They wanted to make sure that she was for-sure gone, so they decided to bash her skull in on the shower floor." Ackerson's husband "picked up [the victim's] head almost all the way up to his shoulder three times until her skull broke open." But Ackerson and her husband still wanted "to make sure [the victim] didn't come back as a zombie," so they got a kitchen knife, "brought it back to the bathroom, and shoved it in her eye."

¶ 16 Ackerson and her husband then "slit [the victim's wrist] all the way to the bone." Ackerson thought it "looked like something you would see on The Walking Dead." Ackerson "was fascinated by the human body, by anatomy and everything like that."

¶ 17 After Ackerson and her husband had slit the victim's wrist, Ackerson "took the blankets off of [the victim's] bed and covered her with them." Ackerson and her husband then took showers, ate, grabbed items from the victim's house (including the victim's credit cards), and left.

¶ 18 The informant testified that when Ackerson was telling this story, Ackerson "got super into it, super excited when she was explaining . . . what they did after [her husband] killed her, to the body. She was really, really into it." The informant said Ackerson was "boasting about it, more or less, like she was proud of herself and amazed at what the human body looks like."

¶ 19 On cross-examination, defense counsel questioned the informant about a letter she had written to the prosecution when she was subpoenaed in this case. The informant testified that she sent the letter (and the subpoena she received) to the prosecution after the prosecution told her that it could not help her with a criminal case in Florida. Defense counsel had the informant read the contents of this letter out loud:

> I'm sorry to inform you that my memory has came back about the day I talked to the detective. The reason I've been having trouble remembering what I said is because I lied during that interview. I overheard . . . staff talking about the case and put together my own story to try to get time off my sentence. . . . As far as I know, the truth is that [Ackerson] had nothing to do with the murder. It was all [her husband]. It was wrong for me to make that up. . . . I never thought it would go this far. [Ackerson] should not be charged with murder. Her boyfriend did

> it, and she didn't know. Again, I am sorry that I made up those lies[.] . . . When [Ackerson] and [her husband] first got arrested, the whole jail was talking about what happened, inmates and staff. I won't have to be a part of [Ackerson] going to prison because of my lies. That's what I'll say on the stand in my striped jumpsuit.

¶ 20 During direct examination, Ackerson agreed that she was in the victim's house when the victim was killed, but she denied that she killed the victim and instead said that her husband had. Ackerson also denied participating in killing the victim, planning to kill the victim, or ordering her husband to kill the victim. Ackerson testified that she entered the victim's house because her husband threatened to kill her if she did not.

¶ 21 Ackerson agreed that she spoke to the informant, when they were cell mates, "about the murder [she] witnessed [her husband] commit" and that the informant had been "the first friend [she had] had in a long time." The following colloquy between defense counsel and Ackerson then took place:

> [Defense Counsel]. [C]an you tell us whether or not you ever talked about a plan with [your husband] to kill [the victim], with [the informant]? Do you understand my question?

[Ackerson]. Kind of. But no, there was never a discussion of any plan with anybody.

Q. Okay. Tell us whether or not you told [your husband] that he should kill [the victim] if he loved you.

A. I did not say that.

Q. Did you tell [the informant] that?

A. No, I didn't.

Q. Tell us whether or not you told [the informant] that you snatched the cell phone out of [the victim's] hand.

A. I did not tell her that, because I didn't do that.

Q. Tell us whether or not you told [the informant] that you then took the house phone from [the victim].

A. I did not tell [the informant] that.

Q. When you were talking to [the informant], did you ever discuss with her that you gave the signal for [your husband] before he killed [the victim]?

. . . .

A. No.

Q. Did you ever . . . tell [the informant] that you used a hunting knife on [the victim]?

A. No.

. . . .

> Q. Were there ever any discussions between you and [the informant] about your obsession with anatomy and the human body?
>
> A. No, there's no obsession.
>
> Q. Were there ever any discussions between you and [the informant] about the reason why [the victim] was killed, because you were upset that you didn't get a chicken?
>
> A. No.

¶ 22 Ackerson then testified to the following. Shortly after she married her husband, he started abusing her in multiple ways, and this abuse eventually became physical. Her husband also admitted to her that he "started hearing voices" when he was a child. He also had "multiple personality types." It was Ackerson's husband's plan to go into the mountains because he "believe[d] it was necessary to live off the land and to separate from everything that man had built and made because . . . it was the end times."

¶ 23 Ackerson and her husband drove into the mountains in January 2018. At some point, they left their vehicle and walked into a wooded area where they unsuccessfully attempted to make a shelter with sticks. In the woods, Ackerson's husband was

physically abusive toward her, and he hit her when she said she was cold. They stayed in the woods for a few days, but, eventually, Ackerson's husband decided that they should leave "to get warm" and "to get some food." So they walked out of the woods and ended up at the victim's house.

¶ 24 At the victim's house, Ackerson's husband went around the back, broke into the house, and opened the front door where Ackerson was standing. When the door opened, her husband was holding a hatchet, and he told Ackerson to come in or he would kill her. Ackerson entered the house, and the two went to a guest bedroom. Ackerson showered, and she and her husband put on bathrobes. Ackerson's husband was trying to make chicken in the kitchen when the victim returned to the house. Her husband took the chicken back to the guest bedroom, and Ackerson followed. Her husband was upset that he was not going to be able to make food. The two stayed in the guest bedroom overnight.

¶ 25 The next day, in the late morning, Ackerson's husband told Ackerson to leave the bedroom, so that they could ask the victim for some food. Ackerson left the bedroom, with her husband following her, and they encountered the victim sitting on a couch listening to

music. The victim "was holding a cell phone. [Ackerson] . . . asked to use the phone. And she handed [Ackerson] her cell phone, but she said that it didn't work, that there was no cell service there." Her husband then asked the victim for some food, and the victim went to the kitchen to get them some eggs. While the victim was at the refrigerator, her husband pulled a paracord out of his pocket, wrapped it around the victim's neck, and strangled the victim. Ackerson was "completely shocked" by this. Her husband then dragged the victim to the bathroom and slammed the victim's head against the floor several times; this caused Ackerson to collapse into the bathtub. While Ackerson remained in the bathtub, her husband got a knife from the kitchen. Her husband "didn't think that [the victim] was dying fast enough, and he needed to make sure that she was gone, because he had seen The Walking Dead and he didn't want her to come back as a zombie." Her husband "tried to stab [the victim] twice, and he said it hit like lead. And so he took the same knife, and he drove it into her eye, into her left eye." Her husband also cut the victim's wrist with a knife. Ackerson did not participate in, or direct her husband to take, any of these actions.

¶ 26 Ackerson's husband then got blankets and a comforter from another room and covered the victim's body with them; Ackerson was "[j]ust standing there." Her husband made a meal and ate, but Ackerson did not eat anything. While Ackerson sat in a chair, her husband gathered things from the house, put them in bins, packed up backpacks that the two had brought with them, and moved the bins and the backpacks out of the house. Ackerson and her husband then left the victim's house.

¶ 27 During an extensive cross-examination of Ackerson (spanning 158 pages of trial transcript), the prosecution asked Ackerson about the informant's testimony that Ackerson "snatched" the victim's phone. The prosecution asked, "Do you know if [the informant] is lying when she said the word 'snatch'?" Ackerson responded, "Yes, I know." The prosecution asked, "You know that she's lying?" Ackerson responded, "I know that she's lying."

¶ 28 Later, the prosecution questioned Ackerson about whether the informant was "lying" about Ackerson's accompanying her husband to the kitchen to get a knife, rather than staying in the bathroom, and about Ackerson's retrieving the comforter from the victim's bed,

rather than her husband doing so. Ackerson responded affirmatively to both questions.

¶ 29 The prosecution later asked Ackerson whether she agreed with the informant's testimony that Ackerson "told her there was a flat tire on [her] car." Ackerson said she agreed with this. The prosecution then asked, "She's not lying about that, right?" Ackerson responded, "No." The following colloquy then took place:

> [Prosecution]. [The informant] testified that you told her there was Smartwater in the car, right?
>
> [Ackerson]. Um, yeah, if that's what she testified, then yeah.
>
> Q. And you agree with that, right?
>
> A. Yes, I do.
>
> Q. She wasn't lying when she said that, was she?
>
> A. No.

¶ 30 The prosecution then asked Ackerson a series of questions about whether certain specific details in the informant's testimony on what Ackerson told her were "correct" or "right." Ackerson agreed that they were "correct" or "right." The prosecution asked

Ackerson, "So [the informant] got a lot of that right, didn't she?" Ackerson responded, "Yeah."

¶ 31 During closing arguments, the prosecution stated:

> Now, it's interesting, because with all of those details — and like I said, I think there are around [fifty] of them that are in there — the only details that [Ackerson] says [the informant] lied about are the details that implicate [Ackerson]. Every detail that points to guilt on behalf of [Ackerson], [Ackerson] says [the informant] lied. That's convenient, that [the informant] got all of the other details correct, but [the informant] is lying about every single thing that implicates [Ackerson].

¶ 32 The prosecution then said that "the defense is going to talk about [the informant] and her motives. And they're going to say she's a liar and she's a felon and she's a thief. Let me tell you what [the informant] is. She's a drug addict." The prosecution stated that the defense would bring up the informant's "many felony convictions" and "all of the different reasons that [the informant] would lie." But the prosecution argued that the informant "got nothing out of her testimony. She went to prison. How is that a benefit?" The prosecution then argued: "[The informant's] still on parole right now. She knows that to lie on the stand, that's a felony. Do you think she's going to lie about what she heard?"

¶ 33 Defense counsel argued as follows:

> [The prosecution's] entire case hinges on [the informant]. So let's talk about [the informant]. She is a professional liar going back [ten] years, making her living at crimes of dishonesty to support her drug habit, ladies and gentlemen. This prosecutor's office had even prosecuted her for crimes of dishonesty, and now they want you to believe her. They want you to suspend all of your reality about her crimes of dishonesty and her [fifteen] felonies in her past, and they want you to believe her.

Defense counsel then noted several of the informant's felonies and said, "[T]his is somebody who is a professional liar and is committing crimes, as I said, to support her drug habit."

¶ 34 Defense counsel discussed the informant's letter to the prosecution, noted benefits that the informant received for her testimony, and argued that the informant made up several details of her testimony. Defense counsel then argued, "If [the informant] is making up those facts, isn't it possible that she's making up the facts and puts [Ackerson] in the mix when [Ackerson] tells her what her husband did? But she needs that information to be more valuable, to get her a better deal and get her the situation that she wants."

¶ 35 Defense counsel later argued, "Ladies and gentlemen, . . . when you look at all the evidence, . . . you must believe [the informant] or their case does not work." Defense counsel explained, "They just want you to believe [the informant], and that's it."

¶ 36 The jury ultimately acquitted Ackerson of first degree murder (after deliberation), conspiracy to commit first degree murder (after deliberation), and tampering with physical evidence.

D. Analysis

¶ 37 We conclude that the error in allowing the challenged questions was not plain. *See Hagos*, ¶ 14. We come to this conclusion for four reasons.

¶ 38 First, the challenged questions and Ackerson's responses were a small part of her testimony and a small part of the evidence presented to the jury during the twelve-day trial.

¶ 39 Second, the error inured to Ackerson's benefit. *People v. Shields*, 822 P.2d 15, 22 (Colo. 1991) (concluding that a trial court's error was not plain because the error "inured to the benefit of the defendant"). Ackerson's defense at trial was that the informant was a "jailhouse snitch" and "professional liar" who "fabricated" her testimony and "lied" about what Ackerson told her to gain a benefit

from the prosecution. Indeed, defense counsel elicited the informant's own testimony that she had admitted to lying about Ackerson's story to gain a benefit from the prosecution. And while Ackerson testified that she did tell her story to the informant, the prosecution's questions allowed Ackerson to testify that the informant was lying about some specific details of that story. So to the extent Ackerson's testimony that the informant was lying invaded the province of the jury, this operated to benefit Ackerson's defense. *See id.*; *Venalonzo*, ¶ 32; *Koper*, ¶ 31.

¶ 40 Third, Ackerson relies on *Koper*, ¶ 45, for the proposition that the error was substantial because the prosecution's "was she lying" questions put her in the "untenable position" of having to either accuse the informant of lying or testify that the informant was not lying — which could raise the inference that Ackerson herself was lying. This reliance is misplaced. In *Koper*, ¶¶ 34-40, the defendant testified in his own defense, and, on cross-examination, the prosecution asked him a "barrage" of "were they lying" questions regarding the prosecution's witnesses. On appeal, the People argued that "defendant's testimony on cross-examination bolstered his version of events, and thus the error" was not plain.

Id. at ¶ 45. A division of our court rejected this argument because the argument gave

> short shrift to the untenable position defendant was in during the cross-examination: asking the defendant to opine on the veracity of the [prosecution's] witnesses places him "in a no-win situation. If the defendant says the other witness *is* lying, then the defendant is put in the position of calling someone a liar. . . . If the defendant says a contradictory witness is *not* lying, then a fair inference is that the *defendant* is lying."

Id. (quoting *Liggett*, 135 P.3d at 732).

¶ 41 But unlike in *Koper*, Ackerson was not put in an untenable position or a no-win situation by the prosecution's "was she lying" questions because Ackerson's primary defense at trial was that the informant was lying. As noted, Ackerson argued at trial that the informant was a "jailhouse snitch" and "professional liar" who "fabricated" her testimony and "lied" about what Ackerson told her to get a benefit from the prosecution. And defense counsel elicited the informant's own testimony that she admitted to lying about Ackerson's story. Simply put, Ackerson's strategy for winning her case was to accuse the informant of lying.

¶ 42 Fourth, the jury's verdicts suggest that the jury carefully considered the credibility of the informant and Ackerson. *See People v. Robinson*, 2019 CO 102, ¶ 33 (concluding that "the fact that the jury acquitted [the defendant] of every charge to which the improper statements were directed tends to show that the jury could fairly and properly weigh and evaluate the evidence, notwithstanding" the prosecution's improper statements). The jury acquitted Ackerson of first degree murder (after deliberation) and the related conspiracy count, suggesting that the jury credited Ackerson's testimony that she and her husband did not plan to murder the victim. But the jury also found Ackerson guilty of felony murder, suggesting that the jury credited the informant's testimony that Ackerson had admitted to participating in the murder, or the acts of robbery and burglary.

¶ 43 Accordingly, for these reasons, we conclude that any error in allowing the challenged questions did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos*, ¶ 14.

II. Admission of Testimony

¶ 44 We next consider whether the trial court committed plain error by admitting testimony that (1) Ackerson and her husband had sex in the victim's house and (2) Ackerson became sexually aroused when she saw her husband's genitalia while he was strangling the victim. Ackerson contends that this testimony was irrelevant and that its probative value was substantially outweighed by its danger of unfair prejudice under CRE 403. We conclude any error was not reversible.

A. Standard of Review

¶ 45 Because Ackerson did not object to the admission of the testimony she challenges on appeal, we review for plain error. *See Hagos*, ¶ 14.

B. Law

¶ 46 In general, all relevant evidence is admissible. *See* CRE 402; *see also People v. Brown*, 2014 COA 155M-2, ¶ 22 ("The Colorado Rules of Evidence strongly favor the admission of relevant evidence."). Evidence is "relevant" when 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.

¶ 47 But even relevant evidence may be excluded when its probative value is substantially outweighed by the danger of unfair prejudice. *See* CRE 403. Unfair prejudice "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, such as the jury's bias, sympathy, anger or shock." *People v. Dist. Ct.*, 869 P.2d 1281, 1286 (Colo. 1994) (quoting *People v. Goree*, 349 N.W.2d 220, 225 (Mich. Ct. App. 1984)).

¶ 48 In reviewing whether a trial court abused its discretion in admitting evidence under CRE 403, we afford the evidence its maximum probative value and its minimum danger of unfair prejudice. *See Dist. Ct.*, 869 P.2d at 1286 (concluding that CRE 403 strongly favors the admission of evidence).

C. Activity at the Victim's Home

¶ 49 At trial, the informant described the story that Ackerson told her about the murder. According to the informant, Ackerson said she and her husband stayed in the victim's unused bedroom for a few days. The prosecution then asked, "What would [Ackerson and

her husband] do at night when [the victim] was at home, did [Ackerson] say?" The informant responded, "I mean, she said that they would — they were not the quietest. Like they'd have sex and everything, and [the victim] never came up."

¶ 50 During closing arguments, the prosecution discussed the informant's "statements and the details with which she gave those statements." The prosecution said it would "list out roughly [fifty] specific details" in the informant's testimony to show that she was telling the truth. The prosecution said, "Those are not all of the details that [the informant] talked about, but I don't have time to go through every single one of them. There's a lot of information." The prosecution then listed numerous details, among which was that Ackerson and her husband "had sex in that house."

¶ 51 We conclude that any error in the trial court's admitting the challenged testimony was not plain. *See Hagos*, ¶ 14. The informant's fleeting reference to Ackerson and her husband's having sex in the victim's house was a very small part of her testimony and a smaller part of the evidence presented to the jury during the twelve-day trial. And although the prosecution briefly mentioned this reference, it did not emphasize it, or use it for an improper

purpose, during its closing argument. *See Dist. Ct.*, 869 P.2d at 1286; *People v. Relaford*, 2016 COA 99, ¶ 48 (concluding that there was no plain error from admitting improper testimony when the prosecution did not emphasize testimony during closing argument). Accordingly, any error did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos*, ¶ 14.

D. Ackerson's Reaction

¶ 52 During opening statements, defense counsel discussed the evidence regarding the events surrounding the victim's murder. Defense counsel stated:

> When [the victim] came home, [Ackerson] thought [her husband] would go to [the victim] and ask for forgiveness and ask for help. But [her husband] had other ideas. To [Ackerson's] utter shock, he attacked [the victim] and murdered her in a horrific way, and she was very traumatized by what she saw.

¶ 53 At one point, the prosecution asked the informant, "Did [Ackerson] say anything else about . . . watching her husband while [he] was strangling [the victim]?" The victim responded, "Yeah. She said, while he was strangling her in the kitchen, he had a bathrobe

on, and it flapped open a little bit. He had nothing on underneath. She had seen his d[***] and said it really turned her on."

¶ 54 And during closing arguments, the prosecution discussed the numerous specific details in the informant's testimony about what Ackerson told her about the murder. At one point, the prosecution stated, "[The informant] also said that [Ackerson] made a comment while [Ackerson's husband] was strangling [the victim] and he's in a bathrobe and he's somehow crouched over [the victim's] body, that his penis is hanging out, and she thought that was hot. That's not a detail you make up. That's something you remember when someone tells you." The prosecution later argued, "There's no evidence aside from [the informant's] statement talking about how sexually aroused [Ackerson] was and [Ackerson] saying that that never happened. It's going to come down to who you believe, folks."

¶ 55 But defense counsel argued:

> Do you really think that, given [Ackerson's] demeanor about the crime that she witnessed on the stand, given her tearful demeanor . . . when she's talking about the crime that she admitted, that she tells [the informant] that it was hot when his d[***] popped out? Those are her words that I'm quoting to you, ladies and gentlemen. No. But you know who talks like

that? A meth head, ladies and gentlemen. That's who talks like that.

¶ 56 We conclude that any error in admitting the challenged testimony was not plain. *See Hagos*, ¶ 14. We come to this conclusion for the following reasons.

¶ 57 First, it is not obvious that the challenged testimony was irrelevant; it could potentially have been relevant as evidence of premeditation and Ackerson's mental state during the murder. *See* CRE 401, 402; *Conyac*, ¶ 54. Part of Ackerson's defense to first degree murder (after deliberation) was that she was "shocked" and "traumatized" when her husband was strangling the victim, suggesting that there had been no plan to strangle the victim and that Ackerson was just a passive observer. So the informant's statement that Ackerson admitted to being sexually aroused during the strangling could have been relevant to rebut Ackerson's defense to first degree murder (after deliberation) because it could have made it more likely that Ackerson was not shocked by the strangling, but, instead, reacted to the strangling in a way that was more consistent with Ackerson and her husband's having planned the strangling. *See* CRE 401, 402.

¶ 58 Second, it is not obvious that the probative value of the challenged testimony was substantially outweighed by its danger of unfair prejudice. *See* CRE 403. The probative value of the statement that Ackerson admitted to being sexually aroused during the strangling was potentially high; Ackerson's mental state was a central issue, and the informant was the prosecution's primary source of evidence regarding Ackerson's mental state. *See Dist. Ct.*, 869 P.2d at 1286. And the danger of unfair prejudice from the testimony was potentially low; the informant's testimony was that she was sexually aroused by seeing her husband's genitalia, not by the strangling itself. *See id.*

¶ 59 Third, any error in admitting the challenged testimony was not substantial. *See Hagos*, ¶ 14. The informant's brief statement was a very small part of the informant's testimony and a smaller part of the evidence presented during the twelve-day trial. And to the extent this brief statement was unfavorable to Ackerson, the statement was vastly overshadowed by the evidence of her participation in the burglary, robbery, and horrific murder of the victim. *See People v. Herron*, 251 P.3d 1190, 1198 (Colo. App. 2010) (concluding that in a criminal case involving stalking, any

error in admitting "testimony that defendant appeared to follow [a middle school student]" was harmless because although the testimony "was unfavorable, it was vastly overshadowed by evidence of defendant's more threatening acts").

¶ 60 Accordingly, for these reasons, we conclude that any error in admitting the challenged testimony was not obvious and did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos*, ¶ 14.

III. Prosecutorial Misconduct

¶ 61 We also consider whether the prosecution committed reversible misconduct during closing arguments by referring to (1) Ackerson's testimony that the informant was lying; (2) the informant's testimony that Ackerson and her husband had sex in the victim's house; and (3) the informant's testimony that Ackerson had been sexually aroused by seeing her husband's genitalia while he was strangling the victim. We conclude any impropriety was not reversible.

A. Standard of Review

¶ 62 We engage in a "two-step analysis" when we review a claim of prosecutorial misconduct. *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, we must determine whether the prosecution's "conduct was improper based on the totality of the circumstances and, second, whether such actions warrant reversal according to the proper standard of review." *Id.*

¶ 63 Because Ackerson did not object to any of the arguments she challenges on appeal, we review for plain error. *See Hagos*, ¶ 14. "To constitute plain error, prosecutorial misconduct must have been so flagrant, glaring, or tremendously improper that the trial court should have intervened sua sponte." *People v. Cordova*, 293 P.3d 114, 121 (Colo. App. 2011); *see Conyac*, ¶ 54.

B. Prosecutorial Arguments

¶ 64 The prosecution has wide latitude during closing argument and may "comment on the evidence admitted at trial, the reasonable inferences that can be drawn from the evidence, and the instructions given to the jury." *People v. Welsh*, 176 P.3d 781, 788 (Colo. App. 2007); *see People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003) ("In closing argument, [a prosecutor] may employ rhetorical

devices and engage in oratorical embellishment and metaphorical nuance . . . .").

¶ 65 But the prosecution may not misstate the evidence, use arguments calculated to inflame the passions or prejudices of the jury, make statements reflecting a personal opinion or personal knowledge, or denigrate defense counsel. *See People v. Gladney*, 250 P.3d 762, 769 (Colo. App. 2010); *People v. Walters*, 148 P.3d 331, 334 (Colo. App. 2006); *see also Domingo-Gomez v. People*, 125 P.3d 1043, 1048 (Colo. 2005) (A "prosecutor, while free to strike hard blows, is not at liberty to strike foul ones." (quoting *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987))).

¶ 66 "Factors to consider when determining the propriety of [the prosecution's] statements include the language used, the context in which the statements were made, and the strength of the evidence supporting the conviction." *Domingo-Gomez*, 125 P.3d at 1050. The "context in which challenged prosecutorial remarks are made is significant, including the nature of the alleged offenses and the asserted defenses, the issues to be determined, the evidence in the case, and the point in the proceedings at which the remarks were made." *Harris v. People*, 888 P.2d 259, 266 (Colo. 1995).

C. Reference to Ackerson's Testimony

¶ 67 We conclude that any impropriety in the prosecution's references to Ackerson's testimony that the informant was lying did not constitute plain error. *See Hagos*, ¶ 14. As discussed, Ackerson's testimony that the informant was lying benefitted Ackerson's defense that the informant lied to gain a benefit from the prosecution. *See Shields*, 822 P.2d at 22. And defense counsel argued in closing argument that the informant was a "professional liar" and highlighted the evidence that the informant lied to gain a benefit from the prosecution. *See Harris*, 888 P.2d at 266. Accordingly, any impropriety in the prosecution's relatively short reference to Ackerson's testimony that the informant was lying did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos*, ¶ 14.

D. Reference to the Activity in the House

¶ 68 We also conclude that any impropriety in the prosecution's reference to the testimony that Ackerson and her husband had sex in the victim's house did not constitute plain error. *See Hagos*, ¶ 14. This was a single, isolated, and fleeting reference to brief

testimony that was admitted at trial without objection. *See People v. Sommers*, 200 P.3d 1089, 1097-98 (Colo. App. 2008) (concluding that improper prosecutorial argument did not constitute plain error when it was "brief and isolated"); *Welsh*, 176 P.3d at 788. Accordingly, any impropriety did not so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See Hagos*, ¶ 14.

E. Reference to Ackerson's Reaction

¶ 69 We also conclude that any impropriety in the prosecution's reference to the testimony that Ackerson had been sexually aroused by seeing her husband's genitalia while he was strangling the victim was not obvious. *See Hagos*, ¶ 14. As discussed, it was not obvious that this testimony was inadmissible. So the prosecution's reference to this testimony was not the kind of "glaring" and "tremendously improper" conduct that would constitute plain error. *Cordova*, 293 P.3d at 121; *see Hagos*, ¶ 14.

IV. Domestic Violence Expert Witness

¶ 70 We next consider whether the trial court abused its discretion by (1) not exempting Ackerson's domestic violence expert witness

from a sequestration order and (2) limiting this expert witness's testimony. We conclude that any error was not reversible.

A. Sequestration Order

¶ 71 Ackerson contends that the trial court abused its discretion by not exempting her domestic violence expert from the sequestration order under CRE 615(3) because this expert's presence for her testimony and the testimony of her family members was essential to the presentation of her case. We disagree.

¶ 72 Under CRE 615, a trial court must "order witnesses excluded so that they cannot hear the testimony of other witnesses." The court may also "make the order of its own motion." CRE 615. But this rule "does not authorize exclusion of . . . a person whose presence is shown by a party to be essential to the presentation of his cause." CRE 615(3).

¶ 73 We review a trial court's ruling regarding a sequestration order for an abuse of discretion. *People v. Cohn*, 160 P.3d 336, 346 (Colo. App. 2007). "A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law." *People v. Grant*, 2021 COA 53, ¶ 12 (citations omitted).

¶ 74 Before trial, Ackerson endorsed an expert in domestic violence to testify at trial. Ackerson stated as follows:

> [The expert] can testify about myths and misconceptions regarding domestic violence, general domestic violence information and explain certain dynamics of domestic violence that are particular to the present matter. She can educate the jury about the general dynamics of domestic violence (e.g., the "power and control" concept) and common misconceptions that can cloud the truth (e.g., if domestic violence were truly severe and ongoing, a person would leave the relationship). She can discern which statements, acts, omissions, background data, cultural norms, family attitudes, religious constraints, financial pressures, and other social framework details are relevant to an analysis of battering and its effects in this case. She can give a history of battering sustained in the present matter and explain how certain types of threatening behaviors can announce to a victim that deadly physical force is imminent. She can provide an explanation of the impact of a batterer's duress on a domestic violence victim and why a victim may commit a crime because she has been coerced to do so by her batterer.

¶ 75 At the beginning of trial, the court entered a general witness sequestration order that covered all witnesses except for the victim's daughter.

¶ 76 Immediately before Ackerson's testimony at trial, defense counsel requested to have Ackerson's domestic violence expert exempted from the sequestration order. Defense counsel stated as follows:

> Experts are allowed to watch testimony in the courtroom if they're potentially going to be examined on it during their testimony. I have a feeling she's going to be vigorously examined by the prosecution, and so I want her to be able to watch [Ackerson's] testimony and [Ackerson's] family members' testimony, who I anticipate will testify tomorrow. I think it's very important information for her to have before she gets on the stand and testifies as an expert in this case.

Defense counsel also denied that the domestic violence expert was a generalized expert because the expert had reviewed the discovery in the case and had identified "several items of abuse" in her report.

¶ 77 The prosecution objected to this request, arguing that while it was permissible for experts to listen to the testimony of other experts to provide advice to counsel, it was not permissible for an expert to listen to lay witnesses testify and give opinions based on the lay witnesses' testimony.

¶ 78 The trial court then read CRE 615(3) out loud and said, "Tell me why the expert is essential to your presentation, [defense counsel]."

¶ 79 Defense counsel responded as follows:

> Well, she's our domestic violence expert. She's going to testify about the behavior of a domestic violence witness in certain circumstances, because I anticipate that [Ackerson] is going to be vigorously cross-examined on why she never left [her husband] even though he was being abusive to her. And so . . . she's essential to my presentation to explain to the jury, to be helpful to the jury, why domestic violence victims stay with people even when people are committing crimes, why they don't leave them, things like that. So she's essential to my presentation, and therefore her listening to [Ackerson] and [Ackerson's] family members' recitation of the facts is essential to my presentation, because I believe it's going to be part and parcel of — of the basis or her opinions. It's already the basis for her opinions, but I mean, . . . I think it's germane to her testimony because she's going to be vigorously cross-examined, and I think it's helpful to her to make explanations to the trier of fact which are outside the common knowledge and understanding of the jurors.

¶ 80 The trial court denied Ackerson's request to exempt the domestic violence expert from the sequestration order. The court found that the expert had investigated the case and "prepared an

expert report which is sort of the basis of what her testimony is going to be." It then found that if the expert were allowed to hear "different statements from [Ackerson] or her family," the expert would "then conform[] her testimony based on what she hears." The court found that this would be "new testimony that has not been disclosed" and would hamper the prosecution's ability to cross-examine the expert." Ultimately, the court found that its concerns went "to the very fabric of the sequestration and the very reason why we have expert disclosures done and why they were done in this case."

¶ 81 The domestic violence expert later testified at trial. The trial court qualified her as an expert in "the area of domestic violence and battery and its effects on the cycle of violence, victim denial, minimization, and recantation."

¶ 82 The expert testified at length about general concepts related to domestic violence. The expert also testified in response to the following questions by defense counsel:

- "Can you summarize the main reasons why victims of domestic violence do not depend on the criminal justice system to stop their abuser's violence?"

- "Why would a domestic violence victim be loyal to somebody who is assaulting her and battering her?"
- "Why [don't victims of domestic violence] leave their abusers?"

¶ 83 We conclude that the trial court did not abuse its discretion by not exempting the domestic violence expert from the sequestration order for three reasons. *See Cohn*, 160 P.3d at 346.

¶ 84 First, Ackerson did not show that exempting the expert was essential to her case. *See* CRE 615(3). The court recognized that under CRE 615(3), defense counsel was required to show that exempting the domestic violence expert from the sequestration order was essential to the presentation of her case; it therefore gave defense counsel the opportunity to make this showing. Defense counsel's rationale was that the expert was an expert in domestic violence and was essential "to explain to the jury, to be helpful to the jury, why domestic violence victims stay with people even when people are committing crimes, why they don't leave them, things like that." But this was generalized testimony that the expert could give (and did give) even if the expert was not subject to the sequestration order. *See People v. Cooper*, 2021 CO 69, ¶ 1 (noting

that "generalized expert testimony" is "testimony aimed at educating the jury about general concepts or principles without attempting to discuss the particular facts of the case").

¶ 85 Second, the trial court's ruling was intended to prevent the expert from listening to the defense witnesses' testimony, varying the content of her own testimony from her expert report, and thereby prejudicing the prosecution's ability to cross-examine the expert; there was nothing manifestly arbitrary, unreasonable, or unfair about doing this. *See Grant*, ¶ 12.

¶ 86 Third, to the extent Ackerson contends that expert witnesses are categorically exempt from sequestration orders under CRE 615, we disagree. There is nothing in the language of CRE 615 that exempts expert witnesses from its operation.

B. Limiting Testimony

¶ 87 Ackerson next contends that the trial court abused its discretion by "severely" limiting her domestic violence expert's testimony. We conclude that Ackerson is precluded from raising this issue on appeal.

¶ 88 "[E]rror may not be predicated upon a ruling that excludes evidence unless a substantial right of the proponent is affected and

the substance of the evidence is made known to the court by offer of proof or is apparent from the context within which questions were asked." *People v. Saiz*, 32 P.3d 441, 446-47 (Colo. 2001); CRE 103(a)(2) ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."). "The offer must sufficiently apprise the trial court of the nature and substance of the testimony to enable it to exercise its discretion pursuant to the rules of evidence, and it must establish a basis in the record for appellate review of the trial court's ultimate ruling." *Saiz*, 32 P.3d at 447.

¶ 89 And a "[d]efendant's failure to make a proper offer of proof precludes" her from raising an error in excluding a witness's testimony "on appeal, even subject to plain error review, because a clear indication as to what [the witness] would have said is essential to analyzing any claim of error with respect to the trial court's ruling." *People v. Washington*, 179 P.3d 153, 165-66 (Colo. App. 2007), *aff'd on other grounds*, 186 P.3d 594 (Colo. 2008).

¶ 90 Before the trial court qualified the domestic violence expert, both the court and the prosecution were unsure about whether the expert would testify as a generalized expert. To clarify, defense counsel engaged in the following colloquy with the expert:

> [Defense counsel]. What items did you review in this case?
>
> [Expert]. I reviewed the Discovery in this case which was available to the Prosecution and the Defense, and that's basically what I reviewed.
>
> Q. Have you ever interviewed [Ackerson]?
>
> A. Oh, no.
>
> Q. And why won't you, as an attorney, interview [Ackerson]?
>
> A. I wouldn't. I'm not a psychologist or psychiatrist. I can't opine on someone's mental or physical diagnosis. What I can talk about is the dynamics of domestic violence and how that impacts people generally so that we can get on kind of the same page about what domestic violence looks like. . . . [My job is] to inform and educate.

¶ 91 The trial court called defense counsel and the prosecution to the bench for a sidebar, which was not transcribed. The trial court then qualified the expert.

¶ 92 The trial court then dismissed the jury and made the following record regarding the sidebar:

> [T]his is not a [generalized] witness. She's reviewed . . . the police reports of some psychological reports on [Ackerson], so she sort of crossed over from a [generalized] witness. And the Court's concern and why the Court called the parties to the bench was because the Court had concerns about once [the expert] crossed over and started talking about case specifics based upon what she read, it now became not educating the jury but bolstering the testimony of [Ackerson] and others. So the Court found that that was not educating the jury, that that had crossed over to bolstering and the Court was not going to permit direct testimony regarding the reports that were read about [Ackerson]. And just to be a little more specific, because [defense counsel] sort of explained some of the testimony she was anticipating that there would be hypotheticals given that closely follow . . . certain evidence in this case. The Court . . . just found that was bolstering as well, just to give facts but not to call on [Ackerson] really has no difference. So to give case specific facts, the Court found to be not educating the jury, to be bolstering the testimony of [Ackerson] and perhaps others. So that's the record we made.

¶ 93 Defense counsel then reiterated that she "objected to proceeding this way." Defense counsel said she was "entitled to go into what [she] want[s] to about her." But defense counsel did not

identify any specific hypothetical question that she wanted to ask the expert and could not ask, and she made no offer of proof regarding what the expert's response to such a hypothetical might be.

¶ 94 During the domestic violence expert's testimony, defense counsel was permitted to ask the expert several hypothetical questions, some of which included factual scenarios similar to Ackerson's case. The expert was permitted to respond to these hypothetical questions.

¶ 95 We conclude that Ackerson is precluded from raising this issue on appeal, even subject to review for plain error, because she did not identify on the record what hypothetical questions she was not allowed to ask and she made no offer of proof regarding what testimony the expert would have given in response to any such hypothetical questions. *See* CRE 103(a)(2); *Saiz*, 32 P.3d at 446-47; *Washington*, 179 P.3d at 165-66. There is no clear indication in the record regarding the substance of the expert's testimony that would allow us to review Ackerson's claim of error. *See Washington*, 179 P.3d at 165-66.

V. Cumulative Error

¶ 96 Ackerson also contends that the cumulative effect of the foregoing errors requires reversal. We disagree.

¶ 97 We must reverse a criminal conviction when "the cumulative effect of [multiple] errors and defects substantially affected the fairness of the trial proceedings and the integrity of the fact-finding process." *Howard-Walker v. People*, 2019 CO 69, ¶ 24 (quoting *People v. Lucero*, 200 Colo. 335, 344, 615 P.2d 660, 666 (1980)). We have concluded that none of Ackerson's foregoing contentions of error require reversal under the applicable standard of review. We also conclude that even when considered in combination, the errors did not "substantially affect[] the fairness of the trial proceedings" or "the integrity of the fact-finding process." *Id.* (quoting *Lucero*, 200 Colo. at 344, 615 P.2d at 666).

VI. Proportionality

¶ 98 Ackerson next contends that her sentence of life without the possibility of parole is constitutionally disproportionate to her offense of first degree felony murder because, in 2021, the General Assembly changed "Colorado's Criminal Code [to reclassify] felony murder as a subset of second degree murder subject to a potential

sentencing range of [eight] to [forty-eight] years" in the DOC. And Ackerson contends that we must remand her case to the trial court to conduct an extended proportionality review. We disagree with Ackerson.

A. Law and Standard of Review

¶ 99 The Eighth Amendment to the United States Constitution prohibits the imposition of a sentence that is grossly disproportionate to the severity of the crime committed. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Wells-Yates v. People*, 2019 CO 90M, ¶ 5. The Amendment "does not require strict proportionality between crime and sentence." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment); *see also Close v. People*, 48 P.3d 528, 536 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. *Close*, 48 P.3d at 536.

¶ 100 Review of the constitutional proportionality of a sentence involves a two-step process: an abbreviated proportionality review

and, if needed, an extended proportionality review. *Wells-Yates*, ¶¶ 7, 10.

¶ 101 On request, a trial court must conduct an abbreviated proportionality review of a defendant's sentence. *People v. Gee*, 2015 COA 151, ¶ 57. An abbreviated proportionality review involves a comparison of two subparts, the gravity or seriousness of the offense and the harshness of the penalty, to determine whether an inference of gross disproportionality is raised. *Wells-Yates*, ¶¶ 7-9, 11, 14, 23.

¶ 102 Some crimes have been designated as inherently or "per se" grave or serious for purposes of a proportionality review. *See id.* at ¶ 13. "'[P]er se' grave and serious . . . offenses . . . are *always* grave and serious regardless of the underlying facts of the conviction." *People v. Tran*, 2020 COA 99, ¶ 79. "For these crimes, . . . a trial court may skip the first subpart of step one — the determination regarding the gravity or seriousness of the crimes — and 'proceed directly to the second subpart' of that step — the assessment related to the harshness of the penalty." *Wells-Yates*, ¶ 13 (quoting *Close*, 48 P.3d at 538).

¶ 103 When considering the harshness of the penalty, "a great deal of deference is due to legislative determinations regarding sentencing." *People v. Deroulet*, 48 P.3d 520, 523 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17. Accordingly, "in almost every case, the abbreviated proportionality review will result in a finding that the sentence is constitutionally proportionate, thereby preserving the primacy of the General Assembly in crafting sentencing schemes." *Id.* at 526. Still, "[o]ur determination of the harshness of the penalty takes into account parole eligibility." *People v. Sellers*, 2022 COA 102, ¶ 60 (*cert. granted* May 15, 2023).

¶ 104 If an abbreviated proportionality review reveals no inference of gross disproportionality, no further analysis is required. *Close*, 48 P.3d at 542. "The court need only conduct an extended proportionality review if the abbreviated proportionality review gives rise to an inference of gross disproportionality." *People v. Strock*, 252 P.3d 1148, 1157 (Colo. App. 2010).

¶ 105 Whether a sentence gives rise to an inference of gross disproportionality to an offense is a question of law that we review de novo. *Wells-Yates*, ¶ 35.

B. The Statutory Change

¶ 106 Ackerson committed the offense of felony murder on January 24, 2018. At that time, felony murder was a class 1 felony. *See* § 18-3-102(1)(b), C.R.S. 2018. And the minimum sentence for such an offense was life in prison without the possibility of parole. § 18-1.3-401(1)(a)(V)(A.1), (4)(a), C.R.S. 2018.

¶ 107 But in 2021, the General Assembly reclassified felony murder as a class 2 felony. *See* Ch. 58, sec. 2, § 18-3-103, 2021 Colo. Sess. Laws 236. In so doing, it lowered the maximum sentence for this offense to forty-eight years. *See* § 18-1.3-401(1)(a)(V)(A.1), (8)(a)(I), C.R.S. 2021. The General Assembly also explicitly provided that this reclassification only applies to offenses committed on or after September 15, 2021. *See* Ch. 58, sec. 6, 2021 Colo. Sess. Laws 238.

C. Analysis

¶ 108 We conclude that the harshness of Ackerson's sentence to life without the possibility of parole did not raise an inference of gross disproportionality when compared to the gravity and seriousness of her offense of felony murder.

1. Gravity and Seriousness of the Offense

¶ 109 Ackerson's offense of felony murder was per se grave and serious. *See Wells-Yates*, ¶ 13; *Tran*, ¶ 79. A division of our court in *Sellers* concluded that even given the 2021 statutory change in the classification of felony murder, the offense of felony murder is per se grave and serious. We agree with that division's reasoning. *See Sellers*, ¶¶ 61-66.

¶ 110 *Wells-Yates* held that

> [a]ggravated robbery, burglary, accessory to first degree murder, and the sale or distribution of narcotics — the other crimes we have previously designated inherently grave or serious — satisfy the standard we announce today as well. The statutory elements of these offenses ensure that, regardless of the facts and circumstances involved, a defendant who stands convicted of any such offense will have committed a crime that is necessarily grave or serious.

Wells-Yates, ¶ 65 (footnotes omitted).

¶ 111 Ackerson's predicate offense was aggravated robbery. Thus, felony murder premised on this offense is likewise per se grave and serious "because it necessarily involves committing a violent predicate felony that results in the death of a person." *Sellers*, ¶ 65.

¶ 112 Accordingly, we proceed directly to the second subpart of our review regarding the harshness of the penalty. *See Wells-Yates*, ¶ 13.

2. Harshness of the Penalty

¶ 113 Considering the harshness of the penalty in this case, we conclude that Ackerson's sentence to life without the possibility of parole does not give rise to an inference of gross disproportionality. *See Close*, 48 P.3d at 536; *Sellers*, ¶ 67. While we recognize that Ackerson's life sentence is potentially substantially longer than the maximum forty-eight years a defendant in her shoes could receive under the amended statute, and that Ackerson is not eligible for parole, these differences do not mean that Ackerson's sentence is grossly disproportionate. *See Sellers*, ¶ 67; *People v. Mandez*, 997 P.2d 1254, 1273 (Colo. App. 1999) (concluding that a life sentence without parole for felony murder was not grossly disproportionate).

VII. Merger

¶ 114 Ackerson contends, the People concede, and we agree that her conviction for first degree criminal trespass must merge into her conviction for first degree burglary. When convictions for first degree criminal trespass and first degree burglary are based on

identical evidence, double jeopardy principles require that the convictions must merge. *People v. Gillis*, 2020 COA 68, ¶¶ 32-38, 50. That was the case here. Accordingly, we vacate Ackerson's conviction and sentence for first degree criminal trespass and remand to the trial court with instructions to merge that conviction into Ackerson's conviction for first degree burglary.

VIII. Conclusion

¶ 115 The judgment is vacated as to Ackerson's conviction and sentence for first degree criminal trespass. The judgment is otherwise affirmed, and the case is remanded to the trial court to merge Ackerson's criminal trespass conviction into her conviction for first degree burglary.

JUDGE FOX and JUDGE RICHMAN concur.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED October 21, 2024 CASE NUMBER: 2023SC814
Certiorari to the Court of Appeals, 2021CA52 District Court, Eagle County, 2018CR85	
Petitioner: Leigha Page Ackerson, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2023SC814
ORDER OF COURT	

In its order dated August 5, 2024, the Court notified the parties it was holding the above-captioned matter in abeyance pending resolution of *Sellers v. People*, case number 22SC738.

The Court NOTIFIES the parties in the above-captioned case that it stayed the mandate in *Sellers v. People* so that petitioner may file a petition for writ of certiorari in the U.S. Supreme Court. The above-captioned case remains held in abeyance.

BY THE COURT, OCTOBER 21, 2024.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED April 14, 2025 CASE NUMBER: 2023SC814
Certiorari to the Court of Appeals, 2021CA52 District Court, Eagle County, 2018CR85	
Petitioner: Leigha Page Ackerson, v. **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2023SC814
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, APRIL 14, 2025.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED April 14, 2025 CASE NUMBER: 2021CA52
Eagle County 2018CR85	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Leigha Page Ackerson.	Court of Appeals Case Number: 2021CA52
MANDATE	

This proceeding was presented to this Court on the record on appeal. In accordance with its announced opinion, the Court of Appeals hereby ORDERS:

JUDGMENT AFFIRMED IN PART AND VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS

TIFFANY MORTIER
CLERK OF THE COURT OF APPEALS

DATE: APRIL 14, 2025