DATE FILED: November 27, 2015 2:59 PM
FILING ID: AFF40DAA830B1
CASE NUMBER: 2012CA2502

COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Boulder County District Court Honorable Thomas Mulvahill, Judge Case No. 12CR0222	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant-Appellant, MICHAEL CLARK.	▲ **COURT USE ONLY** ▲ Case No. 12CA2502
CYNTHIA H. COFFMAN, Attorney General KATHARINE GILLESPIE Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: (720)508-6468 E-Mail: kathy.gillespie@coag.gov Registration Number: 26109 *Counsel of Record	

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that this brief does not comply with C.A.R. 28(g) or C.A.R. 28.1 because it exceeds the word and/or page limit; it is 16, 400 words. A motion to accept the over length brief has been filed contemporaneously with the brief.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b). In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Katharine Gillespie
Counsel of Record

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATEMENT & SUMMARY OF ISSUES

Defendant contends that there was insufficient evidence to find that defendant's gun was the murder weapon, defendant was present at the scene, and his alleged motive. These are not elements of the crime but were pieces of circumstantial evidence used to prove the elements of murder. This circumstantial evidence, in conjunction with the additional evidence admitted at trial, was sufficient to support the verdict.

Defendant's November 3rd interview statements were voluntary. There was no evidence that the officers used any coercion sufficient to overcome defendant's will.

Defendant was not in custody during the April 15th interview. He agreed to speak with officers, invited them to sit down, he was allowed to make and receive phone calls, and the interview ended when he told officers he had to meet his wife for lunch.

The trial court properly admitted portions of the motorcycle theft as res gestae evidence. It provided context for the crime and defendant's motive.

The trial court properly excluded Detective Trujillo's personal assessment of Walter Stackhouse's, a jail house informant's, credibility. The evidence was not explanatory of interview tactics or how the investigation proceeded.

The trial court correctly prohibited defendant from asking Detective Denig about a deceased witness's description of a green car. The evidence did not clarify any admitted evidence and there was no implication that defendant's car was connected to the victim's apartment on the night of the murder.

Detective Trujillo's testimony as to defendant's truthfulness about the gun was properly admitted to explain the gun shot residue ruse and refute defendant's direct examination testimony that the ruse was unsuccessful coercion.

The prosecutor's opening statement properly referenced the evidence he intended to present, and did present, about defendant's love of the Marines. Alternatively, since defendant cannot demonstrate "bad faith and manifest prejudice," there cannot be reversible error.

The prosecutor did not commit misconduct during closing argument. The arguments were based on the evidence and the reasonable inferences that could be drawn therefrom, and were based on the jury instructions as to witness credibility.

The trial court correctly refused to give defendant's tendered instruction that the jury need not reach a unanimous verdict and a hung jury was an acceptable outcome; defendant fails to provide any applicable case law to support the instruction.

STATEMENT OF THE FACTS & CASE

On September 22, 1994, defendant and Kristen Grisham, the victim's daughter, were caught riding a stolen motorcycle (R.Tr. p. 568). Defendant fled the scene but was eventually arrested and charged with a felony.

The same weekend as the motorcycle theft, defendant took care of the victim's cat because he and his daughter were both out of town for the weekend (R.Tr. p. 572). While defendant had access to the victim's apartment, he stole a blank book of checks. Over the next few weeks,

defendant wrote out multiple checks totaling over $4,000 (R.Tr. pp. 1714, 770).

On October 19th, defendant approached his friend, Dion Moore, and asked him to help him get a gun for protection from a "stalker." Moore used a straw purchaser, David Berring, to buy two Bryco Jennings 9mm handguns from the ABC pawnshop in Denver.

The week of October 24th, defendant went into the Marine Recruitment Office and showed Sargent Weyer a chrome 9mm handgun (R.Tr. p. 870). When Weyer removed a bullet from the gun, defendant wiped it off and said it was not a good idea to leave fingerprints on ammunition (R.Tr. p. 873). Weyer later identified the ammunition as full metal jacket ball rounds with copper casings; the same type of ammunition ultimately used to kill the victim (R.Tr. p. 873).

Weyer knew defendant really wanted to join the Marines and he went to the DA's office on his behalf to ask for leniency on the motorcycle case so that it would not prevent defendant from enlisting. Weyer explained to defendant that if he got into any more trouble with the law, he would be unable to enlist (R.Tr. p. 868-69).

On the morning of November 1st, defendant called the victim's bank to check the balance on the account to cover additional checks. When the bank asked a security question defendant was unable to answer, he hung up the phone. Concerned, the bank called the victim to notify him of possible fraud activity on his account. The victim confirmed he did not make the phone call and went to the bank to investigate. That same afternoon, the victim filed a report at the police station.

After the defendant called the bank, he went to Jamie Uhlir's apartment in Denver. Uhlir got home from class around 4pm and found defendant, Moore and two girls waiting for him (R.Tr. p. 818). Defendant first drove Moore and the girls to the bus station. On the way, he showed them a 9mm handgun (R.Tr. p. 933). Afterwards, defendant and Uhlir went to a soccer game in Lakewood. Defendant then dropped Uhlir off at home and left for Boulder around 9pm (R.Tr. p. 824).

At approximately 9:30pm, while the victim and his girlfriend were eating dinner, defendant knocked on the apartment door. The victim

answered the door, was shot four times at close range, and died (R.Tr. p. 1642). Afterwards, defendant drove to the Gunbarrel apartment where he was staying and called two friends, Allison Hackman and Kristin Buchanan (R.Tr. pp. 1826, 1849).

The next afternoon, defendant showed up at the Marine Recruitment office; he appeared over-eager to enlist and asked how quickly he "could get out of here" (R.Tr. p. 879).

On November 3rd, defendant was arrested on the check fraud case. He waived his *Miranda* rights and said the following: (1) he admitted stealing the victim's checks; (2) he denied killing the victim; (3) he admitted he had had a gun that was left in his car by a Mexican man named Luiz a few weeks before; and (4) he admitted Luiz's gun was the one he showed to Weyer (R.Tr. p. 728).

In the county jail, the defendant spoke with inmate Walter Stackhouse. They talked about the murder case and when Stackhouse asked if defendant killed him, defendant nodded his head yes (R.Tr. p. 1115). Defendant told Stackhouse that he was worried the Marines

would find out about the case, but they could not charge him because they would never find the gun (R.Tr. p. 1114).

In 2009, Detective Heidel reviewed the case as part of the cold case unit. He started to compile updated interviews and forensics (R.Tr. pp. 1179-1183). In April 2011, defendant was interviewed twice and admitted he received a gun from Moore in 1994 that was purchased at a pawnshop in Denver (R.CF. pp. 436, 456).

Defendant was charged and convicted of first degree murder after deliberation pursuant to §18-3-102(1)(a), C.R.S. (2015) (R.CF. p. 12). He was sentenced to life in prison without the possibility of parole (R.CF. p. 632).

ARGUMENT

I. The evidence was sufficient to support the elements of first degree murder.

Defendant asserts there was insufficient evidence to support his conviction because the People did not prove: (1) he was at the scene; (2) his gun was the murder weapon; or (3) his motive (OB, pp. 18-24).[1]

A. Standard of Review

When preserved, sufficiency of the evidence in criminal cases is reviewed de novo. *Martinez v. People*, 344 P.3d 862, 869 (Colo. 2015); *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). Where, as here, the appellate claim is unpreserved because the arguments made below were different than the arguments raised on appeal, review is for plain error. Crim.P. 52(b); *People v. Lacallo*, 2014 COA 78, ¶6 ; *People v. Heywood*, 2014 COA 99, ¶12; *but see* e.g., *People v Randell,* 297 P.3d

[1] Defense counsel alleges the "DA determined probable cause did not exist, let alone evidence proving guilt beyond a reasonable doubt, for 17 years" (OB, p. 17). Since there is no record citation or support for this statement, it cannot be considered by this Court. *Laessig v May D & F*, 402 P.2d 183 (Colo. 1965).

989, 997 (Colo. App. 2012); *People v. Duncan*, 109 P.3d 1004 (Colo. App. 2004).

At trial, defendant moved for a judgment of acquittal "based on the record" (R.Tr. p. 1283). Although a division of this Court has rejected the argument that a defendant must preserve a sufficiency challenge with specificity, *People v. Peay*, 5 P.3d 398, 400 (Colo. App. 2000), ample authority exists elsewhere requiring defendants to preserve specific sufficiency claims. *Carey v. State*, 230 S.W.3d 553, 557 (Ark. 2006)(to preserve a challenge to the sufficiency of evidence, appellant must make a specific motion that advises the court of the exact element of the crime that the State failed to prove); *Thacker v. Commonwealth*, 194 S.W.3d 287 (Ky. 2006).

B. Analysis

When examining the sufficiency of the evidence, a reviewing court must determine "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that defendant is guilty beyond a reasonable

doubt." *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973). The substantial evidence test affords the same status to both direct and circumstantial evidence. *Id.*

A reviewing court must defer to the jury's determinations of the credibility of witnesses, the weight of the evidence, and its resolutions of conflicting evidence. *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983); *People v. Rivera*, 56 P.3d 1155, 1164 (Colo. App. 2002). An appellate court cannot sit as a thirteenth juror and set aside a verdict because it could or may have reached a different conclusion. *People v. Fierro*, 606 P.2d 1291, 1295 (Colo. 1980). If reasonable minds could differ, the evidence is enough to support the conviction. *People v. Fuller*, 791 P.2d 702, 706 (Colo. 1990).

A person commits murder in the first degree when, after deliberation and with the intent to cause the death of another person, he causes the death of that person. §18-3-102(1)(a). A person acts with intent when his conscious objective is to cause the specific result proscribed by the statute. §18-1-501(5), C.R.S. (2015). The term "after deliberation" means "that the decision to commit the act has been made

after the exercise of reflection and judgment concerning the act." *People v. District Court*, 926 P.2d 567, 570-571 (Colo. 1996); §18-3-101(3), C.R.S. (2015).

The element of deliberation, like intent, can rarely be proven other than through circumstantial or indirect evidence. *People v. District Court*, 779 P.2d 385, 388 (Colo. 1989). The prosecution may prove whether a defendant acted with intent by inference from his words, conduct, and other evidence including the circumstances surrounding commission of the crime. *Grant*, *supra*; *People v. Madson*, 638 P.2d 18, 26 (Colo. 1981). Examples of appropriate circumstantial evidence may include: (1) use of a deadly weapon; (2) the existence of hostility between defendant and the victim; and (3) the manner in which the gun was used. *Id.*

Presence at Scene. In order to prove the elements, the People offered evidence that defendant was present at the victim's apartment when he was killed.

First, a Carmex container was found lying on its side outside the victim's apartment door the night of the murder (R.Tr. p. 692).

Defendant told police in multiple interviews that he had not been to the victim's apartment for any reason after he took care of the cat in late September. McGill, the apartment manager, testified that he cleaned the common areas of the apartment complex daily and as needed (R.Tr. p. 1640). Thus, it was a reasonable inference that the Carmex container was left the day of the murder.

Woods, a CBI expert, testified that defendant's DNA partially matched the DNA inside the container (R.Tr. 1745). He also testified that 99.4% of the world's male population could be excluded as the major contributor to the DNA found inside the Carmex container, defendant was not part of that 99.4%.

Second, law enforcement established that defendant had sufficient time after the soccer game and before his phone calls to kill the victim. Two detectives drove the potential routes defendant took from Uhlir's apartment to the victim's apartment and then to the Gunbarrel apartment. The detectives drove the routes on the same day of the week and time as the murder (R.Tr. p. 1687). Afterwards, they

concluded defendant had sufficient time to drive to the victim's apartment and kill him.

Third, Stackhouse testified he spoke with defendant in the county jail two days after the murder. When Stackhouse asked if defendant "killed the guy," defendant nodded his head yes and said he was dead (R.Tr. pp. 1116, 1808). Defendant also said he had hidden his Ford, they would never find the gun, if they did not have the gun they could not charge him, and he had wanted to go back and steal the victim's VCR and 13-inch television set (R.Tr. pp. 1133, 1805-06).

Heidel testified that the information Stackhouse received was not information that was known to the public, only the defendant (R.Tr. p. 1194). Stackhouse and law enforcement testified to Stackhouse's multiple felony convictions, his false reporting conviction, and that he did not received anything in exchange for his testimony (R.Tr. pp. 1123-25, 1815).[2] The jury was instructed that it could consider felony and false reporting convictions when assessing the credibility of a witness.

[2] The testimony at trial established that the defendant's work release was ordered prior to him meeting the defendant; it was not in exchange for his testimony (R.Tr. p. 1816).

People v. Harlan, 8 P.3d 448, 473 (Colo. 2000)(presumption jury followed instructions).

Murder Weapon. In order to prove the elements of the crime, the People offered evidence that defendant obtained a weapon a few weeks before the murder and that the bullets that killed the victim were fired from a similar weapon.

Moore testified: (1) he bought two Bryco Jennings semi-automatic pistols for defendant from a pawn shop in Denver using a "straw purchaser;" (2) defendant said he wanted more "stopping power" than a .25; (3) defendant said he needed the gun for protection because he was being stalked; (4) he gave the larger of the two guns to defendant; and (5) he saw defendant with the same gun on the day of the murder (R.Tr. pp. 914, 920, 922, 932-33, 1094). Despite telling police in 1994 that he had a gun because "a Mexican guy" named "Luiz" left it in his car, defendant admitted in 2011 that he got his gun from Moore (R.Tr. pp. 1184, 1907).

Berring confirmed the purchase of two 9mm Bryco Jennings and his signature on the pawnshop receipts. The pawnshop receipts

confirmed the guns were purchased on October 19, 1994 (R.Tr. pp. 993, 998).

Uhlir testified that defendant told him he bought a gun with Moore from a pawnshop on October 19th. Uhlir saw defendant with the gun on October 26th (R.Tr. p. 828-32).

Hammond, a ballistics expert, testified that the bullet that killed the victim and fragments found at the scene could have been fired from a Bryco Jennings Model 59 9mm based on the land and groove measurements (R.Tr. p. 1871).

Heidel testified that one of the checks defendant wrote from the victim's account was for $150 on October 19th. This amount and date matched the gun transaction information (R.Tr. p. 1186).

Finally, Weyer testified that defendant brought in a 9mm gun and showed it to him the week before the murder. The gun was loaded with full metal jacket rounds in brass casings - the same ammunition used in the murder, and defendant was nervous about leaving fingerprints on the bullet (R.Tr. pp. 870-73).

While the prosecutor offered this evidence, in conjunction with other evidence, to establish that defendant caused the victim's death, the weapon itself was not an element of the crime.

Motive. In order to prove the elements of the crime, the People offered the jury an explanation as to why defendant might have wanted to kill the victim. While relevant to defendant's intent, defendant's motive was not an element of the crime. *People v. Spinuzzi*, 369 P.2d 427, 430 (Colo. 1962)(it is well-established the prosecution need not prove motive in murder case); *Masters v. People*, 58 P.3d 979 (Colo. 2002). The elements of deliberation and intent can rarely be proven other than through circumstantial or indirect evidence. *District Court*, 926 P.2d at 571. Thus, the jury can infer intent or deliberation through other relevant circumstantial evidence admitted at trial.

Defendant was not going to be able to join the Marines if it was discovered that he stole the victim's checks and took over $4,000 from the victim's account. The prosecution's theory was that on November 1st, when defendant called the bank and realized the fraud was going to

be discovered, he murdered the victim. The following evidence was presented to support this theory:

- defendant dreamed of becoming a Marine since high school (Argument VIII);
- on the morning of November 1st, defendant called the victim's bank to check the account balance and was told the information could not be confirmed because defendant provided incorrect security information (R.Tr, p. 1708);
- the bank immediately called and told the victim there was fraudulent activity on his account; defendant had written the checks out to himself (R.Tr. pp. 1709, 1713);
- the victim filed a police report on November 1st (R.Tr. pp. 766, 1715);
- Weyer told defendant after the motorcycle theft that if he got into any more trouble he would be unable to join the Marines; a felony conviction was a bright line rule barring enlistment (R.Tr. pp. 867-69, 879);
- defendant told Stackhouse he was concerned that if the Marines heard about the murder case he would not be able to join (R.Tr. p. 1114);
- defendant called Hackman on November 1st after the murder, and told her he had "probably done something that was going to get him caught for stealing those checks" (R.Tr. p. 1846);
- Pamela Grisham told officers that she did not think defendant would steal checks because it would jeopardize his Marine

enlistment; he was already worried about the motorcycle case (R.Tr. p. 550).

The relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, was substantial and sufficient to support a conclusion that defendant was guilty of murder. *Moore v. People*, 483 P.2d 1340 (Colo. 1971)(murder may be proven based solely on circumstantial evidence); *People v. Sanchez*, 518 P.2d 818 (Colo. 1974).

While defendant argues that the evidence brought out through cross-examination was more persuasive and should have resulted in a different verdict that is not the appropriate standard of review. Whether defendant or this Court would make different credibility assessments or weigh the evidence differently is also not an appropriate standard of review. Inconsistencies in trial testimony "are not uncommon to the adversary process which…must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event." *People v. Brassfield*, 652 P.2d 588, 593 (Colo. 1982). Indeed, it

is precisely because "issues of credibility and weight are difficult to resolve and yet essential to the ultimate issue of guilt or innocence that the law entrusts these matters to the collective and diverse experience and judgment of the jury." *People v. Parks*, 749 P.2d 417, 421 (Colo. 1988).

The jury was given all of the information as to each of these factual issues and defendant cross-examined extensively on the issues he wanted the jury to consider and find persuasive (R.Tr. pp. 1700-02, 2070). The jury heard the testimony, it weighed the evidence, it was instructed on the law, and it made all of the necessary credibility determinations it thought appropriate. After completing those tasks, it disagreed with defendant's assessment of the evidence and found beyond a reasonable doubt that defendant murdered the victim. The evidence presented at trial, when considered in the light most favorable to the prosecution, was sufficient to support the verdict and should be affirmed.

II. Defendant's November 3, 1994 statements were voluntary.

A. Standard of Review

Whether a statement is voluntary is evaluated on the basis of the totality of the circumstances under which it is given; the ultimate determination of whether a statement is voluntary is a legal question that it reviewed de novo. *People v. Klinck*, 259 P.3d 489, 493 (Colo. 2011).

Defendant raised this issue in his suppression motion (R.CF. p. 121). Thus, any error is subject to constitutional harmless error review. *Hagos v. People*, 288 P.3d 116, 120 (Colo. 2012).

B. Facts

On November 3, 1994, defendant was arrested for check fraud at the Gunbarrel apartment (R.CF. p. 324). He was read his *Miranda* rights and voluntarily waived those rights. He also gave officers consent to search his room and car. He was transported to the Boulder Police Department where he was interviewed.[3]

[3] The defendant does not challenge his *Miranda* advisement or waiver (OB, p. 28).

At the suppression hearing, the trial court found that defendant was properly advised and gave a knowing, intelligent, and voluntary waiver of his rights (R.Tr. pp. 1484, 1486). As to voluntariness, the trial court ruled as follows:

- defendant was given *Miranda* warnings, indicated he understood them, and he waived his rights;
- he was told that he could take a break if he needed to, he didn't need to answer any questions; the method and style employed by the interrogators in questioning was conversational;
- the only "minimally implied promise" was a discussion about offering to bring the District Attorney in, but the officers were clear to indicate that they didn't have the authority and could not make any specific promises to defendant; a District Attorney was never called in to the interview;
- the interview was an open question and answer; defendant provided primarily narrative answers; primarily of defendant; when defendant asked questions, officers provided answers;
- the volume and tone of the officers' questions and comments were "measured and calm and respectful;"
- it "was clear" no threats and really no pressure applied to defendant beyond some repeat questions to which defendant continually responded in a consistent manner;

- it was "significant that the total interrogation time was less than 3 hours with a 50 minute break.

(R.Tr. pp. 1488-89)(R.CF. p. 544).

Based on the above factors, the court found that defendant's statements were not the result of any threats or violence or implied or express promises, and were therefore voluntary.

C. Analysis

A defendant's involuntary statements may not be admitted into evidence. *People v. Medina*, 25 P.3d 1216, 1221 (Colo. 2001). The burden is on the prosecution to prove by a preponderance of the evidence the confession was voluntary. *People v. McIntyre*, 789 P.2d 1108, 1110 (Colo. 1990). Only where coercive conduct "play[ed] a significant role in inducing the inculpatory statement," will it be deemed involuntary. *People v. Humphrey*, 132 P.3d 352, 360 (Colo. 2006).

In determining whether a defendant's statements were made voluntarily, a court must look to the totality of the circumstances. *People v. Gennings*, 808 P.2d 839, 844 (Colo. 1991). Factors to be

considered include: (1) whether defendant was in custody at the time; (2) whether *Miranda* warnings were given prior to interrogation; (3) whether defendant had an opportunity to confer with counsel beforehand; (4) whether any threat or promise was directed at defendant; (5) whether the statements were volunteered or were made during interrogation; (6) the manner and style of such interrogation; (7) the location and length of such interrogation; (8) defendant's mental and physical condition prior to and during interrogation; and (9) defendant's educational background, employment status, and prior experience with law enforcement and with the criminal justice system. *Id.* Although a defendant's physical, emotional, and psychological state at the time of the interrogation is a factor in considering the voluntariness of his statements, those circumstances alone will not render statements involuntary. *Humphrey*, 132 P.3d at 361.

Defendant demonstrated multiple times throughout the interview that he was not influenced, coerced or intimidated by the interview process or the detectives (R.CF. pp. 337-338, 341, 347, 349-351, 377-378, 380). Defendant asked the detectives if they thought he did it, whether

that was because of his conversations with the Marine officer, and whether they wanted him to continue with his narrative responses (R.CF. pp. 327, 331). He volunteered information that he stole a motorcycle the previous month even though he did not think the detectives knew about it. He offered to repeat or clarify information when he thought it would be helpful (R.CF. pp. 333, 339, 340, 389). Defendant affirmatively expressed multiple times during the interview that he wanted to help the detectives and insisted he was telling them the truth (R.CF. pp. 352, 368, 372, 382). *People v. Clayton*, 207 P.3d 831, 837-38 (Colo. 2009)(statements voluntary where defendant was initially left alone in interview room, defendant was eager to talk to authorities, defendant engaged in idle conversation, and defendant asked questions).

At the start of the interview, the detectives explained the interview could be stopped at any time, defendant could pick and choose what questions to answer, and the detectives wanted to find out the truth about what happened.

> Just like I explained to you before, you know, you can choose not to answer any specific questions that you don't want to. And, like I said, we are not going to have to drag something out of you that you don't want to talk about (R.Tr. p. 1486)…
>
> We're not going to drag something out of you. We're not going to make you say something that isn't true. I mean, we don't want to hear anything that's not true. We want to find out the truth. And so that's what we're going to do, okay? If you have any questions or if you are uncomfortable with anything or if you want to take a break, let us know and we'll do all that stuff (R.CF. p. 325)…

The interview was conversational and relaxed. Defendant never indicated he wanted to stop or that he did not want to answer specific questions. When pressed on certain facts, defendant stood his ground on what he insisted was the truth (R.Tr. p 1488). *See People v. Valdez*, 969 P.2d 208 (Colo. 1998)(not involuntary where defendant did not confess).

Defendant contends that because he was only 19 years old, had "minimal experience" with law enforcement, and "had never been interrogated" before, his statements were involuntary (OB, p. 33). These claims ignore the fact that defendant was arrested a month

before the murder for stealing a motorcycle and fleeing the scene, wherein he had been read his rights, waived those rights, and spoke with police.

Defendant contends he was handcuffed in the interview and this was coercive (OB, p. 30). However, all of the officers testified that, because defendant was cooperative, the handcuffs were removed and remained off while he was in the interview room (R.Tr. pp. 1354, 1407).

While defendant argues that generally a 19-year-old brain is "overly susceptible to coercive police conduct," there was no evidence presented that this specific defendant's age affected the voluntariness of defendant's statements. Quite the contrary, here defendant felt comfortable and confident enough to correct the detectives, offered apologies for not being able to give them some answers they sought, and provided them with additional explanations when they had difficulty understanding his version of the events. Later, it was learned that defendant was confident enough to lie to officers about where he got the gun and what he did with it during this initial interview. *Valdez, supra.*

Defendant points to the GSR ruse as evidence of police coercion. An overwhelming majority of courts have recognized that ruses are a sometimes necessary and critical element of police work and that deception standing alone does not invalidate consent; it is one factor to be considered in assessing the totality of the circumstances. *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996); *People v. Wickham*, 53 P.3d 691, 696 (Colo. App. 2001)(misrepresentation about evidence insufficient to render statement involuntary); *People v. Klausner*, 74 P.3d 421, 425 (Colo. App. 2003). Here, the ruse clearly did not overbear defendant's will, as he continued to maintain his innocence throughout the interview.

Lastly, defendant alleges that his statements were induced by promises of leniency when the detectives said they could get the DA to come into the interview (R.CF. p. 393). However, as the trial court correctly pointed out, the detectives "were clear…that they did not have the authority and they could not make any promises…only that they could provide a [DA] who might be able to talk to Mr. Clark about that sort of thing" if needed (R.Tr. p. 1488). The detectives never promised

anything in exchange for his statements and a DA was never brought into the interview. In response to the DA statement, defendant did not make any new revelations or confessions; he simply told the detectives he had already told them the whole truth (R.CF. p. 393). Thus, there is no evidence to support the claim that this brief statement was coercive police conduct sufficient to overcome defendant's will.

Given the totality of the circumstances surrounding defendant's statements, combined with the fact that there was no evidence of any coercive conduct, the trial court properly found defendant's statements voluntary.

III. Defendant was not in custody during the April 15, 2011 interview.

A. Standard of Review

An appellate court's review of a suppression order presents mixed questions of law and fact. *People v. Martin*, 222 P.3d 331, 334 (Colo. 2010); *Mumford v. People*, 270 P.3d 953, 956 (Colo. 2012). The Court defers to the trial court's factual findings if they are supported by the record, but reviews its legal conclusions de novo. *Id.*

Defendant preserved these issues in his motion to suppress (R.CF. p. 118).[4] Thus, if any error was made, it is subject to constitutional harmless error review. *Hagos, supra.*

B. Facts

The trial court found that the April 15th interview was an interrogation but a *Miranda* advisement was not required because defendant was not in custody (R.Tr. p. 1490). The trial court's determination was based on the following:

- the interview took place in defendant's office, midday, during defendant's work hours;
- although the office door was closed to provide defendant privacy, there was a large window that faced out into the hallway;
- the tone of the interview was conversational, friendly, and "very non-accusatory;" officers even went to the extent of trying to reassure defendant that he was not the target or he was not in trouble. • the length of the interrogation was less than an hour;
- no limitation of movement was placed on defendant;

[4] The defendant does not challenge the trial court's finding of voluntariness on appeal.

- during the interview defendant took a personal call on his cell phone and later made a call.

(R.Tr. pp. 1491-1492)(R.CF. p. 545). Based on the totality of the circumstances, the court found defendant was not in custody at the time that he was interviewed at work and *Miranda* warnings were not required.

C. Analysis

A suspect has a Fifth Amendment right to remain silent and not be compelled to incriminate himself, and a Sixth Amendment right to have counsel present during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966); *People v. Jordan*, 891 P.2d 1010, 1014 (Colo. 1995). For *Miranda* to be applicable, two requirements must be satisfied: (1) the suspect must be in custody; and (2) the statement must be the product of police interrogation. *People v. Redderson*, 992 P.2d 1176, 1180 (Colo. 2000).

The inquiry into whether a suspect is in custody for *Miranda* purposes is whether, under the totality of the circumstances, a reasonable person in defendant's position would consider himself to be

deprived of his freedom of action to the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *People v. Howard*, 92 P.3d 445, 451 (Colo. 2004); *People v. Matheny*, 46 P.3d 453, 467 (Colo. 2002).

Factors that a court may consider when determining whether a person is in custody include, but are not limited to: the time, place, and purpose of the interrogation; the persons present during the interrogation; the words the officers spoke to the suspect; the officers' tone of voice and general demeanor; the length and mood of the interrogation; whether any restraint or limitation was placed on the suspect's movement during interrogation; the officers' response to any of the suspect's questions; whether directions were given to the suspect during interrogation; and the suspect's verbal or nonverbal responses to such directions. *People v. Elmarr*, 181 P.3d 1157, 1162 (Colo. 2008); *People v. Taylor*, 41 P.3d 681, 691 (Colo. 2002). None of the aforementioned factors is determinative, and the question of custody is determined based upon the totality of the circumstances. *People v. Syrie*, 101 P.3d 219, 222 (Colo. 2004).

The record supports the trial court's finding that defendant was not in custody for *Miranda* purposes because/where:

- officers "asked" defendant if he would mind speaking with them (R.Tr. p. 1417);
- defendant agreed to talk with them, invited them into his office, asked them to have a seat, and even brought in an extra chair (R.Tr. p. 1417);
- both officers were dressed in plain clothes and their side arms were concealed (R.Tr. p. 1418);
- defendant's office had a door, a large window that opened into the hallway, a desk and a few chairs (R.Tr. p. 1418);
- the tone of the interview was casual (R.Tr. p. 1419);
- defendant was free to take and make phone calls, and took care of business during the hour-long conversation (R.Tr. p. 1423);
- the conversation ended when defendant told officers he was meeting his wife for lunch (R.Tr. p. 1424);
- the officers approached defendant at his work because they did not think he would feel free to talk at home with his family there (R.Tr. p. 1419);
- defendant gave officers his phone number in case they had any additional questions (R.Tr. p. 1446)(R,CF. p. 458);
- defendant was given the opportunity to ask the officers questions and they answered the questions (R.CF. p. 453).

Moreover, the interview was conducted during normal business hours at a public building in defendant's office. Although the location was also his place of work, defendant was "asked" if they could speak with him. During the interview, the investigator's tone was calm, casual, and conversational, and no threats or intimidation were used. *Cf. Matheny, supra* (no custody where officers' tone of voice was soft, general demeanor was polite, no directions were given to defendant, and there was no restraint used); *compare People v. Minjarez,* 81 P.3d 348 (Colo. 2003)(custody found where officers were highly confrontational and accusatory, officer confronted defendant with the evidence against him and with his own belief in defendant's guilt). The office had a large window into the hallway where other employees were walking by and could see inside. Defendant answered and made phone calls and conducted business during the conversation. Lastly, when defendant told officers he needed to conclude the interview to meet his wife for lunch, the interview ended and he was allowed to leave. *People v. Lawrence*, 55 P.3d 155, 159 (Colo. App. 2001)(defendant not in custody where he was allowed to leave at end of interview).

Defendant contends that since the interview took place at work, it was "intimidating" and "potentially coercive" (OB, p. 37). However, there was no evidence presented at the motions hearing to support this contention. *People v. Montante*, 2015 COA 40 (defendant not in custody when he spoke to police in his own office). In fact, the officers testified that they chose to interview defendant at work because it would be easier for him to talk there rather than at home with his family (R.Tr. pp. 1419, 1441). While the location of the interview is one factor the court must look at to determine custody, it is looked at in the context of all the other additional circumstances that are present.

Thus, the record supports the trial court's custody ruling and it should be affirmed.

IV. The trial court properly admitted portions of the motorcycle theft case as res gestae evidence.

A. Standard of Review

Trial courts have considerable discretion concerning the admissibility of evidence and the determination of its relevancy,

probative value, and prejudicial effect. *People v. Martinez*, 83 P.3d 1174, 1179 (Colo. App. 2003).

Where a defendant objects to the admission of evidence at trial, as defendant did here, this Court reviews for harmless error (R.Tr. p. 2217). *Yusem v. People*, 210 P.3d 458, 469 (Colo. 2009). Where the error is not of constitutional dimension, the error will be disregarded as harmless if there is not a reasonable probability that the error contributed to defendant's conviction. *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000).

B. Facts

The People filed notice of their intent to introduce evidence of the motorcycle theft as res gestae evidence (R.CF. p. 571)(R.Tr. pp. 2208-27).

After a hearing, the trial court partially granted the People's request to introduce evidence of the motorcycle theft as follows:

> The Court finds that evidence of what transpired prior to defendant's arrest for the theft of the motorcycle is not probative of defendant's motive or to provide context regarding possession of keys to the jury. Any probative value is substantially

> outweighed by the danger of unfair prejudice. Furthermore, evidence of the arrest is not necessary to help the jury understand the context in which defendant made statements to a witness in jail because the Court finds that the statement can stand on its own - it does not require the context of the chase, flight from police, or the actual arrest.
>
> However, the Court will allow the people to present as res gestae evidence the charge and the disposition of that charge because it relates to defendant's status as a potential recruit for the Marine Corps and is relevant to show defendant's motive to kill Marty Grisham.

(R.CF. p. 582).

C. Analysis

The rules of evidence strongly favor admission of evidence. *Medina*, *supra.* "In order to be admissible, evidence must be relevant; and unless otherwise provided by constitution, statute, or rule, all relevant evidence is admissible." *People v. Rath*, 44 P.3d 1033, 1038 (Colo. 2002). 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.

Res gestae is a theory of relevance that recognizes that certain evidence is relevant because of its unique relationship to the charged crime. *People v. Greenlee*, 200 P.3d 363, 368 (Colo. 2009)(res gestae evidence is incidental to the main fact and explanatory of it – it is so closely connected as to constitute a part of the transaction, and without knowledge of it, the main fact might not be properly understood); *People v. Quintana*, 882 P.2d 1366, 1371 (Colo. 1994)(res gestae evidence is necessary to complete the story of the crime for the jury). This is particularly true when the evidence sought to be introduced contextualizes defendant's criminal act. *People v. James*, 117 P.3d 91, 93-94 (Colo. App. 2004)(res gestae evidence of defendant's gang activities contextualized his involvement in crime); *People v. Kyle*, 111 P.3d 491, 499 (Colo. App. 2004)(evidence of defendant's threatening and harassing behavior towards sexual assault victim's treatment providers was admissible to show defendant's consciousness of guilt and efforts to engage the victim). Res gestae evidence is not subject to the requirements of CRE 404(b).

Logically relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." CRE 403. However, evidence is not unduly prejudicial simply because it is damaging to a defendant's case. *People v. District Court*, 785 P.2d 141 (Colo. 1990). "[U]nfair prejudice refers to 'an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis,'" such as the jury's bias, sympathy, anger, or shock. *People v. Gibbens*, 905 P.2d 604, 608 (Colo. 1995).

Here, the evidence that defendant was charged with a felony for the motorcycle theft, that this potential felony conviction would prevent him from joining the Marines, that the Marine recruiter negotiated with the DA on defendant's behalf to help him maintain a clean criminal record, and that the recruiter made it clear to defendant that any further trouble would not be tolerated and would prevent his enlistment was all relevant to explain why defendant resorted to murder in order to prevent discovery of his check fraud. The motorcycle theft and the discussions between the recruiter and defendant provided the jury with context for the crime charged. *James, supra.* Without knowledge of the

motorcycle theft, defendant's reasons for killing the victim would not have made sense to the jury. *Quintana, supra*. The court limited the evidence to only those facts necessary to provide the necessary context and minimized any potential prejudice under CRE 403. The trial court's ruling was not error.

Even if this Court finds error, any error was harmless. The motorcycle theft was not a crime with aggravating facts that significantly prejudiced the defendant. The court sanitized the facts presented to the jury and there was no reasonable probability that the error contributed to defendant's conviction.

V. The trial court properly excluded Detective Trujillo's personal assessment of Stackhouse's credibility.

A. Standard of Review

A trial court has substantial discretion in deciding questions concerning the admissibility of evidence; absent an abuse of this discretion, a trial court's evidentiary rulings will be affirmed. *People v. Elie*, 148 P.3d 359, 362 (Colo. App. 2006).

Defendant asserts this issue was preserved by "trial arguments" (OB, p. 51). At trial, defendant asserted that he should be able to introduce through Detective Trujillo: (1) that he thought Stackhouse might be a psychopath; (2) that he thought a polygraph might be useful; (3) he did not follow up on his credibility concerns; and (4) whether he thought Stackhouse was telling the truth (R.Tr. p. 2010). On appeal, defendant argues the evidence was admissible as interrogation "tactics" and its exclusion violated his constitutional right to present a defense. Thus, he did not preserve the issues on the same grounds he argues on appeal.

Where a defendant objects on grounds different from those he argues on appeal, his claim is waived. *Moore*, 925 P.2d at 268; *People v. Renfro*, 117 P.3d 43, 47 (Colo. App. 2004)(failure to object at trial on the grounds asserted on appeal is deemed to be a waiver of the objection). At most, his claim is reviewed for plain error. Plain error requires reversal if, after a review of the entire record, a court can conclude with fair assurance that the error so undermined the fundamental fairness of

the trial itself as to cast serious doubt on the reliability of the conviction. *People v. Boykins*, 140 P.3d 87, 95 (Colo. App. 2006).

If this Court finds that defendant preserved this evidentiary question, review is for non-constitutional harmless error. *Yusem, supra.* Any error will be disregarded as harmless if there is not a reasonable probability that the error contributed to defendant's conviction. *Salcedo, supra.*

B. Facts

During Trujillo's defense testimony, the prosecutor requested the defense not be permitted to ask about the detective's notations about whether Stackhouse should be given a polygraph or whether he thought he was a psychopath (R.Tr. p. 2009).

In response, defense counsel made the following proffer:

> Judge, the issue always with any witness is whether or not that witness is credible, whether that person has any motive or bias. And part of that necessarily isn't, I would say, character evidence, but shows whether or not he thinks the person is telling the truth. Detective Trujillo put in his notes that he…was thinking about polygraphing Stackhouse because he thought that he might be a psychopath. If Detective Trujillo

> [had] questions about Mr. Stackhouse's credibility and he [was] a lead investigator at the time, we're allowed to follow up on that and say, did you ever do that and why did you write that.

(R.Tr. p. 2010). The prosecutor responded as follows:

> Credibility is a question for the jury. They saw Mr. Stackhouse testify and be cross-examined. Some other person's testimony or thought process about the credibility of a witness is essentially like a human lie detector, it's categorically improper, not to mention questioning about polygraphs and wanting to conduct polygraphs. Polygraphs are off limits and would and should not be brought up in this Court at all.

(R.Tr. p. 2010).

The trial court granted the motion in limine based on *Wittrein*, *Liggett*, and *Cook* (R.Tr. p. 2010).

C. Analysis

Questioning one witness as to whether another witness was lying on the witness stand or on a particular occasion is improper. *Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006); CRE 608(b). However, where the testimony serves a purpose other than opining about another witness's credibility, it can be admissible. *People v. Lopez*, 129 P.3d 1061, 1066 (Colo. App. 2005). Thus, in reviewing whether one witness's

testimony constituted an improper opinion about another witness's credibility, a reviewing court should consider the purpose for which the testimony is admitted. *People v. Tallwhiteman*, 124 P.3d 827, 833 (Colo. App. 2005).

In *Lopez*, the court of appeals held that it was acceptable for detectives to reference witness credibility within the narrow context of explaining the detective's interrogation techniques. The court held that "evidence referencing [witness] credibility only to describe a device to interrogate a suspect and to explain the context in which a witness's statements are made is admissible" as part of the give-and-take of an interrogation. *Lopez*, 129 P.3d 1066. *Davis* also held that a detective may testify about his assessments of interviewee credibility when that testimony is offered to provide context for the detective's interrogation tactics and investigative decisions. *Davis v. People*, 310 P.3d 58, 64 (Colo. 2013).

Here, defendant asked to question Trujillo about whether he was "thinking about polygraphing Stackhouse because he thought that he

might be a psychopath" (R.Tr. p. 2010).[5] The evidence was not offered to explain an interview technique or tactic. There was no evidence Stackhouse was aware of Trujillo's thoughts or notations or that the information influenced how Trujillo conducted Stackhouse's interview. Defendant did not offer any theory as to how Trujillo's notations were "interview tactics" or how his notations influenced the investigation. *Lopez*, 129 P.3d 1067 (every reference to the subject was prefaced in terms not of what the detective believed, but of what the detective told defendant during the interrogation); *People v. Conyac*, 2014 COA 8M, ¶71 (the testimony was given in the context of explaining the tactics the officer normally uses in an interview and to give the jury context for defendant's recorded interview).

Instead, defendant sought to introduce Trujillo's personal assessment of Stackhouse's credibility for the purpose of showing the jury that the filing detective thought Stackhouse was incredible. *People v. Bridges*, 2014 COA 65, ¶15 (an interviewer may not usurp the jury's

[5] Trujillo was not qualified as an expert witness and could not have opined that Stackhouse was a psychopath. CRE 702.

role of assessing the credibility of a particular witness's statement by offering an ultimate conclusion about the statement's truthfulness); *Liggett*, 135 P.3d at 731 (witness's belief as to veracity of another witness is irrelevant; it does nothing to make the inference that another witness lied any more or less probable). The fact that Trujillo never followed up with the polygraph is evidence that Trujillo's personal credibility assessment did not explain the progression of the investigation. As such, admission of Trujillo's testimony on this issue was inadmissible. *People v. Gaffney*, 769 P.2d 1081, 1085-86 (Colo. 1989)(holding court erred by admitting a doctor's testimony that victim's description of a sexual crime was "very believable"); *Tevlin v. People*, 715 P.2d 338, 341 (Colo. 1986)(error where social worker testified victim was telling the truth about abuse); *People v. Cook*, 197 P.3d 269, 276 (Colo. App. 2008)(error where investigator stated victims were "credible"); *People v. Hall*, 107 P.3d 1073, 1078-79 (Colo. App. 2004)(improper for investigator to testify that witnesses he interviewed "seemed sincere").

Defendant asserts for the first time on appeal that the trial court could have admitted the testimony with a limiting instruction (OB, p. 54). However, defendant never asked for a limiting instruction and the court's failure to offer one sue sponte was not plain error. *People v. Griffin*, 224 P.3d 292, 299 (Colo. App. 2009)(strategic considerations implicated by limiting instruction; a court's failure to give a limiting instruction without request is categorically not plain error).

Defendant also asserts for the first time that the prosecutor "opened the door" to Trujillo's polygraph and psychopath testimony when it discussed Stackhouse's interview with Stackhouse on direct examination (OB, p. 53). Defendant fails to explain how Stackhouse's direct examination and interview discussion opened the door to the admission of Trujillo's personal assessment of his credibility. *People v. Cooper*, 205 P.3d 475 (Colo. App. 2008)(defendant did not raise this issue below, cites no authority in support of this proposition on appeal, and he does not present an analytical basis for reaching the conclusion he proposes; we will not consider this argument); *U.S. v. Tracy*, 989 F.2d 1279, 1286 (1st Cir. 1993)(claims presented "in a perfunctory

manner, unaccompanied by some effort at developed argumentation" are not preserved for appellate review).

Finally, even if this Court were to find error, any error was harmless. The jury heard witnesses and Stackhouse himself testify that: (1) he had multiple felony convictions; (2) he had a misdemeanor conviction for false reporting; (3) he diluted UA's while on probation; (4) he routinely used cocaine on probation; (5) he was currently serving a California prison sentence; (6) he hoped he would receive work release for his help; (7) he was brought to trial out-of-custody on a plane with investigators; and (8) he had been in and out of prison since 1994 (R.Tr. pp. 1109-11, 1123, 1127, 1134). In light of all of this evidence, defendant has failed to prove that any error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the conviction. *See Kinney v. People*, 187 P.3d 548, 559 (Colo. 2008)(error is prejudicial when a reasonable jury would have had a "significantly different impression" of the witness's credibility had the defendant been allowed to pursue the desired cross-examination).

VI. The trial court did not abuse its discretion when it prohibited defendant from asking Detective Denig about a deceased witness's description of a green car.

A. Standard of Review

A trial court's rulings on evidentiary issues are reviewed for an abuse of discretion." *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). In addition, trial courts are given broad discretion in balancing the probative value of the evidence against the danger of unfair prejudice in a CRE 403 analysis. *Gibbens*, *supra*.

Defendant preserved this issue by objection; review is for harmless error (R.Tr. p. 1918). *Yusem, supra*.

B. Facts

Arman Vandenboss was at a gas station across the street from the victim's apartment on the night of the murder. He told police he saw a green Chrysler leaving quickly between 9:00pm and 9:30pm (R.Tr. p. 1918). Vandenboss was deceased at the time of trial.

Defendant wanted to introduce evidence that the police were looking for a "green car" because of the information obtained from Vandenboss and not because defendant's Mustang was green. He was

concerned that the jury would not understand where the green car information came from.

> Because there's been discussion throughout the trial, including the information in the newspaper and Mr. Stackhouse's testimony, about different cars and different descriptions that is not a car associated with our client in any way. And just to elicit from Officer Denig that he had information about a vehicle, that description, and that they followed up on that description of the vehicle and that…a car of that description was never tied in any way to our client. So I don't think that it's being offered for the truth of the matter asserted. It's being offered for what the officers did, why they did it and why that description has been out there and, further, to show that it didn't tie to our client.

(R.Tr. pp. 1919-20).

After additional discussions, the trial court held that the evidence presented so far was not confusing as to why witnesses testified about the color of defendant's car and the car was not discussed in reference to defendant being at the murder scene. Thus, the current testimony was not confusing, the proffered testimony was not needed to "clear anything up;" in fact, it most likely would inject confusion into the case (R.Tr. p. 1934).

C. Analysis

Relevant evidence is defined as any "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. In general, facts which logically tend to prove or disprove a fact at issue or which afford a reasonable inference that can be drawn from the evidence are relevant and admissible. *People v. Botham*, 629 P.2d 589 (Colo. 1981).

Materiality and probative value are the two components of relevant evidence. *Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007). To be material, the evidence must relate to a fact that is of consequence to the determination of the action. To have probative value means there exists a tendency of the evidence to establish the proposition that it is offered to prove. *Id.*

Trial courts have considerable discretion in balancing the probative value of evidence against the countervailing policy considerations of CRE 403. *People v. Saiz*, 32 P.3d 441, 446 (Colo. 2001). Evidence is unfairly prejudicial where it introduces into the trial

considerations extraneous to the merits, such as bias, sympathy, anger, or shock. *Greenlee*, *supra*. In assessing whether the danger of unfair prejudice substantially outweighs the probative value, the reviewing court must assign to the evidence the maximum probative value and the minimum unfair prejudice which a reasonable fact finder might attribute thereto. *American Family Mut. Ins. Co. v. DeWitt*, 216 P.3d 60, 64 (Colo. App. 2008).

In the prosecution's case-in-chief, three witnesses described the color of defendant's car as primer gray with a few spots of green. Commander Weiler was the first witness to mention the car. He testified that in order to locate defendant after the murder, he contacted DMV to find any vehicles associated with him; DMV listed two cars, a Volkswagen and a Mustang. Law enforcement found the Mustang at the Gunbarrel apartment when they arrested defendant (R.Tr. pp. 710-12, 718).

Next, Uhlir testified that defendant had a Mustang with gray primer and a little green which they drove to the soccer game on the day of the murder (R.Tr. p. 845). Stackhouse then testified that

defendant told him: (1) the police were looking for a Chrysler but his car was a Ford; (2) police thought the car was black but it was silver and green; and (3) he had hidden his Ford (R.Tr. pp. 1119, 1133).

Finally, Detective Heidel, to show that Stackhouse's testimony about what defendant told him was only information he could have obtained from defendant, testified that he reviewed the newspaper stories about the murder and the articles did not say defendant owned a Ford (R.Tr. p. 1195).[6]

A trial court correctly limits a defendant's cross-examination under CRE 403 where there is little probative value. *Griffin*, *supra*; *People v. Underwood*, 53 P.3d 765 (Colo. App. 2002)(no abuse of discretion where exclusion of evidence under CRE 403 did not prevent or hamper the defense from presenting its case); *People v. Watkins*, 83 P.3d 1182 (Colo. App. 2003)(court properly excluded evidence under CRE 403 where admission of the evidence would confuse the issues,

---

[6] In cross-examination, the defendant referenced a newspaper article that described a 1970s Chrysler with silver trim around the bottom (R.Tr. p. 1240).

mislead the jury, and open the door to cross-examination on collateral issues).

Here, the People did not allege or imply that defendant's car was linked in any way to the crime scene or that law enforcement suspected or located him because of Vandenboss' description of a car. In fact, on Trujillo's direct examination, defendant asked about what actions officers took in researching defendant's cars and Trujillo again explained the DMV records listed only two vehicles (R.Tr. p. 2012). Thus, the trial court was correct that there was no confusion about the car, its color, or why officers looked into defendant's cars, the jury was not mislead by the testimony about defendant's car, there was no implication that defendant's car was at the scene or seen leaving the scene, and the proffered testimony would have only injected confusion into the case. For these same reasons, if there was error, it was harmless because the jury only heard evidence that defendant's car was investigated through DMV as a way to locate him after the murder and that he was never connected to any other cars (R.Tr. p. 2014).

VII. Detective Trujillo's testimony as to defendant's truthfulness about the murder weapon was properly admitted.

A. Standard of Review

Trial courts have considerable discretion concerning the admissibility of evidence and the determination of its relevancy, probative value, and prejudicial effect. *Martinez*, *supra*.

The People agree defendant did not object at trial; review is for plain error. *Moore*, *supra*. Plain error requires reversal if, after a review of the entire record, a court can conclude with fair assurance that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the conviction. *Boykins*, *supra*.

B. Facts

Defendant called Detective Trujillo as a witness (R.Tr. p. 1994). In direct-examination, he highlighted the interview tactics used by law enforcement during the 1994 interview, including a ruse involving a gunshot residue kit (R.Tr. pp. 1995, 2002). Defendant emphasized that

the gunshot residue test ruse did not result in a confession, suggesting that therefore, the defendant did not commit the crime (R.Tr. p. 2003).

Q: What was the reasoning behind using the kit?
A: Basically as a ruse to get him thinking that we had some evidence and see if he would tell us more.
Q: You wanted Mr. Clark to give you information as a result of using that gunshot residue field kit?
A: Yes. (R.Tr. pp. 1995, 2001).

♦♦♦

Q: Would it be fair to say…that you were hoping by using the kit that you would be able to get more information from Mr. Clark?
A: Yes.
Q: Were you hoping that he might tell you that he was involved in some way in the murder?
A: Absolutely…
Q: Did the kit work as you hoped it would?
A: It did not.
Q: Did Michael Clark give you any information as a result of you using the kit?
A: No, he did not.
Q: Did Michael Clark confess in any way as a result of you using the kit?
A: He did not (R.Tr. pp. 2002-03).

On cross-examination, the prosecutor addressed the gunshot residue test ruse, and elicited testimony that after the ruse was the first time defendant started to ask questions in the interview, implying he

was nervous about what the test might show and told a lie about the gun to cover-up the crime (R.Tr. p. 2023).

Q: Let me talk to you about this GSR kit. You mentioned earlier that you said it was used as a ruse?
A: Absolutely. (R.Tr. p. 2021).

♦♦♦

Q: …And so when you say used as gunshot residue kit as ruse, it's because you had no thoughts or expectations that there would be any kind of evidentiary value to it?
A: I did not.
Q: And isn't it true that when you actually use that little sticker and you started pulling up gunshot…or started putting it on his hands, he started asking you a lot of questions about how the gunshot residue kit worked?
A: Yes.
Q: In fact, it was one of the first times he started asking you questions about what was going on?
A: Correct.
Q: And I think earlier, if I remember correctly, [defense counsel] asked you if he -- after you did this if he had confessed and you said no?
A: Correct.
Q: Now throughout the course of the interview, did you and Detective Weiler and Weinheimer repeatedly ask him to tell you the truth?
A: Yes, we did.
Q: And I know she said he didn't confess, but you asked him repeatedly to tell you the truth?
A: Yes.
Q: Did he tell you the truth about where he got the gun?
A: He did not.
Q: Did he tell you the truth about what he did with the

gun?
A: I don't believe so (R.Tr. p. 2024).

C. Analysis

Testimony that references the credibility of a witness only to describe a device to interrogate a suspect and to explain the context in which a suspect's statements are made is admissible. *Lopez*, *supra; Davis, supra.* Moreover, where the testimony serves to explain an officer's investigative decisions, it can be admissible. *Zamora*, 13 P.3d at 817 (where detective testified he did not include defendant's initial "lies" in his report because defendant later confessed, not improper opinion on defendant's credibility, it was explanation of report's content); *Deardorff v. State*, 6 So.3d 1205, 1222-23 (Ala. App. 2004)(agent's testimony that he did not find defendant's explanations credible was not impermissible credibility testimony because it was relevant to officer's decision to continue to investigate defendant). In reviewing whether one witness's testimony constituted an improper opinion about another witness's credibility, a reviewing court should

consider the purpose for which the testimony is admitted. *Tallwhiteman*, *supra*.

Here, the prosecutor's questions to Trujillo, when taken in context, simply discussed the interview ruse used by law enforcement, and clarified defendant's implication that the ruse was ineffective because he did not confess. At the time of Trujillo's testimony, the jury had heard defendant's 1994 and 2011 interviews, which included irreconcilable evidence about defendant's gun. In the 1994 interview defendant said a Mexican man named Luiz left a gun in his car when they went to look at stolen stereo equipment, and in the 2011 interview defendant acknowledged Moore gave him the gun that Moore bought at a Denver pawn shop. In fact, the prosecutor's next questions referenced the contradictory information about the gun obtained from Moore and later confirmed by defendant in 2011. The purpose of the prosecutor's questions about the ruse were not to obtain the detective's personal opinion about defendant's truthfulness in the interview, but to show that the ruse was successful because defendant gave additional incriminating information about the gun. *Lopez*, 129 P.3d at 1066.

Like in *Davis*, the detective's testimony was not an opinion on defendant's credibility during in-court testimony, but rather on his credibility during one of the investigative interviews after a ruse was used. *People v. Zadra*, 2013 COA 140, ¶ 60 (because officer's testimony explained the reason for his subsequent method and direction of questioning, it was not improper comment on or opinion about defendant's credibility). The prosecution used the success of the ruse to refute defendant's implication that investigators were unfairly trying to trick defendant. *Renfro*, *supra* (prosecution can dispel impression and not improper for detective to testify that witness statements were "rock solid" where defense attacked adequacy of investigation).

If this Court finds there was error, defendant has failed to establish that the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the conviction. The jury heard two irreconcilable explanations of where defendant got his gun and what he did with it; there was no other explanation, other than defendant was untruthful on at least one occasion, to explain the contradictory information. In addition, defendant admitted lying about

guns to the Marine recruiter (R.CF. pp. 339, 340). In closing argument, defense counsel acknowledged that defendant lied about where he got the gun in 1994 because he was afraid of Moore and did not want to be a snitch (R.Tr. p. 2073). Thus, the detective's testimony about whether defendant told the truth about where he got the gun and what he did with it in the 1994 interview was not plain error. *Zamora*, 13 P.3d at 817 (detective testified that he did not believe defendant's initial denial, after defendant later confessed, and that is why the initial denials were not in his report; court found that testimony neither corroborated nor contradicted defendant's veracity).

VIII. The prosecutor's opening statement properly referenced the evidence he intended to present at trial.

A. Standard of Review

Defendant did not object to the prosecutor's opening statements (R.Tr. p. 1604). In the absence of a contemporaneous objection to a prosecutor's closing or opening argument, the plain error standard of review applies. *Wend v. People*, 235 P.3d 1089, 1097 (Colo. 2010). Although a prosecutor's opening statement should be limited to

evidence that will be adduced at trial, remarks not supported by the evidence do not constitute reversible error unless defendant can demonstrate "bad faith and manifest prejudice." *People v. Bowles,* 226 P.3d 1125, 1132 (Colo. App. 2009).

B. Analysis

An opening statement is intended to inform the jury of the facts that the party intends to prove at trial. *Dunlap v. People*, 173 P.3d 1054, 1075 (Colo. 2007). There are no rigid requirements on the content of an opening statement in a criminal case. *People v. Barron*, 578 P.2d 649 (Colo. 1978). A prosecutor is allowed to argue in opening statement any evidence that will be adduced at trial and remarks later proven unsupported by the evidence at trial will not constitute reversible error unless there is an affirmative showing of bad faith and manifest prejudice. *People v. Melanson*, 937 P.2d 826, 836 (Colo. App. 1996).

Defendant challenges the following comments made in opening statement:

> In 1994 Michael Clark was 19 years old. He graduated from Boulder High School. *And people that come to this trial will describe him as a guy*

> *who had a chip on his shoulder, a guy who had a chip on his shoulder because some people had more than him, some of his classmates, some of his friends were the haves, and he was a have not.*
>
> He went to college actually in Pueblo for a year. But it didn't work out, and he ended up back in Boulder. He ended up back in Boulder, but he didn't have a place to stay. He was having trouble with his parents. And he was basically moving from place to place, couch to couch.
>
> But he had a plan to get out of Boulder. He had a plan, he had a dream of joining the Marine Corps. *In fact, you'll hear from witness after witness in this trial that Michael Clark wanted to join the Marine Corps so badly he would wear a Marine T-shirt all the time, that he had a Marine Corps sticker on his old Jeep, even kept his hair in a high and tight.*
>
> And his recruitment in the Marine Corps was actually on track. And his recruitment in the Marine Corps was actually on track…Sgt. Weyer had processed his paperwork and things were looking good, he was on the way getting out of Boulder until September 22, 1994.

(R.Tr. p. 1604)(italicized portions are those defendant challenges on appeal).

Defendant first asserts that there was no evidentiary support for the comments about defendant having a chip on his shoulder and

talking about the "haves and the have nots" (OB, p. 70). The record refutes this claim.

In his April 15, 1994 interview with law enforcement, defendant talked about Dion Moore, his ties to Chicago gangs, and that defendant thought showing a gun to the marine recruiter made him appear powerful. He then explained the following:

> There's kids that hang out with gangsters and that sort of thing and I don't know, you know. I have a, I have a friend, he's from Chicago and I know he's, you know, hung out with gangsters and, you know, done that gang banging kind of thing. And for them, you know, a gun's cool thing….But for me and the people I hang out with…"cause he's the only one I know that was really like, shouldn't say, I shouldn't say that kind of kid, but that knows those kind of people. The rest of my friends are, not to sound racist or anything, but white, suburb grown up, you know, Boulder kind of kids that, you know, no trouble makers or anything like that.

(R.CF. pp. 340-41).

Later in the interview, when there was a discussion about how defendant knew he could write checks on the victim's account for thousands of dollars and whether Kristen Grisham ever talked about money with defendant, defendant replies as follows:

> …We talked about it but it was usually like, you know, "How's work? Are you getting by?" and stuff. It was like, "Oh, I'm doing fine." You know, that kind of thing. Nobody that knew me ever really talked to me about money, anyway. Just 'cause my family's never been well off at all. So, it's just one of those polite things that your friends do. They just don't bring up the subject. You know what I'm talking about? Does that make sense? But, no. I never talked to her about how well off her dad was.

(R.CF. pp. 372-73).

In addition, Kristen Grisham testified that she offered to let defendant stay at the victim's apartment when he fed the cats for the weekend because he had nowhere else to stay (R.Tr. p. 574). Allison Hackman testified that it was defendant's dream to go into the Marines and that it was a "good path for him" because he "didn't have a lot of opportunities that other kids that grow up in Boulder did, and he felt like that was his way to, you know, like a successful path and possibly college and stuff like that." (R.Tr. p. 1830).

Because the record unequivocally refutes defendant's claim that the prosecutor's opening statement on this issue "lacked evidentiary support," there was no error, let alone plain error.

Next, defendant argues that: (1) the prosecutor "falsely exaggerated" defendant's interest in the Marines; (2) there was no testimony about a Marine t-shirt or jeep sticker; and (3) there was no testimony that defendant's haircut was "high and tight" because he wanted to be a Marine (OB, p. 71). The following testimony refutes defendant's claims:

- Pam Grishom testified, and Detective Kampf confirmed, that defendant told her he really wanted to go in the Marines, and he was scared the motorcycle incident would prevent that from happening (R.Tr. p. 550);

- Commander Weiler testified on cross-examination that defendant wanted to impress the Marine recruiter and acted like he knew a lot about guns (R.Tr. p. 1698);

- Jamie Uhlir, defendant's friend, testified, and Commander Weiler confirmed, that defendant talked about joining the Marines as far back as high school, he was very interested in it, and wanted to be a soldier for sure (R.Tr. p. 814);

- Ronald Weyer, the Marine recruiter, knew defendant, knew he had a strong desire to join the Marines, he had been scheduled for bootcamp until the motorcycle incident, Weyer approached the DA on defendant's behalf, and told defendant he could not get into any more trouble or he would not be able to enlist (R.Tr. pp. 867-69);

- Walter Stackhouse testified defendant had a military hair cut (R.Tr. p. 1120);

- Defendant's Exhibit Q & People's Exhibit 44 showed defendant's military hairstyle in 1994 (R.Ex. pp. 199, 274).

The evidence of defendant's desire to join the Marines was overwhelming. The evidence that defendant's dream was threatened by his check fraud case was also overwhelming. The prosecutor's comments in opening statement emphasized that evidence and how it provided a motive for defendant to kill the victim. While there was no direct evidence of a t-shirt or a sticker, the prosecutor's use of oratorical embellishment and metaphorical nuance was not plain error warranting reversal. *People v. Washington*, 179 P.3d 153 (Colo. App. 2007), *aff'd Washington v. People*, 186 P.3d 594 (Colo. 2008). Defendant has failed to establish that the mention of a t-shirt and a sticker, in light of the overwhelming evidence surrounding defendant's dream of being a Marine, were made in bad faith or resulted in manifest prejudice. *Melanson*, 937 P.2d at 836.

IX. The prosecutor did not commit misconduct during closing argument.

A. Standard of Review

Defendant objected to only one of the many comments he asserts on appeal amounted to prosecutorial misconduct. As such, unobjected to comments are not preserved and should be reviewed for plain error. *People v. Miller*, 113 P.3d 745 (Colo. 2005).

B. Analysis

During closing argument, a prosecutor has wide latitude and may refer to the strength and significance of the evidence, conflicting evidence, and reasonable inferences that may be drawn from the evidence. In fact, "counsel may employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance, so long as he or she does not thereby induce the jury to determine guilt on the basis of passion or prejudice, attempt to inject irrelevant issues into the case, or accomplish some other improper purpose." *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003).

When reviewing a claim of prosecutorial misconduct, an appellate court must first determine whether a prosecutor's actions constituted

misconduct, and then whether such actions constituted reversible error. *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). "[A] contention that the prosecutor engaged in improper argument must be evaluated in the context of the argument as a whole and in light of the evidence." *People v. Ramirez*, 997 P.2d 1200, 1210 (Colo. App. 1999), *aff'd by*, 997 P.2d 1200 (Colo. 2001).

Even if the prosecutor's statements are improper, prosecutorial misconduct is rarely, if ever, so egregious as to constitute plain error. *People v. Constant*, 645 P.2d 843, 847 (Colo. 1982); *Washington*, 179 P.3d at 168-69. In determining whether prosecutorial misconduct mandates a new trial, an appellate court must evaluate the severity and frequency of 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 defendant's conviction. *People v. Merchant*, 983 P.2d 108 (Colo. App. 1999).

Fair Rebuttal to Opening Salvo v. Personal Opinion.

Defendant argues that the prosecutor's comments about potential injuries at the soccer game or defendant's ability to handle a firearm

were improper because the prosecutor conveyed his personal opinion about the evidence (OB, p. 72).

The following comments from *defendant's* closing argument provide the context for the prosecutor's rebuttal comments:

> We heard one person say their 45-minute halves, somebody else said they are 40-minute halves, but the way soccer works is that if there's extra time or injury time, it gets added on to the halves, so those half times individually had to be longer. And then there's this thing because there's two halves called a halftime. So if you add that all up you keep pushing that time frame not where they want it to be. And anybody who's ever been to a sporting event that's of any kind of nature where it's crowded, where it would -- it was held at Lakewood Memorial Stadium, you don't get to run right out. And when your buddy is on crutches because he just had ACL surgery, you are not sprinting down the steps to get to your car and you don't get to get in your car and peel out of the parking lot because, guess what, you are not all alone (R.Tr. pp. 2080-81)…
>
> We know that the person who killed Marty Grisham knew how to handle a firearm. Anybody who knows anything about firearms actually knows it's not easy to pick up a weapon, a 9mm weapon and shoot it in that narrow timeframe, hit your target and be successful, it's not easy. Michael Clark's not that guy (R.Tr. p. 2088).

During the prosecution's rebuttal argument, he stated the following:

> ...that's when citizens from Boulder County are finally going to get to make the decision in this case by looking at all the evidence as the evidence actually is. The evidence as it was actually admitted before you…not what [defense counsel] would like to believe based on how things probably happened or how things should have happened or how things might have happened. I don't know that there are any injury time outs at this soccer game. I don't know if on any other occasion [defendant] knew how to handle a gun, but I knew from -- but I know from 1 to 2 feet away he was able to hit Marty Grisham four times. That's what I know and that's what this evidence shows. And that's not me speculating, that's not me saying what might have been (R.Tr. pp. 2091-92).

A prosecutor has considerable latitude in replying to opposing counsel's arguments, and in making arguments based on facts in evidence and reasonable inferences that can be drawn from those facts. *People v. Iversen*, 321 P3d 573 (Colo. App. 2013). Thus, the reviewing court must weigh the impact of a prosecutor's remarks on the trial but must also take into account defense counsel's "opening salvo." *People v. Vialpando*, 804 P.2d 219, 225 (Colo. App. 1990).

In defendant's closing argument, he attempted to refute the prosecution's theory of how the crime happened by asking the jury to speculate and assume that various facts and conditions may have existed. The facts and conditions he asked the jury to consider – injuries at a soccer game, game traffic, the experience required to fire a 9mm weapon, and the general difficulty in firing a 9mm weapon - were not facts that were established or discussed at trial. Thus, the prosecutor's comments that he did not know about certain facts was a direct reference to defendant's speculative assertions that purported to be based on "actual evidence" produced at trial. *People v. Fears*, 962 P.2d 272 (Colo. App. 1997)(speaking in first person singular does not amount to vouching for the credibility). In other words, the jury could not know if there were injuries at the game, traffic after the game, or whether it was difficult to handle a 9mm weapon because such evidence was never produced at trial.

In context, the prosecutor's comments were simply responsive to defense counsel's closing argument. The prosecutor used rhetorical devices and argument to point out the speculative nature and

weaknesses of defendant's arguments. *Conyac*, *supra*. Thus, there was no error, let alone plain error.

Reasonable Credibility Inferences v. Comments on Truthfulness. Defendant asserts that the prosecutor erred when he improperly commented on defendant's truthfulness (OB, p. 75).

> The same old Mike, same old Mike finds himself in the Boulder Police Department being interviewed by three detectives, and despite over and over and over again insisting that he was telling the truth. At one point even becoming insulted that they didn't believe him, at one point even becoming insulted and critical of the criminal justice system, that's what they say about the criminal justice system, despite the fact that everything he said was untrue. Everything he said was misleading, everything was said was designed to steer the police away from his gun, the gun that he purchased. And they told him, we want to clear you or we want to exclude you and we want to give you an opportunity to explain it…We know from Sergeant Weyer, he saw that gun within the last week with the same kind of ammunition that was used to murder Marty Grisham. Defendant wasn't telling the truth about when he had it, where he got it and what he did with it, his story was ridiculous, but that's the same old Mike (R.Tr. pp. 2096-97).

Prosecutors are afforded wide latitude in closing arguments to comment on the strength or weakness of the evidence, conflicts in the evidence, and reasonable inferences that may be drawn from the evidence. *Domingo-Gomez*, 125 P.3d at 1048. Closing arguments are also to be examined in a realistic manner, recognizing that, unlike appellate arguments which can be labored over and polished, such arguments are usually made by attorneys thinking and speaking on their feet. *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974).

Here the prosecutor did not tell the jury it was his personal opinion that defendant was untruthful in one of his interviews. Instead, he noted Weyer's testimony that he saw defendant with a gun the week before the murder and pointed out that, based on Weyer's testimony, defendant's contradictory version was not the truth. *People v. Perea*, 126 P.3d 241, 248 (Colo. App. 2005); *U.S. v. Spain*, 536 F.2d 170, 174 (7th Cir. 1976)(where there are irreconcilable differences in the evidence which could not have been the result of an honest mistake, counsel can argue that opposing witnesses did not speak the truth); *People v. Lucero*, 677 P.2d 370, 373 (Colo. App. 1983)(prosecutor may

comment on how well and what manner a witness measures up to the tests of credibility in the instructions); *People v. Alengi*, 114 P.3d 11, 17 (Colo. App. 2004)(where the prosecutor stated that defendant's testimony was incredible, she was articulating discrepancies in the evidence, not her personal opinion); *People v. Trujillo*, 75 P.3d 1133 (Colo. App. 2003)(prosecutor's remark that defendant "gave a story, a couple of stories which turn out not to be true" was not reversible; it referred to statements defendant made when initially contacted by police).

Moreover, defendant's second interview on April 15, 2011 directly contradicted his 1994 interview. Thus, the prosecutor's argument that defendant did not tell the truth in one of the interviews simply highlighted the contradictory nature of the two interviews. *See Rodriguez, supra* (prosecutor's comments were proper because the witness' two interviews were directly contradictory, and as such, the prosecutor's comments were merely references to undisputed evidence in the record). The prosecutor did not use the word "lie" in his

discussion of that inconsistency. *Compare Wend v. People*, 235 P.3d 1089 (Colo. 2010).

Lastly, defense counsel admitted in closing argument that defendant's 1994 interview about the gun was not accurate because defendant was afraid of Moore, and he did not want to be a snitch because he and Moore were friends (R.Tr. p. 2073). Thus, if there was error, it did not rise to the level of plain error.

Request to do Justice. Next, defendant argues that the prosecutor's comment about "justice" amounted to plain error because it improperly pressured the jury to reach a guilty verdict (OB, p. 76).

"Prosecutors have a higher ethical responsibility than other lawyers;" they must effectuate the "goal that justice be done in every case and not necessarily that the prosecution win." *Domingo-Gomez*, 125 P.3d at 1049. Prosecutors may not pressure jurors by suggesting that guilty verdicts are necessary to do justice for a sympathetic victim. *People v. McBride*, 228 P.3d 216, 223 (Colo. App. 2009).

At the end of the People's initial closing argument, the prosecutor stated the following:

> Now the decision is yours. It doesn't matter what anyone else did over the course of the last 18 years, the decision is now yours and you can feel confident in returning a verdict of guilt in this case. You can feel confident that returning a verdict of guilty is the right thing to do that is consistent with the evidence and the law, without bias, prejudice or sympathy. You can feel confident that returning a verdict of guilty in this case will support the truth and will finally after 18 years do justice to Marty Grisham (R.Tr. p. 2069).

Here, the prosecutor simply argued that the jury could feel confident that the evidence supported a guilty verdict, that a guilty verdict would be based on the evidence and not bias, sympathy, or prejudice, and that a guilty verdict would support the truth and do justice. Even if the comments were inartfully worded, they did not request that the jury must find defendant guilty in order to "do justice." *Rodriguez*, 794 P.2d at 972 (defendant's failure to object is factor that may be considered in examining impact of prosecutor's argument and may demonstrate defense counsel's belief that the live argument was not overly damaging).

Regardless, even if this Court finds that the comment was improper, it did not amount to plain error. *Conyac*, *supra* (DA's argument that his and judge's jobs were done and jury needed to go back and "find justice" for the victim was improper but not reversible); *People v. Ujaama*, 302 P.3d 296 (Colo. App. 2012)(no plain error where DA argued that "[The] only way to obtain justice in this courtroom, to seek what [you, the jurors] . . . sought when [you] took that oath as jurors, is to find [defendant] guilty of the murder that he committed."); *People v. Kenny*, 30 P.3d 734 (Colo. App. 2000)(request jury bring justice to victim and the People of the State of Colorado, "that has been [eluding] all of us since August of 1988" was inadvisable but not plain error).

At the end of rebuttal argument, the prosecutor stated as follows:

> Every time someone comes in this building no matter what they are charged with, it's a tragedy. This case is a tragedy because a man was murdered. This case is a tragedy because lives are turned upside down everywhere. And I wish it was easy, I wish that there was a way to just put it all in a hopper and press a button and get an answer, but it's never easy, it's never pretty,

> it's never beautiful, it's never majestic, it is hard work. It is hard work.
>
> Boulder Police Department didn't always do the hard work, but when they did and when these excellent lawyers did their work, there was still no suspect, there was still no murderer at large. There is defendant, the only one with a motive, the opportunity and the means to commit this murder. He's the only one, ladies and gentlemen, the only one.
>
> Be proud of the work you are going to do in this case, as hard as it is, as heartbreaking as it may be to hear this evidence and to do what you have to do, be proud, do justice and make sure that the right thing happens. Thank you.

(R.Tr. pp. 2105-06).

Here, while the prosecutor asked the jury to "do justice," he did not take the impermissible step of asking the jury to do justice for the victim, or that it could only do justice by rendering a guilty verdict. Instead, the prosecutor appropriately argued that the jury needed to do the hard work, do justice, and make sure the right thing happened. This comment made it clear that it was up to the jury to decide what the right thing was based on the evidence it heard at trial and that

decision, whatever it was, would be justice. Thus, there was no reversible error in this comment.

Proper Credibility Comment v. Improper Appeal to Sympathy. Defendant argues that comments about Stackhouse's reasons for testifying were improper and meant to inflame the jury's passions (OB, p. 76). Defendant objected at trial to this comment, thus any error is reviewed for harmless error. *Yusem, supra.*

The following exchange took place during the prosecutor's rebuttal argument:

> The most poignant moment is Stackhouse saying despite what this means to him and despite the lack of benefit, despite the harm coming here to testify is going to do to him, if someone did this to my family --
>
> [Defense]: Objection, Judge, completely improper….[Court]: Overruled.
>
> If someone did this to my family, this is his -- these are his words not mine, If someone did this to my family, I would want someone to step forward. When you are in jail with a felony arrest and you are accused of a murder, you are being looked at for a murder, you are being investigated for a murder, Stackhouse is the guy you talk to. Stackhouse stepped forward in this case and he stepped forward 18 years almost to

> the week as the first time he stepped forward and his story never, ever changed. You want someone to step forward and Stackhouse, the felon and drug addict that he is, he's that guy in this case (R.Tr. p. 2104).

Here, the jury was given the credibility instruction that it should "consider all of the testimony given and the circumstances under which each witness has testified" (R.Tr. p. 2038). In addition, the jury was told to consider: (1) the relationships between the witnesses; (2) how each witness might be affected by the verdict; (3) how each witness is supported or contradicted by other evidence in the case; (4) the demeanor of each witness; (5) the manner of each witness on the stand; and (6) the motive a witness might have to testify (R.Tr. p. 2038).

In closing argument, defendant attacked Stackhouse's credibility and discussed how "incredible" it was that Stackhouse was the one person defendant chose to confess to (R.Tr. pp. 2085-87). Defendant argued that "the DA wants to say you ought to believe Walter Stackhouse because he told you how much he had to lose by coming out here to testify under a subpoena escorted by somebody from the DA's

office, but he's a changed man, except he's still in prison right now" (R.Tr. p. 2086).

In response, the prosecutor properly argued the relevant credibility assessment factors. A witness's motive to testify, what he hopes to gain from testifying, and why he has chosen to come forward are all relevant to assessing credibility. In fact, the jury is told to consider exactly those factors. The prosecutor's comments directly refuted defendant's theory that Stackhouse made up defendant's confession in hopes of garnering favor with the prosecutor. Thus, there was no error.

Comment About Judge. Lastly, defendant contends that the prosecutor's comment about Judge Mulvahill was error because it improperly aligned the prosecution with the court's authority (OB, p. 73).

The comment was made as follows:

> …you come into this courtroom where all of the lines are clean and they make sense and they all come together, that's not the way real life is. I wish, ladies and gentlemen, in this building where things are so serious and so grave, so ugly,

> that something could be easy, but a murder trial is not easy. A murder investigation is not easy. I wish things could be clean and pristine and as orderly as things are in this courtroom. I wish that life could always have a man like Judge Mulvahill.
>
> [Defense]: Objection…[Court]: Sustained.
>
> But it's not. This case is not like that, the evidence is not like that, because the evidence is born in the real world and it comes to us from the real world.

(R.Tr. pp. 2092-93).

Because the trial court sustained the objection to the challenged remark, there was no error. *People v. McNeely*, 222 P.3d 370, 373-74 (Colo. App. 2009)(reversal is not warranted because court sustained objections); *People v. Hogan*, 114 P.3d 42, 55-56 (Colo. App. 2004)(no error where the court corrected prosecutor's improper remarks by sustaining objections); *People v. Suazo*, 87 P.3d 124, 128 (Colo. App. 2003)(when court sustains defense's objection, potential for jury prejudice is significantly diminished). The comment was fleeting and was part of the prosecutor's argument that although the investigation and the evidence were not perfect and orderly, there was sufficient

evidence to convict. The point was that real world investigations were not always as straight forward and organized as they appear in court. This single comment did not amount to prosecutorial misconduct and any error was cured by the trial court's decision to sustain the objection.

X. The trial court correctly refused to give defendant's tendered jury instruction that the jury need not reach a unanimous verdict and a hung jury was an acceptable outcome.

A. Standard of Review

An appellate court reviews for abuse of discretion a trial court's decision not to give a particular jury instruction. *Kendrick v. Pippin*, 252 P.3d 1052, 1061 (Colo. 2011). This Court reviews jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. *People v. Lucas*, 232 P.3d 155, 162 (Colo. App. 2009).

The People do not agree that any error is subject to constitutional harmless error review. *Crider v. People*, 186 P.3d 39, 44 (Colo. 2008); *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001)(when defendant objects to an instruction, harmless error applies). "The proper inquiry in

determining a harmless error question is whether the error substantially influenced the verdict or affected the fairness of the trial proceedings." *DeBella v. People*, 233 P.3d 664, 667 (Colo. 2010).

B. Facts

Citing *U.S. v. Rey*, 811 F.2d 1453 (11th Cir. 1987), defendant requested the following jury instruction:

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

(R.Supr. p. 35). In support of the tendered instruction, defendant argued as follows:

> The Court is familiar with the fact that…there's now a modified *Allen* instruction because the original *Allen* instruction was deemed to be coercive. In a lot of cases jurors will come back saying they haven't reached a decision and it's true that in a criminal case that a hung jury is an acceptable outcome, so that's where I based that instruction off of, and I think it accurately says

> what the case law is, which is that they don't have to say guilty or not guilty, that they can actually agree to disagree.

(R.Tr. p. 1565).

The People responded that the *Rey* case did not hold that such an instruction was needed or appropriate prior to the start of deliberations (R.Tr. p. 1564). The trial court refused the tendered instruction because it discouraged deliberation and seemed to indicate to the jury that it did not need to deliberate at all (R.Tr. p. 1565).

C. Analysis

A trial court has substantial discretion in formulating jury instructions so long as they are correct statements of the law and fairly and adequately cover the issues presented. *People v. Warren*, 55 P.3d 809, 816 (Colo. App. 2002). A defendant's conviction will not be reversed if the instructions, when read as a whole, adequately inform the jury of the law. *People v. Gonyea*, 195 P.3d 1171, 1174 (Colo. App. 2008).

Defendant fails to cite to a single case in Colorado or elsewhere that supports his request to provide the jury with the tendered

instruction as part of the pre-deliberation instruction packet. The Colorado cases he cites all reference situations where the jury has deliberated for a period of time and notified the court of its inability to reach a verdict. *Cohen v. People*, 103 P.2d 479, 480 (Colo. 1940)(explaining that language from an opinion does not translate with clarity into a jury instruction because of different purposes opinions and instructions serve). This was also the factual scenario in the *Rey* case. These modified-*Allen* cases are not dispositive here.

Nonetheless, the modified-*Allen* cases and their rationales support the trial court's refusal to give the tendered instruction. In cases where the trial court instructs a jury about a failure to reach a verdict and possible outcomes if a unanimous verdict is not reached, there are stringent requirements that must be met first. The jury must alert the court that it is not progressing in its deliberations, the trial court needs to inquire about the likelihood of progress towards a unanimous verdict, and the language of the modified-*Allen* instruction must be non-coercive. *People v. Lewis*, 676 P.2d 682, 689 (Colo. 1984); *People v. Ragland*, 747 P.2d 4, 5 (Colo. App. 1987)(one of the prerequisites is that

the court first determine that there is little likelihood of progress towards a unanimous verdict upon further deliberation). Courts have reasoned that the failure to make these inquires before giving additional modified-*Allen* instructions can interfere with the deliberative process and deprive the jury of a meaningful opportunity to reach a unanimous verdict free of the constraining influence of the court. *Id.* at 690. In fact, even with a deadlocked jury, a trial court is cautioned that only in "rare circumstances" should the court instruct about the possibility of mistrial. *Fain v. People*, 329 P.3d 270 (Colo. 2014); *Gibbons v. People*, 328 P.3d 95 (Colo. 2014); *Martin v. People*, 329 P.3d 247 (Colo. 2014).

Thus, the trial court correctly refused to give an instruction prior to the start of deliberations that the jury need not reach a verdict in the case and that a hung jury was an acceptable outcome.

XI. Reversal is not warranted under cumulative error.

A. Standard of Review

"A conviction will not be reversed if the cumulative effect of any errors did not substantially prejudice defendant's right to a fair trial." *People v. Whitman*, 205 P.3d 371, 387 (Colo. App. 2007). This standard is similar to a plain error standard. *Miller*, *supra.* Defendant did not discuss the appropriate standard of review in his opening brief.

B. Analysis

While defendant argues in his opening brief as to how and why he disagrees with how the jury weighted the evidence and decided the credibility of the witnesses, such disagreements do not equate to errors. *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986). However, when no error has occurred, there can be no cumulative error requiring reversal. *Whitman*, 205 P.3d at 387. Here, the court did not err for the reasons discussed above; if one error occurred, there can be no aggregation.

Even assuming multiple errors occurred, they did not aggregate in such a way as to "substantially affect defendant's right to a fair trial." *Id.* Defendant fails to explain how the errors he alleges aggregated so

as to create a prejudicial effect greater than the sum of each individual error. Reversal on cumulative error is unwarranted.

CONCLUSION

Defendant's conviction should be affirmed.

CYNTHIA H. COFFMAN
Attorney General

/s/ Katharine Gillespie
KATHARINE GILLESPIE, 26109*
Assistant Attorney General
Criminal Appeals Section
Attorneys for Plaintiff-Appellant
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PEOPLE'S ANSWER BRIEF upon JAMES STEINER HARDY, Senior Deputy State Public Defender, via Integrated Colorado Courts E-filing System (ICCES) on November 27, 2015.

/s/ J.K. Mullen