NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT KEITH RAY, *Petitioner,*

v.

COLORADO, *Respondent.*

On Petition for Writ of Certiorari to the
Colorado Supreme Court

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Justice Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

APPLICATION FOR EXTENSION OF TIME

Petitioner Robert Keith Ray, through undersigned counsel and pursuant to Supreme Court Rules 13.5, 21, 22, and 39, respectfully seeks a 60-day extension of time, to and including February 6, 2026, in which to file a petition for a writ of certiorari. In support of this request, counsel states as follows:

On June 23, 2025, the Colorado Supreme Court (CSC) issued its Opinion affirming Mr. Ray's convictions. (*See* Appendix 1.) On September 8, 2025, the Colorado Supreme Court issued its Order modifying its Opinion and denying rehearing. (*See* Appendix 2.)

Without an extension of time, the time to petition for a writ of certiorari in this Honorable Court would expire on December 8, 2025, which is the next day after the ninetieth day from the date of the CSC's order denying rehearing (the ninetieth day being a Sunday). *See* Sup. Ct. R. 13.1. This Application is being filed more than ten days before that due date. *See* Sup. Ct. R. 13.5.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

BACKGROUND

On June 20, 2005, Mr. Ray's co-defendant Sir Mario Owens killed Javad Marshall-Fields and his fiancée Vivian Wolfe in a drive-by shooting. Mr. Marshall-Fields had been a witness to the 2004 murder of Gregory Vann—which Owens would also be charged with and convicted of.

At the time Mr. Owens killed Mr. Marshall-Fields and Ms. Wolfe, Mr. Ray had been charged as an accessory after the fact to the Vann murder for driving the shooter (Mr. Owens, then unidentified) from a 2004 gathering where Mr. Vann was shot and killed and another two young men were shot and injured. Mr. Marshall-Fields had been one of two witnesses to identify Mr. Ray as the driver of the car in which Mr. Owens had fled. Mr. Marshall-Fields was the only witness who gave a clear description of Mr. Owens as the person who had shot and killed Mr. Vann.

The prosecution then separately charged Mr. Ray with the killing of Mr. Marshall-Fields and Ms. Wolfe and sought the death penalty. The prosecution's theory was that 19-year-old Mr. Ray had masterminded the killings to avoid the possibility of a short prison sentence as an accessory to the Vann murder. The premise of Mr. Ray's alleged involvement was extrapolated from his friendship with Mr. Owens and the temporal proximity of his trial to Mr. Owens' drive-by shooting of Mr. Marshall-Fields and Ms. Wolfe.

The capital trial against Mr. Ray involved almost two weeks' worth of evidence about the incident at which Mr. Vann was killed; essentially, the prosecution retried that entire case during the guilt phase for the homicides that are the subject of this appeal. The direct evidence tying Mr. Ray to the murders of Mr. Marshall-Fields and Ms. Wolfe was minimal and consisted primarily of incentivized testimony.

Ultimately, Mr. Ray was convicted and sentenced to death for the murder of Mr. Marshall-Fields and life imprisonment for the murder of Ms. Wolfe.

Then ensued years of proceedings under Colorado's Unitary Review Statutes (U.R.S.), which required that post-conviction proceedings occur prior to the direct appeal in cases in which a death sentence was imposed. The U.R.S. required the capital direct appeal to then bypass the Colorado Court of Appeals and be made directly to the CSC. In 2020, however, following prospective legislative abolition of the capital punishment in Colorado, Governor Jared Polis commuted Mr. Ray's death sentence to life without the possibility of parole, rendering the U.R.S. procedure inapplicable. Nevertheless, the CSC chose to retain jurisdiction over the direct appeal without it having been first heard by the Colorado Court of Appeals.

Mr. Ray's direct appeal raised seven claims, with multiple sub-issues. The claims included, *inter alia*, whether the introduction of almost two weeks' worth of evidence of uncharged acts violated his rights to due process

and a fair trial; whether the admission of vast amounts of victim-impact evidence in the guilt phase violated his rights to due process and a fair trial; whether the all-white prosecution team's repeated and persistent use of the N-word and other language reflecting and designed to stoke racial bias against Mr. Ray, a Black defendant, violated his right to a fair trial before an impartial jury; and whether a sentence of life without the possibility of parole for an offense committed by a 19-year-old violated the Eighth Amendment.

REASONS FOR GRANTING AN EXTENSION OF TIME

An extension of time is necessary to permit counsel to analyze issues for certiorari and present any claims in an adequate manner.

Undersigned counsel was appointed pursuant to Colo. Rev. Stat. § 21-2-103 to represent Petitioner in his direct appeal before the CSC. Following the denial of rehearing, undersigned counsel sought permission from Colorado's Office of the Alternate Defense Counsel (OADC) to continue to represent Petitioner in seeking certiorari review from this Court. During this time period, there was a change in leadership at OADC, the entity responsible for appointing counsel for indigent defendants in state criminal cases. Despite multiple attempts to obtain appointment, OADC did not approve counsel's continued representation of Petitioner in seeking certiorari review from this Court until November 25, 2025.

This is a legally and factually complex case. Undersigned counsel needs additional time to further analyze the claims presented on direct

appeal to determine which issues may be worthy of certiorari. Once that determination is made, there is a significant amount of information that will need to be conveyed within a petition so this Court will be able to meaningfully exercise its discretion as to whether to grant a writ of certiorari. Presenting these issues directly, clearly, and concisely—as required by Sup. Ct. R. 14—will be difficult and time-consuming.

Undersigned counsel is a partner in a two-partner firm. The undersigned's law partner, Eric Klein, was also counsel of record for Petitioner before the Colorado Supreme Court and will continue to assist before this Court. Both counsel have significant obligations in other cases that will prevent them from preparing an adequate Petition to this Court by the current deadline. Undersigned counsel has Opening Briefs due in state district courts in four prison disciplinary cases on December 2-3, and 8, 2025, and a Complaint due in a fifth such case on December 4, 2025. Undersigned counsel is also in the midst of discovery on a federal religious-rights case in the U.S. District Court for the District of Colorado and will be attending a deposition for this case on December 2, 2025, and a lengthy meeting on December 8, 2025, to prepare her client for her deposition on December 10, 2025. Mr. Klein is engaged as learned counsel in a federal case that is likely to be authorized as a death-penalty prosecution, and he has a meeting on December 9, 2025, with the U.S. Attorney whose office is handling that case. This meeting is about the U.S. Attorney's recommendation to the Department

of Justice and will require significant preparation. Mr. Klein also has a reply brief due on December 5, 2025, in the U.S. Court of Appeals for the Eighth Circuit in a case that had originally been prosecuted as a capital case and resulted in five consecutive life sentences. That case involved complex issues, including some that depend on a detailed parsing of facts to determine the sufficiency of the evidence under case law from this Court and the Eighth Circuit. The government filed a consolidated brief for Mr. Klein's client and a codefendant, which was significantly overlength at nearly 23,000 words.

Due to the delay in counsel's appointment, the significant amount of work that remains to be done to analyze and prepare a Petition, and the amount of time counsel need to dedicate to the other matters referenced herein, counsel will not be able to file Mr. Ray's Petition by December 8, 2025. Given these factors and undersigned counsel's upcoming out-of-state travel for the holidays (from December 21-28, 2025) and to welcome a new baby into the family (from January 3-11, 2026), Mr. Ray respectfully requests an extension of 60 days, as permitted by Sup. Ct. R. 13.5.

Counsel has sought the position of opposing counsel at the Colorado Attorney General's Office, but counsel has not heard back from them as of this filing.

WHEREFORE, the Petitioner, Robert Keith Ray, respectfully requests that an order be entered extending his time in which to petition for writ of certiorari by 60 days, to and including February 6, 2025.

Respectfully submitted,

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Appendix 1:

Opinion of the Colorado Supreme Court
in *People v. Robert Keith Ray*,
2025 CO 42, 575 P.3d 400
(issued June 23, 2025)

575 P.3d 400
Supreme Court of Colorado.

The PEOPLE of the State of Colorado, Plaintiff-Appellee,
v.
Robert Keith RAY, Defendant-Appellant.

Supreme Court Case No. 10SA157
|
June 23, 2025
|
As Modified on Denial of Rehearing September 8, 2025

Synopsis

Background: Defendant was convicted in the District Court, Arapahoe County, Gerald J. Rafferty, J., of two counts of first-degree murder, conspiracy to commit murder, solicitation to commit murder, intimidation of a witness, retaliation against a witness, and related offenses, stemming from drive-by shooting that killed witness to prior shooting and his fiancée, and was sentenced to death for witness's murder, which was commuted to life without the possibility of parole (LWOP) after death penalty was abolished, and LWOP for fiancée's murder. Defendant appealed.

Holdings: The Supreme Court, Hood, J., held that:

error in admitting evidence of prior shooting and of defendant's alleged threats against individuals connected to shooting as res gestae evidence was harmless;

statements made by murder victim related to confrontation with defendant were admissible under excited utterance exception to hearsay rule;

victim's out-of-court statements to his sister about prior shooting were admissible under state of mind exception to hearsay rule;

neither testimony from witness whose brother was killed in prior shooting nor photographs of victim's injuries amounted to victim-impact evidence;

error in admitting testimony about lives of murder victims and in-life photographs of victims was harmless;

even if prosecutor committed misconduct by improperly injecting racial bias into proceedings, misconduct did not amount to plain error;

trial court's errors did not substantially prejudice defendant or undermine fairness of trial, precluding reversal under cumulative error doctrine; and

sentence to LWOP was not facially unconstitutional or unconstitutional as applied to defendant.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection; Post-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

Appeal from the District Court, Arapahoe County District Court Case No. 06CR697, Honorable Gerald J. Rafferty, Judge

Attorneys and Law Firms

Attorneys for Plaintiff-Appellee: Philip J. Weiser, Attorney General, Katharine Gillespie, Senior Assistant Attorney General, Carmen Moraleda, Senior Assistant Attorney General, Denver, Colorado

Attorneys for Defendant-Appellant: Elisabeth Hunt White, Boulder, Colorado, Johnson & Klein, PLLC, Gail K. Johnson, Eric K. Klein, Boulder, Colorado

En Banc
JUSTICE HOOD delivered the Opinion of the Court, in which CHIEF JUSTICE MÁRQUEZ, JUSTICE BOATRIGHT, JUSTICE GABRIEL, JUSTICE HART, and JUSTICE BERKENKOTTER joined.

Opinion

JUSTICE HOOD delivered the Opinion of the Court.

***415** ¶1 Javad Marshall-Fields and his fiancée, Vivian Wolfe, were killed in a drive-by shooting ("the Dayton Street shooting"), just eight ***416** days before Marshall-Fields was expected to testify against Robert Keith Ray. Marshall-Fields had identified Ray as the getaway driver in another shooting at Lowry Park the year before ("the Lowry Park shooting").

¶2 Ray was eventually charged with numerous offenses related to the Dayton Street shooting, and a jury found him guilty of nearly all of them. The district court entered the judgment of conviction, and following a separate sentencing trial, sentenced Ray to death. Pursuant to the unitary review process then in effect, Ray appealed his convictions and sentences related to the Dayton Street shooting directly to this court. *See* §§ 16-12-201 to -210, C.R.S. (2024); Crim. P. 32.2. This opinion addresses that appeal.

¶3 The Colorado General Assembly subsequently abolished the death penalty, and in March 2020, Governor Jared Polis commuted Ray's capital sentence to a sentence of life without the possibility of parole ("LWOP"). Although we determined that the unitary review process no longer applied in this case, we chose to retain jurisdiction over the appeal. And, having reviewed Ray's challenges to his convictions and LWOP sentence, we now affirm.

I. Facts and Procedural History

¶4 Ray was charged with twenty-one counts related to the Dayton Street shooting, which included two counts of first degree murder for the deliberate killing of Marshall-Fields and Wolfe. [1] The prosecution's theory of the case was that Ray had conspired with others to prevent witnesses of the Lowry Park shooting from testifying in that trial, and that conspiracy culminated in the murders of Marshall-Fields and Wolfe. To understand the full context of Ray's trial for the Dayton Street shooting, we must therefore begin with the Lowry Park shooting.

1 Ray was also charged with two counts of second degree murder, naming Marshall-Fields and Wolfe as victims; one count of conspiracy to commit murder; three counts of solicitation to commit murder; two counts of aggravated intimidation of a witness and two counts of retaliation against a witness, naming Marshall-Fields and Wolfe as victims; three counts of intimidating a witness, naming Marshall-Fields, Teresa Riley, and LaToya Sailor Ray as victims; one count of unlawful distribution of a controlled substance; one count of bribing a witness, naming Marshall-Fields as the victim; one count of violating bail bond conditions; one count of violating a restraining order; and two crime-of-violence sentence enhancers.

A. The Lowry Park Shooting

¶5 On July 4, 2004, Marshall-Fields and Gregory Vann hosted a barbecue and rap battle at Lowry Park. The event was well attended, and a large crowd gathered at the park throughout the afternoon and evening. As the event wound down, Marshall-Fields and Vann noticed an altercation in a parking lot adjacent to the park and went over to investigate. During the ensuing confrontation, Ray's friend, Sir Mario Owens, shot and killed Vann, and Ray shot Marshall-Fields and Vann's brother, Elvin Bell. Ray and Owens then fled in Ray's Suburban.

¶6 Ray and Owens sought to conceal their involvement in these shootings. With the help of Ray's wife, LaToya Sailor Ray ("Sailor"), and others, Ray and Owens disposed of certain evidence that might have connected them to the shootings (e.g., the Suburban, guns, and clothes). Owens also cut off his braids to change his appearance after he learned that a witness had described Vann's shooter as having braids. The two men spent the next several days in hiding.

¶7 Meanwhile, the police attempted to identify the Lowry Park shooters. With the help of several witnesses, the police soon identified Ray as the driver of the Suburban and arrested him as an accessory to the Lowry Park shooting. While awaiting his trial on bond, Ray reviewed a discovery packet with Owens and Sailor. From this discovery packet, they learned that two witnesses—Marshall-Fields and Askari Martin—had identified Ray as the getaway driver from the Lowry Park shooting. There was nothing in the packet to indicate that the police had identified the individual who shot Vann. Ray, Owens, and Sailor then began referring to Marshall-Fields and Martin as "snitches" and made comments to the effect that "snitches do not live long" and "snitches die."

¶8 Around this same time, Ray told his friend Jamar Johnson to offer $10,000 to ***417** both Marshall-Fields and Martin in exchange for them not testifying. Ray also told Johnson that if the bribes didn't work, he'd pay Johnson $10,000 to kill them both. A few months later, Ray again offered Johnson $10,000 to bribe or kill just Marshall-Fields because by then, Martin had approached Ray and told him he didn't want to "snitch" and that, although the prosecution was trying to force him, he wasn't going to testify. Ray also told Sailor he wasn't worried about Martin testifying anymore. Ray continued to worry, however, about Marshall-Fields's testimony, which would place him behind the wheel of the Suburban at the Lowry Park shooting.

¶9 On June 19, 2005—eight days before Ray's Lowry Park trial—Sailor went to a Father's Day barbecue at a park. Ray called and asked if she'd seen Marshall-Fields at the park. She said she had, and Ray and Johnson arrived soon after. They saw Marshall-Fields and watched him leave the park. Ray told Johnson that Marshall-Fields was still planning to testify and that he would "take things into [his] own hands."

¶10 Later that same day, Ray and Owens were out with their friends, Parish Carter and Checados Todd, when they saw Marshall-Fields's car at Gibby's, a local sports bar. Carter went into the bar and told Marshall-Fields, "They're looking for you in the street, homie." The next day, June 20, 2005, Marshall-Fields and Wolfe were killed in a drive-by shooting on Dayton Street in Aurora.

¶11 Despite the Dayton Street double murder, Ray's Lowry Park trial proceeded as scheduled. In November 2006, the jury acquitted Ray of Vann's murder and the attempted murder of Jeremy Green (another bystander at the Lowry Park shooting), but it convicted him of attempted first degree murder and first degree assault of Bell and Marshall-Fields, and as an accessory to Vann's first degree murder. The court sentenced Ray to 108 years imprisonment for his Lowry Park crimes.

¶12 After the Dayton Street shooting, witnesses finally identified Owens as the person who had shot and killed Vann at Lowry Park. As a result, Owens was charged and ultimately convicted of numerous offenses related to the Lowry Park shooting, including Vann's murder.

B. The Dayton Street Shooting

¶13 Meanwhile, the investigation of the Dayton Street shooting was underway. Police officers had identified Owens as the Dayton Street shooter. Ray, however, had an alibi for that shooting: He stopped by a barbecue Sailor was hosting at her house and then went with her neighbor to a liquor store. Still, a grand jury indicted both Ray and Owens for the Dayton Street shooting. The men were tried separately.

¶14 At Ray's trial, the prosecution's theory of the case was that, after Ray's attempts to intimidate and bribe Marshall-Fields to prevent him from testifying in the Lowry Park trial failed, Ray conspired with Owens and Carter to kill Marshall-Fields. The prosecution argued that Ray wanted to avoid going to prison for the Lowry Park shooting because he was running a lucrative illegal drug business that he didn't want to lose.

¶15 After lengthy trial proceedings related to the Dayton Street shooting, a jury convicted Ray of all charges except for three witness intimidation counts. The jury then found that a capital sentence was appropriate for Ray's role in Marshall-Fields's murder. The district court sentenced Ray to consecutive sentences of (1) death for murdering Marshall-Fields, (2) LWOP for murdering Wolfe, and (3) an aggregate 155 years in prison on the remaining counts.

II. Analysis

¶16 Ray now appeals his Dayton Street convictions and the resulting LWOP sentence to this court. He contends that the trial court made numerous evidentiary errors, including admitting a large amount of uncharged misconduct evidence under the now-defunct res gestae doctrine. He also challenges the court's admission of, among other things, witness- and victim-fear evidence, victim-impact evidence, and positive evidence of Marshall-Fields's and Wolfe's character. Ray further alleges that the prosecution improperly appealed to the jurors' sympathies and biases, improperly referenced the grand jury indictment, ***418** and undermined the presumption of innocence. He argues that these errors, either in isolation or cumulatively, warrant reversal. Although we agree with Ray that the trial court made several evidentiary errors, we ultimately conclude that they don't warrant reversal.

¶17 We also reject Ray's contention that the district court erred by refusing to allow Ray to subpoena jurors to testify about alleged juror misconduct during deliberations. Finally, we reject Ray's claim that his LWOP sentence is unconstitutional.

¶18 We address each of Ray's contentions in turn, discussing additional procedural or background facts as needed.

A. Evidentiary Issues

¶19 We start by briefly identifying the applicable standards of review and general relevancy principles. Trial courts have broad discretion to determine the admissibility of evidence, and we review those rulings for an abuse of discretion. *Davis v. People*, 2013 CO 57, ¶ 13, 310 P.3d 58, 61–62. A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or if it misapplies the law. *People v. Montoya*, 2024 CO 20, ¶ 47, 546 P.3d 605, 616.

¶20 When an error is preserved by a contemporaneous objection, we generally consider whether the error warrants reversal under a harmless error standard. *Id.* An error is harmless if it doesn't substantially influence the jury's verdict or affect the fairness of the trial proceedings. *Id.*; *see also* Crim. P. 52(a). To analyze such harm, we may consider "factors like evidentiary cross-admissibility, the appropriateness of jury instructions, and whether there is any indication that the jury blended the issues in considering their verdict." *Washington v. People*, 2024 CO 26, ¶ 23, 547 P.3d 1087, 1092. If the error is unpreserved, however, we review for plain error. *Hagos v. People*, 2012 CO 63, ¶ 14, 288 P.3d 116, 120; *see also* Crim. P. 52(b). Under this standard,

we will reverse only if the error is obvious, substantial, and so undermined the trial's fundamental fairness as to cast serious doubt on the reliability of the conviction. *Hagos*, ¶ 14, 288 P.3d at 120.

¶21 Generally, all relevant evidence is admissible. CRE 402. " 'Relevant evidence' means evidence having 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. However, even relevant evidence may be excluded if the risk of unfair prejudice substantially outweighs its probative value. CRE 403.

¶22 With these standards and rules in mind, we unpack the law governing the admission of uncharged misconduct evidence and apply it to Ray's contentions of error.

1. Uncharged Misconduct Evidence

¶23 On appeal, Ray asserts that the trial court erred by admitting "significant" evidence of uncharged misconduct. He specifically challenges the court's admission of evidence related to (1) the Lowry Park shooting; (2) threats Ray allegedly made against Brandi Taylor (his brother's girlfriend) and Askari Martin (one of the Lowry Park witnesses who had identified Ray as the getaway driver); (3) an altercation with Sailor in which she suffered a black eye; (4) threats Ray allegedly made against Lowry Park witness Teresa Riley's son; and (5) Ray's alleged drug dealing before 2005. (The drug offenses charged in the current case allegedly occurred between January and June 2005.)

¶24 The trial court found that the Lowry Park evidence was admissible as res gestae but ruled that any such evidence admitted at trial must be accompanied by a limiting instruction.[2] The court also found that evidence of the threats against Martin and Taylor[3] ***419** and the incident involving Sailor's black eye was admissible as res gestae.

2 Many of the pretrial motions, hearings, and orders addressed Owens, Ray, and Carter at the same time. However, because Owens's trial was scheduled to go first, the court often addressed the issues as to Owens and then later either adopted or incorporated those rulings as to the other defendants.

3 It is the parties' duty to identify where in the record the ruling or order they seek to have us review is located. C.A.R. 28(a)(7). But the parties failed to identify where the trial court provided its reason for admitting the evidence containing the threats against Taylor, and although we aren't required to scour the record for such information, we have looked and haven't found a clear ruling. So, we will review the court's admission of these threats as if they were admitted under the res gestae doctrine. *See People v. Notyce*, 2014 COA 52, ¶ 4, 328 P.3d 302, 303.

¶25 The trial court admitted evidence related to the threats against Riley's son as impeachment evidence. And lastly, the court admitted evidence related to Ray's alleged drug dealing before 2005 under CRE 404(b).

a. Res Gestae Evidence

¶26 To understand the common law res gestae doctrine, it helps to first examine the modern rule governing the admissibility of uncharged misconduct evidence: CRE 404(b). Rule 404(b)(1) provides that evidence of other crimes, wrongs, or acts isn't "admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." But this evidence may be admissible if offered for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." CRE 404(b)(2). The prosecution must provide pretrial written notice of its intent to introduce such evidence, specifying "the permitted purpose for which the prosecution intends to offer the evidence and the reasons supporting that purpose." *People v. Owens*, 2024 CO 10, ¶ 111, 544 P.3d 1202, 1227; *see also* CRE 404(b)(3). The court then determines whether the evidence is admissible by applying the four-prong test

outlined in *People v. Spoto*, 795 P.2d 1314, 1318–19 (Colo. 1990). If the court determines the uncharged misconduct evidence is admissible, and if requested by the defendant, the court must "contemporaneously instruct the jurors of the limited purpose for which the evidence may be considered." *Rojas v. People*, 2022 CO 8, ¶ 27, 504 P.3d 296, 305; *see also* CRE 105.

¶27 At the time of Ray's trial, Colorado also embraced the longstanding res gestae doctrine as an alternate theory of admissibility for uncharged misconduct evidence. Under this doctrine, such evidence was admissible without adhering to Rule 404(b)'s strictures if the evidence was "incidental to a main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of it, and without a knowledge of which the main fact might not be properly understood." *Rojas*, ¶ 18, 504 P.3d at 302 (quoting *Denver City Tramway Co. v. Brumley*, 116 P. 1051, 1052 (Colo. 1911)).

¶28 While Ray's appeal was pending, we abolished the res gestae doctrine. *Id.* at ¶¶ 1–4, 504 P.3d at 300–01. In *Rojas*, we concluded that this amorphous and unpredictable doctrine had become "a breeding ground for confusion, inconsistency, and unfairness." ¶ 3, 504 P.3d at 301. The Colorado Rules of Evidence, we reasoned, suffice to evaluate the admissibility of uncharged misconduct evidence. *Id.* at ¶¶ 39–41, 504 P.3d at 307. While we can't fault the trial court for failing to foresee this development, "we generally apply the law in effect at the time of appeal," and so we must conclude that the trial court abused its discretion by admitting any evidence under this now-abolished doctrine. *Owens*, ¶ 112, 544 P.3d at 1228.

¶29 But just because the uncharged misconduct evidence wasn't admissible as res gestae doesn't mean it wasn't admissible at all. And even if some of this evidence was inadmissible, the court's error in admitting it may have been harmless. We must consider both possibilities in deciding whether the trial court's admission of res gestae evidence justifies reversal. *See People v. Eppens*, 979 P.2d 14, 22 (Colo. 1999) (explaining that an appellate court may affirm "on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court").

¶30 So, we begin by considering whether Rule 404(b) could have provided an alternative basis for admission. In *Rojas*, we explained that, when "evaluating whether uncharged misconduct evidence triggers Rule 404(b), a trial court must first determine if the evidence is intrinsic or extrinsic to the charged offense." ¶ 52, 504 P.3d at 309. Intrinsic acts are limited to "(1) those that directly prove the charged offense and (2) ***420** those that occur contemporaneously with the charged offense and facilitate the commission of it." *Id.* at ¶ 44, 504 P.3d at 308. All other acts are extrinsic.

¶31 Evidence of intrinsic acts is exempt from Rule 404(b)—because it is essentially evidence of *charged* misconduct—and courts should consider its admissibility under the general rules of relevance and prejudice. *Id.* at ¶ 52, 504 P.3d at 309; *see also* CRE 401–403. The same goes for evidence of extrinsic acts that don't suggest the defendant's bad character. *Rojas*, ¶ 52, 504 P.3d at 309. If, however, the extrinsic-acts evidence suggests that the defendant has a bad character and that he acted in conformity with that bad character in this instance, it is admissible "only as provided by Rule 404(b) and after a *Spoto* analysis." *Id.*

¶32 Under *Spoto*, courts must consider whether the evidence (1) relates to a material fact and (2) is logically relevant (3) independent of the prohibited inference that the defendant has a bad character and acted in conformity with that character in this instance, and (4) whether the risk of unfair prejudice substantially outweighs the evidence's probative value. 795 P.2d at 1318–19; *see also Owens*, ¶ 110, 544 P.3d at 1227.

¶33 A material fact is one "that is of consequence to the determination of the action." *Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007) (quoting CRE 401). Material facts include both (1) "ultimate facts," such as the elements of the offense, and (2) "intermediate facts," meaning facts that are probative of ultimate facts. *Yusem v. People*, 210 P.3d 458, 464 (Colo. 2009); *accord People v. Rath*, 44 P.3d 1033, 1040 (Colo. 2002). In considering whether uncharged misconduct evidence is relevant to a material fact, we consider "not the substance of the prior act evidence, but the fact in the case for which the evidence is offered to prove." *Yusem*, 210 P.3d at 464.

¶34 Once the court has identified a material fact, it must determine if the uncharged misconduct evidence is logically relevant to that fact. In other words, does the uncharged misconduct evidence have some tendency to make the existence of that material

fact more or less probable than it would be without the evidence? *See Owens*, ¶ 110, 544 P.3d at 1227. If the answer is yes, the court continues to *Spoto*'s third prong.

¶35 "The third prong of the *Spoto* test does not demand the absence of the [prohibited] inference but merely requires that the proffered evidence be logically relevant *independent* of that inference." *People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994) (emphasis added); *see also Rath*, 44 P.3d at 1038 ("[T]he evidence must be probative for some logical reason other than 'that the defendant committed the crime charged because of the likelihood that he acted in conformity with his bad character.' " (quoting *Spoto*, 795 P.2d at 1318)). In other words, "the evidence cannot be relevant *only* to show a propensity to commit crimes." *People v. Cross*, 2023 COA 24, ¶ 21, 531 P.3d 444, 449 (quoting *People v. Denhartog*, 2019 COA 23, ¶ 42, 452 P.3d 148, 157).

¶36 In considering *Spoto*'s fourth prong, "[u]nfair prejudice occurs ... if otherwise admissible evidence has 'an undue tendency to suggest a decision [made] on an improper basis,' which is 'commonly but not necessarily an emotional one, such as sympathy, hatred, contempt, retribution, or horror.' " *People v. Cousins*, 181 P.3d 365, 370 (Colo. App. 2007) (second alteration in original) (quoting *People v. Dist. Ct.*, 785 P.2d 141, 147 (Colo. 1990)). On appeal, we "must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected." *Nicholls v. People*, 2017 CO 71, ¶ 56, 396 P.3d 675, 687.

¶37 We now apply these principles to the trial court's rulings.

i. Lowry Park Evidence

¶38 Ray preserved his objection to the admission of the Lowry Park evidence through pretrial motions and hearings. Thus, we review the trial court's erroneous admission of this evidence as res gestae for harmless error. In doing so, we consider whether the Lowry Park evidence would have been admissible under Rule 404(b). Thus, we begin with *Rojas*'s threshold intrinsic–extrinsic inquiry ***421** and then turn to *Spoto*'s four-part test as necessary to evaluate extrinsic evidence.

¶39 As we observed in *Owens*, "[t]he Lowry Park shootings did not directly prove, nor did they occur contemporaneously with, the Dayton Street shooting[ ]," so the Lowry Park evidence was extrinsic to the Dayton Street charges. ¶ 115, 544 P.3d at 1228; *see also Rojas*, ¶ 52, 504 P.3d at 309. And because the Lowry Park evidence could impermissibly suggest that Ray had a bad character and acted in conformity with that character in this instance (i.e., he shot someone before, so he likely orchestrated the Dayton Street shooting), Rule 404(b) and *Spoto* applied. *See Rojas*, ¶ 52, 504 P.3d at 309.

¶40 So, we must consider whether the Lowry Park evidence related to a material fact in the Dayton Street case. The prosecution argued that this evidence was relevant "to establish the identities and roles of Ray and Owens in the [Dayton Street] shooting as well as their guilty knowledge and [to] form the basis of their motive to kill Marshall-Fields," and it was therefore admissible to show that "[w]hat would otherwise seem like a completely random drive-by shooting actually has a context where Mr. Owens has a relationship with Mr. Javad Marshall-Fields *because of* the July 4 murder of Gregory Vann." (Emphasis added.)

¶41 " '[M]otive is always relevant' to establish whether the defendant committed the charged act and why, and may also explain otherwise unexplainable behavior." *People v. Delsordo*, 2014 COA 174, ¶ 14, 411 P.3d 864, 867 (quoting *Wagman v. Knorr*, 195 P. 1034, 1035 (Colo. 1921)). And Rule 404(b) expressly provides that uncharged misconduct evidence may be admissible to prove motive. Thus, because the Lowry Park evidence was relevant to show motive for the Dayton Street shooting, it was logically relevant to a material fact. *See id.* at ¶ 17, 411 P.3d at 868 (recognizing that uncharged misconduct evidence may be relevant if it tends to show that the defendant committed a second crime to avoid capture for the initial crime).

¶42 This logical relevance was also independent of any prohibited propensity inference. The prohibited inference was that, because Ray had been involved in at least attempting to kill people before, he was probably involved this time too. But the Lowry Park evidence's relevance was independent of that inference because it showed how the Lowry Park and Dayton Street

shootings were connected and explained how the first incident provided the motive for the second. *See Rath*, 44 P.3d at 1040 (explaining that motive, while not itself an ultimate fact, is among the "well-accepted methods of proving the ultimate facts necessary to establish the commission of a crime, without reliance upon an impermissible inference from bad character").

¶43 Lastly, we must balance the probative value of the Lowry Park evidence against any unfair prejudice it could have introduced. This is the trickiest step on these facts. There's no doubt that the Lowry Park evidence was highly probative. It established a motive for the Dayton Street shooting and connected Ray to Dayton Street when there would otherwise have been no logical connection. But it also carried a substantial risk that the jurors would confuse the issues and unfairly assess Ray's guilt based on the forbidden propensity inference (i.e., he's a violent man who commits violent crimes) or by conflating the strength of the direct evidence from the Lowry Park shooting with the more circumstantial evidence from the Dayton Street shooting.

¶44 This final step of the *Spoto* analysis as to the Lowry Park evidence is further complicated by the sheer volume of evidence the trial court admitted. That evidence included about two weeks of testimony by dozens of witnesses, disturbing photographs and videos, and numerous 911 calls. The deluge of Lowry Park evidence heightened the potential for the jury to simply infer that Ray was a violent person with the propensity to commit violent crimes, rather than focus on the evidence intrinsic to the Dayton Street shooting. The evidence from the Lowry Park shooting that was necessary to establish Ray's motive for the Dayton Street shooting could have been introduced in perhaps two ***422** days, rather than through a multitude of witnesses over two weeks (of a four-week trial).

¶45 Nonetheless, even though we might have made a different decision than the trial court about how much evidence from the Lowry Park shooting to admit under Rule 404(b), we conclude that any evidence improperly admitted didn't substantially influence the jury's verdict or render the trial unfair. *See Owens*, ¶ 117, 544 P.3d at 1228–29; *see also Zapata v. People*, 2018 CO 82, ¶ 67, 428 P.3d 517, 531.

¶46 We reach this conclusion for several reasons. *First*, Ray received ample notice and an opportunity to be heard on this issue. Before trial, the parties extensively debated the admissibility of the Lowry Park evidence, and at trial, Ray was able to cross-examine all the relevant witnesses and to record objections in front of the jury.

¶47 *Second*, the court read a limiting instruction to the jurors each time Lowry Park evidence was discussed or admitted, informing them that the evidence was "offered for the purpose of establishing background, motive, relationship between individuals and identification of the Defendant" and reminding them that they could "consider it only for those purposes" because Ray was "entitled to be tried for the crimes charged in this case"—which didn't include any charges related to the Lowry Park shooting—"and no other." We assume the jury understood and followed this instruction. *People v. Kembel*, 2023 CO 5, ¶ 50, 524 P.3d 18, 28. So, even though the evidence wasn't admitted under Rule 404(b), the trial court essentially provided most of the procedural protections required by that rule.

¶48 *Finally*, to the extent that some of the Lowry Park evidence that the court admitted as res gestae wouldn't have been admissible under Rule 404(b), it was mostly cumulative. The court could have properly admitted evidence establishing what happened at Lowry Park. That evidence—whether outlined over two days or proved at a much more granular level over two weeks—was always going to be disturbing and potentially inflammatory. With that in mind, we conclude that any incremental *unfair* prejudice that might have resulted from the cumulative evidence of the Lowry Park shooting was not enough to substantially influence the verdict or render the Dayton Street trial unfair overall. In short, the trial court's erroneous decision to admit evidence of the Lowry Park shooting as res gestae was harmless, despite our misgivings about the quantity of evidence it chose to admit.

ii. Threats to Brandi Taylor

¶49 In opening statements, the prosecutor explained that the investigation into the Lowry Park shooting had run into a "wall of silence"—for more than a year, no one was willing to talk to the investigators. Things changed when Brandi Taylor (Ray's brother's girlfriend) disclosed what she knew.

¶50 The prosecutor explained that the detective investigating the Dayton Street shooting had obtained a recorded phone call between Ray and his brother, Dumas Brown, in which Ray said that Taylor had been talking too much on the street and was calling Ray a murderer. Ray also told Brown that he had threatened to kill Taylor. The prosecutor played portions of this recorded phone call for the jury. He then told the jurors that it was only after the detective played this call for Taylor that Taylor gave the investigators crucial information about the Lowry Park shooting and the individuals involved, which ultimately led investigators to the evidence needed to charge Ray in this case.

¶51 The phone call was played twice more at trial: once during Taylor's testimony and then again during Sailor's (Ray's wife) testimony. Ray objected both times.

¶52 The threats against Taylor were extrinsic to the charged offenses: they had nothing to do with Taylor potentially testifying against Ray in his Lowry Park trial or with the Dayton Street shooting. But because they could suggest that Ray had a bad character—that is, that he was the sort of person who threatened others—we consider their admissibility under Rule 404(b) and *Spoto*.

¶53 Despite the prosecutor's explanation of the call's significance during the ***423** opening statement, the prosecution failed to explicitly make that connection during either witness's testimony. Still, the call and the threats it contained provided context for why Taylor was suddenly willing to speak with the police and how investigators came to suspect Ray in Marshall-Fields's and Wolfe's murders. And the statements Taylor made after hearing those threats, about hiding Ray's Suburban in her garage after the Lowry Park shooting, tended to show that Ray had consistently tried to evade responsibility for his involvement in the Lowry Park shooting. Therefore, this evidence was logically relevant to one or more material facts (identity and motive) because it made it more likely that Ray was involved in the Dayton Street shooting.

¶54 The evidence also, however, implicated the prohibited propensity inference that, because Ray threatened to kill Taylor, he likely made similar threats to other potential witnesses. And because the prosecution didn't connect the threats in the phone call to the subsequent investigation, other than during the opening statement, the jurors were left to make their own inferences about the evidence. Under these circumstances, it is debatable whether the relevance of these threats was truly independent of the prohibited propensity inference.

¶55 Moreover, Ray wasn't charged with intimidating or threatening Taylor; the threats weren't related to her (or anyone else) being a witness; Taylor testified that she didn't take Ray's threats seriously; and no limiting instruction was given when the call was introduced. So, the probative value of this evidence was substantially outweighed by the risk that Ray would be unfairly prejudiced by it because of the likelihood that the jurors would use the prohibited propensity inference to convict him. We conclude, therefore, that this evidence wasn't admissible under Rule 404(b).

¶56 But the prosecutor's rebuttal closing argument mitigated the potential prejudice. As she summarized various witnesses' testimony and the evidence that had been presented at trial, she said the following:

> Brandi Taylor is a bit of a distraction in this case.... [Y]eah, she's important to the investigation. She's not overwhelmingly important to determining the guilt of Mr. Ray in this case. She's important to the investigation because for the first time law enforcement got a chink in that wall of silence.

¶57 Although a closing argument isn't evidence, this comment provided the missing context and helped to minimize the potential prejudice resulting from this evidence. Further, the jury rendered a split verdict—it found Ray guilty of intimidating Marshall-Fields but acquitted him of intimidating Riley and Sailor—which indicates that the jurors were able to evaluate witness credibility and thoughtfully weigh the evidence and that they weren't unduly persuaded by any propensity inference they may have made. *See Washington*, ¶¶ 27, 31, 35–36, 547 P.3d at 1093–94. Accordingly, the error was harmless.

iii. Threats to Askari Martin

¶58 Ray objected in pretrial motions and hearings to the admissibility of evidence showing that he had threatened Martin (a Lowry Park witness who had identified Ray as the getaway driver) and had solicited anyone to kill Martin. He also maintained continuing objections to this evidence at trial. So, we review the trial court's erroneous admission of this evidence as res gestae for harmlessness, first addressing whether it was otherwise admissible.

¶59 Ray was charged with conspiring with Owens and Carter to commit murder and with soliciting Owens, Carter, and Jamar Johnson to commit murder. The prosecution argued that evidence related to threats Ray allegedly made against Martin (e.g., calling Martin a snitch and saying things to the effect that snitches should die) was relevant to show motive and to show the scope, nature, and duration of the conspiracy between Ray and his friends to eliminate Lowry Park witnesses. Thus, this evidence was intrinsic because it was direct proof of the charges in this case, and its admissibility was governed by the general rules of relevance and prejudice. *Rojas*, ¶ 44, 504 P.3d at 308.

***424** ¶60 The threats against Martin were relevant because they made it more likely that Ray committed the offenses of conspiracy and solicitation. *See* CRE 401. Similarly, given that the evidence was direct proof of some of the charges, was probative of motive, and wasn't *unfairly* prejudicial, we conclude that the probative value was not substantially outweighed by the risk of unfair prejudice. *See Rath*, 44 P.3d at 1043 (explaining that unfair prejudice "refers only to 'an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis' and does not mean prejudice that results from the legitimate probative force of the evidence" (quoting *People v. Gibbens*, 905 P.2d 604, 608 (Colo. 1995))).

¶61 Therefore, we conclude that the trial court's error in admitting this evidence as res gestae was harmless because it was otherwise admissible, relevant evidence.

iv. Sailor's Black Eye

¶62 Before trial, the prosecution sought to introduce evidence that Sailor (Ray's wife) and Ray had gotten into an argument a few days before the Dayton Street shooting, which resulted in Sailor having a black eye. The prosecution argued the evidence was relevant because it would (1) help Sailor determine a timeline for the weekend of the Dayton Street shooting (e.g., she attended one of Ray's pretrial hearings in the Lowry Park case that Friday, so the hearing was before this fight because she wouldn't have gone to the courthouse with a black eye) and (2) show Ray's state of mind that same weekend, which supported the prosecution's theory that Ray wasn't calmly awaiting justice for the Lowry Park shooting but was nervous and actively plotting to avoid conviction.

¶63 Defense counsel objected, arguing that if the only relevance of Sailor's black eye was "to tie time frames," then the fact of Sailor's black eye could be admitted without any evidence about how she got it. Moreover, even accepting that Sailor's black eye had some probative value as to Ray's state of mind the weekend of the Dayton Street shooting, defense counsel argued it wasn't enough to overcome the unfair prejudice.

¶64 The court admitted the black-eye evidence as res gestae of a timeline for the weekend of the Dayton Street shooting and to explain Sailor and Ray's estrangement that same weekend.

¶65 Because Ray objected to admission of this evidence, the issue is preserved, and we review the court's error in admitting this evidence as res gestae for harmlessness. The evidence that Sailor got a black eye during an argument with Ray the weekend of the Dayton Street shooting was extrinsic to the charges in this case. It also suggested bad character; that is, that Ray was a domestic abuser. So, we consider admissibility under Rule 404(b) and *Spoto*.

¶66 Remember, the prosecution argued that Ray masterminded the Dayton Street shooting because he wanted to avoid prison for his role in the Lowry Park shooting. So, this evidence had some tendency to show that Ray used his estrangement from Sailor as a means to establish an alibi—he had receipts and likely video surveillance from the store where he bought her flowers, several people then saw him at Sailor's party trying to make amends, and he spoke to her neighbor for a while and accompanied the neighbor to a liquor store. Thus, Ray's state of mind the weekend before his Lowry Park trial was logically relevant to material facts (intent, preparation, plan) concerning the Dayton Street conspiracy. And this logical relevance was independent of the prohibited bad-character inference.

¶67 In weighing the evidence's probative value against the risk of unfair prejudice, however, we agree with defense counsel that the probative value of the black-eye evidence was substantially outweighed by the danger of unfair prejudice. The prosecution could have established the same proof by having Sailor testify that she had a black eye without stating how she got it or by having witnesses testify that Ray and Sailor were upset with each other that weekend without even mentioning Sailor's black eye. The fact of the black eye didn't prove that Ray used the disagreement to further the conspiracy; instead, it served only to further portray Ray as a generally violent person. *See Martin v. People*, 738 P.2d 789, 794–95 (Colo. 1987).

***425** ¶68 Therefore, we conclude that the trial court erred by admitting evidence about Sailor's black eye and how she got it, and we now consider whether the error warrants reversal.

¶69 The court instructed the jurors that they were to consider the black-eye evidence only "for the purpose of establishing a time line [sic] and a context for the status of [Ray and Sailor's] relationship between June 17th and June 21st, 2005." Sailor then explained that she and Ray had gotten into a fight, and during the fight, she fell and hit her head on the bed, which gave her a black eye. She denied that Ray had hit her.

¶70 Considering the total length of Sailor's testimony, which spanned one full day and two partial days of trial, the questioning about her black eye was relatively brief and peripheral. In the broader context of the four-week trial, this black-eye evidence was even less significant. Furthermore, we presume the jurors understood and followed the court's limiting instruction. *See Kembel*, ¶ 50, 524 P.3d at 28. Consequently, the trial court's error in admitting this evidence was harmless. *See People v. Herdman*, 2012 COA 89, ¶¶ 61–62, 310 P.3d 170, 182; *see also Martin*, 738 P.2d at 795.

b. Teresa Riley's Inconsistent Statements About Threats to Her Son

¶71 Having addressed Ray's challenges to the trial court's admission of uncharged misconduct evidence as res gestae, we now consider Ray's challenges to other uncharged misconduct evidence that the court admitted for other purposes. We begin with threats Ray allegedly made to Lowry Park witness Teresa Riley's son, Mercedes.

¶72 During direct examination, the prosecutor asked Riley whether she had told detectives that Ray had threatened Mercedes:

> Q: My question to you was then you deny telling detectives of the Aurora Police Department that Mercedes had been threatened in connection with his failure to return La[T]oya Ray's car?
>
> A: No, no. And what do my kids have to do with this? They not here on trial. What do my son have to do with this?
>
> Q: Well, you had indicated that your son had been threatened?

A: I never—[Ray] never threatened my son. How many times do I have to say this. Robert Ray has never threatened me or my kids.

....

Q: Do you deny telling detectives back in September of 2005 that your son had been threatened by Robert Ray in connection with the failure to return La[T]oya Sailor's car?

A: I'm fixing to laugh at this because this is crazy. I'm tired of repeating myself. He never threatened my son over anything, our car, a cigarette, nothing.

¶73 A few days later, outside the presence of the jury, the prosecution sought to impeach Riley by introducing a portion of a recorded interview in which Riley told a detective that Ray had threatened Mercedes. Defense counsel objected, noting that in the interview, Riley said Ray's sister, Markeeta, threatened Mercedes, and because the prosecutor hadn't asked Riley about Markeeta, the interview wasn't admissible. After further argument, it became clear that Riley told the detective that Ray had called Markeeta, told Markeeta to call Mercedes, and then told Markeeta what to say during the call (which included threatening Mercedes). Because Riley testified that Ray had never threatened Mercedes and denied that she told the detective that he had, the court concluded that the recorded interview could be played for the jurors to impeach Riley.

¶74 The prosecution subsequently asked the detective about her interview with Riley and started to play the relevant portion of the interview. Defense counsel objected while the recording was playing. The prosecution countered that it was impeachment evidence, and the court agreed, instructing the jury that "what Ms. Riley is telling the detectives her son told her cannot be considered as the truth by you, that's hearsay. It is being offered for the impeachment of whether or not Ms. Riley knew that something had been—well, something about her son. I'll leave it there." The clip was then played in full.

***426** ¶75 "Impeachment is a technique used to attack the truth-telling capacity of a witness [and] may be accomplished by ... contradicting the witness on specific facts in her testimony." *People v. Trujillo*, 49 P.3d 316, 319–20 (Colo. 2002); *see also* § 16-10-201, C.R.S. (2024). Here, the prosecution played the recording, not to prove that Ray had threatened Mercedes but to attack Riley's credibility. Riley's credibility was relevant because Ray was charged with intimidating her as a witness. So, the prosecution was entitled to impeach Riley's credibility by showing that her in-court testimony that Ray had never threatened her or her family was inconsistent with her prior, out-of-court statements to the contrary. *See* § 16-10-201.

¶76 Accordingly, we conclude that the trial court didn't abuse its discretion by admitting the recording.

c. Drug Dealing

¶77 Ray was charged in this case with drug dealing between January 1, 2005, and June 20, 2005. The prosecution filed pretrial notice of its intent to introduce uncharged misconduct evidence related to Ray's drug dealing *before* 2005. This evidence included several criminal charges and various witnesses' observations of Ray's drug business.

¶78 The trial court held a hearing to determine the admissibility of this evidence under *Spoto*. First, it adopted the prosecution's argument that the evidence was relevant to show (1) motive—"to establish that that's why allegedly Mr. Ray would have a witness killed, so that he could stay out and make these large amounts of money"; (2) Ray's ability to "bribe the witnesses or to pay to have someone killed"; and (3) the relationship of the three co-defendants.

¶79 Next, the court explained that this evidence was logically relevant because it provided a "logical explanation for where these huge sums of money come from," given that Ray was "a very young man" who wasn't "otherwise employed." The court found that the evidence also made the existence of the conspiracy more likely because

> Mr. Ray's involvement in these killings is on a complicitor type of situation where he has directed or orchestrated the situation and his relationship with the two people who allegedly were the actual people who fired the guns and killed the people, that there is logical relevance from the fact that they are involved in a drug relationship. There is logical relevance for the jury, if the jury chooses to find that the—that relationship resulted in the killings of Ms. Wolf[e] and Mr. Marshall-Fields.

¶80 The trial court then found that, although the drug-dealing evidence suggested that Ray had a bad character, its relevance to material facts was independent of that prohibited inference. Lastly, the trial court determined that this evidence had "substantial probative value" that wasn't "substantially outweighed by unfair prejudice." Based on these findings, the court concluded that the pre-2005 drug-dealing evidence was admissible, but it limited the scope of this evidence to a single 2003 arrest where Ray was carrying over $2,500 in his shoe and to testimony by Ray's wife, Sailor, and his friend, Checados Todd, that Ray "ran a drug operation that involved Mr. Carter and Mr. Owens" and had access to large amounts of cash.

¶81 When this evidence was admitted during trial, the court gave a limiting instruction that reminded the jurors that Ray wasn't charged with any distribution offenses that occurred before 2005 and that the evidence was being introduced only to establish "motive, intent, opportunity and identification." We perceive no abuse of discretion in the court's *Spoto* analysis or in its decision to admit evidence of Ray's pre-2005 drug dealing.

2. Tattoo Evidence

¶82 During cross-examination, defense counsel asked Sailor how Ray was feeling as his Lowry Park trial approached: "[A]lthough he wasn't happy about it, he was ready to go to jail? ... He was kind of accepting that, I'm going to jail on this thing?" Sailor agreed with that characterization.

¶83 On redirect, the prosecutor asked Sailor if she remembered defense counsel asking her "about what attitude Mr. Ray had expressed ***427** about his upcoming trial." When she said she did, the prosecution then asked, "Between July 4th of 2004 and June 20th of 2005, did Mr. Ray get a new tattoo on his back that expresses an attitude about crime?" Defense counsel objected on relevancy grounds, and a bench conference followed.

¶84 During the bench conference, the prosecutor argued the tattoo evidence was admissible because defense counsel had asked Sailor whether Ray "express[ed] an attitude about his upcoming trial. I think this is the expression of an attitude not only about his upcoming trial but about crime." The evidence at issue was a picture of Ray's back, which showed a large tattoo depicting two guns, a stack of cash, and the words "Crime Payz 999 Wayz" [4]:

[4] The tattoo references a lyric from the song, "Crime Pays" by Cam'ron: "Crime pays 99 ways, 9 gauge, AK-47 homey hit the highway." Cam'ron, *Crime Pays*, *on* Crime Pays (Diplomat Records 2009).

¶85 The court ultimately found that defense counsel had opened the door to this evidence by asking about whether Ray was prepared to go to jail: "[T]he issue is ... his attitude that he was willing to take his punishment and go to trial and go to jail and this shows an attitude of someone who is favoring crime." So, the court concluded that the tattoo evidence was admissible if Ray got the tattoo between the Lowry Park and Dayton Street shootings. The prosecutor then showed the photo to the jury, asked Sailor questions about it, and pressed Sailor about whether Ray really accepted that he was likely to go to prison for the Lowry Park shooting.

¶86 "The concept of 'opening the door' represents an effort by courts to prevent one party in a criminal trial from gaining and maintaining an unfair advantage by the selective presentation of facts that, without being elaborated or placed in context, create an incorrect or misleading impression." *Golob v. People*, 180 P.3d 1006, 1012 (Colo. 2008). Once one party "opens the door" to otherwise inadmissible evidence, the other party "may then inquire into the previously barred matter." *Id.* But the concept isn't unlimited and "inadmissible rebuttal evidence 'is permitted "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." ' " *People v. Cohen*, 2019 COA 38, ¶ 23, 440 P.3d 1256, 1262 (quoting *United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993)). In other words, this doctrine "can be used only to prevent prejudice; it can't be ***428** used as an excuse to inject prejudice into the case." *Id.* at ¶ 23, 440 P.3d at 1262–63.

¶87 We conclude that the trial court abused its discretion by admitting this evidence. The fact that Ray got a tattoo depicting guns, money, and a song lyric doesn't rebut Sailor's testimony that Ray was willing to face his upcoming trial. Moreover, there is nothing connecting this tattoo to Ray's motive or intent regarding the Dayton Street shooting. The evidence simply wasn't relevant to any material fact. And the risk of unfair prejudice that the tattoo evidence introduced into trial substantially outweighed any minimal probative value it arguably could have provided. Thus, the tattoo evidence was inadmissible.

¶88 We further conclude, however, that the trial court's erroneous admission of the tattoo evidence was harmless. The prosecutor displayed the picture of the tattoo very briefly and asked only two questions about it before taking it down. The prosecution again mentioned the tattoo during rebuttal closing argument:

> Now, there is this very interesting photograph .... If you really want to know what motivates a person, take a look at what they permanently affix to their body.... This is [Ray's] attitude towards his case, his attitude towards crime, his attitude towards the system.... Not only is it his motivation in his life, it is his motive for this murder.

This comment, doubling down on the trial court's error, was inappropriate, but it was also brief. Considering the properly admitted testimony regarding Ray's attitude about his upcoming trial and evidence about his illegal drug operation, we conclude that the error didn't substantially influence the jury's verdict or render the trial unfair.

3. Witness- and Victim-Fear Evidence

¶89 Ray argues that the trial court erred by admitting (1) Marshall-Fields's out-of-court statements expressing his fear of Ray and (2) evidence related to other witnesses' fear of Ray or involvement in the witness protection program. He argues that this evidence wasn't relevant to a material issue, was unfairly prejudicial, and served only to improperly appeal to the jurors' sympathies. We address each category of evidence in turn.

a. Marshall-Fields's Statements of Fear

¶90 More than two years before Ray's trial for the Dayton Street shooting, the prosecution filed a notice of intent to introduce various out-of-court statements made by Marshall-Fields between the Lowry Park shooting and his death. This motion was supplemented several times, with the most relevant supplement filed in June 2008, nearly a year before Ray's Dayton Street trial. In this motion, the prosecution identified five categories of statements Marshall-Fields had made that it sought to introduce. These were statements in which Marshall-Fields described (1) the Lowry Park shooting; (2) the encounter with Ray and his associates at the June 19 Father's Day barbecue; (3) the June 19 confrontation at Gibby's Bar; (4) various attempts to prevent him from testifying, including incidents that occurred on and before June 19; and (5) his fear of being killed by Ray and his associates. The prosecution argued these statements were admissible either because they weren't hearsay or because they fell under a hearsay exception—specifically, the then existing state of mind exception, CRE 803(3); the excited utterance exception, CRE 803(2); or the residual hearsay rule, CRE 807. The prosecution also asserted the statements were relevant to prove that Ray intimidated and attempted to bribe Marshall-Fields and had conspired to have him killed. Ray objected based on hearsay, relevance, and unfair prejudice.

¶91 At the subsequent motions hearing, the court adopted its rationale from a pretrial order issued in Owens's case. In that order, the court determined that some of Marshall-Fields's statements were admissible to prove the witness intimidation and witness bribery charges.

¶92 The court allowed Marshall-Fields's friends and family to testify about statements Marshall-Fields had made to them, describing incidents when Ray and his associates had threatened or intimidated him and expressing his fear of Ray and his associates. ***429** Specifically, the court admitted the following categories of statements: (1) Marshall-Fields telling his friends and his uncle about being threatened at Gibby's Bar on June 19, 2005 (the day before his murder) while he was still at the bar and soon after leaving; (2) Marshall-Fields telling his friends about a dream he had recently had in which God told him he was going to die; and (3) Marshall-Fields telling his sister, on the day of his murder, about the encounters at the Father's Day barbecue and at Gibby's the day before.

¶93 Each time a witness testified about these statements, the court instructed the jurors to consider them "only with respect to the charge of intimidation of a witness or victim in which Javad Marshall-Fields is the named victim," and it reminded the jurors that "[s]uch statements cannot be considered with respect to any other charge."

¶94 On appeal, Ray asserts that the trial court erred by admitting Marshall-Fields's out-of-court statements. We perceive no basis for reversal.

i. Hearsay Overview

¶95 " 'Hearsay' is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). Although hearsay is generally inadmissible, CRE 802, there are several exceptions—notably here, the excited utterance and state of mind exceptions, CRE 803(2), (3), and the residual hearsay rule, CRE 807.

¶96 The excited utterance exception allows a court to admit hearsay statements if they relate "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." CRE 803(2). The state of mind exception allows a court to admit, as relevant here, "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." CRE 803(3). Lastly, the residual hearsay rule provides that a hearsay statement that isn't covered by the exceptions provided in Rules 803 and 804 may nonetheless be admissible if it has "equivalent circumstantial guarantees of trustworthiness," and

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

CRE 807. The residual hearsay rule also requires the proponent of the statement to provide notice of its intent to introduce the statement "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." *Id.*; *see also Vasquez v. People*, 173 P.3d 1099, 1106–07 (Colo. 2007).

ii. Statements About Being Threatened at Gibby's

¶97 Most of the fear statements that Ray challenges on appeal relate to an incident at Gibby's Bar on June 19, 2005, the night before Marshall-Fields and Wolfe were murdered. Earlier that day, Marshall-Fields had gone to a Father's Day barbecue at a park with his friend, Brent Harrison. Harrison testified that Marshall-Fields saw Ray and some of Ray's friends and family there, which made Marshall-Fields nervous. So, Harrison and Marshall-Fields left the park and went to Marshall-Fields's apartment where they made plans to go out that evening with some friends.

¶98 After dinner, the group went to Gibby's for a drink. They weren't there long before Marshall-Fields told them they needed to leave. Once outside, Marshall-Fields said that the guys he was going to testify against had come up to him in the bar and said they were going to kill him. Marshall-Fields also called his uncle and told him about what had just happened. The uncle told him to leave the bar and come to his house. So, Marshall-Fields and his friends left the bar; stopped briefly by their apartment complex; and then drove to his uncle's house, dropping Harrison off on the way. Once Marshall-Fields got to his uncle's house, he called ***430** his friend Thomas Goodish and told him about the incident at Gibby's.

¶99 In its pretrial order, the court ruled that these statements Marshall-Fields made "about the incident at Gibby's Bar on June 19, 2005, are admissible under CRE 803(2), 803(3) and 807 with a limiting instruction that the evidence can only be considered on Counts 14 and 19 [witness intimidation and bribery]." We perceive no abuse of the trial court's discretion because the statements were admissible under the excited utterance exception to the hearsay rule.

¶100 The admissibility of an excited utterance rests on the idea that the event was "sufficiently startling to render normal reflective thought processes of the declarant inoperative," *Compan v. People*, 121 P.3d 876, 882 (Colo. 2005), *overruled on other grounds by Nicholls*, ¶ 33, 396 P.3d at 682, eliminating "the possibility of fabrication, coaching, or confabulation," *People v. Vanderpauye*, 2023 CO 42, ¶ 41, 530 P.3d 1214, 1225 (quoting *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)), and lending the statement "sufficient trustworthiness to overcome the hearsay rule's proscription," *id.* So, to be admissible as an excited utterance, the proponent of the statement must show that "(1) the event was sufficiently startling to render normal reflective thought processes of the observer inoperative; (2) the statement was a spontaneous reaction to the event; and (3) direct or circumstantial evidence exists to allow the jury to infer that the declarant had the opportunity to observe the startling event." *Id.* at ¶ 42, 530 P.3d at 1225 (quoting *People v. Pernell*, 2014 COA 157, ¶ 31, 414 P.3d 1, 7). In determining admissibility, courts may consider factors such as "the lapse of time between the startling event or condition and the out-of-court statement; whether the statement was a response to an inquiry; whether the statement is accompanied by outward signs of excitement or emotional distress; and the declarant's choice of words to describe the startling event or condition." *Compan*, 121 P.3d at 882.

¶101 Here, we know Marshall-Fields had an opportunity to observe the startling event because Ray's associate, Parish Carter, threatened him directly. But whether these statements qualified as an excited utterance hinges on temporal proximity.

¶102 We have previously held that "[w]hile the temporal proximity of the statement to the startling event or condition is important, the two do not have to be contemporaneous if the declarant is still under stress when the statement is made." *Id.* But we have more recently concluded that "where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." *Vanderpauye*, ¶ 47, 530 P.3d at 1226 (quoting 2 Kenneth S. Broun et al., *McCormick on Evidence* § 272 (Robert P. Mosteller ed., 8th ed.), Westlaw (database updated July 2022)). In *Vanderpauye*, however, we were considering the temporal proximity of a defendant's self-serving statements, not a victim's spontaneous reaction to a startling event. We noted that "[t]he temporal element takes on added significance when a defendant's out-of-court statement is self-serving," *id.*, and the fact that a statement is self-serving is itself "an indication that the statement was the result of reflective thought," *id.* at ¶ 46, 530 P.3d at 1226 (quoting 2 Broun et al., *supra,* § 272).

¶103 Here, there was nothing self-serving about Marshall-Fields's statements. Being told he was going to be killed was sufficiently startling to render Marshall-Fields's immediate retelling of the threat to his friends and his uncle spontaneous: He told them what happened within minutes of being threatened and while he was still upset about the incident. *See Pena v. People*, 173 P.3d 1107, 1112 (Colo. 2007); *see also People v. Rogers*, 68 P.3d 486, 493 (Colo. App. 2002). Although he told Goodish about the incident thirty minutes to an hour later, by all accounts he was still visibly upset about it. *See Compan*, 121 P.3d at 882; *People v. Hagos*, 250 P.3d 596, 622–23 (Colo. App. 2009); *see also People v. Lagunas*, 710 P.2d 1145, 1148 (Colo. App. 1985) ("Because the duration of stress will obviously vary with the intensity of the experience and the emotional endowment of the individual, the exception necessarily vests the ***431** trial court with broad discretion in applying the rule.").

¶104 We therefore conclude that the trial court didn't abuse its discretion by admitting the statements under the excited utterance exception.[5] We also conclude that Marshall-Fields's statements were relevant because they had some tendency to show that Ray committed the offense of witness intimidation. *See* CRE 401; *see also* § 18-8-704(1)(a), C.R.S. (2024) (explaining that witness intimidation requires proof that the defendant used "a threat" or "act of harassment" against a witness in a criminal proceeding). Although the statements may have been prejudicial, after giving them their maximum probative value and minimal prejudicial effect, we conclude that they weren't unfairly so. *See Nicholls*, ¶ 56, 396 P.3d at 687 ("Reviewing courts give great deference to trial court decisions under CRE 403 because a multitude of factors are considered in this balancing process.").

[5] Even if these statements weren't excited utterances, they were admissible under the residual hearsay rule. *First*, the statements were relevant to a material fact. Ray was charged with intimidating a witness, which required the prosecution to prove that Ray used "a threat, act of harassment ..., or act of harm or injury" against a witness in a criminal proceeding. § 18-8-704(1)(a), C.R.S. (2024). So, Marshall-Fields's statements to his friends that he was threatened in Gibby's were relevant to show that Ray (through Carter) committed that offense. *Second*, had Marshall-Fields not been killed, he could have testified to these facts directly since he was the person to whom the threats were made. But because Marshall-Fields was unavailable to testify, his friends' testimony about what he told them was more probative of this fact than any other evidence that could reasonably have been obtained. *See Pena*, 173 P.3d at 1112. *Third*, the general purposes of the rules of evidence and the interests of justice were served by admission of these statements. *See id.*; *see also* CRE 803(2)–(3), 804, 807; *Vasquez*, 173 P.3d at 1104 ("The forfeiture doctrine prevents defendants from profiting by their own misconduct ...."). The parties discussed the admissibility of Marshall-Fields's statements under the residual hearsay rule at a pretrial hearing nearly nine months before trial, providing Ray with ample notice that the statements would be offered into evidence at trial and an opportunity to object before the evidence was presented to the jury. *See Pena*, 173 P.3d at 1112. And, as discussed above, Marshall-Fields made these statements under conditions that provided circumstantial guarantees of trustworthiness. *See id.*; *Compan*, 121 P.3d at 882.

iii. Statements About Marshall-Fields's Dreams

¶105 Marshall-Fields's friend, Stephanie Hayashido, testified that, while they were at the apartment complex after leaving Gibby's, Marshall-Fields told her that "he had a dream and he said that it was a sign from God that he was going to die because he died in his dream, or that God told him he was going to die in his dream." Defense counsel objected, but the court determined the statement was admissible to show Marshall-Fields's state of mind, which was relevant to the intimidation charge.

¶106 Although fear statements may be admissible if the victim's state of mind is at issue, *People v. Acosta*, 2014 COA 82, ¶¶ 84–91, 338 P.3d 472, 486–87; CRE 803(3), Marshall-Fields's state of mind wasn't at issue here. A defendant commits the offense of witness intimidation if he intentionally uses threats or harassment to intimidate a witness. § 18-8-704(1)(a). But the prosecution doesn't need to prove that the witness was actually intimidated. So, Marshall-Fields's state of mind—that is, whether he was scared or felt intimidated—wasn't directly relevant to a material fact. [6]

[6] For this same reason, the statements weren't admissible under the residual hearsay exception. *See* CRE 807 (admissibility requires the court to find that the statement is relevant to a material fact).

¶107 Even when a victim's state of mind isn't at issue, the victim's statements of fear may nonetheless be admissible to prove identity, motive, or intent, or to rebut certain defenses, such as accident or self-defense. *E.g.*, *People v. Madson*, 638 P.2d 18, 28–29 (Colo. 1981). But we've only invoked this reasoning in homicide cases and, even then, only rarely because "[t]he problem with using evidence of a victim's fear of another to prove identity, motive, malice, or intent in a homicide case is that the victim's statements would be 'used indirectly to infer the defendant's past conduct (a threat or an assaultive act) from which his future conduct and state ***432** of mind are inferred.' " *Rogers*, 68 P.3d at 493 (quoting *Madson*, 638 P.2d at 29 n.14).

¶108 Here, although evidence showing that Marshall-Fields was scared and was having dreams about dying shortly before he was killed may have had some probative value to prove identity and intent (that Ray was attempting to intimidate Marshall-Fields to keep him from testifying), the statements weren't introduced to prove the murder charges—the court admitted them only for the intimidation and bribery charges. Moreover, any probative value these statements might have had was minimal and was substantially outweighed by the risk of unfair prejudice. *See* CRE 403.

¶109 We therefore conclude that the trial court abused its discretion by admitting the statements Marshall-Fields made about his dream. However, considering the properly admitted fear statements and the brevity of questioning about the dream statements, we conclude that the error was harmless. *See Zapata*, ¶ 62, 428 P.3d at 530.

iv. Statements Made the Day of Marshall-Fields's Murder

¶110 Ray challenges the trial court's admission of statements Marshall-Fields made "to Maisha Pollard [his sister] about the incidents at the Park Hill barbecue and at Gibby's Bar on June 19, 2005." The court found these statements "admissible under CRE 803(2), 803(3) and 807 with a limiting instruction that the evidence can only be considered on Counts 14 and 19 [witness intimidation and bribery]." (Footnote omitted.)

¶111 At trial, Pollard testified that Marshall-Fields called her on June 20, 2005 (the day he was killed), and "seemed very discombobulated," which she said wasn't common for him. She said that "[h]e was very confused, agitated, anxious, fearful," and he told her, "[T]hese dudes are after me.... [T]he dudes I'm testifying against.... I keep seeing them. I keep seeing them everywhere I go. They were at the store and then they were at the barbe[c]ue and then I saw them again.... [T]he people who shot me, ... the people I'm testifying against."

¶112 "A victim's statements to the effect that she was, at the time, afraid of another fall squarely within the state of mind hearsay exception under CRE 803 because they refer not to past events or conditions, but to the victim's then existing state of mind." *Cross*, ¶ 32, 531 P.3d at 451 (quoting *Rogers*, 68 P.3d at 493). These statements are also relevant because they have some tendency to identify Ray as the individual who was threatening or harassing Marhsall-Fields. *See* CRE 401. And they aren't unfairly prejudicial, particularly when given their maximum probative value. *See Nicholls*, ¶ 56, 396 P.3d at 687. Under these circumstances, we perceive no abuse of discretion in the trial court's admission of these statements under the state of mind exception to the hearsay rule. [7] *See* CRE 803(3); *People v. Haymaker*, 716 P.2d 110, 113 n.3 (Colo. 1986).

[7] We also conclude that, for the same reasons the statements Marshall-Fields made to his friends about the incident at Gibby's were admissible under the residual hearsay rule, these statements were admissible under the residual hearsay rule as well.

b. Other Witnesses' Statements of Fear

¶113 Ray asserts that the trial court improperly admitted evidence about various witnesses' fear of Ray, evidence about those witnesses' reluctance to testify, evidence that some witnesses were under witness protection, and evidence that some witnesses might be biased because the prosecution had given them preferential deals in other cases. Ray preserved these issues with contemporaneous objections at trial.

¶114 "Within broad limits," evidence may be admissible if it tends to show bias or prejudice, sheds light on a witness's inclinations, or explains that a witness's "change in statement or reluctance to testify" was because of a fear of retaliation. *People v. Villalobos*, 159 P.3d 624, 630 (Colo. App. 2006); *accord People v. James*, 117 P.3d 91, 94 (Colo. App. 2004). A witness is also "allowed to explain or rebut any adverse inferences resulting from cross-examination in order to place matters in context so that the jury can evaluate the existence and significance ***433** of a witness's alleged bias." *People v. Lesney*, 855 P.2d 1364, 1367 (Colo. 1993).

¶115 Here, the trial court admitted the challenged evidence to explain some witnesses' reluctance to testify or changes in some witnesses' testimony, or to rebut the assertion that witnesses weren't credible because they were being paid for their testimony or were being helped by the prosecution in other cases in exchange for favorable testimony.

¶116 Thus, we perceive no abuse of discretion in the trial court's admission of this evidence.

4. Victim-Impact Evidence

¶117 Ray alleges that the trial court erred by allowing the jurors to hear "extensive, gratuitous" victim-impact evidence related to the Lowry Park shooting during the guilt phase of his trial. Elvin Bell testified at Ray's trial for the Dayton Street shooting. Bell's brother, Gregory Vann (Marhsall-Fields's co-host at the Lowry Park rap battle and barbecue), was shot and killed during the Lowry Park shooting. Bell was also shot. Ray challenges the court's admission of Bell's testimony about Vann's personality, work, and hobbies, and about the impact watching Vann die had on him. Ray preserved the issue by moving before trial to exclude victim-impact evidence during the guilt phase of trial. Ray also challenges the prosecution's use of photos that depicted Marshall-Fields's injuries from the Lowry Park shooting at various times throughout the trial to maximize their emotional impact on the jury. Ray didn't object when these photos were introduced.

¶118 "Victim impact evidence is evidence that relates to 'the victim's personal characteristics and to the physical, emotional, or social impact of a crime on its victim and the victim's family.' " *People v. Martinez*, 2020 COA 141, ¶ 29, 486 P.3d 412, 419 (quoting *Schreibvogel v. State*, 228 P.3d 874, 883 (Wyo. 2010)). Victim-impact evidence is often relevant and admissible at the sentencing phase of trial, but only as it relates to the crimes for which the defendant is currently being sentenced. *People v. Dunlap*, 975 P.2d 723, 744–45 (Colo. 1999); *see also* § 18-1.4-102(1)(a)–(b), C.R.S. (2024); § 18-1.3-1201(1)(a)–(b), C.R.S. (2024).

¶119 We haven't addressed whether victim-impact evidence is ever admissible during the guilt phase of a trial, though a division of the court of appeals has. *See Martinez*, ¶¶ 32–34, 486 P.3d at 419–20. In *Martinez*, the division held that, under the facts of that case, victim-impact evidence was irrelevant and thus inadmissible during the guilt phase of a trial. *Id.* The division reasoned that "victim impact evidence is admissible only if it 'tends to show the context or circumstances of the crime itself.' " *Id.* at ¶ 34, 486 P.3d at 420 (quoting *State v. Graham*, 186 N.C.App. 182, 650 S.E.2d 639, 646 (2007)). In other words, although victim-impact evidence may be admissible if it's " 'relevant to determining whether the defendant committed the crime' for which they were charged," *People v. Mena*, 2025 COA 14, ¶ 15, 567 P.3d 161, 164–65 (quoting *Martinez*, ¶ 33, 486 P.3d at 420), "[b]ecause 'the effect of a crime on a [victim or the] victim's family often has no tendency to prove whether a particular defendant committed a particular criminal act against a particular victim,' such evidence is generally irrelevant during the guilt/innocence phase of a trial," *Martinez*, ¶ 33, 486 P.3d at 419 (alteration in original) (quoting *Graham*, 650 S.E.2d at 645). And even if a court determines such evidence is relevant, the court must still weigh the probative value of the evidence against the risk of unfair prejudice before admitting it. CRE 403.

¶120 Here, the trial court ruled that victim-impact evidence—specifically, "evidence about the grieving, sadness, and loss that resulted from that incident" and evidence about "how someone felt when they saw their brother on the ground shot and murdered"—would be inadmissible during the guilt phase of the trial. The court clarified that it would, however, allow evidence during the guilt phase describing "the victim and the life that was taken ... [witnesses] can talk about the life of the person." Regarding the prosecution's use of pictures, the court said it would have to make those rulings in the context of trial.

***434** ¶121 At trial, Bell briefly described Vann's hobbies and interests and then discussed the Lowry Park shooting in greater detail. But his testimony didn't discuss the effect Vann's death had on him or his family and, for the most part, just described his personal experience at Lowry Park. Similarly, the pictures depicting Marshall-Fields's injuries from the Lowry Park shooting were used to help describe those injuries and didn't constitute victim-impact evidence. Hence, we perceive no abuse of the trial court's discretion in admitting this evidence.

5. Positive Character Evidence

¶122 Ray contends that the trial court erred by admitting extensive and impermissible positive evidence about Marshall-Fields's and Wolfe's character that "emotionally hijack[ed] the jury's attention." Specifically, he challenges the court's admission of (1) testimony from several of Marshall-Fields's friends and family, regarding his life, character, values, education, work, plans for the future, relationships with Wolfe and with his nieces, family vacations, and more; and (2) testimony from Wolfe's mother, identifying an in-life photograph of Wolfe and talking about Wolfe's background, education, plans, and her relationship with Marshall-Fields. Ray objected to this evidence at trial.

¶123 The admissibility of evidence related to a victim's good character is limited during the guilt phase of trial. Under CRE 404(a)(2), the prosecution may introduce (1) evidence of a victim's pertinent character trait to rebut defense evidence of the same trait or (2) evidence of the victim's peaceful character to rebut evidence that the victim was the initial aggressor in a homicide case. *See People v. Miller*, 890 P.2d 84, 96 (Colo. 1995) (explaining that "character evidence is 'pertinent' to the crime charged [if] there is some nexus between the proffered character trait and the crime charged").

¶124 Similarly, although in-life photographs of a homicide victim may be "admissible if they depict relevant facts," such photographs shouldn't be admitted if they are "unnecessarily inflammatory." *People v. McClelland*, 2015 COA 1, ¶ 45, 350 P.3d 976, 984. So, for example, in-life photographs may be admissible to show "the appearance of the victim, the location and nature of his wounds, or his identity." *People v. White*, 606 P.2d 847, 849 (Colo. 1980). But courts must still weigh the probative value of such photographs against "the danger that their introduction is merely a means of 'engendering sympathy for the victim with the intent of creating an atmosphere of prejudice against the defendant.' " *McClelland*, ¶¶ 46–47, 350 P.3d at 984 (quoting *Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710, 716 (1994)); *see also People v. Loscutoff*, 661 P.2d 274, 277 (Colo. 1983) (concluding that the trial court didn't abuse its discretion by admitting photographs of a murder victim and her young son, taken several months before the murder, because they were relevant to prove identity and their probative value outweighed any prejudicial effect).

¶125 The trial court's pretrial ruling, allowing witnesses to "talk about the life of the person," encompassed some evidence about Marshall-Fields's and Wolfe's lives. During the trial, however, numerous witnesses repeatedly testified about Marshall-Fields's and Wolfe's positive character traits, and the prosecution introduced several in-life pictures of them, both together and separately. None of this more extensive evidence was probative of any material fact or made it more likely that Ray committed the offenses charged. *See People v. Jones*, 743 P.2d 44, 46 (Colo. App. 1987). Moreover, it engendered sympathy that could have interfered with the jury's ability to render an impartial verdict based on the legally relevant facts. Accordingly, we conclude that the trial court abused its discretion by admitting evidence related to Marshall-Fields's and Wolfe's good character during the guilt phase of the trial.

¶126 But this evidence constituted a relatively small portion of the trial, and the jurors were properly instructed on their duty to weigh all the evidence and to determine the elements of each offense beyond a reasonable doubt. We presume they did so. *See Washington*, ¶¶ 25–27, 547 P.3d at 1092–93. Therefore, these errors were harmless.

B. Prosecutorial Misconduct

***435** ¶127 Ray asserts the prosecution committed misconduct by (1) using language that encouraged jurors to rely on racial bias and prejudice in reaching their verdict, (2) emphasizing the grand jury's decision to indict, (3) diluting the presumption of innocence, and (4) improperly appealing to the jurors' sympathies. In reviewing allegations of prosecutorial misconduct, we engage in a two-step process where "[e]ach step is analytically independent of the other." *People v. Robinson*, 2019 CO 102, ¶ 18, 454 P.3d 229, 233.

¶128 *First*, we must determine whether misconduct occurred; that is, whether the prosecution's conduct was improper "in the context of the argument as a whole and in light of the evidence before the jury." *People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010); *see also Robinson*, ¶ 18, 454 P.3d at 233. "Determining whether a prosecutor's actions constitute misconduct 'is

generally a matter left to the trial court's discretion,' " *People v. Snider*, 2021 COA 19, ¶ 31, 491 P.3d 423, 431 (quoting *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005)), so we review the record for an abuse of that discretion, *see Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010).

¶129 Prosecutors are generally given "wide latitude to make arguments based on facts in evidence and reasonable inferences drawn from those facts." *Strock*, 252 P.3d at 1153. And while prosecutors "can use every legitimate means to bring about a just conviction," they have "a duty to avoid using improper methods designed to obtain an unjust result." *Domingo-Gomez*, 125 P.3d at 1048. Comments calculated to mislead the jury or that suggest the prosecution has access to evidence the jurors don't are improper. *Id.* at 1048–49. So too are comments " 'calculated to inflame the passions or prejudice of the jury' " and "arguments that tend to influence jurors to reach a verdict based on preexisting biases." *Robinson*, ¶ 20, 454 P.3d at 233 (quoting *Dunlap*, 975 P.2d at 758); *see also Domingo-Gomez*, 125 P.3d at 1048–49.

¶130 *Second*, if we determine the prosecution's comments were improper, we then consider whether that misconduct warrants reversal under the appropriate standard. *Robinson*, ¶ 18, 454 P.3d at 233. "To determine whether prosecutorial misconduct requires reversal, we must evaluate the severity and frequency of the misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to the defendant's conviction." *Strock*, 252 P.3d at 1153.

¶131 If a defendant fails to object to the alleged misconduct at trial, we review for plain error. *Robinson*, ¶ 19, 454 P.3d at 233. To warrant reversal under this standard, the prosecutorial misconduct must have been "flagrantly, glaringly, or tremendously improper." *Id.* (quoting *Domingo-Gomez*, 125 P.3d at 1053). After all, "counsel's failure to object ... may 'demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging.' " *Strock*, 252 P.3d at 1153 (quoting *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990)). But if the defendant preserves the error with a contemporaneous objection, we review for harmlessness. *Wend*, 235 P.3d at 1097.

1. Racial Bias

¶132 Ray alleges the prosecution injected racial bias into the proceedings by using the N-word[8] twenty-four times and by repeatedly quoting Owens's alleged comment to Ray after the Dayton Street shooting that "it's 'tooken' care of."

[8] The prosecutor used the actual racial slur during trial, which we won't repeat here. We use "N-word" in this opinion instead to minimize the harm such language may cause.

¶133 "The Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *see also Robinson*, ¶ 21, 454 P.3d at 233 ("Although all appeals to improper biases pose challenges to the trial process, the Supreme Court has observed that an appeal to racial bias should be treated with 'added precaution' ***436** because 'racial bias implicates unique historical, constitutional, and institutional concerns.' " (quoting *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 224–25, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017))). But "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1983)). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); *see also Robinson*, ¶ 28, 454 P.3d at 234.

¶134 Here, each time the prosecution used the N-word, they were quoting Ray's own words. Similarly, the prosecution's use of "tooken" was in reference to Owens's own words. Ray didn't contemporaneously object to the prosecution's failure to paraphrase or modify this language, so we will assume, without deciding, that the prosecution engaged in misconduct by failing

to paraphrase or modify Ray's and Owens's language and pivot to whether this misconduct was plain, which, again in this context, means glaringly improper.

¶135 To evaluate whether the prosecution's use of the challenged language was glaringly improper, we must consider the broader context in which it emerged at trial. Here, the prosecution didn't unduly highlight the offensive language or imply any prejudicial meaning from it. *Cf. State v. Monday*, 171 Wash.2d 667, 257 P.3d 551, 557 (2011) (concluding that it was "highly improper" for the prosecutor to "subtly, and likely deliberately, call to the jury's attention" the race of a witness by using specific language and to imply that the witness wasn't credible because of her race). In most instances, the prosecution simply asked witnesses if they remembered Ray or Owens saying the quoted language and then moved on. Several of the witnesses also spontaneously used similar language during their testimony. Although the prosecution repeated the language in closing argument, the reference was brief and not overtly gratuitous. And the court instructed the jurors that "[n]either sympathy nor prejudice should influence [their] decision." We once again presume the jury followed this instruction. *See Robinson*, ¶ 32, 454 P.3d at 235.

¶136 So, although we strongly condemn any prosecutor's use of language that may encourage reliance on racial prejudices, we conclude that the comments didn't so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction. *See Hagos*, ¶ 14, 288 P.3d at 120; *see also Robinson*, ¶¶ 28–34, 454 P.3d at 234–35; *Commonwealth v. Chalue*, 486 Mass. 847, 162 N.E.3d 1205, 1239 (2021); *State v. Haithcox*, 397 Mont. 103, 447 P.3d 452, 460–61 (2019).

2. Grand Jury Reference

¶137 Ray contends that the prosecutor improperly referenced the grand jury indictment in rebuttal closing. We disagree.

¶138 During closing argument, defense counsel told the jury that "it's important for you to realize the motives and the concerns of the other side." Counsel then described the lack of follow-through and the mistakes investigators had made in the Lowry Park investigation. He argued that these failures affected the Dayton Street investigation because the media, politicians, and heads of both the police department and the district attorney's office pressured the Dayton Street investigators and prosecutors "to make this right." Counsel further argued that these pressures were compounded by investigators' and prosecutors' heightened emotions and personal involvement with these cases, which caused a "massive overreaction, overcharging, [and] overzealousness" in response to the Dayton Street shooting.

¶139 In rebuttal closing, the prosecutor responded:

> There was a comment that somehow the press and political desires put a lot of pressure on this process and apparently caused the wrong person to be charged. Well, you didn't hear any evidence about that.... [N]othing about press putting pressure on anyone, nothing about political ***437** motivations, nothing about people possibly losing their jobs if they couldn't solve this case, et cetera.
>
> This is a case where a Grand Jury made a decision. Grand Jury took testimony, heard evidence and decided to charge, among other people, Mr. Ray.

Defense counsel objected, and the court reminded the jury "that an indictment is not evidence of anything." The prosecutor continued: "Indictment is not evidence, but it was a Grand Jury that ... made the decision to have Mr. Ray charged with these crimes."

¶140 Prosecutors are allowed to respond to defense counsel's arguments and may argue the facts in evidence, the reasonable inferences to be drawn from those facts, and any lack of support for the defendant's theory of defense. *Hafer v. People*, 492 P.2d 847, 851 (Colo. 1972); *People v. Walker*, 2022 COA 15, ¶¶ 39–40, 509 P.3d 1061, 1071; *People v. Carter*, 2015 COA 24M-2, ¶¶ 71–72, 402 P.3d 480, 494. But it is inappropriate for a prosecutor to make remarks that have the "potential to convey that the prosecution had additional inculpatory evidence unknown to the jury." *Domingo-Gomez*, 125 P.3d at 1052. Such "remarks

of personal knowledge, combined with the power and prestige inexorably linked with the office may encourage a juror to rely on the prosecution's allegation that unadmitted evidence supports a conviction." *Id.*

¶141 Here, the prosecutor's reference to the grand jury's indictment didn't suggest she had access to evidence the jurors didn't. *See id.* Rather, when viewed in context, it was a direct response to defense counsel's argument that Ray was charged only because of outside pressures and not because there was solid evidence against him. *See Denhartog*, ¶ 55, 452 P.3d at 158; *People v. Douglas*, 2012 COA 57, ¶ 68, 296 P.3d 234, 249–50. It also reminded the jurors that defense counsel's allegations of improper motives weren't evidence. *See People v. Sanders*, 2022 COA 47, ¶ 54, 515 P.3d 167, 179, *aff'd on other grounds*, 2024 CO 33, 549 P.3d 947; *Denhartog*, ¶ 53, 452 P.3d at 158.

¶142 Under these circumstances, we conclude that the prosecutor's reference to the grand jury's indictment wasn't improper.

3. Presumption of Innocence

¶143 Ray contends that the prosecutor diluted the presumption of innocence and violated his constitutional rights during rebuttal closing argument by saying:

> Now, it is true that at the beginning of a trial every defendant is presumed to be not guilty unless and until the prosecution has proven beyond a reasonable doubt that in fact he is guilty.
>
> The evidence in this case has proven beyond any reasonable doubt that the defendant, Mr. Ray, committed these crimes in order, once again, to avoid being held accountable. He did not want to be held accountable for his involvement in the [Lowry Park] shooting. He was not a killer in that case because he did not want that motivation, that money to disappear.
>
> At this time, the evidence has proven that he is guilty and the prosecution would ask that you hold him accountable. You hold him accountable for committing these terrible crimes in order to avoid being held responsible in the past, and we would ask that you find him guilty.

¶144 Divisions of our court of appeals have regularly disapproved of comments that suggest "that the presumption of innocence that had existed when the trial began was 'gone' because of the presentation of evidence." *People v. Conyac*, 2014 COA 8M, ¶ 141, 361 P.3d 1005, 1029; *accord, e.g.*, *People v. Ujaama*, 2012 COA 36, ¶¶ 73–74, 302 P.3d 296, 311; *People v. McBride*, 228 P.3d 216, 224 (Colo. App. 2009). In *McBride*, for example, the division concluded that the prosecutor erred by telling the jurors during closing argument that the defendant "sits here in front of you a guilty man. That presumption of innocence that we had when we started this case is gone." 228 P.3d at 223. The prosecutor also "told jurors not to begin their deliberations at 'not guilty' because, 'You're about [ten] miles from not guilty before you even start deliberating.' " *Id.* Such comments are improper because "[a] defendant retains the presumption of innocence *throughout* the trial process *unless and until* the jury returns a guilty verdict," ***438** and so, "as a jury evaluates the evidence, it must continue to presume the defendant innocent until it concludes that the evidence proves guilt beyond a reasonable doubt." *Conyac*, ¶ 141, 361 P.3d at 1029 (emphases added); *People v. Estes*, 2012 COA 41, ¶¶ 32–33, 36, 296 P.3d 189, 195 ("[A] comment that suggests to a jury that the presumption of innocence may be eliminated at any time before the jury arrives at a guilty verdict—whether upon the close of evidence, or otherwise—is a misstatement of the law.").

¶145 We conclude that the prosecutor's comments here, while perhaps inartful, weren't improper. *See McBride*, 228 P.3d at 221. Unlike in *McBride*, the prosecutor here didn't encourage the jury to find that the presumption of innocence had been overcome even before deliberations commenced. And even if we were to infer that the prosecutor insinuated as much, defense counsel didn't object, and the error wasn't plain.

¶146 For an error to be plain, it must be obvious. And for an error to be obvious, it "must contravene a clear statutory command, a well-settled legal principle, or established Colorado case law." *People v. Crabtree*, 2024 CO 40M, ¶ 42, 550 P.3d 656, 667.

We evaluate obviousness at the time the error is made. *Id.* at ¶ 4, 550 P.3d at 660. Although a defendant's right to be presumed innocent throughout the trial was well-settled during Ray's trial, the first appellate opinion to explicitly disapprove of comments at all like those the prosecutor made here wasn't announced until after Ray's trial. *See McBride*, 228 P.3d at 224 (announcing the opinion on October 1, 2009, nearly five months after closing arguments in Ray's trial). Therefore, any error wasn't plain and doesn't warrant reversal. *See Conyac*, ¶ 143, 361 P.3d at 1029; *see also Ujaama*, ¶¶ 73–74, 302 P.3d at 311.

4. Emotional Appeal to Juror Sympathies

¶147 Defense counsel argued in closing that the prosecution wanted the jurors "to substitute common sense and suspicion for proof beyond a reasonable doubt." He said that although the prosecution had talked "about a lot of things that could have happened, that it could be that Robert Ray made these orders, it could be that Robert Ray instructed these people," there was "[n]o reliable proof of any of that.... They're hoping that you substitute this suspicion, this emotion of this case for reasonable doubt." Defense counsel acknowledged that this was "an emotional case. It's a horrible, horrible crime, no question about it. These poor people have had to go through losing a loved one at such a young age and not knowing what happened or why." But he reminded the jurors that they had "sworn a duty to not let bias or your emotions influence you."

¶148 In rebuttal closing, the prosecutor responded to defense counsel's comments:

> [Defense counsel] pointed out that the families of Javad Marshall-Fields and Vivian Wolfe have suffered. They had to suffer the tragedy of burying a child. And he indicated that they had to do that without knowing what had happened or why.
>
> Well, you all do know what happened and you do know why.

¶149 Ray contends that this comment improperly appealed to the jurors' passions and sympathies. We disagree.

¶150 A "prosecutor should not make arguments that encourage the jury to depart from its duty to decide the case on the evidence and the inferences reasonably derived therefrom." *Dunlap*, 975 P.2d at 758–59 (quoting Standards for Crim. Just., Prosecution Function & Def. Function § 3–5.8, comment. at 109 (Am. Bar Ass'n, 3d ed. 1993)). The prosecutor's comments here mirrored defense counsel's own words and were a response to defense counsel's argument about the lack of evidence; they didn't improperly appeal to juror sympathies. *Cf. People v. Vasquez*, 2022 COA 100, ¶ 68, 521 P.3d 1042, 1055–56 (concluding that it was improper for the prosecutor to call the case " 'a tragedy' for the victim and her family," to characterize the trial as "a public reckoning," and to tell the jury it was "the conscience of our community").

¶151 We therefore conclude that these comments weren't improper.

C. Cumulative Error

***439** ¶152 Ray contends that the trial court's numerous evidentiary errors and the prosecution's misconduct constitute cumulative error that violated his right to a fair trial. We disagree.

¶153 The cumulative error doctrine recognizes that although individual errors viewed in isolation may be harmless, "numerous formal irregularities ... may in the aggregate show the absence of a fair trial." *People v. Vialpando*, 2022 CO 28, ¶ 33, 512 P.3d 106, 114 (quoting *Howard-Walker v. People*, 2019 CO 69, ¶ 24, 443 P.3d 1007, 1011). After all, a defendant's constitutional right to a fair trial includes the right to an impartial jury—a right that "comprehends a fair verdict, free from the influence or poison of evidence which should never have been admitted, and the admission of which arouses passions and prejudices which tend to destroy the fairness and impartiality of the jury." *Howard-Walker*, ¶ 23, 443 P.3d at 1011 (quoting *Oaks v. People*, 371 P.2d 443, 447 (Colo. 1962)); *see also* U.S. Const. amend. VI; Colo. Const. art. II, §§ 16, 23. To warrant reversal for cumulative

error, there must have been multiple errors that collectively prejudiced the substantial rights of the defendant and affected the integrity of the fact-finding process, even if any single error didn't. *Howard-Walker*, ¶¶ 24–25, 443 P.3d at 1011.

¶154 Here, we have either determined or assumed without deciding that the trial court made several errors, including admitting Lowry Park evidence as res gestae, evidence of uncharged threats to Brandi Taylor, evidence related to Sailor's black eye, a picture of Ray's back tattoo, and irrelevant hearsay statements Marshall-Fields made about a dream; and allowing improper comments by the prosecution. But we also determined that none of those errors individually warranted reversal. And now, considering the effect of those errors in the aggregate, we conclude that they didn't substantially prejudice Ray or undermine the fairness of his trial.

¶155 Many of the errors involved evidence that was otherwise admissible or was cumulative of admissible evidence. And in those few instances where the evidence wasn't admissible at all, any prejudice was minimized by the brevity of the presentation, a limiting instruction, and/or further context and explanation through cross-examination or voir dire. *See Vialpando*, ¶ 46, 512 P.3d at 116. Moreover, none of the errors established proof of an element of any of the charges, improperly implicated a witness's or Ray's credibility, or affected Ray's constitutional rights. *See, e.g.*, *Howard-Walker*, ¶¶ 40–48, 443 P.3d at 1014–15. The fact that this was a lengthy trial that included many witnesses and voluminous evidence also minimized the prejudicial impact these handful of errors might have had. *See Vialpando*, ¶ 33, 512 P.3d at 114; *Howard-Walker*, ¶ 40, 443 P.3d at 1014.

¶156 Therefore, we conclude that Ray is not entitled to reversal under the cumulative error doctrine.

D. Juror Misconduct

¶157 Following Ray's conviction and sentencing, he moved for a new trial. In that motion, he alleged that a juror had failed to disclose material information on her juror questionnaire that revealed potential bias and prejudice. The information related to the juror's brother-in-law's recent death, her family's suspicions that his death was a homicide, and her belief that potential witnesses in that case weren't coming forward out of fear. Ray also alleged that the juror shared this information with other jurors, which introduced extraneous prejudicial information into the deliberative process. He asked the court to hold an evidentiary hearing to resolve these allegations and to allow him to subpoena jurors to testify at the hearing. The parties discussed the issue at a postconviction evidentiary hearing for other matters. The court concluded that an evidentiary hearing was required to discuss the juror's failure to disclose information on her questionnaire because it raised issues of potential bias. The court further explained that the issue of whether the juror had introduced extraneous information into the jury room wouldn't be discussed, but it recognized that the hearing could "morph" and that the extraneous ***440** information issue could become relevant.

¶158 At the subsequent evidentiary hearing, the juror explained that her brother-in-law had died of a drug overdose about six months before Ray's trial, and "[t]he family fe[lt] like it could have been a homicide," or at least, they "would like to think" his death wasn't a drug overdose. She also said that she never saw a police report and never spoke to the police about her brother-in-law's death. She conceded it was possible that there were witnesses who weren't coming forward regarding her brother-in-law's death, but she didn't have any information that such witnesses existed. During cross-examination, she further explained that although the family had questioned the circumstances of her brother-in-law's death, the police had never indicated it was anything other than an overdose.

¶159 At one point during the juror's direct examination, defense counsel asked if she had told the other jurors about her brother-in-law's death, and she said, "Yes." He then asked her to "tell me what you told the members of the jury," and the prosecution objected, arguing that the questioning fell under CRE 606 and invaded "the province of the jury's deliberative process." The court sustained the objection. After further discussion, defense counsel asked the juror whether her brother-in-law's "suspicious death ... cause[d] [her] to have any special insight during [the] deliberations in [Ray's] case," and she said, "No." Counsel then again asked the juror whether she shared this information with the other jurors, and the court again sustained the prosecutor's objection.

¶160 At the end of the hearing, the court concluded that the juror hadn't deliberately hidden information in answering the questionnaire and hadn't, by her conduct, deprived Ray of the opportunity to challenge her for cause. The court also concluded that Rule 606 precluded it from inquiring into the extraneous-information allegations.

¶161 Ray contends that the court erred by concluding that Rule 606 precluded it from inquiring into the extraneous-information allegations. We disagree.

¶162 Colorado law strives "to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion" and therefore "strongly disfavors any juror testimony impeaching a verdict." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005); *accord Clark v. People*, 2024 CO 55, ¶ 66, 553 P.3d 215, 230. As a result, a juror is prohibited from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon ... any ... juror's mind or emotions as influencing the juror to assent to or dissent from the verdict ... or concerning the juror's mental processes in connection therewith," though a juror may testify about "whether extraneous prejudicial information was improperly brought to the jurors' attention." CRE 606(b).

¶163 The scope of this no-impeachment rule is broad and allows for exceptions only when allegations of juror bias are so extreme that the usual safeguards aren't sufficient to protect the integrity of the jury-trial right. *See Peña-Rodriguez*, 580 U.S. at 221, 137 S.Ct. 855. So, for example, relying on the nearly identical federal version of this rule, the Supreme Court has allowed inquiry into the deliberative process when there was "a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* at 225, 137 S.Ct. 855. To justify setting aside the no-impeachment bar, the statements "must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.* at 225–26, 137 S.Ct. 855. But the Court has precluded inquiry into juror deliberations even when it was alleged that a juror was inebriated during deliberations and when a juror allegedly lied about a pro-defendant bias during voir dire. *See id.* at 219–21, 137 S.Ct. 855 (discussing *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), and *Warger v. Shauers*, 574 U.S. 40, 135 S.Ct. 521, 190 L.Ed.2d 422 (2014)).

¶164 A party seeking to impeach a verdict based on the improper introduction ***441** of extraneous prejudicial information to the jurors "must show both that extraneous information was improperly before the jury and that the extraneous information posed the reasonable possibility of prejudice to the defendant." *Clark*, ¶ 68, 553 P.3d at 230 (quoting *Kendrick v. Pippin*, 252 P.3d 1052, 1063 (Colo. 2011), *abrogated on other grounds by Bedor v. Johnson*, 2013 CO 4, 292 P.3d 924). So, courts must first determine whether the complaining party "has presented competent evidence alleging that extraneous prejudicial information was improperly before the jury." *Id.* at ¶ 70, 553 P.3d at 230. Because this determination presents a mixed question of law and fact, we review the court's factual findings for an abuse of discretion and its legal conclusions de novo. *Kendrick*, 252 P.3d at 1064. Whether information constitutes extraneous prejudicial information is a question of law. *Clark*, ¶ 65, 553 P.3d at 230.

¶165 If a court determines the challenged information wasn't extraneous or prejudicial, it may dismiss a motion for a new trial without an evidentiary hearing. *Id.* at ¶¶ 70, 74, 553 P.3d at 231. But if the court determines the information was extraneous and prejudicial, it must then determine whether there was an objectively "reasonable possibility that the ... information influenced the verdict to the detriment of the defendant." *Id.* at ¶ 71, 553 P.3d at 231. This determination is often made after an evidentiary hearing. *Id.*; *accord Harlan*, 109 P.3d at 625.

¶166 Extraneous information is "any information that is not properly received into evidence or included in the court's instructions." *Kendrick*, 252 P.3d at 1064 (quoting *Harlan*, 109 P.3d at 624). It " 'consists of (1) "legal content and specific factual information" (2) "learned from outside the record" (3) that is "relevant to the issues in a case." ' " *Clark*, ¶ 75, 553 P.3d at 231 (quoting *People v. Newman*, 2020 COA 108, ¶ 15, 471 P.3d 1243, 1250). Extraneous information is improper for jury consideration. *Kendrick*, 252 P.3d at 1064 (explaining that jurors are instructed "to consider only the evidence admitted at trial and the law as given in the trial court's instructions" (quoting *Harlan*, 109 P.3d at 624)).

¶167 But jurors are expected "to use their life experiences to engage the record evidence and to participate in thoughtful deliberations." *Id.* at 1066 ("[T]his approach recognizes the traditional role of the jury, that the jurors are expected to call on their personal experiences and common sense in reaching their verdict."). So, information isn't considered extraneous "if it was 'part of the juror's background, gained before the juror was selected to participate in the case and not as the result of independent investigation into a matter relevant to the case.' " *People v. Clark*, 2015 COA 44, ¶ 222, 370 P.3d 197, 227 (quoting *Kendrick*, 252 P.3d at 1066).

¶168 Here, although the juror's family had suspicions about her brother-in-law's death, there was no evidence of foul play and no investigation in which the juror was involved or of which she was aware. And based on the juror's testimony at the hearing, it seems she was only peripherally aware of the family's suspicions and not pursuing any sort of investigation herself. *Cf. id.* at ¶¶ 239–40, 370 P.3d at 229 (concluding that jurors introduced extraneous information into deliberations when they conducted an informal experiment to test the credibility of witness testimony during the trial). Rather, this information was part of the juror's background and personal life experience, independent of the trial. It wasn't, therefore, extraneous.

¶169 And even if it was, there's no reasonable possibility that this information could have prejudiced Ray because it didn't contain any information relevant to the issues in Ray's case. Moreover, "[b]ecause the line between past experience and extraneous information is a fine one, the admonition that we 'err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity'—is important." *Clark*, ¶ 84, 553 P.3d at 232 (quoting *Garcia v. People*, 997 P.2d 1, 7 (Colo. 2000)). So, we conclude that Rule 606(b) precluded jurors ***442** from testifying about the alleged juror misconduct.

E. Cruel and Unusual Punishment

¶170 Following the guilt phase of Ray's trial, the court held a separate penalty-phase trial, which resulted in the imposition of a death sentence for Marshall-Fields's murder and LWOP for Wolfe's murder. The Governor later commuted Ray's capital sentence to LWOP. Ray now challenges, for the first time, his LWOP sentences as unconstitutional, both facially and as applied, under the Eighth Amendment of the U.S. Constitution. He asks this court to remand his case so the district court can hold an evidentiary hearing to address these constitutional challenges.

¶171 We review constitutional challenges to sentencing determinations de novo. *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005). In doing so, we recognize that it is the legislature's prerogative to define crimes and punishments, circumscribed of course by the Eighth Amendment's prohibition against "cruel and unusual punishments," and so we generally defer to the legislature's policy choices regarding sentencing. *McDonald v. People*, 2024 CO 75, ¶¶ 8, 10, 560 P.3d 412, 417–18 (quoting U.S. Const. amend. VIII); *accord* Colo. Const. art. II, § 20; *Ewing v. California*, 538 U.S. 11, 25, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (plurality opinion). We also generally presume that statutes are constitutional unless "the party challenging it proves its unconstitutionality beyond a reasonable doubt." *Woo v. El Paso Cnty. Sheriff's Off.*, 2022 CO 56, ¶ 21, 528 P.3d 899, 905 (quoting *Coffman v. Williamson*, 2015 CO 35, ¶ 13, 348 P.3d 929, 934).

¶172 "A statute is facially unconstitutional only if no conceivable set of circumstances exist under which it may be applied in a constitutionally permissible manner." *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007). A statute is unconstitutional as applied if the challenging party establishes that it "is unconstitutional 'under the circumstances in which [he] has acted or proposes to act.' " *People v. King*, 2017 CO 44, ¶ 7, 401 P.3d 516, 517 (quoting *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011)). "The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative." *Id.* (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008)).

¶173 The Colorado legislature has created a comprehensive sentencing scheme. This scheme provides that, for offenses committed before July 2020, the presumptive sentencing range for a class 1 felony is life imprisonment to death. § 18-1.3-401(1)(a)(I)–(V)(A.1), C.R.S. (2024). However, recognizing that a court might later determine that the death penalty

was unconstitutional, the legislature provided a mechanism by which "the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment." § 18-1.3-401(5).[9] And it defined life imprisonment for adult offenders who committed an offense on or after July 1, 1990, as LWOP. § 18-1.3-401(4)(a)(III); *see also* § 18-1.3-401(4)(b) (explaining that, for juveniles tried as adults for offenses committed after July 1, 2006, life imprisonment means life with the possibility of parole after forty years); *People v. Tate*, 2015 CO 42, ¶¶ 32–34, 352 P.3d 959, 967 (describing Colorado's evolving definition of "life imprisonment").

9 In 2020, the legislature abolished the death penalty for offenses committed on or after July 1, 2020. Ch. 61, secs. 1, 10, §§ 16-11-901, 18-1.3-401(1)(a)(V.5)(A), 2020 Colo. Sess. Laws 204, 204, 209–10. But it left intact the sentencing scheme for offenses committed before July 2020.

¶174 Ray seems to argue as follows. "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. 460, 479, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *see also Graham v. Florida*, 560 U.S. 48, 74–75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Ray was nineteen when he committed the offenses here. And while nineteen-year-olds aren't defined as juveniles by statute, they should be included in the LWOP prohibition because "developing brain science" is expanding "the longstanding recognition that ***443** juveniles have diminished moral culpability for their crimes ... to encompass emerging adults—those who were [eighteen to twenty] years old at the time of their crimes." Therefore, Ray's LWOP sentences are unconstitutional. We reject Ray's argument for four reasons.

¶175 *First*, neither this court nor the U.S. Supreme Court has held that LWOP sentences are categorically unconstitutional. *See Sellers v. People*, 2024 CO 64, ¶¶ 20–25, 560 P.3d 954, 959–60; *see also*, *e.g.*, *Graham*, 560 U.S. at 69, 130 S.Ct. 2011; *Tate*, ¶ 31, 352 P.3d at 967. And because we see no reason to depart from existing precedent, we conclude that an LWOP sentence imposed upon a class-1-felony conviction is facially constitutional.

¶176 *Second*, both this court and the U.S. Supreme Court have held that, as applied to juveniles, mandatory LWOP sentences are unconstitutional but discretionary ones are permissible in some cases. *Miller*, 567 U.S. at 479, 132 S.Ct. 2455; *Tate*, ¶¶ 35–36, 352 P.3d at 967–68. Both the Colorado legislature and the U.S. Supreme Court also recognize eighteen as the age that divides juveniles and adults, and neither has yet adopted a broader definition of "juvenile." *See Graham*, 560 U.S. at 74–75, 130 S.Ct. 2011 (noting that "[t]he age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood" (first alteration in original) (quoting *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005))); § 19-1-103(10), (21), (88), C.R.S. (2024) (defining "Adult" as "a person eighteen years of age or older"; "Child" as "a person under eighteen years of age"; and "Juvenile" as having the same meaning as "Child"); *accord* § 19-2.5-102(6), (28), C.R.S. (2024).

¶177 Ray points to several states that have expanded the prohibition on mandatory LWOP sentences to include defendants as old as twenty-one years old. *See Commonwealth v. Mattis*, 493 Mass. 216, 224 N.E.3d 410, 415 (Mass. 2024) (holding that, under the state constitution, mandatory LWOP for defendants who were under twenty-one years old when they committed their offense is unconstitutionally cruel and unusual); *In re Monschke*, 197 Wash.2d 305, 482 P.3d 276, 279–81 (Wash. 2021) (same); *People v. Parks*, 510 Mich. 225, 987 N.W.2d 161, 182 (Mich. 2022) (same but only as to eighteen year olds); *see also* 730 Ill. Comp. Stat. Ann. 5/5-4.5-115(b) (West 2025) (allowing defendants who were under twenty-one years old when they committed their offense to seek parole review after ten years, or after twenty years if their offense was first degree murder). *But see People v. Spencer*, 2025 IL 130015, ¶ 32, —— N.E.3d —— (Ill. 2025) ("We ... continue to hold that *Miller* only applies to juveniles and does not apply to emerging adults."). Colorado has not yet followed suit, though the legislature in recent years has added "young adults" (defined as defendants who were eighteen to twenty years old when they committed their offense) to certain statutes that had previously given various sentencing considerations only to juveniles. *See* §§ 17-34-101 to -102, C.R.S. (2024) (specialized program placement); § 17-22.5-403.7(1)(a)(III), C.R.S. (2024) (parole eligibility). Notably, however, in amending these statutes, the legislature expressly excluded young adults, like Ray, who were sentenced to LWOP. *See* § 17-34-101(1)(a), C.R.S. (2024); § 17-22.5-403.7(1)(b), (2).

¶178 Nonetheless, even if we were to accept Ray's argument that scientific research and society's evolving standards of decency support the conclusion that emerging adults share the qualities of youth that render mandatory LWOP sentences for juveniles unconstitutionally cruel and unusual, we would nonetheless affirm Ray's sentences here.

¶179 When we previously considered the constitutionality of mandatory LWOP sentences for juveniles, we reasoned that, because life imprisonment is proportionally so much longer for juveniles than it generally is for adults and because juvenile brains aren't fully developed, courts must "follow a certain process—considering an offender's youth and attendant characteristics—before imposing [this] particular penalty." *Tate*, ¶ 31, 352 P.3d at 967 (quoting *Miller*, 567 U.S. at 483, 132 S.Ct. 2455); *see also Miller*, 567 U.S. at 474–75, 477–78, 132 S.Ct. 2455; *Graham*, 560 U.S. at 59, 130 S.Ct. 2011 ("The concept of proportionality is central to the Eighth Amendment."). ***444** Ray received this individualized consideration.

¶180 Several experts testified for the defense during Ray's penalty-phase trial. These experts discussed, both in general terms and specifically as to Ray, psychology, brain and neurological development, trauma responses, and the long-term effect that brain injuries can have. This testimony examined Ray's age, family, social life, potential brain injuries, exposure to violence and trauma, and more. Ray's family and friends also testified about Ray's childhood neighborhoods, upbringing, prior criminal activity, and personality.

¶181 At the end of the trial, the jurors were presented with the only two sentencing options authorized by statute at the time—LWOP or death. The jurors were instructed to consider all the testimony, information, and evidence they had received during the guilt and penalty phases of the trial and to make their own determinations regarding the weight of the evidence based on the witnesses' credibility, motives, and relationships, as well as any other relevant circumstances. This information would necessarily include the testimony and evidence related to Ray's "youth and attendant characteristics." *Miller*, 567 U.S. at 483, 132 S.Ct. 2455. We presume the jurors followed the court's instructions in deciding to impose the harshest sentence available for Marshall-Fields's murder. *See Washington*, ¶¶ 25–27, 547 P.3d at 1092–93.

¶182 We therefore conclude that, given the individualized consideration Ray received, a sentence to LWOP is constitutional as applied to Ray. *See Miller*, 567 U.S. at 479–80, 132 S.Ct. 2455 (explaining that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," but the Court wouldn't "foreclose a sentencer's ability to make that judgment," as long as the sentencer considered "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

¶183 *Third*, Ray's LWOP sentence for Marshall-Fields's murder wasn't imposed by a court; it was granted by the Governor, exercising his authority to commute Ray's death sentence. The Governor has exclusive authority "to grant reprieves, commutations and pardons after conviction." Colo. Const. art. IV, § 7. Thus, so long as the Governor's "commutation is constitutionally permissible" and the original sentence was "legally imposed by a court," the judiciary has no authority to alter the sentence. *Johnson v. Perko*, 692 P.2d 1140, 1142 (Colo. App. 1984); *accord People ex rel. Dunbar v. Dist. Ct.*, 502 P.2d 420, 421 (Colo. 1972); *People v. Davis*, 526 P.2d 312, 313 (Colo. 1974). Ray's LWOP sentence for Marshall-Fields's murder meets both criteria.

¶184 Ray was originally sentenced pursuant to the capital sentencing procedures in place at the time of his conviction, and he hasn't argued on appeal that his original capital sentence wasn't legally imposed. Moreover, under the sentencing statutes, a court could have resentenced Ray to LWOP following the death penalty's abolishment, and mandatory LWOP sentences for adult, class-1-felony offenders aren't categorically unconstitutional. *Sellers*, ¶ 37, 560 P.3d at 962. [10] We thus conclude that Ray's commuted LWOP sentence is constitutional.

10 Even if nineteen-year-olds were juveniles for sentencing purposes, the Supreme Court in *Miller* held only that *mandatory* LWOP sentences for juveniles are unconstitutional. 567 U.S. at 479–80, 132 S.Ct. 2455; *see also*, *e.g.*, *Graham*, 560 U.S. at 74–75, 130 S.Ct. 2011. But there was nothing mandatory about Ray's commuted LWOP sentence. The Governor is authorized to commute a capital sentence "by reducing the penalty ... to imprisonment for life or for a term of not

less than twenty years at hard labor." § 16-17-101, C.R.S. (2024). Thus, the Governor wasn't required to reduce Ray's sentence to LWOP; he had other options.

¶185 Lastly, while we commend Ray for refocusing his life in a positive direction, we generally determine as-applied constitutionality at the time a sentence is imposed. *See, e.g.*, *Lucero v. People*, 2017 CO 49, ¶¶ 26–29, 394 P.3d 1128, 1134 (concluding that the defendant's sentence was constitutional and "appropriate" because the sentencing court considered the relevant circumstances *at the time the sentence was imposed*). A court may consider a defendant's rehabilitative progress and society's ***445** evolving standards of decency during a proportionality review, *see Wells-Yates v. People*, 2019 CO 90M, ¶¶ 45–48, 454 P.3d 191, 206, but when a sentence is facially constitutional and a court is considering a defendant's Eighth Amendment as-applied challenge, the key considerations are "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," *Graham*, 560 U.S. at 67, 130 S.Ct. 2011; *see also Wells-Yates*, ¶¶ 5–18, 454 P.3d at 196–200. And, as discussed above, Ray received this consideration. Therefore, we need not remand this case to the trial court for an evidentiary hearing regarding these claims.

III. Conclusion

¶186 We affirm the trial court's judgment of conviction and Ray's LWOP sentence.

JUSTICE SAMOUR did not participate.

All Citations

575 P.3d 400, 2025 CO 42M

End of Document

Appendix 2:

Order of the Colorado Supreme Court
Denying Petition for Rehearing
in *People v. Robert Keith Ray*,
Case No. 10SA157
(issued Sept. 8, 2025)

Supreme Court of Colorado

STATE OF COLORADO
2 EAST 14TH AVENUE
DENVER, COLORADO 80203

DATE FILED
September 8, 2025
CASE NUMBER: 2010SA157

CHERYL L. STEVENS
CLERK OF THE COURT

People v. Ray

Case No. 10SA157

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

The Opinion in the above referenced case announced on June 23, 2025, has been modified, and as Modified, said Petition for Rehearing shall be, and the same hereby is DENIED.

Attached are the marked pages showing the revisions:

- Headnote, page 2
- Caption page (disposition)
- Page 1, ¶ 1
- Page 6, ¶ 8
- Pages 45–46, ¶ 104
- Page 49, ¶ 112
- Page 71, ¶ 162
- Pages 75–85, ¶¶ 170, 172–85, n. 9, 10.

BY THE COURT, EN BANC, September 8, 2025.
JUSTICE SAMOUR does not participate.

Appendix 2

deliberations. And finally, the defendant challenges his sentences ~~—a term~~ of life without the possibility of parole, ~~which was imposed after the Governor commuted his originally imposed death sentence —~~as unconstitutional under the Eighth Amendment.

The supreme court concludes that although the district court erred in some ways, none of those errors, individually or cumulatively, warrant reversal. Similarly, although some of the prosecution's comments were improper, none of them constitutes reversible misconduct. The supreme court further concludes that the district court properly denied inquiry into alleged juror misconduct under CRE 606(b). And lastly, the court holds that the defendant's sentences are ~~is~~ constitutional.

The supreme court therefore affirms the judgment of conviction and ~~commuted~~ sentence.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 42M

Supreme Court Case No. 10SA157
Appeal from the District Court
Arapahoe County District Court Case No. 06CR697
Honorable Gerald J. Rafferty, Judge

Plaintiff-Appellee:

The People of the State of Colorado,

v.

Defendant-Appellant:

Robert Keith Ray.

Judgment and Sentence Affirmed
en banc
June 23, 2025

Modified Opinion. Marked revisions shown.

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JUSTICE HOOD delivered the Opinion of the Court.

¶1 Javad Marshall-Fields and his fiancée, Vivian Wolfe, were killed in a drive-by shooting ("the Dayton Street shooting"), just eight days before Marshall-Fields was expected to testify against Robert Keith Ray. Marshall-Fields had identified Ray as the getaway driver~~one of two gunmen~~ in another shooting at Lowry Park the year before ("the Lowry Park shooting").

¶2 Ray was eventually charged with numerous offenses related to the Dayton Street shooting, and a jury found him guilty of nearly all of them. The district court entered the judgment of conviction, and following a separate sentencing trial, sentenced Ray to death. Pursuant to the unitary review process then in effect, Ray appealed his convictions and sentences related to the Dayton Street shooting directly to this court. *See* §§ 16-12-201 to -210, C.R.S. (2024); Crim. P. 32.2. This opinion addresses that appeal.

¶3 The Colorado General Assembly subsequently abolished the death penalty, and in March 2020, Governor Jared Polis commuted Ray's capital sentence to a sentence of life without the possibility of parole ("LWOP"). Although we determined that the unitary review process no longer applied in this case, we chose to retain jurisdiction over the appeal. And, having reviewed Ray's challenges to his convictions and LWOP sentence, we now affirm.

¶8 Around this same time, Ray told his friend Jamar Johnson to offer $10,000 to both Marshall-Fields and Martin in exchange for them not testifying. Ray also told Johnson that if the bribes didn't work, he'd pay Johnson $10,000 to kill them both. A few months later, Ray again offered Johnson $10,000 to bribe or kill just Marshall-Fields because by then, Martin had approached Ray and told him he didn't want to "snitch" and that, although the prosecution was trying to force him, he wasn't going to testify. Ray also told Sailor he wasn't worried about Martin testifying anymore. Ray continued to worry, however, about Marshall-Fields's testimony, which would ~~make him a shooter and~~ place him behind the wheel of the Suburban at the Lowry Park shooting.

¶9 On June 19, 2005—eight days before Ray's Lowry Park trial—Sailor went to a Father's Day barbecue at a park. Ray called and asked if she'd seen Marshall-Fields at the park. She said she had, and Ray and Johnson arrived soon after. They saw Marshall-Fields and watched him leave the park. Ray told Johnson that Marshall-Fields was still planning to testify and that he would "take things into [his] own hands."

¶10 Later that same day, Ray and Owens were out with their friends, Parish Carter and Checados Todd, when they saw Marshall-Fields's car at Gibby's, a local sports bar. Carter went into the bar and told Marshall-Fields, "They're looking for

596, 622–23 (Colo. App. 2009); *see also People v. Lagunas*, 710 P.2d 1145, 1148 (Colo. App. 1985) ("Because the duration of stress will obviously vary with the intensity of the experience and the emotional endowment of the individual, the exception necessarily vests the trial court with broad discretion in applying the rule.").

¶104 We therefore conclude that the trial court didn't abuse its discretion by admitting the statements under the excited utterance exception.[5] We also conclude that Marshall-Fields's statements were relevant because they had some tendency to show that Ray committed the offense of witness intimidation. *See* CRE 401; *see*

[5] Even if these statements weren't excited utterances, they were admissible under the residual hearsay rule. *First*, the statements were relevant to a material fact. Ray was charged with intimidating a witness, which required the prosecution to prove that Ray used "a threat, act of harassment . . . , or act of harm or injury" against a witness in a criminal proceeding. § 18 8 704(1)(a), C.R.S. (2024). So, Marshall-Fields's statements to his friends that he was threatened in Gibby's were relevant to show that Ray (through Carter) committed that offense. *Second*, had Marshall-Fields not been killed, he could have testified to these facts directly since he was the person to whom the threats were made. But because Marshall-Fields was unavailable to testify, his friends' testimony about what he told them was more probative of this fact than any other evidence that could reasonably have been obtained. *See Pena*, 173 P.3d at 1112. *Third*, the general purposes of the rules of evidence and the interests of justice were served by admission of these statements. *See id.*; *see also* CRE 803(2)–(3), 804, 807; *Vasquez*, 173 P.3d at 1104 ("The forfeiture doctrine prevents defendants from profiting by their own misconduct . . . ."). The parties discussed the admissibility of Marshall-Fields's statements under the residual hearsay rule at a pretrial hearing nearly nine months before trial, providing Ray with ample notice that the statements would be offered into evidence at trial and an opportunity to object before the evidence was presented to the jury. *See Pena*, 173 P.3d at 1112. And, as discussed above, Marshall-Fields made these statements under conditions that provided circumstantial guarantees of trustworthiness. *See id.*; *Compan*, 121 P.3d at 882.

also § 18-8-704(1)(a), C.R.S. (2024) (explaining that witness intimidation requires proof that the defendant used "a threat" or "act of harassment" against a witness in a criminal proceeding). Although the statements may have been prejudicial, after giving them their maximum probative value and minimal prejudicial effect, we conclude that they weren't unfairly so. *See Nicholls*, ¶ 56, 396 P.3d at 687 ("Reviewing courts give great deference to trial court decisions under CRE 403 because a multitude of factors are considered in this balancing process.").

iii. Statements About Marshall-Fields's Dreams

¶105 Marshall-Fields's friend, Stephanie Hayashido, testified that, while they were at the apartment complex after leaving Gibby's, Marshall-Fields told her that "he had a dream and he said that it was a sign from God that he was going to die because he died in his dream, or that God told him he was going to die in his dream." Defense counsel objected, but the court determined the statement was admissible to show Marshall-Fields's state of mind, which was relevant to the intimidation charge.

¶106 Although fear statements may be admissible if the victim's state of mind is at issue, *People v. Acosta*, 2014 COA 82, ¶¶ 84–91, 338 P.3d 472, 486–87; CRE 803(3), Marshall-Fields's state of mind wasn't at issue here. A defendant commits the offense of witness intimidation if he intentionally uses threats or harassment to intimidate a witness. § 18-8-704(1)(a). But the prosecution doesn't need to prove

testifying against. . . . I keep seeing them. I keep seeing them everywhere I go. They were at the store and then they were at the barbe[c]ue and then I saw them again. . . . [T]he people who shot me, . . . the people I'm testifying against."

¶112 "A victim's statements to the effect that she was, at the time, afraid of another fall squarely within the state of mind hearsay exception under CRE 803 because they refer not to past events or conditions, but to the victim's then existing state of mind." *Cross*, ¶ 32, 531 P.3d at 451 (quoting *Rogers*, 68 P.3d at 493). These statements are also relevant because they have some tendency to identify Ray as the individual who was threatening or harassing Marhsall-Fields. *See* CRE 401. And they aren't unfairly prejudicial, particularly when given their maximum probative value. *See Nicholls*, ¶ 56, 396 P.3d at 687. Under ~~And under~~ these circumstances, we perceive no abuse of discretion in the trial court's admission of these statements under the state of mind exception to the hearsay rule.[7] *See* CRE 803(3); *People v. Haymaker*, 716 P.2d 110, 113 n.3 (Colo. 1986).

b. Other Witnesses' Statements of Fear

¶113 Ray asserts that the trial court improperly admitted evidence about various witnesses' fear of Ray, evidence about those witnesses' reluctance to testify,

[7] We also conclude that, for the same reasons the statements Marshall-Fields made to his friends about the incident at Gibby's were admissible under the residual hearsay rule, these statements were admissible under the residual hearsay rule as well.

juror whether she shared this information with the other jurors, and the court again sustained the prosecutor's objection.

¶160 At the end of the hearing, the court concluded that the juror hadn't deliberately hidden information in answering the questionnaire and hadn't, by her conduct, deprived Ray of the opportunity to challenge her for cause. The court also concluded that Rule 606 precluded it from inquiring into the extraneous-information allegations.

¶161 Ray contends that the court erred by concluding that Rule 606 precluded it from inquiring into the extraneous-information allegations. We disagree.

¶162 Colorado law strives "to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion" and therefore "strongly disfavors any juror testimony impeaching a verdict." *People~~Peopl~~ v. Harlan*, 109 P.3d 616, 624 (Colo. 2005); *accord Clark v. People*, 2024 CO 55, ¶ 66, 553 P.3d 215, 230. As a result, a juror is prohibited from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon . . . any . . . juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith," though a juror may testify about "whether extraneous prejudicial information was improperly brought to the jurors' attention." CRE 606(b).

background and personal life experience, independent of the trial. It wasn't, therefore, extraneous.

¶169 And even if it was, there's no reasonable possibility that this information could have prejudiced Ray because it didn't contain any information relevant to the issues in Ray's case. Moreover, "[b]ecause the line between past experience and extraneous information is a fine one, the admonition that we 'err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity'—is important." *Clark*, ¶ 84, 553 P.3d at 232 (quoting *Garcia v. People*, 997 P.2d 1, 7 (Colo. 2000)). So, we conclude that Rule 606(b) precluded jurors from testifying about the alleged juror misconduct.

E. Cruel and Unusual Punishment

¶170 Following the guilt phase of Ray's trial, the court held a separate penalty-phase trial, which resulted in the imposition of a death sentence for Marshall-Fields's murder and LWOP for Wolfe's murder. The Governor later commuted Ray's capital sentence to LWOP. Ray now challenges, for the first time, his LWOP sentences~~sentence~~ as unconstitutional, both facially and as applied, under the Eighth Amendment of the U.S. Constitution. He asks this court to remand his case so the district court can hold an evidentiary hearing to address these constitutional challenges.

¶171 We review constitutional challenges to sentencing determinations de novo. *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005). In doing so, we recognize that it is the legislature's prerogative to define crimes and punishments, circumscribed of course by the Eighth Amendment's prohibition against "cruel and unusual punishments," and so we generally defer to the legislature's policy choices regarding sentencing. *McDonald v. People*, 2024 CO 75, ¶¶ 8, 10, 560 P.3d 412, 417–18 (quoting U.S. Const. amend. VIII); *accord* Colo. Const. art. II, § 20; *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion). We also generally presume that statutes are constitutional unless "the party challenging it proves its unconstitutionality beyond a reasonable doubt." *Woo v. El Paso Cnty. Sheriff's Off.*, 2022 CO 56, ¶ 21, 528 P.3d 899, 905 (quoting *Coffman v. Williamson*, 2015 CO 35, ¶ 13, 348 P.3d 929, 934).

¶172 "A statute is facially unconstitutional only if no conceivable set of circumstances exist under which it may be applied in a constitutionally permissible manner." *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007). A statute is unconstitutional as applied if ~~it doesn't, "with sufficient clarity, prohibit~~ the challenging party establishes that it "is unconstitutional 'under the circumstances in~~conduct against~~ which [he] has acted or proposes to act.'"~~it is enforced."~~ *People v. King*, 2017 CO 44, ¶ 7, 401~~*Shell*, 148~~ P.3d 516, 517~~162, 173 (Colo. 2006)~~ (quoting *Qwest Servs. Corp.* ~~*People*~~ *v. Blood*, 252~~*McIntier*, 134~~ P.3d 1071, 1085 (Colo. 2011)).

"The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative." *Id.* (quoting *Developmental Pathways v. Ritter*, 178 P.3d 524, 534~~467, 475~~ (Colo. 2008~~App. 2005~~)).

¶173 The Colorado legislature has created a comprehensive sentencing scheme. This scheme provides that, for offenses committed before July 2020, the presumptive ~~that guides our courts in resentencing defendants who were initially sentenced to death under Colorado's previous capital~~ sentencing range for a class 1 felony is life imprisonment to death. § 18-1.3-401(1)(a)(I)–(V)(A.1), C.R.S. (2024). However, recognizing that a court might later determine that the death penalty was unconstitutional, the legislature provided a mechanism by which~~scheme. Under this revised sentencing scheme,~~ "the court which previously sentenced a person to death shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment." § 18-1.3-401(5).[9] And it defined life imprisonment~~), C.R.S. (2024). The statute further explains that,~~ for adult offenders~~defendants like Ray,~~ who committed an offense on or after~~their offenses between~~ July 1, 1990, as ~~and July 1, 2020, life imprisonment means~~ LWOP.

[9] In 2020, the legislature abolished the death penalty for offenses committed on or after July 1, 2020. Ch. 61, secs. 1, 10, §§ 16-11-901, 18-1.3-401(1)(a)(V.5)(A), 2020 Colo. Sess. Laws 204, 204, 209–10. But it left intact the sentencing scheme for offenses committed before July 2020.

§ 18-1.3-401(4)(a)(III); *see also* § 18-1.3-401(4)(b) (explaining that, for juveniles tried as adults for offenses committed after July 1, 2006, life imprisonment means life with the possibility of parole after forty years); *People v. Tate*, 2015 CO 42, ¶¶ 32–34, 352 P.3d 959, 967 (describing Colorado's evolving definition of "life imprisonment").

¶174 Ray seems to argue as follows. "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. 460, 479 (2012); *see also Graham v. Florida*, 560 U.S. 48, 74–75 (2010). Ray was nineteen when he committed the offenses here. And while nineteen-year-olds aren't defined as juveniles by statute, they should be included in the LWOP prohibition~~that statutory definition~~ because "developing brain science" is expanding "the longstanding recognition that juveniles have diminished moral culpability for their crimes . . . to encompass emerging adults—those who were [eighteen to twenty] years old at the time of their crimes." Therefore, Ray's LWOP sentences are~~sentence is facially~~ unconstitutional. We reject Ray's argument for four~~two~~ reasons.

¶175 *First*, neither this court nor the U.S. Supreme Court has held that LWOP sentences are categorically unconstitutional. *See Sellers v. People*, 2024 CO 64, ¶¶ 20–25, 560 P.3d 954, 959–60; *see also, e.g.*, *Graham*, 560 U.S. at 69; *Tate*, ¶ 31, 352 P.3d at 967. And because we see no reason to depart from existing precedent,

we conclude that an LWOP sentence imposed upon a class-1-felony conviction is facially constitutional.

¶175¶176 *Second*, both this court and the U.S. Supreme Court have held that, as applied to juveniles, *mandatory* LWOP sentences are unconstitutional but discretionary ones are permissible in some cases. *Miller*, 567 U.S. at 479; *Tate*, ¶¶ 35–36, 352 P.3d at 967–68. Bothboth the Colorado legislature and the U.S. Supreme Court also recognize eighteen as the age that divides juveniles and adults, and neither has yet adopted a broader definition of "juvenile." *See Graham*, 560 U.S. at 74–75 (noting that "[t]he age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood" (first alteration in original) (quoting *Roper v. Simmons*, 543 U.S. 551, 574 (2005))); § 19-1-103(10), (21), (88), C.R.S. (2024) (defining "Adult" as "a person eighteen years of age or older"; "Child" as "a person under eighteen years of age"; and "Juvenile" as having the same meaning as "Child"); *accord* § 19-2.5-102(6), (28), C.R.S. (2024). ~~And, within constitutional limits, we are bound by the legislature's policy choices.~~

¶177 Ray points to several states that have expanded the prohibition on mandatory LWOP sentences to include defendants as old as twenty-one years old. *See Commonwealth v. Mattis*, 224 N.E.3d 410, 415 (Mass. 2024) (holding that, under the state constitution, mandatory LWOP for defendants who were under twenty-one years old when they committed their offense is unconstitutionally cruel and

unusual); *In re Monschke*, 482 P.3d 276, 279–81 (Wash. 2021) (same); *People v. Parks*, 987 N.W.2d 161, 182 (Mich. 2022) (same but only as to eighteen year olds); *see also* 730 Ill. Comp. Stat. Ann. 5/5-4.5-115(b) (West 2025) (allowing defendants who were under twenty-one years old when they committed their offense to seek parole review after ten years, or after twenty years if their offense was first degree murder). *But see People v. Spencer*, 2025 IL 130015, ¶ 32, __ N.E.3d __ (Ill. 2025) ("We . . . continue to hold that *Miller* only applies to juveniles and does not apply to emerging adults."). Colorado has not yet followed suit, though the legislature in recent years has added "young adults" (defined as defendants who were eighteen to twenty years old when they committed their offense) to certain statutes that had previously given various sentencing considerations only to juveniles. *See* §§ 17-34-101 to -102, C.R.S. (2024) (specialized program placement); § 17-22.5-403.7(1)(a)(III), C.R.S. (2024) (parole eligibility). Notably, however, in amending these statutes, the legislature expressly excluded young adults, like Ray, who were sentenced to LWOP. *See* § 17-34-101(1)(a), C.R.S. (2024); § 17-22.5-403.7(1)(b), (2).

¶178 Nonetheless, even if we were to accept ~~*Second,*~~ Ray's argument that scientific research and society's evolving standards of decency support the conclusion that emerging adults share the qualities of youth that render mandatory LWOP

sentences for juveniles unconstitutionally cruel and unusual, we would nonetheless affirm Ray's sentences here.

¶179 When we previously considered the constitutionality of mandatory LWOP sentences for juveniles, we reasoned that, because life imprisonment is proportionally so much longer for juveniles than it generally is for adults and because juvenile brains aren't fully developed, courts must "follow a certain process—considering an offender's youth and attendant characteristics—before imposing [this] particular penalty." *Tate*, ¶ 31, 352 P.3d at 967 (quoting *Miller*, 567 U.S. at 483); *see also Miller*, 567 U.S. at 474–75, 477–78; *Graham*, 560 U.S. at 59 ("The concept of proportionality is central to the Eighth Amendment."). Ray received this individualized consideration.

¶180 Several experts testified for the defense during Ray's penalty-phase trial. These experts discussed, both in general terms and specifically as to Ray, psychology, brain and neurological development, trauma responses, and the long-term effect that brain injuries can have. This testimony examined Ray's age, family, social life, potential brain injuries, exposure to violence and trauma, and more. Ray's family and friends also testified about Ray's childhood neighborhoods, upbringing, prior criminal activity, and personality.

¶181 At the end of the trial, the jurors were presented with the only two sentencing options authorized by statute at the time—LWOP or death. The jurors

were instructed to consider all the testimony, information, and evidence they had received during the guilt and penalty phases of the trial and to make their own determinations regarding the weight of the evidence based on the witnesses' credibility, motives, and relationships, as well as any other relevant circumstances. This information would necessarily include the testimony and evidence related to Ray's "youth and attendant characteristics." *Miller*, 567 U.S. at 483. We presume the jurors followed the court's instructions in deciding to impose the harshest sentence available for Marshall-Fields's murder. *See Washington*, ¶¶ 25–27, 547 P.3d at 1092–93.

¶182 We therefore conclude that, given the individualized consideration Ray received, a sentence to LWOP is constitutional as applied to Ray. *See Miller*, 567 U.S. at 479–80 (explaining that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," but the Court wouldn't "foreclose a sentencer's ability to make that judgment," as long as the sentencer considered "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

~~¶176~~¶183 *Third*, Ray's LWOP sentence for Marshall-Fields's murder~~LWOP sentence~~ wasn't imposed by a court; it was granted by the Governor, exercising his authority to commute Ray's death sentence. The Governor has exclusive authority "to grant reprieves, commutations and pardons after conviction." Colo.

Const. art. IV, § 7. Thus, so long as the Governor's "commutation is constitutionally permissible" and the original sentence was "legally imposed by a court," the judiciary has no authority to alter the sentence. *Johnson v. Perko*, 692 P.2d 1140, 1142 (Colo. App. 1984); *accord People ex rel. Dunbar v. Dist. Ct.*, 502 P.2d 420, 421 (Colo. 1972); *People v. Davis*, 526 P.2d 312, 313 (Colo. 1974). Ray's LWOP sentence for Marshall-Fields's murder meets both criteria.

¶177¶184 Ray was originally sentenced pursuant to the capital sentencing procedures in place at the time of his conviction, and he hasn't argued on appeal that his original capital sentence wasn't legally imposed. Moreover, under the sentencing statutes, a court could have resentenced Ray to LWOP following the death penalty's abolishment, and we have previously held that mandatory LWOP sentences for adult, class 1 felony offenders aren't categorically unconstitutional. *Sellers v. People*, 2024 CO 64, ¶ 37, 560 P.3d at954, 962.[10] We thus conclude that

[10] Even if nineteen-year-olds were juveniles for sentencing purposes, the Supreme Court in *Miller* held only that *mandatory* LWOP sentences for juveniles are unconstitutional. 567 U.S. at 479–80; *see also, e.g.*, *Graham*, 560 U.S. at 74–75. But there was nothing mandatory about Ray's commuted LWOP sentence. The Governor is authorized to commute a capital sentence "by reducing the penalty . . . to imprisonment for life or for a term of not less than twenty years at hard labor." § 16-17-101, C.R.S. (2024). Thus, the Governor wasn't required to reduce Ray's sentence to LWOP; he had other options. But he chose LWOP after, presumably, considering the circumstances of this particular case as required by statute—including, Ray's character before conviction and during confinement, any "statements of the sentencing judge and the district attorneys, . . . and any other material [or comments] concerning the merits of the [commutation]

Ray's commuted LWOP ~~it is facially constitutional for the Governor to commute a defendant's capital~~ sentence is constitutional ~~to LWOP when the defendant was at least nineteen years old when he committed the relevant offenses~~.

~~¶178~~¶185 Lastly, ~~We also conclude that Ray's sentence is constitutional as applied to him because we assume that in commuting Ray's sentence, the Governor adhered to the statutory requirements and considered Ray's conduct during incarceration and his reformation potential. *See* § 16-17-102(1), C.R.S. (2024). And~~ while we commend Ray for refocusing his life in a positive direction, we generally determine as-applied constitutionality at the time a sentence is imposed. *See, e.g.*, *Lucero v. People*, 2017 CO 49, ¶¶ 26–29, 394 P.3d 1128, 1134 (concluding that the defendant's sentence was constitutional and "appropriate" because the sentencing court considered the relevant circumstances *at the time the sentence was imposed*). A court may consider a defendant's rehabilitative progress and society's evolving standards of decency during a proportionality review, *see Wells-Yates v. People*, 2019 CO 90M, ¶¶ 45–48, 454 P.3d 191, 206, but when a sentence is facially constitutional and a court is considering a defendant's Eighth Amendment as-applied challenge, the key considerations are "the culpability of the offenders at issue in light of their crimes and characteristics, along with the

~~application" that the Governor believed to be "just and proper," "with due regard for the reformation of the accused." § 16-17-102(1), C.R.S. (2024).~~

severity of the punishment in question," *Graham*, 560 U.S. at 67; *see also Wells-Yates*, ¶¶ 5–18, 454 P.3d at 196–200. And, as discussed above, Ray received this consideration. Therefore, we need not remand this case to the trial court for an evidentiary hearing regarding these claims.

III. Conclusion

~~¶179~~¶186 We affirm the trial court's judgment of conviction and Ray's LWOP sentence.